



**TC03440**

**Appeal number: TC/2013/02028**

*Paragraph 1 of Schedule 36 to the Finance Act 2008 - Appeal by Taxpayer against Information Notice – should Information Notice be confirmed? – No – appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**R D UTILITIES LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ALISON MCKENNA**

**Sitting in public at Bedford Square on 26 February 2014**

**Michael Pauline of counsel, instructed by Maclean Fisher Tait Accountants for  
the Appellant**

**Peter Massey, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This matter concerns the Appellant's appeal against an Information Notice served on it by HMRC in connection with its enquiry into the company's 2007 Corporation Tax Self Assessment Tax Return. In particular, HMRC sought information about the company's accounts in which a £700,000 contribution to a Remuneration Trust was shown. HMRC first raised its concerns in 2009 and the parties then engaged in a lengthy correspondence.

2. The Information Notice now under appeal was served on the Appellant company, pursuant to paragraph 1 of schedule 36 to the Finance Act 2008, on 19 July 2012. It required the Appellant to provide two pieces of "information" and two documents. The Information Notice was reviewed by HMRC on 15 February 2013 and upheld. The Appellant filed its Notice of Appeal to the Tribunal on 15 March 2013.

3. By the time of the hearing of this appeal in February 2014, the parties had agreed that the two documents required by part B of the Information Notice had been supplied, but there remained a dispute between them as to whether the two pieces of information required by part A had been supplied so as to comply with the Information Notice. The Appellant's case was that the Information Notice had been fully complied with so far as it was possible to do so but that the Information Notice was defective in asking for subjective opinion, which was not lawfully required to be provided. The Respondent's case was that the two pieces of information in part B of the Information Notice were reasonably required and remained outstanding.

4. The Appellant made a door-of-the-court application to admit witness evidence from Mr Aidan Tait, who is the Appellant company's accountant. HMRC did not object to its admission and the Tribunal allowed it, reluctantly in view of its late service. The Tribunal read Mr Tait's witness statement, heard brief oral evidence from him, and allowed Mr Massey to cross examine him on behalf of HMRC. Mr Tait gave negligible evidence as to fact, described his feelings about the Information Notice, stressed that he was not an expert witness but gave his opinion anyway. In all the circumstances the Tribunal did not find this evidence of assistance in reaching its decision.

5. The Information required in part A of the Information Notice was as follows:

"Constructive Obligation

a. Please specify for each year what the directors considered to be the pre-existing constructive obligations that arose to their suppliers, in doing this they should:

- explain precisely why they considered there was a constructive obligation
- what that constructive obligation was

- why discharging the constructive obligation would benefit their trade.

5 b. Do the lists provided with the resolution provided to the Trust provide the suppliers relevant to that year and, if not, how are the Trustees to know to whom payments are relevant? For each year please let me have a full list of the potential “providers”, a term used in the Trust deed to describe the class of beneficiary; the names, addresses, services provided, and the total amount paid to each provider by the company for their services”.

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6. Mr Pauline submitted that there had been a misunderstanding of the Remuneration Trust deed by HMRC, from which the requests for information flowed. He referred the Tribunal to HMRC’s Compliance Handbook at CH23240 which makes clear that an Information Notice may not be used to require the supply of opinion or speculation and that Information Notices should only properly require the supply of facts.

7. In relation to request “a” in paragraph 5 above, he submitted that the information sought relied upon a prior assumption on the part of HMRC that a constructive obligation was required to be recognised by the Company in order for the Trust to make a payment to any person, whereas that was an incorrect analysis. The Appellant submitted that an explanation for why HMRC’s understanding was incorrect had been sent to HMRC on 30 August 2012 and on 21 February 2013 and that the information specifically requested could not be supplied because it rested on the false assumption that a constructive obligation had been recognised by the Company.

8. In relation to the request at “b” in paragraph 5 above, Mr Pauline submitted, with reference to the Trust Deed, that “provider” is defined in the Trust provisions as “a person who provides or has provided or may in future provide service or services or custom or products...to the Founder” and as such the list was non-exclusive and could potentially include everyone in the world. He further submitted that as the Trustees have absolute discretion whether to confer a benefit on any beneficiary, HMRC’s request for the names and addresses and services provided by “potential providers” could clearly not be complied with. Mr Pauline also submitted that the request for information at “b” was based upon a misunderstanding of the Trust Deed to the effect that the trustees could only distribute benefits in any given year if they had been provided with a list of names of potential beneficiaries who had provided services to the Appellant during that year, whereas the trustees had much wider discretionary powers.

9. Mr Massey accepted on behalf of HMRC that if the Information Notice could not be complied with then it should be set aside. He conceded that the parties took a different view as to whether a constructive obligation was required to be recognised and explained that HMRC wished to know how the figure of £7000,000 paid to the Remuneration Trust had been calculated to see if it was correct. In relation to the

request at “b” he submitted that the Appellant could have explained that the potential providers were everyone in the world minus any excluded persons, but accepted that names and addresses could not have been supplied in those circumstances.

5 10. The Tribunal takes the view that Information Notices should be expressed in clear terms and that it should be a straightforward matter for both parties to know whether an Information Notice has been complied with. That is why HMRC guidance states that the Information Notice should request facts and not opinion. In this case, the built-in assumptions on which the requests for information were based made it impossible for the parties to know whether the Notice had been complied with  
10 because the accuracy of the assumptions was disputed by the Appellant. In those circumstances, I have concluded that it would be fair and just to set aside the request for “information” in the Information Notice. I do so under paragraph 32 (3) (c) of Schedule 36 to the Finance Act 2008 because, in my view, information that it is impossible to supply cannot be “reasonably required” by HMRC. It is unnecessary  
15 for the Tribunal to make any order in respect of the request for documents in the Information Notice, which the Tribunal is satisfied has been complied with by the Appellant in any event.

11. The Tribunal explained to the Appellant that the setting aside of this Information Notice did not preclude HMRC from serving another one, which might  
20 be better-worded. Alternatively, HMRC might raise an assessment and leave it to the Appellant to appeal it. In other words, the Tribunal made clear that it had made no findings helpful to the Appellant in the substantive dispute between the parties, which remained alive notwithstanding the Tribunal setting aside the Information Notice.

12. This document contains full findings of fact and reasons for the decision. Any  
25 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)”  
30 which accompanies and forms part of this decision notice.

**ALISON MCKENNA  
TRIBUNAL JUDGE**

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**RELEASE DATE: 25 March 2014**