



TC05978

Appeal number: TC/2016/05326

INCOME TAX – Information Notice – statutory records excluded from appeal - whether reasonable grounds for issue: to be determined by reference to facts known at issue not later – reasonable grounds – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GARY NICOL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Eagle Building, Glasgow on Wednesday 14 June 2017

David Walker, for the Appellant

Matthew Mason, Officer of HMRC, for the Respondents

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DECISION

Background facts

1. The appellant operates a school contract business and engages taxi drivers to assist in performing various contracts driving school children to and from schools, and after school and summer clubs.
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2. On 6 March 2015 the respondents (“HMRC”) opened an enquiry under Section 9A Taxes Management Act 1970 (“TMA”) into the appellant’s self-assessment tax return for the year ended 5 April 2014. Correspondence with the appellant’s agent (“the agent”) ensued and in the course thereof two inaccuracies in the return were identified. Annual Investment Allowance had been incorrectly claimed and the appellant’s wife’s fuel expenses for her business had been incorrectly claimed in the appellant’s return as well as in her own return.
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3. The primary point still at issue is whether or not all of the vehicle and fuel expenses were wholly and exclusively incurred for the purpose of the business.
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4. At the outset of the enquiry, on 2 April 2015, the agent stated unequivocally that the use of a Mercedes car for school hires was “minimal” and therefore fuel for that vehicle had been disallowed. On 7 July 2015, he stated “The vehicle was utilised as a private car and was never claimed through the business”. In October 2015, HMRC intimated to the agent that, in their view, the fuel costs were in excess of what would be expected in the light of the information provided.
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5. The agent responded on 10 November 2015 with a *volte face* stating that the appellant kept the 16 seater PSV (“the PSV”) overnight in Kilmarnock on his brother’s property and drove the Mercedes to and from Kilmarnock (a round trip of 34 miles) to enable him to collect the PSV. Of course, the PSV also had to do that extra mileage. He then submitted an amended, and increased, fuel claim. Unsurprisingly, HMRC asked for documentary evidence of the business and private usage of the Mercedes.
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6. The Mercedes was handed back in October 2014 to clear the finance costs.
7. On 23 December 2015, the agent wrote to HMRC intimating that there was no documentary evidence in the form of a fuel or mileage log which could support the use of the Mercedes for business or private journeys.
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8. On 20 January 2016, HMRC wrote to the agent stating that in the absence of records they required information as to which contracts required the use of the Mercedes for additional school clubs and the use of the 16 seater transit and the Mercedes to travel to its location. On 26 January 2016 the agent intimated that they had requested the necessary information from the Council but that it might take some months for a response. On 14 March 2016 the agent stated that they had cancelled the request to the Council since they consider the information to be irrelevant and it would be impossible for the appellant to identify which specific contract pertained to what vehicle.
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9. On 2 May 2016, HMRC wrote to the agent confirming that they did require to know which vehicles were used for business and for what business mileage and since no information had been kept for the year of enquiry, they would like information for the current year. The agent declined to provide that information or to engage in further correspondence.

10. On 13 June 2016, HMRC issued an Information Notice under paragraph 1 of Schedule 36 Finance Act 2008 (“Schedule 36”) requiring the following information:-

- “1. Which of the contract runs have you yourself been covering since September 2015?
2. Which vehicles have you used for these journeys?
- 10 3. Has anyone else used the vehicles mentioned in 2, and if they have for what journeys and what mileage?
4. What are the total fuel purchases for the period 1 September 2015 – present”.

That information has not been provided.

The appellant’s arguments

15 11. The agent has argued that:

- (a) The fuel expenditure during the 2015/16 and 2016/17 tax years has no relevance to the year under review being 2013/14. Therefore the information is not reasonably required.
- 20 (b) The appellant was entitled to park the vehicle in Kilmarnock because he believed that the residents were less likely to complain there. He had the right to choose to park his two cars on his driveway rather than park either PSV there.
- (c) By parking in Kilmarnock he was saving approximately £3,000 per annum by not having to rent a facility near his home.
- 25 (d) The information sought would not identify business and private use for individual vehicles.
- (e) HMRC had failed to “list” this case for hearing before the FTT on three occasions.

HMRC’s arguments

12. HMRC say that:

- 30 (a) The appellant could park the vehicle(s) on his own driveway, or not as he chooses, but the question was whether the mileage costs caused by that were wholly and exclusively for business purposes. The total mileage of the PSV for the year of enquiry excluding trips to Kilmarnock is 22,380 whereas the mileage for the Kilmarnock trips is 12,920 and that is implausible.
- 35 (b) There are a number of fuel receipts that are not consistent with the PSV being parked overnight in Kilmarnock.

5 (c) The conflict in the information provided whereby the “business” use of the Mercedes only came to light when the high fuel cost in relation to turnover was questioned was not plausible as direct questions about business use had been posed and answered. The agent would or should have had instructions in that regard.

(d) In the absence of any mileage logs or similar for the year of enquiry, the then current year, for which there should be records, would be a reasonable starting point from which to reconstruct a picture of business use.

The Legislation

10 13. Paragraph 1 of Schedule 36 provides as follows:-

“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”) -

(a) to provide information, or

15 (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.”

20 14. There is no right of appeal against all Information Notices. Schedule 36 only gives the taxpayer a limited right to appeal against an Information Notice issued under paragraph 1 as it provides at paragraph 29 as follows:-

“29. **Right of appeal against taxpayer notice**

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal... against the notice or any requirement in the notice.

25 (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 ...”.

15. Statutory records are defined in paragraph 62 of Schedule 36 as follows:-

“Statutory records

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30 (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.”

16. The “Taxes Acts” are defined in paragraph 58 of Schedule 36. This definition includes “the Tax Acts”. The Tax Acts are defined in the Interpretation Act 1978 as including the Income Tax Acts and that in turn includes Taxes Management Act 1970
5 (“TMA”). Section 12B(3)(a) provides that

“... the records required to be kept and preserved ... shall include records of the following, namely:

(i) all amounts received and expended in the course of the trade, profession or business and the matters in respect of which the receipts and expenditure take place , ...”.

10 17. “Tax position” is defined in paragraph 64 of Schedule 36 as follows:-

“(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 in the person’s position as regards—

(a) past, present and future liability to pay any tax

15 (4) References in this Schedule to a person’s tax position are to the person’s tax position at any time or in relation to any period, unless otherwise stated.”

Jurisdiction

18. Paragraph 32 of Schedule 36 provides that, on an appeal, a tribunal may confirm, vary or set aside an Information Notice or any requirement in it.

Discussion

20 *Item 4 in the information notice*

19. It was conceded that the fuel receipts were statutory records. Accordingly no appeal is possible in regard to item 4 in the Information Notice.

20. I agree with, and accede to, the request from HMRC that the word “- present” in item 4 be deleted and that there be substituted therefor the words “to 13 June 2016”.

25 *Item 1*

21. The appellant is either unable or unwilling to provide information as to which contract runs utilised the PSV and Mercedes in the year of enquiry. HMRC’s understanding was that the appellant himself utilised the PSV for almost all of the contract work undertaken by him as opposed to by the sub-contractors. The HMRC
30 officer had seen the contracts for the year of enquiry but many of them were not marked as to who had undertaken which work.

22. In asking for details of the contract runs for the current year it was intended that that could be used as an effective proxy for the year of enquiry on the basis that there would be a presumption of continuity and it could be scaled back as necessary or, if
35 supplementary information were to be provided, in the light of such information.

Item 2

23. HMRC wished to try and identify the vehicles utilised by the appellant and for which journeys so that the fuel and mileage attributable to the PSV and therefore to the Mercedes and the appellant could be identified.

Item 3

24. In fairness to the appellant, it would be essential to identify any other drivers and their mileage to ensure that that was not included in the appellant's own fuel and mileage.

10 *General*

25. It is not for HMRC to list cases for the Tribunal. An appellant either has an appealable decision, or not. It is for an appellant to decide whether or not to appeal a decision.

26. The appellant did not attend the Hearing. Officer Ng spoke to his reasoning when issuing the Information Notice. He was straightforward.

27. In summary, HMRC's approach was that they wished to build a business economic exercise to test the information provided by the appellant and so to check his tax position. In plain English, what the officer wanted to do, was to look at the fuel receipts in relation to the turnover and ascertain whether or not the gross profit percentage looked reasonable or appropriate.

28. Since the appellant, through his agent, had flatly refused to provide further information, HMRC's only options were to issue an Information Notice or to close the enquiry. In the latter event they would have to have used an estimated assessment.

29. Mr Mason referred me to, and relied upon paragraph 10 in *Steven Price v HMRC*¹ ("Price") which reads as follows:-

30 "Although the cases show that where the full facts are not known, HMRC are entitled to issue estimated assessments ... and are, ... entitled to issue closure notices in broad terms, HMRC are not bound to do so. On the contrary HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue ... information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008).

¹ 2011 UKFTT 624 (TC)

30. I am not bound by that case but I agree entirely. I do not accept Mr Walker's argument that since that case dealt with a Closure Notice it is not relevant to this case. It is.

5 31. Mr Walker argued that HMRC were not entitled to use estimated figures. As *Price* establishes, they certainly are entitled to do so. Furthermore, if a Closure Notice were to have been issued in this matter, in order to successfully appeal the estimated assessment(s), the appellant would have had to produce the sort of information requested in the Information Notice.

10 32. Mr Mason also relied on paragraph 37 in *Marilyn May Phillipou v HMRC*² ("Phillipou") which reads:

"It is our view that HMRC are entitled, when checking a taxpayer's tax position, to seek, and obtain, information about the business of the taxpayer in order to put it in a position, which is broadly equivalent to that of the taxpayer's professional advisers."

Again I agree.

15 33. Mr Walker said that he did not take issue with that case other than to state that the information therein sought was restricted to the year of enquiry. The point is that the legislation makes it abundantly clear that there is no restriction to the year of enquiry. On the contrary, paragraph 64 of Schedule 36 is explicit in its terms and includes "past, present and future".

20 34. In my view, given the appellant's intransigent stance in not providing the information in the year of enquiry, HMRC have adopted a pragmatic and sensible approach in looking for, what was then, current and presumably easily accessible information.

25 35. It was only at the hearing that it came to HMRC's attention that in that period the appellant had still not adopted a practice of keeping mileage logs, notwithstanding the open enquiry into his affairs.

36. I find that it was reasonable for HMRC to assume that the enquiry should have triggered the putting into place of appropriate record keeping in order to satisfy the appellant's obligations under the Taxes Acts.

30 37. When considering the reasonableness of the requirements in the Information Notice I considered both the officer's belief as to whether the information was reasonably required but also whether this was objectively justified. I was not referred to the case but I agree with the Tribunal at paragraph 74 of *Jonathon Beckwith v HMRC*³ where it is indicated that the reasonableness of the requirement is to be
35 determined at the time the Notice was issued rather than retrospectively. If the officer had known that there were still no mileage logs he might have adopted a different stance but that is not the point.

² 2017 UKFTT 20 (TC)

³ [2012] UKFTT 181 (TC)

38. Lastly, the mere fact an enquiry is burdensome on a taxpayer is not a reason to allow an appeal against an Information Notice as it is clear that Parliament intended (for obviously good reasons) HMRC to have power to investigate the tax affairs of taxpayers and Parliament must have understood that cooperating with such investigations would be burdensome on taxpayers.

Conclusion

39. HMRC accepted that it bore the burden of proof in showing that the information specified in the Information Notice were either statutory records or reasonably required to check the appellant's tax position. The agent agreed with this approach. Like Judge Popplewell in *Phillipou* I agree that the issue of burden of proof in Information Notice cases was eloquently discussed by Judge Redston in *Joshi Mathew v HMRC*⁴ where she explained that there were cogent reasons as to why the burden of proof of establishing that documents and information are reasonably required may not lie with HMRC. Instead, the burden might be on the appellant to show that such documents or information were not reasonably required. However, like both judges, I find that HMRC has met the burden of establishing that the information sought by the Notice is reasonably required and therefore I do not need to decide this point. I am content to adopt HMRC's position on the burden and the standard of proof.

40. I have decided that I should not set the Information Notice aside.

41. As I indicate in paragraph 18 above I vary *item 4* in the Notice to specify the period as being **1 September 2015 to 13 June 2016**.

42. Accordingly, in the interests of clarity and consistency I vary *item 1* by deleting the words "since September 2015" and substituting therefor the words "**during the period 1 September 2015 to 13 June 2016**".

43. **I DIRECT** that the Information Notice, as amended, be complied with within 30 days of the issue of this decision.

44. Paragraph 32(5) of Schedule 36 provides that a decision of the Tribunal on an appeal under paragraph 29 of Schedule 36 is final. This decision in relation to the Information Notice cannot, therefore, be appealed to the Upper Tribunal.

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

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 27 JUNE 2017

⁴ 2015 UKFTT 0139