[2016] UKFTT 0730 (TC)

TC05459

Appeal numbers: TC/2016/01989
TC/2015/04209, 00056, 00059 & 01787
TC/2014/04211, 04414 & 04415

VAT – Information Notices – Schedule 36 Finance Act 2008 – documents and information required – Penalties - whether statutory records – no right of appeal – whether information reasonably required – permission to appeal out of time – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DRINKS STOP CASH & CARRY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MR NICHOLAS DEE

Sitting in public at Fox Court on 7 September 2016

Mr Rizwan Ashiq, Counsel for the Appellant instructed by Rainer Hughes solicitors and

Mr Tarlochan Lall, Counsel for the Respondents instructed by the General Counsel and Solicitor to HM Revenue and Customs,

With supplementary submissions on behalf of the Respondents dated 21 September 2016

DECISION

1. The Tribunal heard eight appeals by the appellant, Drinks Stop Cash and Carry Limited, against information notices and penalties imposed upon the appellant by the respondents, HMRC, under Schedule 36 to the Finance Act 2008. The appeals raise a number of issues as identified below.

Overview of the appeals

2. The first six appeals are against penalties imposed by HMRC upon the appellant for failure to comply with the information notices.

3. The first appeal, TC/2014/04211 proceeds by way of appeal notice dated 1 August 2014. It challenges a review decision dated 11 July 2014 upholding a £300 fixed penalty and £2,360 and £2,100 in daily penalties in respect of a failure to comply with an information notice dated 3 December 2013 in respect of VAT period August 2013.

4. The second appeal, TC/2014/04414 proceeds by way of appeal notice dated 12 August 2014. It challenges a review decision dated 29 July 2014 upholding a £300 fixed penalty and £2,400 in daily penalties previously imposed in respect of a failure to comply with an information notice dated 10 February 2014 in respect of VAT period November 2013.

5. The third appeal, TC/2014/04415 proceeds by way of appeal notice dated 12 August 2014. It challenges a review decision dated 22 July 2014 upholding a £300 fixed penalty previously imposed in respect of a failure to comply with an information notice dated 2 May 2014 in respect of VAT period February 2014.

6. The fourth appeal, TC/2015/00056 proceeds by way of appeal notice dated 23 December 2014. It challenges a review decision dated 2 December 2014 upholding a £300 fixed penalty previously imposed in respect of a failure to comply with an information notice dated 12 September 2014 in respect of VAT period May 2014.

7. The fifth appeal, TC/2015/00059 proceeds by way of appeal notice dated 23 December 2014. It challenges a review decision dated 9 December 2014 upholding a £300 fixed penalty and £6,960 in daily penalties previously imposed in respect of a failure to comply with an information notice dated 10 February 2014 in respect of VAT period November 2013.

8. The sixth appeal, TC/2015/01787 proceeds by way of appeal notice dated 28 January 2015. It challenges a review decision dated 16 January 2015 upholding £5,760 in daily penalties previously imposed in respect of a failure to comply with an information notice dated 2 May 2014 in respect of VAT period February 2014.

9. The seventh and eight appeals are against information notices themselves issued by HMRC requiring the appellant to produce documents and not against any penalty for failure to comply therewith.

10. The seventh appeal, TC/2016/01989 proceeds by way of appeal notice dated 7 April 2014. It challenges a review decision dated 11 March 2014 wherein HMRC upheld its earlier decision to issue an information notice dated 3 December 2013.

11. The eighth appeal, TC/2015/04209 proceeds by way of appeal notice dated 7 July 2015. It challenges the decisions to issue the information notices dated 3 December 2013, 10 February 2014, 2 May 2014 and 12 September 2014.

12. The eighth appeal, having been made out of time, requires permission from the Tribunal to proceed.

The Law

13. Paragraph 1 of Schedule 36 to Finance act 2008 ("Sch 36 FA 2008") permits an officer of HMRC to require information or document "if the information or document is reasonably required by the officer of the purpose of checking the taxpayer's tax position."

14. A notice requiring information or documents under that paragraph 1 is a "taxpayer notice" (paragraph 1(2) Sch 36 FA 2008).

15. A taxpayer notice is also an "information notice" under paragraph 6 Sch 36 FA 2008 because any notice under paragraphs 1, 2 and 5 is such.

16. A taxpayer given a taxpayer notice may appeal against it or any requirement in the notice (paragraph 29(1) Sch 36 FA 2008).

17. However there is no right of appeal against a taxpayer notice requiring the provision of information or any document that form part of the taxpayer's statutory records (paragraph 29(2) Sch 36 FA 2008).

18. Taxpayers must bring appeals under paragraph 29 within 30 days of when the notice is given pursuant to paragraph 32 of Sch 36 FA 2008.

19. Information or a document forms part of a person's statutory records if it is required to be kept or preserved under or by virtue of the Value Added Tax 1994 or any other enactment relating to value added tax charged in accordance with that Act (paragraph 62(1)(b) Sch 36 FA 2008). Tax includes VAT by virtue of paragraph 63 Sch 36 FA 2008.

20. Regulation 31(1) of the Value Added Tax Regulations 1995 (SI 1995/2518), so far as is material requires the following records to be kept for the purpose of accounting for VAT:

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

(a) his business and accounting records,

(b) his VAT account,

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

(d) all VAT invoices received by him,

(e) documentation received by him relating to acquisitions by him of any goods from other member States,

(f) copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(g) documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(h) documentation relating to importations and exportations by him, and

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

……"

21. Paragraph 64 Sch 36 FA 2008, so far as is material, defines the meaning of a person's tax position as follows:

(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.

…….

(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.

22. A person becomes liable to a penalty of £300 where that person "fails to comply with an information notice" (paragraph 39(1) and (2) Sch 36 FA 2008).

23. Liability to a further daily penalty not exceeding £60 per day arises where the failure to comply with an information notice continues (paragraph 40(1) and (2) Sch 36 FA 2008).

24. Penalties may be assessed and notified to the person under paragraph 46 of Sch 36 to FA 2008.

25. Liability to the fixed and daily penalties in paragraphs 39 or 40 of Sch 36 FA 2008 do not arise if the person satisfies HMRC, or on appeal to the tribunal, that there is a reasonable excuse for the failure to comply with a relevant information notice (paragraph 45 Sch 36 FA 2008).

26. A person may appeal against the decision that a penalty is payable or the amount of such penalty pursuant to paragraph 47 of Sch 36 to FA 2008. Notice of such an appeal must be given within 30 days of the issue of the notification of the assessment under paragraph 48.

Issues within the appeals

The six penalty appeals

27. The first issue within the six penalty appeals is whether the two categories of documents required by HMRC under the information notices, namely due diligence material and transportation documents, constitute statutory records kept for the purposes of Regulation 31(1)(a) of the VAT Regulations, namely whether they are business and accounting records for the purpose of accounting for VAT.

28. The second issue, if they are not statutory records, is whether they are reasonably required by the officer for the purpose of checking the taxpayer's tax position for the purpose of paragraph 1 of Sch 36 FA 2008.

29. The third issue is whether HMRC have proved that the appellant failed to comply with the information notices.

30. The fourth issue is whether the appellant has any reasonable excuse for any failure to comply with the information notices.

31. In these appeals there is no appeal against the information notices themselves.

The seventh and eighth appeals - information notices

32. In the seventh and eight appeals against the information notices themselves, the first issue is identical to that in the first six appeals. If the records required by HMRC are statutory records then there is no right of appeal to the tribunal against the information notices requiring the appellant to produce the material given para 29(2) of Sch 36 FA 2008.

33. If the records required are not statutory records, and therefore there is a right of appeal to the tribunal, then the second issue is whether the records required were reasonably required by the officer to check the taxpayer's tax position for the purposes of paragraph 1 of Sch 36 FA 2008.

34. In relation to the eighth appeal there is a preliminary issue as to whether the appeal should be dismissed as being made out of time or whether the Tribunal should grant permission to bring the appeal.

Background Facts

35. The Tribunal received a total of: 6 volumes of material from the appellant and HMRC including: information requests, information notices, penalty notices, review decisions and voluminous correspondence between the parties; one volume of authorities; three skeleton arguments on behalf of the respondents prior to the hearing, together with attached appendices including computer print outs; one skeleton argument on behalf of the appellant and one set of supplementary submissions from the respondents following the hearing.

36. The tribunal accepted the contents of the 6 volumes in evidence together with the material appended to skeleton arguments.

37. The only evidential issue is that the appellant challenged whether the respondents have proved the appellant's alleged failure to comply with the information notices as is set out in the issues section later in this decision.

38. The appellant carries on a cash-and-carry business and is VAT registered.

39. As early as 17 April 2012 HMRC wrote to make the appellant aware that it was still experiencing problems with business that wholesale commodities involved in Missing Trader Intra Community (MTIC) VAT fraud. It advised the appellant to make enquiries in relation to proposed transactions and referred to information Notice 726 "Joint and Several Liability" which was available from the HMRC website.

40. On 4 May 2012 the appellant was advised that it had entered into arrangements with a company whose VAT registration number had been cancelled and any input tax claimed in relation to transactions involving this company may fall to be verified.

41. As early as December 2012 HMRC wrote to request further paperwork relating to the verification for the appellant's VAT period 05/12. This included a request for due diligence packs for all suppliers for the period.

42. In January 2013 as part of the verification for the 05/12 period the appellant was informed by letter that four purchase invoices had been traced in transaction chains to those commencing with a VAT loss from a defaulting trader. The appellant was again warned that MITC VAT fraud was HMRC's top fraud priority. The appellant was also asked to satisfy that it had undertaken sufficient due diligence commensurate with the perceived risk to satisfy itself as to the integrity of its suppliers and customer and of the underlying supply chains. It was again referred to notice 726.

43. Thereafter, throughout 2013 and 2014 there were very many pieces of correspondence from HMRC to the appellant of a similar nature to the types described in the paragraphs above.

44. In 2013 and 2014 HMRC requested information from the appellant on numerous occasions by letter. Where there was an alleged failure to comply with these requests, information notices were issued by HMRC under Sch 36 FA 2008 with a schedule of information and documents required to be produced. Where there was an alleged failure to comply with the information notices, penalties were issued under Sch 36 FA 2008.

45. The appellant challenged those penalties by requesting a review of the information notices and penalties by HMRC.

46. Thereafter the appellant challenged HMRC's reviews upholding of the notices and penalties by appealing to the Tribunal.

47. The details of the appeals, information notices, penalty reviews and VAT periods involved are set out above.

First six appeals

First issue – statutory records

48. The appellant accepted that the majority of the documents required under the schedules to the various information notices were statutory documents for the purposes of paragraphs 29(2) and 62 of Sch 36 FA 2008. There was no dispute that all the documents required to be produced by the appellant under the schedules to the various information notices were statutory documents except for the requests for:

a) all due diligence paperwork relating to customers or suppliers used in the period; and

b) any relevant delivery / transport / collection paperwork

("due diligence and transportation records")

Appellant's submissions

49. In summary, it was submitted on behalf of the appellant that the due diligence and transportation records required under the information notices were not statutory records as they did not fall within Regulation 31(1)(a) of the VAT Regulations 1995. It was submitted that they were not business and accounting records kept for the purpose of accounting for VAT.

50. It was submitted that in the context of a taxpayer's VAT position only the following types of documents would constitute business and accounting records, namely those evidencing:

a. the quantum of business done both in terms of goods / services purchased or otherwise acquired and good/services sold or otherwise disposed of;

b. the nature of the goods purchased / acquired and sold/ disposed of.

c. the dates of all respective purchases / acquisitions and sales / disposals.

d. the price paid for the goods purchased / acquired and the price received in respect of all sales / disposals.

51. The appellant therefore submitted that an exhaustive list of documents falling within and outside the category of 'business and accounting records' could be defined. It was submitted that this is not a context or fact specific exercise. It was submitted that the due diligence paperwork relating to its customer and suppliers and transportation documents could not conceivably constitute records that form part of the accounting process and would not identify the amount of VAT payable and / or reclaimable. The documents had no bearing upon accounting in respect of either input or output VAT.

52. The appellant accepted that due diligence paperwork might become relevant but only if and after HMRC had made a decision to deny input tax on the basis that a tax fraud had taken place within the appellant's supply chain following operation of the principle in *Kittel v Belgium; Belgium v Recolta Recycling SPRL* [2008] STC 1537. This was not the appellant's position. It was further submitted that to the extent that the appellant had received any references to Notice 726 or warnings of Missing Trader tax fraud taking place in its supply chains these were in respect of other VAT periods than those in respect of which the information notices were issued.

HMRC's submissions

53. HMRC submitted that the documents requested under the information notices were statutory records within the definition of regulation 31(1)(a) of the VAT Regulations.

54. They relied upon the decision in *Couldwell Concrete Flooring ltd v Revenue & Customs* [2015] UKFTT 135 (TC) where it was held that all business and accounting records a trader in fact keeps would be statutory records for the purpose of an information notice. They submitted that the expression "business and accounting records" has a wide meaning.

55. They submitted that records kept for the purpose of accounting for VAT would include records kept to evidence the entitlement of credit to input tax. In the appellant's case, HMRC had previously entered into detailed correspondence with it regarding the potential for VAT fraud in its supply chain, for VAT periods which were mainly prior to those in respect of which the information notices were issued.

56. It was submitted that the appellant had been informed that HMRC wished to check whether VAT was properly accounted for or claimed as input tax and this included testing the integrity of the transactions entered into by the appellant.

57. The due diligence and transport records required from the appellant were of the type that HMRC say should be kept under Notice 726 'Joint and Several Liability for Unpaid VAT'. HMRC had previously drawn the appellant's attention to Notice 726 on numerous occasions so the appellant had been given guidance by it knew or should have known that is should maintain due diligence and transportation documents. Such records, if maintained, were bound to have been kept for the purpose of its business and for the purposes of accounting for VAT. On the other hand, if the Appellant had not kept such records then it could simply say so.

Discussion and decision

58. In interpreting whether the due diligence and transportation documents are statutory records under regulation 31(1)(a) of the VAT Regulations for the purposes of para 29(2) and 62 of Sch 36 FA 2008, there are two distinct sub-issues.

59. The first sub-issue is whether the disputed documents are business or accounting records. We consider that the term 'business records' within Regulation 31(1)(a) must be read disjunctively from 'accounting records'.

60. 'Business and accounting records' is widely drafted. It is entirely within the control of a business whether it keeps such records and it is a question of fact whether a business does in fact keep records. It would therefore be impossible to design an exhaustive or exclusive list of what documents constitute 'business records' but must include all electronic or hard copy correspondence, purchase and sales invoices etc. and any electronic material or paperwork received or generated by a business in the course of its operation or trading.

61. Indeed, we consider that the draftsman in drafting regulation 31(1)(a) was providing a catch-all provision, to encompass all the specific examples of records required to be kept in regulation 31(b)-(k) but not to limit the requirement only to those specified records. It is to be noted that regulation 31(f) and (g) specifically require the retention of transportation documents issued and received in relation to movement of goods to other member States of the EU. However, regulation 31(a) must also be capable of including transportation documentation relating to movements within the United Kingdom.

62. We respectfully agree with the decision of the first tier tribunal in *Couldwell Concrete Flooring ltd v Revenue & Customs* [2015] UKFTT 135 (TC) at paragraph 38 of its reasons:

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

63. We consider that the due diligence and transportation documents, if kept by the appellant, would be kept for its business purposes (and almost certainly exclusively

so) rather than for any private or personal purpose of its directors or employees. They are therefore business records.

64. The second and core sub-issue is whether the records, if kept, are kept 'for the purpose of accounting for VAT'. This is an objective test but is also a fact specific question requiring an examination of the circumstances in which the appellant found itself. The objective test has to be applied to the specific factual context of the appellant and its dealings with HMRC.

65. We consider that records kept 'for the purpose of accounting for VAT' are not simply those that evidence the basis of the numerical calculation to input and output tax on a VAT return and the consequential accounting for a payment to or repayment from HMRC.

66. Regulation 31 is capable of additionally covering those documents that would reliably and credibly evidence the factual foundation for the trading represented by the figures inputted on a VAT return. It may cover the documents which are used to justify a VAT return or defend a claim to entitlement to input or output tax if challenged. This much can be inferred from the inclusion of the requirement to keep records of transportation document to other member states and importations and exportations under regulation 31(e)-(h).

67. The appellant, like any other company, had to take a view of its entitlement to input tax and net this off with its output tax liabilities in submitting each VAT return. In the context of this appellant, it had been repeatedly and previously warned that there was suspected tax fraud and loss somewhere in its supply chains. Thereafter it was reasonably on notice that it should henceforth form a view of its entitlement to input tax based upon the test in *Kittel v Belgium; Belgium v Recolta Recycling SPRL* [2008] STC 1537 as applied in *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] EWCA Civ 517:

> "A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct."

68. The appellant was on notice that HMRC had concerns that it had been trading in supply chains where there was fraudulent tax loss and it had been advised to keep due diligence and transportation documents to mitigate the risk of a denial of input tax.

69. During the hearing, the tribunal asked counsel for HMRC whether HMRC had to show any evidence of fraud and tax loss in the supply chains in which the Appellant dealt for the VAT periods which were the subject of the appeal in the event the tribunal had to determine whether HMRC reasonably required the documents in question. The question was further refined as to whether it was sufficient for HMRC to do this in general terms or it had to be done more specifically.

70. It was said for HMRC that HMRC had done so in both general terms and by reference to named traders over which HMRC had concerns. The tribunal's attention was drawn to one specific example.

71. In his reply, counsel for the appellant stated that the example which had been identified did not relate to any VAT period under appeal. He went on to state that there are no examples in the bundles which relate to the periods under appeal.

72. However we agree with the submission on behalf of HMRC that where it draws attention to the risk of VAT fraud in supply chains in which a taxpayer deals, that alone would be sufficient to make HMRC's requests to see evidence of later precautions taken by the taxpayer reasonable. The reasonableness of HMRC's request should be assessed by reference to all the relevant facts, including without limitation, the repeated warnings about tax losses in supply chains in which the taxpayer deals.

73. HMRC would not necessarily have to have provided evidence of that risk in the VAT periods in respect of which HMRC requests or requires a tax payer to provide documents. When HMRC requests or requires information or records, at that point HMRC may not, and often does not have sufficient information to identify tax losses in the supply chains, where those losses are and which transactions are or may be connected with suspected or known tax losses. However HMRC may have cause to make enquiries. The verification of transaction chains is time consuming. It involves having to undertake enquiries into the activities or a number of traders. Such enquiries include ascertaining which transactions undertaken may or may not involve or be connected with tax losses. The refusal, and repeated refusal in particular, by a trader to provide information and records heightens HMRC's concerns and adds to the cause to make enquiries.

74. In this case, while most of the tax loss letters sent to the Appellant were in relation to earlier VAT periods than those which the subject of the information notices and penalties appealed, there were some specific tax loss letters which concerned three of the same periods, namely August 2013, February 2014 and May 2014.

75. In any event, we are satisfied that the tribunal only need therefore decide whether the documents required, if kept by the appellant, would therefore have been kept for the purpose of accounting for VAT. The tribunal does not itself have to take a view as to whether there was indeed such fraudulent tax loss or whether HMRC took a reasonable view as to there being a fraudulent tax loss in the appellant's previous supply chains.

76. We are therefore satisfied that the due diligence and transportation documents required from the appellant under the information notices, in the context of the factual background, were and are statutory records.

Second Issue – checking the tax payer's tax position

Appellant's submissions

77. The appellant submitted that the due diligence and transportation documents required under the notices were not reasonably required by the officers for the purpose of checking the taxpayer's position pursuant to paragraph 1(1) of Sch 36 FA 2008. This was largely for the same reasons as submitted in relation to the statutory records.

78. It was submitted that it was no answer that the documents could possibly become relevant if HMRC were to disallow input tax as this had not occurred. It submitted that there was no evidence as to how or why the identified documents could be remotely relevant to any issues that could arise even if HMRC decided to invoke the *Kittel* principle in denying input tax.

HMRC's submissions

79. HMRC submitted that the due diligence and transportation documents required under the notices were reasonably required by the officers for the purpose of checking the taxpayer's position. This was largely for the same reasons as submitted in relation to the statutory records. It was submitted that the various letters to the appellant alerted it to problems with VAT fraud and VAT loss in its supply chains and attention was drawn to Notice 726 and guidance given on how the appellant could verify the VAT status and integrity of its suppliers and customers. There were numerous examples of similar warnings about fraud and requirements for information in relation to named traders the appellant dealt with. HMRC required all the records in question in order to verify whether the Appellant was entitled to the input tax it had claimed in its relevant VAT returns, which must be checking the Appellant's tax position.

Discussion and decision

80. Given our decision that the due diligence and transportation documents requested under the notices are statutory records then there is no need for us to determine the issue as to whether they were reasonably required by HMRC to check the taxpayer's tax position under paragraph 1(1) of Sch 36 FA 2008.

81. Nevertheless, for the sake of completeness, we are satisfied that the due diligence and transportation documents required under the information notices were reasonably required by the officers for the purpose of checking the appellant's tax position. This is largely for the same reasons that we are satisfied the documents, if kept, are kept for the purpose of accounting for VAT.

82. Indeed paragraph 1(1) of schedule 36 may cover a wider class of documents than those under regulation 31 of the VAT Regulations. When considering the reasonableness of the requirement we considered both the officer's belief as to whether the documents were reasonably required but also whether this was objectively justified. The reasonableness of the requirement is to be determined at the time the notice was issued rather than retrospectively – see paragraph 74 of *Jonathon Beckwith v HMRC* [2012] UKFTT 181 (TC).

83. The definition of 'tax position' under paragraph 64 of Sch 36 FA 2008 is wide. It is likely that it will be reasonable in checking a taxpayer's position for the purposes

of paragraph 1(1) for HMRC to require at least the same documents required to be kept by regulation 31 of the VAT Regulations for the purpose of accounting for VAT.

84. We rely on the same material as above which was relied upon to determine whether the documents were or are statutory records. A further example of this evidence is derived from an earlier extended verification process, in which HMRC's wrote to the appellant's advisors on 5 April 2013 to makee clear the purpose of the verification was to "*...make all reasonable enquiry into claims. This includes testing the information given in support of the claim, prior to making repayment*". This made it clear that HMRC's enquiries had been directly connected with claims for input tax. In order to deny input tax under the *Kittel* principle, HMRC have to establish whether there is evidence which shows that the appellant knew or should have know that its transaction were connected with the fraudulent evasion of VAT. The circumstances in which such transactions were undertaken need to be understood on an objective basis.

85. As above, the appellant was therefore on ample prior notice that any documents created or obtained in connection with the Appellant's activities concerning trading, including checks performed in relation to the appellant's counterparties would be relevant to any verification exercise past or future. Those documents would include due diligence and transportation documents.

86. We are satisfied that the due diligence and transportation documents as required under the information notices were reasonably required by the officers for the purpose of checking the appellant's tax position.

Third Issue – proving non-compliance

Appellant's submissions

87. The appellant submitted that because these were penalty appeals, HMRC bore the burden of proving that the penalties were payable and that it needed to prove the appellant's alleged failure to comply with the information notices before the penalties could be upheld.

88. It was submitted that HMRC had failed to provide any evidence of non-compliance as they did not produce any witness statements to evidence this nor did they set out in in evidence what they said was or was not received from the appellant in respect of each of the information notices.

HMRC's submissions

89. It was submitted on behalf of HMRC that each of the review letters which upheld the penalties and formed the basis of the six appeals made clear that none of the documents required under the information notices had been provided by the appellant. This alone was sufficient evidence.

90. In addition HMRC had supplied computer print outs with its third skeleton argument. These showed that when each penalty notice was issued it was

accompanied by a schedule of documents which HMRC said had not been produced by the appellant. While the actual penalty notice and schedule of documents sent were not available, they should have been attached to the penalty notices but were not, it was submitted that the print outs sufficiently evidence what was not produced by the appellant.

91. What HMRC argue is that these printouts therefore prove the schedule of documents not sent by the appellant in reply to the information notice and are further evidence of non-compliance with the information notice.

Discussion and Decision

92. The burden is on HMRC to satisfy the Tribunal that the circumstances giving rise to the information notice and penalty have arisen in fact and law. This includes a requirement that HMRC has proved any failures by the appellant to comply with the information notices.

93. The issue of sufficiency of evidence to prove non-compliance was only raised by the appellant shortly before the hearing in its skeleton arguments and had not been raised in earlier directions before the tribunal.

94. Rule 15(2) of the Tribunal Rules does not attempt to define or limit the admissibility of evidence before the tribunal in providing:

> (2) The Tribunal may— (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or

95. Any lack of witness statement from HMRC, where none was previously directed by the Tribunal nor requested by the appellant, could not determine the sufficiency of evidence. There is no authority before this Tribunal which requires evidence only to be admitted pursuant to a witness statement.

96. The reference, within the review letters upholding the penalties, to the appellant's failures to provide the information required is sufficient to discharge the burden of proof.

97. Furthermore, there has been no active submission or evidence provided by the appellant to suggest it did at any stage comply with the information notices.

98. The further computer print outs from HMRC provide some supporting evidence that the penalty notices when sent to the appellant also included schedules of the documents which had not been provided by the appellant.

99. We are satisfied that HMRC have discharged the burden in proving that the information notices and penalties were properly issued and that the appellant failed to comply with the information notices which gave rise to the penalty. The appellant failed to produce all the documents required under the notices. The information notices and penalties are confirmed as such.

Fourth Issue – reasonable excuse

100. The appellant did not pursue any argument to suggest it had any reasonable excuse for its failure to comply with the information notices so as to avoid liability to the penalties.

101. HMRC submitted that there was no such reasonable excuse and the appellant had failed to argue or evidence any form of excuse.

102. The Tribunal therefore does not need to consider this issue any further.

Seventh and Eighth appeals

103. Determination of the seventh and eighth appeals involves determination of the same first two issues as in the six appeals against the penalties imposed.

104. For the reasons set out above, the Tribunal finds that the documents required under the information notices were statutory records for the purposes of regulation 31 of the VAT Regulations and therefore there is no right of appeal against the information notices or their requirements pursuant to paragraph 29(2) of Sch 36 FA 2008. The tribunal has no jurisdiction to hear the seventh and eighth appeals.

105. The appeals against the information notices must therefore on this basis alone be struck out under Rule 8(2)(a) of the Tribunal Rules.

106. Even if the documents are not statutory records and the tribunal did have jurisdiction to consider the appeals, we would confirm and uphold the information notices as requiring information and documents reasonably required by the officers to check the appellant's tax position for the purposes of paragraph 1(1) of Sch 36 FA 2008. The appeals would therefore be dismissed.

Eighth appeal - out of time?

107. The tribunal considered whether or not to grant permission to bring the eighth appeal out of time.

108. The eighth appeal, TC/2015/04209 proceeds by way of appeal notice dated 7 July 2015. It is an appeal against the information notices dated 3 December 2013, 10 February 2014, 2 May 2014 and 12 September 2014.

109. The appeal notice was filed considerably later than the 30-day time limit for appeals against information notices provided under paragraph 32 of Sch 36 FA 2008. The appeals were filed between nine and eighteen months late.

The Appellant's submissions

110. The appellant submitted that a crucial reason for the late filing of its appeals against the information notices was that it was misled by an incorrect statement of fact and law made by HMRC within the notices themselves. The notices asserted that the

appellant did not have a right of appeal because the information and documents were statutory records.

111. It was submitted that HMRC misled the appellant as to its appeal rights and it would plainly be just to permit it permission to extend time to bring the appeal. It was submitted that the issue in the information notice appeals was substantively the same as the penalty appeals and the late filing had not resulted in any further delay in the hearing of the appeals nor added any delay in listing nor time estimate for the hearing of the appeal. It was submitted that there was no consequence or prejudice suffered by HMRC in giving permission to bring the appeal. In contrast, the consequence for the appellant of not giving permission would be to dismiss the appeal.

HMRC's submissions

112. HMRC opposed the appellant's application. It submitted there was nothing misleading in the information notices. Having fairly taken the view that the documents were statutory records then HMRC took the view there was no right of appeal against the information notices. It was always open to the appellant to challenge whether the documents were statutory records by appealing against the notices notwithstanding HMRC's view. It was submitted that the appellant had been legally represented throughout and had managed to file six penalty appeals and failed to make appeals against the information notices. It was only when it was drawn to its attention in correspondence from HMRC that they had not appealed the notices that the appellant attempted to rectify its error.

113. HMRC submitted it would and had suffered prejudice in time and expense in having to deal with matters such as responding to the appeal and making submissions in opposing the appeals being heard out of time.

Discussion and Decision

114. The tribunal applies the overriding objective under Rule 2(1) of the Rules to deal with cases fairly and justly. It also considered the factors set out in Rule 2(2) namely:

(2) Dealing with a case fairly and justly includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.

115. The tribunal notes the useful summary provided by the First Tier Tribunal at paragraph 4 of its decision in *Assaf Ali Butt v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 95 (TC):

'In terms of the tests and general approach that we must adopt in dealing with applications to appeal out of time we have considered the recent decisions of the Court of Appeal in *Mitchell*

v News Group Newspapers Ltd [2103] EWCA Civ 1537 and *Denton v T H White Ltd* [2014] EWCA Civ 906, and those of the Upper Tribunal in *McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC), *Data Select Limited* [2012] UKUT 187 (TCC) and *Leeds City Council* [2014] UKUT 350 (TCC). Taking together all those decisions, we concur with the conclusion reached by this Tribunal in the recent case of *Aeron Mathers* [2014] UKFTT 893 (TC) (at [25]):

> "… briefly, we consider the main points to be that:
>
> - even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
> - as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
> - we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and
> - in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select*. Those points are that we should address the questions:
>
> (1) What is the purpose of the time limit?
>
> (2) How long was the delay?
>
> (3) Is there a good explanation for the delay?
>
> (4) What will be the consequences for the parties of a refusal to extend time or the grant of such an extension?
>
> - We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and
> - It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times."'

116. The approach we adopted was therefore to concentrate upon the criteria set down by Mr Justice Morgan in *Data Select* at paragraph 34 of the decision:

> As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time

limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

117. However, the tribunal considers all the circumstances of the case as a whole and also noted the Court of Appeal's judgment in *BPP Holdings v RC* [2016] EWCA Civ 121; 2016 1 WLR 1915 in which the Senior President of Tribunals stated at paragraph 15-16 and 37-38 of his judgment:

> 15.There are two conflicting decisions of the UT about the principles that are to be applied when non-compliance with rules and directions falls to be considered by a tax tribunal. The first in time is the decision of Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), [2014] STC 973 and the second is the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) where he declined to follow Judge Sinfield's approach. The *Leeds* decision was promulgated after Judge Mosedale's determination in this case and accordingly she could not have known of it. Judge Bishopp followed his earlier reasoning in *Leeds* in coming to the conclusion that the FtT in this case had erred in law.
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> 17.The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.
>
> ……..
>
> 37.There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

118. In applying the law to the facts of this case, the purpose of the time limit in which to bring an appeal, is in pursuit of a clear public interest in the finality of decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion. As time limits, whether imposed by statute, tribunal rule or tribunal directions serve the public interest, compliance is normally to be expected. This decision is not the forum in which to analyse the potential effect of the stricter approach to compliance with rules and directions mandated by *BPP Holdings* when balancing or giving weight to the competing factors in *Data Select*. Indeed at paragraph 44 of the Court of Appeal's judgment in *BPP Holdings*, His Lordship, the Senior President declined to analyse *Data Select*. However, the fact that the deadline for appeal in this case is set by statute, namely section paragraph 32 of Sch 36 FA 2008, rather than the Rules only emphasises its importance.

119. The length of the delay in this case before a notice of appeal was filed by the Tribunal on 7 July 2015 was extraordinary. It amounted to between nine and eighteen months later than required for each of the information notices. We note that the Upper Tribunal in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at paragraph 96 stated that 'a delay of more than three months cannot be described as anything but serious and significant.' We also note that the Upper Tribunal in *O'Flaherty v Revenue and Customs Commissioners [2013]* UKUT 0161 (TCC) stated that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

120. It seems to us that the appellant's explanation for the delay, that it was misled, is unsustainable. It was legally represented throughout and indeed appealed against a review decision in relation to one of the information notices on 7 April 2014. It was perfectly able to discern that it could disagree with the assessment contained within the information notice that the documents were statutory records. Indeed the appellant did not offer any further explanation for the delay and why it took so long before it decided to file the appeal. Therefore it could and should, it if chose to do, to have brought the appeal at an earlier date.

121. In terms of the consequences for both parties of granting or refusing permission to appeal, HMRC was not prejudiced substantially beyond the general requirements of defending the penalty appeals as they raised the same issues as the appeal against the information notices. No further substantial time was required to consider the appeal. HMRC did not suggest that it would be unable to reply to the substantive points raised nor submit that documents or evidence relevant to the appeal had become unavailable. The consequences for the appellant of refusing permission would be dramatic in the sense that the appeal would fall away and the information notices would stand without consideration of the merits of the appeal.

122. Despite the majority of the factors weighing against the appellant, we considered that in the circumstances of hearing seven other appeals on the same issue

and determination of the eighth appeal requiring no further time or resources, the lack of substantial prejudice to HMRC should weigh in the appellant's favour.

123. Therefore we considered that in the exceptional circumstances it would be in accordance with the interests of justice and overriding objective to extend time for filing of the notice of appeal and grant permission for the eighth appeal to be brought out of time. However we strike out the appeal on the grounds of lack of jurisdiction as is set out above.

Conclusion

124. All eight appeals are dismissed or struck out for the reasons set out above and the information notices and penalties for failure to comply therewith are confirmed and upheld.

125. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 28 OCTOBER 2016