



TC04047

Appeal number: TC/2014/03075

*Penalty – paragraphs 39 & 46 Schedule 36 FA 2008 – Authorised Inspection
– obstruction – reasonable excuse – no – penalty confirmed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

V8680 LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE SCOTT
MR MOHAMMED FAROOQ**

**Sitting in public at Priory Courts, 33 Bull Street, Birmingham on Monday
28 July 2014**

**Having heard Mr Poon for the Appellant and Mrs Perrett, Officer of HMRC, for
the Respondents**

The Decision under Appeal

1. On 13 March 2014, HMRC issued a Penalty Notice in the sum of £300, imposed under paragraphs 39 and 46 of Schedule 36 Finance Act 2008 (FA 2008) in respect of the appellant's failure to allow inspection under paragraph 10 Schedule 36 FA 2008. That inspection has been authorised by the Tribunal under paragraph 13 of Schedule 36 on 19 February 2014.
2. That decision was upheld following a statutory internal review on 30 April 2014.

The Appeal

3. The appellant lodged an appeal with the Tribunal on 28 May 2014. The stated grounds for appeal were: - "The VAT officers have successfully carried out paragraph 10 & 13 Schedule 36 FA 2008. In particular part A) and B) as they had the opportunity to inspect the premises and business assets. We do not see why a penalty has been imposed."

Preliminary matter

4. On 25 July 2014 the appellant lodged a brief witness statement, from Kraisor Thiangakorn, an authorised officer of the appellant, with the Tribunal and sought to have it admitted in evidence. HMRC objected. That statement was extremely short and, in our opinion, added little to the evidence before the Tribunal. It simply stated:- "I have not obstructed HMRC officers from conducting an inspection on the visits dated 7 August 2013 and 7 March 2014. They have misinterpreted their powers under Paragraph 10 Schedule 36 Finance Act 2008 by asking me a lot of questions when I have refused to engage our answer." We gave due consideration to Rules 5 and 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Rules') and admitted the evidence as there was no prejudice to HMRC albeit the witness was not present so there was no opportunity to cross-examine him.

The Facts

5. There was no dispute between the parties in regard to the facts in this matter.
6. The appellant carries on business as Suko Thai Restaurant from Queen Street, Penzance, TR18 4BQ. The appellant was incorporated on 15 August 2013 and had acquired the business from 238D Ltd as a going concern. That company ceased trading on 31 August 2013. That company had in turn acquired the business as a going concern from Mrs B Sae-Teng on 10 November 2012. She had been a sole proprietor. HMRC had made an unannounced inspection visit to the business whilst she had been the sole proprietor.
7. On 31 July 2013, whilst the business was owned by 238D Ltd, Officer Chapman was authorised to conduct an unannounced inspection of the business premises, business assets, and business documents under Paragraph 10 Schedule 36 Finance Act 2008.

8. On 7 August 2013 at 2010, Officer Chapman and two colleagues called at the business premises to conduct that inspection. Mrs B Sae-Teng, who at that time was an employee of 238D Ltd, advised the officers that the company's accountants had instructed her not to speak to anyone from HMRC and to refer any callers from HMRC to them.

9. The officers made a second visit to the business premises on 7 August 2013 at 2130. On that occasion Officer Chapman furnished Mrs B Sae-Teng with a copy of the notice authorising the visit and fact sheet CC/FS4. He advised her that she had the right to refuse the inspection, all as stated in the fact sheet. She again advised the officers that both she and Mr Thiengaksorn had been told not to answer any questions from HMRC and to refer any callers to the accountants. She agreed to translate and relay the contents of the notice and fact sheet to Mr Thiengaksorn. Officer Chapman advised her that when an inspection visit is refused then HMRC can seek authority from the Tribunal to make a visit. Where that is authorised by the Tribunal, and the visit is obstructed, then HMRC will consider imposing a penalty in terms of the relevant legislation. The officers left having failed to inspect the premises.

10. Over the next few months, whilst the appellant was operating the restaurant, further attempts to make an inspection visit failed. HMRC applied to the Tribunal for approval of a Notice of Inspection under paragraphs 10 and 13 Schedule 36 FA 2008 on 13 December 2013. On 19 February 2014, the Tribunal granted HMRC's application. The relevant paragraphs in that Notice read as follows:-

“We must carry out the inspection between 5 March 2014 and 10 March 2014. This will usually be within business hours.

We are allowed to inspect the business premises and

- the assets of any business that are on the premises, and
- any statutory records that are on the premises.

Here, ‘statutory records’ means any person’s business records that have to be kept for tax purposes.

The company does not have to let our officer enter this address or carry out an inspection. If the company refuses, the company may have to pay a penalty of £300....”.

11. On 7 March 2014, at 2200, Officer Chapman, accompanied by a colleague, attended the appellant’s restaurant to conduct the authorised inspection. The restaurant was very busy when they walked past at 2130. They returned at 2200 and asked Mrs B Sae-Teng if they could speak to the director (Mr Thiengaksorn, the chef, whom they could see in the kitchen). She stated that they had been told by their accountant not to talk to HMRC but to refer them to him. She consulted with the director and then confirmed that they were not prepared to speak to the officers.

12. The officers handed over an envelope containing the Notice of Inspection and two sets of explanatory notes. The officer pointed out the heading in the notes “Do you have to allow this inspection to take place” and confirmed that if the inspection was not permitted then a penalty of £300 might be levied. He asked that that be drawn

to the attention of the director and was told that that changed nothing. Mrs B Sae-Teng attempted to phone the accountant but got no response.

13. The restaurant was still busy so the officers undertook to return at 2230. They did so at 2235. They were again told that neither the director, nor anyone else, was prepared to speak to the officers. Mrs B Sae-Teng then telephoned the accountant, Mr Fisher, and passed the telephone to Officer Chapman. The officer explained the position. In particular he pointed out that the Tribunal had authorised the inspection and that if it did not proceed a penalty might be levied. He reiterated that they wished to conduct an inspection and probably wished to take away some records to peruse. Mr Fisher stated that the officers should leave the building. Officer Chapman then asked Mrs B Sae-Teng if it was the wish of the company for the officers to leave and she confirmed that it was their wish. The officers left.

The Discussion and Decision

14. The dispute between the parties is very simple. HMRC are quite clear that they were unable to conduct the inspection having been requested to leave both by the accountant and by the responsible employee. They had been obstructed.

15. By contrast, Mr Poon argued that the officers had had access to the premises in that they had entered the restaurant twice. The inspection had been achieved in that they had been able to look around where they stood and that the word “inspection” did not include talking to people. Indeed the officers had no right to ask questions of anyone.

16. Mr Poon argued that the law required to be changed but it was pointed out to him that the jurisdiction of the Tribunal extended only to finding the relevant facts and applying the relevant law thereto.

17. There was no dispute that Paragraph 13 of Schedule 36 FA 2008 allows an HMRC officer to apply to the Tribunal to approve an inspection in terms of the said Schedule. As indicated above the facts are not in dispute.

18. The relevant law on “inspection” is to be found at paragraph 10 Schedule 36 FA 2008 and reads as follows:-

“10 (1) An officer of Revenue and Customs may enter a person's business premises and inspect –

- (a) the premises,
- (b) business assets that are on the premises, and
- (c) business documents that are on the premises....”

19. Although Mr Poon had produced a dictionary definition of the word “inspect” which read “1. to examine closely, esp. for faults or errors. 2. To scrutinise officially (a document...)”, he argued orally, and repeatedly, that inspection did not mean to examine. Indeed, he, physically and graphically, indicated that inspection was the equivalent of sitting back in a chair and looking around whereas examination meant a close attention to detail and he demonstrated that by leaning forward and studying his

papers. It was explicitly put to him that that contradicted the dictionary definition he had produced. He did not, or would not, take the point.

20. He then went on to argue that the crux of his argument was that the word "inspect" did not mean to talk to people or to interrogate them.

5 21. We have no hesitation in finding as a matter of fact that the officers were wholly
unable to inspect the premises or the business assets or the business documents. Of
course, they were able to observe the restaurant from where they were standing but
since they could elicit no information whatsoever about the restaurant business from
any employee or the accountant, they were wholly unable to ascertain what business
10 assets or documents were present on the premises. The only information that they did
obtain was confirmation that the appellant owned only the restaurant but not the
whole building .

15 22. The officers were left in no doubt, having repeatedly been told so, that no
employee was prepared to communicate with them. In asking the officers to leave the
premises it was abundantly clear that there would be no cooperation whatsoever with
HMRC. Before the officers entered the premises they knew that it was a restaurant.
They left knowing no more. It had not been possible to perform any sort of inspection
of the nature envisaged by the legislation.

20 23. We accept that an inspection does not cover what Mr Poon described as
"interrogation". However, we also accepted the very clear and credible evidence from
Officer Chapman that when undertaking any inspection the first step is to identify a
director or responsible employee to ascertain whether or not the inspection visit can
proceed. Having done so, the next step would be to ask that person what statutory
records are held and proceed from there. In this case they could not even get to that
25 step because it was quite clear that no inspection visit was going to be allowed. Indeed
they were asked to leave the premises both by the accountant and by the responsible
employee.

24. We therefore find that the appellant failed to allow the inspection visit that had
been approved by the Tribunal.

30 25. The only discussion before us related to whether or not there had been an
inspection. However, it is relevant to consider the penalty legislation and that is to be
found at paragraphs 39, 45 and 46 of Schedule 36 FA 2008. Since it was not in
dispute it is not rehearsed in any detail in this decision but those paragraphs are set out
at Appendix A.

35 26. We did consider the meaning of the word "obstruct" albeit neither party
addressed us thereon. We do not think that we require a dictionary to understand that
word. However, Collins English dictionary defines obstruct as:- "to make (progress or
activity) difficult." Looking at the totality of the evidence, we have no doubt that it
was the appellant's very clear policy to deliberately obstruct the officers in their
40 attempts to inspect the business, whether as the current corporate entity or otherwise.

27. For the reasons that we have set out above we have no hesitation in finding that
the appellant deliberately obstructed the officers of HMRC, all in terms of
paragraph 39(1)(b) of Schedule 36 FA 2008.

28. Accordingly, in terms of paragraph 39(2) of the same Schedule the penalty is correctly assessed at £300.

29. Lastly, we considered paragraph 45 of that Schedule, albeit we were not addressed thereon. No argument on “reasonable excuse” was advanced. On the facts found there is no reasonable excuse.

30. Accordingly, the appeal is dismissed and the penalty of £300 is confirmed.

31. 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.

15

ANNE SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 1 October 2014

Schedule 36 FA 20085 **39—**

(1) This paragraph applies to a person who—

(a) fails to comply with an information notice, or

10 (b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.

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

15

(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.

20

45—

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the Tribunal that there is a reasonable excuse for the failure or the obstructin of an officer of Revenue

25

and Customs.

(2) For the purposes of this paragraph—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

30

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

35

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

40

46—

(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A—

(a) HMRC may assess the penalty, and

45

(b) if they do so, they must notify the person

(2) An assessment of a penalty under paragraph 39 or 40 must be made [within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3)].

50

- (3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—
- 5 (a) the date on which the person became liable to the penalty,
- (b) the end of the period in which notice of an appeal against the information notice could have been given, and
- 10 (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.
- (4) An assessment of a penalty under paragraph 40A must be made—
- 15 (a) within the period of 12 months beginning with the date on which the inaccuracy first came to the attention of an officer of Revenue and Customs, and
- (b) within the period of 6 years beginning with the date on which the person became liable to the penalty.
- 20