



**TC03621**

**Appeal number: TC/2013/02092, TC/2013/05256 & TC/2013/05261**

*Procedure – VAT – information notices under Schedule 36 Finance Act 2008 – application to suspend effect of decision to confirm notices – intention to apply for judicial review of original decision – application allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WHITEFIELDS GOLF CLUB LTD  
WHITEFIELDS GOLF LTD  
DRAYCOTE HOTELS LTD**

**Appellants**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE KEVIN POOLE**

**Sitting in chambers in Temple Court, Birmingham on 20 May 2014**

## DECISION

### Introduction

1. This decision concerns an application by the Appellants for an effective  
5 extension to a time limit for compliance with first party notices under Schedule 36  
Finance Act 2008 (“Schedule 36”) which have been confirmed by the Tribunal  
following the hearing of an appeal against the issue of such notices.

2. The time limit (of 42 days from 4 April 2014) was contained in a decision of  
the Tribunal issued in summary form on 4 April 2014 following the hearing, on 21  
10 February 2014, of the Appellants’ appeals against the issue of the notices.

3. The Appellants seek an extension to the time limit (through the mechanism of  
a suspension of the decision as a whole) because, although Schedule 36 provides there  
is no right of appeal against the Tribunal’s decision, they wish to challenge the  
decision (either by judicial review proceedings or by arguing that the provision  
15 excluding a direct right of appeal to the Upper Tribunal is *ultra vires*).

### The facts

4. On or about 1 May 2012, HMRC issued information notices under paragraph  
1 of Schedule 36 to each of the Appellants, requiring them to deliver various  
documents and information.

5. The Appellants appealed against the issue of the notices and, on 21 February  
20 2014, the Tribunal heard their appeals.

6. On 4 April 2014, the Tribunal issued a summary decision on the appeals.

7. In broad terms, the summary decision confirmed the notices, subject to a slight  
alteration to one of them. It also imposed a time limit of 42 days for compliance with  
the notices as so confirmed. This time limit expired on 16 May 2014.  
25

8. In accordance with paragraph 32(5) of schedule 36 to FA08, the decision of  
the Tribunal issued on 4 April 2014 confirmed that there was no right of appeal  
against the decision of the Tribunal. It also confirmed however that the Appellants  
were entitled, upon request within 28 days, to full findings of fact and reasons for the  
decision of the Tribunal. This statement reflected the requirements of Rule 35 of the  
30 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Procedure  
Rules”).

9. On 17 April 2014 the Tribunal received a request for full findings of fact and  
reasons for the original decision, within the time limit set out in Rule 35 of the  
35 Procedure Rules. On 13 May 2014 such findings and reasons were issued.

10. The Tribunal received, by email on 15 May 2014 from the Appellants’  
representatives, an application to suspend the effect of the Tribunal’s earlier decision,  
“pending the determination of this matter by the Upper Tribunal on an appeal and/or

judicial review”. At the time the application was submitted, it appears that the Appellants’ representatives had not received the full findings of fact and reasons issued on 13 May 2014.

11. In the application, it was stated that the Appellants were intending to challenge the decision of the Tribunal, and effectively they wished to preserve the *status quo ante* pending such challenge by not delivering the required documents to HMRC pursuant to the Tribunal’s decision. As was stated in the application:

“As things currently stand, if the Appellants do not comply with the information notices as varied, they will each risk incurring a penalty of £300 plus daily penalties of up to £60, subject to their success in the Upper Tribunal....”

Conversely, however, complying with the notices would render any Upper Tribunal proceedings totally nugatory.”

12. The Appellants therefore sought:

“... a direction under **rule 5(2) and (3)(1)** which suspends the effect of its earlier decision (made on 4 April 2014) pending the determination of this matter by the Upper Tribunal on an appeal and/or judicial review”

### **The law**

13. The law relating to the confirmation by the Tribunal of the original information notices was set out in the earlier decisions of the Tribunal and I do not propose to recite it again here.

14. The law relating to this application depends upon a narrow point of construction. Rule 5 of the Procedure Rules provides, in part, as follows:

#### **“5 – Case Management Powers**

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction –

....

(1) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal.”

## Discussion and decision

15. On its face, the power to suspend contained in Rule 5(3)(l) only applies in contemplation of an application for permission to appeal, a substantive appeal or a review. In the present case, Schedule 36 specifically excludes any right of appeal and accordingly, no review can be carried out (see Rule 41(1) of the Procedure Rules).  
5 The provisions of Rule 5(3)(l) cannot therefore be directly relevant.

16. However, Rule 5(3)(l) is expressed in specific terms but “without restricting the general powers in paragraphs (1) and (2)”, and therefore it should be seen as being just one example of a situation in which one or other of those general rules might  
10 apply. It seems to me that once this point is accepted, it is entirely appropriate to accept that situations which are analogous or similar to appeals (e.g. applications for judicial review which are intended to effectively take the place of an appeal) should also be covered under the general wording in Rule 5(2), thus giving rise to a power to suspend decisions in such situations.

17. The question is whether, on the basis that this power exists, I should exercise it.  
15

18. So far as HMRC are concerned, the matter has been resolved once and for all by a hearing before the Tribunal, from which Parliament has specifically excluded any right of appeal. That should therefore be the end of the matter.

19. So far as the Appellants are concerned, however, there is a clear supervisory power residing in the High Court and the Upper Tribunal by which, through the mechanism of judicial review, this unappealable decision can be challenged (subject to all the usual restrictions and safeguards associated with judicial review proceedings). If it is fairly arguable that their remedies through that process would  
20 effectively be annulled by refusing to suspend the Tribunal’s decision, then it seems to me that the balance of fairness militates in favour of allowing the suspension, especially in a situation where judicial review must be pursued with proper expedition and any delay is therefore likely to be short.  
25

20. I do not consider the application to have any great merit, but I do not consider it to be entirely hopeless. I am therefore prepared to make a direction in relation to  
30 the disposal of these appeals, suspending the effect of the earlier decision such that the time limit for delivery to HMRC of the documents comprised in the information notices (as amended pursuant to the decision) is extended until 4 July 2014, subject to an application for permission to bring judicial review proceedings in respect of the  
35 Tribunal’s decision being made to the Upper Tribunal or the High Court by that date. If such application is made on or before that date, then I further direct that the time limit for delivery of the relevant documents shall, subject to any order to the contrary by the Upper Tribunal or the High Court, be extended until 14 days after the date on which the judicial review proceedings are determined, withdrawn or settled by  
40 agreement.

21. For the avoidance of doubt, if no application for permission to bring judicial review proceedings is made by 4 July 2014 then the suspension of the Tribunal's earlier decision shall end, such that the deadline for delivery to HMRC of the documents in question shall be 5pm on that day.

5 22. I have considered whether to seek representations from HMRC before reaching a decision on this application, or granting only a very short suspension as a "holding" measure until HMRC have had the opportunity to make representations. In the circumstances, however, as the matter is one of some urgency, as the timetable for judicial review proceedings does not permit lengthy delays and as this application  
10 could be regarded as being protective in nature and ancillary to any judicial review proceedings, I consider it appropriate to order this suspension without considering any representations from HMRC on the point.

23. 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  
15 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.

20

25 **KEVIN POOLE**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 21 May 2014**