



TC01876

Appeal number: TC/2011/09213

Income tax – Notice issued under Sch 36 FA 2008 – whether taxpayer’s private bank statements were “statutory records” – on the facts, yes – appeal against that part of the Notice struck out – whether other information in the Notice “reasonably required” for the purposes of checking the taxpayer’s tax position – yes – appeal against that part of the Notice dismissed - fixed and daily penalties for non-compliance with the Sch 36 Notice - whether taxpayer had a reasonable excuse for non-compliance – no – appeal against penalties dismissed and penalties confirmed.

**FIRST-TIER TRIBUNAL
TAX**

JONATHON BECKWITH

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)
ANTHONY HUGHES (TRIBUNAL MEMBER)**

Sitting in public at 45 Bedford Square, London WC1 on 14 February 2012

Michael Edhouse of MJ Edhouse & Co, Chartered Certified Accountants and registered auditor, for the Appellant

Karen Weare of HM Revenue and Customs Appeals and Reviews Unit, for the Respondents

DECISION

1. This was Mr Beckwith's appeal against a Notice issued under Finance Act 2008, Sch 36¹, para 1 ("the Notice").

5 2. The Notice required him to provide various information and documents, including his private bank statements, for the period relating to his 2007-08 tax return, which was under enquiry.

3. Mr Beckwith also appealed against a fixed penalty notice of £300 and a penalty notice charging a daily penalty of £15 from 14 September 2010 to 21 October 2010,
10 which totalled £570.

4. The provisions of Sch 36 which apply to this appeal are set out as an Appendix to this Decision.

The issues in the case

5. The first issue was whether the private bank statements requested in the Notice
15 formed part of Mr Beckwith's statutory records. If they did, then he has no right of appeal against the Notice (Sch 36, para 29(2)).

6. To the extent that the information requested was not part of Mr Beckwith's statutory records, the second issue was whether that information was "reasonably required by the officer for the purpose of checking the taxpayer's tax position" as
20 required by Sch 36, para 1.

7. If the personal bank accounts constitute "statutory records" and/or the information was "reasonably required", then the third issue was whether Mr Beckwith had a reasonable excuse for not complying with the Notice. If he has such an excuse, liability to a penalty "does not arise" (Sch 36, para 45).

The evidence

8. The Tribunal was provided with the correspondence between the parties. Oral evidence was given by Mrs Ferreiro Cives of HMRC, the investigating officer who issued the Notice, and also by Mr Edhouse, who acted as agent for Mr Beckwith throughout the enquiry and conducted all the correspondence.

30 9. On the basis of that evidence, we find the following facts.

The facts

10. Mr Beckwith is a carpenter who works as a sole trader and sometimes uses sub-contractors. He is VAT registered.

¹ The legislation is referred to as Sch 36 throughout this Decision.

11. On 17 September 2009, Mrs Cives opened an enquiry into Mr Beckwith's 2007-08 SA return.

12. On 25 January 2010, Mrs Cives met Mr Beckwith and Mr Edhouse to progress the enquiry. Mrs Cives was told that the business records are maintained by Mrs Beckwith using excel spreadsheets. No balance sheet is drawn up.

13. Mr Beckwith said that he had a number of credit cards which were used for both business and private expenditure. He also said:

(1) he had a business bank account with Abbey National;

(2) all his earnings were paid into Abbey National;

(3) he had private bank accounts, being a current account with First Direct and a savings account with Nationwide;

(4) the First Direct account was used to pay the balances due on his credit cards and "bills are paid from the First Direct account by cheque."

14. Copies of the Abbey National business bank statements were supplied to Mrs Cives. The personal bank statements were not included in the information provided.

15. During the meeting, Mrs Cives asked about bad debts. The meeting notes record "there were no bad debts in 2008 and neither Mr Beckwith nor Mr Edhouse could recall seeing any bad debts written off in the accounts for the year ended 28 February 2008."

16. On 1 February 2010 Mrs Cives wrote to Mr Edhouse, asking a number of questions about the business, and in particular for the First Direct bank statements. She said "this account has been used to pay business expenses, therefore, the statements form part of the business records."

17. Mrs Cives did not receive a reply and on 5 May 2010 the Notice was issued to Mr Beckwith under Sch 36, para (1). It was copied to Mr Edhouse.

18. The Notice asked Mr Beckwith to produce his First Direct bank statements. It also repeated the other questions raised in Mrs Cives' letter of 1 February 2010. These covered payments made to subcontractors, rental income, invoices which did not match to moneys banked and the low level of cash withdrawals, especially in the run-up to Christmas.

19. The Notice warned Mr Beckwith that if he did not comply, he might be subject to a fixed penalty of £300 and that a further failure to comply could result in a daily penalty being levied. It concluded "you cannot appeal against having to give me the information and documents I have requested that relate to your statutory records. However, you can appeal against having to give me the information and documents that do not relate to your statutory records."

20. This Notice appears to have crossed with Mr Beckwith's reply to Mrs Cives's 1 February letter, which was dated 3 May 2010 and received by HMRC on 5 May. In

relation to the First Direct account, Mr Edhouse said “payments by sole traders from their personal accounts take the form of Capital Introduced to the business and therefore, the personal bank documentation remains outside your remit and will not be supplied to HMRC.”

5 21. On 13 May 2010, Mrs Cives replied to Mr Edhouse. With respect to the personal bank account, she said

10 “any account which is used to pay out or receive money to and from a business forms part of the business records...if a ‘private’ bank account is used at all to receive business income or pay business expenses, it is not purely private. It has a dual purpose and forms part of the business records.”

22. In the same letter, he also said that she had been unable to match payments from Mr Beckwith’s expenditure schedule with the expenses on his Abbey account, and that:

15 “this reinforces Mr Beckwith’s statement that he uses another account to make business payments by cheque or direct debit. This may or may not be the First Direct account, but whichever account it is, I need to see the account statements.”

20 23. Mrs Cives also told Mr Edhouse that she was satisfied on two of her other points of enquiry, but that three remained outstanding. She asked for the private bank statements and the information required to settle these other three issues, to be sent to her by 11 June 2010.

25 24. On 6 July 2010, Mrs Cives sent Mr Beckwith a “Penalty warning” letter. It said, in bold “This letter is a final warning” and that if Mr Beckwith did not provide the outstanding items by 26 July 2010, a fixed penalty of £300 would be levied. It continued “if you still have not given me the items I have asked for by the time I have assessed that penalty, you may also have to pay a further daily penalty of up to £60 a day until you do.”

30 25. By letter dated 17 July 2010, and stamped as received by HMRC on 29 July 2010, Mr Edhouse replied to Mrs Cives’s letter of 13 May. He provided explanations for some of the outstanding issues. In answer to Mrs Cives’ question about the invoices which were not matched by bankings, he said “one small invoice was paid in cash that was never banked and three others turned out to be bad debts.”

35 26. In relation to the First Direct account, Mr Edhouse said that “private banking documentation will not be made available to you as it is not a requirement under law to do so.”

40 27. On 5 August 2010, Mrs Cives wrote to Mr Edhouse. She accepted his explanation for the unmatched invoices, but still had questions about subcontractor costs and some of the credit card expenses. She asked for the “bank statements for the other account(s) used to service Mr Beckwith’s business activities.” She warned that if these were not provided within 14 days, she would reconsider the penalty of which Mr Beckwith had been warned in the letter of 6 July 2010.

28. On 16 August 2010 Mr Edhouse replied, saying that HMRC can only obtain private bank statements if “there is a specific discovery of fraud”. With respect to the other two questions, he said that the credit card amounts were “simply drawings” and irrelevant, and that he would ask the previous accountant about the subcontractor payments.

29. On 24 August 2010 Mrs Cives wrote to Mr Edhouse, asking again for the personal bank statements but saying she would postpone issuing the penalty for a further 14 days. She also asked again for the answers to the other two questions, being contractor costs and credit card payments.

30. On 13 September 2010, a penalty notice for £300 was issued to Mr Beckwith. A copy was sent to Mr Edhouse. The Tribunal finds as a fact that on this date the following information requests included in the Notice had not been satisfied:

- (1) Copies of the First Direct bank statements.
- (2) Information on subcontractor costs.

31. The third item which remained outstanding on this date was the credit card payments. Questions about these payments were first raised by Mrs Cives in her letter of 13 May 2010 and they were not included in the Notice

32. On 22 October 2010, a further penalty notice was issued, charging Mr Beckwith £570, being £15 a day from 14 September 2010 to 21 October 2010.

33. On 29 October 2010 Mr Edhouse wrote to Mrs Cives, repeating his view that Sch 36 cannot be used except in cases of fraud. He supplied some information about the subcontractors (obtained from the previous accountant), and also about the credit cards. On the same day he appealed both penalties on Mr Beckwith’s behalf.

34. By letter dated 5 November 2010, Mrs Cives replied. She accepted the explanation provided for the credit card questions but asked for more details about the subcontractor payments. She also pointed out that Mr Edhouse had appealed only the penalty notices and not the Notice itself. She said “perhaps you might like to consider making a late appeal now.”

35. On 21 December 2010, Mr Edhouse made a late appeal against the Notice, saying he was under the impression that “his generic letter of 29 October 2010 had also covered this item.”

36. On the same day he replied to Mrs Cives, including more information about the subcontractor costs. Under the heading “bad debts” he said “you will recall that two sales invoices were never paid and due to the original date of sales invoice issue it is obvious that at 28 February 2008 these must be considered to be bad debts.” He said that he had calculated that the profit was overstated as a result of these bad debts by £3,800.

37. In the same letter, Mr Edhouse said that while he was of the same opinion about the status of the personal bank account, he had produced a two page Schedule showing:

5 “all amounts received into the First Direct bank that had any relationship with the business...the only amounts were the drawings as transferred from the Abbey National business account...[It] also outlines capital introduced into the business by way of payments made on behalf of the business...”

38. This Schedule discloses between 7 and 11 business-related transactions each month, covering rent of £3,869, rates of £1,624, credit card payments of £923, mobile telephone bills of £923, materials of £66 and drawings of £25,800. There are somewhat more than 100 transactions in total, of which 14 were described as “drawings.”

39. By letter dated 10 January 2011, Mrs Cives challenged the bad debts, reminding Mr Edhouse that in the original meeting in January 2010, he and Mr Beckwith had said there were no bad debts.

40. She asked for Mr Edhouse’s “assurance that your schedule includes all business related deposits and withdrawals and there are no other such transactions on that account or such transactions that are unidentified and should be considered business related.”

41. She also raised a number of specific questions about amounts on Mr Edhouse’s two page schedule.

42. On 15 March 2011 Mr Edhouse provided the assurance asked for and said “I regard this schedule as a courtesy to you and not as a supplement to the personal and private First Direct bank statements.”

43. Further correspondence ensued, which further narrowed the issues in dispute. The last letter between Mrs Cives and Mr Edhouse which has been provided to the Tribunal is dated 7 June 2011. As at that date there was only one remaining issue, which concerned a retention from a sum due to a supplier and therefore did not involve either the personal bank account or subcontractor payments.

44. Before the Tribunal, Mrs Cives said that she is now ready to close her enquiry as “everything has now been resolved”. She said she had accepted Mr Edhouse’s assurances about the completeness of the Schedule, resolved her other questions, and did not now need to see the private bank statements. However, she said the enquiry remained open pending the resolution of this Appeal.

45. Mrs Weare confirmed to the Tribunal that the Notice had not been withdrawn or cancelled and that HMRC were asking the Tribunal to uphold both the Notice and the penalty Notices.

Issue 1: are the personal bank statements statutory records?

The legislation

46. Statutory records are defined in Sch 36, para 62 as follows:

Statutory records

- 5 (1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—
- (a) the Taxes Acts, or
- (b) any other enactment relating to a tax...

10 47. Sch 36, para 63 defines “a tax” as including income tax and VAT.

48. Information and documents which a person is required to keep for the purposes of the Value Added Taxes Act 1994 (“VATA”) are set out at Sch 11, para 6:

Duty to keep records

- 15 (1) Every taxable person shall keep such records as the Commissioners may by regulations require...
- (2) Regulations under sub-paragraph (1) above may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.
- 20 (3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases)
- (4) The duty under this paragraph to preserve records may be discharged—
- 25 (a) by preserving them in any form and by any means, or
- (b) by preserving the information contained in them in any form and by any means,
- 30 subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

49. Regulation 31 of the VAT Regulations 1995 specifies as follows:

Records

- (1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—
- 35 (a) his business and accounting records,
- (b) his VAT account,
- (c) copies of all VAT invoices issued by him,
- (d) all VAT invoices received by him...

50. VAT Notice 700/21 “Keeping VAT Records” at §1 opens by saying “This notice gives guidance on the records you must keep if you are registered for VAT.

51. At §2.3, it states that HMRC’s “view of business records is wide and will include...bank statements and paying-in slips”. At §2.4 it says:

5 “Generally, you must keep all your business records for VAT purposes for at
least six years. Records that you use for other tax purposes may need to be
kept for longer periods. If the six-year rule causes you serious storage
problems or undue expense, or you need advice on records for other types of
tax, then you should consult our advice service. We may be able to allow you
10 to keep some records for a shorter period.”

52. If a document is part of a taxpayer’s statutory records, he has no right of appeal against the Notice (FA 2008, Sch 36, para 29(2).

The parties’ submissions on statutory records

15 53. In correspondence, HMRC considered that the use of a private bank account to make business payments made it part of the business records.

54. At the hearing, Mrs Weare asked the Tribunal to consider whether or not the First Direct account was part of Mr Beckwith’s “statutory records.”

20 55. Mr Edhouse submitted that First Direct account was not part of the statutory records. He said that the accounts were drawn up using a spreadsheet prepared by Mrs Beckwith, who kept the books. These spreadsheets were prepared for the purposes of the quarterly VAT returns and listed the invoices which had been raised and the expenditure. He said that although he did not prepare the 2007-08 accounts (Mr Beckwith had a different accountant at the time), he believed that the spreadsheets were complete and accurate. He submitted that these spreadsheets were Mr
25 Beckwith’s statutory records.

30 56. Mr Edhouse was asked by the Tribunal whether Mrs Beckwith’s schedules were secondary documents, and whether in his view HMRC had the right to see the underlying primary documents. Mr Edhouse did not recognise a distinction between primary and secondary documents, and said that accountants when preparing accounts would look at spreadsheets such as Mrs Beckwith’s and would not review invoices or bank statements. He said that at the year-end “the accountant doesn’t conduct an audit.”

Discussion on the statutory records issue

35 57. The definition of statutory records in Sch 36 means that if a taxpayer is required by any statutory provision relating to tax to keep a document, then that document is a “statutory record”. There is no necessary link between the tax which is under enquiry, and the source of the obligation to keep the records for tax purposes. So, for example, if a document is required to be kept by VATA, then it is a “statutory record” for the purposes of Sch 36, even if the Notice relates to documents required for an enquiry
40 into the individual’s self-assessment return.

58. Mr Beckwith is a self-employed individual who is VAT registered. We set out earlier in this Decision the relevant statutory record-keeping requirements under VATA. Mr Beckwith was required to keep records by VATA, Sch 11 para 6.

59. Reg 31 of the VAT Regulations specifies that these records include “business and accounting records.” VATA, Sch 11 para 6(2) also allows this regulation “to be framed by reference to such records as may be specified in any notice published by the Commissioners.”

60. Notice 700/21 “Keeping business records” says that bank statements are among those business records which “must” be kept. HMRC have also set out “in writing”, as allowed by VATA, Sch 11 para 6(3), that business records must be kept for a minimum of six years.

61. Business bank statements thus constitute business records and statutory records. Mr Beckwith’s business bank account was produced without complaint to HMRC; we read this as indicating that Mr Edhouse accepts that a business bank account is a “business record” and on the above analysis he was correct to do so.

62. What, then, of the First Direct account? Over 90² business transactions went through this account during the year under enquiry. The account³ was used to settle business purchases made by credit card, to pay rent and rates relating to the business, to buy one item of materials and to settle business phone bills.

63. Mr Beckwith’s Schedule categorises all these items of expenditure as “capital introduced”, with the regular deposits of income being described as “drawings.” The total “drawings” are £25,800; the “capital introduced” is £19,666.

64. This is not an account from which Mr Beckwith makes occasional injections of funds into his business – indeed, the net balance in relation to these transactions is negative (£25,800 less £19,666), so there was no net inflow of funds at all⁴. It is an operational part of the business, used for making regular payments of business expenses. The fact that this bank account also contains personal expenditure does not prevent the bank statements from being “business records” and thus “statutory records” within the meaning of Sch 36.

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² i.e., excluding the amounts identified as drawings

³ As far as we can establish, Mrs Cives’ question about whether there was one, or more than one, private account which was partly used for the business remained unanswered. The Notice asked only for the First Direct statements, so the question of whether the Nationwide savings account (or any other account) was also used for business purposes is not material to this part of the Decision. For the avoidance of doubt, we make no finding of fact as to the number of private bank accounts or whether another account, as well as the First Direct account, was used in part for the business.

⁴ For completeness we say that had the net balance been positive, we would still have found that the usage of this account made it clearly part of Mr Beckwith’s business records.

65. For completeness, we note Mr Edhouse's submission that accountants when preparing accounts rely on spreadsheets and do not review invoices or bank statements. This may well be the case, but it is not relevant to the classification of bank statements as statutory records.

5 *Decision on statutory records*

66. Our decision on the first issue is that Mr Beckwith's First Direct Account is a "business record" and so forms part of his statutory records.

67. As a result, Mr Beckwith has no right of appeal against a Notice under Sch 36, para (1) to the extent that it asks for the bank statements relating to First Direct account.

Issue 2: was information in the Notice "reasonably required"?

68. Our decision that the First Direct bank statements were statutory records makes it unnecessary to consider whether HMRC's request for them was "reasonably required". However, in case we are wrong in that conclusion we have gone on to consider whether the bank statements would have been "reasonably required" for the purposes of checking Mr Beckwith's tax position.

69. In addition, as the Notice did not only cover the First Direct bank statements but included several other information requests, we must consider whether this other information was "reasonably required" for the purposes of checking his tax position.

20 *Submissions of the parties on "reasonably required"*

70. Mr Edhouse said that "all relevant business documentation" was supplied to HMRC at the meeting on 25 January 2010.

71. In relation to the First Direct statements, he said that Mrs Cives accepted after receiving his Schedule that she didn't need these documents and as a result they couldn't be "reasonably required."

72. Mrs Weare said that at the time the Notices were issued, the information asked for was "reasonably required". Mrs Cives had written to ask for this information on 1 February 2010 but no reply was received for over three months. The Notice was issued in May 2010.

30 *Issue 2: whether the information (other than the First Direct bank statements) was "reasonably required"?*

73. The test which has to be applied under Sch 36, para (1) is whether the information included in the Notice was "reasonably required by the officer for the purpose of checking the taxpayer's tax position".

35 74. If the validity of the Notice depended on hindsight, it would not be possible to know, until some indeterminate future date, whether the Notice was correctly issued. In our judgment, the statutory test must be applied at the date the Notice was issued.

75. The Notice was issued on 5 May 2010. As at that date, Mrs Cives had legitimate questions arising from the meeting on 25 January 2010, to which she had received no answers. It was not the case (as Mr Edhouse asserts) that “all relevant business documentation” had been supplied to her at that meeting.

5 76. We find that the information requested in the Notice, which covered payments made to subcontractors, rental income, invoices which did not match to moneys banked and the low level of cash withdrawals, were all “reasonably required” for the purpose of checking Mr Beckwith’s tax position.

10 77. The fact that Mr Edhouse was, eventually, able to satisfy Mr Cives as to Mr Beckwith’s tax position does not change the position: as we said above, hindsight is not the criterion for establishing whether or not the statutory test is met.

Issue 2: whether the personal bank statements were “reasonably required”

15 78. Mr Beckwith admitted, at the meeting in January 2010, that business amounts went through his private account. Mrs Cives had tried, and failed, to reconcile the paperwork without sight of the First Direct statements.

79. In our judgment the personal bank statements (through which around 90 business expenses were paid) were clearly “reasonably required” for the purposes of checking Mr Beckwith’s tax position.

20 80. Again, the fact that Mrs Cives subsequently accepted, in lieu of the private bank statements, a summary provided by Mr Edhouse together with his personal assurance that it was complete and correct, does not change the position. At the time the Notice was issued the requirement to provide the bank statements was entirely reasonable.

25 81. For completeness, we say that Mr Edhouse’s frequently repeated assertion that personal bank statements can only be required under Sch 36 if there is evidence of fraud, does not accord with the legislation. There is no statutory requirement that HMRC have to prove or allege fraud before including personal bank statements in a Sch 36 Notice.

Issue 2: Decision on “reasonably required”

30 82. We find that the information included in the Notice was reasonably required in so far as it covers matters other than the First Direct statements. Mr Beckwith’s appeal against those parts of the Notice is dismissed.

83. Were the First Direct statements not “statutory records” we would have found that the Notice was reasonably required in so far as it included a request for those statements, and we would have dismissed the appeal.

Issue 3: Appeal against the penalties

84. No separate oral submissions were made on the penalties, or the question of reasonable excuse.

5 85. We have, however, considered whether the facts do disclose a reasonable excuse for the non-compliance with the Notice, and we have also considered Mr Edhouse's written grounds of appeal to the Tribunal which are set out earlier in this Decision.

86. As at the date the penalties were issued, Mr Beckwith had not complied with two of the requests in the Notice - the subcontractor costs and the First Direct bank statements.

10 87. In relation to the subcontractor costs, we note that Mr Edhouse was only able to answer Mrs Cives' questions by obtaining information from the previous accountant and we considered whether this provided him with a reasonable excuse. In his letter of 16 August 2010 Mr Edhouse told HMRC that he made contact with the previous accountant, and the information (which gave rise to further questions) was supplied to
15 HMRC on 29 October.

88. However, Mrs Cives had repeatedly requested this information from Mr Edhouse and he could have asked the previous accountant at an earlier stage. He was asked on 1 February 2010; on 5 May 2010, by way of the text of the Notice itself; on 13 May 2010 Mrs Cives extended the deadline to comply with her request; on 6 July she sent
20 a "final warning"; after a small flurry of correspondence over the summer, she issued another warning on 24 August and finally imposed the penalties in September and October. In our view, the fact that Mr Edhouse had to obtain information from the previous accountant does not provide a reasonable excuse for the penalty.

89. In relation to the First Direct statements, Mr Edhouse gave two reasons for non-compliance. The first was that the Notice was *ultra vires* or beyond the powers of
25 HMRC, because there was no fraud. This, as we have already said, is not the statutory test, and misunderstanding the law is not a reasonable excuse.

90. His second reason is that any money paid out of the personal account is "capital introduced". This was his stated ground of appeal to the Tribunal. For the reasons we
30 have already discussed, we do not find that categorising expenditure as "capital introduced" in any way prevents the bank statements being "business records"; we do not find that his belief to the contrary provides a reasonable excuse.

Decision

91. Because we have found that the First Direct account formed part of Mr
35 Beckwith's statutory records, there is no right of appeal against the part of the Notice relating to that bank account. We therefore strike out Mr Beckwith's appeal against that part of the Notice.

92. This means that the Notice can be enforced by HMRC in relation to the First Direct bank statements (subject to Mr Beckwith's right to appeal this part of our Decision, see below).

5 93. We find that the other information requested in the Notice was "reasonably required by the officer for the purpose of checking the taxpayer's tax position".

94. Under Sch 36, para 32 the Tribunal is empowered to confirm, vary or set aside any requirement in the Notice. If we confirm or vary a requirement, the recipient of the Notice must comply with that requirement, and the Tribunal can specify a period within which compliance must take place. If the Tribunal does not specify a period,
10 then the person must comply "within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision."

95. We confirm all the requirements⁵ in the Notice, but (noting the evidence of Mrs Cives, the investigating officer in the case) we do not set a timetable for compliance, but leave this to HMRC.

15 96. We dismiss Mr Beckwith's appeal against the penalties as we find there was no reasonable excuse.

97. The Tribunal has considered its powers under Sch 36, para 48 and decided to confirm the penalties in the sum of £300 for the fixed penalty and £570 for the variable penalty.

20 **Appeal rights**

98. There is no right of appeal against our Decision to uphold the parts of the Notice dealing with information other than the First Direct bank statements. Under Sch 36, para 32(5) our Decision on this final.

25 99. We found that Mr Beckwith had no right of appeal to this Tribunal in relation to the First Direct bank statements, because they were statutory records. The normal appeal rights apply to our Decision to strike out this part of his appeal (see *LS v London Borough of Lambeth* (HB) [2010] UKUT 461 (AAC)).

100. Normal appeal rights also apply to our Decision to confirm the penalties (Sch 36, para 32(6)).

30 101. Any party dissatisfied with the Tribunal's Decision to strike out the appeal, or its Decision to confirm the penalties, or both, has a right to apply for permission to appeal, pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

35 102. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a

⁵ Other than in relation to the First Direct bank statements, as we found that those parts of Notice are not under appeal before us.

Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this Decision Notice.

103. This document contains full findings of fact and reasons for the Decisions.

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Anne Redston

**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 8 March 2012**

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LEGISLATION

Finance Act 2008, Schedule 36

5 **1 Power to obtain information and documents from taxpayer**

(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—

(a) to provide information, or

(b) to produce a document,

10 if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph....

....

15

6 Notices

(1) In this Schedule, "information notice" means a notice under paragraph 1, 2 or 5.

20 (2) An information notice may specify or describe the information or documents to be provided or produced

7. Complying with notices

(1) Where a person is required by an information notice to provide information or 25 produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),
as is reasonably specified or described in the notice.

30

....

29 Right to appeal against taxpayer notice

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

35 (2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

32 Procedure

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(1) Notice of an appeal under this Part of this Schedule must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

45 (c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

- (3) On an appeal that is notified to the tribunal, the tribunal may—
- (a) confirm the information notice or a requirement in the information notice,
 - (b) vary the information notice or such a requirement, or
 - (c) set aside the information notice or such a requirement.
- 5 (4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—
- (a) within such period as is specified by the tribunal, or
 - (b) if the tribunal does not specify a period, within such period as is reasonably
- 10 specified in writing by an officer of Revenue and Customs following the tribunal's decision.
- (5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.
- 15 (6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

39 Penalties for failure to comply or obstruction

- 20 (1) This paragraph applies to a person who—
- (a) fails to comply with an information notice, or
 - (b)
- (2) The person is liable to a penalty of £300.

40 Daily default penalties for failure to comply or obstruction

- 25 (1) This paragraph applies if the failure...mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure...
- (2) The person is liable to a further penalty or penalties not exceeding £60 for
- 30 each subsequent day on which the failure...continues.

44 Failure to comply with time limit

35 A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

45 Reasonable excuse

- 40 (1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.
- (2) For the purposes of this paragraph—
- 45 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

5 (c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

...

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47 Right to appeal against penalty

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

15 (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

48 Procedure on appeal against penalty

(1) Notice of an appeal under paragraph 47 must be given—

20 (a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

25 (3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

30 (b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

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49 Enforcement of penalty

(1) A penalty under paragraph 39, 40 or 40A must be paid—

40 (a) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, or

(b) if a notice of an appeal against the penalty is given, before the end of the period of 30 days beginning with the date on which the appeal is determined or withdrawn.

45 (2) A penalty under paragraph 39, 40 or 40A may be enforced as if it were income tax charged in an assessment and due and payable.

58 General interpretation

In this Schedule—

"document" includes a part of a document (except where the context otherwise requires),

5 "enactment" includes subordinate legislation (within the meaning of the Interpretation Act 1978 (c 30))...

"the Taxes Acts" means—

(a) TMA 1970,

(b) the Tax Acts, and

10 (c) TCGA 1992 and all other enactments relating to capital gains tax...

62 Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is
15 required to keep and preserve under or by virtue of—

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,
subject to the following provisions of this paragraph.

(2) To the extent that any information or document that is required to be kept and
20 preserved under or by virtue of the Taxes Acts—

(a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of [any other
enactment relating to a tax,

25 it only forms part of a person's statutory records to the extent that the chargeable
period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records
when the period for which they are required to be preserved by the enactments
mentioned in sub-paragraph (1) has expired.

30 63 Tax

(1) In this Schedule, except where the context otherwise requires, "tax" means all
or any of the following—

(a) income tax,

(b) capital gains tax,

35 (c) corporation tax,

(d) VAT....

and references to "a tax" are to be interpreted accordingly.