



TC03305

Appeal number: TC/2013/03455

***INFORMATION NOTICE - appeal against information notice under Schedule 36
FA 2008 – whether material in possession or power***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**H A PATEL AND K PATEL
(A PARTNERSHIP)
- and -**

Appellants

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

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

**Appeal considered on 27 January 2014 without a hearing, each party having
agreed that the matter should be dealt with on written submissions only.**

DECISION

Introduction

1. This decision is further to and should be read with my decision dated 27 September 2013 with directions in relation to this appeal. As explained more fully
5 in the earlier decision, this is an appeal against an information notice dated 14 September 2012 issued to the Appellants by the Respondents (“HMRC”) under paragraph 1 of Schedule 36 to the Finance Act 2008. In summary, the Appellants contended that they were not obliged to provide a list of documents, as required by Regulation 5(2) of the Information Notice: Resolution of Disputes as to Privileged
10 Communications Regulations 2009 (SI 2009/1916) because the list itself would be privileged. The Appellants further contended that certain unspecified items requested by the information notice were not in the Appellants’ possession or power.

2. The Appellants subsequently waived their claim that the documents were subject to legal professional privilege. The only remaining issue is whether the
15 information and documents specified in the information notice were in the Appellants’ possession or power and so they are not required to produce them by virtue of paragraph 18 of Schedule 36. As they are the ones asserting that they do not have the documents or the means to obtain them, the Appellants have the burden of proving, on the balance of probabilities, that the information and documents are not in
20 their possession or power. For the reasons set out below, my conclusion is that the Appellants have not satisfied me that the information and documents specified in the information notice are not in their possession or power.

Background

3. In my decision of 27 September 2013, I directed that the Appellants should
25 provide a list of documents and copies of the documents which they claimed were covered by legal professional privilege to the Tribunal within 14 days. In a letter dated 9 October 2013, emailed to the Tribunal on 10 October, Baxendale Walker Limited, the Appellants’ representatives, stated:

30 “Having discussed the matter with its advisers the Appellant (sic) does not wish to pursue the claim to privilege before the Tribunal and, therefore, is willing to waive privilege and provide the disputed documents to the Respondent (sic). For that reason we have not provided the Tribunal with a list and copies of the disputed documents ...”

35 4. The letter of 9 October enclosed a joint witness statement of H A Patel and K Patel, the Appellants, which was unsigned but stated to be “Agreed verbally on 10 October 2013”. A signed version of the witness statement was provided on 31 October. The witness statement was in response to the direction made in the decision dated 27 September that:

40 “Within 14 days of the date of release of this direction, the Appellants shall serve on the Tribunal and the Respondents a witness statement

5 (or statements) stating which, if any, documents requested in the
information notice dated 14 September are not in their possession or
power but are in the possession of Bay Trust International Limited
("the Trustee"); describing the Appellants' relationship and
communications with the Trustee generally and, in relation to any
copies of the documents in the trustee's possession, setting out the
steps taken to obtain the documents from the Trustee including how
the Appellants knew that the Trustee had received the Appellants'
10 letter of 11 October 2012 requesting the documents, what response to
their request, if any, was received from the Trustee and, if none, what
steps, if any, the Appellants took to obtain a response from the
Trustee."

15 5. The Appellants' joint witness statement stated "... the following documents
requested in the information notice dated 14 September are not in our possession or
power of possession but are in the possession of Bay Trust International Limited ("the
Trustee")" and then listed the following:

- (1) The Remuneration Trust accounts.
- (2) Details and evidence of all loans made by the Trust – to include all loans
made by the Trustees and details of the terms of any loans made.
- 20 (3) Details of any payments made to the beneficiaries during the year ended 5
April 2010 and details of all beneficiaries who did receive payments.
- (4) Details of any payments made to persons other than beneficiaries.
- (5) Details of any of the potential beneficiaries being made aware of the
existence of the trust (sic).
- 25 (6) Details of the business relationship between FVT Holdings Limited and
Bay Trust International Limited.
- (7) Details of all assets and liabilities of the Trust that have been transferred
to or are now managed by GSA Investments Limited.
- (8) Details of all assets of the Trust which have not been transferred to GSA
30 Investments Limited.
- (9) Evidence that the Trustees did not habitually follow the wishes of the
partnership when making payments or loans from the Trust."

6. The witness statement continued as follows:

35 "We [the Appellants] state that our relationship and communications
with the Trustee generally is (sic) as follows:

We understand that the Trustee must remain independent of other
parties involved in the creation of the Trust. We have not considered it
necessary to contact the Trustee with any regularity as we understand
that the Trustee must be allowed to act without influence and that our
40 role as Protectors is extremely limited in terms of the powers we
possess to influence Trust matters.

5 We [the Appellants] state that we took the following steps to obtain the documents from the Trustee including how we knew that the Trustee received our letter of 11 October 2012, what response was received from the Trustee and what steps we took to obtain a response from the Trustee:

10 No response has been obtained but please note that throughout this period we have been subject to intense scrutiny from HMRC and have not had the ability (in terms of time and resources) to focus on obtaining a response from the Trustee. We have sent a further reminder to the Trustee in light of the Tribunal's involvement."

7. In a subsequent letter, dated 29 October 2013, Baxendale Walker Limited stated

"16 October 2013 at 05:02 – Appellant sent an email to the Trustee requesting a response to the Appellant's letter dated 11 October 2012.

15 18 October 2013 at 18:25 – Trustee sent an email to the Appellant attaching a copy of the Trustee's response."

8. The letter from Baxendale Walker Limited enclosed a copy of a letter dated 18 October 2013 from Bay Trust International Limited to the Appellants which stated as follows:

20 "We write in our capacity as Trustee of the [Hemant Patel and Kirti Patel Remuneration Trust] and in response to your letter dated 11 October 2012 requesting for certain detailed information and documents showing the activity of the trust and its assets.

25 Please note that we are not in a position to provide you with such documentation as we believe that it is our right as Trustee to keep certain matters private. We consider such information highly sensitive and confidential and therefore not privy to third party inspection or review."

9. The appeal against the information notice was listed to be heard on 17 January 2014 but that hearing date was vacated at the request of HMRC. Both parties then wrote to request that I deal with the appeal on the papers which I now do.

Discussion

35 10. The information notice required the Appellants to provide certain information and documents relating to a remuneration trust established by them. The Appellants appeal against the information notice on the basis that certain items in the information notice are not in their possession or power because they are held by the Trustee of the Appellants' remuneration trust. Paragraph 18 of Schedule 36 provides that:

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

40 The Appellants accept that certain (unspecified) information and documents are in the possession or power of the Trustee. The Appellants' case is that the Trustee has refused to hand over the information and documents and they have produced some material to support that case.

11. The Appellants sent a letter in October 2012 which asked the Trustee to provide and comment on information and documents requested in the information notice. The letter was extremely brief and did not set out any of the relevant background to the request or make any attempt to persuade the Trustee to provide such information and documents. The Trustee did not respond and, indeed, it was not even clear that the Trustee had received the Appellants' letter.

12. The witness statement dated 10 October 2013 states that the Appellants "have sent a further reminder to the Trustee in light of the Tribunal's involvement". No evidence has been produced to show that the Appellants ever sent an initial reminder or a "further reminder" to the Trustee. The only suggestion that the Appellants contacted the Trustee after the letter of 11 October 2012 is the statement in the letter from Baxendale Walker Limited that the Appellants emailed the Trustee on 16 October 2013. No copy of that email has been provided and I am unable to determine what was said in it. The Trustee responded, within two days, with a letter which asserts that the information requested is highly sensitive and confidential without explaining why.

13. It is clear from the Trust Deed, dated 26 March 2010, that the Appellants are the settlors (or "Founders") and "Protectors" of the remuneration trust. As such, the Appellants have the power to appoint and remove trustees of the trust, including the Trustee. On the day that the trust was established, the Appellants separately applied to the Trustee for loans of £550,000 which appear to have been advanced under an agreement made the same day. Further, the Appellants are (or, at least, were) directors of GSA Investments Limited, a UK company to which the Trustee, via another company in Belize, delegated powers to invest the trust funds. In that capacity, the Appellants would have been aware of and, indeed, authorised the loans.

14. It appears to me that, as Founders and Protectors, the Appellants must have power to influence the behaviour of the Trustee in relation to such things as the provision of documents or information. I do not accept that the Trustee does not respond to and take account of the wishes of the Appellants. The fact that the Appellants were able to ask for and obtain substantial loans from the Trustee in March 2010 shows that the Trustee does accede to the Appellants' requests. The fact that the Trustee replied to the Appellants' email of 16 October 2013 within two days shows that the Trustee responds promptly to communications from the Appellants and makes the lack of any response to the Appellants' letter in October 2012 difficult to understand. I conclude that the Appellants can influence and, in practice, require the Trustees to comply with their lawful and reasonable requests. Nothing that I have seen in the Trust Deed or the letter from the Trustees shows that the provision of the documents and information would be unlawful or that it would be unreasonable to expect the Trustee to comply with the request.

15. On the basis of the evidence provided, I find that the Appellants' only asked the Trustee to provide the information and documents specified in the information notice in the letter dated 11 October 2012 which, if it was received, the Trustee ignored. The Appellants made no attempt to obtain a reply to their letter until the email of 16 October 2013. Having received the Trustee's reply, the Appellants do not appear

to have made any effort to persuade the Trustee to reconsider its refusal to provide the documents and information. From the language of the letter and the fact that no attempt was made to follow it up for more than a year (and then only in response to my earlier decision) and the passive acceptance of the Trustee's refusal to provide the documents and information, I conclude that the Appellants have not made any serious attempt to obtain the relevant information and documents from the Trustee.

16. In conclusion, I am not satisfied, on the balance of probabilities, that the information and documents specified in the information notice are not in the Appellants' possession or power.

10 **Decision**

17. For the reasons given above, the Appellants' appeal against the information notice dated 14 September 2012 is dismissed.

Rights of appeal

18. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision 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 Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 3 February 2014