TC04220

Appeal number: TC/2014/03644

PENALTY – whether failure to comply with information notice - whether information notice related to statutory records – whether information notice valid – whether reasonable excuse for non-compliance – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Royal Courts of Justice, Strand on 22 December 2014

Mr R Thomas, director, for the Appellant

Mr A Stewart, HMRC officer, for the Respondents

DECISION

1. A notice ('the information notice') under paragraph 1 of Schedule 36 to the Finance Act 2008 ('Sch 36') was issued to the appellant company on 5 March 2013 requiring the company to provide information and produce documents in respect of the period ended 30 April 2010 no later than 14 April 2013.

2. Paragraph 1 of Sch 36 provided as follows:

> **"1 Power to obtain information and documents from taxpayer**
>
> (1) An officer of Revenue and Customs may by notice in writing require a person ('the taxpayer') -
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this schedule, 'taxpayer notice' means a notice under this paragraph."

3. On 30 August 2013 HMRC issued a £300 penalty against the company for (alleged) non compliance with the information notice.

4. On 17 October 2013 the appellant requested that HMRC carry out a review of the imposition of the penalty but HMRC failed to carry out the review. On 4 June 2014 HMRC wrote to the appellant formally notifying it that (under section 49E(9) Taxes Management Act 1970) the review was treated as concluding with HMRC's view of the matter being upheld. HMRC's view was that the penalty was properly imposed.

Facts and evidence

5. The facts are largely set out above. In addition to that I had copies of the letters and emails passing between the parties.

6. Both parties had stated before the hearing that neither would be relying on witness evidence. At the hearing Mr Thomas did chose to give a little evidence about the company's position on the Data Protection Act 1998 ("DPA") which was as follows:

- He had read an article about the DPA and HMRC's information powers in October 2013;
- The company did not take legal advice on the DPA and how it interacted with HMRC's right to demand information under Sch 36.

Mr Stewart also gave evidence on this point in that he said that he had only read HMRC's guidance on the DPA and undertaken no further research on the matter. I

accept this unchallenged evidence from both parties, and deal with its relevance below.

Appellant's submissions

7. The appellant raised some 9 grounds of appeal in its notice of appeal but Mr Thomas informed me at the hearing that he was not proceeding with any of them other than those raised in the hearing. The grounds of appeal which it still maintained were:

> (1) The appellant's case is that it lodged an appeal with HMRC against the information notice on 8 March 2013 and was (it says) wrongly advised by HMRC on 8 April 2013 that there was no right of appeal against it. Its case is that its appeal against the information notice is outstanding and until it is resolved penalties cannot be issued for non compliance with the information notice; I deal with this at §25, 29, 49 and 52.
>
> (2) Compliance with at least part of the information notice would cause the appellant (it says) to breach the Data Protection Act ("DPA"); I deal with this at §44, 54-58.
>
> (3) The information notice was (it says) a fishing expedition; I deal with this at §36 and §59-60.
>
> (4) The information notice had been part complied with and that compliance had been a time-consuming exercise; I deal with this at §13 and §61-62.

HMRC's submissions

8. HMRC's position is that the information notice asked for information and documents which were statutory records, and that therefore there was no right of appeal against the information notice. Mr Stewart did not consider compliance with the information notice could breach the DPA. He did not consider HMRC was conducting a fishing expedition. He accepted that there was partial compliance with the information notice; in particular, he accepted requests 2 and 10-11 had been complied with.

The law on penalties

9. The power for HMRC to obtain information from taxpayers is contained in Sch 36. HMRC had relied on paragraph 1 of Sch 36 to issue the information notice in question and the penalty was imposed on the appellant company under paragraph 39 of Sch 36. It provided:

> **Penalties for failure to comply or obstruction**
>
> **39 –**
>
> (1) The paragraph applies to a person who –
>
> (a) fails to comply with an information notice, or

(b) …..

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

Compliance

10. There is no liability unless there has been a failure to comply. Mr Thomas did not suggest that there had been any compliance with the information notice other than compliance with paragraphs 2, 10 and 11. HMRC accepted that this information had been provided.

11. So far as paragraph 1 of the information notice was concerned, this was a request by HMRC for confirmation of the basis on which the appellant company claimed to meet the small company test for exemption from audit, and in particular if the company relied on its turnover and number of employees.

12. I find Mr Thomas accepted that the company had not complied with this request because at the hearing before me he volunteered compliance, saying that the company did rely on its turnover and number of employees for its claimed qualification to be exempt from the liability to have its accounts audited.

13. There was no suggestion the company had ever complied with the remaining information requests (3-9). I find therefore that there was a failure to comply with points 1 and 3-9 of the information notice, although I accept point 1 was belatedly complied with on 22 December 2014. Partial non compliance is non compliance for the purpose of paragraph 39(1)(a) of Sch 36. In so far as it was Mr Thomas' case that partial compliance satisfied the information notice, I reject it.

14. Non-compliance with part of an information notice exposes the company to the £300 penalty for non-compliance, but was the notice served on 5 March 2013 a valid information notice?

Invalid information notice?

15. I consider that paragraph 39 presupposes that it is only a valid information notice for which a taxpayer is penalised for non-compliance with; so if an information notice is invalid and set aside on appeal, there can be no penalties for not complying with it. The information notice at issue in this appeal has not been set aside but the appellant's main ground of appeal is that it has challenged its validity, and if that challenge is successful, the notice will be set aside. Certainly paragraph 46 of Sch 36 which sets out the time limits in which HMRC can assess penalties presupposes that penalties would be imposed after an appeal against an information notice had been resolved.

Was there a right to appeal the information notice?

16. But there is no right of appeal against all information notices. Sch 36 only gives the taxpayer a limited right to appeal against an information notice issued under paragraph 1 as it provides at paragraph 29 as follows:

"**29 Right of appeal against taxpayer notice**

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

(2) Sub-paragraph 1 does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

…."

17. So whether there is a right of appeal depends on whether the information notice required information and documents to be produced which form part of the appellant's statutory records. Statutory records are defined in paragraph 62 of Schedule 36 as follows:

"**Statutory records**

62

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it information or a document which the person is required to keep and preserve under or by virtue of -

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

Subject to the following provisions of this paragraph"

18. The 'Taxes Acts' are defined in paragraph 58 of Sch 36. This definition includes 'the Tax Acts'. The Tax Acts are defined in the Interpretation Act 1978 as including the Corporation Tax Acts; the Corporation Tax Acts are defined in the same Act as meaning enactments relating to the taxation of the income and chargeable gains of companies. The Schedule 18 of the Finance Act 1998 is therefore one of the Taxes Acts as it deals with the taxation of income and chargeable gains of companies.

19. Schedule 18 of that Act ("Sch 18") provides at paragraph 21 as follows:

"**Duty to keep and preserve records**

21

(1) A company which may be required to deliver a company tax return for any period must -

(a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and

(b) preserve those records in accordance with this paragraph.

….

(3) If the company is required to deliver a company tax return by notice given before the end of the relevant day, the records must be preserved until any later date on which -

(a) any enquiry into the return is completed…..

20. As there was an open enquiry into the relevant corporation tax return, there could be no issue over timing. If any of the records were statutory records, they would remain so during the course of the enquiry. The only issue could be whether under Sch 18 paragraph 21(1)(a) they were records 'as may be needed to enable [the company] to deliver a correct and complete return for the period'.

21. Mr Thomas did not suggest that any of the items required by HMRC were not statutory records. Nevertheless, I consider whether they were. In summary, and ignoring the points now complied with, the information notice required the following:

> (3) Trading account and profit and loss account for period under enquiry;
>
> (4) A breakdown into the type of income comprising the turnover shown in the tax reconciliation;
>
> (5) An explanation of where a particular amount of interest shown in a note to the accounts was credited in the accounts;
>
> (6) A breakdown of the expenses shown as 'cost of sales'
>
> (7) Ditto for the expenses shown as 'administration expenses'
>
> (8) Identification of the source of the net increase in shareholder loans of £3.5million and a copy of shareholder loan accounts
>
> (9) In respect of unlisted investments acquired by the company and then revalued, a list of the investments and the date of acquisition and a copy of the independent valuation of them.

22. Was the information and documents required in the notice records 'as may be needed to enable [the company] to deliver a correct and complete return for the period'? A return includes the accounts which accompany the statutory form (see paragraph 4 of Sch 18).

23. I consider that the various breakdowns requested of figures shown in the accounts accompanying the company's tax return for the relevant period (demanded at 4, 5, 6, 7 and 8 of the information notice) are clearly statutory records as they must be needed to enable the company to deliver a correct return. The same is true of the trading account, P and L account, and shareholder loan accounts: they are needed to enable the company to deliver a correct return.

24. As the unlisted investments are assets of the company's shown in its accounts the company would need the information requested at (9) to ensure the accounts delivered as part of the return were correct.

25. I am therefore satisfied that all of the information demanded at (3)-(9) inclusive of the information notice comprises part of the appellant company's statutory records. Therefore under Paragraph 29(2) there is no appeal against the information notice. Because the information notice cannot be appealed against, it cannot be set aside by this Tribunal.

Did the appellant have a right to a review of the information notice?

26. Mr Thomas' fall back position on this seemed to be that even if there was no right of appeal, the company had the right to a review of the issue of the information notice; the company had asked for a review of it and HMRC had not carried it out. Until it did so, the appellant's position was that it was not obliged to comply with the information notice.

27. Did the appellant have an entitlement to a review being carried out? A right to a review exists where a 'notice of appeal' has been given to HMRC. Section 49A Taxes Management Act 1970 provides:

> **49A Appeal: HMRC review or determination by tribunal**
>
> (1) This section applies if notice of appeal has been given to HMRC.
>
> (2) In such a case –
>
> (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question….."

The 'matter in question' is defined in s 49I as:

> "(1) (a) 'matter in question' means the matter to which an appeal relates"

28. Apart from stating his bare position that he considered the company had a right to a review, Mr Thomas made no submissions on this point. Mr Stewart's position was that there could be no notice of appeal and no 'matter in question' because there was no right of appeal.

29. I agree. In the same way that Parliament's imposition of a penalty for non-compliance with an information notice must be presumed to apply only in so far as the information notice was valid, S 49 must be presumed only to apply to a valid appeal. If the taxpayer has no right of appeal, he cannot give a valid 'notice of appeal' to HMRC and he cannot request a review as there is no 'matter in question' as the matter is not something to which an appeal relates, as there is no right to appeal it. Therefore, because the information notice related to statutory records, there was no right of appeal. It follows that there was no right to a review even if the appellant purported to give HMRC a notice of appeal in respect of it.

30. So the appellant has neither validly appealed nor validly requested a review of the information notice. It largely failed to comply with the information notice so prima facie it is liable to the £300 penalty imposed on it.

Was the issue of the information notice unlawful?

31. The absence of a right to challenge the legality of an information notice by an appeal to this Tribunal does not, of course, mean that the issue of the information notice is necessarily valid. It must be the case that a taxpayer could challenge the issue of an information notice in the Administrative Court on the grounds HMRC exceeded their powers in issuing it. Moreover, although there is no right to appeal an

information notice relating to statutory records to this tribunal, that does not mean that this Tribunal must assume that an information notice is validly issued. It seems to me that under the doctrine in *Wandsworth LBC v Winder* [1985] AC 461 a taxpayer could defend a penalty in this Tribunal on the grounds that HMRC exceeded its powers in issuing the information notice. This is because the vires for the penalty depends on the prior legality of the information notice: if the information is invalid, the appellant cannot be penalised for not complying with it.

32. While Mr Thomas did not put his case in this technical way, it was part of his case that HMRC should not have issued the information notice because it was his case that, as I have said at §7 above:

> (2) Compliance with at least part of the information notice would cause the appellant to breach the Data Protection Act ("DPA");
>
> (3) The information notice was a fishing expedition.

33. A Fishing expedition? By using the term 'fishing expedition' I understood Mr Thomas to mean that HMRC were seeking to investigate the appellant's tax return without having any reason to suspect that it was wrong.

34. So did HMRC exceed its powers in issuing the information notice? Paragraph 1 of Sch 36 provides that an HMRC officer can issue an information notice 'if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position' (see §2 above). There is nothing in this section that requires HMRC to suspect that the return is incorrect before issuing an information notice. HMRC are entitled to check taxpayer's tax position and they are entitled to any documents or information reasonably required for the purpose of doing so. In other words, HMRC are entitled to undertake 'fishing expeditions' when checking returns: they do not need suspicion in order to check a tax return.

35. From what Mr Stewart said at the hearing, it appeared to be that he did have concerns about some of the entries in the accounts which he considered to be unusual (the introduction of £3.5million from shareholders in particular). Mr Thomas considered these concerns groundless as (he said) similar loans had been made in respect of this and other companies controlled by the same shareholders. I do not need to decide the point, because I do not consider it relevant. HMRC do not need suspicions in order to lawfully issue an information notice. They are entitled to check any taxpayer's tax return and to reasonably require reasonable information to that end.

36. HMRC are entitled to check the appellant company's tax return without having grounds for suspicion; and it is reasonable to require from the company the information on which it relied (or ought to have relied) in compiling specific entries on the return which HMRC wished to check. In so far as it was Mr Thomas' case that the information notice was invalidly issued as a 'fishing expedition', I dismiss it.

37. The relevance of the Data Protection Act: as I have said it was also Mr Thomas' case that HMRC should not have required some of the information required by the

information notice because it was his view that this might put the company in breach of the DPA, by requiring it to provide personal data relating to the company's shareholders.

38. Mr Thomas only considered compliance with items 8 & 9 of the information notice might lead to a breach of the DPA by requiring the company to reveal personal data about shareholders. This factor by itself would justify me not considering this ground further: even the appellant accepts that compliance with the other outstanding items (3-7) would not put the appellant in breach of the DPA. The information notice therefore could not be invalid on this ground in respect of items (3)-(7) and the appellant ought to have complied with it.

39. Nevertheless, the appellant clearly wanted me to consider this part of its case, so for completeness, I do so. I find its case was that it need not comply with the information notice unless and until this Tribunal had resolved the question of whether complying with it would breach the DPA. Mr Thomas had not in fact researched the matter or reached any concluded view himself on whether or not compliance with items (8) and (9) would breach the DPA. I revert to this point again below at §54.

40. So far as the question of the validity of demanding the information at points (8) and (9) of the notice is concerned, the appellant's case could only be that the information notice was invalid in that it required the appellant to breach the DPA. Whether this is right requires the appellant to show that compliance with the notice actually *would* be a breach of the DPA.

41. While I did not have the benefit of submissions on the point, I find that s 29 of the DPA provides an exemption for

> (3) Personal data are exempt from the non-disclosure provisions in any case in which—
>
> (a)the disclosure is for any of the purposes mentioned in subsection (1), and
>
> (b)the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters mentioned in that subsection.

42. The 'purposes' and 'matters' mentioned in sub-section (1) of s 29 include:

> "(c) the assessment or collection of any tax or duty or of any imposition of a similar nature"

43. While HMRC are only (at present) enquiring into the appellant's tax return and have not yet decided whether to raise an assessment, and indeed require the information for the purpose of that check, nevertheless it seems to me that the (c) should be read as including checks the purpose of which is to assess any tax discovered to be underpaid. Ultimately the purpose of an enquiry is to assess underdeclared tax even though of course the enquiry may show that tax has not been underdeclared. Therefore, my interpretation is that complying with a request under Sch 36 is exempt from the disclosure provisions of the DPA.

44. In conclusion, compliance with the information notice, even if it does require the appellant company to disclose to HMRC personal information about its shareholders, does not involve a breach of the DPA.

45. I conclude that the information notice was validly issued and related to statutory records. It is therefore not possible for the company to appeal against it nor require HMRC to carry out a review of it. The appellant company ought therefore to have complied with the notice. In fact, it only comprised with part of the information notice. It is on the face of it liable to the penalty imposed of £300.

Reasonable excuse?

46. Mr Thomas told me that the appellant did not rely on the defence of reasonable excuse for non-compliance. Nevertheless, Mr Thomas was unrepresented and to the extent he raised matters in defence which could be considered as possible excuses for non-compliance, I considered whether they amounted to reasonable excuses within the meaning of paragraph 45 of Sch 36:

> **Reasonable excuse**
>
> **45**
>
> (1) Liability to a penalty under paragraph 39 ….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….
>
> (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,
>
> (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.
>
> ….."

Ground 1: expectation of appeal/review?

47. The appellant's main ground of appeal, as I have said, was that it was entitled to either or both appeal against or have a review of the issue of the information notice and that it did not need to comply with the information notice unless and until such appeal and/or review was concluded and only if the outcome was unfavourable to the company.

48. This ground of appeal is simply disposed of. Ignorance of the law is no excuse. Even if the appellant reasonably believed it had a right of appeal and/or a right of review, as a matter of law, for the reasons given at §§16-30, it was wrong. Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who choose to remain in ignorance of it above those persons who choose to acquaint themselves with the law in order to abide by it.

49. In any event, in this case, the appellant chose to give no evidence (save on the one matter referred to at §6). Therefore I had no evidence of its actual beliefs. The appellant has the burden of proof. Without evidence, it was unable to satisfy me that it actually had a belief in a right of appeal/review and that that belief actually caused its failure to comply.

50. Moreover, even if I had been satisfied as a matter of fact that the appellant genuinely believed it had a right of appeal/review and that that belief caused the failure to comply, I would also have to be satisfied that that amounted to a *reasonable* excuse for failing to comply. I find, on the contrary, on the basis of the letters in the appeal bundle, that the letter from HMRC enclosing the information notice, dated 5 March 2013 explained that there was no right of appeal against the information notice in so far as it required statutory records to be produced and that the author's view was that all the information and documents requested were statutory records. It suggested the appellant appeal if it did not consider that all the documents were statutory records.

51. Although an appeal was lodged on 8 March, at that point the ground of appeal was not that the documents were not statutory records. The information about statutory records was repeated in HMRC's letter of 5 April 2013 together with the information that there was also no right to review where statutory records were concerned. Mr Thomas' reply again made no reference to any claim that the documents were statutory records. The penalty was imposed in August 2013. The appellant appealed against the penalty to HMRC on 23 September 2013. There were 8 specified grounds of appeal, many of which I have commented above, were not proceeded with at the hearing. Again, none of them were that the documents did not amount to statutory records. In its notice of appeal against the penalty to the Tribunal had 9 grounds of appeal, many of which were not proceeded with and none of which were that the documents did not amount to statutory records. Lastly, at the hearing before me, Mr Thomas raised no case that the documents demanded were not statutory records.

52. In conclusion, while the appellant has consistently claimed a right to appeal and/or review against the issue of the information notice, it has never had a reasonable basis for that claim. It was informed correctly by Mr Stewart that it had no right of appeal or review if the information sought was statutory records, yet it had never even suggested that the information and documents required were not statutory records. So if it had a belief that it had a right of appeal/review, that belief would not have been reasonably held as it was held without a rational basis.

53. I also comment that its failure to put forward a case that the information sought amounted to statutory records would suggest that no such belief was held: but I have already found it failed to establish this by its failure to put forward any evidence.

Ground 2: DPA

54. I have dismissed its case on the DPA. I also find that its case on the DPA does not amount to a reasonable excuse, for much the same reasons given in respect of its claim to a right of appeal/review. Firstly, I was given very little evidence, and none

of it established that the appellant genuinely believed that HMRC should not have issued the information notice because compliance with it would cause the appellant to breach the DPA. Indeed, even at the hearing, Mr Thomas' position was that he had seen an article which had suggested to him that there might be concerns with the DPA and HMRC's information powers, but he had not researched the point further, taken no legal advice on it, and was asking the Tribunal to resolve the matter. He had no representations he wanted to make to me about why the DPA and Sch 36 were in conflict.

55. Moreover, Mr Thomas' evidence was that he read the article in October 2013. This was after the company failed to comply with the information notice and indeed after the penalty was issued. It was therefore not the *cause* of its failure to comply and could not therefore amount to a reasonable excuse, as to be the excuse it would have to be a cause of the failure.

56. Secondly, even if I was satisfied (which I am not) that a genuine belief that it would otherwise be in breach of the DPA if it complied actually caused the non-compliance by the company, I would have to be satisfied that that amounted to a *reasonable* excuse. I do not consider that it would be reasonable to simply read an article, and then take no further steps for months to research the point, all the while failing to comply with an information notice issued by HMRC.

57. A reasonable excuse is something that has nevertheless caused a taxpayer, taking seriously his responsibility to pay the right amount of tax at the right time, not to do so: such a taxpayer would not have simply registered that there might be an issue but fail to consider the point further. Mr Thomas suggested to me that it was too expensive to take legal advice, but I do not accept that a reasonable taxpayer in such a situation would have failed to take any steps at all to check whether the concerns raised were reasonable. Indeed, for Mr Thomas to satisfy me that legal advice was too expensive for the appellant, he would have needed to give me evidence of the appellant's financial position. He didn't.

58. In addition, of course, the DPA point only applied to items (8) and (9) and could never amount to a reasonable excuse for failure to comply with items (1) and (3)-(7).

Ground 3: fishing expedition?

59. I have dismissed its case on the information notice being a 'fishing expedition'. I also find that its case on the 'fishing expedition' does not amount to a reasonable excuse, for much the same reasons given in respect of its claim to a right of appeal/review.

60. While it is clear from the correspondence that from the first the appellant had questioned HMRC's right to demand the information, nevertheless I had no evidence the appellant genuinely believed HMRC did not have the right to demand the information. And I do not accept that even if it genuinely believed this, that it was reasonable for it to believe this. There is no evidence that it took any steps to check to

what HMRC was entitled nor did it present a case to me at tribunal as to why HMRC should not be entitled to randomly check the accuracy of tax returns.

Ground 4: time consuming part compliance?

61. Item 1 of the notice was not complied with until the hearing. It was complied with in one sentence. It is impossible for the appellant to suggest that, however long it took to comply with items (10-11) that that prevented it complying with item 1.

62. And in so far as the other items with which the appellant had not complied were concerned, I had very little evidence and none that satisfied me that compliance with items 10 and 11 had left the appellant with no time to comply with the other items. I do not accept that this was the reason items (1) and (3)-(9) were not complied with.

63. In conclusion, the appellant did not put forward its defence on the basis it had a reasonable excuse, and although I have considered its defence on that basis, I find it did not have a reasonable excuse for its non compliance.

64. Its appeal against the penalty is therefore dismissed.

65. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 12 January 2015