



**TC04906**

**Appeal number: TC/2015/02656  
TC/2015/02413**

*Income tax - penalties under Schedule 36 - incorrect returns - HMRC amendments to self-assessment return in respect of profits of self-employment and corporation tax - whether penalties correctly assessed - yes - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ALAN CAPPS & THE CHILLI CLUB LTD**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER JOHN WILSON**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 28  
September 2015**

**Mr Allan Speakman for the Appellant**

**Mr Simon Bracegirdle, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### **The Appeal**

- 5 1. These are appeals by Mr Alan Capps (“the Appellant”) and The Chilli Club Ltd (“the Company”) against penalty determinations for failure to comply with information notices under Schedule 36 FA 2008.
2. The penalties relate to notices to supply information and documentation, issued:
  - (a) On 11 April 2013 to the Appellant
    - 10 i. HMRC say it was not complied with within the statutory time limit or by the date a £300 penalty was imposed on 4 November 2013; and
    - ii. The information and documentation was still not fully supplied by 17 January 2014, when further daily penalties were imposed.
  - (b) On 4 November 2013 to the Appellant

15 HMRC say that the notice was not complied with within the statutory time limit or by the date the £300 penalty was imposed on 17 January 2014.
  - (c) On 5 November 2013 to the Company

HMRC say that the notice was not complied with within the statutory time limit or by the date the £300 penalty was imposed on 17 January 2014.
- 20 3. The point at issue is whether the Appellant failed to comply with the information notices and whether the consequent imposition of penalties is valid

### **Background**

- 25 4. By profession the Appellant is chartered quantity surveyor. He is also a director of the Company and another associated company. For many years he has been based primarily in South East Asia working as a commercial construction consultant. For the whole of the tax year under enquiry (to 5 April 2010) he was working in Hong Kong.
- 30 5. In 2000, he returned from Asia to England and opened a family restaurant business in Altrincham, Cheshire. In 2003 he purchased a second restaurant in Lymm, Cheshire operating from premises held on a 21 year lease. He also purchased another property. Both properties provided income in the form of rent and interest on director’s loans. He formed two companies, The Chilli Club (Mgt) Limited and Chilli Club (Cheshire) Ltd. The leased premises were purchased in the name of the Appellant and leased to the Chilli Club (Mgt) Limited, which sub-let the premises to the Chilli Club (Cheshire) Ltd which operated the restaurant business.
- 35 6. In 2004 the Appellant purchased the 999 year leasehold reversion of the Lymm restaurant premises. To raise the necessary capital, he re-mortgaged his house, took a

loan from the Bank of Scotland and the balance came from his personal savings. He financed the purchase of the other property using a buy to let mortgage from Birmingham Midshires Building Society.

7. In 2007 the Altrincham restaurant business failed and was sold.
- 5 8. The Appellant says that most of the rent and interest he received on loans to the Company was used to pay for interest on his loans. The balance (less expenses) was declared as taxable income. He says that some of the rents had been repaid to the Company (as all of the rents had not been shown on his returns)
- 10 9. On 22 November 2011, HMRC opened an enquiry into the Appellant's tax return for the year ended 5 April 2010, and an enquiry into the Company's self-assessed tax return for the period ended 31 March 2010, because the Company was claiming £25,957 in interest costs paid to the Appellant in respect of capital loaned to the Company, whereas the Appellant's return only showed £7,200 interest received. There were also other anomalies.
- 15 10. Subsequent enquiries show that there were discrepancies with regard to figures in the accounts shown for 'capital introduced', 'sales/turnover', 'interest paid/received', and 'rental income' which should have been taxed under part 3 of the Income and (Trading and other Income) Act 2005 ("ITTOIA 2005") having been treated as income arising under Part 2 of the Act against which loss relief was erroneously  
20 claimed. The Appellant therefore agreed adjustments to his returns for the years 2007-08 to 2010-11.
11. In March 2012 the Appellant's agent submitted an amended company tax return for the year ended 31 March 2010, reducing the interest claim in the Corporation tax accounts from £25,957 to £7,200 shown as interest received in the Appellant's return.
- 25 12. On 11 April 2013 HMRC raised further enquiries and served an information notice on the Appellant requiring him to provide information and documentation to check his tax position. The notice stated that if the Appellant did not provide the information asked for, HMRC may charge a penalty of £300 and that if he had still  
30 not complied with the notice by the time the £300 penalty had been issued daily penalties of up to £60 a day may be charged for each day of non-compliance.
13. On June 2013 the agent provided amended tax computations for the years ended 31 March 2007 to 31 March 2011 in respect of the Company. The agent's computations showed that losses carried forward for year ended 31 March 2011 had been reduced from £138,085 to £62,227, a difference of £75,858. The losses were  
35 reduced because interest was incorrectly over claimed. This was despite the guidance given by HMRC during a previous enquiry. The Company should have only claimed the amounts 'paid' rather than the amounts due to be paid.
14. The Appellant provided some but not all of the information required and on 4 November 2013 HMRC issued a £300 penalty warning of further penalties as  
40 indicated above. The outstanding information was the records to support a 'Creditors' figure of £18,327 and documentation to support a 'Capital Introduced' figure of

£3,000 which the Appellant's agent said referred to the rents repaid and the VAT adjustment. HMRC asked for the information to be provided by 4 December 2013.

5 15. In a letter dated 27 November 2013 and in a subsequent telephone conversation with HMRC in late December 2013 the agent said that he thought bank statements containing the information requested had been provided. HMRC explained that no statements had been provided.

16. On 24 December 2013 HMRC wrote to the Appellant's agent setting out in detail the information requested that had still not been produced.

10 17. On 17 January 2014 HMRC, having still not received the information requested, issued further daily penalties of £30 a day from 5 November 2013 to 16 January 2014 amounting to £2,190, and repeated the request for the outstanding information to be delivered no later than 17 February 2014.

18. The information required by HMRC was:

- 15 a. Confirmation as to how £1,000 paid monthly from the Appellant's Bank of Scotland account to the Appellant had been treated in the accounts. The HMRC officer explained that she was unable to find the answer to the question in previous correspondence (as asserted by the Appellant's agent).
- 20 b. The officer also requested documentation to support the rents paid to the Company. She explained that although the agent believed that he had sent the bank statements to her she had previously informed him that she had not received statements for the relevant period, that is, August 2011 to February 2012. She also pointed out that she had received no information to show that the required VAT adjustments had been made.
- 25 c. The officer asked for the underlying documentation to support 'Other Creditors' figure of £18,327 that the agent had said referred to rents to be repaid. The agent had said in his letter of 27 November 2013 that the records were simply the bank statements. It had been explained in a conversation later that the bank statements did not show the creditors figure of £18,327 and that she was unable to follow all the different adjustments for rents paid through
- 30 the account from the bank statements. The agent had said that he would forward copy bookkeeping entries to demonstrate how the figures had been arrived at.

35 19. On 13 February 2014 the Appellant's agent replied to HMRC's letter of 24 December 2013.

- a. He said that the £1,000 a month has been posted against loan repayments.
- b. He provided gross and net VAT figures, (it appears with the intention of confirming the VAT adjustment) without any explanation.
- 40 c. He said that the £18,327 had been brought forward from the previous year and consisted of rent reductions for 2008 and 2009 totalling £19,674 less £1,347 transferred to capital.

20. On 14 February 2014, the Appellant's agent appealed the penalties, and replied to HMRC's enquiries stating that the information requested had been provided previously. Other information requested by HMRC did not exist. "The Appellant lives in Hong Kong... and does not have access to the information on a regular basis."

5 21. On 7 April 2014 HMRC responded stating that they could not understand the agent's VAT figures and querying why a debit to drawings and a credit to bank account and a credit to drawings and a debit to the loan repayments had not been recorded but treated as credit bank debit loan repayments. Again the officer set out in full the information which was required together with a comprehensive explanation,  
10 reiterating that the agent had still not provided documentation to support a £3,000 capital introduced figure which he said referred to the rents repaid and VAT adjustments.

15 22. The officer reminded the agent that having reconsidered all of the papers there was no documentation to support his explanation that all the rents were repaid to the Company and that she would have to draw conclusions from the partial information supplied. She reminded the agent that no bank statements had been provided to support the figures stated in his letters with regard to rental repayments by the Appellant to the Company. The officer also raised a number of other queries regarding VAT anomalies and enclosed computations showing the tax implications.

20 23. The officer summarised the correspondence she had had with the agent. The figures agreed as omitted from the rental receipts for the years 2007-2011 inclusive totalled £38,541.

25 24. HMRC say that when the Appellant submitted his income tax return he knew that the rents declared had been understated. It did not matter that his intention was to repay the rent back to the Company when he got round to it. He had received the money and therefore should have declared it, and made any adjustments at a later date when they occurred.

30 25. The officer enclosed a penalty explanation letter regarding the penalties charged under Schedule 24 Finance Act 2007 for the years 2008-09 to 2010-11 and a separate explanation with regard to penalties for the year 2007-08.

26. With regard to the method of calculation of the penalties and mitigation the officer summarised the position as follows:

#### Disclosure

35 27. Ten months after the question of omitted rents was raised the agent and the Appellant agreed that there had been an omission of approximately £10,000. This could be regarded as full disclosure and therefore the HMRC officer proposed to allow a full abatement of 20%.

## Cooperation

28. The Appellant had provided all the business records requested and agreed that the rents had been omitted. The officer therefore proposed a full abatement of 40%.

## Seriousness

- 5 29. Rents omitted from the Appellant's returns of £10,000 equated to 22% of the overall turnover, which could be considered high in relative terms but not in absolute terms. The Appellant knew that his 2007-08 return was understated and therefore could not be regarded as simply careless. The officer therefore proposed an abatement of 30% out of the maximum of 40%.
- 10 30. The abatement therefore totalled 90%, which meant that the s 95 penalty would be 10% which the Appellant's agent agreed in respect of 2007-08.
31. With regards the later years, 2008 to 2011, abatements were given of 15% for telling, 35% for helping and 30% for giving access.
- 15 32. In respect of the Company, on 10 April 2014 HMRC asked the agent to confirm exactly how much "rent repaid" was included in the turnover figure in the Company accounts for the year ended 31 March 2012, so that the necessary adjustments could be made to the turnover to take into account the rents said to have been repaid.
- 20 33. The Appellant's agent appealed the penalties and reiterated that in his view there had been a misinterpretation of information supplied at the outset which could have been found from the copy bank statements provided, which he assumed must have been lost by HMRC. On 23 July 2014 the agent provided "as evidence of rent repayment", bank statements from February 2011 to January 2014.
- 25 34. HMRC responded by saying that the figures shown in the statements did not equate to those previously claimed to have been paid. Apart from a deposit of £3,000 made in January 2014, there was no evidence of any of the rents being repaid, and deposits shown in the statements may simply have been capital introduced into the Company by the Appellant, something that historically he had done every year.
- 30 35. Following a further exchange of correspondence and the provision of further information the Appellant's agent agreed revised figures for 2007-08, 2008-09, 2009-10 and 2010-11, and on 10 November 2014 HMRC issued closure notices for the years 2009-10 and 2010-11 and formal assessments for the years 2007-08, 2008-09 and 2011-12. The agent also agreed to amended figures for 2012-13 as set out in a letter from HMRC of 12 May 2014 allowing HMRC to "Self-Amend" the 2012-13 return, obviating the need for any further enquiry or a penalty for that year.
- 35 36. In respect of the Company, nothing was supplied in response to HMRC's request of 10 April 2014, and therefore HMRC were unable to make the necessary amendments to the Company return for the year ended 31 March 2012. On 18 August 2014 HMRC repeated their request for this information.

37. Eventually, following a further exchange of correspondence and meetings, on the 18 November 2014, HMRC set out necessary adjustments to the Company accounts ended 31 March 2010. The agent agreed the adjusted loss figures.

5 38. For the year ended 31 March 2012, HMRC informed the agent that they needed to know how much of the rent repaid was in the turnover figure in the accounts. Two figures had been given - £40,000 and £50,000. HMRC needed to know which figure was correct so that the correct loss could be calculated.

10 39. On 13 January 2015 the agent confirmed that the rent repaid figure was £40,000 not £50,000 as had been previously stated which meant that the loss to carry forward from year ended 31 March 2012 was £56,006 instead of the £16,006 as originally shown (£16006 + £40000). The agent agreed the conclusion.

40. A Closure notice in respect of the Company enquiry was issued on 13 January 2015.

### Legislation

15 41. The penalties are charged under Paragraphs 39 and 46 [£300 penalty] and 40 and 46 [daily penalties] of Schedule 36 to the Finance Act 2008. This legislation applies to a person who has failed to comply with an information notice, and is liable to a penalty of £300 for the initial failure to comply. It permits the amount to be assessed by HMRC.

20 42. Paragraphs 39 and 40:

39(1) This paragraph applies to a person who-

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

39(2) A person to whom this paragraph applies is liable to a penalty of £300....;

25 40(1) This paragraph applies if the failure...in para 39(1) continues after the date on which a penalty is imposed under that para in respect of the failure...

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

30 43. Paragraph 46 of Schedule 36, which allows the penalty to be assessed, and Paragraphs 44 and 45 state that a penalty will not arise where HMRC has given further time or where there is a reasonable excuse for non-compliance and the Notice is complied with as soon as possible after the 'excuse' has ended. Paragraph 45 states:

45(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

45(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,

5 (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

10 (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.

15 44. With regard to the Fixed Penalty (failure to comply with an Information Notice imposed under Paragraphs 39 & 46, Schedule 36 Finance Act 2008), on 22 November 2011 valid enquiries were opened by HMRC into the Appellant's return for the period ended 5 April 2010 and the Company's return for the period to 31 March 2010. They covered all aspects of the returns that included the Appellant's self-employment and income from property. A list of information and documents needed to resolve the enquiry was sent to the Appellant's agent.

20 45. Information and records concerning the Appellant's tax affairs and those of the Company was collected from the accountants' office on 7 March 2012. Correspondence and meetings followed and by 23 January 2013 the caseworker had identified the information and documents she needed to check aspects of the Appellant's return which she requested by letter.

25 46. By April 2013 information records and documents requested on 23 January 2013 had not been provided despite follow up telephone calls. A formal Information Notice was issued on 11 April 2013 which was copied to the accountants. The statutory deadline for complying with the Notice was 11 May 2013.

30 47. Correspondence on outstanding issues continued, but by 4 November 2013 the information, records and documents required by the Notice issued on 11 April 2013 had still not been provided and HMRC issued a Penalty Notice.

35 48. Following an appeal against the penalty on 27 November 2013, the caseworker summarised her views of the matter by letter on 4 April 2014, it being clear that the Appellant and his agents had not provided the information requested, despite assertions to the contrary. The agents requested a review on 2 May 2014, without providing any grounds that could reasonably be regarded as valid.

49. The Appellant failed to comply with three of five points detailed in the Information Notice issued on 11 April 2013, which were still outstanding when the summary letter was sent on 4 April 2014, that is:

40 Point 1 - Confirmation of how the £1,000 paid monthly from Bank of Scotland account to the Appellant had been treated in the accounts.

Point 2 – Provision of all documentation to demonstrate that the rents had been paid/repaid

Point 4 - The underlying documentation to support the balance of the ‘other creditors’ figure of £18,327 which the agent said referred to rents to be repaid.

- 5 50. With regard to the daily penalties (failure to comply with an Information Notice – imposed under Paragraphs 39(1), 40 & 46, Schedule 36 Finance Act 2008), by December 2013 the Information Notice issued on 11 April 2013 had still not been complied with in full. Points 1, 2 and 4 of the Information Notice and documents listed on the schedule that formed part of the Notice remained outstanding.
- 10 51. The caseworker issued further penalties in respect of the Appellant’s continued failure to comply with the Notice. Daily penalties at a rate of £30 per day for the period 5 November 2013 to 16 January 2014 were imposed and the Penalty Notice was issued on 17 January 2014.
52. An appeal against the daily penalties was made on 14 February 2014.
- 15 53. The agent requested a review on 2 May 2014.
54. With regard to the fixed penalty issued to the Company (failure to comply with an Information Notice – imposed under Paragraphs 39 & 46, Schedule 36 Finance Act 2008), information and documents to support a ‘Capital Introduced’ figure, which in the later stages of the enquiry was said to relate to rents repaid to the Company and a
- 20 VAT adjustment were requested in a letter dated 13 August 2013, but were not provided.
55. The Appellant and the Company did not appeal the Information Notices nor ask for further time to be allowed for compliance, although the HMRC officer did allow a significant period of grace before issuing the first penalty.
- 25 56. The bases of the appeals, as submitted by the agent, are effectively that the information and documentation required by the officer had either been provided previously or did not exist. However, he failed to specify which documents and information did not exist. In any event, records relating to a taxpayer’s business affairs must be retained, for the relevant statutory periods.
- 30 57. At the hearing Mr Speakman said that, for the most part, HMRC had all the information they needed almost from the outset. It was only a matter of extraction and interpretation. However he acknowledged that he perhaps should have met with the HMRC enquiry officer and “explained it all”. He acknowledged that it finally became obvious to him, following the service of the Schedule 36 notices, that HMRC
- 35 did not have all the information or explanations that they needed and that during the course of the enquiries some mistakes on his part had to be corrected.

## **Conclusion**

58. There seems to have been considerable confusion on the part of the Appellant's agent, as to what was needed by HMRC and what was provided. In respect of both the Appellant and the Company the officer set out what she required, and followed this up by letters and telephone calls when the information did not materialise. She enquired when material she was missing and which was said to have been sent to her, was actually sent. The agent failed to supply these details. To add to the confusion and delay the agent did not always answer the points that had been put to him by HMRC and on other occasions provided figures without any covering explanation. Often the explanations when given appeared to be contradictory or not directly relevant to the issues. What HMRC were asking for was plain and clear. If it was purely a matter of interpretation and explanation the agent should have supplied his working papers and where necessary copy book keeping entries.

59. Although the enquiry was opened in November 2011 it was not until two and a half years later that the Appellant's agent provided sufficient information to HMRC to allow closure notices to be issued. If it was only a matter of interpretation of information already supplied as claimed by the agent, he should have clarified or identified that information. We cannot accept however that it was only a matter of interpretation of fact and information already supplied, because if it were, that would not explain why the Appellant's agent eventually agreed that returns filed for both the Appellant and the Company had to be amended.

60. We dismiss the appeal. The penalties in respect of both the Appellant and the Company were correctly imposed and calculated and are accordingly confirmed.

61. 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.

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

35

**RELEASE DATE: 22 FEBRUARY 2016**