



TC05769

Appeal number: TC/2016/06269

INCOME TAX – appeal against disclosure notice - paragraph 1 Schedule 36 Finance Act 2008 – whether documents requested form part of appellant’s statutory records – whether reasonably required for the purposes of checking appellant’s tax position – to the extent that appeal related to statutory records the appeal was struck out – one variation to notice - otherwise appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEW WAY CLEANING LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Fox Court, Brooke Street, London on 28 March 2017

Kevin Kinsella Snr , Kinsella Tax 2014 Limited, for the Appellant

Steve Goulding, Presenting Officer, for the Respondents

DECISION

Introduction

5 1. The appellant appeals against HMRC's decision to issue a notice ("the notice") requiring it to produce information and/or documents under paragraph 1 Schedule 36 Finance Act 2008 ("FA 2008") as part of an enquiry into the appellant's PAYE compliance.

10 2. In the course of the hearing, as I shall explain in more detail, a number of matters relating to the notice were agreed or conceded and it was also agreed that one aspect of the notice should be varied. As a result, this decision effectively reflects the agreed position between the parties.

The facts

15 3. I make the following findings of fact from the documents and witness evidence (Mr Arnold an HMRC officer involved in the enquiry into the appellant's PAYE affairs gave a witness statement and was cross-examined) produced to me and solely for the purposes of determining this appeal.

20 4. The appellant carries on a cleaning business providing services for general and deep cleaning to customers such as clubs, pubs and restaurants across the UK.

5. On 16 March 2016, HMRC wrote to the appellant stating that they wished to check the appellant's PAYE records in order to ensure that the appellant was complying with its PAYE obligations. The period into which HMRC were enquiring ran from 17 March 2015 to 16 March 2016.

25 6. A meeting took place between HMRC and the appellant on 28 April 2016. HMRC were represented by Ms Fan and Mr Arnold and the appellant was represented by Mr Lepadatu, the director of the appellant, and by Mr Efrosi, the appellant's book-keeper.

30 7. At the meeting, HMRC were informed that the appellant had four employees i.e. Mr Lepadatu, Mr Efrosi, a full-time employee who assisted in the office and one cleaner. In addition, the appellant engaged 40-50 sub-contractor cleaners.

8. HMRC were informed that the sub-contracted cleaners supplied their own cleaning equipment and did not claim back expenses.

35 9. Mr Lepadatu said that he travelled a lot and claimed travel expenses on the company credit card or sometimes by way of personal reimbursement – all receipts were kept. In addition, he used his personal car for business travel and details of all business trips were recorded.

10. Furthermore, the appellant's representatives informed HMRC that the company owned a van and fuel for the van was also "claimed for". HMRC were also informed that no other expenses were claimed and that although Forms P11D had not been submitted in the past, the appellant would commence submitting those forms "this year".

11. HMRC were informed that there was a "capital account" for Mr Lepadatu and that the company owed him £15,000, which he had invested in the business.

12. On 28 April 2016, HMRC wrote to the appellant requesting 14 items of information/documents to be provided by 13 May 2016. This letter also enclosed HMRC's notes of the 28 April 2016 meeting. The letter was written by Ms Fan and the letterhead stated that the letter was sent by HMRC's "Fraud Investigation Service".

13. HMRC subsequently confirmed that, at present, it was not pursuing a criminal enquiry into the appellant's affairs but only a civil enquiry. Nonetheless, the appellant was perturbed by the letterhead and in May 2016 instructed Mr Kinsella of Kinsella Tax 2014 Limited to represent it. In my view, HMRC's letterhead was unfortunate and the concern caused to the appellant was understandable.

14. After correspondence between HMRC and Mr Kinsella, HMRC emailed Mr Kinsella on 20 June 2016 requesting documents. In an email dated 21 June 2016, Mr Kinsella informed HMRC that he had received "a lot of information which I intend to send to you within the next 7-10 days." In response, on 22 June 2016, HMRC indicated by email that they would "hold off sending the Information Notice until Monday 4 July 2016" in order to allow Mr Kinsella to send the information/documents to HMRC. The email noted, however, if the information/documents were not received by HMRC by 4 July 2016, HMRC would issue a formal information notice.

15. Next, on 12 July 2016, Mr Kinsella sent a number of documents to HMRC.

16. HMRC responded by email on 24 August 2012 and stated that seven items of information/documents were outstanding. Essentially, these seven items were the same as those contained in the notice when it was ultimately issued.

17. On 13 October 2016 HMRC issued the notice. The documents/information specified by the notice, for the period 17 March 2015 to 15 March 2016, were as follows:

- 35 "1. Bank statements;
2. Purchase Ledger;
3. Mileage Logs - both for any company vehicles and the directors logs;
4. Copy of any directors' loan account/current account;
5. Copy of all employee contracts/Terms & Conditions;

6. List of all employees TUPE'd over to New Way;
7. Copy of the capital/loan account for the amount owed by the company to the director....”

18. On 14 November 2016, the appellant submitted a Notice of Appeal against the notice.

19. In a letter to HMRC dated 8 October 2013, before the enquiry began, the appellant's accountants had stated:

“We [ie the appellant] do have vacuum cleaners, buffing and polishing machines, brass and metal polishers, carpet dryers, carpet cleaning machines, steam cleaning machines, jet machines. All this is cleaning equipment.”

20. Finally, HMRC issued a penalty notice on 24 November 2016 in respect of the failure to comply with the information notice. HMRC now accept that this penalty notice was incorrectly issued because the appellant had appealed the notice. Notwithstanding this, HMRC's skeleton argument incorrectly urged me to confirm the penalty. When I raised this with Mr Goulding, who appeared for HMRC, I was informed that this was a mistake and was assured that the penalty notice has been cancelled. Accordingly, there was no need to consider the penalty notice further.

20 Discussion and submissions

21. Shortly before the hearing, the appellant applied for HMRC to be required to produce Ms Fan as a witness at the hearing. Judge Morgan, on 22 March 2017, refused the application on the basis that she was not satisfied that evidence from Ms Fan was relevant to the proceedings and that the decision under appeal was taken by Mr Arnold, who would be giving evidence at the hearing. Moreover, Judge Morgan did not consider it to be in the interests of justice and fairness to postpone the hearing. Nonetheless, Judge Morgan gave permission for the appellant to renew its application at the start of the hearing.

22. At the commencement of the hearing I asked Mr Kinsella whether he wished to renew the appellant's application. He confirmed that he did not wish to do so.

23. Essentially, the dispute between the parties revolved round the question whether the documents/information required by the notice constituted “statutory records” within the meaning of paragraph 62 Schedule 36 FA 2008 or whether the informational document was reasonably required by HMRC for the purpose of checking the taxpayer's tax position (paragraph 1 (1) Schedule 36 FA 2008).

24. As regards the question of “statutory records”, paragraph 29 (2) Schedule 36 FA 2008 makes it clear that the right of appeal against an information notice to this Tribunal does not apply to a requirement to provide “any information, or produce any document, that forms part of the taxpayer's statutory records.”

25. Paragraph 62 Schedule 36 FA 2008 provides:

“(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 –

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(a) the Taxes Acts, or

(b) VATA 1994 or any other enactment relating to value-added tax charged in accordance with that Act,

subject to the following provisions of this paragraph.”

26. Paragraph 21 Schedule 18 Finance Act 1998 (“FA 1998”) requires a company which is required to deliver a tax return for an accounting period to:

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“keep such records as may be needed to enable it to deliver a correct and complete return for the period... and preserve those records in accordance with this paragraph.”

27. Reg 97 of the Income Tax (Pay As You Earn) Regs 2003 (“the PAYE Regs”) requires employers to retain all documentation relevant to the calculation of employees’ PAYE income or the deduction of tax from those payments, and “all documents relating to any information which an employer is required to provide to HMRC” in relation to the completion of forms P11D and P9D. For the purposes of those Regulations, the term “employee” encompasses directors, see Reg 2(1) and the Income Tax (Earnings and Pensions) Act 2003, ss 4 and 5. Reg 97(1) provides that “An employer must keep and preserve for not less than three years after the end of the tax year to which they relate all PAYE records which are not required to be sent to HMRC...”

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28. FA 1998, Sch 18, para 21(5) specifies that a company’s statutory records include:

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“(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.”

29. In *Jonathon Beckwith v Revenue & Customs* [2012] UKFTT 181 (TC) (Ms Redston and Mr Hughes) this Tribunal stated at [57]:

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“The definition of statutory records in Sch 36 means that if a taxpayer is required by any statutory provision relating to tax to keep a document, then that document is a “statutory record”. There is no necessary link between the tax which is under enquiry, and the source of the obligation to keep the records for tax purposes. So, for example, if a document is required to be kept by VATA, then it is a “statutory record” for the purposes of Sch 36, even if the Notice relates to documents required for an enquiry into the individual’s self-assessment return.”

30. Although this decision is not binding upon me, I respectfully agree with it.

31. In addition, HMRC accepted that it bore the burden of proof in showing that the information/documents specified in the notice were either statutory records or reasonably required to check the appellant's tax position. The burden of proof in relation to an information notice under paragraph 1 Schedule 36 FA 2008 was discussed by this Tribunal in *Joshy Mathew v Revenue & Customs* [2015] UKFTT 139 (TC) at [66]-[92] (Judge Redston and Ms Myerscough). The Tribunal concluded that, taking account of the presumption of regularity, the balance of authorities indicated that the burden of proof lay upon the taxpayer rather than HMRC. Nonetheless, as I have said, HMRC accepted that it bore the burden of proof in this case and it seemed to me that this was a pragmatic and sensible way to proceed.

32. As regards the seven matters listed in the notice, I shall deal with each item in turn.

Item 1 – bank statements

33. HMRC submitted that the bank statements were statutory records. The bank statements were required, HMRC argued, to check the appellant's tax position and to help understand the position of the subcontractors. I agree with that submission. It is very hard to see how a company can submit a tax return which is not, at least in part, dependent on its bank statements. The company's accounts will certainly take into account the company's bank statements as part of its primary records. Moreover, the bank statements which show what payments were paid to employees and subcontractors.

34. In the end, Mr Kinsella did not dispute this analysis.

35. In any event, I consider that the appellant's bank statements were reasonably required to check the company's tax position in relation to PAYE. The bank statements would enable HMRC to check the individuals to whom the appellant had made payments and the amounts and dates of those payments.

36. Accordingly, I conclude that item 1 (bank statements) comprise statutory records. Alternatively, I consider that these documents were reasonably required by HMRC to check the company's tax position.

Item 2 – purchase ledger

37. Again, HMRC contended that the appellant's purchase ledger were part of the company's statutory records. Alternatively, HMRC contended that the purchase ledger was reasonably required to check the appellant's tax returns.

38. I agree with HMRC's submission that the purchase ledger forms part of the appellant's statutory records. A purchase ledger would clearly be part of the records required to enable a company to complete its tax return.

39. In any event, I also consider that the purchase ledger was reasonably required by HMRC to check the appellant's returns. In particular, in the light of the letter of 8

October 2013 from the appellant's accountants regarding cleaning equipment, I consider that the purchase ledger would have been reasonably required to check the appellant's tax position (i.e. whether it actually owned the equipment used by the cleaners) and to clarify any uncertainty arising as a result of that letter and statements made at the 28 April meeting.

40. In the event, Mr Kinsella accepted that the purchase ledger formed part of the appellant's statutory records.

Item 3 – mileage logs

41. HMRC contended that the mileage logs were reasonably required to check the appellant's tax position. HMRC had concerns in respect of the benefits in kind provided to employees and travel expenses. HMRC abandoned its previous position that the mileage logs constituted part of the appellant's statutory records.

42. In my view, in order to substantiate travelling expenses claimed by the appellant's director or any other employee, the mileage logs were records which HMRC reasonably required to check the company's tax position.

43. In the event, Mr Kinsella agreed with this conclusion.

Item 4 – director's loan account/current account

44. The request for documents/information irrespective any director's loan or current account was prompted by the reference in the notes of the meeting of 28 April 2016 to the fact that Mr Lepadatu had injected £15,000 into the appellant by way of loan. Mr Kinsella contended that this was a capital account and that there was no director's loan account or current account.

45. I considered that a capital, loan or current account would be part of the appellant's statutory records because it would have been necessary to have referred to this information in compiling the accounts of the company on which the corporation tax return was based. Moreover, it would be necessary to ascertain the terms of any loan (e.g. was any interest payable) in drawing up the appellant's corporation tax computations. In any event, I also consider that this information was reasonably required to check the appellant's tax position. It is reasonable for HMRC to ascertain whether the appellant lent money to its directors and, if so, on what terms.

46. Again, Mr Kinsella accepted this conclusion. It was agreed that details of the £15,000 capital account would be supplied. To the extent that there was no loan or current account, there would be no documents or information to provide and that this would be noted by the appellant in its response to the notice.

Item 5 – all employee contracts/Terms & Conditions

47. There was a discussion about this documentation requirement at the hearing. Mr Goulding contended that the employees' contracts were required in order to establish what terms and conditions applied to the employed cleaner and in what way these differed from the role of the subcontractor that necessitated the two roles having different employment status.

48. On this basis, it seemed to me that the notice was, in this respect, too widely framed. The relevant employment contract was that of the employed cleaner(s).

49. At the hearing, it was, therefore, agreed that the reference in item 5 to “all employee contracts/Terms & Conditions” should be amended to refer to “all employed cleaners’ contracts of employment/Terms & Conditions.” Pursuant to the powers conferred by paragraph 32 (3) (b) Schedule 36 FA 2008, I have decided to vary the information notice in this manner.

Item 6 – list of all employees TUPE’d over to New Way

50. Mr Arnold’s evidence was that he required this information to check whether a change in status had occurred as regards employed cleaners transferred to the appellant. HMRC’s submission was, therefore, that this information was reasonably required to check the appellant’s tax position. I agree with this submission and understood that Mr Kinsella did so too.

Item 7 – capital/loan account for the amount owed by the company to the director

51. Mr Arnold’s evidence was that he required this information to check how the loan to Mr Lepadatu was being repaid and how it should be factored into his income from the appellant. HMRC contended that the capital/loan account was part of the appellant’s statutory records and was, in any event, reasonably required in order to check the appellant’s tax position.

52. I agreed with HMRC’s submissions on this point as did, ultimately, Mr Kinsella. It seems to me that in preparing the corporation tax computations of the appellant, it would be necessary to establish the terms of any loan made by Mr Lepadatu to the company. Accordingly, it seemed to me that this information would constitute part of the company’s statutory records. In addition, I concluded that this information was reasonably required in order to check the appellant’s tax position.

Conclusion

53. In respect of items 1, 2, 4, and 7 of the notice, I have reached the conclusion that the information/documents required by the notice constitute part of the appellant’s statutory records and that, accordingly, there is no right of appeal. Therefore, insofar as the appeal relates to those items, the appeal must be struck out. In the alternative, I have concluded that each of these items was required to check the appellant’s tax position.

54. In relation to items 3 (mileage logs) and 6 (list of all employees TUPE’d over to New Way) I have agreed with HMRC’s submission that the information/documents are reasonably required to check the appellant’s tax position

55. As regards item 5, I have varied the notice as recorded in paragraph 49 above.

56. At the hearing, the parties agreed that the appellant should have 30 days from the date of the release of this decision to provide the above documents/information

and I specify this period as the period within which the appellant must comply with the notice.

57. There is no right of appeal in respect of this decision in accordance with paragraph 32 (5) Schedule 36 FA 2008.

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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 11 APRIL 2017