



**TC05040**

**Appeal number: TC/2016/411**

***PENALTY – failure to comply with taxpayer information notice – Part 7 sch  
36 FA 2008***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**K.W. BROTHERS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Judge Peter Kempster  
Mr Terence Bayliss**

**Sitting in public at Centre City Tower, Birmingham on 14 March 2016**

**Mr Simon Poon (STF (30) Limited) for the Appellant**

**Mr Philip Osborne (HMRC Appeals Unit) for the Respondents**

## DECISION

1. The Appellant appeals against a penalty for alleged non-compliance with an information notice issued by the Respondents (“HMRC”) pursuant to sch 36 Finance Act 2008.

### Background

2. HMRC opened a formal enquiry into the Appellant’s corporation tax return for the accounting period ended 31 March 2013 (Part IV sch 18 Finance Act 1998 refers). Some business records were supplied but on 5 March 2015 the Appellant made a declaration that “The sales invoices and backup data of SAGE accounting package for the year ended 31<sup>st</sup> March 2013 are not under our possession.”

3. On 9 November 2015 HMRC issued a taxpayer information notice (“the Notice”) to the Appellant, pursuant to para 1 sch 36 FA 2008. The covering letter included the following:

“I wrote to the company’s agent on 5 October 2015 to ask for some information and documents. I believe these are reasonably required. This means that it is reasonable for me to ask for these so that I can check the company’s Corporation Tax position. I need them so that I can check that company’s tax return is correct.

I have not received any of the items I asked for. Because of this, I am now issuing this notice. The attached schedule shows what I still need.

This notice means that by law the company must let me have the information and the documents I have asked for by 8 December 2015. ... I am issuing this notice under Paragraph 1 of Schedule 36 to the Finance Act 2008.

...

If the company does not do what this notice asks, the company may have to pay a penalty of £300 without further warning.”

4. The schedule to the letter stipulated two categories of items:

“**Statutory records or information that we need ...**

1. Sales invoices for the year ended 31 March 2013.
2. The computer backup data for the year ended 31 March 2013.

**Other documents or information that we need ...**

If either of the two items above are no longer in your possession can you please let me know why they are no longer in your possession and why they were not retained.”

5. On 19 November 2015 the Appellant’s agent appealed to HMRC against the Notice on the grounds that “the information requested is not under the [Appellant’s] possession.” They also requested an internal review of the decision to issue the Notice.

6. On 17 December 2015 HMRC issued a penalty of £300 for failure to comply with the Notice, pursuant to paras 39 & 46 sch 36 FA 2008 (“the Penalty”).

7. On 5 January 2016 HMRC gave their formal review decision, upholding the issue of the Notice and stating:

5 (1) In relation to the statutory records requested (the sales invoices and the computer backup data), “as stipulated by Paragraph 29(2) of Schedule 36 a person cannot appeal against a request for statutory records.”

(2) In relation to the other documents or information requested (an explanation why the sales invoices and the computer backup data were no longer in the Appellant’s possession and why they were not retained),

10 “I consider this information is reasonably required for the purpose of checking your tax position. ... I note that the signed declaration you produced dated 5 March 2015 says that the records are not in your possession. I do not think it is unreasonable to expect you to provide further information about why these records are not in your possession and why they were not retained. The sales invoices and the computer backup data that have been requested are certainly reasonably required for the purpose of checking your tax position. If these are no longer available then it follows that a satisfactory explanation as to why these documents are not available would also be reasonably required as part of a compliance check.”

8. On 12 January 2016 the Appellant appealed against the Penalty giving as grounds:

(1) The sales invoices and the computer backup data for the year ended 31 March 2013 were no longer in the Appellant’s possession; and

25 (2) Schedule 36 “does not require the [Appellant] to explain the reasons why the sales invoices and the computer backup data are no longer in their possession.”

9. The appeal now comes before us.

## Law

30 10. Schedule 36 FA 2008 provides, so far as relevant:

“1 *Power to obtain information and documents from taxpayer*

(1) An officer of Revenue and Customs may by notice in writing require a person (“the taxpayer”)—

35 (a) to provide information, or

(b) to produce a document,

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

(2) In this Schedule, “taxpayer notice” means a notice under this paragraph.

...

#### *7 Complying with notices*

(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

- 5 (a) within such period, and  
(b) at such time, by such means and in such form (if any),  
as is reasonably specified or described in the notice.

(2) Where an information notice requires a person to produce a document, it must be produced for inspection—

- 10 (a) at a place agreed to by that person and an officer of Revenue and Customs, or  
(b) at such place as an officer of Revenue and Customs may reasonably specify.

...

#### *18 Documents not in person's possession or power*

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

...

#### *29 Right to appeal against taxpayer notice*

20 (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.

25 ...

#### *39 Penalties for failure to comply or obstruction*

(1) This paragraph applies to a person who—

- (a) fails to comply with an information notice, ...  
(2) The person is liable to a penalty of £300.

30 (3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.

...

#### *45 Reasonable excuse*

(1) Liability to a penalty under paragraph 39 or 40 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 or the obstruction of an officer of Revenue and Customs.

40 (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.

...

#### *47 Right to appeal against penalty*

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

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

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

#### *48 Procedure on appeal against penalty*

(1) Notice of an appeal under paragraph 47 must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the 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.

(5) Subject to this paragraph and paragraph 49, 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.

...

#### *62 Statutory records*

(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.

5 (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,

10 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.

15 ...”

11. Paragraphs 21 & 22 sch 18 FA 1998 provide, so far as relevant:

*“21 Duty to keep and preserve records*

(1) A company which may be required to deliver a company tax return for any period must—

20 (a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and  
(b) preserve those records in accordance with this paragraph.

(2) The records must be preserved until the end of the relevant day.

(2A) In this paragraph “relevant day” means—

25 (a) the sixth anniversary of the end of the period for which the company may be required to deliver a company tax return, or  
(b) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases).

30 (3) If the company is required to deliver a company tax return by notice given before the end of the relevant day, the records must be preserved until any later date on which—

(a) any enquiry into the return is completed, or  
(b) if there is no enquiry, an officer of Revenue and Customs no longer has power to enquire into the return.

35 (4) If the company is required to deliver a company tax return by notice given after the end of the relevant day and has in its possession at that time any records that may be needed to enable it to deliver a correct and complete return, it is under a duty to preserve those records until the date on which—

40 (a) any enquiry into the return is completed, or

(b) if there is no enquiry, an officer of Revenue and Customs no longer has power to enquire into the return.

(5) The records required to be kept and preserved under this paragraph include records of—

5 (a) all receipts and expenses in the course of the company's activities, and the matters in respect of which the receipts and expenses arise, and

(b) in the case of a trade involving dealing in goods, all sales and purchases made in the course of the trade.

10 (5A) The Commissioners for Her Majesty's Revenue and Customs may by regulations—

(a) provide that the records required to be kept and preserved under this paragraph include, or do not include, records specified in the regulations, and

15 (b) provide that those records include supporting documents so specified.

(5B) Regulations under this paragraph may—

(a) make different provision for different cases, and

20 (b) make provision by reference to things specified in a notice published by the Commissioners for Her Majesty's Revenue and Customs in accordance with the regulations (and not withdrawn by a subsequent notice).

(6) "Supporting documents" includes accounts, books, deeds, contracts, vouchers and receipts.

25 *22 Preservation of information etc*

(1) The duty under paragraph 21 to preserve records may be discharged—

(a) by preserving them in any form and by any means, or

30 (b) by preserving the information contained in them in any form and by any means,

subject to sub-paragraph (3) and any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

...”

35 **Respondents' case**

12. Mr Osborne for HMRC submitted as follows.

13. The items stipulated in the Notice were reasonably required by HMRC to check the Appellant's tax position being examined under the corporation tax enquiry; in particular, the Appellant's dealings with third parties.

14. The statutory restriction in para 18 sch 36 related only to *documents* not in the taxpayer's possession or power. The Notice also required the provision of stipulated *information*: "If either of the two items above are no longer in your possession can you please let me know why they are no longer in your possession and why they were not retained." That requirement had not been complied with. Thus the Penalty was properly charged.

### **Appellant's case**

15. Mr Poon for the Appellant submitted as follows.

16. The Notice had been complied with. Paragraph 18 sch 36 stated: "An information notice only requires a person to produce a document if it is in the person's possession or power." The requested sales invoices and computer backup were not in the possession or power of the Appellant. That had been explained to HMRC on 5 March 2015 (see [2] above). The Appellant used a SAGE computer accounting system. No paper records had been maintained. The Appellant moved trading premises on 13 September 2013 and during the transfer to the new office all electronic data and backups could not be located. The Appellant had done everything possible to locate the data but without success. The Appellant did not have the power to obtain duplicates. In response to a question from the Tribunal: a SAGE disaster recovery service was not available.

17. Having established that the documents were not available, the Appellant did not have to give details. HMRC wanted copies of sales invoices so that they could check whether the Appellant's customers have two accounts for one business to avoid VAT and income tax. The Appellant had no such policies; it was a substantial business with an annual turnover of £5.5 million. If HMRC doubted the Appellant's turnover then they could use other means. The Appellant had ceased trading on 31 March 2015.

### **Consideration and Conclusions**

18. The Notice required provision of two distinct categories of items. First, statutory records in the form of sales invoices and computer backup data for the year ended 31 March 2013. Secondly, other information in the form of an explanation why "If either of the two items above are no longer in your possession ... why they are no longer in your possession and why they were not retained."

19. We are satisfied that both categories of items (both the statutory records and the other information) were reasonably required by HMRC to check the Appellant's tax position being examined under the open corporation tax enquiry.

20. In relation to the statutory records required by the Notice, we do not accept the statement that the Appellant had absolutely no records available to supply to HMRC. First, a sizeable business that experienced a catastrophic loss of accounting data would necessarily immediately instigate steps to reconstruct its bookkeeping sufficiently to enable it to continue to trade, collect its debts, and pay its creditors; in



our view it is not feasible that there was simply nothing that could be provided by way of original or substitute records. Secondly, the statutory duty to keep and preserve records under paras 21 & 22 sch 18 FA 1998 imposes important obligations, as evidenced by the serious penalties for failure prescribed by para 23 sch 18 FA 1998; again, a sizeable business that experienced a catastrophic loss of statutory records should replace those with “other documentary evidence” (para 23(3)(b) sch 18 FA 1998 refers).

21. In relation to the “other information” required by the Notice, we do not accept Mr Poon’s argument that the Appellant was not required to give the explanation requested by HMRC in the Notice. It was entirely reasonable for HMRC to require that explanation and it was unreasonable for the Appellant to refuse to provide it.

22. For those reasons we find that (i) both categories of items in the Notice were required to be provided or produced by the Appellant; (ii) the Appellant failed to comply with the Notice; and (iii) there was no reasonable excuse (within the meaning of para 45 sch 35 FA 2008) for the Appellant’s failure to comply with the Notice. Accordingly, we dismiss the appeal against the Penalty.

### **Decision**

23. The appeal is DISMISSED.

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

**Peter Kempster**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 15 APRIL 2016**