TC03585

Appeal number: TC/2013/02092, TC/2013/05256 & TC/2013/05261

Information notices under schedule 36 FA08 – appeal against issue of taxpayer notices – HMRC seeking copies of old documents which had been previously provided by taxpayers but destroyed by HMRC – long hiatus in HMRC's investigation of VAT restructuring of golfing activities – in spite of unfortunate history, documents were reasonably required and it was appropriate to require their delivery – appeal dismissed subject to one variation to one of the notices

FIRST-TIER TRIBUNAL
TAX CHAMBER

WHITEFIELDS GOLF CLUB LTD **Appellants**
WHITEFIELDS GOLF LTD
DRAYCOTE HOTELS LTD

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MRS SHAMEEM AKHTAR

Sitting in public in Priory Court, Bull Street, Birmingham on 21 February 2014

Ian Scott of Weatherer Bailey Bragg, Chartered Certified Accounts, for the Appellants

Steven Winder of the office of the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These are appeals against the issue of three "taxpayer" information notices under Schedule 36 Finance Act 2008 ("FA08") by HMRC. On 4 April 2014 the Tribunal issued a summary decision on the three appeals. In spite of the fact that there is no right of appeal, the Appellants have exercised their right to require full findings of fact and reasons for the original decision and this document is issued in response to that requirement.

2. No objection having been raised by HMRC, we gave permission (to the extent necessary, which was a matter of some disagreement between the parties) for the appeals to proceed in spite of being notified to the Tribunal after the expiry of any relevant time limit. The parties were agreed that the Tribunal was validly seized of the appeals for all purposes.

The facts

3. These appeals arose out of a longstanding enquiry carried out by HMRC (and their predecessor body) into a reorganisation in 1999 of the golfing activities originally carried on by the third Appellant. In very broad terms, the reorganisation was structured (with purported retrospective effect from 1 August 1999) so as to carry out all golfing activities through the first Appellant with the exception of the activities attributable to non-members of the golf club, which were to be carried out through the second Appellant.

4. The reorganisation had come to the attention of HMCE, the predecessor body of HMRC, in the course of a routine inspection in June 2003. There followed some correspondence and HMCE were also supplied with copy documents relating to the reorganisation.

5. A major fire then destroyed large parts of the third Appellant's hotel in late November 2003, causing it to cease to trade for nearly a year. Following the provision of some documents to HMRC in February 2004, matters effectively ground to a halt on the investigation of the reorganisation. The reasons were not explained in detail, but clearly the retirement of the relevant investigating officer played a large part.

6. It was only following a further visit in November 2010 that HMRC sought to pick up the investigation again in July 2011. In the meantime, it appears that the documentation previously supplied to HMRC had been lost or destroyed. In order to pursue their investigation, HMRC requested copies of the documents that had already been supplied (and lost or destroyed by them).

7. The Appellants did not supply the documents requested and HMRC therefore issued formal taxpayer notices under paragraph 1 of Schedule 36 FA08 addressed to the three Appellants requiring the delivery of certain documents and information

relating to the reorganisation. The original notices were withdrawn and replaced by notices issued on 1 May 2012, requiring the three Appellants to deliver:

In the case of the first Appellant:

- "The lease between [the third Appellant] and [the first Appellant] and any other agreement which gives [the first Appellant] the right to occupy the golf course and associated facilities, whether or not the lease or agreement also gives rights to others"

- "All agreements between [the third Appellant] and [the first Appellant] in respect of management services and other services supplied to [the third Appellant]"

- "The minutes of all board or committee meetings of [the third Appellant] from the first such meeting (which I expect occurred some time around its formation in 1999) until 1 January 2001"

- "The minutes of all board or committee meetings of [the third Appellant] from 1 January 2011 – 31 December 2011".

In the case of the second Appellant:

- "The lease between [the third Appellant] and [the second Appellant] and any other agreement which gives [the second Appellant] the right to occupy the golf course and associated facilities, whether or not the lease or agreement also gives rights to others"

- "All agreements between [the third Appellant] and [the second Appellant] in respect of management services and other services supplied to [the second Appellant]"

- "The minutes of all board or committee meetings of [the second Appellant] from the first such meeting (which I expect occurred some time around its formation in 1999) until 1 January 2001"

- "The minutes of all board or committee meetings of [the second Appellant] from 1 January 2011 – 31 December 2011".

In the case of the third Appellant:

- "The lease between [the third Appellant] and [the second Appellant] and/or [the first Appellant] and any other agreement which gives [the second Appellant] and/or [the first Appellant] the right to occupy the golf course and associated facilities, whether or not the lease or agreement also gives rights to others"

- "All agreements between [the third Appellant] and [the second Appellant] and/or [the first Appellant] in respect of management services and other services supplied to [the second Appellant] and/or [the first Appellant]"

- "The identity of the person or persons who instigated the separation of the golf activities from the hotel; what their authority was to instigate the separation; and the reasons why the separation was made."

- "All company minutes from 1 January 1998 at which the decision to split the business was considered by [the third Appellant] or its officers, including any papers, diagrams and projections that were put to such meetings for consideration."

8. No application had been made to the Tribunal for its approval of the giving of any of the above notices pursuant to paragraph 3 of Schedule 36 FA08.

9. In passing, we observe that any requirement to provide documents is to be read subject to paragraph 18 of Schedule 36 FA08, which provides that "[a]n information notice only requires a person to produce a document if it is in the person's possession or power". The Appellants are therefore protected against any penalties for non-production of the documents if they can establish that they are not in their possession or power (though there was no suggestion raised at the hearing that this was an issue).

The appeal

10. The Appellants have appealed against the issue of the information notices. The appeal of the first Appellant was in slightly different terms to the appeals of the other two Appellants. However, essentially the appeals are on the following grounds:

(1) The documents required are not "statutory records" and therefore a right of appeal against a notice requiring their production does exist;

(2) The issuing of the notices was unreasonable in all the circumstances;

(3) The documents and information are not reasonably required by the officer who issued the notices; and

(4) The purpose for which the documents are required is not that of checking the Appellants' tax position, it is in order to correct HMRC's administrative error in losing or destroying the copies originally provided and/or failing to follow up their original enquiries.

11. Mr Winder did not seek to dispute the argument put forward under head (1) above and we therefore consider it no further. We express no view on the extent to which any of the documents sought might in fact have been statutory records.

The law

12. The provisions regulating an appeal against the issue of a notice such as this are set out in paragraphs 29 and 32 of Schedule 36 FA08, which provide as follows:

> "**29 –** (1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal 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.

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3."

"**32 –** (1) Notice of an appeal under this Part of this Schedule must be given –

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(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.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement –

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(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.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

Discussion and decision

13. As there are no particular provisions to guide a Tribunal in considering an appeal under paragraph 32, we take it that we have a general discretion, to be exercised after proper consideration of all factors that we consider relevant (and disregarding all matters that we consider irrelevant), to confirm, vary or set aside the notices or any requirement within them.

14. It goes without saying that we should only confirm a notice if we are satisfied that it complies with the requirement of paragraph 1 of Schedule 36, which requires that the document or information in question should be "reasonably required by the officer for the purpose of checking the taxpayer's position".

15. It is important to state at the outset that we are concerned here only with the issue of notices under Schedule 36 FA08. Our decision in this appeal will have no relevance to any ultimate dispute about the correct VAT treatment of the arrangements between the three Appellants. The corollary is that arguments that may be relevant to that treatment are not directly relevant to our consideration of this appeal. This appeal is not the appropriate forum for a detailed consideration of the appropriate VAT treatment of the Appellants' arrangements; and any attempt by the Appellants to head off such a detailed consideration by seeking to withhold, through this appeal, information and documents relevant to that detailed consideration must be refused. The sole question before us is whether it is reasonable to require the Appellants to comply with the notices that have been issued, either as originally issued or after some variation.

16. We are quite clear (subject to one slight qualification) that it is.

17. The Appellant argues that it would not be reasonable to require delivery of the documents and information in a situation where (a) it has already been supplied once and (b) HMRC (and HMCE before it) have quite clearly been dilatory in following up that information, as well as losing or destroying it. Whilst this might be a valid reason for some embarrassment on HMRC's part, we do not consider it is sufficient reason to allow the appeal in full. The matters the Appellants complain of are effectively matters of good administration and they are seeking to persuade us that the Tribunal can effectively assume a general quasi-judicial review power through the back door of a finding that the relevant documents and information are not "reasonably required".

18. To the extent that such a jurisdiction exists, it is certainly not to be found in the Tribunal. As a creature of statute, the Tribunal has only the powers conferred on it by statute. In considering whether information or a document being sought by HMRC is "reasonably required", the Tribunal cannot embark upon a general supervisory review of the conduct of HMRC, it must simply decide what is "reasonably required" for the purposes of establishing the correct tax liability of the taxpayer(s) in question in accordance with the law. Whilst the Appellants may be able to raise judicial review type arguments as to why strict tax liabilities should not be enforced in the circumstances of their particular case, that is only part of the overall picture (and, incidentally, is not a part of the picture over which this Tribunal

has any jurisdiction). The fact of the matter is that the documents which HMRC are seeking to obtain are clearly relevant as part of the overall picture in establishing the Appellants' proper VAT liabilities and should therefore be provided, notwithstanding the unfortunate history. To order otherwise would either be entirely pointless (on the basis that production of the documents would in any event be ordered in the context of a substantive appeal) or would be tantamount to hamstringing permanently all efforts on the part of HMRC to ensure that the Appellants' VAT affairs are properly in order (and are not, for example, providing them with an ongoing unfair competitive advantage over other traders in a similar position) – which would be completely inappropriate.

19. In his lengthy written submission that was read out at the hearing, Mr Scott explored at some length many of the arguments that the Appellants may wish to advance in connection with any dispute as to the appropriate substantive VAT treatment of their chosen structure; those arguments cannot however be used as justification for refusing to deliver the requisite documents to HMRC in the first place.

20. We mentioned at [16] above one slight qualification to this view. This relates to the "information" being sought by HMRC from the third Appellant. In the circumstances, we do not consider that it is appropriate to require the third Appellant to provide "the identity of the person or persons who instigated the separation of the golf activities from the hotel; what their authority was to instigate this separation and the reasons why the separation was made". It is one thing to provide documents dating back some 15 years (insofar as they still exist) but it is altogether another matter to provide this information so long after the event (which would inevitably be somewhat unreliable after so many years). In the context of any substantive appeal, the Tribunal will need (in the absence of any evidence as to those matters) to draw any necessary inferences from the documentary evidence and any oral evidence which may be available to supplement it. In any event, the requirements of the relevant paragraph seem to us to be more intended to embarrass the Appellants than to extract useful evidence and we therefore do not consider that such information is "reasonably required".

21. We therefore confirm the three notices under appeal, subject to deletion of numbered paragraph 3 from the list of information/documents contained in the notice addressed to the third Appellant. We consider that a period of 42 days should be more than sufficient to comply with the notices as so amended and we therefore specify that period from the date of issue of this decision, pursuant to paragraph 32(4)(a) of Schedule 36 FA08, for compliance with the original notices dated 1 May 2012 as varied by this decision.

22. This document contains full findings of fact and reasons for the decision.

23. By virtue of paragraph 32(5) Schedule 36 FA08, neither party has a right of appeal against this decision.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 13 May 2014