

[2013] UKFTT 133 (TC)



TC02562

Appeal number: TC/2012/03432

INCOME TAX – schedule 36 para 39 & 40 finance act 2008 – whether penalties for non compliance with information notice should be upheld – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAI YAN CHAN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE IAN HUDDLESTON
MRS PATRICIA GORDON**

Sitting in public in Belfast on 4 December 2012.

**Mr. P. Donnelly for HMRC
Mr. Michael Feng, Feng & Co., for the Appellant**

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DECISION

Appeal

1. This is an appeal by Wai Yan Chang (“the Appellant”) against penalties which have been levied by HMRC under paragraphs 39 and 40 of Schedule 36 of the Finance Act 2008.
2. The penalties levied consisted originally of a £300 fixed penalty (paragraph 39), and a sum of £3,060 calculated as a daily penalty of £30 per day for the period from the 2 September 2011 to the 12 December 2011 (102 days).
3. The Appellant’s representatives requested a statutory review of the penalty, the determination of which was originally issued on the 12 December 2011.
4. Upon review the penalties were upheld and notification of that decision was released to the Appellant and his agents by letter dated the 1 February 2012. It is against that decision that the Appellant now appeals.

Legislation

5. The penalties in reference were imposed under paragraphs 39 and 40 of Schedule 36 of the Finance Act 2008 which provides as follows:

Paragraph 39(1)

“This paragraph applies to a person who –

(a) fails to comply with an Information Notice

(b)

(2) The person is liability to a penalty of £300.

(3) The reference in this paragraph to a person who fails to comply with an Information Notice includes a person who conceals, destroys, or otherwise disposes of or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.”

Paragraph 40(1)

“(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

“(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.”

Facts

6. An Information Notice was issued by Mr. Boles (the investigating officer) on the 13 August 2010 in accordance with the provisions of paragraph 1, Schedule 36, Finance Act 2008 covering, in total, seven items on which further information was sought.

7. The requirement for further information had arisen out of Mr. Bole’s review of the Appellant’s 2008 tax return and the opening of an enquiry under Section 9A of the Taxes Management Act 1970.

8. Prior to the issue of the Information Notice, the Appellant’s representatives had written seeking a Closure Notice. Arising from that exchange, the Appellant sought an independent review of the decision to issue the Information Notice. That review upheld the original Schedule 36 Notice. The decision not to issue a Closure Notice was then appealed to this Tribunal (TC/2010/03792).

9. The Tribunal determined that it was inappropriate to direct the issue of a closure notice given the currency of the outstanding investigation and information sought on foot of the Information Notice.

10. Subsequent to that decision, HMRC wrote to the Appellant’s agents repeating their request for outstanding information, specifically in relation to a number of bank accounts, redacted bank statements provided in relation to those bank accounts, and certain details regarding the acquisition of some residential investment properties.

11. The next stage was that the Appellant appealed against the confirmation (on review) of the Schedule 36 Notice.

12. That case was heard by the Tribunal on the 15 June 2011 where the appeal against the Schedule 36 Notice was dismissed.

13. Subsequent to those proceedings, Mr. Chan made a witness statement detailing the extent of his belief that he had complied with the Schedule 36 Notice.

14. HMRC did not agree with his interpretation, however, and accordingly levied a £300 penalty on the 1 September 2011 under paragraphs 39 and 46 of Schedule 36 Finance Act 2008.

15. The Appellant's representatives appealed that penalty and requested an independent review.

16. Mr. C. Agg (Appeals and Review Unit, York) issued the conclusions of his independent review on the 26 October 2011. As part of that review, Mr. Agg accepted that item 1 (Business Bank Accounts), items 2, 3 and 4 (in relation to the working papers of the Appellant's former accountants) and item 5 (Accommodation for Employees) as detailed on the Schedule 36 Notice could be regarded as satisfied, but that the information requirement in relation to item 6 (Personal Bank Accounts) and item 7 (the Financing of Property Acquisitions) had not been satisfied, and therefore determined that the penalty should be upheld.

17. On the 2 December 2011 HMRC wrote to Mr. Chan warning of the intention to charge daily penalties and, subsequent to that warning, HMRC did charge daily penalties in the sum of £3,060 (£30 per day for 102 days from the 2 September 2011 to the 12 December 2011).

18. The Appellant's representatives requested an independent review which was undertaken by Mrs. J. Laube, Appeals and Review Unit, York, and was issued on the 1 February 2012.

19. In relation to item 6 (the Bank Accounts) Mrs. Laube accepted that information concerning five bank accounts had been satisfied, but that information concerning three bank accounts was outstanding.

20. As regards item 7 (Financing of Properties) Mrs. Laube determined that the request for information had not been satisfied. Accordingly, she concluded that "*the penalties should be upheld*".

21. The Appellant appealed to this Tribunal.

22. On the 24 April 2012 HMRC advised Mr. Chan that they intended to issue third party notices to the three banks concerned.

23. On the 10 May 2012 the Appellant's agents produced photocopies of statements from three banks. The statements showed a number of lodgements totalling £6,000 in cash during the period of the enquiry, but did not give any explanation as to the source of this cash. The bank statements failed to show repayments on the mortgages for the three properties concerned, and equally failed to show the deposit which had been paid in relation to the purchase of one of them (218 College Heights).

24. The account also failed to disclose information regarding a family trip to China in July 2007 – again within the enquiry period.

25. Mr. Boles, who gave evidence to the Tribunal, confirmed that no further information regarding either item 6 (the Bank Statements) or item 7 (the Financing of the Properties) had been furnished.

HMRC's Case

26. Based on the history of this case, HMRC advanced the argument that the Appellant has not fully complied with the Information Notice by the date upon which the penalty determination was issued.

27. For that reason, HMRC contend that the penalty determination of £300 and £3,060 should be upheld.

The Appellant's Case

28. The Appellant was represented by Mr. Feng.

29. The Appeal Notice before the Tribunal disclosed three grounds of appeal:

(1) that the initial penalty of £300 had been issued without HMRC following internal guidelines. As this argument was not further advanced at the Tribunal and the appeal in relation to it was, in essence, withdrawn, I make no further comment in relation to it;

(2) that the level of daily fine was too high in light of HMRC's reviews. In relation to this ground, the Appellant considers that £30 per day as against a total of £60 per day is excessive;

(3) finally, the Appellant advanced the argument that Mr. Boles is on a fishing expedition.

30. It is these three points that were advanced at the Appeal hearing.

Decision

31. The issue for this Tribunal is firstly whether or not the Information Notice had been fully complied with prior to the issue of the daily penalties notice. In that specific regard, we heard oral evidence from both Mr. Boles on behalf of HMRC and submissions from the Appellant's representative, Mr. Feng.

32. Mr. Feng's argument is that the requirement for "full" compliance with the Information Notice is not strictly part of the legislation, and he therefore advanced the view that the provision of redacted bank account statements (which provided information on interest accrued, but did not disclose any other entries) was sufficient compliance in relation to the information sought regarding the Appellant's personal bank statements (item 6), and that the requirements of the Information Notice was therefore satisfied.

33. As regards item 7 (the Financing of Properties) he relied essentially on Mr. Chan's witness statement of 2 August 2012 in which Mr. Chan advanced the argument that he had sufficiently complied with the request for information regarding the purchase of the properties because he had written to his then instructed solicitor – even though no information was actually provided.

34. As regards the details sought regarding the specific purchase of College Heights, Mr. Chan, in that witness statement, indicated that they were “*not in [my] possession because I have misplaced them*”.

35. This is the stance which Mr. Feng adopted at the Tribunal.

36. Faced with that argument, the Tribunal can do no more than confirm that it agrees with the conclusions of Mrs. Laub who undertook the independent review.

37. As regards the question of the redacted bank statements, the Information Notice sought “*statements / books for all other bank / building society accounts for which interest was received during the period from the 6 April 2007 to the 5 April 2008 for Mr. W. Y. Chan, including joint accounts.*”

38. In relation to the specific point, the Tribunal concludes that the provision of redacted bank statements showing only the interest accruing is not due compliance with the original request. The Tribunal does not accept Mr. Feng’s view that the redacted statements were sufficient.

39. As regards the properties, the Information Notice sought the following details:

(1) all documents that show detail of mortgage repayments to 20 Old Forge and 18 Linen Green during the period from the 1 February 2007 to the 5 April 2008;

(2) all documents that show details of the purchase of College Heights, including but not limited to those documents showing for the period from 1 February 2007 to 5 April 2008:

- (a) the purchase price;
- (b) deposit paid;
- (c) mortgage arrangements;
- (d) amounts of legal fees and disbursements paid; and
- (e) cost of furnishings bought.

40. In response to this request, no information has been supplied. The Appellant has advanced an argument that this information was not in his control. We do not accept that as a proposition. To suggest that merely writing to the instructed solicitor is sufficient is not in our view enough. We conclude that the Appellant has not complied with the requirement of the Information Notice.

41. In those circumstances the Tribunal finds that there was not due compliance with the Information Notice at the time when the notice of the daily penalties was sent to the Appellant.

42. As for the quantum of the penalties, HMRC are at liberty charge a penalty up to a maximum of £60 per day pursuant to the provisions of paragraph 40, where there is continuing “*failure or obstruction*”.

43. This Tribunal finds that at the date upon which the penalty notice was issued there continued to be such “*failure or obstruction*” and, having heard the parties and reviewed the facts which pertained to this case, consider that Mr. Boles, in raising a penalty of £30 per day, was acting reasonably and had not taken into account something he ought not.

44. It follows from those two findings that the Appeal is dismissed.

45. No order as to costs.

46. If you are dissatisfied with the outcome of the application for permission to appeal the decision in this appeal, either party has the right to apply to the Upper Tribunal for permission to appeal. Such an application must be made in writing to the Upper Tribunal at 45 Bedford Square, London, WC1B 3DN no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet “Appealing to the Upper Tribunal (Tax and Chancery Chamber).”

IAN HUDDLESTON

TRIBUNAL JUDGE

RELEASE DATE: 19 February 2013