TC03386

Appeal numbers: TC/2013/00099 & TC/2013/00110

INCOME TAX - ***Penalties for failures to comply with Information Notices issued under paragraph 5 of Schedule 36 Finance Act 2008 – whether any reasonable excuse – whether any other reasons to cancel – no – whether penalties proportionate – yes - appeals dismissed***

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN BACKHOUSE **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK
MR LESLIE BROWN

Sitting in public in Manchester on 31 January 2014

Mr Nicolas Davis of Albinson Napier & Co Solicitors for the Appellant

Mr Barry Marriott of HM Revenue & Customs appeared for the Respondents

DECISION

Background and Facts

1. The appellant, Mr John Backhouse appeals against penalties assessed on him for his failure to comply with taxpayer information notices ("taxpayer notices") given by HMRC. His two appeals arise out of similar facts and were heard together.

2. Before us, Mr Backhouse was represented by his solicitor, Mr Nicholas Davis, and HMRC by Mr Barry Marriott, one of their senior officer.

The Legislation

3. With the exception of s.114 of the Taxes Management Act 1970, to which we will later return, the remainder of the legislation in point in the appeals is to be found in Schedule 36 to the Act. That schedule contains harmonised rules dealing with HMRC's right to information. Para 1 relates to information that can be demanded from taxpayers. It provides that an officer of HMRC may give a written notice, a taxpayer notice, requiring the recipient to provide information, provided the required information is reasonably required by the officer for the purpose of checking the recipient's tax position.

4. Paragraph 39(2) of Schedule 36 provides for a penalty of £300 for failure to comply with a taxpayer notice.

5. Paragraph 40A of Schedule 36 provides that where a person provides inaccurate information in complying with a taxpayer notice and does so carelessly (meaning a failure to take reasonable care) or deliberately, knowing of the inaccuracy at the time of disclosure, that person is liable to a penalty not exceeding £3,000 for each inaccuracy.

6. Paragraph 45 of Schedule 36 provides a defence of reasonable excuse for failure to comply with a notice in the following terms:

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

7. Paragraphs 47 and 48 deal with the rights of appeal against a penalty assessment. They provide as follows;

"47. A person may appeal to the First-tier Tribunal against any of the following decisions of an officer of HM Revenue and Customs—

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

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

48 ….

(3) On an appeal under paragraph 47(a), the First-tier Tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), [the First -tier Tribunal] may—
(a) confirm the decision, or

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

Appeal TC/2013/00099

8. Mr Backhouse's first appeal is against five separate penalties of £300 assessed on 30 August 2012 under para.45 of Schedule 36. The penalty notices were issued because he failed to provide all the information required by taxpayer notices served on him on 27 June 2012 in relation to the following five companies:

(1) Bravejoin Company Limited
(2) Archer Structures Limited
(3) Carpe Diem Group Holdings Limited
(4) Payment Card Technologies (Retail) Limited
(5) Payment Card Technologies (UK) Limited.

9. In all twenty taxpayer notices were issued to Mr Backhouse and his associates. His time for reply having been extended, his solicitors, Albinson Napier & Co, provided a collective response to all the taxpayer notices on 17 August 2012**.** That response failed to include specific information requested in the five taxpayer notices relating to the companies named in the last preceding paragraph.

10. In his address to us in relation to this appeal, Mr Davis acknowledged that his firm had been instructed to respond to the twenty notices served on Mr Backhouse and his associates, and claimed that the member of staff delegated to deal with the matter had mistakenly assumed that all the notices were identical and required the same information in response. In fact, the five of them in point required the disclosure of information additional to that sought in the remaining fifteen. Against that background, Mr Davis contended that Mr Backhouse should not be penalised because:

(i) HMRC already possessed the information omitted as it had been provided in reply to previous requests of Mr Backhouse in relation to other parties;

(ii) his, Mr Davis's, firm had explained to HMRC that the information requested in the notices (DOTAS numbers) had been omitted by mistake; and

(iii) certain individuals at HMRC were pursuing a campaign or vendetta against Mr Backhouse, as evidenced by their levying penalties as opposed to simply informing him that information was missing and asking him to provide it. Further, the officer concerned had failed to exercise his discretion to levy a single penalty rather than imposing five separate ones; that was unnecessary and disproportionate when the information being sought was identical in each request.

11. Mr Marriott submitted that:

(i) the notices were clear as to what was required of Mr Backhouse, and he had had a long period of time in which to respond to them;

(ii) Mr Backhouse could not assume that, because the investigating officer might have had knowledge from other sources sufficient to satisfy the disclosure requirement, he need not deal with it; and

(iii) the penalty was fixed by law, and a penalty was payable for the breach of each statutory notice.

Appeal TC/2013/00110

12. In his second appeal, Mr Backhouse appeals against a penalty of £2,000.00 assessed under para.46 of Schedule 36 for an alleged inaccuracy in response to a taxpayer notice of 23 January 2012. The notice required Mr Backhouse to disclose "the names and addresses of all companies that have used schemes, devised promoted or marketed by you and from which you have received, accrued or otherwise accumulated, whether directly or indirectly, fees or other charges during the stated period [24 June 2010 to 23 January 2012]". He failed to disclose the names of two companies which fell to be disclosed, and whose names were known to HMRC as a result of their having been declared in response to other similar notices served on Mr Backhouse.

13. Mr Davis produced a witness statement made by Mr Backhouse explaining what he claimed to be a mistake for omitting the names of the two companies. We were not prepared to deal with the appeal on the basis of that statement for Mr Backhouse did not attend the hearing, and thus was not available for cross-examination on its contents. He had had some three months notice of the hearing, did not apologise for non-attendance, and provided no explanation for non-attendance.

14. Mr Davis claimed that in his response to the relevant taxpayer notice Mr Backhouse did not identify the two companies – Archer Structure Limited and Payment Card Technologies UK Limited – as he did not believe they had to be identified. The information he had provided in relation to seventeen other companies under the notice was comprehensive and accurate.

15. By way of explanation for Mr Backhouse's failure to identify the two companies, Mr Davis said that he, Mr Backhouse, denied deriving any benefit from either of them. The penalty had been imposed as a result of suspicion on the part of HMRC, without rationale as to its amount, and as part of the campaign or vendetta against Mr Backhouse. Mr Davis maintained that Mr Backhouse's claim in that behalf was supported by the setting aside of the original penalty notice for ambiguity, and its subsequent re-issue.

16. Mr Marriott explained that in the taxpayer notice in question HMRC were seeking details of entities engaged to administer Backhouse promoted PAYE and NIC avoidance schemes from which Mr Backhouse had benefited financially. They suspected that he had failed to disclose the names of the two companies, and their suspicion was confirmed when their names appeared on bank statements of other companies apparently using Mr Backhouse's tax avoidance schemes.

17. Mr Backhouse had failed to explain why details of the two companies were omitted from his disclosure, and on 8 May 2012 he was invited to explain the apparent inaccuracy in his response. While it was accepted that a penalty notice dated 30 May 2012, issued in consequence of the apparent failure to comply with the taxpayer notice had to be cancelled due to ambiguity, in Mr Marriott's submission, the penalty notice re-issued on 6 September 2012 in the sum of £2,000 was in accordance with para.40A of Schedule 36 to the Act, and had been upheld on internal review within HMRC. As Mr Backhouse had failed to disclose the names of two companies concerned, HMRC could have imposed maximum penalties of £6,000.

Findings of Fact and Decisions

18. It is common ground that the burden of establishing liability to a penalty lies with HMRC. Mr Davis submits that Mr Backhouse has a reasonable excuse for failure to comply with the taxpayer notices within appeal TC/2013/00099, so that we can confirm or cancel each of the £300 penalties. He further submits that the tribunal can take an overall view in relation to the penalties assessed. In contrast, Mr Marriott maintains that, since every penalty relates to a failure to comply with an individual notice, each one must be considered individually.

19. In dealing with Mr Backhouse's earlier appeal in time, and his claim to have a reasonable excuse for his failure to comply with the five taxpayer notices which led to the penalty assessments, as we disclosed earlier, the notices were passed by Mr Backhouse to his solicitors for their attention. No evidence was adduced as to the qualifications, level of competence or experience of the person entrusted to respond to them, whether the work of that person was supervised by another, or what checks, if any, were made on the completed response to ensure that in relation to each notice it was accurate and complete. Indeed, we were told nothing of the work involved, Mr Davis simply saying that "by mistake" five of the responses were incomplete. Whether Mr Backhouse himself checked the contents of the response before it was sent to HMRC was another question that remained unanswered. In our judgment, in the particular circumstances of this case, s.45(2)(b) of Schedule 8 operates to prevent Mr Backhouse having a reasonable excuse for his failure to comply with the five notices; he did rely on a third party, his solicitors, to deal with the notices and did not take reasonable care to ensure that their response was accurate and true. Whilst we accept that Mr Backhouse's may not have been deliberate, he nevertheless failed to comply with each notice. The penalty of £300 – a sum provided for in para. 39(2) of Schedule 36 – follows in respect of each notice breached.

20. Of Mr Davis's suggestion that HMRC had "pounced" on Mr Backhouse's error in failing to exercise their discretion and imposing a single penalty for one such failure, rather than taking a global view, we need merely say that, in our judgment, they did not behave improperly in imposing the five penalties. We are not prepared to take a global view as to the reasonableness of the overall level of the penalties, and do not

consider HMRC's response to have been disproportionate. We therefore uphold all five penalty assessments, and dismiss appeal TC/2013/0099.

21. In relation to Appeal TC/2013/00110, Schedule 8 to the Act provides us with power not only to uphold or cancel the penalty, but also to vary it.

22. Initially HMRC erred in giving notice that the penalty they were imposing was provided for by para 5 of Schedule 36, whereas it was provided for by para 46(1) of Schedule 36. On realising their error, they withdrew the assessment to the original penalty, but proceeded to reimpose it by letter of 6 September 2012 on that occasion maintaining that it was provided for by paras 39 and 46 of Schedule 36.

23. Section 114 TMA prevents an assessment becoming void or voidable as a result of an error which is not materially misleading in the following terms:

> "(1) An assessment, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding
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> (2) An assessment shall not be impeached or affected—
>
> (a) by reason of a mistake therein as to—
>
> (i) the name or surname of a person liable, or
>
> (ii) the description of any profits or property, or
>
> (iii) the amount of the tax charged, or
>
> (b) by reason of any variance between the notice and the assessment"

24. Mr Davis sought to persuade us that the new notice of the penalty was not of such a trivial nature as to be capable of being saved by s. 114 TMA. The cases he relied on were those of *Vickerman (Inspector of Taxes) v Mason's Personal Representatives* [1984] 2 All ER 1; *Peter G Gunn v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKUT 59 (TCC); *John Backhouse & Another v The Commissioners for Her Majesty's Revenue and Customs* TC/2012/03350 & 03351. The only one of those cases we propose to mention here is that of *Gunn*. There the Upper Tribunal dismissed the taxpayer's argument that s.29 TMA discovery assessments were invalid because they did not state whether they were made under s.29 or any other provision for the purposes of s.114. The Tribunal held that there was no statutory provision which required an assessment to state the exact statutory provision under which it was issued. The words "an assessment… which purports to be made in pursuance of any provision of the Taxes Acts…" could not be read as containing a requirement that the provision of the Taxes Act had to be stated in either an assessment or the notice of assessment. If such a requirement existed it would undoubtedly be explicit within the words of the section.

25. Although accepting that none of the cases cited was directly in point, Mr Davis submitted that they illustrated the limited extent errors in notices could be corrected, so that we should rule the notice to be invalid and allow the appeal against it. He

accepted that whilst it might not be fatal to omit from a notice the statutory provision under which a penalty was imposed, it could be if an incorrect provision was said to be relied upon. Mr Davis maintained that Mr Backhouse's error should, and could, have been corrected by HMRC simply having asked for confirmation that his response to the information notice was complete.

26. In contrast, Mr Marriott submitted that there was no ambiguity in the penalty notice; that any technical defect in it was cured by s.114 TMA; and that Mr Backhouse deliberately or carelessly omitted the missing names of the two companies in his response. He added that, had HMRC thought it appropriate, as there were two inaccuracies in the disclosure, they could have assessed in a sum of up to £6,000.

27. We are satisfied that Mr Backhouse was at least careless in complying with the taxpayer notice of 23 January 2012, so that HMRC were entitled to assess him to a penalty in accordance with para 46(1) of Schedule 36.

28. We are also satisfied that Mr Backhouse was adequately informed of the basis on which the penalty was assessed by HMRC and why, i.e. for the particular failure to disclose the names of two companies from which he was said to have derived benefit. Having considered the case law on which Mr Davis relied, in our judgment, Mr Backhouse was not misled as to why the penalty was imposed, or that any defect in the notification of the provision under which the penalty was imposed was incapable of cure under s. 114 TMA. The mistake in the notice was not so serious as to invalidate it.

29. With regard to the amount of the para.46 penalty, we are satisfied on the evidence that, in raising the penalty assessment, HMRC gave proper consideration to its level and did not act perversely in proceeding on the basis that Mr Backhouse deliberately or carelessly omitted the names of two companies in his response to the Notice. We are not prepared to interfere with the penalty assessed; in our judgment, the sum of £2,000 is a proper assessment of the consequential penalty. We therefore uphold the penalty and dismiss appeal TC/2013/00110.

30. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal no later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 6 March 2014