[2017] UKFTT 0525 (TC)

TC05974

Appeal numbers: TC/2015/07128
TC/2015/07130

INFORMATION NOTICES – ***FA 2008 Sch 36 – penalties for failure to comply with requirements of notices under para 39 – continued failure despite imposition of daily penalties pursuant to para 40 – appeal not brought under para 45 – challenge of validity of information requests under para 29 instead – the basis for considering such a challenge out of time – the burden of proof – whether items reasonably required to check tax position – whether reasonable excuse nevertheless – whether penalties disproportionate – appeal dismissed – penalties confirmed***

FIRST-TIER TRIBUNAL
TAX CHAMBER

KENNETH CARLYLE **Appellant**

- and -

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

ELIZABETH FIELDMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
IAN MALCOLM

Sitting in public at Edinburgh Tax Tribunal, George House, 126 George Street, Edinburgh on 25 April 2016 and 12 September 2016

Mr Kenneth Carlyle, in person, and as representative for Ms Elizabeth Fieldman

Ms Christine Cowan, H M Inspector of Taxes, for the Respondents

DECISION

Introduction

1. The appellants, Mr Carlyle and Ms Fieldman, are husband and wife. As part of the enquiry into the appellants' tax affairs, several information notices had been issued under Schedule 36 to the Finance Act 2008 ('Sch 36'). The notices issued on 27 August 2014 were the notices to which these appeals relate.

2. The appellants did not comply with the information notices by the stipulated dates, and each appellant was issued the following penalty notices:

(1) for an initial penalty of £300 on 3 October 2014;

(2) for daily penalties of £1,460 on 16 December 2014;

(3) for further penalties of £3,100 on 17 February 2015.

3. On 14 December 2015, the appellants notified their appeals against the penalty notices to the Tribunal on the ground that the information notices were invalid.

Evidence

4. Mr Carlyle represented himself and Ms Fieldman. He called Mr Sinclair (accountant acting for both appellants) and Ms Fieldman as witnesses, and gave evidence himself. All three witnesses were cross-examined by Officer Cowan. We accept the evidence given by Mr Sinclair, Ms Fieldman and Mr Carlyle without qualification. The oral evidence led was in line with the documentary records and correspondence provided to the Tribunal.

5. The respondents did not call any witnesses. A documents bundle was produced to the Tribunal and served on the appellants. The bundle includes the Sch 36 penalty notices, which are the subject of these appeals, the enquiry correspondence between the parties, and HMRC's notes of meetings with the appellants, together with notes of telephone calls made to the appellants and their agent.

6. The documentary evidence forms an important part of the proceedings. The appellants were sent a copy of the meeting notes at the time, and Mr Sinclair was also included in the circulation list from an early stage of the enquiry. There is no dispute as regards the contents of these records.

The legislative framework

7. HMRC's powers to obtain information and documents from a taxpayer are provided under Sch 36 of FA 2008, of which para 1 states as follows:

> '**1** (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") –
>
> (a) to provide information, or
>
> (b) to provide a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.'

8. Part 4 of Sch 36 provides for the restrictions on powers on HMRC to make information requests, and under para 18, it is stated that:

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

9. The legislation governing appeals against information notices is provided under Part 5 of Sch 36, of which para 29 states:

'**29** (1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the tribunal against the notice or any requirement in the notice.

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

10. The provisions in relation to an appeal against an information notice to the Tribunal are under para 32, and under sub-paras 32(3) and (5), it is stated:

'**32** (3) On an appeal that is notified to the tribunal, the tribunal may –

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

…

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

11. The provisions as regards the imposition of penalties are set out under Part 7 of Sch 36, paras 39-52, whereby:

'**39** (1) This paragraph applies to a person who –

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

(b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.

(2) The person is liable to a penalty of £300.

…

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

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

…

Reasonable excuse

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

(2) For the purposes of this paragraph –

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.'

12. Certain terms used in Schedule 36 are given their statutory definition under Part 9 (paras 58 to 64) of the Schedule. The terms of relevance to the current appeals are:

'**58** In this Schedule –

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

…

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

Business

60 (1) In this Schedule (subject to regulations under this paragraph), references to carrying on a business include –

(a) the letting of property,

(b) …

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, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

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

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

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

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

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

Tax

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

(a) income tax,

(b) capital gains tax, …

Tax position

64 (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 a ny 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.'

Factual background

Ms Fieldman's property letting business

13. Ms Fieldman is a US citizen who came to study in Edinburgh for a Masters degree in Business Studies and stayed on to find employment. In 1994, she purchased her first property in Crighton Place as her home. She returned to the US in 1995 and the flat was let out, but she did not register as an overseas landlord because she reckoned that the rental income only covered her costs.

14. In 1997, Ms Fieldman married Mr Carlyle, and the couple jointly owned a new property at St Claire Place while Crighton Place continued to be let out.

15. Mr Carlyle developed Crighton Place by converting the attic into bedrooms and the property turned from being a 2-bedroom flat to a 6-bedroom let. The conversion was carried out in 2000 and letting for multiple occupancy, which required licencing by the City of Edinburgh Council, commenced in September of 2000.

16. Crighton Place gave the couple 'the business model' whereby flats with an attic were identified for purchase for conversion.

17. Ms Fieldman worked for Scottish & Newcastle Brewery as a business and financial analyst until 2004 when she took redundancy. Mr Carlyle was contracted to work for Transco in 2000-01. In 2004, all properties in joint names were put into Ms Fieldman's name only, as Mr Carlyle had not been in paid employment since 2001, excepting the three months from January to March 2012, when he worked for a fire suppression company in Wakefield.

18. From their different employments, the couple turned to set up a business which consists of purchasing property with an attic for conversion as investors and developers, and then letting the flats out as landlords. The initial capital to buy the first investment property had come from the profit from the sale of St Claire Place, and from inheritance received. By financial arrangements which combined equity release with borrowing, the couple acquired further properties and had a portfolio of some 11 properties by 2012.

19. The assignation of all the properties to Ms Fieldman in 2004 was in part prompted by the couple's re-financing of their mortgages on these let properties to fund purchase of new properties. Instead of individual mortgages for each property, a kind of consolidated fund was set up with the lender, to provide the finances to purchase new properties in a portfolio held in Ms Fieldman's sole name.

20. While the acquisition and conversion of properties were progressing at a steady pace, the tax affairs of Ms Fieldman as the sole property owner of these letting properties since 2004 were very much in arrears. Prior to 2006-07, the couple reasoned that since there had been no real profits to give rise to a tax liability due to the high gearing of the properties, so no attempts were made to return the income and expenditure of these rental properties. When questioned by HMRC's enquiry officers how the living costs were covered during this period, Mr Carlyle asserted that there were loans from extended family to fund the day-to-day living expenditure of the couple and their three children.

21. Attempts were made to get their financial papers into order to make a return for 2006-07 by engaging the service of a bookkeeper and then an accountant. These attempts were abortive because both the bookkeeper and the accountant turned out to be deficient in many respects. Some of the business records also became unavailable as they were not returned by the accountant.

Background to the information notice of 27 August 2014 served on Ms Fieldman

22. On 17 November 2009, HMRC opened a compliance check into Ms Fieldman's tax position. On 4 November 2010, the information request was provided in draft format and HMRC were informed that a return was yet to be submitted for the year ended 5 April 2010.

23. On 30 January 2011 a return was submitted for 2009-10 and an official enquiry into 2009-10 was opened on 27 January 2012.

24. On 27 April 2012, the first meeting between HMRC and Ms Fieldman took place. Ms Fieldman was represented by her accountant, Mr Andrew Sinclair throughout the enquiry.

25. On 21 May 2012, Officer Lawson, who was in charge of the enquiry, wrote to Ms Fieldman to request a list of documents for the enquiry, to be provided by 25 June 2012. Two copies of the meeting notes of 27 April 2012 were enclosed. These notes were not disputed at the time.

26. On 24 August 2012, Officer Lawson issued a formal notice under Sch 36 since the information she requested by letter dated 21 May 2012 had not all been provided. The list of information that remained outstanding consisted of 10 items to be provided by 9 October 2012.

27. On 25 October 2012, a second meeting took place to progress with the enquiry. HMRC's notes of the meeting were supplied to Mr Carlyle and Ms Fieldman and were not disputed at the time.

28. On 10 January 2013, Officer Lawson issued a second information notice for compliance by 11 February 2013.

29. On 23 April 2013, Officer Lawson included the tax year ended 5 April 2011 into the ongoing enquiry under s 9A of the Taxes Management Act ('TMA'). The SA return for 2010-11 was submitted late on 30 April 2012.

30. On 16 May 2013, a meeting between Ms Fieldman and HMRC as part of the enquiry took place in which Officer Lawson raised the matter that no evidence was available to support the renovation costs of each property. While Mr Carlyle had given the figure of at least £500,000 being spent on renovating the properties, it was difficult for Officer Lawson to accept the figure without supporting evidence, especially in view of the labour and time put in by Mr Carlyle himself.

31. HMRC's meeting notes for 16 May 2013, of which the appellants were sent a copy, stated at para 2.8 the following:

> 'After discussion, it was agreed that Mr Carlyle would cost out the entire development of the last property. He explained that a quantity surveyor could provide a reasonable estimate of the costs and he was confident that the sums would back up his estimates.'

32. On 21 June 2013, Officer Lawson contacted Mr Sinclair to follow up several matters after the meeting of 16 May 2013. In respect of the surveyor's report, Mr Sinclair advised that Mr Carlyle was still obtaining a report on the value of the attic conversion at Crighton Place to support the additional mortgage used to cover the capital expenditure incurred. Officer Lawson said that she was surprised that no receipts were kept for any of the work carried out since they would be required for capital gains purposes when the property was sold. Mr Sinclair then advised that HMRC would accept estimates when the property was eventually sold, and that was the reason why a surveyor's estimate was being suggested.

33. There were some email exchanges between Officer Lawson and Mr Sinclair in July 2013 before Officer Lawson's letter of 14 August 2013 to Mr Sinclair. The letter starting by noting that some of the information originally requested in the schedule attached to the letter of 10 January 2013 remained outstanding.

34. In relation to the costs for attic renovations for the properties held, Officer Lawson commented in her letter of 14 August 2013 the following:

> 'I appreciate that it is proving difficult and time consuming for you to obtain from your client supporting invoices for Crighton Place however as I have not seen any corroborating evidence of building costs relating to the attic conversions it is unrealistic for me to accept the figure of £403K without further examination.
>
> In your figure of £403K would you please advise if there is any element of Mr Carlyle's labour costs included and if so how much is attributable to each year? If there are no labour costs included for Mr Carlyle then I have difficulty in agreeing this figure knowing that Mr Carlyle was heavily involved in the attic conversions.
>
> I know that substantial expenditure would have been incurred and that we need to come to some agreement on a figure however it would be good to see some supporting evidence of the full costs incurred in at least one of the attic conversions and I therefore request any documentation relating to a more recent attic conversion than Crighton Place. If this is not possible then please explain in detail what has happened to the invoices that make them so difficult for your client to produce.'

35. On 26 September 2013, Mr Sinclair emailed Officer Lawson in respect of the attic conversion costs:

> 'My clients are suggesting, once again, that the best way forward on this would be to get a QS firm to provide an opinion on the works carried out on either Crighton Place or another which would ultimately provide the answers you and they are looking for. This has been raised previously but they now ask that this is taken as a request and seek your agreement on it. Please come back to me to confirm your agreement. I can arrange this as I have a QS contact.'

36. On 27 August 2014, an information notice was issued to Ms Fieldman, and documents requested for submission were: (1) a QS report assessing the costs of

building works on one typical property conversion, and (2) a finalised statement of property income and expenditure for all relevant years.

Mr Carlyle's various business undertakings

(a) The Woodhall Arms Public House

37. At the enquiry meeting on 27 April 2012, Mr Carlyle made a disclosure to HMRC, probably on the advice of Mr Sinclair. In 2009-10, Carlyle took over a failing pub business with the view of purchasing the premises and business. He ran the business for 10 months during 2009-10, but the deal to purchase fell through and a new owner took over. There were full books and records for the period of business operated by Mr Carlyle; the records include till tales and rolls, cashbook, PAYE records etc.

38. Mr Carlyle advised that the rent for the pub business period was £35,000 and that he did not take much in drawings; that the pub only served drinks and snacks and no food. Mr Sinclair indicated that there should not be any tax to pay.

39. Officer Lawson was accompanied by Officer Goode, who raised the matter of VAT, and that VAT would have been due on the pub business, and advised that a payment on account should be made.

40. Mr Carlyle was not sure if he had registered for VAT.

(b) The CIS issue

41. In the enquiry meeting on 25 November 2013 between HMRC and Ms Fieldman, it came to light that Mr Carlyle had been project managing the renovations of properties not only for Ms Fieldman, but two others.

42. After leaving Transco, from around 2001 onwards, Mr Carlyle has been heavily involved in developing the properties in the portfolio held (since 2004) in the sole name of Ms Fieldman. In this capacity, Mr Carlyle confirmed that he had not been paid for any of the renovation works and stated that 'I've only one pair of hands', which meant joiners, plumbers, plasterers, electricians etc were contracted and paid to carry out the attic conversion projects. There were, however, no records to support the payments made to the trades, as the records had been given to the previous agent in 2006-07 and were never returned.

43. Apart from managing the renovation projects for Fieldman, in around 2005 to 2007, Carlyle was also managing the renovations of properties for a Mr Dyer and a Mr Stewart. He described his responsibility in these renovation projects for Fieldman, Dyer and Stewart as giving architectural instructions, purchasing materials, paying tradesmen and carrying out general labouring and joinery work. Dyer paid Mr Carlyle by cheque in round sums to be disbursed as required.

Background to the information notice of 27 August 2014 served on Mr Carlyle

44. Officer Lawson was accompanied at the November 2013 meeting by Officer Anderson, who raised the CIS issue in respect of Carlyle's engagement in the capacity as a project manager in these renovations. Anderson advised that either Carlyle or Fieldman had acted as a contractor and that failure to operate the CIS scheme meant one or both of them could be liable for the tax that should have been deducted.

45. After a short adjournment, Officer Anderson offered, 'without prejudice' (which was explained to Carlyle and Fieldman) the basis HMRC were prepared to move forward with the enquiry, and this was recorded in the meeting notes as follows:

- 'Acceptance that no other mortgage funds, beyond the £100k, had been used to support personal expenditure.
- The balance of, approx., £403,000 was used to fund renovations, specifically materials and labour.
- As previously offered a quantity surveyor should be instructed to assess the cost of building works at one "typical" property, split between material and labour (factoring in Carlyle's labour) – if all parties agreed with their findings it would be used as a basis to quantify the building costs at all developments (required for CG purposes going forward).
- The findings would also be used to quantify the overall costs, in term [sic] of tradesmen, which would inform them as to the potential liability under the failure to operate CIS.'

46. Officer Anderson's proposal as quoted above from the meeting notes was followed by the statement: 'All parties agreed with the proposals.'

47. Under the heading of 'Conclusion', the meeting notes stated as follows:

> 'Lawson agreed to supply written confirmation of the agreed way ahead and Sinclair undertook to contact the QS to make arrangements. He agreed to update Lawson in 2 weeks with a timeframe for the QS to carry out his assessment.'

Officer Wilkie took over the enquiry in May 2014

48. By letter dated 12 May 2014, Officer Wilkie wrote to Mr Sinclair and advised that he had taken over the enquiry from Mrs Lawson and would be dealing with all matters through to settlement, which he hoped would be in the very near future. He continued by stating: 'This check has been ongoing for a number of years and really must now be settled by agreement or by the raising of estimated assessments.'

49. In respect of Ms Fieldman, Officer Wilkie requested a response by 6 June 2014 from Mr Sinclair to the following matters which remained outstanding:

> '1. A report from a Quantity Surveyor assessing the costs of building works on one typical property conversion. This should be split between materials, general labour and Mr Carlyle's labour.

> 2. An up to date statement of income and expenditure covering rental income received for all relevant years. This should include any earlier years or amounts relating to St Claire Place or Crighton Place which may require estimated amounts to be included. Any loan interest adjustments and adjustments for private use (agreed earlier at 15%) should be included. If this is not in my hands by 6th June I will raise, on that day, estimated assessments for all relevant years.
>
> 3. I cannot see that a completed Statement of Assets has been submitted. Please let me have this by 6th June.'

50. In a separate letter dated 12 May 2014, Officer Wilkie set out to Mr Sinclair the outstanding matters in relation to Mr Carlyle's tax position:

> '1. For the last 2 years you have been promising that the outstanding accounts in relation to the Woodhall Arms public house together with the outstanding relevant Self Assessment tax returns would be submitted. I do not intend delaying matters further therefore I have contacted my colleague in the Debt Management Team who will shortly be issuing tax determinations for the years 2009/10 and 2010/11 in the amounts of £10,000 each year.
>
> 2. It was agreed at an earlier meeting that the Construction Industry Scheme had not been correctly operated in that Mr Carlyle had failed to deduct tax from payments to sub-contractors. It may be that the information requested at point 1 of my letter regarding Ms Fieldman's affairs will clarify this but your views on the amounts involved for work carried out for Ms Fieldman as well as Dyer and Stewart would be appreciated.
>
> 3. What amounts were earned personally by Mr Carlyle as far as all renovation work was concerned? Please submit income and expenditure statements for all relevant years.'

Communications between the parties before the issue of information notices

51. On 12 June 2014, Mr Sinclair responded to Officer Wilke's letter of 12 May 2014 in respect of Ms Fieldman. (No response regarding outstanding matters in Mr Carlyle's case seemed to have been made.)

52. Mr Sinclair stated his clients' position regarding a QS report as follows:

> 'It was suggested that a QS be engaged for analysis for future CGT liabilities. Your two colleagues Lawson and Anderson determined that a labour and material split be calculated to give them information to support their erroneous assertion re the CIS position which has been covered off [sic] in point 2 of the letter re Mr Carlyle. We no longer consider this necessary.'

53. On 8 July 2014, Officer Wilkie replied to Mr Sinclair on the point of the QS report as follows:

> 'Given the comments in my letter to yourselves concerning Mr Carlyle, I consider that the information from the quantity surveyor is still required and I look forward to receiving this shortly.'

54. On 4 August 2014, Officer Wilkie telephoned Mr Sinclair in view of the lack of response to his letters of 27 June 2014 (not in the bundle) and 8 July 2014.

55. Mr Sinclair advised over the phone that his clients had been very busy with new re-lets and this was the reason for the delay. He related that Mr Carlyle was still adamant that the work in question fell outside the scope of the Construction Industry Scheme; that he considered he only did the work for the 'love and affection' of his wife and that she paid the bills. Office Wilkie replied that he was prepared to discuss the Construction Industry Scheme issue at a meeting but that it would not really be a 'settlement meeting' as such, but also advised that he could not see his view changing on this.

The information notices and the penalty notices

56. Officer Wilkie's note of telephone call to Mr Sinclair on 4 August 2014 was the last communication log on file before the issue of the information notices to which the appeals relate.

57. On 27 August 2014, Officer Wilkie issued an information notice to Mr Carlyle, requesting the submission of the following documents:

> '1. income and expenditure statements in respect of renovation work carried out for all relevant years.'

58. As related earlier, on 27 August 2014, Officer Wilkie also issued an information notice to Ms Fieldman, requesting the submission of the following documents:

> '1. a Quantity Surveyors report assessing the costs of building works on one typical property conversion
>
> 2. a finalised statement of property income and expenditure for all relevant years.'

59. In both instances, 27 September 2014 was stated as the date for complying with the information notices.

60. Mr Andrew Sinclair, accountant to the appellants, was sent an agent's copy of both information notices.

61. On 3 October 2014, the first penalty notice was issued to each appellant, to impose an initial penalty of £300 under Sch 36 paras 39 and 46 for failure to provide the requested information by 27 September 2014.

62. Under the section heading of 'What to do now', the penalty notice advised of further penalties of 'up to £60 a day from the date of this penalty notice' if the requested information was not produced by 3 November 2014. Crucially, for the purposes of these appeals, the penalty notice also stated the following:

> 'If you are finding it difficult to do what the notice asks, please phone me as soon as possible on the number shown at the top of the notice.'

63. On 16 December 2014, Officer Wilkie issued a second penalty notice to each appellant to impose daily penalties at £20 per day from 3 October 2014 to 15 December 2014, in the sum of £1,460 for the 73 days. The daily penalties were imposed under Sch 36 paras 40 and 46.

64. The penalty notice continued by requesting information to be provided by 15 January 2015, and advised of further penalties up to £60 a day for failure to do so.

65. On 4 February 2015, Officer Wilkie made note of his two telephone calls before the issue of the third penalty notices.

66. The first call was to Ms Fieldman at her home, and she stated that she did not appreciate being called as she had an accountant who was acting for her. Officer Wilkie explained that it is HMRC's policy to make a 'courtesy call' before the issue of any further daily penalties under Sch 36. Ms Fieldman was unaware of any outstanding matters and asked Officer Wilkie to phone Mr Sinclair.

67. The second call was to Mr Sinclair and related the gist of the phone call to Ms Fieldman. Mr Sinclair advised that he had been speaking to Mr Carlyle regarding the outstanding information and would hope to have it submitted shortly. Officer Wilkie remarked that there seemed to be a breakdown in communication between husband and wife as Ms Fieldman had advised that all information had been submitted and knew nothing about the penalties. Crucially, Mr Sinclair said that he had received the penalty letters and was 'totally aware of the charges which had been raised', according to the note of the conversation. Mr Sinclair also undertook to speak to both spouses in an effort to get matters resolved and the outstanding documents submitted.

68. On 17 February 2015, Officer Wilkie issued a third penalty notice to each appellant, to assess further penalties under Sch 36 paras 40 and 46 at £50 a day from 16 December 2015 to 12 February 2015, in the sum of £2,900 for 58 days.

69. Mr Sinclair was sent the agent's copy of the three penalty notices for each appellant on the same dates of their issue.

Appeal and review

Appeals against the penalties

70. On 27 February 2015, Mr Sinclair sent an email to Officer Wilkie and referred to the penalty notices issued on 17 February 2015, and stated that his clients would be appealing against the penalties.

71. On 18 March 2015, Mr Sinclair wrote two separate letters to make an appeal. Both letters started by referring to the penalty notice issued on 17 February 2015, and the letter for Ms Fieldman continued as follows:

> 'We hereby wish to lodge an appeal against this Penalty Notice on the grounds that it is not relevant as items requested are not required by HMRC, namely a Quantity Surveyors Report, due to the ongoing

> disagreement regarding HMRC's treatment of the client as a CIS Contractor. Until such time as this is determined no Quantity Surveyor Report should be requested due to the costs involved in such a report which may never be required by HMRC.'

72. Mr Sinclair's letter of 18 March 2015 for Mr Carlyle stated the reason for the appeal as follows:

> 'We hereby wish to lodge an appeal against this Penalty Notice on the grounds that the Income and Expenditure Statements in respect of renovation works carried out for all relevant years cannot be finalised until such time as HMRC determine CIS Contractor Status of Mr Carlyle's wife Ms E R Fieldman.'

73. On 23 March 2015, Mr Sinclair sent two separate letters setting out the reasons for contending the validity of the information notices issued in each case.

74. On 5 May 2015, Officer Wilkie sent an email to Mr Sinclair, confirming that his 'appeal had been received and has now been actioned'. He continued by advising that the collection of the penalties of £2,900 has been 'suspended until this appeal is resolved'; and that the other amounts, namely '£300 and £1,460 remain due and payable'. As far as Officer Wilkie was concerned, the appeal Mr Sinclair had lodged was only against the *third* penalty notice; the first and second penalty notices had not been appealed.

HMRC's decision on the penalties

75. On 12 August 2015, Officer Wilkie wrote to Mr Sinclair in response to the appeal made on behalf of Mr Carlyle and gave his reasons for upholding the penalties:

> 'When M [sic] Carlyle first commenced this business the income should have been notified to HMRC within one year from the end of that year of assessment. As you have advised that Mr Sinclair [sic] commenced on 6/4/01 HMRC should have been notified by 6/4/03. Your grounds for appealing this notice are, in my opinion, irrelevant. This income was a separate issue from the CIS matter of his wife and there can be no excuse for failing to declare this income in the subsequent years.
>
> As far as these particular penalties are concerned however the facts are that the requested information was not submitted until 23/3/15 and that the penalties refer to the non-submission over the period 16/12/2014 to 12/2/15.'

76. In respect of the appeal for Ms Fieldman, Officer Wilkie wrote to Mr Sinclair, also on 12 August 2015, and gave his reasons for upholding the penalties as follows:

> 'Although you suggest that the QS report was not required, and ultimately this may have been proved correct, that fact is that this course of action was agreed with your client at a meeting on 25/11/13 and at that time, was indeed considered relevant. Whilst you may disagree with my views or suggest that you have a case to contest this

> particular request the fact remains that the second request – income from property details – were not submitted until 23/3/15.'

Late appeals of the earlier penalties

77. On 4 September 2015, Mr Sinclair responded in two separate letters to Officer Wilkie's decisions of 12 August 2015 on behalf of his clients. The letters went into considerable detail in raising objections against the information requests, and in both letters, it was stated that 'this letter should be taken as an appeal against the previous two penalty determinations made for the production of the same information, and that our stance on this remains the same as that of our appeal against tranche 3' penalties.

78. On 14 September 2015, Officer Wilkie replied to Mr Sinclair's letters of 4 September. He addressed the issue of the late appeals in respect of the initial penalty of £300 and the daily penalties of £1,460 imposed in the following terms:

> 'I note you have supplied no information as to why these appeals were not submitted within the 30 day appeal period. Nevertheless, in an effort to make some much needed progress towards settlement of this compliance check, I am prepared to allow submission of these late appeals.'

79. On 23 October 2015, the appellants were informed that HMRC would carry out a statutory review of the Officer Wilkie's decision as requested.

Statutory review conclusion of the penalty appeals – the appealable decision

80. On 17 November 2015, the review conclusion letter was issued to each appellant, and this is the appealable decision notified to the Tribunal.

81. The review officer, Ms Saxby, upheld all the penalties, and increased the further penalties imposed for the period from 16 December 2015 to 12 February 2015, in the sum of £2,900 for 58 days to £3,100. The increase was to take the penalty period up to 16 February 2015, the date before the issue of the penalty notice on 17 February 2015.

82. Officer Saxby's letter to Ms Fieldman was five pages long and addressed the grounds of appeal as set out in Mr Sinclair's letter of 4 September 2015. The review conclusion letter to Mr Carlyle was four pages long and again addressed the substantive grounds of appeal as set out in the agent's letter of 4 September 2015.

Determination on the CIS position in July 2015

83. Contemporaneously and independently from the Sch 36 penalties, the appellants were pursuing a review of the CIS position of Ms Fieldman. HMRC's position was that Ms Fieldman was a contractor for CIS purposes due to the large sums of expenditure to engage tradesmen in the renovation of her numerous properties.

84. Ms Fieldman's position, as represented by Mr Sinclair, was that she was a property investor, and as such was a 'deemed contractor' within the exception rules of

the CIS regime since her annual expenditure on construction work does not exceed £1,000,000. Mr Sinclair stated in an email of 3 January 2015 on this matter that 'Ms Fieldman is the property investor who has developed her own properties while Mr Carlyle has simply assisted her in achieving this.'

85. The statutory review conclusion by Officer Burlison was given by letter dated 20 July 2015, and the conclusion is as follows:

> 'Having considered the nature of your business, it seems to me that yours is not the property business of a person who buys investment property, maintains it in good order and holds it for the rental income and the capital appreciation it provides.
>
> You purchase property, renovate and develop it, usually by dividing it into a number of smaller self-contained dwellings, letting those dwellings, and possibly selling them at some future date. You have spent substantial sums in the process. However I have to decide whether your business is that of a property developer, in which case you are within the CIS scheme), or whether you are a property investor, in which case you are not, given that your construction expenditure does not exceed £1,000,000 p.a.
>
> It is a fine distinction given that you habitually buy property, and immediately make substantial investment in subdividing it into smaller units. I can see why the inspector reached his decision that you were trading as a property developer. However a property developer will normally buy property, (including raw land) and spend money on demolition, construction and conversion work with the objective of ultimate resale, or sometimes short term letting. Without recurrent construction contracts the developer's trade would cease to exist. You do spend large sums on construction contracts, but this is more because you are rapidly increasing your property holdings than because construction is a fundamental part of your rental business. If you ceased to buy property your spend on construction contracts would be greatly reduced, but you would continue to have a property letting business.'

86. Officer Burlison concluded that there was insufficient evidence to apply the CIS rules to Ms Fielman's business, and the relevant determination should therefore be cancelled.

Appeals notified to the Tribunal

87. On 14 December 2015, Mr Carlyle lodged an appeal to the Tribunal against the total penalties imposed of £4,860. On the same day, he also lodged an appeal on behalf of Ms Fieldman.

88. By letter dated 29 January 2016, the Tribunal acknowledged receipt of the notices of appeal, and informed Mr Carlyle that the appeal 'has been assigned to proceed under the "basic" category'. No statement of case or skeleton arguments were therefore required.

89. The Tribunal also advised that signed authority from Ms Fieldman was required for Mr Carlyle to act on her behalf, which Ms Fieldman provided on 16 February 2016.

90. By email correspondence on 29 January 2016, the Tribunal Service wrote to HMRC advising of the receipt of Mr Carlyle's appeal, attaching the Notice of Appeal, HMRC's decision notice, and supporting documents, and noting that the appeal 'has been assigned to the proceed under the basic category'.

91. On 29 February 2016, after obtaining the parties' agreement, the Tribunal issued direction for the two appeals to be joined and be heard together by the same Tribunal.

Admitting the appeals as against the information notices under para 29 Sch 36

92. On 25 April 2016, the appeals were heard by this Tribunal. Ms Cowan presented the respondents' case by establishing the validity of the penalty notices issued in consequence of the non-compliance of the information requests to the respective appellants. Thereafter, it was explained to the appellants that the onus was on them to establish that they had a reasonable excuse for the non-compliance of the information notices for the penalties to be vacated.

93. Mr Carlyle represented himself and Ms Fieldman. He called the evidence of Mr Andrew Sinclair, who is and was the accountant acting for Ms Fieldman at the material times. Mr Sinclair's evidence covered the many aspects of an enquiry into Ms Fieldman's tax affairs that resulted in the information notices.

94. Mr Carlyle then called the evidence of Ms Fieldman before giving evidence on his own behalf. Mr Carlyle's evidence took the proceedings to the close of the day.

95. The appeals were re-listed for a second day of hearing on 12 September 2016.

96. At the outset of the second day of hearing, the Tribunal tried to ascertain from Mr Carlyle what exactly was his intended line of argument. The Tribunal explained to Mr Carlyle that the ground of appeal that the Tribunal has jurisdiction to consider in a case of a Sch 36 penalty appeal is provided at para 45(1) of Sch 36, which states:

> 'Liability to a penalty … does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure…'

However, the evidence we had heard so far seemed to be challenging the validity of the information notices as befitting an appeal under para 29, rather than supporting any pleading of reasonable excuse in an appeal under para 45.

97. It was further explained to Mr Carlyle that a challenge of the validity of the information notices would mean the substantive matter of the appeals was against the information notices, rather than against the penalty notices. We sought clarification from Mr Carlyle how he intended to proceed with the appeals.

98. Mr Carlyle confirmed that it had been his intention to challenge the validity of the information notices; that he wished to proceed with the appeals on that basis; and that he did not intend to advance any grounds of appeal on 'reasonable excuse' against the penalties imposed.

99. The Tribunal made the decision to admit the late appeals of the information notices, and to determine these appeals as against the information notices rather than the penalty notices. The two aspects to this decision concern: (a) the exercise of discretion to admit a late appeal; and (b) the substantive matters for determination.

100. In respect of our decision to admit the late appeals against the information notices, we have regard to the following:

(1) The appeals against the third penalty notices of 17 February 2015 were made within the normal time limit to HMRC on 18 March 2015.

(2) The late appeals against the first two penalty notices of 3 October 2014 and 16 December 2014 were accepted by the decision communicated by Officer Wilkie on 14 September 2015; the appeals against these notices were made by Mr Sinclair in his letters of 4 September 2015.

(3) The appeals notified to the Tribunal on 14 December 2015 were in time by reference to the appealable decisions by Officer Saxby of 17 November 2015.

The appeals against the penalty notices have therefore been validly made to HMRC and notified to the Tribunal, albeit with the discretion exercised by Officer Wilkie to accept the late appeals against the first two penalty notices.

101. The appellants have a right to have their appeals against the penalties being considered by this Tribunal. However, the grounds of appeal as advanced against these penalty notices are actually grounds against the information notices. We considered the following options open to us in progressing with the hearing:

(1) To proceed by considering the appeals as against the penalties with reference to the normal grounds of 'reasonable excuse' such as exceptional circumstances, unforeseeable events, and dismiss the appeals as having been advanced on irrelevant grounds;

(2) To adjourn the proceedings for the appellants to apply for their appeals as against the information notices to be admitted out of time, and for HMRC to respond to the application;

(3) To consider the grounds of appeal as the appellants sought to advance under their appeals against the penalty notices, which would mean conflating the issues of '*reasonable excuse*' relevant to the consideration of the penalty appeals with the issues of '*whether information reasonably required*' as relevant to an appeal against items on an information notice.

(4) To admit the late appeals of the information notices, and to determine the appeals on those grounds as the appellants sought to advance.

102. Given that the appellants' case was not advanced on 'reasonable excuse' for their non-compliance with the information notices, the inevitable consequence of the first option would be that the appellants would consider their appeals had not been properly heard. The second option, while following the proper procedural protocol, would have caused delay to the hearing of the substantive appeals. The third option is untenable, as it would mean considering the issues relevant to an appeal against an information notice under the cloak of 'reasonable excuse' as relevant to an appeal against a penalty for non-compliance.

103. Having weighed up the consequences of the available options, we decided the best course of action was to admit the late appeals of the information notices under para 29, and to determine the appeals on those grounds as the appellants sought to advance. In so doing, we also have regard to the fact that HMRC have carried out their review conclusions in respect of the penalty appeals by engaging with the same substantive grounds which are in fact relevant to a challenge of the information notices. In other words, the appealable decisions (the review conclusion letters by Officer Saxby) have addressed those grounds of appeal as relevant to the consideration of whether the items of information requested are 'reasonably required'.

104. By admitting the late appeals of the information notices, we are keenly aware of the potential prejudice to HMRC. We explained to the appellants that procedural fairness demands that we can only consider events in their linear sequence. There is an intrinsic flaw in the appellants' submissions which they must guard against, which is to challenge the validity of the Sch 36 notices ('the Notices') by reference to the unfolding of events subsequent to the issue of those Notices on 27 August 2014.

105. The Tribunal then explained whilst the appellants did have a right to appeal against the information notices, the right should have been exercised within 30 days from the date of the notices. The appeal should have been made to HMRC, and could then be notified to the Tribunal. No appeal had ever been made or notified against the information notices issued on 27 August 2014, to either HMRC or the Tribunal within the 30-day time limit.

106. Officer Wilkie's covering letters of 27 August 2014, which accompanied the Sch 36 notices, stated clearly the right to appeal against the Notices under a bold heading '**Appealing against this notice**', with the paragraphs as follows:

> 'If you want to appeal against this notice, you need to write to me within 30 days from the date you receive it, telling me why you want to appeal. I will then contact you and try to settle the matter by discussing it with you. If we cannot come to an agreement, I will write and tell you why. I will then offer to have your appeal reviewed by someone who has not previously been involved.
>
> I will also tell you about your right to go to an independent tribunal. You can find further information about this in factsheet HMRC1-*HM Revenue & Customs decisions – what to do if you disagree*. You can get this factsheet by downloading it from our website [website address] or phoning our … Orderline [number].'

107. The 30-day appeal window against the Sch 36 Notices issued on 27 August 2014 was the time frame that an appeal against the information notices should have been brought. The appellants could have exercised their right of appeal against the Notices in the 30-day appeal period during September of 2014, but they had not done so. To avoid prejudice to HMRC due to the appeals against these Notices now being significantly out of time, it was impressed on the appellants that the Tribunal can only consider their challenge of the items of information requested on those Notices by 'freezing' the time frame at the particular point in time when the Notices were issued. In short, we cannot take account of any events or factors that came to light subsequent to the issue of those Notices.

The grounds of appeal

108. On the Notices of Appeal for each appellant, the same wording is used to state the grounds of appeal as follows:

> '1. The adjudicator claims to have reviewed all correspondence relating to this matter.
>
> We will show that, if this was indeed the case, the outcome would have been different.
>
> 2. The adjudicator claims that penalties are commensurate with tax at risk. There was no tax at risk.'

109. Mr Sinclair's letters of 4 September 2015, in reply to Officer Wilkie's decision letters of 12 August 2015, set out the reasons against the imposition of the three tranches of penalties. Mr Sinclair's reasoning was reiterated by Mr Carlyle's submissions during the hearing, and served as the grounds of appeal of the appellants.

Grounds in respect of Mr Carlyle's Notice

110. The item of information requested is: 'Income and Expenditure Statements in respect of renovation work for all relevant years.'

111. Mr Sinclair submitted that '[t]his would have always been an impossible task' due to the differing stance taken by the appellant from HMRC on the CIS position, which meant if the appellant submitted the statements on the basis of what he considered to be correct, that Ms Fieldman was not a contractor under CIS, then the statements would be wrong in HMRC's view.

112. Referring to the review conclusion by Officer Burlison on the CIS issue, Mr Sinclair asserted that since HMRC's CIS position has been proven wrong, that 'there are no grounds for the penalties, whether they were tranche 1, tranche 2 or tranche 3'.

Grounds in respect of Ms Fieldman's Notice

113. Mr Sinclair's letter of 4 September 2015 to Officer Wilkie contended that item 1 of the request, the QS report 'was proved to be not required following the independent review due to the technically incorrect stance taken by HMRC over the CIS issue'.

114. Furthermore, in respect of the QS report, Mr Sinclair pointed out that the matter could have been resolved 'as early as December 2013 when Mr Carlyle wrote [through Sinclair partnership] direct to HMRC quoting CIS Guidance Notes … and received no response'. Another letter of 11 June 2014 was sent to HMRC restating the position and asking for confirmation, but 'none was received other than the stubborn stance with no quoting of legislation'; that 'the independent review clearly states relevant legislation and guidance which ultimately supported our position'.

115. In respect of item 2 on the information notice, Mr Sinclair submitted that 'it was difficult to finalise this based on the ongoing CIS stance taken by HMRC'. Mr Sinclair stated the effect of unresolved CIS issue in the following terms:

> '[The effect] was to prevent us from crystallising the property income and expenditure statement as without the agreement of HMRC of building works on a typical property conversion (the purposes of the QS Report) a final version of the Statement of Rental Income and Expenditure could not be produced.'

Mr Carlyle's oral submissions

116. Mr Carlyle submissions reiterated the various arguments put forward in Mr Sinclair's letters of 4 September 2014 when the appeals against the penalties were first made to HMRC.

117. Mr Carlyle submitted that the request of a QS report 'has no legitimate place'; that Sch 36 para 18 provides that an information notice 'only requires a person to produce a document if it is in the person's possession'. He asserted that a QS report had never been in the appellant's possession, and therefore it was not legitimate to require Ms Fieldman to produce it.

118. He submitted that if one item on the information notice is invalid, that item renders the whole information notice invalid: the document must be taken in its entirety. Item 2 on the information notice therefore is also invalid.

119. Furthermore, in respect of item 2, Mr Carlyle argued that the statements for rental income and expenditure were 80% complete as at 2009, and all that was outstanding concerned the inclusion of some costs, whose net effect would have been to reduce Ms Fieldman's profits and her tax liability.

120. As regards the only item on his own information notice, namely, 'income and expenditure statements in respect of renovation works carried out for all relevant years', Mr Carlyle submitted that HMRC's position regarding the CIS issue meant that the statements could not be produced until the CIS issue was resolved. At the point the information notice was served on him, the CIS issue was not resolved, and that the statements were therefore not reasonably required, especially when HMRC was found to be wrong with their CIS stance.

121. Finally, Mr Carlyle submitted that the penalties were not proportionate to the tax at risk.

HMRC's position

122. The review conclusion letters by Officer Saxby of 17 November 2015 represent HMRC's position as regards these Notices.

Item 1 and 2 on Ms Fieldman's Notice

123. In relation to the QS report, being item 1 of the information notice, Officer Saxby concluded as follows:

> 'It was agreed at a meeting between you, your agent and HMRC that a Quantity Surveyors report be compiled to establish overall expenditure and future CG position. After the issue of Determinations under Regulation 13 and S61 FA04 – failure to deduct tax from payments made to sub-contractors by the contractor, the appeal was considered by the Review Team who decided that the assessments should be cancelled. It was considered therefore, that at this time, 17 July 2015, the report was no longer required. As this was retrospectively found not to be reasonably required, I have removed this point when considering my position on the penalties.'

124. In relation to item 2, being 'a finalised statement of property income and expenditure for all relevant years', Officer Saxby concluded as follows:

> 'This information has been requested since the enquiry opened on 17 November 2009. I agree with Mr Wilkie that the ongoing CIS issue had nothing whatsoever to do with the rental statements which the agent himself submitted prior to any CIS issues being resolved. The actual statement requested was not submitted until 23 March 2015, well after all penalties had been issued. ..
>
> … item 2 was reasonably required to progress the enquiry as this was the only item outstanding and the main reason why the enquiry was still ongoing. … The information was later submitted on 23 March 2015 which indicates that that information was available and as this was submitted prior to any CIS issues being resolved it is clear that this had no bearing on this information being available.'

Item on Mr Carlyle's notice

125. In respect of the contention against the item requested on Mr Carlyle's Notice, Officer Saxby concluded as follows:

> 'I believe the income and expenditure statements were reasonably required to check your tax position. The statements in question were submitted on 23 March 2015 which was after any of the dates shown on the penalty notices. The statements were submitted on 23 March 2015 which in effect discredits your argument that the ongoing issue of the CIS payments prohibited you from submitting this information.
>
> I therefore agree with Mr Wilkie that it is not credible that your agent is suggesting that your income details could not have been submitted because of the CIS issue which involved the failure to deduct tax from sub-contractors in your spouse's business.

> Furthermore, your income should have been declared in tax returns as far back as the period ending 5 April 2002, when there was no dispute with HMRC over any CIS payments, and therefore no reason for returns not to have been submitted.' (sub-paragraph divisions added)

126. Referring to Mr Sinclair's statement in his 4 September 2015 letter: 'we decided prior to our letter of 23 March 2015 to proceed on our position as we were confident of this and a statement was prepared on that basis and submitted to HMRC', Officer Saxby concluded that if that was the case, 'the information could have been submitted when the initial information notice was issued, prior to the penalties being incurred'.

HMRC's submissions

127. Ms Cowan helpfully went through the chronology of events to highlight the background to each item of information request. She summarised the key stages in the enquiry and of its chequered course of progress due to the lack of full compliance with the information requests.

128. As regards the validity of the information notices, the essential argument in Ms Cowan's submissions is that even if a QS report was not reasonably required by the time Officer Saxby carried out her review, item 2 on Ms Fieldman's Notice and the only item on Mr Carlyle's Notice remained 'reasonably required' for the purpose of checking the taxpayers' tax position.

Discussion

129. The hearing proceeded on the basis that the appellants' appeals are against the items requested on the information notices. The appellants did not plead 'reasonable excuse' as provided under Sch 36, para 45 against the penalties imposed for their repeated failure to comply with the information notices. Instead, the appellants asserted that the information notices were invalid in the first place.

130. The line of argument the appellants sought to advance, so far as we understand it, is as follows: the invalidity of the information notices rendered the information requests ineffective in law; if ineffective in law, the notices could not be enforced; if the requests for information could not be enforced, there could be no legal requirements for compliance; if no legal requirements for compliance, no penalties could be imposed for non-compliance.

131. By entertaining the grounds of appeal as the appellants have sought to argue, the Tribunal will determine each of the items on the respective information notices in the light of the facts at the juncture when the notices were issued; that is, as the state of affairs was at 27 August 2014.

The test of 'reasonably required' under Sch 36

132. A notice served under Sch 36 para 1 for the production of information or a document is under the condition that the requested information or document are 'reasonably required' for the purpose of checking the taxpayer's tax position.

133. 'Tax position' is defined under Sch 36 para 64(1)(a) as regards 'past, present and future liability to pay any tax', and is followed by a list of loosely defined categories intended to be maximally inclusive. The use of generic references such as *penalties, claims, elections, applications* and *notices* allows a wide range of issues to be brought within 'tax position'. The wording is encompassing on purpose; for example, para 64(1)(b) states 'penalties and *other* amounts that have been paid, or are or *may* be payable, by or to the person in connection with *any tax*'; the words highlighted in italics are intended to allow the widest margin of appreciation.

134. So far as para 1 is concerned, there is only one test, and the test is whether an item listed on an information notice is reasonably required. The primacy of the purposive test underpins the validity of an item on an information notice. The validity issue is determined by the purpose test of reasonable requirement, and the purpose is the checking of the taxpayer's tax position.

The burden of proof

135. In terms of the burden of proof for the 'reasonably required' test, there seems to be an assumption that the burden lies with HMRC. In *Kevin Betts v HMRC* [2013] UKFTT 430 (TC), that the burden of proof lies with HMRC is referred to as 'common ground'. In *Eudora Thompson v HMRC* [2013] UKFTT 103 (TC), it is stated at [62] that 'the onus of proof in relation to an appeal against an information notice lies on HMRC', with no contrary or contrasting argument being related.

136. In *Joshy Mathew v HMRC* [2015] UKFTT 0139 (TC) ('*Mathew*'), Judge Redston considered the application of analogous case law authorities on Sch 36, and concluded that 'it remains arguable that the burden is on HMRC' (at [85]). There were very limited submissions on the issue in *Mathew*, and the case was determined on the hypothesis that the burden lies with HMRC and found that it was met. The approach taken by the tribunal in *Mathew* is not without qualification, as indicated at [86]: 'Had we found that HMRC had not met that burden, we would have adjourned the case for further submissions in relation to the burden of proof.'

137. In the absence of direct authority, the tribunal in *Mathew* has considered the implications of analogous authorities on the burden of proof for the 'reasonably required' test. The authority of *R v Commissioners of Inland Revenue ex parte T C Coombs & Company* [1991] 2 AC 283 ('*Coombs*') raises the principle of a 'presumption of regularity' as applicable to the predecessor legislation of Sch 36.

138. That the principle of a presumption of regularity applies to Sch 36 is expressly stated in *R (oao) Derrin Brother Properties Ltd v HMRC* [2014] EWHC 1152 (Admin) ('*Derrin*'). The case concerned a judicial review application against *ex parte* notices under Sch 36. To issue a third-party information notice, Sch 36 provides that

HMRC have to apply to the Tribunal, and an *ex parte* notice can only be issued with the Tribunal's authority. The High Court dismissed the application, and Simler J confirmed at [15] that the principle of a presumption of regularity applies as respects Sch 36 powers to be exercised by HMRC and the Tribunal:

> '… the Tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC' intrusive powers. Parliament designated the officer as the decision-maker and the Tribunal as the monitor of the decision. A presumption of regularity applies to both, and is strong in relation to the Tribunal in particular.'

139. In addition to the principle of a presumption of regularity weighing in favour of HMRC's exercise of powers under Sch 36, there is also the presumption that in relation to a person's tax affairs, the true facts are known, if known at all, to one person only, and that is the taxpayer himself (Walton J in *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a)). This presumption has allowed the threshold test for a discovery assessment to be set very low, as stated by Walton J in the High Court decision of *Jonas v Bamford* (1973) 51 TC 1 ('*Jonas*') at page 23: 'In law, indeed, very little is required to constitute a case of "discovery".'

140. The Tribunal is of the view that there are two stages in the operation of onus in an appeal against an information notice under the 'reasonably required' test.

141. The first stage of proof is that HMRC have the burden of meeting the purpose test by establishing that the item is reasonably required for the purpose of checking the taxpayer's tax position. The definition of 'tax position' is loosely drawn to allow a wide margin of appreciation.

142. After the officer has met the burden to prove the purpose test at the first stage, the principle of a presumption of regularity arguably shifts the onus onto the appellant, to prove the contrary by establishing that the item requested is *not* reasonably required at the second stage. In other words, a presumption of regularity weighs in the officer's favour that his decision on the information request has been reasonably reached once the purpose test is met, and the onus is shifted onto the taxpayer to prove the contrary.

143. Furthermore, we consider that the overall intention of Sch 36 is to set the requisite threshold for the first stage of proof required of an officer at a low level. The encompassing nature intended by the statutory definition of 'tax position' means that the purpose test can be readily met on the level of relevance. The presumption that the taxpayer is in the best position to know his own affairs, together with the safeguard of the right of appeal against any item requested which is not statutory record, have the combined effect that a low threshold can be set for the 'reasonably required' test.

Whether a Quantity Surveyor's report 'reasonably required'

144. Applying the law to the facts of Ms Fieldman's information notice, the Tribunal is mindful that the origin of a Quantity Surveyor's ('QS') report laid firmly with Mr Carlyle. It was not HMRC's idea that a QS report should be commissioned, but Mr Carlyle's. He first suggested this in the enquiry meeting on 16 May 2013 as a way

forward to support his claim that some £500,000 had been expended on attic conversions of the various properties.

145. In our judgment, the peculiar circumstances leading to a QS report being listed as an item on Ms Fieldman's information notice arguably bypassed the first stage of proof required of the officer, and reversed the onus squarely onto the appellants to prove that such a report was not 'reasonably required'.

146. The suggestion of a QS report was due to the dearth of evidence available to support the claim of £500,000 costs of renovation. There was a loss of records to the accountant in 2006-07, but that of itself only partially explained the unsatisfactory state of supporting documents.

147. In her letter of 14 August 2013, Officer Lawson was asking for costs of renovation of a more recent property. Between 2007 and 2013, there were new properties added to the portfolio, and yet these new additions did not seem to yield any further evidence to support the 'typical' costs of renovating a property based on the couple's business model, so as to dispense with the suggestion of a QS report.

148. The appellants' failure in record keeping in respect of the renovation costs of their letting properties was the ultimate reason why a QS report was listed for production. The parties agreed the commissioning of a report as the way forward at conclusion of the meeting on 25 November 2013. As recorded in Officer Lawson's meeting notes: 'All parties agreed with the proposals'. The meeting notes were provided to the appellants and Sinclair, and no objection was raised at the time.

149. In this respect, the request of a QS report had never been a requirement foisted on Ms Fieldman unilaterally by HMRC, without prior consultation or her agreement. On the contrary, the very idea of a QS report came from Mr Carlyle himself, as he considered that a QS report would provide 'a reasonable estimate of the costs', and that he was 'confident that the sums would back up his estimates'.

150. The production of a QS report was maintained by the appellants after its first suggestion; see for example, Sinclair's email to Lawson of 26 September 2013: 'My clients are suggesting, once again, that the best way forward on this would be to get a QS firm to provide an opinion on the works carried out on either Crighton Place or another'. In this regard, we reject Mr Carlyle's application of Sch 36 para 18 to the request of a QS report.

151. Paragraph 18 states: 'An information notice only requires a person to produce a document if it is in the person's possession or power.' The Tribunal accepts that a report was not *in possession* by Ms Fieldman at the time. However, such a report was clearly in her *power* to produce, as indicative of Mr Carlyle's offer of its production in the first place, which was subsequently reinforced more than once by himself and his agent; for example, Sinclair had emailed HMRC on 26 September 2013 that he had a QS contact for such a report.

152. By November 2013, a QS report as a requirement became conjoined with the CIS issue, which was first raised by Officer Anderson in the meeting of 25 November

2013. A QS report was agreed between HMRC and the appellants to serve the dual purposes of establishing renovation costs for future capital gains, and as the basis to quantify the potential CIS liability for the labour proportion of the renovation costs.

153. A QS report at this juncture of the enquiry therefore assumed the additional significance of forming the basis for any potential CIS liability assessable on Ms Fieldman as a contractor of the tradesmen in the renovation of the letting properties.

154. From the documents bundle, the first indication that the appellants no longer considered a QS report necessary was communicated by Sinclair's email of 12 June 2014 to Wilkie. Replying to Wilkie's request of the outstanding QS report by his letter dated 12 May 2014, Sinclair stated that 'Lawson and Anderson determined that a labour and material split be calculated to give them information to support their erroneous assertion re CIS position … We no longer consider this necessary.'

155. Sinclair's assertion that a QS report was no longer necessary was based on his opinion that Fieldman came under the exception rules of the CIS scheme as a contractor of the trades. Sinclair's opinion of Fieldman's CIS position was ultimately supported by Officer Burlison's review decision dated 20 July 2015, which was over a year after the first indication of the appellants' disagreement to provide a QS report.

156. It was made clear to the appellants at the hearing, that the Tribunal can only take account of the facts as they stood at 27 August 2014 when the Sch 36 Notice was issued to assess whether the item required was within the scope of the legislation. We cannot take account of Burlison's decision on the CIS issue that was reached almost 11 months after the date of the Notice.

157. The information notice was accompanied by a covering letter of the same date, with a whole section of the letter devoted to advising Ms Fieldman of her right of appeal against the Notice, by making an appeal in writing to Officer Wilkie within 30 days from the date of receipt. The appeal may also be notified to the Tribunal.

158. Had the appeal been notified by the Tribunal *at the time*, the appeal process would have allowed representations to be made on the CIS issue, and of the appellants' change of position as regards the relevance of a QS report for future CG purposes. Had the appeal been lodged within the normal time limit, the appeal process would have allowed events subsequent to the issue of the information notice to be taken into account in the Tribunal's determination. The Tribunal might, for example, have varied the Notice by suspending the item until the CIS issue was determined. However, that course of action was no longer open to this Tribunal when we heard the case 'retrospectively' in April and September 2016. Procedural fairness and protocol demand and dictate the strict time-frame within which the appellants' grounds of appeal can be considered.

159. Given the aforesaid, we conclude, as at 27 August 2014, the date of issue of the information notice for compliance by Ms Fieldman, the appellant had not proved that a QS report was no longer 'reasonably required'.

Whether statements of rental income and expenditure 'reasonably required'

160. The sole criterion for assessing the validity of an item requested by a Sch 36 notice is the purposive test of being 'reasonably required' for the purpose of checking the taxpayer's tax position.

161. Item 2 on Ms Fieldman's Notice was a request for '*a finalised statement of property income and expenditure for all relevant years*'. Officer Wilkie's letter of 12 May 2014 was a prelude to the Notice issued on 27 August 2014, in which he requested the provision of 'the income and expenditure covering rental income received for all relevant years', to include the amounts relating to St Claire Place or Crighton Place which may require estimates, and to adjust for any loan interest deduction for private use as agreed at 15%. He stated that if the statements were not with him by 6 June, he would raise estimated assessments for all relevant years.

162. Mr Carlyle submitted that HMRC had statements of the income and expenditure on rentals since 2009; that the statements were 80% complete by Sinclair's estimation; that the finalised version had the effect of increasing expenditure and reducing Ms Fieldman's tax liability.

163. In our view, the appellants' response to HMRC's requests throughout the course of the enquiry was characterised by dilatoriness. However much the appellant asserted that HMRC had had such statements since 2009, such assertion has no significance in the context that these statements were only 80% complete; and hence, not *finalised*. Officer Wilkie's letter of 12 May 2014 made it clear that he was seeking closure to the enquiry. A *finalised* statement for all relevant years was reasonably required in order to reach closure.

164. This is a case where not just one year of tax position was outstanding, but several. The relevant years, as stated clearly in Wilkie's letter of 12 May 2014, covered those earlier years when Ms Fieldman was not reporting her rental income.

165. In the absence of these finalised rental accounts, HMRC could not close the enquiry properly. In the absence of these finalised statements, HMRC would have to raise estimated assessments, which the appellants would most likely challenge.

166. We reject Mr Sinclair's argument that the CIS issue had any relevance on the production of a finalised statement for all relevant years. The CIS issue had implications on quantifying the renovation costs of the let properties; those costs were *capital* expenditure to be relieved as enhancement value of the properties for calculating any capital gains accruing on disposal.

167. A finalised statement of all property income and expenditure for the relevant years pertained to the *revenue* expenditure that can be deducted against income. Only the costs incurred by tradesmen in relation to repairs and maintenance are of the kind that can be relieved against income. In terms of scale, these revenue repairs would have been marginal compared with the capital renovation costs to which the CIS issue related. Even if the CIS issue was relevant for the determination of such revenue costs in relation to the trades, the figures of those costs (as incurred) could still have been

finalised, leaving any potential CIS liability to be grossed up on the incurred costs. This approach would seem to have been taken, at last, in March 2015 by Mr Sinclair, well before the determination of the CIS issue was made in July 2015.

168. Finally, whether the finalised statements actually resulted in a reduction of tax liability has no bearing on the reasonable requirement test of the documents requested. On the contrary, Mr Carlyle's assertion that the finalised statements resulted in a lower tax liability would seem to support the validity of the information request and its essential purpose. There is a public interest in ensuring the correct amount of tax is collected. Without the finalised statements for all relevant years, Ms Fieldman's final tax position simply cannot be established.

169. The Tribunal concludes that HMRC have discharged the onus of proving that the request for a finalised statement of income and expenditure related to Ms Fieldman's rental properties for all relevant years was 'reasonably required' as at 27 August 2014. The appellant has failed to prove the contrary.

Whether item on Mr Carlyle's notice reasonably required

170. The item requested was income and expenditure statements in respect of renovation works carried out for all relevant years. The appellant's main contention is that the item was not reasonably required due to the CIS issue. In essence, the appellant insisted that the statements could not be produced because of the differences between the appellant and HMRC over the CIS status of Ms Feldman as a contractor.

171. Officer Wilkie's letter of 12 May 2014 to Sinclair gave the background to the item on Carlyle's information notice. He sought clarification as regards the CIS issue from Sinclair, as to whether Mr Carlyle had failed to deduct tax from payments to sub-contractors, and asked for Sinclair's 'views on the amounts involved for work carried out for Ms Fieldman as well as Dyer and Stewart'.

172. The only temporal point of reference that the Tribunal can adopt in applying the 'reasonably required' test is the matter as it stood at 27 August 2014, the date of issue of the information notice. We conclude that the item was reasonably required for the following reasons:

(1) The works carried out for Dyer and Stewart had nothing to do with the CIS status concerning Ms Fieldman, and those works were firmly in the background why the item was requested;

(2) The renovation works for Dyer and Stewart happened in around 2005 to 2007, and should have been returned long ago;

(3) Officer Saxby's review conclusion letter referred to income that should have been declared 'as far back as the period ending 5 April 2002';

(4) The CIS issue related to Ms Fieldman's status as a contractor and her potential liability in failing to deduct income tax from sub-contractors she had used in her business, to carry out works *not* done by Mr Carlyle; the

CIS issue therefore did not concern Mr Carlyle as he was not one of the paid sub-contractors;

(5) The appellant had stated that the works he carried out in Ms Fieldman's business was for 'love and affection' without payment, and whether a deemed value was to be put to his labour in Ms Fieldman's business was the reason for the request of a QS report to quantify the 'deemed value' of Carlyle's renovation works for Ms Fieldman.

173. That the CIS issue remained contentious as at 27 August 2017 did not render the item on Carlyle's information notice invalid, as the appellant sought to argue.

174. The CIS issue did not preclude the eventual submission of the statements by Mr Sinclair on 23 March 2015, which was before the CIS determination of 20 July 2015. As HMRC submitted, if the appellant was able to provide the statements in March 2015 before the determination of CIS issue, he could have complied with the requirement earlier to avoid the imposition of the daily penalties.

175. The relevant test, which the appellant seems to have failed to appreciate, is that an item on the information notice is valid if it is 'reasonably required' to check the taxpayer's tax position. As related earlier, the threshold for meeting the test of 'reasonably required' is low, due to a presumption of regularity conferred on the officer's decision, and a presumption that the taxpayer is in the best position to know his own affairs, and has a right of appeal under Sch 36 against an information notice.

176. The appellant had failed to exercise his right of appeal at the time, which would have given him the opportunity to oppose the terms of the request, such as the perceived effect the CIS issue might have on complying with the requirement. Any perceived difficulty of complying with the request could have been raised to the issuing officer of the Notice at the time. If such objections were not satisfactorily resolved, an appeal could have been made to HMRC, and also notified to the Tribunal. That course of action was open to Mr Carlyle; the fact that he failed to exercise his right at the time to remove any perceived obstacle to complying with the request cannot be the ground for rendering the information notice invalid.

No right of appeal

177. An appeal against an information notice is made under Part 5 of Sch 36 under para 29, and sub-para 32(5) states that 'a decision of the tribunal on an appeal under this Part of the Schedule is final'.

178. The Upper Tribunal decision of *Jordan v HMRC* [2015] UKUT 218 (TCC) is the authority that the legislative purpose of para 32(5) is to restrict judicial scrutiny in the exercise of Sch 36 powers to one stage. In the words of Judge Bishopp at [12]:

> 'The meaning of the later provision [ie para 32(5)] is perfectly clear, and the policy objective behind it is equally readily identified: it is to enable the taxpayer to secure judicial scrutiny of a notice served by HMRC, but to ensure that such judicial scrutiny may take place at only

> one stage in order that the information gathering process is not unduly delayed.'

179. There is no appeal from any part of a decision reached by the First-tier Tribunal in respect of its jurisdiction exercised under para 32 of Sch 36, to confirm, to vary or to set aside an information notice.

180. For this reason, our decision to confirm the items requested on Ms Fieldman's information notice, and the item requested on Mr Carlyle's information notice, is *final* and cannot be appealed.

Whether reasonable excuse

181. The Tribunal is not required to consider whether the appellants had a reasonable excuse for their repeated failure to comply with the Notices. For completeness, we give our judgment on this aspect to ensure that our decision to dismiss these appeals has been comprehensively reached.

182. The appellants had been in the business of letting properties since at least 2000, and earlier in Ms Fieldman's case. There is no doubt that the couple have worked hard to build up their portfolio of letting properties, but their insouciant attitude towards their tax affairs can be characterised as verging on being irresponsible.

183. In evidence, Ms Fieldman informed the Tribunal of how her property at Crighton Place became her first let, but the rental income was never returned as it merely covered the costs, according to her. Since 2000, the couple had discovered the 'business model' of buying properties with attic conversion potential to augment the rental prospects of these properties, but they made no attempts to account for their letting business activities until 2006-07. The reason given was that they reckoned they were not making much profit and that no tax liability should arise. When they tried to tackle the matter of bringing their tax affairs up to date by engaging an accountant, it turned out to be an unsuitable appointment which led to some irretrievable loss of business records. When the enquiry opened into Ms Fieldman's tax position after the submission of her 2009-10 return, her tax affairs were very much in arrears. The long period of arrears, coupled with the dearth of business records, explained in part why the enquiry process was so protracted. The enquiry that started in November 2009 was concluded after the submission of rental statements for all relevant years in March 2015 – that was five and a half years.

184. In evidence, Mr Carlyle spoke of his pub business undertaking in 2009-10, and that since he reckoned he was not making much profit, he did not take any trouble to notify HMRC of his self-employment, or to become registered for VAT, or to make a return. It would seem that his disclosure of his pub business of 10 months' standing during the meeting on 27 April 2012 was prompted by Mr Sinclair. Officer Saxby's review conclusion also highlighted the extent of arrears; Mr Carlyle had tax matters that should have been returned as far back as the year to 5 April 2002.

185. It cannot be said that the appellants lack the business acumen to understand their legal obligations in their many various capacities – as landlords with legal duties

towards tenants, as licensees of the local authority with compliance obligations to keep their HMO licences, as purchasers of properties in numerous land transactions, as mortgagees in sophisticated financial arrangements to fund their portfolio expansion and renovation projects, as contractors with tradesmen, as litigants even in some protracted lawsuits involving the engagement of Queen's Counsel to represent their case, and which had occasioned some sizeable legal and professional fees payable to two notable legal firms and E-Litigate in the years 2008-09 and 2009-10.

186. The appellants simply have not given proper regard to, or exercised due diligence, as respects their obligations and duties as taxpayers. There has been a pattern of non-compliance by the appellants in respect of their taxpayers' duties. There has been a unilateral determination on their part that certain statutory obligations laid upon a taxpayer can be bypassed simply because the appellants decided that no tax was at stake. Their reckless disregard of the many time limits for compliance with the information requests by unilaterally deciding that the requests were invalid, and therefore no need to comply with, is of a similar character.

187. The enquiry opened on 17 November 2009 had given rise to several information requests. Officer Lawson had issued several letters to make and follow up her requests, and at least two Sch 36 notices to obtain the required information. These information notices were not fully complied with, but Officer Lawson had not imposed any penalties for the continual failure to comply. Officer Lawson's unduly lenient approach would seem to have reinforced the appellants' experience that time limits could be ignored with impunity.

188. When Officer Wilkie took over the enquiry in May 2014, the enquiry had been ongoing for 4 years and 6 months. In view of the length of time taken, it was understandable that Officer Wilkie took a more vigorous approach in obtaining the outstanding information.

189. However, Officer Wilkie was met with a persistent lack of response, from his first letters dated 12 May 2014 to the third penalty notices of 17 February 2015. Apart from Mr Sinclair's response on 12 June 2014, there was no response to Wilkie's attempts to progress with matters by letter on 27 June, 8 July, and a phone call to Mr Sinclair on 4 August, before the issue of the information notices on 27 August 2014.

190. The appellants might have been very busy with re-lets during that period, as Mr Sinclair indicated on 4 August 2014, but the appellants were represented by Mr Sinclair throughout the enquiry period. The information notices issued on 27 August 2014 and the penalty notices of 3 October 2014, 16 December 2014, and 17 February 2015 were all sent in duplicate with one copy to Mr Sinclair.

191. In the telephone call from Officer Wilkie to Mr Sinclair on 4 February 2015, Mr Sinclair had stated that he was 'totally aware of the charges which had been raised'. The Tribunal finds it inexplicable that while Mr Sinclair was fully aware of the penalties, no action was taken by him or his clients after the notices to impose £300 and £1,460 penalties. It was not until the third penalty notice of 17 February 2015 that Mr Sinclair finally responded by email of 27 February, by letter of 18 March 2015,

and finally by submission of the required income and expenditure statements for both appellants on 23 March 2015.

192. Each penalty notice came with the warning of possible further penalties imposable for non-compliance, and yet there was a persistent wall of silence between August 2014 to February 2015 from the appellants and their agent. It took the third penalty notice issued on 17 February 2015 to get some response eventually.

193. Unlike his predecessor, Officer Wilkie was prepared to impose penalties when each compliance date passed by. He was right in considering that the history of the matter showed that he could not be confident of compliance without taking some punitive measures. Office Wilkie's letter of 12 May 2014 to Mr Carlye, after all, started by stating: 'For the last 2 years you have been promising that the outstanding accounts in relation to the Woodhall Arms public house together with the outstanding relevant Self Assessment tax returns would be submitted.'

194. Even if the appellants had adopted a casual attitude towards the import of the penalty notices, as was their wont, their agent knew, or ought to have known, the statutory time limits for compliance, and the financial consequences for non-compliance. Collectively, there can be no reasonable excuse for the persistent failure to comply with the information requests.

195. Finally, we should emphasise that the appellants could have been successful in varying the requirement for a QS report – if they had exercised their right of appeal against the information notice *at the time*. They did not do so within the time limit, and HMRC were entitled to expect full compliance with the requests. It is untenable to argue retrospectively that the information requests were unreasonable or invalid as an excuse for the continual failure to comply.

Whether penalties disproportionate

196. The appellants asserted that there was no tax at risk, and the penalties were therefore disproportionate.

197. Firstly, the penalties are imposed for failure to comply with the information requests; they are not tax-geared penalties. Whether any tax is at risk therefore has no impact on the legal basis for imposing the penalties. That there was a failure to comply from the first stipulated date of 27 September 2014 until 23 March 2015 was not in dispute. On the basis of non-compliance, the penalties have been correctly imposed according to the terms of the legislation.

198. It is worth distinguishing the penalties imposed under paras 39 and 40 from those under para 50, which are tax-geared. In the words of Judge Bishopp in *HMRC v Romie Tager* [2015] UKUT 0040 (TCC) at [37], the nature of para 39 and 40 penalties is primarily to achieve compliance:

> '… that para 39 is designed, like other provisions imposing automatic penalties for non-compliance, or late compliance, to discourage non-compliance and to punish it where it occurs, but that the relatively

> modest amount of the penalty shows that it is intended to operate as a reminder or incentive rather than as a more draconian measure. The offender becomes liable to the daily penalties for which para 40 provides if the para 39 reminder does not have the desired effect, but as he can limit the extent to which he incurs such penalties by bringing his non-compliance to an end these penalties too can be seen to have the primary purpose of encouraging compliance; punishment, or the threat of it, is the means by which the aim is achieved.'

199. In the appellants' case, the 'relatively modest amount of the penalty' under para 39 of Sch 36 made no impact, and the daily penalties were allowed to accumulate into nearly £5,000 each. The penalties might seem to be disproportionate, but the appellants could have brought non-compliance to an end much earlier. The penalties had, in the present case, achieved the intended purpose of eventual compliance.

200. Secondly, on the matter of proportionality, this Tribunal has no jurisdiction to consider issues concerning proportionality in terms of fairness or reasonableness in the judicial review sense, as there is no statutory authorisation in this respect.

201. Finally, the decision of the Upper Tribunal in *HMRC v Hok* [2012] UKUT 0363 (TCC) is binding on us, and at [58], it is stated explicitly that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

Decision

202. For the reasons stated, the Tribunal conclude that at the date of their issue on 27 August 2014, all items on the appellants' respective information notices were 'reasonably required' under para 1 of Sch 36 FA 2008.

203. In the absence of compliance with the notices, the penalties have been correctly imposed according to the terms of the provisions under paras 39 and 40 of Sch 36.

204. The penalties imposed in the total sum of £4,860 on Mr Carlyle are confirmed.

205. The penalties imposed in the total sum of £4,860 on Ms Fieldman are also confirmed.

206. Both appeals under para 29 of Sch 36 are dismissed.

207. Paragraph 32(5) of Sch 36 provides that the decision by this Tribunal on an appeal under para 29 of Sch 36 is final. There is no right of appeal.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 27 JUNE 2017