



**TC04392**

**Appeal number: TC/2015/0427**

*INCOME TAX – Schedule 36 Finance Act 2008 notice – whether HMRC’s requirement to produce reasonable – yes – whether bank and credit card statements personal records – no – notice varied.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JAMES SMITH**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE AMANDA BROWN  
MRS SHAMEEM AKHTAR**

**Sitting in public at Vintry House, Wine Street, Bristol BS1 2BD on 15 April 2015**

**Mr I Anderson, Tax Agent, for the Appellant**

**Mr D Bradby, Presenting Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr James Smith (“Mr Smith”) has appealed to the Tribunal against a Notice to Provide Information and Produce Documentation (“Information Notice”), dated 28 May 2014, requiring him to provide certain specified documents relating to the tax year ended 5 April 2012 to HM Revenue and Customs (“HMRC”)

### **Background**

2. On 23 January 2013, Mr Smith submitted his Self-Assessment tax return for the tax year 2011-12. That return declared income from various properties in the sum of £116,051. After deduction of expenditure and wear and tear, the declared profit for the year was £5,577.

3. On 9 January 2014, HMRC issued a Notice of Enquiry for the tax year 6 April 2011 to 5 April 2012 pursuant to section 9A Taxes Management Act 1970 (“TMA”). The Notice of Enquiry stated it was checking the whole of the return for the tax year to establish that it was correct and complete. In order to facilitate that enquiry, HMRC attached a “Schedule of information and documents needed to carry out our checks”. Under two headings: 1) Income from Property, and 2) Other Matters, various particulars of information and identified documents were thereby requested.

4. In the absence of a complete disclosure of the information and documentation requested, HMRC issued the Information Notice pursuant to paragraph 1(1) Schedule 36 Finance Act 2008 (“FA 2008”). The information and documentation specified in the Information Notice in relation to income from property included:

(1) Please let me have sight of bank statements in respect of the year from 6 April 2011 to 5 April 2012 pertaining to any bank/investment account into which business monies lodged or business expenditure paid. Please also confirm the source of lodgements into the said account(s).

(2) Please let me have sight of credit card statements in respect of the period from 6 April 2011 to 5 April 2012 pertaining to any credit card account from which business expenditure was paid.

5. On 23 June 2014, Mr Smith’s agent lodged an appeal with HMRC against the Information Notice dated 28 May 2014, specifically as regards the requirement to provide bank and credit card statements, on the grounds that such documents were not reasonably required by HMRC. By the same letter, an Internal Review was requested.

6. By letter dated 24 September 2014, but not by way of Internal Review, HMRC expressed the view that the records submitted were incomplete as not all letting statements and tenancy agreements had been supplied and (following disclosure by Mr Smith’s agent) it had been established that loan interest claimed had been overstated. On that basis, HMRC had:

5 “... concluded that it is reasonable and proportionate in order to fully  
test the accuracy of rental income returned ... and expenditure claimed  
thereon to request bank statements in respect of the year from 6 April  
2011 to 5 April 2012 pertaining to any bank/investment account into  
which business (income from property) monies lodged or business  
10 (income from property) expenditure paid. I also require confirmation  
of the source of any lodgements into the said account(s) to ensure that  
your tax return is complete and correct. Furthermore I have concluded  
that in order to verify expenditure claimed that it is reasonable to  
request sight of any credit card statements in respect of the period from  
6 April 2011 to 5 April 2012 pertaining to any credit card account from  
which business (income from property) expenditure was paid”.

7. By letter dated 22 October 2014, an Internal review was again requested by Mr  
Smith’s agent. The basis for review was stated to be that income from property was  
15 not derived from a business and Schedule 36 provided only for the disclosure of  
information and documentation relating to a business; accordingly, there was no basis  
for the Information Notice to have been issued.

8. The Independent Review was completed and the result notified by letter dated  
3 December 2014. The independent review upheld the officer’s decision that the  
20 documentation required by the Information Notice was reasonably required.

**Facts**

9. There was no dispute regarding the facts of this case and no evidence was taken  
from either party.

10. From the documentation available, the tribunal proceeds on the basis that it is  
25 accepted that during the tax year 2011/12 Mr Smith owned, either on his own or  
jointly with others, 11 properties. One of the properties was Mr Smith’s principal  
private residence and another appeared to have been, at some point, the subject of a  
principal private residence election. The other properties were either let or vacant  
with a view to being let.

11. In the main, Mr Smith let the properties through letting agents who managed all  
30 income and expenditure associated with the tenancies granted. However, two  
properties were let otherwise than through a letting agent and on a room by room  
basis, the rents payable in respect of these were paid in cash.

12. Mr Smith had, during the tax year 2011-12, completed construction of two of  
35 the properties having incurred substantial expenditure in relation to the construction.

13. The tribunal were told that Mr Smith does not operate separate business bank  
accounts. That his bank accounts and credit cards are all private accounts.

14. Pursuant to the Information Notice, Mr Smith had provided certain information  
and documentation to HMRC. Mr Smith claimed to have provided, by the time of the  
40 hearing, all interest statements associated with the mortgages on the properties and the  
income and expenditure statements from the letting agents.

15. It is not clear to the Tribunal from the correspondence whether, and if at all, Mr Smith has provided any information or documentation regarding the construction work undertaken.

### **Legislative overview**

5 16. Pursuant to section 8 TMA a person may be required by notice to deliver a return of his income specifying each separate source of income and the amount of that source.

17. By virtue of s9A TMA an officer may enquire into a return under section 8 if, subject to certain requirements, he gives notice of his intention to do so.

10 18. Section 12B TMA requires any person required to deliver a return for a year of assessment to keep and preserve all records as are requisite for the purposes of enabling him to make and deliver a correct and complete return for the year or period. Pursuant to regulations enabled by section 12B, HMRC may specify certain records be kept. No regulations have been made which specify that bank statements be retained.  
15

19. By virtue of Part 3 to Income Tax (Trading and Other Income) Act 2005 (“ITTOIA 2005”), a charge to income tax is imposed on, inter alia, the profits of a UK property business. “UK Property Business” is defined by section 264 as “every business which the person carries on for generating income from land in the United  
20 Kingdom” and “every transaction which the person enters into for that purpose [*i.e. for the purpose of generating income*] otherwise than in the course of such a business”. Section 266 defines “generating income form land” as exploiting an estate, interest or right over land as a source of rents or other receipts, which in turn are defined.

25 20. Pursuant to paragraph 1(1) Schedule 36 FA 2008, an officer of HMRC may by notice in writing require a taxpayer to provide information or produce documentation if the information or documentation is reasonably required by the officer for the purposes of checking the taxpayer’s tax position.

30 21. Part 4 of Schedule 36 sets out the restrictions (other than the requirement that information and documentation be reasonably required for the purposes of checking the taxpayer’s tax position) on HMRC’s powers. Explicitly, by virtue of paragraph 19(2), an information notice does not require a person to provide or produce personal records as defined in section 12 of the Police and Criminal Evidence Act 1984 (“PACE”); however, paragraph 19(2) permits an information notice may require a  
35 person (including a taxpayer) to produce documents that are personal records but subject to the right to redact the personal information.

40 22. Section 21 prescribes the circumstances in which information notices may be issued where the taxpayer has rendered a tax return. Specifically, and of relevance to the present appeal, an information notice may be issued where either a notice of enquiry has been given and has not been completed (“Condition A”) or where an

officer of HMRC has reason to suspect that an amount which ought to have been assessed has not been assessed or that an assessment is insufficient (“Condition B”).

23. Part 5 of Schedule 36 provides the taxpayer with a right of appeal to the First-tier Tribunal against an information notice or any requirement in it. There is, however, no right of appeal where the documents or information requested form part of the taxpayer’s statutory records (paragraph 29(2)).

24. On appeal, the tribunal may, by virtue of paragraph 32(3), confirm, vary or set aside the information notice.

### **Arguments of the parties**

25. On behalf of Mr Smith, Mr Anderson challenged the Information Notice on two principal grounds, namely that:

(1) A Schedule 36 Information Notice could only be issued in order to establish the accuracy of business income required be self-assessed to tax; as the properties owned by Mr Smith were not a business but represented investment activity, any request for production of the bank and credit card statements was unreasonable. In connection with this argument, the tribunal was referred to *Marson v Morton and related appeals* [1986] STC 463, *Ms Parveen Azam* [2011] UKFTT 50 and another case for which Mr Anderson did not have the citation. The tribunal has been unable to find the case and no copies were provided of any of the cases.

(2) That the bank and credit card statements were private documents and disclosure was in breach of Mr Smith’s right to privacy and further that the statements may represent private records as defined in PACE.

26. In relation to each of these challenges HMRC submitted:

(1) Mr Smith’s property activities constituted business activity and, accordingly, Mr Smith was required to maintain sufficient records to enable him to deliver a complete and accurate tax return for the year.

HMRC accepted that bank statements were not statutory records and took no issue with the jurisdiction of the tribunal to hear the appeal. However, HMRC maintained that the information and documentation provided to them by Mr Smith had not permitted them to fully determine the accuracy of the 2011-12 return and, on that basis, pursuant to paragraph 1(1) Schedule 36 FA 2008 they were entitled to require production of such information and documentation as was reasonably required by the officer for the purposes of checking the taxpayer’s tax position.

HMRC contended that the bank and credit card statements were reasonably required to check Mr Smith’s tax position.

(2) That the Information Notice had not required production of private bank and credit card statements per se but rather had required production of the bank and credit card statements which recorded the property income and expenditure.

## Consideration of the arguments

27. By reference to the provisions of sections 264 and 266 ITTOIA 2005, the  
5 Tribunal considers that it is abundantly clear that, whether income is generated from  
land as a consequence of a trading activity or as a consequence of an investment  
activity, the income so generated arises from a UK Property Business as defined. The  
cases to which the tribunal was referred concerned land which was either not let at all  
10 or was the subject of temporary letting due to a downturn in the property market and  
were of no relevance in the present case where, on the admitted facts, Mr Smith had  
let the properties over a consistent period with a view to generating income.

28. On that basis the Tribunal considers it unarguable that the activities of Mr Smith  
in relation to all income generated through exploitation of his properties and  
expenditure associated with the generation of such income is not chargeable to tax  
15 and accordingly required to be assessed on his tax return. As a consequence, subject  
to the reasonableness of the request, HMRC are entitled to request the provision of  
information and documentation to check the accuracy of Mr Smith's tax return as it  
relates to the properties.

29. In the present case, certain information was produced to HMRC after the issue  
20 of the Information Notice in the form of interest statements, tenancy agreements,  
letting agent accounts. The Tribunal takes the view that, at the time the Information  
Notice was issued, a broad scope request including bank and credit card statements  
was reasonable.

30. Based on Mr Anderson's submission that HMRC had all the information they  
25 needed without the bank and credit card statements, the Tribunal has considered  
whether it was reasonable to continue to require the bank statements. The Tribunal  
has concluded that, as regards the two properties for which there was no letting agent,  
the information provided would provide no basis for determining the accuracy of the  
return. Mr Anderson contended that, as rents were received in cash which was  
30 probably not banked, the bank statements would add nothing. It may or may not be  
the case that the cash is banked but the Tribunal considers that the bank and credit  
card statements may nevertheless contain relevant information and are therefore  
reasonably required. Further, for the two properties where substantial building works  
were undertaken, the bank and credit card statements are reasonably required vis a vis  
35 expenditure information likely to be contained within them.

31. As regards the issue of privacy, the Tribunal was referred to the case of *Taylor v*  
*HM Inspector of Taxes* [2004] UKSC SPC00448. In that case, the taxpayer had been  
required by an information notice to produce information and documentation relating  
to the business but had also expressly been requested to produce information  
40 regarding personal expenditure. The Special Commissioner determined that, as  
regards the request relating to personal expenditure, the request was intrusive

however, he did not set aside the notice merely stayed it for further argument after the officer had had an opportunity to consider the other information and documentation.

32. The Tribunal has considered the provisions of paragraph 19 Schedule 36 FA 2008 and section 12 PACE. Personal records are defined in section 12 of PACE as  
5 “documentary and other records concerning an individual ... who can be identified from them relating;(a) to his physical or mental wellbeing; (b) to spiritual counselling or assistance given or to be given to him; or (c) to counselling or assistance to be given to him for the purposes of his personal welfare by any voluntary organisation...”. It appears to the tribunal that it is *possible* that a bank or credit card  
10 statement may include detail of a payment relating to physical or mental health, spiritual counselling, or counselling for personal welfare (for instance a payment made to Relate, the relationship counselling organisation) which would therefore fall within the scope of section 12.

33. However, it is clear from the terms of paragraph 19(3) that an information  
15 notice may require a person to produce documents or copies that are personal records for the purposes of PACE omitting any information whose inclusion makes the original document a personal record and to provide any information contained in the records which is not personal information.

34. The tribunal take the view that any bank or credit card statement sheet which  
20 contains information which is relevant to income required to be returned for tax purposes *and* private information which meets the PACE definition is a personal record but that the majority of the information contained in such a personal record will not be personal information. Where a statement sheet contains no personal information is not, in the view of the tribunal, a personal record.

25 35. Given that there is a possibility that a bank or credit card account which is used both for returnable activities and private ones, the tribunal considers paragraph 19(3) should be invoked.

36. By the letter from Mr Anderson dated 20 February 2014, it was inferred that  
30 there was no separate business account though that is not entirely clear because, by the same letter, Mr Anderson contended that the property activities were not a business. The correspondence does not, at any point, make it clear that the bank and credit card accounts are used for business and private purposes as the arguments are focused on the property income generation activities not being a business. However, it was stated to the tribunal that this was the case.

35 37. The Tribunal therefore determines that. at the time the Information Notice was issued, it was in respect of information reasonably required. That, had there been separate accounts for the Property Business, the Information Notice would have been upheld. However, on the basis of the information presented at the tribunal that the  
40 bank and credit card statements include personal transactions, the tribunal has determined to vary the Information Notice in accordance with the provisions of paragraph 19(3).

## Decision

38. The Information Notice shall be varied as follows:

5 (1) Please let me have sight of bank statements in respect of the year from 6 April 2011 to 5 April 2012 pertaining to any bank/investment account into which business monies lodged or business expenditure paid. Please also confirm the source of lodgements into the said account(s).

(2) Please let me have sight of credit card statements in respect of the period from 6 April 2011 to 5 April 2012 pertaining to any credit card account from which business expenditure was paid.

10 (3) Where any sheet of any statement falling with items (1) and (2) above includes receipts or payments relating to your:

(a) Physical or mental health

(b) Spiritual counselling or assistance given or to be given to you

15 (c) Counselling or assistance given or to be given to you for the purposes of your personal welfare, by any voluntary organisation or by any individual who (i) by reason of his office or occupation has responsibility for your personal welfare; or (ii) by reason of an order of a court has responsibilities for your supervision.

(d) (a) – (c) above being defined as personal information

20 you are required to produce the bank statements for the period specified omitting any personal information but providing all other information

39. In the event that HMRC consider that any omission from the statements required to be produced is or may not constitute personal information, there be liberty to apply to the Tribunal for determination of whether the information be properly  
25 omitted.

40. This document contains full findings and reasons for the decision.

41. Paragraph 32(5) Schedule 36 provides that the decision on an appeal under paragraph 29 of Schedule 36 is final. Our decision in relation to the Information Notice cannot, therefore, be appealed to the Upper Tier.

30

**AMANDA BROWN  
TRIBUNAL JUDGE**

35

**RELEASE DATE: 7 May 2015**