



TC04340

Appeal number: TC/2014/01214 & TC/2014/01794

PROCEDURE – Information Notices – Schedule 36 Finance Act 2008 – documents and information required – whether statutory records – no right of appeal – one appeal struck out, one appeal partly struck out – whether other information reasonably required – information required in vague and ambiguous terms – one appeal partly allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COULDWELL CONCRETE FLOORING LTD Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR DEREK ROBERTSON**

Sitting in public in Leeds on 17 December 2014

Dr R Milton of Milton & Co for the Appellant

Mr A Burke of HM Revenue & Customs for the Respondents

DECISION

Background

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1. There are two matters before us with separate appeal references which we heard consecutively. Both relate to Information Notices issued to the Appellant. The first matter with reference TC/2014/01214 is an application to strike out the appeal in relation to an Information Notice issued on 13 January 2014. The second matter is the substantive appeal with reference TC/2014/01794 in relation to an Information Notice issued on 10 March 2014. We shall deal with each matter separately.

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TC/2014/0124

2. This is an application by the Respondents to strike out an appeal against an Information Notice issued to the Appellant pursuant to Schedule 36 Finance Act 2008. The basis of the application is that the documents and information required by the Information Notice form part of the Appellant's statutory records, and there is no right of appeal against such an Information Notice.

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3. The Information Notice was issued on 13 January 2014. The documents and information required were as follows (sic):

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“Documents

1. *The record of sales for the period 1 April 2012 to 31 March 2013. Please forward the sales records within a computer disc/memory stick format.*

2. *Please provide the sales records and any other records to support the opening debtors of £161,927 as at 1 April 2012.*

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3. *Please provide the business bank account (accounts) statements used for all company deposits and all company withdrawals for the period 1 April 2012 to 31 March 2013.*

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4. *Please provide the paying in books and cheque books stubs for the Companies business bank account (accounts) for the period 1 April 2012 to 31 March 2013.*

Information

1. *Please provide an analysis of the opening debtors £161,927 that separates opening trade debtors and any none trade opening debtors.*

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2. *Please provide an analysis of closing debtors £414,817 that separates closing trade debtors and any none trade closing debtors. Please identify the closing trade debtors individually and link to the sales invoices as requested under Documents above at point 1.*

3. *Should there be any none trade opening debtors please provide an analysis and full names and address of who was in debt to the company, how much is owed, and for what reason as at 1 April 2012.*

5 4. *Should there be any none trade closing debtors please provide an analysis and full names and address of who was in debt to the company, how much is owed, and for what reason as at 31 March 2013.*

5. *Please provide an analysis of administration and office expenses of £178,336 for the period 1 April 2012 to 31 March 2013.”*

10 4. In this decision we shall refer to the individual documents and information required as “Document [1-4]” or “Information [1-5]” as appropriate.

5. The grounds of appeal relied on by the Appellant may be summarised as follows:

(1) The documents required to be produced are not statutory records.

15 (2) The Information Notice wrongly requires the Appellant to prepare or create documents in a format in which they do not presently exist.

Statutory Provisions

20 6. Paragraph 1 Schedule 36 Finance Act 2008 (“FA 2008”) provides that an officer of HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer’s tax position.

25 7. Paragraph 29 Schedule 36 provides that a taxpayer can appeal against an Information Notice or any requirement in an Information Notice unless the requirement is to provide information or produce documents which form part of the taxpayer’s statutory records.

8. Paragraph 62 Schedule 36 provides that information or documents will form part of a persons “statutory records” for present purposes if:

“...it is information or a document which the person is required to keep and preserve under or by virtue of -

30 (a) *the Taxes Act, or*

(b) *any other enactment relating to tax”*

9. The relevant enactments relating to tax to which we were referred are Finance Act 1998 (“FA 1998”) and Value Added Tax Act 1994 (“VATA 1994”).

35 10. Paragraph 21 Schedule 18 FA 1998 provides for a duty on companies to keep and preserve records for the purpose of making company tax returns. In so far as relevant it provides as follows:

“ (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

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

...

(5) The records required to be kept and preserved under this paragraph include records of—

10 (a) all receipts and expenses in the course of the company’s activities, and the matters in respect of which the receipts and expenses arise, and

(b) in the case of a trade involving dealing in goods, all sales and purchases made in the course of the trade.”

11. We should add that paragraph 21(5A) Schedule 18 makes provision for HMRC
15 to make regulations requiring other records to be kept and preserved but no such regulations have been made.

12. Paragraph 22(1) Schedule 18 makes provision for the format in which those records should be preserved:

“ (1) The duty under paragraph 21 to preserve records may be discharged —

20 (a) by preserving them in any form and by any means, or

(b) by preserving the information contained in them in any form and by any means...”

13. Taxable persons for VAT purposes also have a duty under paragraph 6 Schedule
25 11 VATA 1994 to keep such records as the Commissioners may by regulations require. Regulation 31 of the Value Added Tax Regulations 1995 (SI 1995/2518) makes provisions for records to be kept as follows:

“ (1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a) his business and accounting records,

30 (b) his VAT account,

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him,

...

(i) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him.”

5 14. We were also referred to various extracts from HMRC manuals which do not have the force of law. There is no need for us to mention them further.

Reasons

10 15. The issue on this application is essentially what, if any, documents and information required by the Information Notice amount to statutory records for the purposes of Schedule 36.

15 16. Mr Burke for HMRC submitted that all the documents and information required by the Information Notice were statutory records for the purposes of Schedule 36. He relied on a decision of the F-tT in *Midgley v Commissioners of HM Revenue & Customs [2011] UKFTT 187 (TC)*. In that case the F-tT found that bank statements, paying in books and cheque book stubs were statutory records for the purposes of Schedule 36.

17. Dr Milton submitted that none of the documents and information requested amounted to statutory records. In particular he submitted that:

20 (1) None of the documents the Appellant was required by the Information Notice to produce were “... *needed to enable it to deliver a correct and complete [corporation tax] return*”. It may be that a business would find it helpful to have such documents but they were not necessary as such.

(2) The Appellant could not be required to create documents which did not already exist.

25 (3) The Respondents were not aware whether Information 1-4 existed. As such these could not be requests for statutory records. Simply because documents or information ought to exist does not make them statutory records.

18. We shall consider the position firstly by reference to the record keeping requirements of companies in paragraph 21 Schedule 18 FA 1998.

30 19. Paragraph 21 refers to the keeping of records, whereas Schedule 36 refers to documents and information. In Schedule 36 it is both documents and information which can be statutory records. It seems to us that a requirement to keep records in FA 1998 includes a requirement to keep both documents and information. In paragraph 21(5) the requirement to preserve records may be discharged by preserving the information in them.

35 20. A record will include an original document such as an invoice. It will also include a record of information, for example whether a particular debtor has paid or not. Hence in paragraph 21(5) it is not just a record of receipts and expenses that is

required to be kept, but also the matters in respect of which those receipts and expenses arise.

21. We are concerned in this application with requests for both documents and information. We must therefore consider what documents and information “*may be needed to enable [the Appellant] to deliver a correct and complete return...*”.

22. Dr Milton’s argument was that few if any documents are necessary to deliver a correct return. Indeed he limited that class of documents to the original sales and purchase invoices of a company. He suggested that a cash business could still be in a position to deliver a complete and correct return without bank statements.

23. In our view paragraph 21(1)(a) requires a company to keep all records which are necessary to establish, without doubt, that a return is accurate. That will include all documents and information necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period. The requirement that the return must be correct and complete implies a requirement that the documents and information to be kept must evidence that the return is correct and complete.

24. What is needed may depend to some extent on the nature of the company’s business. The Appellant’s business is laying concrete floors for garages, industrial units and supermarkets. We were told that the Appellant uses a Sage computerised accounting system, but not for all accounts. It maintains some manual records including those for petty cash and excel spreadsheets for various purchases. To some extent it is a cash business.

25. In our view it is plainly necessary for any company seeking to prepare a correct and complete tax return to have records of sales, purchases, receipts, payments, trade debtors and other debtors. If a business operates a bank account it will need to keep a record of transactions on the account and of the balance on the account at any particular time to ensure that receipts and expenditure have been properly recorded. Not just in the company’s accounting records but also that the transactions and balance on the account have been properly recorded by the bank.

26. One way in which a business can satisfy itself that bank transactions have been properly recorded both in the business’ own records and by the bank is by retaining paying in books and cheque book stubs. We accept that there may be other means by which a business could do this, perhaps making a computer or manual record of each bank transaction as it is effected. There is no evidence before us that the Appellant has any other system to record such transactions. Therefore, if the Appellant retains paying in books and cheque book stubs then they are the means by which the Appellant satisfies the requirements of paragraph 21(1)(a). They will be statutory records.

27. We are satisfied that a trading company must be able to verify trade debtors and other debtors in order to deliver a correct tax return. In particular it must be able to identify the individual debtors from documents and information in its records. It must

also be able to identify opening and closing debtors for the relevant accounting period.

28. A company must also retain records of its purchases, including administration and office expenses. These records are specifically required by paragraph 21(5).

5 29. Dr Milton made the following submissions in relation to the specific requirements of the Information Notice:

Document 1 was statutory records, but HMRC could not require them to be provided in a specific format.

10 **Document 2** required a reconciliation and “an act of accountancy” to create a document which does not already exist.

Document 3 was not “needed” to prepare a complete and correct tax return. They may be desirable, but many businesses, including cash businesses, prepare accurate returns without bank statements.

15 **Document 4** was not “needed” to prepare and complete an accurate return.

Information 1 required an act of accountancy to create a document which does not already exist.

20 **Information 2** required an act of accountancy to create a document which does not already exist.

Information 3 was a speculative request in relation to a document that may not exist and which required an act of accountancy to create a document.

25 **Information 4** was a speculative request in relation to a document that may not exist and which required an act of accountancy to create a document.

Information 5 required an act of accountancy to create a document. If HMRC had asked for the invoices relating to administration and office expenses then they were statutory records and would have to be provided.

30 30. We have dealt above with what is needed to prepare a complete and correct company tax return. We deal with Dr Milton’s more specific submissions as follows.

31. There was some discussion before us as to whether the Information Notice wrongly required the Appellant to prepare or create documents in a format in which they do not presently exist. That issue is not relevant to the strike out application.
35 However Mr Burke accepted that in relation to Document 1, the notice wrongly required production of the sales records in electronic format. The sales records must still be produced in whatever form they exist. However, when requesting documents HMRC cannot require those documents to be produced in another format.

32. The position in relation to requests for information may be different, but that point does not arise on the present appeal. The Information Notice does not require the information to be provided in any particular form.

5 33. We do not consider that Document 2 requires any act of accountancy. It is a request for existing documents. We note that paragraph 18 Schedule 36 provides that an Information Notice only requires a person to produce a document if it is in that person's possession or power. If a taxpayer satisfies HMRC or a Tribunal that he does not have a required document then the taxpayer will not have failed to comply with the Information Notice. In so far as the documents covered by Document 2 do not
10 exist the same information is requested in Information 1.

34. The fact that a request for information requires some act of accountancy does not mean that the information requested is not a statutory record. If there is a duty to keep the information then it is a statutory record.

15 35. Where there is a request for information, it is the information which must be provided by the taxpayer. In the present Information Notice the way in which the information is provided is left to the taxpayer. The Appellant might choose to give the information in a letter, or to produce documents such as schedules which contain the information. It does not affect the issue as to whether what is required forms part of the Appellant's statutory records.

20 36. Whether or not any of the requests for information are speculative is not relevant to the question of whether the information is part of the Appellant's statutory records. If there are any non-trade debtors, then information in relation to them will form part of the Appellant's statutory records.

25 37. For the reasons given above, all the documents and information required form part of the Appellant's statutory records. We must therefore strike out the appeal.

30 38. We have reached that conclusion without reference to the duty to keep records in VATA 1994. Indeed we were not specifically told whether the Appellant was registered for VAT. We note in passing that the requirement for taxable persons to keep records extends to "*his business and accounting records*". It seems to us that this applies to all business and accounting records that the trader in fact keeps. All such records would therefore be statutory records for the purposes of Information Notices.

TC/2014/01794

35 39. This is an appeal against another Information Notice issued to the Appellant pursuant to Schedule 36 FA 2008. The Information Notice was issued on 10 March 2014. The documents and information required were as follows:

(1) "*Documents – Company bank statements showing any reimbursements made by individuals back to the company for the period 1 January 2009 to 5 April 2012.*"

(2) “*The miles travelled and the total amounts paid to the individuals for the period 1 January 2009 to 5 April 2012.*”

40. The requirement under (1) was for documents and we shall refer to this as “the Document Requirement”. The requirement under (2) was for information and we shall refer to this as “the Information Requirement”.

41. The Information Notices were issued against the background of an enquiry into possible car benefits and car fuel benefits received by the directors, Mr and Mrs Couldwell. There was also an enquiry into whether certain vehicles were “pool cars”. These aspects of the enquiry apparently focus on the rate at which Mr and Mrs Couldwell were paid a mileage allowance by the Appellant, the extent to which any private fuel provided was reimbursed by Mr and Mrs Couldwell, and use of the vehicles concerned. There was also reference during the hearing to Mr and Mrs Couldwell’s daughter involvement in these aspects of the enquiry.

42. The grounds of appeal relied on by the Appellant may be summarised as follows:

(1) In relation to the Document Requirement, that the documents requested are not statutory records

(2) In relation to the Information Requirement, that it is so vague and ambiguous as to be meaningless and impossible to comply with.

Reasons

43. We can deal with the appeal against the Document Requirement relatively briefly. For the reasons given above we are satisfied that the Appellant’s bank statements are statutory records for the purposes of Schedule 36. We therefore have no jurisdiction to entertain an appeal against the Document Requirement.

44. Having said that, we would observe that the terms in which HMRC have identified the bank statements which are to be supplied are vague and ambiguous. Simply referring to “reimbursements made by individuals” does not identify with sufficient particularity which bank statements are to be supplied. It does not identify reimbursements of what, or by which individuals. It seems to us that little thought has gone in to the terms of this aspect of the Information Notice. That is surprising because there had been three previous Information Notices in relation to the same matters issued to the Appellant on 6 June 2013, 11 September 2013 and 21 January 2014, but which were not pursued for one reason or another.

45. As we have no jurisdiction to hear an appeal against the Document Requirement, the vagueness and ambiguity of that aspect of the Information Notice would only be relevant if HMRC were to impose a penalty for non-compliance.

46. HMRC accept that the Information Requirement does not require production of statutory records. We therefore have jurisdiction in relation to an appeal pursuant to paragraph 32(3) Schedule 36 which provides as follows:

“(3) *On an appeal that is notified to the tribunal, the tribunal may –*

- (a) confirm the information notice or a requirement in the information notice,*
- (b) vary the information notice or such a requirement, or*
- (c) set aside the information notice or such a requirement.”*

5 47. HMRC can only issue an Information Notice in respect of documents or information which is reasonably required for the purpose of checking the Appellants’ tax position. We take the view that if an officer issues an Information Notice in vague and ambiguous terms then we cannot be satisfied that the documents or information are reasonably required for that purpose.

10 48. We agree with Dr Milton that the Information Requirement is vague and ambiguous. Even against the background of the enquiry, described briefly above, we consider that the Information Requirement remains unclear. It does not identify:

15 (1) What miles travelled are to be provided. In particular whether it relates to business mileage, private mileage or both. Which vehicles the required mileage information relates to.

(2) What the total amounts paid (presumably by the Appellant) must relate to, or

(3) Which individuals are relevant for the purposes of the request.

20 49. Mr Burke agreed that the request was ambiguous, but did not offer any clearer form of words which might have been used.

25 50. We are not satisfied that the Information Requirement is reasonably required for the purpose of checking the Appellant’s tax position. In the circumstances we can confirm, vary or set aside the Information Requirement. We consider that it is so vague that we cannot reasonably vary it so as to identify the information which would be reasonably required to check the Appellant’s tax position.

51. In the circumstances we allow this appeal in part and set aside the Information Notice in so far as the Information Requirement is concerned.

Conclusions

30 52. We have reached the following decisions in relation to the two appeals:

TC/2014/01214 - In our judgment all the documents and information required to be produced fall within the definition of statutory records. In the circumstances we strike out the appeal.

35 TC/2014/01794 – In our judgment the appeal against the Document Requirement is in respect of statutory records and we must strike out that aspect

of the appeal. The appeal against the Information requirement is allowed and to that extent the Information Notice is set aside.

53. Pursuant to paragraph 32(5) Schedule 36 Finance Act 2008 there is no right of appeal against this decision.

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**JONATHAN CANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 23 March 2015