[2016] UKFTT 0232 (TC)

TC05007

Appeal number: TC/2015/4219

INFORMATION NOTICE – daily penalties – whether further time for compliance allowed – whether abuse of process to raise issues that could have been raised in earlier appeal - whether penalties should imposed while appeal outstanding - to what extent if any partial compliance should reduce penalties – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Royal Courts of Justice, Strand, London on 6 April 2016

Mr M Upton, Counsel, for the Appellant

Ms H Jones, HMRC officer, for the Respondents

DECISION

1. This was the hearing of a consolidated appeal against three assessments imposing daily penalties on the appellant company.

The facts

2. The facts were not in dispute and I find as follows. A notice ('the information notice') under paragraph 1 of Schedule 36 to the Finance Act 2008 ('Sch 36') was issued to the appellant company on 5 March 2013 requiring the company to provide information and produce documents in respect of the period ended 30 April 2010 no later than 14 April 2013. The information notice asked for 11 items (item 8 was sub-divided into three).

3. On 30 August 2013, HMRC issued a £300 penalty under paragraph 39 of Schedule 36 of the Finance Act 2008 ('Sch 36') against the company for non-compliance with the information notice. The appellant appealed and the appeal came before this Tribunal on 22 December 2014. Before the appeal was heard, the appellant provided to HMRC items 2, 10 and 11 which were required by the information notice. At the date of that hearing items 1 and 3-9 remained outstanding, but item 1 was provided during the course of the hearing.

4. I issued my decision in that appeal on 5 January 2015 dismissing the appeal and upholding the £300 penalty. The decision notice may be found at *Spring Capital Ltd* [2015] UKFTT 8 (TC).

5. That was not the end of the matter. In the face of continued failure by the taxpayer to provide items 3-9 of the information notice, on 20 February 2015 HMRC issued daily penalties under paragraph 40 of Sch 36 for the period 20 August 2013 to 19 February 2015 totalling £16,110. The appellant appealed and on review the penalties were reduced to £10,950 covering only the period 20 February 2014 to 19 February 2015 on the grounds that HMRC had been out of time to assess the earlier non-compliance to daily penalties (paragraph 46(2) Sch 36). HMRC charged the penalty at the rate of £30 a day.

6. On 13 March 2015, the appellant provided items 3-7 and 9, and then on 24 March 2015 item 8(a). The only items outstanding were by then items 8(b) and 8(c). On 24 March 2015 HMRC imposed further penalties at the maximum daily rate of £60 for the period 21 February to 22 March 2015, totalling £1,800. (I note in passing that on review the review officer increased this to £1,920 by adding two extra days but HMRC accepted that he had no power to do this and seek to only defend the penalty of £1,800).

7. In the face of continued failure by the taxpayer to provide items 8(b) and (c), further daily penalties at the maximum rate of £60 per day were imposed on 9 July 2015 for the period 25 March 2015 to 9 July 2015 totalling £6,420.

The Tribunal's jurisdiction

8. A person may appeal against the imposition of a penalty and/or the amount of a penalty (para 47 Sch 36) and my jurisdiction (para 48(4) Sch 36) is that I can uphold or 'substitute for the decision another decision that the officer of Revenue and Customs had power to make'.

9. It seems to me therefore that I can uphold the penalty, reduce the penalty, cancel the penalty or even increase the penalty (but not above £60 per day). However HMRC did not suggest that the penalty should be increased so I will only consider whether it is appropriate to uphold, reduce or cancel the daily penalties.

10. I will consider the appeal in the following sections:

(1) Whether all penalties should be discharged because (says the appellant) further time for compliance was allowed;

(2) Whether there was no non-compliance with item 8(b);

(3) Whether there was no non-compliance with item 8(c);

(4) Whether penalties to be discharged in whole or part because of (alleged) misinformation?

(5) Whether penalties to be discharged in whole or in part because of partial compliance?

(1) Whether further time for compliance allowed?

11. Ms Jones' skeleton made a reference to an extension of time for compliance by HMRC being granted after the daily penalties had been imposed, a suggestion she repeated in her oral submissions. I asked whether she really meant what she said; the appellant's response to this apparent concession by HMRC (not surprisingly) was that as (in its view) all items (bar 8(b) and (c)) were provided by the due date (as allegedly extended by HMRC to 8 August 2015) and that (on its case) item 8(b) did not exist and item 8(c) could not lawfully be required, there was no non-compliance and the appeal should be allowed in its entirety.

12. The matter turned on what HMRC had said in letters to the appellant after the imposition of the first batch of daily penalties and the effect of paragraph 44 of Sch 36:

> 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.

13. HMRC's position, as I understood it, was even if there had been an extension of time, it would not affect liability for penalties imposed for non-compliance which occurred before the date on which the time for compliance was extended. I cannot agree. Paragraph 44 is quite clear and states common sense: if time for compliance is extended, any 'non-compliance' before that date, even if it occurred before the date on which HMRC announced the extension of time for compliance, is not non-

compliance. So if HMRC did extend time for compliance to 8 August 2015, then it follows that I must allow the appeals against all 3 assessments for daily penalties.

14. But I also understood Ms Jones to say, after some consideration and taking instructions, was that she had used loose terminology and it was not HMRC's position that there had been an actual revision of the deadline for compliance with the information notice.

15. This entire issue arose out of letters an HMRC officer Mr Stewart had written to the appellant. Mr Stewart was the HMRC officer in charge of the affairs of the appellant, and who had issued the information notice and imposed the daily penalties.

16. Mr Stewart's letter of 20 February 2015 which charged the daily penalties of £16,110 (later reduced to £10,950), went on to say:

> **What to do now**
>
> To avoid any further penalties, the company should let me have what we have asked for by 22 March 2015. If the company does not do this we may charge further penalties of up to £60 a day.

17. Identical wording was used when the second batch of daily penalties were issued by letter dated 24 March 2015 but with a new date of 23 April 2015; and again when the third batch of penalties were issued by letter dated 9 July 2015 with a new date of 8 August 2015.

18. Mr Upton's position was that this wording clearly 'allowed' the appellant 'further time'. But I think that the reference to allowing further time in paragraph 44 must be read in context, and that context was allowing further time to comply with an information notice. So the question is not whether Mr Stewart allowed further time, but whether he allowed further time to comply with the information notice.

19. And I think a fair reading of what Mr Stewart said was that he would not impose further penalties if there was compliance by a certain date; he was saying that HMRC would not further penalise continuing non-compliance if the non-compliance was brought to an end by the specified date. It was not further time to comply with the information notice, but a deadline which, if complied with, would mean no further penalties would be imposed for the continuing failure to comply. In other words, the appellant was allowed further time before more penalties would be imposed for non-compliance: it was not allowed further time for compliance. It is a fine line, but one I think which HMRC just failed to cross.

20. So I dismiss this ground of appeal and consider those of which the appellant had notified HMRC in advance and which it continued to advance at the hearing.

(2) There was no non-compliance with 8(b) as item 8(b) did not exist?

21. Those grounds centred on item 8 which I set out in full here:

> Note 9 to the accounts refers to a net increase in shareholders loans of £3,454,913. Please provide:
>
> (a) an analysis of the net amount of £3,454,913 as between each shareholder.
>
> (b) Copies of the shareholders loan accounts with the company to show the amounts introduced and withdrawn, and the dates introduced and withdrawn.
>
> (c) Your advice as to the source of all introductions/loans over £20,000.

22. It was the appellant's case that 8(b) sought documents which did not exist and therefore it was not in breach of 8(b) and the penalties should be reduced or discharged accordingly. HMRC accepted that the company did not keep a written account for each shareholder showing amounts introduced and withdrawn. In other words, it did not have individual shareholder loan accounts.

23. HMRC's case, as I understood it, was that even though shareholder loan accounts did not exist, the appellant must have the information that would have been comprised in such accounts in order to complete its tax return and must therefore be in a position to provide that information to HMRC.

24. The appellant's position was that if HMRC sought the information which would have been comprised in the shareholder loan accounts had they existed, then HMRC should have issued an information notice requesting such information. It took the view that an information notice could not give the taxpayer an obligation to create records which did not exist. The failure to keep shareholder loan accounts might be a breach of the obligation to keep and preserve records necessary to compile a complete and accurate tax return (para 21 Sch 18 of Finance Act 1998 ('Sch 18')) but HMRC had not sought to levy a penalty for that and it was irrelevant here.

25. I think that the law, as it permits HMRC to ask for information, and that information can amount to statutory records (see §§69-78 below), permits information notices to in effect require the appellant to create accounts that did not already exist. This is because HMRC could have asked the appellant for the information that would have been contained in specified accounts such as shareholder loan accounts had they existed. But the question is whether HMRC did that in this particular information notice.

26. And on this, I agree with the appellant. Item 8(b) must be read by itself and in its context. By itself, it refers to 'copies of ….accounts…' I agree with Mr Upton that 'accounts' implies financial records. And both the words 'accounts' and 'records' imply information which has been recorded, not just any kind of information. It was a request for documents and not for information, albeit the documents requested would contain information.

27. And that view is reinforced by looking at item 8(b) in its context which is Item 8 as a whole. By item 8, I find HMRC sought a mixture of documents and information. It wanted to know who had lent the money, by what means and when.

Items 8(a) and (c) largely asked for the information that would be comprised in the shareholder loan accounts, but the request at (b) was for actual copies of the shareholder loan accounts. That makes sense: if they existed HMRC wanted them. But to treat 8(b) as a request for information would be to ignore its natural reading of 'copies of …accounts' and to give it a meaning that largely duplicated items 8(a) and (c).

28. So I think that 8(b) went no further than to request copies of shareholder accounts already in existence. When the appellant informed HMRC that such accounts did not exist, at that point, if HMRC did not consider the replies to (a) and (c) sufficient (which they could not as nothing was provided), HMRC could have responded with a request for the information that would have been comprised in the shareholder loan accounts had they existed. They could also have considered action under para 23 Sch 18. But they did not.

29. In conclusion, 8(b) asked for documents which did not exist and could not therefore be provided. It did not ask the appellant to provide the information which would have been contained in such documents had they existed.

30. Therefore, I accept that the documents requested at 8(b) did not exist and the appellant did not breach the information notice by failing to provide them. (I leave open the question whether it was in breach of 8(b) up until the point when it informed HMRC the information did not exist: I was not addressed on this. So without deciding the point, I will merely assume in the appellant's favour it was never in breach of 8(b). It makes no difference to the outcome as explained below).

(3) There was no non-compliance with 8(c) as HMRC should not have required this information?

31. The appellant's case is that HMRC had no right to require the information requested at item 8(c) and/or it was unclear what information was sought. The first issue on this point was whether the appellant could make such a challenge in this Tribunal.

Right to challenge legality of information notice in appeal against penalties?

32. The appellant had never brought an appeal to the Tribunal challenging the validity of the information notice or any part of it. It had always been HMRC's position, from when the appellant first attempted to appeal the notice back in 2013, that the appellant had no right of appeal because everything requested by the information notice was statutory records and there was no right of appeal in so far as an information notice required production of statutory records (para 29(2) Sch 36).

33. I agree with the appellant, and Ms Jones did not suggest otherwise, that nevertheless the legality of the whole or part of an information notice relating to statutory records could be challenged in this Tribunal in a hearing determining an

appeal against a penalty imposed for non-compliance with that information notice. I said as much in my earlier decision in *Spring Capital Ltd* [2015] UKFTT 8 (TC) and neither party suggested that what I said there was wrong:

> 31. The absence of a right to challenge the legality of an information notice by an appeal to this Tribunal does not, of course, mean that the issue of the information notice is necessarily valid.…although there is no right to appeal an information notice relating to statutory records to this tribunal, that does not mean that this Tribunal must assume that an information notice is validly issued. It seems to me that under the doctrine in *Wandsworth LBC v Winder* [1985] AC 461 a taxpayer could defend a penalty in this Tribunal on the grounds that HMRC exceeded its powers in issuing the information notice. This is because the vires for the penalty depends on the prior legality of the information notice: if the information [notice] is invalid, the appellant cannot be penalised for not complying with it.

34. In conclusion, it was accepted and I agree that the appellant could in principle challenge the legality of an information notice in a penalty hearing even if it related to statutory records.

35. But HMRC's position was that the appellant could not challenge the validity of item 8(c) of the information notice because the Tribunal, in an appeal against the £300 penalty, had already ruled that it was valid and it would be an abuse of process to allow the appellant to reopen the matter.

Was it an abuse of process for the appellant to challenge the information notice in this hearing?

36. For this proposition, HMRC relied on what I said in *Qualapharm Ltd (No 2)* [2016] UKFTT 100 (TC):

> [108] Moreover, while I was not specifically addressed on this matter, there is an issue to what extent findings of fact and law I made in the first Qualapharm decision ([2015] UKFTT 479 (TC)) are relevant to this second Qualapharm case. It seems to me that as both proceedings concerned not only the same parties but arise out of the same tax enquiries and to a large extent involve related submissions, albeit a different subject matter (information notices rather than closure notices) it would be an abuse of process to allow either party to re-open decided matters. So far as I am aware the appellant has made no attempt to appeal that decision and therefore my conclusions in that case stand. I found there that the appellant had failed to make out its case that the enquiry was opened for an improper motive: [35-38].

37. The appellant pointed out that this comment was not binding; indeed, a reference to my decision in *Fonecomp* [2015] UKFTT 410 (TC) at §21-40 would have been more useful, not because it is any more binding, but because it is a summary of authorities on this which are binding.

38. Neither party suggested that the doctrine of issue estoppel and cause of action estoppel (collectively referred to as 'res judicata' roughly translated as meaning 'already adjudicated') had any application in the tax tribunal. I agree that cause of action has no application as that only exists where the cause of action is identical to one in earlier proceedings: here the cause of action are assessments for daily penalties, whereas my earlier decision concerned an assessment for £300 fixed penalty albeit the underlying basis for the assessment (non-compliance with the same information notice) is the same. Does issue estoppel apply?

> 'Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue…' Per Lord Keith in *Arnold v NatWest Bank Plc* [1991] 2AC 93

39. As HMRC accepted, issue estoppel has little place in this Tribunal. In *Cafoor* [1961] AC 584 PC it was held that a decision in one tax year does not create an issue estoppel for another tax year. In *Littlewoods* [2014] EWHC 868 (Ch) at §190 HMRC were held able to defend a claim to interest on the basis there was no underlying liability to repay tax although in separate earlier proceedings HMRC had conceded their liability to repay that tax. In other words, Mr Justice Henderson appeared to consider that there was no issue estoppel in a tax case even where exactly the same tax accounting period was concerned, as long as a different liability was concerned. This is much the same as saying there is no issue estoppel in tax cases, only cause of action estoppel. It seems an irresistible conclusion that a tribunal determination on a one penalty for non-compliance with an information notice cannot create an issue estoppel in a later action involving a different penalty assessed in respect of the same non-compliance with the same information notice.

40. However, having said that, the doctrine of *abuse of process* is not part of the doctrine of *res judicata*, and it is still applicable to tax cases. In *Littlewoods*, Henderson J held that HMRC were unable to advance the position that the tax was not due in defending the claim for interest because to do so would be an abuse of process, irrespective of the non-application of issue estoppel to tax cases: [250]. So the fact that issue estoppel does not apply to tax cases appears to be no bar to a court concluding that re-opening a decided issue is an abuse of process.

41. What is abuse of process?

> "…[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" page 536 C per Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.

42. Later cases, including *Littlewoods*, make it clear that the operation of the doctrine of abuse of process appears similar to issue estoppel except that there is flexibility where there are special circumstances:

> "a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal…..
>
> …it would be an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings…"
>
> per Ralph Gibson LJ in *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028 page 1049 delivering the unanimous judgment of the Court of Appeal , also citing Lord Kilbrandon in the Privy Council that abuse of process:
>
> > 'is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.'

43. Abuse on facts of this case? For true fairness, there must be finality in litigation. Barring special circumstances, there is no second bite of the cherry.

44. The first point is that the original Tribunal decided that the information notice was validly issued. This was considered at length at §31-45. Indeed, the main thrust of the appellant's defence in that case was that the information notice was invalid. The grounds on which it made its case was that there was a breach of the Data Protection Act (§§37-44) and that it was an unwarranted fishing expedition (§33-36). In particular, the Tribunal considered with with respect to the 'fishing' allegation the requirement of para 1 Sch 36 that the information requested must be reasonably required for the purpose of checking the taxpayer's tax position (§34) and the Tribunal considered that specifically in connection with Item 8(§35). It was the Tribunal's conclusion that Item 8 was reasonably required for the purpose of checking the appellant's tax position.

45. Mr Upton now wants to advance the point that Item 8(c) was not (in his view) reasonably required for the purpose of checking the appellant's tax position. While the exact reason he makes this submission was not before me in the previous hearing, it seems to me to be clearly abusive (bar special circumstances) to allow the appellant to challenge the legality of the information notice and item 8 in particular a second time.

46. So are there special circumstances?

47. Although this was not a point made by Mr Upton, it was clear that in this hearing (concerning penalties amounting to nearly £20,000) the appellant had chosen to be represented by counsel whereas in the earlier hearing for a £300 penalty the appellant had been represented by its director. I consider it may be sensible for a

taxpayer to put greater resources into an appeal where a more significant sum is at stake and therefore not surprising if issues are raised the second time round which could have been but were not raised in the first hearing. This might amount to 'special circumstances, but weighed against this, however, is the fact that the appellant was warned at the time the £300 penalty was imposed that HMRC also intended to impose daily penalties. So at the time of the first hearing, the appellant ought to have appreciated the seriousness of the matter and ought therefore to have raised the points which it seeks to raise now.

48. I also take into account that item 8(c) was at the time of the first hearing only one of many items which the appellant had failed to provide so that even a successful challenge on 8(c) may not have affected the outcome of that first appeal. Whereas in this hearing, minds were concentrated on item 8(c) as at this point it was only one of two items still outstanding. Does this amount to special circumstances to permit the appellant to argue a new point on 8(c)? It might have done so except, if the alleged ambiguity of the item 8(c) and/or its alleged invalidity was the real reason for non-compliance with 8(c), it is strange this was not mentioned at the first hearing. Bearing in mind item 8 was specifically discussed in that earlier hearing, this suggests that whatever was the reason for non-compliance with 8(c), it was not the grounds put forward to challenge its validity in this hearing. While the appellant is entitled to take 'legal' points which are not in practice the reason why it has not done what HMRC say it should have done, nevertheless such 'legal' points could and should have been taken at the first opportunity so I do not think that there are special circumstances which would justify an second opportunity to put this case.

49. My conclusion is that in this case there are no special circumstances which apply to justify permitting the appellant to argue in this appeal matters which it could and should have argued in the original £300 penalty appeal. It cannot put the case for the second time that the information notice, and specifically item 8(c), was invalid.

What did 8(c) require the appellant to produce?

50. Nevertheless, I consider the appellant's submission on 8(c) in case this appeal goes further. But what follows at §§51-61 is merely comment because I have found that the appellant cannot challenge the validity of item 8(c).

51. The appellant's case was that 8(c) was ambiguous. It suggested that it meant the company must inform HMRC from where its shareholders obtained the funds which they had loaned to the company.

52. From letters, it is clear Mr Stewart gave it a narrower meaning. HMRC's case was that Mr Stewart wished to know the origin of the credit and in particular whether it was transferred in from an outside source or was money already held by the company.

53. As the appellant pointed out, a third meaning had been attributed to Item 8(c) by the review officer who had said in his letter that it referred to 'advice that the company sought regarding certain items appearing in the loan accounts…'

54. My view is that last interpretation is almost bizarre and certainly a reading of 8(c) inconsistent with idiomatic English. Had HMRC been requesting copies of advice given to the company, Item 8(c) ought to have said something like 'copies of advice received in respect of…' and not 'your advice as to'. I do not consider this is evidence that 8(c) was ambiguous.

55. I am also unimpressed by the interpretation that the appellant sought to place on the words. The source of the introductions/loans to the company is clearly (to me) seeking the source of money introduced/loaned to the company, such as a 'bank transfer by Mr X on such and such date'; it is not seeking the source of the source; it was not asking from where Mr X obtained the money to lend to the company. Moreover, I agree with the appellant that the source of the source is not obviously relevant to the company's tax position, and in my view that reinforces the natural meaning of the words which is that HMRC wanted to know from where the company obtained the money.

56. In conclusion I do not agree with the appellant that there is anything truly ambiguous about 8(c). Its meaning was that ascribed in §52 above.

Does item 8(c) go further than HMRC are permitted?

57. Paragraph 1 of Sch 36 permits HMRC to require the taxpayer to provide documents and information

> 'reasonably required by the officer for the purpose of checking that taxpayer's tax position'

58. As I have said, the appellant's case was that item 8(c) was asking the company to inform HMRC from where its shareholders obtained the funds which they had loaned to the company. That information, were it provided, said Mr Upton, could not be relevant to the company's tax liability.

59. The issue of whether the information was relevant to the company's tax liability depended of course on what item 8(c) actually requested. As I have said, I consider its natural meaning is the narrower one: it asked from where the company obtained the money shown as loaned to it in the accounts. And I agree with HMRC that that information was relevant to the company's tax position and was reasonably required to check its tax position. This is because the question was relevant to whether the money was really loaned to the company or whether company money was simply reallocated to the shareholders.

60. In conclusion, even if I had permitted the appellant to re-open a challenge to 8(c), I do not find the challenge justified. The request at 8(c) was lawful, narrow in scope, and the appellant was obliged to comply with it.

Conclusion on 8(c)

61. The appellant cannot reopen its challenge to the validity of Item 8; even if it could, I do not accept for the reasons explained above that the information notice in so

far as it required the information at 8(c) was invalid or ambiguous. So the question remains whether it has complied with it.

62. The appellant did not suggest that it has provided the information requested at 8(c), although in correspondence it has suggested the information would be contained in part in the company's bank statements and that HMRC had declined to accept bank statements. However, the appellant did not repeat this allegation in the hearing and in any event it was not borne out in the correspondence where at most it appears that HMRC had indicated that bank statements alone might not be enough to answer 8(c). And it is clear that so far the appellant has not provided the statements in any event. I find the appellant has to date failed to comply with item 8(c) because it has not specified the source of the funds shown as loans from shareholders.

(4) Was there relevant misinformation by HMRC?

63. As I understood it, it was also the appellant's case that the penalties should be mitigated because (alleged) misinformation from HMRC meant that the appellant was allegedly denied a legal remedy which it would otherwise have had and the exercise of which would have allegedly reduced its liability to penalties.

64. This submission arose from the fact that the appellant had been informed by HMRC (as was clear in the papers) that all the information required by the information notice comprised statutory records and there was no right of appeal: indeed the appellant had lodged an appeal against the information notice with HMRC which HMRC had refused to process, although the appellant had not followed this up with an appeal to this Tribunal. Mr Upton's point was that if 8(c) required information that was not statutory records, then the appellant had been incorrectly denied its right to challenge 8(c), and (said the appellant) as penalties should not be imposed for any period the information notice was under challenge, or would have been under challenge but for (alleged) misinformation from HMRC, I should discharge the penalties to reflect the position as it should have been.

65. So it can be seen that this submission depends on two legal questions; the first question is whether there was misinformation, in that was HMRC right to class all the information and documents requested by the information notice as statutory records, and, secondly, if HMRC were wrong, would no penalties have been chargeable for the period that the information notice would have been under appeal but for the misinformation?

Can the appellant put the case that item 8(c) was a statutory record?

66. The same issue with abuse of process arises with this as with the allegation that item 8(c) was unlawfully requested: both issues were decided against the appellant in the previous hearing. As recorded at §21, Mr Thomas did not suggest at that previous hearing that the information notice related to anything other than statutory records. Nevertheless his main submission, which was that the information notice was invalid, depended upon it relating at least in part to non-statutory records. So this was a submission which *ought* to have been made in the earlier hearing. For the same

reasons as with its submission that the information was unlawful, I think it is abusive to raise, effectively a second time in proceedings with the same respondents and same information notice, the submission that at least a part of the information notice did not relate to statutory records.

Was item 8(c) a statutory record?

67. Nevertheless, in case this goes further I consider it. The appellant's position was also that 8(c), even if lawfully required, was not a statutory record. Not only had HMRC said the information notice comprised statutory records, my previous decision in *Spring Capital Ltd* [2015] UKFTT 8 (TC) had concluded that all items required by the information notice were statutory records:

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

68. The basis for the appellant's case that the information sought by 8(c) was not statutory records was that it was unlawful for HMRC to require production of that material. I have dismissed that claim: item 8(c) did not require the company to state from where its lenders obtained the funds, only from where the company obtained the funds. Nevertheless, not everything which it is reasonably required by an officer is a statutory record.

Can information be a statutory record?

69. HMRC seemed to understand the challenge as a suggestion that only records comprising documents could be statutory records and 'information' could not comprise statutory records.

70. The definition of 'statutory records' is in paragraph 62 of Sch 36 and that is:

> **Statutory records**
>
> 62 (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……

71. So the answer seems quite simple and that is information as well as a document can amount to statutory records: the question is whether it is information or documents which a taxpayer ought to have recorded and preserved under the Taxes Acts whether or not it actually has recorded and preserved it.

72. I was referred by HMRC to what Judge Redston said in the case of *Matthews* [2015] UKFTT 139 (TC):

> *Can information be a statutory record?*
>
> [53] The first question is whether TMA 12B extends to 'information' which has not been written down, as well as to 'documents'. The purpose of the section is to require taxpayers to retain the material they need to file their SA returns. It uses the word 'records' rather than 'documents'.
>
> [54] The OED's first two meanings of 'record' refer to phrases, such as 'on record' and 'to take record of'. The third meaning is 'the fact or condition of being preserved as knowledge or information, esp. by being set down in writing.'
>
> [55] We therefore find that information does not necessarily have to be set down in writing before it can be a 'record' and that therefore 'information' as well as 'documents' comes within TMA s 12B.

In so far as the judge referred to Section 12B TMA, what she said must be equally applicable to s 21 FA 1998 which is the equivalent provision for companies, as it is virtually identical.

73. But is what she said right? She refers to information not necessarily being set down in writing. Was she contrasting written records with computer records, or was she contrasting documentary and electronic records with information merely known to someone but not yet recorded by being written down or entered onto a computer? It is difficult to be sure but she appears to be treating information known to a taxpayer but not yet set down in writing or electronically as a 'record' within s 12B. If that is what she meant, respectively I must disagree.

74. If that is what she meant, I think she misunderstood the OED definition: information in someone's head is clearly not 'preserved as knowledge' and although the OED indicates that 'being set down in writing' is not the only means of preservation of information, the OED is contrasting the position with other means of recording, such as electronic means. It is clear from the context that the OED does not mean being held in someone's head is a means of preservation of information.

75. Moreover, the judge's interpretation of s 12B TMA is not only inconsistent with the OED but with what must have been Parliament's intention. Parliament has imposed a substantial penalty under s 12B(5) TMA or paragraph 23 Sch 18 on taxpayers who fail to keep and preserve records: I do not consider Parliament intended it to be an answer to the obligation to keep and preserve records that the information was all in the taxpayer's head and therefore recorded and preserved. I think it implicit in s 12B TMA and s 21 Sch 18 that the requirement first to keep records and then preserve them is that the legislation was requiring the information to be in a medium that is reasonably permanent and accessible, and not merely in someone's head. And that is the meaning of 'record'.

76. When s 62 Sch 36 is read with s 12 B TMA/para 21 Sch 18, it is plain that information which the taxpayer is required to keep and preserve, whether or not he has done so, is information which amounts to statutory records, and therefore information he can be required to deliver up to HMRC.

77. In other words, a taxpayer is liable to a penalty if information and documents necessary to complete the tax return have not been recorded in writing or electronically and preserved; but being in breach of the obligation to keep and preserve such records is no answer to an information notice. The information must be produced even if it is not yet recorded anywhere.

78. So while I do not agree with the process of reasoning by which Judge Redston reached her conclusion, I do agree that information is a part of a taxpayer's statutory records so far as Sch 36 is concerned if it was needed to compile the taxpayer's return. This is true irrespective of whether or not it was recorded in writing or electronically or by any other means of preservation. But, contrary to the implications of what she said at [53-55] of her decision, I do not think it is any answer to a penalty for failure to keep records that the information was held in the taxpayer's head.

Was the information requested at 8(c) a statutory record?

79. As information can, in so far as Sch 36 is concerned, amount to a statutory record, the fact that item 8(c) required information does not mean that what it asked for was not a statutory record: the answer to that question depends on whether it was information which the company was required to keep and preserve under Sch 18, in other words, whether it was information it was necessary for the company to have to deliver a complete and accurate tax return.

80. The company had to know what loans it had received and from whom in order to compile its accounts and therefore its returns. It also had to know if the money was truly loaned to it, rather than being money already owned by it but simply reallocated to the shareholders so that it could be loaned back. So it seems to me, as I said before, that 8(c) required information that amounted to a statutory record in that it was information necessary to complete a correct tax return.

Wrongly denied appeal?

81. I don't therefore need to consider the second part of the appellant's submission on being wrongly denied an appeal; not only can it not raise the allegation that 8(c) required more than just statutory records as this point has already been decided against it and it would be an abuse of process to allow it to be relitigated, the submission is wrong in any event. Nevertheless, for the sake of completeness, I do consider the second half of its proposition.

82. The submission is that the appellant had been incorrectly denied its right to challenge 8(c) of the information notice because it had been incorrectly informed by HMRC that the information notice entirely related to statutory records and paragraph 29(2) limits appeals only to those information notices, or parts of information notices,

which concern non-statutory records. The submission is then that as (says the appellant) penalties should not be imposed for any period the information notice was under challenge, I should discharge the penalties to reflect the position as it would have been but for the misinformation from HMRC.

83. So its submission depended not only on paragraph 29(2) but its proposition that penalties for non-compliance could not or ought not to be imposed during any period in which any part of the validity of the information notice is under challenge.

84. But I cannot agree that this is right. There is nothing in the legislation which would delay the imposition of penalties until an appeal was concluded and indeed the legislation expressly provides in paragraph 39 that the initial penalty can be imposed at any time where there is non-compliance with an information notice and in paragraph 40 that daily penalties can be imposed if the non-compliance continues after the imposition of the initial penalty.

85. Moreover, the appellant's interpretation of the legislation would be contrary to Parliament's clear intentions. Parliament's intention is to encourage prompt compliance with information notices: delaying imposition of liability to the initial and daily penalties until after an appeal against the information notice had been resolved would encourage unmeritorious appeals rather than compliance. For the same reason, as a matter of policy I do not see why HMRC ought to delay imposing penalties until after an appeal an information notice was resolved and the appellant did not suggest that this was HMRC's policy.

86. I accept that a taxpayer may have genuine concerns with the validity of an information notice and if it challenges the notice without complying with it, it risks penalties. In my view, well-founded but ultimately wrong concerns might amount to a reasonable excuse, but otherwise that is a risk a taxpayer is exposed to if it chooses to challenge an information notice without compliance. The alternative scenario cannot have been intended by Parliament: the logical outcome of the appellant's submission is that penalties for and compliance with an information notice can be avoided for years while hopeless appeals are taken to the Tribunal.

87. So in principle, I do not accept the appellant's proposition that it should not have to pay penalties for non-compliance during the time an appeal against an information notice is (or would have been bar misinformation from HMRC) outstanding.

88. And even if I agreed in principle, which I must certainly do not, I note in passing that in practice it would not lead to a diminution or discharge of penalties in this case. Item 8(c) was only a part of the information left outstanding. The appellant does not suggest that any of the other information requested was not statutory records, so it must accept that it had no right of appeal against the information notice apart from (on its case) item 8(c). And as it did not comply with those other parts of the information notice save as set out above and below, it has no grounds for the penalty to be reduced (see what I say at §§100-105 about partial compliance).

89. For all these reasons, I dismiss this ground of appeal.

The relevance of other assessments to 8(b) and (c)?

90. Mr Upton mentioned in passing that the three shareholders or associates of shareholders whom the company had informed HMRC, in answer to question 8(a) were the source of the shareholder loans, had all now been assessed in respect of this money. He seemed to suggest that having assessed them, HMRC did not need to persist with the information notice.

91. My attention was not drawn to paragraph 19 of Sch 1 which provides:

> (1) An information notice does not require a person to provide or produce –
>
> (a) information that relates to the conduct of a pending appeal relating to tax or any part of a document containing such information…

92. I was not informed when the assessments were raised or whether they were under appeal (although that seems likely). It does not matter. The information requested does not relate to the conduct of any such appeal if one has been made.

93. So whatever the appellant considers, the existence of appeals by the shareholders do not affect the enforceability of the information notice.

(5) Partial compliance

94. I now consider whether the appellant's partial compliance should lead to a reduction in the penalties charged by looking at each penalty in turn and the dates on which there was compliance.

The first penalty

95. HMRC levied a daily penalty for the period 20 February 2014 to 19 February 2015 at a rate of £30 per day. During this entire period items 3-9 requested in the information notice were outstanding: at the start of the period, all 11 of the items had been outstanding but 3 were provided in October 2014 and one in December 2014. All items were provided well over a year after the date for compliance in the information notice and for many it was closer to two years.

96. Date on which penalty levied: the first daily penalty was levied *after* I released my decision upholding the initial penalty of £300. As I have said, there is no reason in law while it should have been issued so late and indeed HMRC's failure to issue it more promptly meant that a large period of days of non-compliance fell out of charge under paragraph 46(2) (which requires an assessment to be made within 12 months of the date on which liability was incurred.)

97. As the appellant put the case that it should not have been penalised for the period an appeal against the information notice would have been outstanding (see §§81-89), I have also considered whether daily penalties should only be levied for a

period after determination of an appeal against the initial £300 penalty. I come to the same conclusion. Not only does the law provide for non-compliance to be punished with daily penalties from the date of assessment of the initial penalty (paragraph 40), this was known to the appellant as it was warned of daily penalties running from that date in a letter from Mr Stewart back in August 2013 when the initial penalty was imposed.

98. Indeed, it seems obvious that Parliament's intention in permitting HMRC to impose daily penalties is to encourage prompt compliance: delaying liability to daily penalties until after resolution of an appeal against the initial appeal would encourage appeals rather than compliance. In conclusion, I see no reason to reduce the first tranche of daily penalties just because they reflect a period before the appeal against the initial penalty was determined.

99. Moreover, it seems to me that where there is continued non-compliance, HMRC ought to consider levying daily penalties shortly after the issue of the initial penalty, whether or not it is appealed. It was clearly the intent of Parliament that HMRC do this (see para 40) to encourage compliance and HMRC's failure to do it in this case left a large period of non-compliance out of charge. But HMRC's failure does not justify any reduction in the penalties in this case: it just means the appellant escaped some £6,000 in penalties (see §5).

100. Should the penalty reflect partial compliance? The appellant suggested that the level of the penalty should reflect a percentage of how much information was outstanding out of the total requested. A moment's reflection would indicate that, while it may well be appropriate for the penalty to reflect partial compliance in some way, partial compliance should not really be measured by a count of the items actually provided. What if the notice only required two items and one was outstanding? Should the penalty be 50%? But what if the notice required 10 items and only one was outstanding? Should the penalty only be 10%? Yet both taxpayers would be equally culpable in that one item was outstanding. It seems to me that what is really relevant to the amount of the penalty is the number of items outstanding and the reason why they are outstanding. I do not suggest partial compliance is irrelevant; for instance, if the information notice was onerous and asked for a lot of information in a short time frame, this may explain why the taxpayer only managed partial compliance by the due date. In other words, a reduction in penalty may be justified where there is a good reason for partial compliance; but the mere fact some of the requested items have been provided does not of itself justify a reduction. Why should the fact a taxpayer has provided some of the documents required justify a reduction in the penalty when the law requires that all must be provided? There must be a good reason for the partial non-compliance if a penalty is to be reduced or avoided. It seems to me, that without good reasons, even one item outstanding could, in appropriate circumstances, justify the maximum penalty whether the original information notice had required just that one item or 100 items.

101. In this case, only 11 items were requested, and many of them were left outstanding for nearly two years. There is no suggestion that providing any of them was particularly onerous. Compliance mostly appears to have required no more than

a single sentence per item. And I was not given any reason for any non-compliance except in relation to items 8 (b) and (c) (as discussed above).

102. In conclusion, I see no reason to reduce the first daily penalty (ony charged at 50% in any event) to reflect that during the period of non-compliance there was some compliance. A significant amount of the information notice remained outstanding at the end of the penalised period and no good reason for this has been given. Indeed, a large part of the information was provided on 13 March 2015 and no reason was given why it was not provided when first asked for in 2013.

103. Mr Upton suggested in particular that, should I find that 8(b) did not require compliance as the item requested did not exist, as I have found, then the penalty should be reduced to reflect this. For the reasons I have already given, I do not accept the mere percentage of actual compliance is how the level of the penalty should be measured: failure to provide even one item without good reason which could and should have been provided may well justify the full penalty, however many other items had actually been provided or did not exist.

104. Mr Upton made a similar submission with respect to 8(c) which I dismiss at §110 below and what I say there applies as much to this period as that later one.

105. I do not say that the penalty should have been higher: I was given no reason why it was charged only at 50% but it seems not unreasonable to me that the officer chose to impose it at a lower percentage than the maximum on the first occasion daily penalties were imposed (although that should not be taken to suggest the maximum penalty would have been inappropriate either). In any event, I see no reason to reduce it and I uphold it in the amount of £10,950.

The second daily penalty

106. This was levied for the period 21 February 2015 to 22 March 2015 and at the maximum rate of £60 per day totalling £1,800. A significant amount of the outstanding information was provided on 13 March, leaving only item 8 outstanding for the remainder of the assessed period. Item 8(a) was in fact provided two days after the assessed period (on 24 March).

107. I consider what I said above about partial compliance applies here. Item 8(a) remained outstanding during this entire period and that alone would justify the maximum penalty where no good reason was given for not providing it earlier. No such good reason was given, and indeed it was eventually provided on 24 March.

108. I note that the officer here did charge the penalties at the maximum rate but again that seems appropriate to me where the taxpayer had, at this point, failed to comply despite the imposition of a fixed penalty of £300 and daily penalties at a rate of £30.

The third daily penalty

109. This was levied for the period 25 March to 9 July 2015 at the maximum rate of £60 totalling £6,420. During the whole of this period items 8(b) and (c) were outstanding. HMRC have now accepted that shareholder loan accounts did not exist and as I have found that that is what item 8(b) required to be produced, it follows that (paragraph 18) that there was no obligation to produce them. The appellant had hinted to HMRC by email that such shareholder loan accounts did not exist on 13 March 2015, before the start of the period assessed, and stated this outright on 2 April 2015. So there was no non-compliance with 8(b).

110. However, item 8(c) remained outstanding as it does to this day. The appellant actively disputed with HMRC what 8(c) required, giving it the wider meaning they put in this hearing and refusing to provide what Mr Stewart said it meant, which is what I have found it meant. I see no good reason why the appellant did not provide the more limited information which is what Mr Stewart said, and I have found, the information notice required to be provided. It said it found it ambiguous but I consider that no explanation of (a) why it did not seek to clarify the meaning much earlier and (b) why it did not provide HMRC with the information on the basis of the narrow meaning HMRC ascribed to it. In conclusion, I do not consider that the appellant had a good reason for 8(c) being outstanding in the period for which the third daily penalties were assessed.

111. As I have already said, even one item outstanding where there is no good reason for it justifies the maximum penalty. That was what was charged and I see no reason to interfere with that.

112. Appeal dismissed. I uphold the assessments in the sums £10,950, £1,800 and £6,420, making a total of £19,170.

113. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE

TRIBUNAL JUDGE
RELEASE DATE: 13 APRIL 2016