[2015] UKFTT 0440 (TC)

TC04612

Appeal number: TC/2013/07182
and TC/2014/01808

PENALTIES – taxpayer information notice issued to alleged MSC Provider - compliance with information notice – reasonable excuse – whether notice related to tax position of MSC Provider or of its clients – whether third party notice should have been issued - validity of notice - rights of clients under Article 8 ECHR – Schedule 36, Finance Act 2008

FIRST-TIER TRIBUNAL
TAX CHAMBER

PML ACCOUNTING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER
REBECCA NEWNS

Sitting in public at Bedford Square on 8 July 2014

Mr McCloskey, tax consultant, for the Appellant

Mr Khawar, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by PML Accounting Limited ("PML") against penalty notices issued under Schedule 36, Finance Act 2008 for failure to comply with an information notice dated 26 November 2012 ("the Information Notice"). On 20 March 2013 HMRC issued an initial penalty notice for £300. On 24 May 2013 HMRC issued a penalty notice for daily penalties of £20 per day for 44 days (20 March 2013 to 2 May 2013), totalling £880. On 17 June 2013 HMRC issued a penalty notice for daily penalties of £30 per day for 36 days (3 May 2013 to 7 June 2013), totalling £1080. On 15 November 2013 HMRC issued a penalty notice for daily penalties of £20 per day for 115 days (8 June 2013 to 30 September 2013) totalling £2300. The penalties amount to £4560 in total.

2. Mr McCloskey represented PML and Mr Khawar represented HMRC at the hearing of the appeal. A bundle of documents was presented at the hearing, but no witness statements were presented to the Tribunal at, or in advance of, the hearing, nor did anyone give oral evidence. After the hearing we gave directions permitting PML to submit additional written evidence relating to the accident suffered by Mr Paul Hazell's daughter, and the illness of Mr Richard Hazell, and giving HMRC the opportunity to respond to such evidence. We also directed that the parties should provide written submissions relating to various issues of law raised during the course of the hearing.

3. We received witness statements from Mr Paul Hazell and from Mr Richard Hazell following the hearing in accordance with our directions. These were not challenged by HMRC.

4. We also received submissions received from the parties, but these were far from adequate, and did not consider in sufficient depth (if at all) the various issues on which the parties were directed to make submissions, nor did they address many of the cases of which the Tribunal was aware that would be relevant to the issues in this appeal. The Tribunal therefore initially issued this decision in draft, and invited the parties to make representations in respect of the draft before the decision was finalised. This final decision notice takes account of the representations made by the parties following the issue of the draft decision.

The Law

5. There is set out in an appendix to this decision:

(1) Extracts from Part V, Taxes Management Act 1970 ("TMA") dealing with the conduct of appeals

(2) Extracts from Chapter 9, Part 2, and Part 11 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), relating to "managed service companies" ("MSCs")

(3) Regulations 97B and 97C of the Income Tax (Pay as You Earn) Regulations 2003 (SI 2003/2682) ("PAYE Regulations") relating to the transfer of tax liabilities relating to MSCs

(4) Extracts from Schedule 36 Finance Act 2008 ("Schedule 36") relating to information notices and penalties for failure to comply with such notices.

(5) Extracts from the Human Rights Act 1998 ("HRA") and the schedule to the Act (which sets out certain provisions of the European Convention on Human Rights ("the European Convention")).

Managed Service Companies

6. The MSC legislation was enacted to address the tax position of individuals who provided their services to clients through individual service companies, rather than as employees.

7. For a company to be an MSC, it must satisfy each of the four conditions set out in section 61B(1) ITEPA. In summary, these are that:

(1) The company's business must consist wholly or mainly of providing, directly or indirectly, services of an individual (the "worker") to third party clients.

(2) The worker supplying their services to the third party client receives payments from the service company equal to the greater part of the sums received by the service company from the client for the services provided by the worker.

(3) The payments received by the worker are greater than they would have received if all of the payments were treated as employment income of the worker relating to an employment with the service company.

(4) There must be person (an "MSC Provider"), and that person must be "involved" with the service company.

8. A person is an MSC Provider if it carries on business of promoting or facilitating the use of companies to provide the services of individuals. An MSC Provider is involved with an MSC if it (or an associate):

(1) Benefits financially on an on-going basis from the provision of the services of the worker,

(2) Influences or controls the provision of those services.

(3) Influences or controls the way in which payments to the worker (or associates of the worker) are made,

(4) Influences or controls the finances of the worker's MSC or any of its activities, or

(5) Gives or promotes an undertaking to make good any tax loss.

9. The MSC legislation applies where:

(1) The services of the worker are provided by an MSC,

(2) The worker (or an associate) receives payments in respect of those services, and

(3) The payments are not earnings received directly by the worker from the MSC.

10. Where the MSC legislation applies, the MSC is treated as making payments of employment income to the worker (section 61D(2) ITEPA). The practical effect is to treat payments received by the worker as if they were employment income subject to PAYE and NICs. The MSC is treated as the employer, and has the duty to account to HMRC for PAYE and NICs in respect of the deemed employment income.

11. If the MSC does not account to HMRC for the PAYE and NICs due, then in the circumstances set out in section 688A ITEPA, HMRC have the right to recover the PAYE and NICs from certain other persons, including the MSC Provider.

Information Notices

12. Schedule 36, Finance Act 2008 gives HMRC power to issue notices ("information notices") requiring the person to whom they are addressed to provide information or produce documents.

13. Paragraph 1, Schedule 36, Finance Act 2008 gives HMRC the power to issue information notices ("taxpayer notices") requiring a person ("the taxpayer") to provide information or produce documents, where the information or documents are reasonably required for the purposes of checking the taxpayer's tax position. Tax position is defined in paragraph 64, and is discussed in detail later in this decision.

14. The taxpayer has a right under paragraph 29 to appeal against the taxpayer notice (or any requirement in the notice), save to the extent that the notice relates to statutory records. However, if HMRC sought and obtained approval of this Tribunal in advance to the issue of the taxpayer notice, the taxpayer has no such right of appeal.

15. Paragraph 2 gives HMRC the power to issue information notices ("third party notices") requiring a person ("the third party") to provide information or produce documents, where the information or documents are reasonably required for the purposes of checking another person's ("the taxpayer") tax position. Unlike taxpayer notices, third party notices can only be issued with the prior consent of either the taxpayer or this Tribunal. The third party has a right of appeal under paragraph 30 on the grounds that compliance with the notice would be unduly onerous (save to the extent that the notice relates to the taxpayer's statutory records).

16. Paragraph 5 of Schedule 36 makes provision for the obtaining of information notices in relation to a class of persons whose individual identities are not known. Such notices can only be issued with the prior consent of this Tribunal.

17. If a person fails to comply with a taxpayer notice, paragraph 39 provides that they are liable to a £300 penalty. If the failure continues after the imposition of a paragraph 39 penalty, the person is liable under paragraph 40 to further penalties not exceeding £60 for each day on which the failure continues.

18. However, paragraph 45 provides that a penalty shall not arise under paragraphs 39 or 40 in the event that the person has a reasonable excuse for their failure. A person against whom a penalty has been assessed may appeal to this Tribunal against the penalty.

Background Facts

19. For the most part, the background facts are not in dispute and we find them to be as follows.

20. PML provides accounting, tax and corporate services to contractors and consultants. The services include company formation, bookkeeping, preparation of accounts, calculation of taxes due, preparation of tax returns, and various other accounting, tax and corporate services. PML assert that they are not an MSC Provider. Whether or not PML are an MSC Provider is not in issue before this Tribunal, and we make no findings in that regard.

21. PML's sole director is Paul Hazell. The shareholders in PML are Paul Hazell and his two brothers; however the two brothers play no active part in the business and have other business commitments. PML has between 700 to 800 active clients at any one time.

22. Hazell Minshall (previously known as Hazell Minshall & Co) are a firm of accountants, who act as PML's tax agents. It is unclear whether Hazell Minshall are a sole trader or a partnership (the information is not disclosed on its letterhead), but in any event, the principal individual at Hazell Minshall is Richard Hazell, who is Paul Hazell's father. Hazell Minshall are to be distinguished from Hazell Minshall LLP. This latter entity was established to undertake audit work. It only ever undertook one audit, and was dormant throughout the period covered by this appeal. We note that some of the correspondence in the bundle is on the letterhead of Hazell Minshall LLP – and we can only assume that the typist picked up this letterhead in error (it is very similar to that used by Hazell Minshall), and the error was never spotted.

23. On 6 August 2012 Mark Dootson, an Inspector of Taxes, wrote to PML stating that he was considering whether the arrangements existing between PML and its clients would bring PML within the scope of the managed service company legislation set out in Chapter 9, Part 2, ITEPA. In the letter, Mr Dootson said that it would be helpful to have an initial meeting to discuss PML's business, followed by a review of PML's business records. He went on to say that it was HMRC's experience for both parties to approach the investigation in an informal manner by discussion. But if this is not possible, a formalised approach would be available to HMRC using its information powers. Mr Dootson attached to his letter a generic list of the sort of records he would want to examine.

24. Paul Hazell replied on 3 October 2012 stating that their agents, Hazell Minshall & Co would be dealing with HMRC's enquiries. Mr Dootson wrote back to Paul Hazell on 9 October 2012 noting that over two months had elapsed since his original letter, and suggesting once more that a meeting be arranged. Not having received a response to his letter of 9 October 2013, on 24 October 2012 Mr Dootson wrote again suggesting a face-to-face discussion. The letter contained the following paragraphs:

> "If a meeting is not possible, you will appreciate that HMRC will then consider using its information powers and with that the enquiry may become protracted. In addition in seeking relevant documentation and information this may involve HMRC contacting your clients as potential managed service companies at a later date.
>
> Writing to the client companies could potentially have a major impact on PML's business and HMRC has to balance any request with a need to obtain any information and documentation.
>
> I attach a request for information and documentation in relation to PML Accounting Ltd and I expect to receive a full response by the 23rd November 2012 after that date I shall issue a formal notice if the information and documentation had not been provided."

25. Attached to the letter was a list extending to nearly three and a half pages. Two pages requested information relating to the period 6 April 2008 to 24 October 2012, and the balance requested documentation relating to the period from 6 April 2008 to 6 April 2013. The documentation request was limited to a sample of eleven clients of PML.

26. On 25 October 2012, Hazell Minshall LLP replied to Mr Dootson's letter of 9 October (evidently crossing with Mr Dootson's letter of 24 October). In this letter Hazell Minshall LLP state that they consider that would be less costly in terms of time and money if HMRC would let them know precisely what information and documents are required. They note that PML is under no obligation to attend any meeting, but ask HMRC to set out a list of questions, to which they will then respond.

27. On 26 November 2012, Mr Dootson issued an information notice under paragraph 1 of Schedule 36 in order to

> "check the company's Chapter 9 ITEPA 2003 position […] to give proper consideration to the application of the Managed Service Company Legislation."

The notice was issued without the prior approval of this Tribunal. The information and documents required under the notice are identical to those requested in Mr Dootson's letter of 24 October 2012. PML were given until 11 January 2013 to comply with the notice. The notice set out the penalties that would apply if PML failed to comply. Also set out in the notice were PML's rights to appeal against the notice to this Tribunal.

28. On 7 December 2012, Hazell Minshall replied as follows:

> "The Notice asks for a substantial amount of information covering almost five years and requires compliance by 11 January 2013.
>
> We wish to appeal against the Notice as it does not give us or our client sufficient time to provide all of the information requested. There are three reasons for this:-
>
> 1. We are now entering the Christmas/New Year holiday season with consequent office closures etc.
>
> 2. The period between now and 31 January is probably the busiest period of the year for an accountancy practice given the 31 January deadline for filing personal tax returns. It also happens to be a busy time for fining the returns of corporate clients, many of whom have 31 March or 31 December accounting year ends.
>
> 3. Unfortunately Richard Hazell, the principal of this firm, has recently had medical issues which have prevented him giving full attention to matters such as your enquiry.
>
> We shall therefore be grateful if you will be able to agree a deferral of the deadline set by the Notice to 28 February 2013. We are confident that we should be able to comply fully with the Notice by that date."

29. Mr Dootson responds by fax on 11 December 2012 agreeing to the extension of the deadline to 28 February 2013 on the understanding that the notice is complied with in full by that date. In addition he refers to the mention of "appeal" in Hazell Minshall's letter, and seeks confirmation that this is not an appeal against the notice itself but a request to extend the deadline. He also asks that PML or Hazell Minshall contact him two weeks before the deadline to confirm that the matter is in hand, and to explore any difficulties that may be encountered.

30. Hazell Minshall LLP fax Mr Dootson back the same day stating:

> "With regard to the matter which require clarification of we would respond as follows:
>
> 1. The appeal was in relation only to the request to extend the deadline
>
> 2. Either the company or ourselves will contact you two weeks before the 24 February 2013 as requested."

31. On 12 December 2012, Mr Dootson faxed Hazell Minshall confirming the extension of time on the basis of the correspondence. On 17 December 2012 Mr Dootson sent copies of his faxes of 11 and 12 December to PML.

32. On 13 February 2013, Hazell Minshall LLP wrote to Mr Dootson saying that collation of the information and documentation is in hand, and they anticipate sending it by first class post on 27 February 2013.

33. According to Paul Hazell's statement dated 30 July 2014, on 27 February 2013 he had been working to get the information and documentation together for the 28 February 2013 deadline – working through the night and into the next day to finish by noon on 28 February 2013. However, when Paul Hazell checked to confirm that a courier would be available, the courier company said that they could not deliver to

HMRC's PO Box address. Paul Hazell therefore telephoned Mr Dootson to ask for a street address. According to Mr Dootson's contemporaneous note of the conversation, he is unable to give a street address, and Paul Hazell says he will try Royal Mail. According to Paul Hazell's statement, Mr Dootson gave him a street address in Sheffield.

34. According to Paul Hazell's statement, whilst he was phoning HMRC, he missed calls and messages from his wife. He learned that his daughter had been badly injured in an accident at home and had been taken to the A&E department at Southampton hospital. Paul Hazell left everything he had been working on, and went straight to the hospital. His daughter was placed under 24 hour surveillance whilst the doctors at the hospital decided whether or not they should operate. It was not until 4pm the following day (28 February) that the doctors made a decision that because of the age of the daughter, it would be too dangerous to operate, and it would be better to let her wounds heal naturally, which meant that Paul Hazell and his wife would need to monitor her constantly over the next few days in case the injuries got worse. Because his wife's health was also poor, the burden of monitoring the daughter fell primarily on Paul Hazell.

35. Hazell Minshall fax and post a letter to Mr Dootson on 28 February 2013 with a response to the information request. The copy of the letter in the bundle has a receipt datestamp of 1 March 2013. Their letter included the following postscript:

> "Unfortunately there will be a hold up in forwarding the welcome/information packs and other documentation to you because sadly Paul Hazell's two year old daughter has had a serious accident and was admitted to Southampton General Hospital yesterday and will be having an operation later today to see the extent of her injuries and if her internal organs have been affected. Paul did not wish to let you down and expects to be able to send you the documentation referred to next week. We hope that this will be acceptable to you and that you will not be inconvenienced by the temporary delay."

36. On 4 March 2013, Mr Dootson faxes Paul Hazell at PML and says that he understands the priority to attend to family matters rather than the Information Notice. Mr Dootson also says that he has noticed that there are one or two answers to the information request that are incomplete, and will need to get Mr Hazell to review them. As regards the documents, Mr Dootson states that as these had already been prepared for dispatch, he hoped that someone at Hazell Minshall will be able to send them before the end of the week. Mr Dootson confirms that in the circumstances he obviously would not raise any penalty. But if there is a problem in sending the documents, he requested that he be contacted by Hazell Minshall to explain the problem.

37. According to Paul Hazell's statement, he continues to collate the information and documentation as soon as he felt his daughter was out of danger, and he arranged for a courier to collect and deliver the 16 boxes of documents to HMRC on 8 March 2013. However, when the courier did not arrive, Paul Hazell telephoned the courier company to be told that there had been a mistake and the courier had not been

booked. They offered to re-book the delivery, but the new date would not be in time for HMRC's 8 March deadline. So Paul Hazell drove from Southampton to HMRC's office in Sheffield on 8 March 2013, arriving there just before 5pm. The office was closed, but the security guard accepted delivery of the boxes.

38. On 15 March 2013, Mr Dootson wrote to Hazell Minshall (with a copy to PML) confirming receipt of Hazell Minshall's letter of 28 February 2013, and the 16 boxes of documents received on 8 March 2013. Mr Dootson states that the responses to the information request are incomplete in a number of respects, and that a number of documents are missing. In particular Mr Dootson cannot find:

(1) PML's bank statements showing fees collected for the period 6 April 2011 to 6 April 2013

(2) bank statements relating to eight of PML's sample clients

(3) PML's records used to calculate salaries, dividends, taxes and other items for four of the sample clients

(4) PML's fee invoices for four of the sample clients

(5) payment notifications for four of the sample clients

(6) bank mandates

(7) sales invoices relating to five of the sample clients.

39. Mr Dootson concludes by stating that he will issue a penalty notice and will warn the company of its liability to daily penalties for continuing failures.

40. On 20 March 2013, Mr Dootson writes to PML. The letter is headed "Penalty Notice" and assesses a penalty of £300. In his letter he states that he encloses a copy of the Information Notice on which he has marked what is still needed. He goes on to say that if PML does not provide the missing details by 19 April 2013, HMRC may charge further penalties of up to £60 per day from the date of the penalty notice.

41. On 15 April 2013, Hazell Minshall send two letters to Mr Dootson. The first letter responds to the Penalty Notice of 20 March 2013 and appeals against the £300 penalty. They state that it is unreasonable and premature to levy a penalty, particularly given the great volume of material requested and supplied. Hazell Minshall also note the difficult personal circumstances of Paul Hazell. They also state that the list of missing information and documents was not enclosed with the Penalty Notice, and that therefore they are unable to comply with the request by the 19 April deadline.

42. The second letter responds to Mr Dootson's letter of 15 March 2013, and they state that it is the intention of PML and themselves to provide full replies to the open points as soon as possible, but in view of the Easter break and the need to meet employer 2012/13 return deadlines, they aim to provide the response by the end of May 2013 at the latest.

43. Mr Dootson writes back to Hazell Minshall on 23 April 2013 noting that even if the list was omitted from the Penalty Notice of 20 March, the outstanding information and document requests were listed in his letter of 15 March, which had been sent to both PML and Hazell Minshall in advance of issuing the penalty. Mr Dootson also notes that the deadline for responding to the information was extended twice, first to 28 February 2013 and then to 8 March 2013, and that the £300 penalty was correctly charged. He declines to extend the timeframe for submission of outstanding issues beyond 19 April and states that daily penalties are under consideration.

44. Mr Dootson writes again on 2 May 2013 to PML setting out the outstanding information and documents, and exploring a way forward for PML to avoid the need to escalate matters beyond the initial penalty to daily penalties. In this letter, Mr Dootson goes through (in greater detail than in his letter of 15 March) the further information and documents required. In relation to the request for PML's records used to calculate salaries, dividends, taxes and other items he notes that of the 16 boxes of information, 14 contain thousands of statements which appear to be weekly or other regular summaries of these matters. Mr Dootson recognised that PML had supplied a lot of the requested documentation, however he could not find records for all of the sample companies listed in the Information Notice.

45. Mr Dootson concludes the letter by suggesting that PML or Hazell Minshall contact him to discuss how the matter can best be resolved, and whether there is any way in which HMRC could help PML comply with the notice. Full compliance is requested by 17 May 2013.

46. On 16 May 2013, Paul Hazell writes to Mr Dootson saying that PML is in the process of assembling full replies to all of the questions. However he also says that there has been a setback as Richard Hazell of Hazell Minshall collapsed with kidney failure on 2 May, and that he was currently the intensive care unit at Salisbury Hospital. Paul Hazell therefore asks for Mr Dootson's understanding for the further delay this will cause.

47. From Richard Hazell's witness statement we learn that he collapsed on 3 May and was hospitalised for about two and a half weeks, initially in intensive care, because excessive potassium levels in his blood had caused his kidneys and bowels to cease functioning. On leaving Salisbury Hospital, Richard Hazell was transferred to Sarum Road Hospital for rehabilitation. Richard Hazell was in a very poor state and very weak. He had also lost the use of both of his legs. He only went home on 31 May 2013, but at that point he could only walk with difficulty, and only then with the use of crutches. Because of his weakness and lack of mobility, he did not resume working until mid-August 2013, and then very slowly. Richard Hazell's health is still poor, and he remains under medical supervision, and he works only four days a week.

48. Richard Hazell states that he has been told that the medication that he was taking prior to his collapse had contributed to the poor state of his health, and following his admission to Salisbury Hospital, he was told to stop taking various medicines, and to reduce others. Mr Hazell believes that he must have been getting progressively weaker over many months preceding his collapse.

49. Mr Dootson replies on 23 May. He levies daily penalties for the continuing failure to comply with the original information notice, but he takes into account Richard Hazell's illness by charging penalties only for the period from 20 March 2013 to 2 May 2013, and at a rate of £20 per day. He states that providing PML comply in full by 7 June 2013, no further daily penalties will be levied – but that absent compliance, daily penalties will be charged from 3 May. The formal penalty notice is issued on 24 May, charging penalties at £20 per day for the 44 days from 20 March to 2 May 2013. This totals £880.00.

50. Not having received any response from PML or Hazell Minshall, Mr Dootson writes again to PML on 10 June 2013 and issues a further Penalty Notice for daily penalties at £30 per day for the 36 days from 3 May to 7 June 2013. This totals £1080.00. Mr Dootson writes on 20 June, summarising the background to the penalties and inviting PML to withdraw its appeal – or otherwise either notify the appeal to this Tribunal or request a review within 30 days. This letter crosses with a letter of the same date from Hazell Minshall appealing against the Penalty Notices of 24 May and 17 June 2013. Hazell Minshall's letter notes that Richard Hazell was not yet back at work, and was not yet in a position to oversee and sign off the full reply being prepared. On 27 June 2013 Mr Dootson writes to acknowledge receipt of the appeal against the two sets of daily penalties, and informs PML that it must either request a review or notify the appeal to this Tribunal within 30 days.

51. The correspondence between PML, Hazell Minshall and Mr Dootson continues, but with no substantive response from either PML or Hazell Minshall to the missing information and documents. On 24 July 2013, Hazell Minshall write to request a review of Mr Dootson's decision to levy penalties – this letter is sent 3 days after the deadline in Mr Dootson's letter of 20 June, but Hazell Minshall ask that the late request be accepted in view of the health problems suffered by Richard Hazell.

52. A review is conducted in respect of the initial £300 penalty. On 26 September 2013, the review officer writes to PML upholding the penalty on the basis that PML had not provided all of the information and documents listed in the Information Notice. On 17 October 2013, an appeal against this decision is notified to the Tribunal.

53. On 15 November 2013, Mr Dootson issues a further Penalty Notice for daily penalties at £20 per day for the 115 days from 8 June 2013 to 30 September 2013. This totals £2300.

54. A review is conducted in respect of the daily penalties charged by the penalty notice dated 15 November 2013. . On 14 March 2014, the review officer writes to PML upholding the penalty on the basis that PML had not provided all of the information and documents listed in the Information Notice. On 2 April 2014, an appeal against the review decision, and against the two other daily penalty notices is notified to the Tribunal (Mr Dootson, by a letter dated 13 March 2014 having given PML an extension of time until 14 April 2014 to lodge an appeal).

Issues in the appeal

55. The following appear to be the issues in the appeal:

(a) Had PML complied with the Information Notice? The burden of proof falls on HMRC to demonstrate that PML had not complied with the Information Notice.

(b) Had PML appealed against the Information Notice? On 15 April 2013, Hazell Minshall wrote to HMRC appealing against the first penalty notice. What happened to this appeal? Mr McCloskey, for PML, asserts that this appeal is still unresolved

(c) Assuming that we find that PML did not comply with the Information Notice, did PML have a reasonable excuse for their failure? There are three aspects to the reasonable excuse issue. The first is the pressure placed on Paul Hazell by reason of his daughter's accident. The second is that the information and documents requested in the Information Notice required a level of technical expertise and understanding which was beyond Paul Hazell's understanding (and he therefore had to rely upon the advice of his tax agents, Hazell Minshall). The final aspect is whether, because of Richard Hazell's illness, Hazell Minshall were unable to provide the advice and support that PML needed in order to comply with the Information Notice.

(d) Is the Information Notice valid? This turns on whose tax position is being checked by HMRC. Is it PML or is it their clients? If it is PML's clients, should HMRC have issued a third party notice under paragraph 2 of Schedule 36?

(e) What are the rights of PML and its clients under the European Convention on Human Rights, and in particular the right to privacy under Article 8? Does the Information Notice breach the Article 8 rights of either PML or its clients?

(f) If there is a question as to the validity of the Information Notice, is it now too late to challenge the validity? Can the validity of the notice be challenged in an appeal against penalties? Alternatively, is the correct procedure for PML to make a late appeal against the notice?

Compliance with the Information Notice

56. Mr Dootson's letter of 2 May 2013 analyses in detail the requests in the Information Notice that he considers have not been answered, and we use this as a convenient list of the matters HMRC submit remain outstanding.

57. As regards the request for information, the only outstanding item is Item 4 in the information section of the notice – "Does PML Accounting Ltd maintain a reserve account to provide for client companies corporation tax, PAYE, etc. duties?" The answer given to this request was "The reserve accounts are the individual company bank accounts set up through LloydsLink and PML Accounting Limited's net pay account." Mr Dootson asks for additional clarification of this answer – and for that

reason it would appear that he considers the answer to be incomplete. However we find that PML answered the request for information. The fact that the answer gave rise to further questions, does not mean that the original question had not been answered. We therefore find that the "information" aspects of the Information Notice had been complied with.

58. However, as regards the request for documents, we find that PML had not complied with the Information Notice.

59. In his letter of 2 May 2013, Mr Dootson sets out six categories of documents that were not supplied. These are as follows.

60. First, Item 3 in the document section of the notice was a request for "(a) all bank statements held by PML Accounting Ltd for the collection of client fees for the period 6 April 2011 to 5 April 2012 and (b) all bank statements held by PML Accounting Ltd for the holding of client funds to meet contingent liabilities of its client companies such as corporation tax, value added tax, and PAYE reserves for the period 6 April 2011 to 5 April 2012". What PML appear to have supplied was not bank statements, but summaries and calculations.

61. Second, Item 4 was a request for copies of PML's records (computer or otherwise) used to calculate salaries, dividends, taxes and other matters for the sample clients for the period 6 April 2011 to 5 April 2012. In his 2 May letter, Mr Dootson notes that of the sixteen boxes supplied by PML, fourteen contain thousands of "statements" which appear to be weekly or other regular summaries of the information requested. However Mr Dootson was unable to find the information requested for all of the sample clients listed in the Information Notice.

62. Third, Item 5 was a request for fee invoices and annual statements raised by PML to the sample clients. Mr Dootson was unable to find the statements for eight of the twelve sample clients.

63. Fourth, Item 6 was a request for payment notifications issued to the sample clients. Mr Dootson was unable to find the notifications for eight of the twelve sample clients.

64. Fifth, Item 7 was a request for copies of client bank mandates giving authority to PML to manage the client's bank account. The answer given on behalf of PML was "Authority given to Paul Hazell (Director) via LloydsLink". What Mr Dootson wanted to see was the copies of the mandates issued by clients to their bank authorising PML to access the accounts and transfer funds on behalf of the client.

65. Finally, Item 8 was a request for copies of sales invoices raised by PML on behalf of the sample clients. Mr Dootson was unable to find invoices issued for eight of the twelve sample clients.

66. We were told by Mr McCloskey that another half box of documents was sent by PML to HMRC at some time after 16 March 2014, however there is not record of this in any of the documents in the bundle of evidence, and assuming such a box was sent

to HMRC, there is no record in the evidence before us of what was contained in that box. HMRC acknowledge that further documents were delivered to HMRC as recently as June 2014, but assert that others continue to remain outstanding.

67. Mr McCloskey submitted that the number of documents that remained outstanding was now very small. He also submitted that HMRC had not reviewed all of the documents supplied, the reason being that they did not have the resources to do so. HMRC's response to these submissions was that the quantity of the missing documents was not relevant, what is relevant is the transactions that they evidence. HMRC acknowledge that they have not examined every single one of the thousands of pay statements included in the boxes. However the inspector conducted a number of tests and sample checks and found instances of PML clients who had worked through a limited company during 2011/12 for whom no pay statements had been submitted.

68. Finally Mr McCloskey noted that HMRC were not willing to put a case for the MSC legislation applying to PML, notwithstanding the large volume of documents made available, and that if there is a *prime facie* case for PML to answer, why have HMRC not been prepared to make it? HMRC's response is that the application of the MSC legislation is not in issue in this appeal, and is therefore not a matter to which we should give any consideration.

69. We find that PML did not provide all of the documents requested by HMRC in the Information Notice by the extended due date of 8 March 2013. We also find that documents requested in the Information Notice remained outstanding as at 30 September 2013 (the date to which the last daily penalty notice relates).

70. We also find that the question of whether PML is subject to the MSC legislation is not an issue before us. The only issue in this appeal is PML's compliance with the Information Notice. The fact that HMRC have not yet reached any decision as to whether PML is an MSC provider is not relevant to the issues before us.

71. Paragraph 18 of Schedule 36 provides that an information notice only requires a person to provide a document if it is in the person's possession or power. There has been no submission made on behalf of PML that the notice extended to documents that were not in PML's possession or power.

72. We therefore find that PML did not comply with the Information Notice, and that the failure to comply continued until at least 30 September 2013 (the date to which the last daily penalty notice relates).

Appeal

73. On 7 December 2012, Hazell Minshall wrote to HMRC, and their letter includes the following sentence:

> We wish to appeal against the Notice as it does not give us or our client sufficient time to provide all of the information requested.

The "Notice" to which the letter refers, is the Information Notice

74. It has been submitted by PML that this appeal has not been determined, and it is therefore open to this Tribunal not only to consider the issue of penalties, but also the underlying information notice itself.

75. We disagree.

76. Hazell Minshall's letter of 7 December went on to propose that the filing deadline be extended to 28 February 2014. Mr Dootson replied by fax dated 11 December 2012, in which he agrees to the extension of the deadline to 28 February 2013 on certain terms. In addition he refers to the mention of "appeal" in Hazell Minshall's letter, and seeks confirmation that this is not an appeal against the notice itself but a request to extend the deadline. Hazell Minshall LLP fax Mr Dootson back the same day stating:

> "With regard to the matter which require clarification of we would respond as follows:
>
> 1. The appeal was in relation only to the request to extend the deadline
>
> […]"

77. We consider that the exchange of correspondence between Mr Dootson and Hazell Minshall effectively settled the appeal – Hazell Minshall proposed that the filing deadline be extended, and Mr Dootson accepted the proposal. The agreement is evidenced in writing by the exchange of correspondence, and therefore satisfies the requirements of section 54, Taxes Management Act 1970 which permits tax appeals to be settled by agreement between the parties or their representatives. The fact that the correspondence does not expressly mention section 54 does not prevent section 54 from applying.

78. There is therefore no open appeal in relation to the Information Notice itself.

Reasonable Excuse

79. Paragraph 40(1) of Schedule 36 provides that a liability to a penalty does not arise if the person penalised satisfies HMRC (or on an appeal, this Tribunal) that there is a reasonable excuse for the failure. Paragraph 40(2) places limitations on the excuse. It provides that reliance on another person to do anything cannot be a reasonable excuse, unless the person penalised took reasonable care to avoid the failure (paragraph 40(2)(b)). It also provides that where a reasonable excuse existed, but then ceased, the failure must be remedied without unreasonable delay after the excuse ceased (paragraph 40(2)(b)).

80. The onus of proof that there was a reasonable excuse for the failure falls upon PML.

81. No definition is given in the legislation of what amounts to a "reasonable excuse". In the context of VAT default surcharges the approach followed is that set

out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 where Judge Medd QC said,:

> "It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

82. We consider that the approach taken in *The Clean Car Co Ltd* should also be followed in relation to Schedule 36.

Paul Hazell

83. In their submissions, HMRC recognises that the accident suffered by Paul Hazell's daughter would give rise to a reasonable excuse at the time, and for some period thereafter. However they question how long that period would be, given that PML's failure to comply with the Information Notice was continuing. HMRC also note that they were unaware of the fact that Paul Hazell's wife was ill at the time, and that the burden of monitoring their daughter fell disproportionately on Paul Hazell.

84. HMRC submit that even if Paul Hazell had a reasonable excuse for not devoting time to the dealing information notice, there were others at PML who could have dealt with this in his absence. They note that Paul Hazell's brothers are also shareholders in the company, and that one of the brothers was a qualified (ACCA) accountant.

85. Even if his brothers were not available (acknowledging that they were engaged in other family businesses), HMRC submitted that there were employees of PML who would have been capable of assisting with the information request. HMRC note in their submissions that in 2012-13, PML employed seven staff, of whom one had a salary in excess of £22,000 and another had a salary in excess of £31,000 (although HMRC provided no evidence to support these submissions, PML's response confirmed that these facts were true). This suggested, according to HMRC, that there were staff that had the capability to deal with or assist with the production of the information and documents requested in the Information Notice.

86. Finally, HMRC assert that between 26 November 2012 (the date of the Information Notice) and 8 March 2013 (the date on which the 16 boxes of documents were received), over 300 companies were incorporated by PML. Between 9 March 2013 and 18 August 2014, HMRC assert that over 1600 companies were incorporated by PML. This shows, they submit, that whether or not a reasonable excuse existed for Paul Hazell, his absence from PML would not appear to have hindered its operations, and this seems at odds with PML's apparent inability to comply with the Information Notice (HMRC recognise that one of the addresses used by PML is in multiple occupancy, so not all of the companies incorporated at that address are necessarily PML's clients, although HMRC believe that they are).

87. PML's response to these submissions is that Paul Hazell's brothers are not engaged in the business of PML, have other business commitments, and would not have been equipped to deal with the requests in the Information Notice.

88. As regards PML's staff, PML submits that the seven staff members have specific training in administration and operations, and none would have been capable of assisting in the production of information and records outside of their control. The two employees with salaries of £22,000+ and £31,000+ were responsible for the day-to-day running of the PML business and standard customer support, and would have no spare time to assist, even if they had the experience to do so. Mr McCloskey submitted that only Paul Hazell had the knowledge, experience and expertise to be able to deal with HMRC's information notice.

89. Finally, as regards the number of company incorporations, Mr McCloskey stated that PML has between 700 and 800 active client companies at any one time. The reason the number of companies had increased was because HMRC was blocking the striking-off of client companies that had ceased trading by the Registrar of Companies – and that a significant number of the companies identified by HMRC were dormant companies that had ceased to trade and which would have been struck-off had HMRC not blocked this.

90. We find that PML did not have a reasonable excuse for its failure to comply with the Information Notice by the extended due date of 8 March 2013 as a result of the accident suffered by Paul Hazell's daughter.

91. Our reasons are as follows. PML had over three months to collate the information required by the Information Notice. On 13 February 2013, Hazell Minshall LLP wrote to Mr Dootson saying that collation of the information and documentation is in hand, and they anticipated sending it to him by first class post on 27 February 2013. Paul Hazell's daughter's accident occurs on 27 February 2013, the day before the submission deadline. At that point, Paul Hazell drops everything in order to get to the hospital to be with his wife and daughter.

92. The point to note is that Mr Hazell managed to get the boxes of documents to HMRC by the extended deadline of 8 March 2013, notwithstanding the accident. The problem was that the boxes did not contain all of the information requested by HMRC.

93. Can the fact that there was information omitted from the boxes be put down to the accident suffered by Mr Hazell's daughter? In other words, absent the accident, would the boxes have been complete? The fact that some of the requested information is still missing as at the date of the hearing – long after the accident - indicates that the answer to this question is "no". We find that it was not the accident that caused information or documents to go missing or delayed their production to HMRC. It therefore follows that the accident could not be a reasonable excuse for the failure by PML to produce all of the documents requested by the extended due date.

94. We also find that the accident could not be a reasonable excuse for the continuing failure by PML to produce the all of the documents. Again we note that documents were still missing as at the date of the hearing, long after the accident. It therefore follows that the accident cannot be a reasonable excuse for the continuing failure by PML to produce these documents. In his witness statement, Paul Hazell says that he was away from the office for several weeks following the accident. We recognise over this period of time, there would have been disruption to PML's business, and even after Paul Hazell returned to the business, there would have continued to be some disruption as he would have to clear a backlog of work that accumulated in his absence. But at some point things would have started to return to normal (or, if not, a responsible trader would have brought in temporary help). At that point he would be able to find and produce the missing documents. But even as late as 30 September 2013 (the last date to which daily penalties were charged), documents continued to be missing. This indicates to us that the accident was not the reason why there continued to be non-compliance with the Information Notice.

95. Further, the Information Notice was served on PML, not Paul Hazell, and the resources of the company would have been available to comply with the notice. There was no evidence before us to support PML's submissions relating to their staff. There is no evidence that the more junior members of staff would not have been able to help with the collation of documents and information within the scope of their own jobs, and the two senior members of staff would not have been able to co-ordinate and supervise the junior members (possibly with the assistance of Hazell Minshall). Although we appreciate that the staff may have had a full workload, given the express threat by HMRC that daily penalties would be charged, we would have expected that the priorities of the staff should have been reallocated to assist with compliance with the Information Notice.

96. However we do not accept HMRC's submissions in relation to Paul Hazell's brothers, as the brothers are merely shareholders in PML, they have no obligations in relation to the management of the business, and they could not be expected to help. The submissions by HMRC relating to the raw number of company incorporations does not assist us in reaching our decision, and was not supported by any evidence.

97. Quite separate from the issue of the accident, we have noted that in relation to PML's response to one of the document requests (for copies of bank mandates), the documents supplied were not the mandates issued by client companies to the bank – and it may be the case that Paul Hazell was confused about precisely what was required. Because the test for a reasonable excuse is not wholly objective, it is possible that Paul Hazell's confusion could give rise to a reasonable excuse. This is because the hypothetical "responsible trader" is deemed to have the experience and other relevant attributes of the taxpayer. However we find that any confusion cannot amount to a reasonable excuse for the default in this case. This is because the confusion related only to one part of the document request, (bank mandates) and did not extend to other documents that were omitted from the documents supplied to HMRC (such as bank statements).

Illness of Richard Hazell

98. Paragraph 45(2)(b) of Schedule 36 provides as follows:

> 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

99. Thus, to the extent that PML relied on Hazell Minshall (and therefore on Richard Hazell), that reliance can only be a reasonable excuse to the extent that PML itself took reasonable care to avoid the failure.

100. But what was it that PML relied upon Hazell Minshall to do? There is very little evidence before us as to how – if at all – PML relied upon Hazell Minshall.

101. It is clear from the correspondence that Hazell Minshall dealt with the correspondence with Mr Dootson, including seeking extensions of time, dealing with disputes about the extent of compliance with the Information Notice, and managing the appeals.

102. As Hazell Minshall wrote to Mr Dootson with the answers to the information part of the Information Notice, it is clear that they must have assisted with the preparation of these answers. But these answers were provided within the relevant time limit.

103. What is unclear from the evidence is the extent to which PML relied upon Hazell Minshall for the preparation and collation of documents to address the provision of documents part of the Information Notice. We know from Paul Hazell's witness statement that on 27 February 2013, he was collating and boxing documents. Following the accident of his daughter, it was Paul Hazell that finished boxing the documents and transporting them to HMRC. The only evidence before us that indicates that Hazell Minshall played any material part in relation to the provision of those documents that were submitted to HMRC on 8 March 2013 is a sentence in Richard Hazell's witness statement that he "had managed to assist [PML] in collating the 16 boxes of information/documentation which were delivered on 8 March 2013, despite my feeling very unwell" – but the extent to which he assisted is not stated, and remains unclear.

104. In submissions, it was stated on behalf of PML that when Mr Dootson indicated that the documents submitted were incomplete, it took PML and Hazell Minshall considerable time to review what had been submitted – particularly given the illness of Richard Hazell, the accident of Paul Hazell's daughter, and the illness of Paul Hazell's wife. We can understand that the sudden collapse of Richard Hazell would have had a serious impact on any review undertaken by Hazell Minshall to determine what documents were missing in the period after 3 May 2013 (we note that there is a conflict in the evidence as to whether Richard Hazell collapsed on 2 May or 3 May – in this regard we prefer the evidence of Richard Hazell himself given in his witness statement).

105. But there is no actual evidence before us that PML relied upon Hazell Minshall to undertake such a review (other than a bare assertions in submissions – which is not evidence). And even if PML had relied upon Hazell Minshall to conduct such a review, that reliance would not be a reasonable excuse unless PML itself took reasonable care to avoid the compliance failure.

106. In submissions, it is asserted on behalf of PML that the information requested in the Information Notice was of a complex and technical nature, and the Information Notice consisted of six pages requesting detailed information and documentation plus six pages setting out what the taxpayer should do if he disagrees with HMRC's decision. PML submits that it would be unusual for a taxpayer not to seek the assistance and advice of its accountants in responding to such a request, as this is a complex and technical area of tax legislation, and as the managed service company legislation was at that time relatively new and untested, it was thought necessary to engage technical support. PML further submits that it took considerable preparation time and required knowledge of the systems, history and experience to identify and collate the information and documents requested.

107. We accept that it was reasonable for PML to have sought professional advice at the time it received the Information Notice, in order to obtain professional help to understand the nature of the obligations imposed by the notice, the consequences of failure to comply with the notice, and PML's rights of appeal. But the Information Notice was issued in November 2012, and the date specified in the notice for compliance was (as subsequently extended) 8 March 2013. Richard Hazell did not collapse until 3 May 2013 – long after these dates.

108. Although the managed service company legislation may be highly technical, we find that knowledge and understanding of this legislation was not needed to answer the questions in the Information Notice, nor to collate and deliver to HMRC the documents specified. The actual questions and lists of documents required by the Information Notice were not couched in excessively technical language, and were capable of being understood by anyone with knowledge of PML's business and systems. We accept that in order to provide this information and these documents, it would have required the input of someone with knowledge and experience of PML's systems and history, but that "someone" could be Paul Hazell (or one of the other senior staff of PML) and did not have to be Richard Hazell.

109. We note that in relation to PML's response to one of the document requests (for copies of bank mandates), the documents supplied were not the mandates issued by client companies to the bank – and it is possible that Paul Hazell was confused about precisely what was required. However, any confusion would have been addressed by Mr Dootson's letters of 15 March 2013 and 2 May 2013 which clarified exactly what was required, and therefore the advice of Hazell Minshall would not have been required to clarify this aspect of the Information Notice.

110. Can the fact that there was information omitted from the boxes be put down to the fact that Richard Hazell was feeling unwell at the end of February and beginning of March 2013? In other words, absent his illness, would the boxes have been

complete? The fact that some of the requested information is still missing as at the date of the hearing – long afterwards - indicates that the answer to this question is "no". We find that it was not Richard Hazell's illness that caused documents to be omitted from the boxes submitted to HMRC. It therefore follows that the illness could not be a reasonable excuse for the failure by PML to produce all of the documents requested by the extended due date.

111. We also find that his illness and subsequent collapse could not be a reasonable excuse for the continuing failure by PML to produce the all of the documents. We find that PML would not have required the advice or assistance of Hazell Minshall to identify, collate and produce the documents that were omitted from the material submitted to HMRC in March 2013. Even if PML had relied upon Hazell Minshall to advise or assist in relation to these documents, the legislation provides that Hazell Minshall's default cannot be a reasonable excuse unless the PML itself took reasonable care to avoid the failure. As the identification, collation and production of these documents could have been undertaken by PML without the need for advice or assistance of Hazell Minshall, the illness and collapse of Richard Hazell cannot give rise to a reasonable excuse for PML's default.

112. HMRC in their submissions state that even taking account of Richard Hazell's illness and collapse, there were other members of the Hazell Minshall team that would have been available to assist PML. HMRC refer to Duncan Joyce, David Bryant, R Rouse and John Hazell.

113. Mr Joyce was a member in Hazell Minshall LLP with Richard Hazell. However, as we stated above, this entity was established to undertake audit work only, and following its first and only audit, it became dormant – well before the matters raised in this appeal.

114. HMRC note that since June 2013, the letterhead of Hazell Minshall refers to three other individuals – David Bryant, R Rouse and John Hazell. In response, PML state that although these three individuals are identified on Hazell Minshall's letterhead, they are not in fact partners in the practice. Mr Bryant has his own practice (Bryant & Co), and only provides advice and services to Hazell Minshall clients relating to the finalisation and approval of statutory accounts and Companies House compliance. Mr R Rouse advises on personal tax returns and had no knowledge or experience to assist PML during Richard Hazell's illness. Finally John Hazell had only recently qualified as a certified accountant and had no experience or knowledge of PML's systems.

115. No evidence was submitted by PML to support the submissions made in relation to Duncan Joyce, David Bryant, R Rouse and John Hazell, but as we have found that Richard Hazell's illness did not give rise to a reasonable excuse in any event, we do not need to reach any conclusion in respect of their ability to assist PML during Richard Hazell's absence due to illness.

Reasonable excuse – conclusions

116. We find that PML did not have any reasonable excuses for its failure to comply with the Information Notice.

Validity

Breadth and timing of information notice

117. Paragraph 1 of Schedule 36 limits the information and documents requested in the Information Notice to those reasonably required for the purpose of checking the taxpayer's tax position. Paragraph 7 of Schedule 36 provides that the information and documents must be produced within such period or at such time as may be reasonably specified in the notice. HMRC recognise that the information sought was voluminous. The questions are whether (a) the request was too broadly drawn; and (b) whether PML was given insufficient time within which to respond. If the answers to either (or both) of those questions is "yes", then the Information Notice does not comply with the requirements of Schedule 36.

118. As regards the breadth of the request, given the nature of the MSC legislation, we find that the information and documents sought was reasonable – and this was never challenged by PML during the course of the enquiry, although it was challenged in the course of the appeal. The analysis of whether a client of PML is a managed service company and whether PML is an MSC Provider depends upon an analysis of the various factors listed in section 61B ITEPA. This inevitably requires a review of the detailed relationship between PML and its client, the financial transactions between PML and the client, and the matters undertaken by PML on behalf of the client. We note that HMRC's request was limited to a sample of twelve of PML's clients, and that PML was invited to provide much of the information in electronic form (but they chose not to do so).

119. The Information Notice was issued on 26 November 2012, with a return date (after the initial extension request) of 28 February 2013 – a period of over three months. This period was further extended by a few days to take account of the accident of Paul Hazell's daughter. We note that although Hazell Minshall objected to the return date initially specified by Mr Dootson, they themselves suggested 28 February 2013 as being a suitable date. On 13 February 2013 they wrote to Mr Dootson confirming that the collation of the required information was in hand, and they did not anticipate any problems in providing the information by 28 February.

120. We find that the information and documents sought were reasonably requested by HMRC, and that PML was given a reasonable amount of time to respond to the Information Notice.

Tax position

121. The Information Notices was issued under paragraph 1 of Schedule 36, which provides that an information notice may be issued "for the purpose of checking the taxpayer's tax position".

122. The taxpayer in this case is PML. "Checking" is defined in paragraph 58 as including "an investigation or enquiry of any kind". "Tax" is defined in paragraph 63 to include income tax and corporation tax. It does not include NICs.

123. HMRC submit that the Information Notice seeks information and documentation about PML's own business, which would assist HMRC in forming a view as to PML's own tax positon. PML submit that HMRC were checking the tax position of PML's clients, and not the tax position of PML.

124. Paragraph 64 of Schedule 36 sets out an extensive definition of "tax position". Although it is set out in full in the Appendix to this decision, we repeat the relevant provisions here:

> **64 Tax position**
>
> (1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards—
>
> (a) past, present and future liability to pay any tax,
>
> (b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and
>
> (c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax,
>
> and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.
>
> (2) References in this Schedule to a person's tax position include, where appropriate, a reference to the person's position as regards any deductions or repayments of tax, or of sums representing tax, that the person is required to make—
>
> (a) under PAYE regulations,
>
> (b) under Chapter 3 of Part 3 of FA 2004 or regulations made under that Chapter (construction industry scheme), or
>
> (c) by or under any other provision of the Taxes Acts.
>
> (2A) References in this Schedule to a person's tax position also include, where appropriate, a reference to the person's position as regards the withholding by the person of another person's PAYE income (as defined in section 683 of ITEPA 2003).
>
> […]

125. The Information Notice states that it was issued to:

> "check the company's Chapter 9 ITEPA 2003 position […] to give proper consideration to the application of the Managed Service Company Legislation."

126. Does this amount to an investigation or enquiry relating to the past, present and future liability of PML to pay any income tax or corporation tax (including amounts that PML is required to pay under PAYE regulations)?

127. The first point to note is that if the managed service company legislation applies, the MSC is treated as making payments of employment income to the worker. The MSC is treated as the employer, and has the duty to account to HMRC for PAYE and NICs in respect of the deemed employment income. The effect of the legislation is that income that would otherwise be trading income of the MSC (liable to corporation tax) is transformed into employment income of the worker (liable to income tax). The tax liability arising under the MSC legislation falls on the worker, and the liability to account for that tax falls on the MSC under PAYE.

128. No liability for either corporation tax or income tax falls upon the MSC Provider, unless the MSC does not account to HMRC for the PAYE and NICs due, and then only in limited circumstances.

129. "PAYE debt" is defined in regulation 97B. An MSC has a PAYE debt if it must pay an amount of tax for a period, and one of a number of conditions is satisfied. The conditions require HMRC to have made a determination under regulation 80 or to serve on the "employer" (in this case the MSC) a notice or certificate stating the amount of tax due, and for any part of that tax to remain unpaid for at least 14 days after service of the determination, notice or certificate.

130. Regulation 97C of the Income Tax (Pay as You Earn) Regulations 2003 (SI 2003/2682) applies if an MSC has a relevant PAYE debt, and an officer of HMRC is satisfied that the MSC's liability to account for PAYE is irrecoverable within a reasonable period.

131. In such circumstances, HMRC can issue a direction authorising the recovery of the PAYE owed from the various persons listed in section 688A(2) ITEPA, which includes the MSC Provider. On making the direction, those persons become jointly and severally liable for the PAYE owed. But HMRC may not recover the PAYE from any of those persons until they have served a "transfer notice" on that person. The transferred liability does not change its character, and continues to be "income tax".

132. Thus PML has no liability to for any tax under the MSC legislation unless (i) it is an MSC Provider in respect to an MSC; (ii) the MSC has a relevant PAYE debt which is unpaid for at least 14 days after service of a notice (or other specified document) on the MSC; (iii) an officer of HMRC is satisfied that the liability of that MSC to account for PAYE is irrecoverable within a reasonable period; (iv) HMRC has issued a direction under Regulation 97C; and (v) a transfer notice in respect of that liability has been served on PML.

133. In their submissions, HMRC acknowledge that the primary obligation to account for tax under the MSC legislation falls on the MSC. Indeed the MSC itself has a PAYE debt, evidenced by a PAYE determination under Regulation 80 which has been served on the MSC (or HMRC must have served one of the other notices or

documents specified in Regulation 97B). However, HMRC submit that the documents sought by the information notice were necessary to establish whether PML is an MSC Provider, and hence whether clients of PML are MSCs. In addition, the fact that PML might have a liability to account for the PAYE under Regulation 97C is sufficient for it to have a "tax position". In particular HMRC refer to paragraph 64(1)(b), which refers to "… other amounts that … may be payable by … the person in connection with any tax".

134. HMRC also submit that it is likely that PML's clients are unlikely to be able to pay the tax and NICs due, and that the debt transfer provisions in regulation 97C are likely to be invoked to transfer liabilities to PML to the extent that they are not met by the MSCs. HMRC's operational guidance suggests a timescale of three months before a transfer of debt would take place, and at that point PML would have an actual rather than a contingent tax liability. HMRC's intention would be to issue transfer notices to persons in categories 1 and 2 of section 688A(2). Therefore the officers of the MSC, the MSC Provider (PML), and the officers and associates of the MSC Provider, would all receive joint and several debt transfer notices.

135. HMRC submit that Mr McCloskey conceded at the hearing that this was likely, although our notes of the hearing do not record any concession by Mr McCloskey of this nature.

136. HMRC submit that because PML may have a tax position in the future, it has a present tax position, and that tax position may arise in a short timescale once the original debts of the MSC become final and conclusive. HMRC submit that this prospect is not too remote to prevent an information notice being issued under paragraph 1 of Schedule 36. HMRC submit that Schedule 36 does not require a future tax liability to exist at the time the notice is issued, for the notice to be valid.

137. Even if it subsequently transpires as a result of HMRC's enquiries that PML is not an MSC provider (and therefore does not have a "tax position"), HMRC submit that the information notice under paragraph 1 remains valid, as there was a reasonable possibility of there being a tax position at the time the notice was issued. This is no different from HMRC enquiring into the need of a business to be VAT registered, but finding that it does not need to be. The final factual outcome, according to HMRC, cannot affect whether there is a current tax position allowing those facts to be the subject of an information notice.

138. HMRC say that their submissions are supported by the facts relating to the information sought in connection with various bank accounts. HMRC sought to obtain bank details on the basis of mandates signed by directors of PML's clients. However the banks have resisted giving any information on the basis that the directors are not signatories on the accounts, and that they accounts are not "styled" in the client's name. HMRC submit that the reality is that the accounts are under the control of PML, and the resistance of banks to providing information supports HMRC's contention that the documents sought are PML's and not the client's.

139. Further, HMRC specified in the Information Notice that it also required PML's bank statements, this was to determine how PML charged fees to test the application of s61B(1)(a). HMRC submit that these could not have been obtained through a third-party notice.

140. We disagree with HMRC's submissions for the following reasons.

141. First, it appears to us that the circumstances of this case would more properly be addressed through a third party notice issued under paragraph 2 of Schedule 36. If the MSC legislation applies, the primary obligation to account for tax falls on PML's clients – in relation to whom PML stands as a third party. An MSC Provider does not have any liability to account for income tax in respect of fees earned by is clients. A liability can only arise in the hands of the MSC Provider in the event that an MSC defaults in the obligations that it owes HMRC, and then the MSC Provider may have a secondary liability for those obligations. By seeking notices under paragraph 2, the rights of the MSC's would have been respected for the reasons we give below.

142. Second, we consider that the potential liability of PML to account for tax under the MSC legislation is too remote to fall within sub-paragraph (a) of paragraph 64. At the time the notice was issued, there was no past or present liability for PML to account for tax, as no notice under Regulation 97C had been issued. Nor is there any future liability for PML to account for tax unless and until (i) it is determined that it is an MSC provider in respect to an MSC; (ii) the MSC has a liability to account for PAYE; (iii) that liability becomes a relevant PAYE debt by virtue of the service of a Regulation 80 determination (or other specified notice or document) on the MSC by HMRC; (iv) the PAYE debt remains unpaid for at least 14 days after service of the determination notice (or other specified document) on the MSC (v) an officer of HMRC is satisfied that the liability of that MSC to account for PAYE is irrecoverable within a reasonable period; (vi) HMRC has issued a direction under Regulation 97C; and (vii) a transfer notice in respect of that liability has been served on PML. Although there may be a liability if all of these contingencies have been satisfied, they do all need to be satisfied for a liability to fall on PML. We consider given the existence of these contingencies – that on the basis of the facts and circumstances in existence on 26 November 2012 (the date of the Information Notice), there was no future liability of PML to account for any tax.

143. HMRC's submission, that paragraph 1 of Schedule 36 does not require a future tax position to exist, is misconceived. "Tax position" as defined by the legislation does not mean tax liability. And it is of course perfectly proper for HMRC to enquire into a person's tax position, but to find that the person has no liability to pay any tax. But the circumstances here are different. The person with the "tax position" is the MSC (or possibly the individual whose services are provided through the MSC). PML has no "tax position" unless and until a transfer notice is given. If HMRC want to determine whether PML stands in the relationship of MSC Provider to any of its clients, they can do so by enquiring into the tax position of that client.

144. Nor do we accept that the resistance by banks to providing information illustrates that a paragraph 1 taxpayer notice is appropriate. This information could

have been obtained by use of a paragraph 2 third party notice. We are also consider that it would be possible to require PML to provide copies of its own bank statements under a third party notice, if it could be show that the statements were required for the purpose determining whether PML stood in the position of an MSC Provider to a particular client.

145. Nor do we consider that the reference to "other amounts" that may be payable in paragraph 64(1)(b) assists HMRC. The provision refers to "penalties and other amounts …" and so "other amounts" has to be construed *ejusdem generis*. The reference cannot be to the underlying liability to the tax itself, as that is covered by sub-paragraph (a). We find that sub-paragraph (b) relates to amounts due (or repayable) that are in addition to the underlying tax liability. This could include, for example, surcharges, repayment supplements and interest.

146. Finally, we would distinguish the position of PML as an MSC Provider from an employer with a liability to account for income tax under PAYE. In the case of an employer, it has an actual liability to account for income tax in respect of (for example) remuneration paid to its employees. An MSC Provider does not have any liability to account for income tax in respect of fees earned by is clients. A liability can only arise in the event that an MSC defaults in the obligations that it owes HMRC, and then the MSC Provider may have a secondary liability for those obligations.

147. We therefore find that the Information Notice did not meet the requirements of paragraph 1 of Schedule 36, as it did not relate to the tax position of PML.

Article 8, European Convention.

Background

148. Article 8 of the European Convention provides that—

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

149. Article 8 protects the right to four distinct interests: a person's private life, family life, home and correspondence. Of relevance to this appeal is the right to respect for private life. In this context "private life" is not limited to personal matters, but extends to a right to privacy in a person's professional and business life (see *Funke v France* (1993) 16 EHRR 297 and *Amann v Switzerland* (16/2/2000) ECHR 27798/95).

150. The right under Article 8(1) is qualified by Article 8(2). Public authorities (which includes HMRC) may interfere with the right under Article 8 only where they can show that the interference—

(1) has a legitimate aim;

(2) is "in accordance with the law"; and

(3) is "necessary in a democratic society".

151. To be a legitimate aim, the interference must be aimed at protecting one of the interests listed in Article 8(2). The decisions of the UK courts show that notices under Schedule 36 (and the predecessor provisions in s20 and s19A TMA) which require the disclosure of private and confidential information, constitute a *prima facie* breach of Article 8(1), but that the interference is generally justified under Article 8(2) for protecting the taxation system and revenue of this country – in other words, the interference in question has as its aim either preventing crime (such as tax fraud) or protecting the economic well-being of the country.

152. The wording "in accordance with the law" requires the existence of adequate and effective safeguards against abuse of the measure. The European Court of Human Rights, has indicated, in the context of searches of premises that mere statutory authority for actions that impinge upon the rights protected by Article 8 is insufficient; there must be sufficient procedural safeguards (such as external judicial control) to ensure that the interference is adequately supervised in place (see *Huvig v France* (1990) 12 EHRR 528 and *Kruslin v France* (1990) 12 EHRR 547).

153. Determining whether the measure is "necessary in a democratic society" requires the supervisory court to carry out a balancing act between the societal need for the interference and the individual's right to respect for his private life under Article 8.

154. The particular interference also must be proportionate to the legitimate aim that is being pursued. In *Handyside v UK* (1976) 1 EHRR 737, the European Court of Human Rights reasoned (at 753–754) that because democracy required "pluralism, tolerance and broad-mindedness", a restriction could not be necessary in a democratic society unless it was "proportionate to the legitimate aim pursued". Proportionality is an important aspect of the "necessity" test - this requirement is unlikely to be met unless the interference bears as least onerously as possible as is consistent with achieving the purpose of the interference.

155. These issues have been addressed in the UK courts in a number of cases. In *Re an Application by Revenue and Customs Commissioners to serve section 20 Notice* ([2006] STC (SCD) 71 at 78), HMRC applied *ex parte* for consent to serve a notice under s20(8A) TMA on a financial institution to obtain information in relation to individuals with a UK address and a non-UK bank account. The Special Commissioner said that the *ex parte* procedure under s20 compared favourably to other *ex parte* procedures for obtaining a search warrant. He noted that in *Funke v France*, the European Court of Human Rights' objection was not to the French customs officers' powers of search and seizure as such, but the lack of safeguards

against abuse of their power, and concluded by saying that he believed that the European Court of Human Rights would approve of the *ex parte* procedure as being proportionate, particularly given that the financial institution had been able to raise legal arguments in writing for him to consider. Consent was given to the issuance of the notice.

156. *R (on the application of Cooke) v Revenue and Customs Commissioners* [2008] STC 1847 concerned a solicitor who received a notice under s20(3) TMA that required information to be provided in relation to a taxpayer's affairs. The solicitor argued that Article 8 required that, when a s 20(3) notice was given by the Board of Inland Revenue, the same safeguards (and, in particular, the requirement that either a General or Special Commissioner had consented to the issuance of the notice) had to apply as if the notice had been given by an inspector. Munby J rejected the argument, saying that there was nothing in the jurisprudence of the European Court of Human Rights to suggest that prior judicial approval is necessarily required in the case of interference with the rights protected by Article 8 and that any need for judicial scrutiny is adequately met by the availability of judicial review. However, Munby J stated that his decision was subject to a number of important qualifications regarding the practical availability of judicial review as a remedy. At paragraph [57] of his decision he analyses the difference between notices given under s20(3) TMA and searches conducted under s20C:

> [57] There are, as it seems to me, two obvious and important differences between a notice given under s20(3) and a search conducted under s20C. In the first place, a search under s20C is more intrusive, very much more intrusive, than a notice under s20(3). Secondly, and in the nature of things, there is not the same ability for the victim of the commissioners' attentions under s 20C to seek a pre-emptive judicial remedy as there is in the case of the recipient of a s20(3) notice. In practical terms it will be difficult, if not impossible, for someone presented with a search warrant to apply to a judge before the warrant is executed. In contrast, and as the present case illustrates, there is no difficulty in the recipient of a notice applying to a judge for relief and, if the relief sought is judicial review, doing so before the stipulated time for compliance. (For this reason I am less impressed with the argument that the ability to defend subsequent enforcement proceedings provides an adequate safeguard.)

157. He further considers this point at paragraphs [60] onwards

> [63] The other matter relates to the availability of judicial review. If it is to be the important safeguard which, as it seems to me, is needed in circumstances where, because the notice under s20(3) is being given by the Board rather than by an inspector, there is lacking the safeguard of prior judicial approval by a General or Special Commissioner, then judicial review has to be an effective remedy. And it is unlikely to be an effective remedy, and unlikely to be a remedy meeting the standards mandated by art 8, unless there is proper scope for an appropriate degree of judicial examination and evaluation of the reasons why the commissioners have decided to exercise their powers in the particular case. The function of the judge on a judicial review is, of course, one

> of review, but the intensity of the review will vary with the context and the circumstances. Where the Convention is engaged, context is everything.

Corporations

158. Whilst it is clear that the business premises of an individual will be protected under the "home" head of Article 8, the question whether Article 8 protection extends to non-natural persons, such as corporations, has not been conclusively determined by the European Court of Human Rights. In *Hoechst AG v EC Commission* ([1989] ECR 2589), the European Court of Justice held that the company was not entitled to the right to the inviolability of the home under Article 8. The decision in *Hoechst* was examined by the European Court of Human Rights in *Niemietz v Germany* (1992) 16 EHRR 97 in relation to the search of a lawyer's office, but was not followed; and the European Court of Human Rights held that the search violated the applicant's right to respect for his home and correspondence. In *Roquette Freres SA v Directeur General de la Concurrence, de la Consummation et de la Repression des Fraudes* (Case C-94/00 [2003] 4 CMLR 1), the European Court of Justice indicated that corporations are entitled to limited protection under Article 8. The issue of whether corporations may rely on the right under Article 8 has been considered by the UK courts. *R v A Special Commissioner ex parte Morgan Grenfell & Co Ltd* 74 TC 511 considered whether legal professional privilege trumped the disclosure obligations under a section 20 TMA notice. One of the points in issue in the proceedings was the rights of the parties under Article 8. Although the House of Lords eventually decided the appeal on other grounds, there appears to have been an assumption that relevant parties (all corporations) did have rights under Article 8. In *R v Broadcasting Standards Commission* [2001] QB 885, the Court of Appeal held that the corporation in question did have a right to privacy under the relevant domestic legislation (ss 110 and 111, Broadcasting Act 1996), but considered that the European Court of Human Rights case law was not decisive as to the approach to be taken to Article 8 with regard to corporations. Lord Woolf MR said, at para 33, that, as a matter of UK law, a "company does have activities of a private nature which need protection from unwarranted intrusion". In *Cantabrica Coach Holdings Limited v Vehicle Inspectorate* [2001] 1 WLR 228., the company claimed that removal of tachograph records by a senior traffic examiner of the vehicle inspectorate breached its right to privacy under Article 8, but the House of Lords declined to express any view on this point.

159. We find that corporations should be entitled to protection under Article 8 in respect of notices issued under Schedule 36.

The rights of PML

160. As regards PML, HMRC submit that the Information Notice was proportionate to the underlying need and necessary for the economic wellbeing of the UK. We agree, and PML's arguments as regards Article 8 were not in respect of its own rights.

161. We find that the Information Notice did not breach any of PML's rights under Article 8.

The rights of PML's clients

162. As regards PML's clients, HMRC submit that they are not the focus of the Information Notice, and the mere fact that the information and documents required might be relevant to the tax affairs of PML's clients does not make them "taxpayers" for the purposes of either paragraph 1 or 2 of Schedule 36. Accordingly, HMRC submit, it is not appropriate to consider the rights of PML's clients in respect of the Information Notice.

163. HMRC note that third party information is routinely provided by taxpayers fulfilling their statutory duties, for example every VAT sales invoice provided by taxpayers to HMRC contains the name and address of a third party (the customer). It would be disproportionate and impossible in practice for HMRC to apply for third party notices every time the details of a third party was disclosed to HMRC.

164. HMRC submit that to require a third party notice to be obtained in these circumstances is unlawful, unnecessary and unworkable. Unlawful because HMRC can only seek a third party notice to obtain information about "another person", and in this case is was seeking information about PML. Unnecessary because the information obtained in limited to that reasonably required for establishing the tax position of a particular person at a particular time. Unworkable because HMRC requires and handles documents relating to one party that may contain information about third parties. It would be impossible for HMRC to identify the third parties in all cases.

165. HMRC also note that PML potentially had over 6000 clients, although this submission was not supported by any evidence. Indeed PML's submission was that had between 700 and 800 clients at any one time (and the only reason that it currently had more, was because HMRC were objecting to former clients (now dormant) from being struck of by the Registrar of Companies).

166. In our view, these submissions miss the point. PML's clients have rights to privacy under Article 8, irrespective of whether they are a "taxpayer" for the purposes of Schedule 36. For these purposes we have to consider the rights not only of PML's corporate clients (the companies whose status as MSCs was being considered by HMRC), but also the individuals whose services were being provided through those companies – and who would have a liability to PAYE income tax if the company was an MSC. We find that both the company and the individual are entitled to the protection of Article 8.

167. The question we have to consider is whether the Information Notice breached their rights under Article 8. In particular, was the notice issued "in accordance with the law"? It is not in question that the Information Notice was issued in accordance with the procedural requirements of Schedule 36 as regards taxpayer notices. But Article 8 requires the existence of adequate and effective safeguards against abuse of the measure. As discussed above, mere statutory authority for actions that impinge upon the rights protected by Article 8 is insufficient; there must be sufficient procedural safeguards in place (such as external judicial control) to ensure that the interference is adequately supervised. Although in Munby J found in *R (oao Cooke) v*

Revenue and Customs Commissioners that the need for judicial scrutiny was adequately met by the availability of judicial review, his decision was subject to important qualifications. In particular, absent prior judicial approval of the notice by a General or Special Commissioner, for judicial review to be an effective remedy, there has to be proper scope of an appropriate degree of judicial examination. We find that this must mean that the person whose Article 8 rights are in question must be made aware of the information notice, so that he can bring judicial review proceedings. If that person is unaware of the notice, judicial review is not an effective remedy, as it cannot be effectively exercised.

168. In this case, the Information Notice extends to documents and information relating to clients of PML – both companies and individuals. We find that the notice interferes with their rights under Article 8. We find that the notice was not "issued in accordance with the law" for the purposes of Article 8, as there are insufficient procedural safeguards (such as external judicial control) to ensure that the interference of their rights was adequately supervised. In particular, HMRC did not seek the prior approval of this Tribunal to the issue of the notice, and judicial review does not provide an effective remedy, as the PML clients were unaware of the notice, and were therefore in no position to bring judicial review proceedings.

169. We distinguish between circumstances where (i) information provided to HMRC contains details relating to third parties (where the third parties are not the subject of HMRC's enquiry); and (ii) the third party is in fact the object of the enquiry. This is not a case where information provided by PML happens to contain information about its clients. Rather, its clients were the object of the enquiry. If HMRC were correct about the status of PML's clients as MSCs (and that PML was an MSC Provider in relation to them), then HMRC's first step in enforcing any tax liability would be to issue determinations (or other notices) in respect of PAYE against those clients (and not against PML).

170. This is also in contrast to the position in relation to standard PAYE enquiries, where the obligation to deduct and account for PAYE falls upon the employer rather than the employee. So to the extent that information notices are required, a paragraph 1 notice can properly be served on the employer, as it is the employer that is the object of the enquiry, as it has the obligation to account for tax (and would be the subject of a Regulation 80 determination).

171. We also are not persuaded that the fact that PML has potentially 6000 clients makes the issue of third party notices under paragraph 2 impractical. Paragraph 5 of Schedule 36 makes provision for the obtaining of information notices in relation to a class of persons whose individual identities are not known. Indeed we note that in this case, the Information Notice did not seek documents relating to every one of PML's clients, but only to a sample.

172. We therefore find that the Information Notice was issued in breach of the rights of PML's clients (companies and individuals) under Article 8.

173. In this context, we note that had HMRC sought a third party notice under either paragraph 2 or 5 of Schedule 36, our decision may have been very different, as the procedure would have provided safeguards for PML's clients – in particular the notice would have been subject to the prior approval of this Tribunal. In respect of paragraph 2 notices, the clients would normally have had prior notice of the intention of HMRC to apply for a notice, and, in practice, would also have the opportunity of making representations to this Tribunal before the notice was issued (see for example *Revenue & Customs Commissioners ex parte certain taxpayers* [2012] UKFTT 765 (TC)).

174. We have also considered Article 6 (right to a fair trial) and Article 1 to the First Protocol (right to peaceful enjoyment of possessions), and we agree with HMRC's submissions that none of these provisions are engaged in this case. We note that PML made no submissions in relation to these provisions.

Human Rights Act 1998

175. Section 3(1) HRA 1998 provides that:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

176. The meaning of this provision was considered by the House of Lords in the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. Although Lord Millett gave a dissenting speech, a clear majority of their Lordships gave an expansive meaning to the application of this provision.

177. We have already found that the Information Notice did not comply with the requirements of paragraph 1 of Schedule 36, as the documents and information sought by the notice did not concern the tax position of PML. However if we are wrong in this regard, and the notice did concern the tax position of PML, we would find that the notice also concerned the tax position of PML's clients (both the companies, and the individuals working for them). Thus HMRC would have been able to apply for an information notice under paragraph 2 or 5 of Schedule 36. Given our finding that a taxpayer notice issued to PML under paragraph 1 breached the Article 8 rights of PML's clients, we need to address how Schedule 36 should be interpreted in the light of the requirements of section 3(1) HRA. We find that in circumstances where a taxpayer notice under paragraph 1 would breach the rights of a person (other than the "taxpayer") under Article 8, and that breach would not arise if an information notice was obtained under either paragraph 2 or 5, then HMRC must seek an information notice under paragraph 2 or 5, and not a taxpayer notice under paragraph 1. Thus, even if the documents and information sought by the notice did relate to the tax position of PML, we would have found that the notice was unlawful, as HMRC should have applied for an information notice under paragraph 2 or 5.

178. Section 6(1), HRA renders it unlawful for public authorities (such as HMRC) to act in a way which is incompatible with a Convention right. By obtaining a taxpayer notice under paragraph 1 of Schedule 36, they breached the Article 8 rights of PML's

clients, and therefore acted unlawfully. Section 6(2) provides no defence to HMRC, as they could have acted differently, by seeking an information notice under paragraph 2 or 5 of Schedule 36. Under section 7, HRA, PML may rely on Convention rights in any legal proceedings.

Challenge in penalty proceedings

179. Can the validity of the Information Notice be challenged in this appeal?

180. HMRC submit that any challenge to the validity of the Information Notice can only be made in an appeal under paragraph 29 of Schedule 36. The time limit for making such an appeal is limited by paragraph 32(1)(b), which provides that notice of appeal must be given within 30 days of the issue of the notice (subject to provisions for late appeals with the consent of HMRC or this Tribunal under section 49 TMA). HMRC submit that if PML wish to challenge the validity of the Information Notice, they should now submit a late appeal in accordance with the requirements of s49 TMA. HMRC will consider the late appeal, and if HMRC should decide not to accept it, PML would have the right to refer the matter to this Tribunal.

181. We disagree with HMRC's submissions. This is an appeal by PML against penalties, and the onus of proof is on HMRC to demonstrate that the penalties have been assessed in accordance with the law. If PML can show that the Information Notice to which the penalties relate was not valid, it follows that the penalties are also invalid, and the appeal must succeed.

Ancillary matters – return of documents and no reliance

182. HMRC in their written submissions have informed the Tribunal that since the hearing they have taken other actions in respect of PML. We have had no evidence in this respect, and have not taken this information into account in reaching our decision.

183. As we have found that the Information Notice was invalid, it follows that HMRC are in possession of documents and information to which they are not entitled. Save to the extent that they lawfully have these documents otherwise than pursuant to the Information Notice, they must therefore return the documents (and any copies they may have made) to PML, and cannot rely upon them.

184. However we recognise that HMRC may now wish to apply under paragraph 2 or 5 of Schedule 36 for the same documents and information. There are procedural requirements with which HMRC would need to comply, and the requirements include an application to this Tribunal. Should HMRC make such an application within a reasonable time of the release of this decision, then we would understand why HMRC might retain the documents and information, pending the decision of the Tribunal to grant the third party notice. However, in the interim HMRC could not rely upon or use the information obtained by the Information Notice.

185. We note that this Tribunal does not have any power to require HMRC to return documents, and in the event that HMRC should fail to do so, PML would need to

pursue its remedy either by judicial review in the High Court (which could be transferred to the Upper Tribunal), or through the Revenue Adjudicator.

Conclusions

186. We find that PML had not complied with the Information Notice, and its default continued until at least 30 September 2013 (the date to which the last daily penalty notice relates).

187. We find that any appeal against the Information Notice was settled prior to the hearing of this appeal.

188. We find that PML had no reasonable excuse for its failure to comply with the Information Notice.

189. We find that the information and documents sought by the Information Notice were reasonably required, and that PML was given a reasonable period of time in which to comply with the Information Notice.

190. We find that the Information Notice did not comply with the requirements of paragraph 1 of Schedule 36, as it did not relate to the tax position of PML, but rather to the tax position of its clients. If we are wrong in this conclusion, we find that the Information Notice breached the rights of PML's clients under Article 8 of the European Convention, and that HMRC should have applied for an information notice under paragraph 2 or 5 of Schedule 36. We therefore find that the Information Notice is therefore invalid.

191. As the Information Notice is invalid, we find no penalties can arise for any non-compliance.

192. We find that as the validity of the Information Notice is fundamental to the question of the lawfulness of the penalties under appeal, it is in order for PML to raise the issue of the validity in this appeal, and there is no requirement that they apply to make a late appeal against the Information Notice itself.

193. PML's appeal therefore succeeds.

194. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE
RELEASE DATE: 10 SEPTEMBER 2015

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 9 September 2015

Cases considered by the Tribunal, but not referred to in this decision:

R v IRC ex parte Banque Internationale à Luxembourg SA [2000] STC 708
Guyer v Walton [2001] STC (SCD) 75
Tamosius v UK [2002] STC 1307
In Re an Application by Revenue and Customs Commissioners to serve 308 Notices under Para 5 of Sch 36 to the Finance Act 2008 [2009] UKFTT 224
R v Inland Revenue Commissioners, ex parte Davis Frankel & Mead (a firm) [2000] STC 595
Gould & anor (t/a Garry's Private Hire) v Revenue and Customs Commissioners [2007] STC (SCD) 502
Ravon and Others v France (application no 18497/03) ECtHR

APPENDIX

Taxes Management Act 1970

49D Notifying appeal to the tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Subsections (2) and (3) do not apply in a case where—

(a) HMRC have given a notification of their view of the matter in question under section 49B, or

(b) HMRC have given a notification under section 49C in relation to the matter in question.

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H.

54 Settling of appeals by agreement

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the [tribunal]1, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the [tribunal]1 had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

[…]

(3) Where an agreement is not in writing—

(a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and

(b) the references in the said preceding provisions to the time when the agreement was come to shall be construed as references to the time of the giving of the said notice of confirmation.

[…]

(5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal.

Chapter 9, Part 2, Income Tax (Earnings and Pensions) Act 2003

61B Meaning of "managed service company"

(1) A company is a "managed service company" if—

(a) its business consists wholly or mainly of providing (directly or indirectly) the services of an individual to other persons,

(b) payments are made (directly or indirectly) to the individual (or associates of the individual) of an amount equal to the greater part or all of the consideration for the provision of the services,

(c) the way in which those payments are made would result in the individual (or associates) receiving payments of an amount (net of tax and national insurance) exceeding that which would be received (net of tax and national insurance) if every payment in respect of the services were employment income of the individual, and

(d) a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals ("an MSC provider") is involved with the company.

(2) An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider—

(a) benefits financially on an ongoing basis from the provision of the services of the individual,

(b) influences or controls the provision of those services,

(c) influences or controls the way in which payments to the individual (or associates of the individual) are made,

(d) influences or controls the company's finances or any of its activities, or

(e) gives or promotes an undertaking to make good any tax loss.

(3) A person does not fall within subsection (1)(d) merely by virtue of providing legal or accountancy services in a professional capacity.

(4) A person does not fall within subsection (1)(d) merely by virtue of carrying on a business consisting only of placing individuals with persons who wish to obtain their services (including by contracting with companies which provide their services).

(5) Subsection (4) does not apply if the person or an associate of the person—

(a) does anything within subsection (2)(c) or (e), or

(b) does anything within subsection (2)(d) other than influencing the company's finances or activities by doing anything within subsection (2)(b).

61C Section 61B: supplementary

(1) The Treasury may by order provide that persons of a prescribed description do not fall within section 61B(1)(d).

(2) An order under subsection (1) may be made so as to have effect in relation to the whole of the tax year in which it is made.

(3) In section 61B and this section, "company" means a body corporate or partnership.

(4) References in section 61B to an associate of a person ("P") include a person who, for the purpose of securing that the individual's services are provided by a company, acts in concert with P (or with P and other persons).

(5) In section 61B(2)(e), "undertaking to make good any tax loss" means an undertaking (in any terms) to make good (in whole or in part, and by any means) any cost to the individual or an associate of the individual resulting from a relevant provision, or a particular kind of relevant provision, applying in relation to payments made to the individual or associate.

(6) In subsection (5) "relevant provision" means—

(a) a provision of the Tax Acts,

(b) an enactment relating to national insurance, or

(c) a provision of subordinate legislation made under any such provision or enactment.

61D Worker treated as receiving earnings from employment

(1) This section applies if—

(a) the services of an individual ("the worker") are provided (directly or indirectly) by a managed service company ("the MSC"),

(b) the worker, or an associate of the worker, receives (from any person) a payment or benefit which can reasonably be taken to be in respect of the services, and

(c) the payment or benefit is not earnings (within Chapter 1 of Part 3) received by the worker directly from the MSC.

(2) The MSC is treated as making to the worker, and the worker is treated as receiving, a payment which is to be treated as earnings from an employment ("the deemed employment payment").

(3) The deemed employment payment is treated as made at the time the payment or benefit mentioned in subsection (1)(b) is received.

(4) In this Chapter—

"the worker" has the meaning given by subsection (1),

"the relevant services" means the services mentioned in that subsection, and

"the client" means the person to whom the relevant services are provided.

(5) Section 61F supplements this section.

[…]

688A Managed service companies: recovery from other persons

(1) PAYE regulations may make provision authorising the recovery from a person within subsection (2) of any amount that an officer of Revenue and Customs considers should have been deducted by a managed service company ("the MSC") from a payment of, or on account of, PAYE income of an individual.

(2) The persons are—

(a) a director or other office-holder, or an associate, of the MSC,

(b) an MSC provider,

(c) a person who (directly or indirectly) has encouraged or been actively involved in the provision by the MSC of the services of the individual, and

(d) a director or other office-holder, or an associate, of a person (other than an individual) who is within paragraph (b) or (c).

(3) A person does not fall within subsection (2)(c) merely by virtue of—

(a) providing legal or accountancy advice in a professional capacity, or

(b) placing the individual with persons who wish to obtain the services of the individual (including by contracting with the MSC for the provision of those services).

(4) The supplementary provision that may be made by the regulations includes provision as to the liability of one person within subsection (2) to another such person.

(5) In this section—

"associate" has the meaning given by section 61I,

"director" has the meaning given by section 67,

"managed service company" has the meaning given by section 61B, and

"MSC provider" means an MSC provider who is involved with the MSC (within the meaning of section 61B).

(6) Section 61C(4) (extended meaning of "associate") applies for the purposes of subsection (2)(d).

(7) The Treasury may by order amend this section (but not this subsection or subsection (8)).

(8) The Treasury must not make an order under subsection (7) unless a draft of it has been laid before and approved by a resolution of the House of Commons.

97B Relevant PAYE debts of managed service companies

(1) A managed service company has a relevant PAYE debt if—

(a) a managed service company must pay an amount of tax for a qualifying period, and

(b) one of conditions A to E is met.

(2) Condition A is met if—

(a) an amount of tax for a qualifying period has been determined in accordance with regulation 80 (determination of unpaid tax and appeal against determination), and

(b) any part of the tax determined has not been paid within 14 days from the date on which the determination became final and conclusive.

(2A) Condition A2 is met if—

(a) HMRC serve a notice on an employer under regulation 75A(5) (power of HMRC to issue a notice and certificate in cases where regulation 67B or 67D returns are not made, etc) requiring payment of the amount of tax they consider the employer is liable to pay, and

(b) any part of that amount remains unpaid at the end of a period of 14 days beginning with the date on which the notice is prepared.

(3) Condition B is met if—

(a) an employer delivers a return under regulation 73 (annual return of relevant payments) for the tax year 2007–08, or any later tax year, showing an amount of total net tax deducted by the employer for that tax year,

(b) HM Revenue and Customs prepare a certificate under regulation 76 (certificate if tax in regulation 73 return is unpaid) showing how much of that amount remains unpaid, and

(c) any part of that amount remains unpaid at the end of a period of 14 days beginning with the date on which the certificate is prepared.

(4) Condition C is met if—

(a) HM Revenue and Customs prepare a certificate under regulation 77(6) (return and certificate if tax may be unpaid) showing an amount of tax which the employer is liable to pay for a qualifying period, and

(b) any part of that amount remains unpaid at the end of a period of 14 days beginning with the date on which the certificate is prepared.

(5) Condition D is met if—

(a) HM Revenue and Customs serve notice on an employer under regulation 78(4) (notice and certificate if tax may be unpaid) requiring payment of the amount of tax which they consider the employer is liable to pay, and

(b) any part of that amount remains unpaid at the end of a period of 14 days beginning with the date on which the notice is prepared.

(6) Condition E is met if—

(a) HM Revenue and Customs prepare a certificate under regulation 79(2) (certificate after inspection of PAYE records) showing an amount of tax which it appears that the employer is liable to pay for a qualifying period,

(b) HM Revenue and Customs make a written demand for payment of that amount of tax, and

(c) any part of that amount remains unpaid at the end of a period of 14 days beginning with the date on which the written demand for payment is made.

97C Transfer of debt of managed service company

(1) This regulation applies if—

(a) a managed service company has a relevant PAYE debt, and

(b) an officer of Revenue and Customs is of the opinion that the relevant PAYE debt or a part of the relevant PAYE debt (the "specified amount") is irrecoverable from the managed service company within a reasonable period.

(2) HM Revenue and Customs may make a direction authorising the recovery of the specified amount from the persons specified in section 688A(2) (managed service companies: recovery from other persons).

(3) Upon the making of a direction under paragraph (2), the persons specified in section 688A(2) become jointly and severally liable for the relevant PAYE debt, but subject to what follows.

(4) HM Revenue and Customs may not recover the specified amount from any person in accordance with a direction made under paragraph (2) until they have served a notice (a "transfer notice") on the person in question (the "transferee").

(5) If an officer of Revenue and Customs is of the opinion that it is appropriate to do so, HM Revenue and Customs may accept an amount less than the specified amount (the "lower amount") from a transferee; but this acceptance shall not prejudice the recovery of the specified amount from any other transferee.

(6) HM Revenue and Customs may not serve a transfer notice on a person mentioned in section 688A(2)(c), or on a paragraph (c) associate, if the relevant PAYE debt is incurred before 6th January 2008.

(7) HM Revenue and Customs may not serve a transfer notice on a person mentioned in section 688A(2)(c), or on a paragraph (c) associate, unless an officer of Revenue and Customs certifies that, in his opinion, it is impracticable to recover the specified amount from persons mentioned in paragraphs (a) and (b) of section 688A(2) and from paragraph (b) associates.

(8) In determining, for the purposes of paragraph (7), whether it is impracticable to recover the specified amount from persons mentioned in paragraphs (a) and (b) of section 688A(2) and from paragraph (b) associates, the officer of Revenue and Customs may have regard to all managed service companies in relation to which a person is a person mentioned in paragraph (a) or (b) of section 688A(2) or a paragraph (b) associate.

(9) In determining which of the persons mentioned in section 688A(2)(c) and which of the paragraph (c) associates are to be served with transfer notices and the amount of those notices, HM Revenue and Customs must have regard to the degree and extent to which those persons are persons who (directly or indirectly) have encouraged or been actively involved in the provision by the managed service company of the services of the individual mentioned in that provision.

Schedule 36, Finance Act 2008

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.

2 Power to obtain information and documents from third party

(1) An officer of Revenue and Customs may by notice in writing require a person—

(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 tax position of another person whose identity is known to the officer ("the taxpayer").

(2) A third party notice must name the taxpayer to whom it relates, unless the tribunal has approved the giving of the notice and disapplied this requirement under paragraph 3.

(3) In this Schedule, "third party notice" means a notice under this paragraph.

3 Approval etc of taxpayer notices and third party notices

(1) An officer of Revenue and Customs may not give a third party notice without—

(a) the agreement of the taxpayer, or

(b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless—

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

(4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

(5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax.

[…]

5. Power to obtain information and documents about persons whose identity is not known

(1) An authorised officer of Revenue and Customs may by notice in writing require a person—

(a) to provide information, or

(b) to produce a document,

if the condition in sub-paragraph (2) is met.

(2) That condition is that the information or document is reasonably required by the officer for the purpose of checking the tax position of—

(a) a person whose identity is not known to the officer, or

(b) a class of persons whose individual identities are not known to the officer.

(3) An officer of Revenue and Customs may not give a notice under this paragraph without the approval of the tribunal.

(3A) An application for approval under this paragraph may be made without notice.

(4) The tribunal may not approve the giving of a notice under this paragraph unless it is satisfied that—

(a) the notice would meet the condition in sub-paragraph (2),

(b) there are reasonable grounds for believing that the person or any of the class of persons to whom the notice relates may have failed or may fail to comply with any provision of the law (including the law of a territory outside the United Kingdom) relating to tax,

(c) any such failure is likely to have led or to lead to serious prejudice to the assessment or collection of tax, and

(d) the information or document to which the notice relates is not readily available from another source.

6 Notices

(1) In this Schedule, "information notice" means a notice under paragraph 1, 2, 5 or 5A.

(2) An information notice may specify or describe the information or documents to be provided or produced.

(3) If an information notice is given with the approval of the tribunal, it must state that it is given with that approval.

(4) A decision of the tribunal under paragraph 3, 4 or 5 is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

7 Complying with notices

(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

(2) Where an information notice requires a person to produce a document, it must be produced for inspection—

(a) at a place agreed to by that person and an officer of Revenue and Customs, or

(b) at such place as an officer of Revenue and Customs may reasonably specify.

(3) An officer of Revenue and Customs must not specify a place that is used solely as a dwelling.

(4) The production of a document in compliance with an information notice is not to be regarded as breaking any lien claimed on the document.

[…]

18 Documents not in person's possession or power

An information notice only requires a person to produce a document if it is in the person's possession or power.

[…]

29 Right to 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.

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3.

30 Right to appeal against third party notice

(1) Where a person is given a third party notice, the person may appeal against the notice or any requirement in the notice on the ground that it would be unduly onerous to comply with the notice or requirement.

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

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3.

[…]

32 Procedure

(1) Notice of an appeal under this Part of this Schedule must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(3) On an appeal the 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.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

[…]

39 Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who—

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

(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.

(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.

40 Daily default penalties for failure to comply or obstruction

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

[…]

44 Failure to comply with time limit

A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

45 Reasonable excuse

(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 obstruction of an officer of Revenue 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,

(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

(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.

46 Assessment of penalty

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

(a) HMRC may assess the penalty, and

(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).

(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—

(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

(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—

(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.

47 Right to appeal against penalty

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

(a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

48 Procedure on appeal against … penalty

(1) Notice of an appeal under paragraph 47 must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b) that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

49 Enforcement of penalty

(1) A penalty under paragraph 39, 40 or 40A must be paid—

(a) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, or

(b) if a notice of an appeal against the penalty is given, before the end of the period of 30 days beginning with the date on which the appeal is determined or withdrawn.

(2) A penalty under paragraph 39, 40 or 40A may be enforced as if it were income tax charged in an assessment and due and payable.

[…]

58 General interpretation

In this Schedule—

"checking" includes carrying out an investigation or enquiry of any kind,

"the Commissioners" means the Commissioners for Her Majesty's Revenue and Customs,

"document" includes a part of a document (except where the context otherwise requires),

"enactment" includes subordinate legislation (within the meaning of the Interpretation Act 1978 (c 30)),

"HMRC" means Her Majesty's Revenue and Customs,

[…]

"the Taxes Acts" means—

(a) TMA 1970,

(b) the Tax Acts, and

(c) TCGA 1992 and all other enactments relating to capital gains tax,

"taxpayer", in relation to a taxpayer notice or a third party notice, has the meaning given in paragraph 1(1) or 2(1) (as appropriate) and

"tribunal" means the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal.

[…]

62 Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is 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.

(2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—

(a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

[…]

63 Tax

(1) In this Schedule, except where the context otherwise requires, "tax" means all or any of the following—

(a) income tax,

[…]

and references to "a tax" are to be interpreted accordingly.

[…]

64 Tax position

(1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards—

(a) past, present and future liability to pay any tax,

(b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax,

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.

(2) References in this Schedule to a person's tax position include, where appropriate, a reference to the person's position as regards any deductions or repayments of tax, or of sums representing tax, that the person is required to make—

(a) under PAYE regulations,

(b) under Chapter 3 of Part 3 of FA 2004 or regulations made under that Chapter (construction industry scheme), or

(c) by or under any other provision of the Taxes Acts.

(2A) References in this Schedule to a person's tax position also include, where appropriate, a reference to the person's position as regards the withholding by the person of another person's PAYE income (as defined in section 683 of ITEPA 2003).

(3) References in this Schedule to the tax position of a person include the tax position of—

(a) a company that has ceased to exist, and

(b) an individual who has died.

(4) References in this Schedule to a person's tax position are to the person's tax position at any time or in relation to any period, unless otherwise stated.

Human Rights Act 1998

1 The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

[…]

3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

[…]

6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[…]

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

[…]

(6) In subsection (1)(b) "legal proceedings" includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means—

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by…the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

[…]

8 Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

[…]

(6) In this section—

"court" includes a tribunal;

[…]

"unlawful" means unlawful under section 6(1).

[…]

Schedule 1
Part 1 – The Convention

[…]

Article 8 Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.