



TC02521

Appeal number: TC/20011/08374

INCOME TAX – information notice - paragraph 1 Schedule 36 Finance Act 2008 – onus of proof – whether information or document reasonably required by officer - yes - whether documents in appellant’s possession or power - yes - whether certain information constituted appellant’s “statutory records” resulting in no right of appeal against the relevant part of the information notice - yes - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EUDORA THOMPSON

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
DAVID E WILLIAMS CTA**

Sitting in public at Bedford Square, London WC1 on 10 April and 2 November 2012, with further written submissions.

Hennessy Thompson, H A S Thompson & Co accountants, for the Appellant

Karen Weare, presenting officer, for the Respondents

DECISION

1. This is an appeal by Mrs Eudora Thompson ("Mrs Thompson") against an information notice issued by the Respondents ("HMRC") on 16 May 2011 pursuant to paragraph 1 Schedule 36 Finance Act 2008 ("information notice"). Mrs Thompson lodged her appeal on 23 June 2011.

2. The main issues in this appeal are whether Mrs Pask, the officer conducting an enquiry into Mrs Thompson's tax returns in respect of the years ended 5 April 2004, 2005, 2006, 2007 and 2008, reasonably required the information and documents specified in the information notice to check Mrs Thompson's tax position and whether the information and documents were within her possession or power. The appeal also raises an issue whether some of the documents required by the information notice constituted part of the appellant's statutory records, within the meaning of paragraph 62 Schedule 36 Finance Act 2008 ("Schedule 36"), from which no appeal lies to this Tribunal by virtue of paragraph 29(2) of Schedule 36.

Background

3. Mrs Thompson was the founder and Chief Executive Officer of a company called Zynap Limited ("Zynap"), a position which she held from August 2002 to 3 September 2007.

4. Zynap went into administration on 3 September 2007.

5. In her tax returns for the periods referred to in paragraph 2 above, Mrs Thompson claimed expenses (primarily travelling expenses) incurred in the course of the performance of the duties of her employment/office.

6. HMRC (Mrs Pask) opened an enquiry into Mrs Thompson's tax return for the year ended 5 April 2007 on 16 February 2009 and, at the same time, opened enquiries into the tax returns for the other years referred to in paragraph 2 above.

7. The procedural history of this information notice is somewhat complicated and is as follows.

8. An information notice was issued to the taxpayer on 10 June 2010. That information notice contained seven separate requirements. Only two of these (effectively paragraphs 1 and 2 of the information notice of 16 May 2011 referred to in paragraph 13 below, although the "Nemo loan" issue does relate to self-employment expenses for the tax year ended 5 April 2008) requirements are relevant to the information notice currently under appeal.

9. Mrs Thompson's accountants requested a statutory review of the 10 June 2010 information notice. The outcome of that review was notified to Mrs Thompson and her accountants by a letter from HMRC dated 10 December 2010.

10. So far as is material to the current appeal, the review concluded that the first two requirements of the information notice should be limited to documents in respect of the tax year ended 5 April 2007. The two requirements were, first, a request for credit card and/or bank statements as evidence that Mrs Thompson had personally
5 incurred expenditure which she claimed as expenses incurred in performance of the duties of her employment in respect of the year ended 5 April 2007. Secondly, HMRC required a schedule of all payments received from Zynap during the year ended 5 April 2007 detailing what each payment represented (e.g. salary, bonus, and expenses) and the period to which the salary and bonus related.

10 11. The review required compliance in respect of the above two requirements within 30 days of 10 December 2010.

12. Mrs Thompson's accountants appealed on her behalf against the information notice of 10 June 2010. Before the hearing of the appeal (which was due to take place on 12 May 2011), HMRC withdrew from the appeal because of a technical problem.
15 The nature of the problem was not explained to us. Nonetheless, the upshot was that the information notice of 10 June was withdrawn by a letter from HMRC dated 16 May 2011.

13. HMRC (Mrs Pask) issued a new information notice on 16 May 2011. This is the information notice which is the subject of this appeal. The information notice read as
20 follows:

"Documents or information that we need

In this context "document" means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk,
25 memory stick, flash drive, floppy disk or other recording media.

1. Credit card and/or bank statements as evidence of your claim to have personally incurred expenditure of £33,904 in the course of your employment with Zynap Limited during the year ended 5 April 2007.

2. A schedule of all payments received from Zynap Limited during the year ended 5 April 2007 detailing what each payment represents (e.g. salary, bonus, expenses) and the period to which the salary and bonus
30 related.

3. Documents confirming the loan with Nemo was secured on the property and relates to either its purchase or renovation costs."

35 14. Mrs Thomson appealed to this Tribunal on the basis that HMRC was estopped from issuing a second Schedule 36 notice because the effect of withdrawing from the original appeal was that her case succeeded and that HMRC should not be allowed to issue a second notice. The Tribunal (Judge Short and Mr Midgley) decided that it had no jurisdiction to prevent HMRC from issuing a second Schedule 36 information
40 notice i.e. one which reflected the terms of the statutory review. The Tribunal's decision was released on 6 October 2011.

15. A penalty notice for failure to comply with the information notice was issued 15 February 2012. This has not been appealed.

16. Mrs Thompson has now appealed against the information notice of 16 May 2011.

5 17. The hearing took place on 10 April 2012 but was adjourned, part-heard, and was resumed on 2 November 2012. At the resumed hearing we requested further written submissions from both parties on the question whether paragraph 3 of the information notice related to the appellant's statutory records within the meaning of paragraph 62 of Schedule 36 – an issue which related to the jurisdiction of this Tribunal.

10 **The evidence**

18. The following witnesses filed witness statements and gave oral evidence on behalf of the appellant, Mrs Thompson:

(1) Mrs Thompson

15 (2) Mr Anthony Davenport – chief financial officer of Zynap from 8 January 2001 to 3 September 2007.

(3) Mr David Doughty – chief technical officer of Zynap from 10 August 2000 to 3 September 2007.

19. On behalf of HMRC, Mrs Natasha Pask, an officer within the Personal and Capital Gains Compliance Team of HMRC, filed a witness statement and gave oral
20 evidence.

20. In addition, both parties produced bundles of documents and correspondence.

The facts

21. As noted above, Mrs Thompson was the founder and chief executive officer of Zynap.

25 22. Mrs Thompson had originally qualified as a chartered accountant but her role at Zynap was on the business rather than the accounting side. As chief executive officer she reviewed management accounts and forward-looking statements prepared for investors. She was also a signatory on Zynap's bank account. However, if a person was a recipient of a cheque another authorised signatory had to sign the cheque.

30 23. Zynap's business involved the development and exploitation of software in the Human Resources sector. Mr Davenport described the brilliance of Zynap's software as leading to the company's downfall. It was the perfect tool for large multinational companies but Zynap itself was a small, undercapitalised company. Zynap was a small company doing business with "giants" such as UBS, AstraZeneca and the NHS.

35 24. Zynap was consistently cash poor. The company had continual cash flow problems. There were frequent board meetings to consider whether to continue

trading and, eventually, by the end of August 2007 it was decided that the company should cease to trade. The cash flow situation had been problematic for years before that. Every year Mrs Thompson had to inject funds into the company or forego salary. Zynap eventually went into administration on 3 September 2007.

5 25. Mr Doughty's and Mr Davenport's evidence, which was unchallenged in the following respects, was that executive and non-executive directors would often not be paid their salaries, bonuses and expenses. The unpaid amounts were substantial and spread over a number of years. The executive directors had to capitalise unpaid salaries and bonuses. Travelling and overseas expenses were often not paid to Mrs
10 Thompson by Zynap as the company was not in a financial position to pay them. Mr Davenport's evidence was that on occasions, when Zynap had positive cash flow, it would make a single payment into an employee's bank account that frequently included both net pay and reimbursed expenses. Moreover, those payments often included a mixture of current and catch up payments. It was not an easy task to
15 reconcile the payments to a particular year.

26. Mr Davenport identified a statement signed by the administrator of Zynap dated 17 October 2007 which showed arrears of salary owed by the company to Mrs Thompson of £98,336.02 (gross) and £56,248.25 (net of PAYE and employee NIC) as
20 at 3 September 2007 (the date of the administration). These amounts had not been paid to Mrs Thompson. Mr Doughty also referred to the same statement which showed that he was owed £65,806.84 (gross) and £38,826.04 (net of PAYE and employee NIC).

27. Mr Davenport told us that overseas expenses were accounted for separately. Overseas expenses tended to be greater than domestic travelling expenses because of
25 intercontinental business travel. There was a large disparity between the size of overseas and UK travelling expenses. Overseas expenses tended not to get paid but built up. Mrs Thompson travelled frequently to the US seeking to expand the business into the US and to raise money from US investors. These were genuine business trips and the success of the company depended on them.

30 28. Mr Thompson referred Mr Davenport to a number of invoices for a travel company called DialAFlight which were exhibited to Mrs Thompson's witness statement. These invoices were addressed mainly to Mrs Thompson or Ms Victoria Smith (Mrs Thompson's PA) or Ms Juleen Grant (Ms Smith's assistant) or Mr Paul Mayow (one of Mrs Thompson's assistants). All the invoices were also co-addressed
35 to Zynap Limited at its business address. Mr Davenport stated that these were the sort of expenses that Zynap would not have reimbursed to Mrs Thompson.

29. Mrs Thompson's evidence was that these invoices reflected expenses which were not paid by Zynap. On each of these invoices Mrs Thompson was the only
40 person travelling abroad and the purpose of the journey was to drum up business and funding for Zynap. Her evidence was that she used her own funds to pay these expenses and that the invoices were co-addressed to Zynap because the expenses were incurred on behalf of Zynap and her assistants were responsible for filing and keeping track of them.

30. Mr Doughty stated that, to his own knowledge, Mrs Thompson did not receive her travelling expenses from Zynap, although he accepted that he was not personally involved in the company's finances, except as regards his duties as a director.

5 31. Mrs Thompson referred to her Lloyds Bank statements for 2006/2007 which were annexed to her witness statement and which had been produced to HMRC. Mrs Thompson confirmed that her Lloyds account was her only active account during the relevant periods (although she believed she may have had a dormant Barclays account). She also referred to a summary ("the Summary") which she had prepared itemising the credit entries as regards receipts from Zynap for that period. She noted
10 that HMRC considered that the credits described as salary were in excess of the amounts recorded in the Form P14. The Summary records items such as "part salary paid late", "late salary catch-up", "UK expenses paid", "part salary", "Loan to Company", "Part Payment of Loan" and "Balance of Loan repayment".

15 32. The bank statements disclosed that on 30 January 2007 Mrs Thompson received a mortgage advance from Cheltenham & Gloucester of £41,850. Mrs Thompson explained that she took this loan out in order to meet the financial requirements of Zynap and that, in common with other directors, she had lent £14,000 to the company on 27 February 2007. This loan was subsequently repaid in two instalments in March 2007.

20 33. The executive directors capitalised unpaid salaries and bonuses. As indicated above, directors were often called upon to inject money into Zynap by way of loan. Sometimes these loans were repaid but often they were simply capitalised, thereby increasing each director's share capital in the company. Expenses owed to the directors were not, however, capitalised.

25 34. Mrs Thompson stated that the DialAFlight invoices related to her business travel on behalf of Zynap. She had provided these invoices to HMRC because they had been kept by her assistant as evidence of the sums owed to her by Zynap.

30 35. Mrs Thompson's evidence was that was that the DialAFlight invoices were not paid through her bank debit card (which was only used to secure a flight reservation) but rather were paid by one of her credit cards. Mrs Thompson had maintained a large number of credit cards. Her assistants use these credit cards to pay the invoices. She had tried to recall and trace these cards. The cards she recalled having were:

British Airways – American Express

MBNA (now HSBC)

35 Marks & Spencer

Lloyds TSB – Gold Card

Citibank

Capital One

Barclaycard

36. Mrs Thompson also believed that there may have been "a few others" (i.e. credit cards).

37. Mrs Thompson said that a number of her credit cards were set up in order to transfer balances from one to the other to provide funding by taking advantage of increased limits. She had reviewed the DialAFlight invoices to see whether she could trace the cards back, but noted that the payment section showed all cards ended with the numerals 5972. This was her bank debit card which was simply used to reserve the flight. As indicated above, the payments were not made through the bank debit card.

38. Mrs Thompson's evidence was that she had not kept her credit card statements. She said she "did not keep paper." She had assumed that she would be able to obtain duplicates if required. We considered this to be an odd approach from a person who was a qualified accountant and who, on her own evidence, was incurring significant expenses on behalf of Zynap from her own pocket at a time when the company was plainly struggling financially.

39. She had contacted American Express who agreed to produce statements for 2006/2007. The statements produced, however, only covered March 2007 – April 2007. Mrs Thompson had contacted American Express who offered to send the statements but they had not arrived at the date of her witness statement which was produced prior to the first hearing in April 2012. At the second hearing in November 2012, Mrs Thompson informed us that American Express had told her that they could not supply credit card statements for periods prior to March 2007. Mrs Thompson also stated that she had made efforts to obtain statements in respect of other credit cards but had been informed that either the credit card company did not keep records after than six years or "after a period."

40. We questioned Mrs Thompson on this statement. Statements for the tax year ended 5 April 2007 would have been within any six year period at the date of the first hearing in April 2012 (and would certainly have been within any such period when Mrs Pask issued her information notice on 16 May 2011). Mrs Thompson replied that the credit card companies had said they could not supply the statements. Mrs Thompson's reply was vague and, in our view, unsatisfactory. HMRC had been requesting credit card statements from November 2009. They had also been requested in the information notice of 10 June 2010. It seems odd to us that the appellant seems to have been unable to obtain her credit card records. Mr Thompson also informed us that his firm had written to credit card companies but had been unable to obtain earlier statements. We were not shown copies of this correspondence and there was no written record of Mrs Thompson having written to her credit card companies requesting copies of her past statements, although Mr Thompson, in his closing submission to us, said that she had done so.

41. Mrs Thompson had taken out a loan from Nemo Personal Finance ("Nemo") on 28 September 2007. The purpose of the loan was to pay off her various credit cards and other creditors thereby consolidating her liabilities into one loan. In a letter of 28 September 2007 from Nemo to Mrs Thompson (of which we were only provided with the first page of what appeared to be a file copy) records that Nemo sent to Mrs

Thompson a copy of the executed credit agreement and "mortgage deed" under cover of that letter. In addition, the letter stated that it enclosed the following cheques:

	"EL Thompson	£23,381.00
	Capital Bank plc	£9216.00
5	Capital One Bank	£2061.00
	Citifinancial plc	£2135.00
	Morgan Stanley	£2508.00
	Harvey Nichols Card Services	£5715.00
	GE Money	£6521.00
10	M & S F S Ltd	£11,994.00
	American Express Services Ltd	£13,417.00
	Lloyds TSB Bank plc	£21,052.00"

42. Mrs Thompson noted that the Harvey Nichols credit card related to her personal expenditure.

15 43. In addition, we were provided with the first page of a Loan Agreement (expressed be secured by "a Legal Charge or Standard Security" between Mrs Thompson and Nemo dated 28 September 2007. The cash amount of the loan was £98,000.

20 44. Mrs Thompson explained that the amount of £23,381 advanced to her by Nemo was used for the refurbishment of her apartment in Central London. Mrs Thompson had claimed interest relief in respect of the tax year ended 5 April 2008 in respect of certain interest on the Nemo loan against her self-employment income. In the period to which the interest related (i.e. after her employment with Zynap had terminated in September 2007), Mrs Thompson was self-employed.

25 45. In cross-examination Mrs Thompson was asked what evidence there was that she had paid the DialAFlight invoices. Mrs Thompson replied that there was no evidence that Zynap had paid them.

30 46. Also in cross-examination, Mrs Thompson was asked why no un-reimbursed expenditure had been included on the schedule provided by the administrator (referred to in paragraph 26 above). Mrs Thompson replied that the schedule dealt only with salary and bonuses and not with outstanding expenses. She believed that she was owed much more than was shown on this schedule. At the hearing in April 2012, Mr Thompson stated that the administrators had produced a schedule showing all creditors and that this could be produced to HMRC. However, by the time of the
35 second hearing in November 2012, Mr Thompson had still not produced this schedule.

47. In her evidence Mrs Pask stated that she needed credit card statements in order to be satisfied that Mrs Thompson had incurred the expenditure in question. Mrs Pask accepted that the appellant had complied with the notice as regards her bank account

by producing copies of her Lloyds Bank account for the tax year ended 5 April 2007. In addition, from the information provided by Mrs Thompson in respect of her Lloyd's TSB bank account, the credits from Zynap exceeded her net pay and Mrs Pask was, therefore, concerned whether expenses for which a deduction was claimed had been reimbursed to Mrs Thompson. For this reason, she had requested a schedule of payments received from Zynap for the tax year ended 5 April 2007 detailing what each payment represented in the period to which the salary and bonus payments related.

48. In respect of the Nemo loan, Mrs Pask said that her concern was that interest relief had been claimed in respect of home use of Mrs Thompson's property. There was no evidence that she had seen which showed that the proceeds of the loan had been used either as a mortgage for the purchase of the property or its renovation or on legitimate self-employed expenses. Moreover, although the letter of 28 September 2007 relating to the Nemo loan showed that part of the proceeds of the loan had been used to pay off credit card balances, there was no evidence as to how those balances had arisen. For these reasons, Mrs Pask believed that she needed the information and documents referred to in the disclosure notice in order that she could make an informed decision in respect of Mrs Thompson's tax returns.

49. Mrs Thompson stated that she would be able to produce an invoice in respect of the renovation works to her property, although this had not been included in the hearing bundle. Certainly it would be a sensible step for this invoice to be produced. In the subsequent written submissions made on behalf of the appellant after the November hearing an invoice from a decorator (P. Cronin) was produced – we do not know whether this was the invoice to which Mrs Thompson was referring.

25 **Statutory provisions**

50. The information notice in this appeal was issued under paragraph 1 Schedule 36 Finance Act 2008. Paragraph 1 provides:

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

30 (a) to provide information, or

(b) to produce a document,

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

35 (2) In this Schedule, “taxpayer notice” means a notice under this paragraph.”

51. Paragraph 18 of Schedule 36 provides:

“An information notice only requires a person to produce a document if it is in the person's possession or power.”

40 52. A taxpayer's rights of appeal in respect of an information notice are contained in paragraph 29 of Schedule 36 and are as follows:

" (1)Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the First-tier Tribunal against the notice or any requirement in the notice.

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(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.

(3)Sub-paragraph (1) does not apply if the First-tier Tribunal approved the giving of the notice in accordance with paragraph 3."

10 53. Paragraph 62 Schedule 36 Finance Act 2008 defines statutory records as follows:

"(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—

15

(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 preserved under or by virtue of the Taxes Acts—

20

(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],

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.

25

(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 54. Section 12 B Taxes Management Act 1970 ("TMA"), so far as is material, sets out the circumstances in which a taxpayer is required to keep and preserve records:

“(1) Any person who may be required by a notice under section 8, 8A. . . or 12AA of this Act . . . to make and deliver a return for a year of assessment or other period shall—

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(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

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(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—

(i) where enquiries into the return . . . are made by an officer of the Board, the day on which, by virtue of section 28A(1) or 28B(1) of this Act, those enquiries are . . . completed; and

5 (ii) where no enquiries into the return . . . are so made, the day on which such an officer no longer has power to make such enquiries.

(2) The day referred to in subsection (1) above is—

(a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company, the fifth anniversary of the 31st January next following the year of assessment or (as the case may be)

10 the sixth anniversary of the end of the period;

(b) otherwise, the first anniversary of the 31st January next following the year of assessment ...

or (in either case) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different

15 days may be specified for different cases)

...

(2A) Any person who—

(a) is required, by such a notice as is mentioned in subsection (1) above given at any time after the end of the day mentioned in subsection (2)

20 above, to make and deliver a return for a year of assessment or other period; and

(b) has in his possession at that time any records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period,

25 shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before the day mentioned in subsection (2) above, would have been the relevant day for the purposes of subsection (1) above.

(3) In the case of a person carrying on a trade, profession or business alone or in partnership—

30 (a) the records required to be kept and preserved under subsection (1) or (2A) above shall include records of the following, namely—

(i) all amounts received and expended in the course of the trade, profession or business and the matters in respect of which the receipts and expenditure take place, and

35 (ii) in the case of a trade involving dealing in goods, all sales and purchases of goods made in the course of the trade....”

55. The question before us, therefore, is whether the information or documents required by the information notice issued by Mrs Pask on 16 May 2011 is reasonably

40 required by her for the purpose of checking Mrs Thompson's tax position and whether the documents and/or information are within her possession or power. In addition, as regards paragraph 3 of the information notice, the question arises whether the documentation required forms part of Mrs Thompson's "statutory records", in which case she has no right of appeal.

Discussion

Credit Card and Bank Statements

56. In our view, paragraph 1 of HMRC's information notice of 16 May 2011 specified information and/or documents that were reasonably required for the purpose of checking Mrs Thompson's tax position. HMRC accept that Mrs Thompson has complied with that notice in relation to her Lloyds bank account. But she has not yet complied with the notice in relation to credit card statements.

57. The appellant's objection to providing her credit card statements appears to rest on two arguments.

58. First, from the evidence of Mr Doughty, Mr Davenport and the appellant, the appellant submits that Zynap was not in a sound enough financial position to reimburse the appellant in respect of her overseas travelling expenses. Therefore, it must be the case, in Mr Thompson's submission, that Mrs Thompson herself incurred the expenses and that HMRC cannot now reasonably request sight of her credit card statements to substantiate her claim.

59. We reject this argument.

60. In our view, HMRC are entitled to have sight of primary evidence substantiating Mrs Thompson's claim that she incurred the relevant expenditure and the manner in which she paid it, as well as to evidence that she was not reimbursed. HMRC should not be required, in determining the reasonableness of the information notice, to accept the inference that, because Zynap was not in a position to reimburse the appellant, she must have incurred the expenditure herself. Instead, HMRC are entitled to see the information and documents which provide the best and most direct evidence to substantiate the appellant's claim to relief viz the credit card statements which show the appellant incurring the expenditure in question. They are not required, in determining whether the information and documents specified in the information notice are reasonably required, to rely on secondary sources where the primary sources are available.

61. Secondly, Mrs Thompson tells us that she has made efforts to obtain her credit card statements but that they are not available. We were not convinced by her evidence. We were not satisfied that she had made adequate efforts to obtain her credit card records from her credit card companies. We saw no written requests or correspondence with the credit card companies. Her reference to a six-year limit applied by the credit card companies in providing past statements was unconvincing bearing in mind that she has been asked for this information since at least the end of 2009.

62. The onus of proof in relation to an appeal in respect of an information notice lies upon HMRC. However, where the information notice specifies information or a document which is reasonably required for the statutory purposes and that information or document (such as a bank or credit card statement) is prima facie within the taxpayer's possession or power the burden shifts to the taxpayer to demonstrate why

that information or document cannot be produced. Credit card statements are prima facie obtainable from the credit card provider and are therefore in the card-holder's power to obtain, even if not in their actual possession. As noted, we are not satisfied that Mrs Thompson has made sufficient efforts to obtain her credit card statements and were not convinced by her explanations as to why they were not forthcoming. As Mrs Weare conceded, if it was eventually demonstrated that the credit card statements could not be obtained, Mrs Pask would have to pursue her enquiries through an alternative route.

Summary of payments from Zynap

63. The second paragraph of the information notice of 16 May 2011 requires a schedule of payments from Zynap to Mrs Thompson giving details of the payments and the periods to which they relate.

64. Essentially, in relation to this request, the appellant argues that she has produced her bank statements for the year ended 5 April 2007 and her accountants have produced the Summary (see paragraph 31 above) which seeks to identify those bank credits that relate to payments from Zynap. There was no other information that could be produced.

65. The information produced in the form of the Lloyds bank accounts showed that credits paid in from Zynap exceeded the appellant's net pay. Mrs Pask wanted to be sure that those excess payments did not involve reimbursement of expenses.

66. The bank statements for the year ended 5 April 2007 show various credits from Zynap which have been annotated in manuscript. These manuscript amendments are recorded in the Summary as an explanation of the payments from Zynap throughout that year. As already noted, the Summary records items such as "part salary paid late", "late salary catch-up", "UK expenses paid", "part salary", "Loan to Company", "Part Payment of Loan" and "Balance of Loan repayment". But it does not allocate payments in respect of salary to any particular period. On behalf of Mrs Thompson it was said that it was now too late to work out to which period these payments should be allocated.

67. In our view, it is reasonable for HMRC to insist on a reconciliation of the payments from Zynap into the appellant's Lloyds bank account and that that reconciliation should show the periods to which the payments of remuneration relate. We accept that providing this reconciliation may be difficult. However, we were assured that the April hearing by Mr Thompson that a full schedule of creditors had been produced by the administrators. It is to be expected that that schedule should contain details of unreimbursed non-UK travelling expenses incurred by the directors. This schedule has not been produced. The appellant, as both a shareholder in, and a creditor of the company, would in our view have received, or been entitled to obtain, such a schedule from the administrator. Accordingly, we consider that HMRC can reasonably require the information specified in paragraph 2 of the information notice, that such information is in the appellant's possession or power, and that the appellant

has not satisfied us that there is any reasonable excuse why this information cannot be supplied.

The Nemo loan

5 68. At the resumed hearing on 2 November 2012 we raised the issue whether the information required by paragraph 3 of the information notice of 16 May 2011 was part of the Appellant's "statutory records" within the meaning of paragraph 62 of that Schedule and section 12B TMA. Where an information notice requires the production of information which forms part of a taxpayer's statutory records, the right of appeal which is normally given in respect of information notices does not apply
10 (paragraph 29 (2) Schedule 36 Finance Act 2008).

69. We requested further written submissions from the parties on this point because it had not previously been considered by either party.

15 70. HMRC submitted that the information on the use of the Nemo loan funds constituted "statutory records" for the purposes of Schedule 36. HMRC argued that Mrs Thompson took out the loan on 28 September 2007 of £98,000. Mrs Thompson had argued that part of the loan was used for the purposes of her consultancy business. Therefore, the information formed part of her "statutory records."

20 71. Mr Thompson, insofar as we understood his submissions, argued that the Tribunal was not expected to rule on paragraph 3 of the information notice because, together with his further submissions, he had enclosed an invoice from a decorator (P. Cronin) in respect of work done to Mrs Thompson's flat which, in his view, would resolve the issue.

25 72. Mr Thompson, in his submissions, appeared to accept that the flat was used for Mrs Thompson's consultancy business and that she operated that business from the flat.

30 73. That, in our view, amounted to an admission that the information requested in the notice about the Nemo loan "relates to the carrying on of a business", and, therefore, was not within the time limit for the retention of documents and information imposed by section 12B(2) TMA. It must follow that it would fall within section 12B(1) TMA and needed to be kept until (for the tax year 07/08) 31 January 2015 or, if later, until the enquiry into Mrs Thompson's tax return is closed. For Schedule 36 purposes, therefore, they remained part of the "statutory records" until
35 the later of those dates for the purposes of paragraph 62(3) Schedule 36 Finance Act 2008.

74. We, therefore, conclude that pursuant to paragraph 29(2) of Schedule 36 we have no jurisdiction to hear an appeal in relation to paragraph 3 of the information notice.

75. For the reasons given above, we dismiss this appeal in relation to paragraphs 1 and 2 of the information notice and, therefore, confirm the information notice. As regards paragraph 3 of the information notice, we conclude that we have no jurisdiction to entertain an appeal and the appeal is therefore, on this point, struck out.

5 76. This document contains full findings of fact and reasons for the decision. Our
decision is final and there is no right of appeal in relation to our decision in respect of
paragraphs 1 and 2: paragraph 32(5) Schedule 36 Finance Act 2008. The normal
appeal rights apply to our decision to strike out the appeal in respect of paragraph 3 of
the information notice (see *LS v London Borough of Lambeth* (HB) [2010] UKUT 461
10 (AAC)). Any party dissatisfied with the Tribunal's decision to strike out an appeal has
a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal
Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. 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 Decision from the First-tier
15 Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 6 February 2013