[2021] UKFTT 0080 (TC)

TC08065

INCOME TAX – Information notices issued under paragraph 1 of Schedule 36 to Finance Act 2008 – whether issued to person whose tax position was being checked – whether information reasonably required to check the recipient's tax position – appeals allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: **TC/2018/07519**
TC/2018/07520
TC/2018/07523
TC/2018/07525
TC/2018/07526
TC/2018/07527
TC/2018/07530
TC/2018/07531
TC/2018/07532
TC/2018/07533
TC/2018/07534
TC/2018/07536
TC/2018/07537
TC/2018/07538
TC/2018/07540
TC/2018/07541
TC/2018/07544
TC/2018/07546
TC/2018/07547
TC/2018/07550
TC/2018/07551

BETWEEN

A HARGREAVES
R BAKER
S R OXBY
L DAVIES
A HARRISON
G TOTTON
J SIDDELL
D ATKINS
A ALLEN
R N MOORE
D E HULL
R NEWMAN
N JONES
P E BREEN
PP O'BRIEN
T SMITH

Appellants

A N WHITEFORD
A HENMAN
S JACKSON
S SKIPSEY
J HEFFERMAN

-and-

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

TRIBUNAL: JUDGE ROBIN VOS

The hearing took place on 8 March 2021 using the Tribunal's video platform

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Gary Brothers of The Independent Tax and Forensic Services LLP for the Appellants

Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. This hearing related to 21 separate appeals. The names of each of the appellants and the Tribunal reference numbers are listed at the beginning of this Decision notice. Apart from some minor differences in dates, the relevant facts, the decisions which are being appealed and the grounds for appeal are identical in all cases. The Tribunal had therefore previously directed that the appeals should proceed together and be heard together.

2. This group of appeals has been known variously as the Hargreaves Group or the Moore Group. Throughout the hearing, for the sake of simplicity, references were made to Mr Hargreaves and I will do the same in this decision. However, unless I indicate to the contrary, the findings of fact and the conclusions which I reach apply in respect of each of the appeals.

3. The appeals all relate to information notices issued by the Respondents, HMRC in early 2018 and which HMRC say were issued to each of the appellants in their capacity as the scheme administrator of a particular pension scheme. HMRC believe that the information is required in order to determine whether certain tax liabilities may have arisen or may be imposed in relation to the pension schemes and for which the scheme administrator is liable. Appendix 1 to this decision lists the name of the relevant pension scheme, the appellant who is said to be the scheme administrator, whether the pension scheme remains active or whether it has been wound up and the relevant Tribunal case reference number.

4. On review, the information notices were largely upheld although some relatively minor changes were made to the information and documents required to be produced.

5. The appellants have appealed to the Tribunal against both the notices themselves and against the requirements contained in the notices. As far as the appeals against the notices are concerned, these are based primarily on the identity of the person to whom the notices are addressed although, as we shall see, there are a number of facets to this point. The appeals against the requirements of the notices are on the basis that the information is not reasonably required to check the relevant tax position.

REPRESENTATION/HEARING IN THE PARTY'S ABSENCE

6. There were originally 22 appeals comprised in the group. One appellant withdrew their appeal approximately two weeks before the hearing.

7. A week before the hearing, Mr Brothers notified the Tribunal that he no longer represented four of the appellants, being SR Oxby, N Jones, T Smith and AN Whiteford.

8. These four appellants were not therefore represented at the hearing and were not themselves present. As a result, it was necessary to consider whether the hearing of these four appeals should go ahead in the absence of the appellants.

9. Rule 33 of the Tribunal Rules permits the Tribunal to proceed if it is satisfied that the party has been notified of the hearing and it considers that it is in the interest of justice to proceed with the hearing.

10. Mr Brothers confirmed that the four appellants in question had been kept updated about the progress of the appeals on a regular basis in the same way as all of the other appellants. These updates were sent by email to email addresses which had been used throughout the duration of the appeals and from which the relevant appellants had responded in the past. The reason that Mr Brothers withdrew from acting for the four appellants in question is that they were no longer providing him with any instructions.

11. On 1 March 2021, Mr Brothers had emailed the appellants in question advising them that he would no longer be acting and recommending that they should contact the Tribunal before the hearing. Although the notices from the Tribunal confirming the date of the hearing were sent to Mr Brothers and not directly to the appellants, Mr Brothers confirmed that, as part of his regular updates, he would have informed each of the appellants when the hearing was due to take place soon after the notification received from the Tribunal in November 2020. He had also confirmed the date of the hearing in his emails to the appellants sent on 1 March 2021.

12. Mr Marks, on behalf of HMRC, submitted that it would be in the interests of justice for the hearings to take place. He notes that there is no suggestion that the four appellants would provide any relevant evidence which has not already been put before the Tribunal, that they had apparently authorised the actions taken by Mr Brothers whilst he was still acting for them and that the fact that they would not be able to cross-examine HMRC's witness would not put them at any disadvantage given that the witness would in any event be cross-examined by Mr Brothers.

13. I am satisfied on the basis of what Mr Brothers told me that the four appellants have been notified of the date of the hearing. I am also satisfied that it is in the interests of justice to proceed with the hearing. Although Mr Brothers accepted that the four appellants have not seen his statement of case, the grounds of appeal in all 21 appeals are identical. It would be fanciful to suppose that these four appellants would put forward any arguments which Mr Brothers would not be putting forward on behalf of the remaining 17 appellants. On this basis, there is no prejudice to the four unrepresented and absent appellants in their appeals being determined at the same time as the remaining appeals.

THE EVIDENCE AND THE FACTS

14. The appellants have provided a bundle of documents and correspondence which the parties have together agreed should be put before the Tribunal. There are also two witnesses who have provided witness statements, Mr Fulwood on behalf of HMRC and Ms Liddell on behalf of the appellants.

15. Mr Fulwood gave oral evidence and was cross-examined by Mr Brothers. At the end of January 2021, the appellants applied to the Tribunal for a stay of proceedings on the basis that Ms Liddell was unwell and would not be able to attend the hearing. This application was refused as Ms Liddell's witness statement was very short, dealt only with one point and was not challenged by HMRC.

16. As a result of this, the appellants made an application on 1 February 2021 for permission to submit further documents. I directed that the appellants should provide the proposed documents to HMRC and to the Tribunal by 18 February 2021 and file a written application for permission to rely on those documents by 23 February 2021. The appellants have done this and so the Tribunal has a supplementary bundle of documents which I had to decide whether to admit.

17. On Friday 5 March the appellants sent a second supplementary bundle of documents to HMRC and to the Tribunal and an application for those documents to be admitted.

18. In deciding whether to admit this additional evidence, both parties agreed that I should apply the principle set out in paragraph 20(2) of the decision of Lightman J in *Mobile Export 365 Limited v HMRC* [2007] EWHC 1737 (Ch):

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

19. As far as the first supplementary bundle is concerned, Mr Marks does not suggest that there is any compelling reason why the evidence should not be admitted. The question therefore is whether the evidence is relevant.

20. The documents in the first bundle fall into two categories. The first is various items of correspondence relevant to comments made in Mr Fulwood's witness statement as to whether the appellants had been responsible for delaying matters and/or failing to work collaboratively with HMRC as well as dealing with one or two technical arguments. The second category of documents relates to correspondence in respect of a different taxpayer (i.e. not one of the appellants) which shows that HMRC may have dealt differently with that taxpayer to the way in which they have dealt with the appellants.

21. As far as the first category of documents is concerned, Mr Brothers submitted that these documents are relevant as they address points in Mr Fulwood's witness statement and would therefore potentially be referred to in cross-examination. Mr Marks' response to this is that any question of delay or lack of co-operation is not relevant to the issues which the Tribunal has to decide.

22. As far as the second category of documents is concerned, Mr Brothers argues that these support his submissions that HMRC's stance in these appeals is wrong and would form the basis of cross-examination of Mr Fulwood as to why he had dealt with these taxpayers differently. Mr Marks submits that how HMRC treats another taxpayers is irrelevant as each taxpayer must be considered on the basis of the individual merits of their particular situation.

23. My decision was not to admit the first supplementary bundle. I agree with Mr Marks that none of these documents are relevant to the issues which the Tribunal has to decide. As far as the first category is concerned, there would be no point in cross-examining Mr Fulwood as to whether there had been delay or lack of co-operation and, if so, whose fault this was as it does not affect the answers to any of the questions which the Tribunal has to decide. To the extent they rehearse technical arguments, these are a matter for submissions and are not evidence. As far as the second category of documents is concerned, the fact that HMRC may have treated another taxpayer differently sheds no light at all on what the correct treatment should be.

24. Turning to the second supplementary bundle, all but one of the documents contained in that bundle are correspondence or documents which are referred to by Mr Fulwood in his witness statement. The one document which was not referred to is an item of correspondence which formed part of a series of correspondence consisting of other documents in the bundle, all of which were referred to in Mr Fulwood's witness statement. On this basis, Mr Brothers submits that the documents are clearly relevant.

25. Mr Marks suggested that the documents were not relevant on the basis that the only reason they were referred to in Mr Fulwood's witness statement was by way of a narrative explanation as to why he had formed the view that tax liabilities may have arisen or may in the future arise in relation to the pension schemes connected with the appellants. He also submitted that there were compelling reasons why these documents should not be admitted as part of the evidence.

26. The first reason put forward is that the bundle was produced very late (the last working day before the hearing) and well outside the timescale directed by the Tribunal in February 2021. The second point is that the appellants' original application to provide further documents was said to be in place of the availability of Ms Liddell to give evidence. However, the documents have nothing to do with any evidence which Ms Liddell might have given.

27. Nonetheless, I decided to admit the documents contained in the second supplementary bundle. It is, in my view, extraordinary that HMRC have allowed their witness to produce a witness statement referring to documents which were not contained in their list of documents and which were not exhibited to the witness statement. Mr Fulwood apparently thought that they provide valuable context to the investigations which have given rise to the information notices and, as a result of this, are in my view clearly relevant to the appeals.

28. Although the fact that they were only provided the day before the hearing is unsatisfactory to say the least, there is in my judgment no compelling reason not to admit the documents. They have been examined by Mr Fulwood and referred to in his witness statement. They are all documents which he has produced or which have been sent to him as part of the investigation. There is therefore no prejudice to HMRC or to Mr Fulwood in admitting the documents as part of the evidence.

29. Ironically, Mr Brothers did not refer to any of these documents either in his cross-examination of Mr Fulwood or in relation to his submissions.

30. The key facts are largely undisputed. Based on the evidence I have seen and heard, I make the following findings of fact.

31. Each of the appellants is connected with a company that has established a pension scheme. These pension schemes came to the attention of HMRC as part of their enquiries into a company known as Liddell Dunbar Limited in 2016. At that time, Liddell Dunbar Limited was the scheme administrator of all of the relevant pension schemes except for the one connected with Mr Hargreaves where the scheme administrator was an associated company, LD Administration Limited. The investigation was being conducted by an HMRC officer, Mr Richard Fulwood.

32. Mr Fulwood suspected that each of the pension schemes was based on an arrangement promoted by Sympatico Corporate Strategies Limited known as a "non-sponsoring employer scheme". There is no need for the purposes of this decision to go into the details of the arrangement. It is enough to say that it was said to provide tax savings and cashflow advantages in relation to corporation tax, national insurance contributions and/or income tax.

33. In January 2017, Mr Fulwood issued an information notice to Liddell Dunbar Limited asking for information about a large number of pension schemes, including those connected with the appellants.

34. On 1 February 2017, each of the appellants were recorded on HMRC's pensions online system as having been appointed as the scheme administrator of the pension scheme with which they were connected in place of Liddell Dunbar Limited (or in Mr Hargreaves' case, in place of LD Administration Limited). This process requires certain declarations to be made by the person becoming the scheme administrator.

35. HMRC have provided evidence from their IT department which shows that on 30 and 31 January 2017 there were two web browser sessions during which HMRC's pensions online system had been accessed in respect of at least 60 different pension schemes related to Liddell Dunbar. Mr Marks invited the Tribunal to infer from this that the appellants did not personally access the pensions online system and make the relevant declarations which led to them being recorded as the scheme administrators from 1 February 2017. Mr Brothers did not challenge this. Given the conclusions I have reached, I do not need to make any finding on this point, and do not do so.

36. Mr Fulwood met with Mr Brothers to discuss the position in June 2017. However, having not received any explanation for the change of scheme administrator nor the information he had been seeking from Liddell Dunbar about the relevant pension schemes, on

various dates between 22 January 2018 – 30 January 2018 (set out in Appendix 2), Mr Fulwood issued taxpayer information notices under the provisions of paragraph 1 of schedule 36 to Finance Act 2008 ("schedule 36") to each of the appellants in their capacity as scheme administrator of the relevant pension scheme. I should note that there is some dispute as to who the information notices were addressed to, which I will come to. The notices required the appellants to provide information about the assets of the scheme, their appointment as scheme administrator, the advisers to the scheme, the trustees of the scheme and the members of the scheme.

37. The notices were appealed by each of the appellants. Following a review, HMRC upheld the issue of the notices but amended some of the requirements by removing the requirement to provide information about the trustees and the members of the scheme, changing two requirements to provide a declaration in writing confirming certain matters so that the requirement was simply to confirm the matters and amending a requirement relating to bank accounts/bank statements so that this was no longer shown as falling within the definition of statutory records (there being no right of appeal against a requirement to provide statutory records – paragraph 29(2) of schedule 36).

38. HMRC's review conclusion letter was sent on 22 October 2018. The appellants all appealed to the Tribunal on 21 November 2018.

39. At some point after the appeals were notified to the Tribunal but before the date of the hearing, a number of the schemes (identified in Appendix 1) have been wound up.

TAXPAYER INFORMATION NOTICES – THE LEGAL FRAMEWORK

40. Paragraph 1 of schedule 36 entitles an HMRC officer to issue a notice requiring a person to provide information or documents which are "reasonably required by the officer for the purpose of checking the taxpayer's tax position". This is known as a taxpayer notice.

41. A taxpayer notice must be issued to the person whose tax position HMRC wishes to check. There are separate provisions allowing HMRC in certain circumstances to issue a notice (known as a third party notice) requiring somebody to provide information relevant to another person's tax liabilities.

42. "Tax" is defined in paragraph 63 of schedule 36 and, particularly relevant in this case, includes income tax.

43. Paragraph 64 of schedule 36 defines a person's "tax position" as being:

> "the person's position as regards any tax, including the person's position as regards –
>
> (a) past, present and future liability to pay any tax,…"

44. It is clear therefore that an information notice can be used to obtain information not only to determine whether a tax liability has already arisen but also whether a tax liability may arise in the future.

45. An appeal may be made against the information notice itself or against any requirement contained in the notice (paragraph 29 of schedule 36).

46. The Tribunal has power to confirm, vary or set aside the notice or any requirement contained in the notice (paragraph 32 of schedule 36).

47. In this case, the appellants appeal against the information notices themselves (based on the identity of the persons to whom the notices are addressed). However, if their appeal against the notices fails, they also appeal against the individual requirements of the notices.

48. HMRC ask the Tribunal to uphold the notices subject to the amendments made on review. They also make one further concession which I discuss below in relation to those schemes which have been wound up.

49. In relation to the question as to whether information or documents are reasonably required by an officer for the purposes of checking a person's tax position, there was some discussion as to whether this is an entirely objective test, the question being whether, objectively, the Tribunal considers that the information is in fact reasonably required to check a person's tax position, the subjective belief of the officer issuing the information notice being irrelevant; or, alternatively, whether the officer must believe that the information is required to check the person's tax position and the only question for the Tribunal being whether that subjective belief is objectively reasonable.

50. Mr Marks and Mr Brothers were agreed that the test is an objective one. Mr Marks referred to the decision of the First-tier Tribunal in *Sadiq Ahmed v HMRC* [2020] UKFTT 337 (C) in support of this. He submitted that this showed that the Tribunal must take into account events taking place between the date that the notice was issued and the date of the Tribunal hearing (in that case, the provision of further information) in reaching a conclusion. This, he says, shows that the test must be objective as the Tribunal is looking at the position at the date of the hearing and not at the date the notice was issued.

51. That case however dealt with the question of penalties for failure to comply with an information notice. The reason the penalties were set aside was that, as Mr Ahmed had provided further information, HMRC had failed to show that Mr Ahmed had not complied with the requirements of the information notice. The case says nothing about whether the information requested by the notice was reasonably required.

52. Mr Marks also referred, in the context of the burden of proof, to the decision of the First-tier Tribunal in *Joshy Mathew v HMRC* [2015] UKFTT 139 (TC). The Tribunal in that case referred in turn to the decision of Simler J in *R (oao) Derrin Brother Properties Limited v HMRC* [2014] EWHC 1152 (Admin). That case in fact dealt with a third party notice rather than a taxpayer notice but Simler J expressed the view at [14] that:

> "the question whether the documents or information are reasonably required for the purpose of checking a taxpayer's position depends on the conclusion of the officer, which must be justified in the circumstances … It follows that the Tribunal must be satisfied … that the officer holds the relevant opinion that the documents are reasonably required for checking the tax position of the taxpayer and is justified in so concluding"

53. This might be taken as indicating that the first question is whether the officer has a subjective belief that the information is reasonably required to check the taxpayer's tax position and that the function of the Tribunal is to determine whether that belief is objectively reasonable. However, Simler J went on at [16] to say:

> "accordingly, in challenging a third party notice, what must be proved are facts which are inconsistent or irreconcilable with the authorised officer's conclusion that the documents are reasonably required for checking the taxpayer's tax position and the Tribunal being satisfied that the officer is justified in the circumstances in giving that notice."

54. The procedure for issuing a third party notice differs from a taxpayer notice in that the officer must obtain the Tribunal's approval before the notice is issued. The Tribunal must be satisfied that, in the circumstances, the officer giving the notice is justified in doing so

(paragraph 3(3)(b) of schedule 36). It is clear from this, and confirmed by the comments of Simler J in *Derrin*, that the Tribunal is to determine not just whether the officer's belief is reasonable but to take its own view as to whether the information is reasonably required for the purposes of checking the taxpayers tax position. If the information were not so required, the Tribunal would be bound to conclude that, in the circumstances, the giving of the notice was not justified.

55. It cannot have been Parliament's intention that the position should be any different in relation to a taxpayer notice. The only difference is the timing of the Tribunal's oversight. In the case of a third party notice, the Tribunal must consider the position before the notice is issued. In the case of a taxpayer notice, the Tribunal will only exercise its oversight if the taxpayer appeals against the notice or against the requirements contained in it.

56. It follows from this that the Tribunal's role is not simply to review the officer's decision by determining whether their belief that the information is reasonably required is a reasonable one; instead it is to come to its own conclusion as to whether the information is, objectively, reasonably required. In doing so, it follows in my view that the Tribunal must assess this based on the circumstances at the time of the hearing. There would be little point in basing its decision on the circumstances prevailing at the date the notices were issued as this could lead to taxpayers being required to produce information which was no longer relevant or no longer reasonably required.

57. I did not understand Mr Marks or Mr Brothers to disagree with this conclusion.

58. Turning to the burden of proof, there are inconsistent decisions of the First-tier Tribunal. The Tribunal in *Joshy Mathew* concluded (principally on the basis of the observations in *Derrin* and in an earlier case referred to in *Derrin*, *R v Commissioners of Inland Revenue ex-parte TC Coombs and Company* [1991] 2 AC 283 – which both dealt with third party notices rather than taxpayer notices) at [82] that:

> "the weight of authority is that the burden of proof in relation to the "reasonably required" test in schedule 36 notices rests on the Appellant, and not on HMRC."

59. However, the Tribunal acknowledged at [85] that:

> "the differences between *Derrin* and *Coombs* on the one hand, and Mr Mathew's position on the other, means that it remains arguable that the burden is on HMRC."

60. In the event, the Tribunal decided that HMRC had shown that the information was reasonably required and so it was not necessary for it to reach a final decision on this point.

61. Mr Marks also referred to the more recent First-tier Tribunal case of *Michelle Mauro v HMRC* (14 March 2018 – unreported) where Judge Hellier stated at [37] that, had he been required to do so, he would have concluded that the burden was on HMRC to show a prima facie case that the information might be relevant to checking the tax position and that the evidential burden would then pass to the taxpayer to show that, in the circumstances, the requirement was not a reasonable one. However, as was the case in *Joshy Mathew*, the Tribunal did not need to express a firm view given that HMRC had provided sufficient reasons as to why the information was required in that particular case.

62. I should pause to note that, in general, it is not in my view appropriate for HMRC to refer to previous decisions at the First-tier Tribunal which are not published. Decisions of the First-tier Tribunal are not binding on another tribunal in any event. However, presenting unpublished decisions to a Tribunal potentially puts HMRC at an unfair advantage given that

a taxpayer is unable to obtain copies of such decisions and so it is deprived of the opportunity of putting forward other unpublished decisions which might be helpful to their case.

63. However, in this case, Mr Marks accepted that HMRC had the burden of initially providing reasons why the information is reasonably required to check the taxpayer's tax position and that, once they have done this, the burden shifts to the appellant to show why the information is not reasonably required. The case was not therefore being relied on to put HMRC in a better position.

64. Like Judge Hellier, I would also tend to view that this is the correct analysis. The position in relation to appeals against taxpayer notices is very different to an appeal against a third party notice. In the case of a third party notice, HMRC will already have had to persuade a tribunal that the information is reasonably required. It is not therefore surprising that, on an appeal against a third party notice (which can only take place by way of judicial review) the burden is on the appellant to show why the information is not reasonably required. In the case of a taxpayer notice, it must be right that, in the same way, HMRC initially has the burden of explaining the reasons why they believe that the information is reasonably required and that, only then, does the taxpayer have the burden of proving that it is not.

65. It was common ground that HMRC also have the burden of showing that the information notice was properly issued in the first place in accordance with the requirements of schedule 36.

PENSION SCHEME TAX LIABILITIES AND SCHEME ADMINISTRATORS

66. In order to determine whether the information notices are valid and whether the information which has been requested is reasonably required, it is necessary to understand the tax liabilities in question and who is liable for them.

67. The relevant legislation is in Finance Act 2004 (FA 2004). Section 239 FA 2004 provides for an income tax charge known as a scheme sanction charge where certain unauthorised payments are made by a registered pension scheme. The person liable for the scheme sanction charge is the scheme administrator (s 239(2) FA 2004).

68. There is also a charge to income tax, known as a de-registration charge where HMRC withdraws the registration of a registered pension scheme (s 242(1) FA 2004). Again, the person liable for the de-registration charge is the person who was the scheme administrator immediately before the registration was withdrawn (s 242(2) FA 2004).

69. The circumstances in which HMRC may withdraw the registration of a pension scheme are set out in s 158 FA 2004. These include the following circumstances:

(1) The pension scheme has not been established wholly or mainly for the purpose of making authorised pension payments.

(2) The scheme administrator is not a fit and proper person to act as such.

(3) Any declaration made to HMRC in connection with the pension scheme is false in a material particular.

70. It will be seen from Appendix 1 that only eight of the relevant pension schemes remain active (including the scheme relating to Mr Hargreaves). The remaining 13 schemes have been wound up at some point after the appeal was made to the Tribunal but before the date of the hearing. HMRC accept that they have no ability to de-register a pension scheme which has been wound up and that, therefore, any information required by the information notices which relates only to the potential de-registration charge is no longer reasonably required.

71. During the hearing, I drew Mr Marks' attention to s 159A FA 2004 which contains a power for an officer of HMRC to issue an information notice to the scheme administrator, or to any other person, requiring them to provide information for the purposes of considering whether the scheme administrator is a fit and proper person to act as such. I questioned whether, in the light of this, it is open to HMRC to issue an information notice under schedule 36 requiring information to be provided which is designed to allow HMRC to check whether the scheme administrator is a fit and proper person.

72. Mr Marks' response to this was that, whilst the provisions overlap, there is nothing either in FA 2004 or schedule 36 which prevents an information notice being issued under schedule 36 in order to obtain this information as long as it is reasonably required to check the taxpayer's tax position. Mr Brothers did not argue to the contrary and, although it is perhaps surprising that there are two separate provisions which allow HMRC to obtain the same information, I accept that the existence of s 159A FA 2004 does not prevent HMRC from seeking this information by issuing a notice under paragraph 1 of schedule 36 as long as the requirements of that paragraph are satisfied.

73. Section 268 FA 2004 allows a scheme administrator to apply to HMRC for relief from a scheme sanction charge where it would not be just and reasonable for them to be liable. There is no similar provision however in relation to the de-registration charge.

74. The main provisions relating to scheme administrators are contained in ss 270 and 271 FA 2004. The relevant provisions are as follows:

> "**270 Meaning of "scheme administrator"**
>
> (1) References in this Part to the scheme administrator, in relation to a pension scheme, are to the person who is, or persons who are, appointed in accordance with the rules of the pension scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator of the pension scheme by and under this Part.
>
> (2) But a person cannot be the person who is, or one of the persons who are, the scheme administrator of a pension scheme unless the person—
>
> (a) ...
>
> (b) has made the required declaration to the Inland Revenue, and
>
> (c) ……
>
> (3) 'The required declaration' is a declaration that the person—
>
> (a) understands that the person will be responsible for discharging the functions conferred or imposed on the scheme administrator of the pension scheme by and under this Part, and
>
> (b) intends to discharge those functions at all times, whether resident in the United Kingdom or another state which is a member State or a non-member EEA State.
>
> …………
>
> **271 Liability of scheme administrator**
>
> (1) Any liability of a person who is, or of any of the persons who are, the scheme administrator of a registered pension scheme ceases to be

a liability of that person or the person ceasing to be, or to be one of the persons who is, the scheme administrator of the pension scheme. This subsection does not apply to a liability to pay a penalty and is subject to subsection (4).

(2) Where a person becomes, or becomes one of the persons who is, the scheme administrator of a registered pension scheme, the person assumes any existing liabilities of the scheme administrator of the pension scheme, other than any liability to pay a penalty.

(3) Subsection (4) applies where, on the person who is or the persons who are the scheme administrator of a registered pension scheme ceasing to be the scheme administrator, there is no scheme administrator of the pension scheme.

(4) Any liability of the person or persons as scheme administrator remains a liability of that person or those persons as if still the scheme administrator (unless dead or having ceased to exist) until another person becomes, or other persons become, the scheme administrator of the pension scheme.

(5) But a person who retains, or persons who retain, any liability by virtue of subsection (4) may apply to the Inland Revenue to be released from the liability.

……..”

75. Section 274(3) FA 2004 goes on to provide that:

> “(3) No liability to pay tax or interest, or other obligation, of any person in relation to a registered pension scheme arising –
>
> (a) by reason of a person being, or being one of the persons who is, the scheme administrator of the pension scheme concerned, or
>
> (b) under section 271(4), 272, 272C or 273 or regulations under section 273(A)
>
> is affected by the termination of the pension scheme or by its ceasing to be a registered pension scheme.”

76. The key points emerging from these provisions which are relevant to these appeals are as follows:

(1) A person only becomes a scheme administrator for the purposes of FA 2004 if they make the required declarations to HMRC.

(2) A person who becomes a scheme administrator assumes previous liabilities.

(3) A person who ceases to be scheme administrator continues to be liable until a new scheme administrator is appointed.

(4) The liabilities and obligations of the scheme administrator continue even if the pension scheme is terminated or registration is withdrawn. It is perhaps in the light of this last point that Mr Brothers did not, at the hearing, pursue the argument made in his skeleton argument that there could be no obligation on the appellants whose schemes have been wound up to comply with the information notices as they are no longer the scheme administrators (there being no scheme in existence).

THE VALIDITY OF THE NOTICES

77. As I have already mentioned, the key point in relation to the challenge to the validity of the notices is the identity of the person to whom it is addressed. The appellants have put forward a number of arguments in relation to this which can be summarised as follows:-

(1) The notices are addressed to the pension schemes and not to the relevant individuals as scheme administrators and are not therefore valid as the pension schemes do not have a "tax position" to check given that any tax liability is that of the scheme administrator.

(2) In any event, an information notice must be clear and precise in its terms given that failure to comply can in certain circumstances lead to criminal sanctions.

(3) Even if the notices are addressed to the appellants as scheme administrators they are ineffective as, if HMRC are right that the appellants did not personally make the required declarations, they have not validly been appointed as scheme administrators.

(4) Given that Mr Fulwood's concern appears to have been that the pension schemes were part of an arrangement to avoid corporation tax, national insurance contributions and/or income tax by persons not specified, the relevant taxpayers are third parties and so the notices should have been issued to those third parties or, alternatively third party notices should have been issued to the appellants as scheme administrators.

WHO WERE THE NOTICES ADDRESSED TO?

78. The notices consist of a letter explaining the purpose of the notice together with a schedule which sets out the information and documents required.

79. The letter is addressed to the relevant appellant. The opening section of the letter (using Mr Hargreaves as an example) is as follows:-

> "Dear Mr Hargreaves
>
> **Notice to provide information and produce documents**
> **The Andhar Limited pension scheme**
> **Scheme administrator: Mr A Hargreaves**
>
> I am writing to you as the Statutory Scheme Administrator of the above-named Pension Scheme.
>
> This letter is an information notice. It is a legal request for information and documents.
>
> I am now issuing this notice as I believe the information that I am requesting is reasonable for HMRC [to] check on the tax position of this pension scheme. As the Scheme Administrator you may be liable to any tax charges associated with the Scheme.
>
> The attached schedule shows what I require."

80. The schedule which is attached to the letter states at the top:-

> "**Customer name:** Andhar Limited pension scheme"

81. Mr Brothers submits on behalf of the appellants that, as a result of the schedule naming the pension scheme as the customer, the notice has either been sent to the pension scheme (which does not have any tax liabilities as it is not a legal entity) or, alternatively, that the notice is unclear as to who has to provide the relevant information. He also points out that the letter refers to “the tax position of this pension scheme” rather than the tax position of the scheme administrator.

82. In support of his submission, Mr Brothers refers to the decision of the First Tier Tribunal in *Anstock v HMRC* [2017] UK FTT 0307 (TC). In that case, the Tribunal emphasised the importance of clarity explaining at [11(2)] that:

> "The next enquiry will be whether the Notice sets out precise, clear and unambiguous requests for (relevant) information and/or documents, so that the requirements of the Notice can be readily understood and complied with. This is essential. A person cannot be subject to a penalty (whether criminal or civil) for being in breach of an obligation unless he is made aware of that which he must do (or must not do) to avoid such a penalty."

83. The Tribunal went on to find at [16] that:

> "The Notice is so poorly drafted that it would be perverse to conclude that the recipient of it could know precisely what it was that he was required to provide to the Respondents by way of either information or documents."

84. Mr Marks submits that the information notice is the letter itself rather than the schedule. In any event, he argues that the fact that the schedule refers to the pension scheme rather than to the scheme administrator does not affect the validity of the notice given that the information which the appellants are required to provide all relates to the relevant pension scheme. As far as the reference to the tax position of the pension scheme is concerned, he notes that the next sentence makes it clear that the liability to tax is that of the scheme administrator.

85. Whilst I accept the need for clarity in the drafting of an information notice, particularly in relation to the description of the information or documents which the recipient of the notice is required to provide (which is what the decision in *Anstock* was dealing with), I do not accept that any deficiency in the drafting (however minor) will automatically invalidate the entire notice. What is important is that it can readily be understood what information has to be provided and who is being asked to provide it.

86. In this case, there cannot in my view be any doubt that the notices have been issued to the appellants in their capacity as scheme administrators of the relevant pension schemes and that they are the people whose tax liability is being checked and who are required to provide the information set out in the schedule.

87. This is abundantly clear from the terms of the covering letter which specifically states that the letter is being sent to the relevant individual in their capacity as scheme administrator of the relevant pension scheme, that the scheme administrator may be liable for tax charges related to the pension scheme and that the individual is required to provide the information described in the schedule.

88. Whilst the schedule shows the pension scheme itself as the customer this does not in my view cast any doubt on who the notice is addressed to or who is required to provide the information. Indeed, the terms of the schedule describing the information required reinforces the position. For example, the second requirement is to provide “a copy of the deed of appointment, appointing you as a Statutory Scheme Administrator of the Scheme”. There is no realistic basis on which anybody receiving the notices could be in any doubt that they, in their capacity as scheme administrator, were the person required to provide the information contained in the schedule.

FIRST PARTY NOTICE OR THIRD PARTY NOTICE

89. Mr Brothers' submission that the notice should either have been addressed to whoever was thought by Mr Fulwood to be avoiding corporation tax, national insurance contributions and/or income tax or that it should have been a third party notice is based on the proposition that Mr Fulwood's enquiry related to the tax benefits said to be available in the Sympatico marketing materials and not any liabilities relating to the pension schemes themselves.

90. Mr Brothers refers for example to Mr Fulwood's "view of the matter" letter which he wrote on 30 April 2018 following the appeals made by the appellants against the information notices. This letter states that:

> "HMRC suspects that this scheme may not have been established to provide pension benefits but as part of a series of transactions to avoid corporation tax and income tax charges. The information requested from you is to establish if this is the case and ensure that the pension scheme has been operated within the pension rules."

91. Mr Marks however points out that the immediately preceding paragraph confirms that:

> "The information is requested under schedule 36 paragraph 1 Finance Act 2008. The Statutory Scheme Administrator of any Pension Scheme would have a tax liability, should there be any unauthorised payments or other tax charges. There is therefore, a potential, but clear tax position on you and a first party information notice under the legislation is appropriate."

92. Mr Brothers goes on to note that there was no suggestion in the Sympatico documents that the arrangements contravene any pension tax rules and that, in his evidence, Mr Fulwood accepted that those documents do not contain any such suggestion.

93. On this basis, Mr Brothers submits that the real purpose of the notices is to obtain information in relation to any possible avoidance of corporation tax, national insurance contributions and/or income tax and that, as such, the notices should either have been sent to the taxpayers concerned or should have been issued as third party notices. The suggestion that there is scope for a scheme sanction charge or a de-registration charge is, he says, simply an attempt by HMRC to backfill their mistake.

94. I accept that the key benefits of the proposals put forward by Sympatico relate to corporation tax, national insurance contributions and income tax savings and that there is no mention of any tax charges in relation to the pension schemes themselves. However, it is quite clear from the evidence that the information notices were issued with a view to obtaining information which would allow HMRC to check whether any tax charges had arisen or might in future arise in relation to the pension schemes.

95. The "view of the matter" letter written by Mr Fulwood made it clear that he was concerned that there may have been unauthorised payments. He also makes it clear that he suspects that the pension scheme may not have been established wholly or mainly to provide pension benefits. This would of course give HMRC the right to de-register the scheme and to impose a de-registration charge on the scheme administrator. The reference to the avoidance of corporation tax and income tax was simply to explain Mr Fulwood's concern that this, rather than the provision of a pension, was the main reason for setting up the schemes. It was not an indication that the information notices were issued in order to determine whether there had in fact been any avoidance of corporation tax or income tax.

96. I am therefore satisfied that the information notices were issued to the appellants in their capacity as scheme administrators of the relevant pension schemes in order to check

whether they had incurred or may in future incur tax liabilities in relation to the pension schemes. They were therefore correctly issued as taxpayer notices to the correct taxpayers and should not have been issued as third party notices.

THE APPOINTMENT OF THE APPELLANTS AS SCHEME ADMINISTRATORS

97. HMRC have made it clear that they suspect that the appellants did not personally make the relevant declarations when they were registered on HMRC's pensions online system as being appointed as the scheme administrators. Their view is that if the declarations were not made personally, this does not satisfy the relevant statutory requirement. It is not something, they say, which can be delegated to a third party.

98. However, Mr Marks submits that HMRC are entitled to assume that the person shown on the pensions online system as the scheme administrator has been validly appointed until the contrary is shown and so, even if they are right that the declarations have not been made personally so that the appellants have not been validly appointed as scheme administrators, the information notices are still valid as they are sent to the persons who purport to be the scheme administrators.

99. Mr Brothers however points out that, if HMRC are correct and that, as a result, the appellants have not been appointed as scheme administrators for the purposes of the relevant legislation, they cannot have a tax liability as the tax liability is imposed on the scheme administrator.

100. Mr Marks' response to this is that the information is still required in order to determine whether or not the appellants have a tax liability. He accepts that, if they have not been appointed as scheme administrators, they will not have a tax liability. However, the information is needed in order to determine whether or not they have been validly appointed.

101. I would start by observing that it would be very surprising if, in circumstances such as this, HMRC had no power to require a person to provide information in order to determine whether they have or have not been appointed as a scheme administrator of a pension scheme for the purposes of FA 2004. Clearly, if they have been validly appointed, they will potentially have tax liabilities. If they have not, there will be no tax liability for that person.

102. The definition of "tax position" in paragraph 64 of schedule 36 is widely drawn. It means "the person's position as regards any tax". The paragraph then goes on to say that this includes a person's past, present or future liability to tax. It is apparent from this that a person's position as regards any tax goes beyond simply the question as to whether they may have any liability to tax. On the plain wording of the legislation, this is clearly wide enough to encompass a requirement to provide information to check whether that person in fact has no liability to a particular tax.

103. On this basis, there is no reason why HMRC cannot require the appellants to provide information which will enable HMRC to determine whether they have in fact been validly appointed as scheme administrators as this is relevant to their "tax position".

104. On this basis, it is not therefore necessary for me to determine whether the appellants have been validly appointed even though they may not have made the relevant declarations personally and I express no view on this. Of course, if it turns out that they have not been validly appointed, it may well be that they will have no liability for any tax charge which HMRC seek to impose in relation to the pension schemes.

CONCLUSION ON THE VALIDITY OF THE INFORMATION NOTICES

105. The notices have been addressed to the appellants in their capacity as scheme administrators of the relevant pension schemes. It is clear that they are the people who are required to provide the relevant information.

106. The information notices have been issued in order to enable HMRC to check the tax position of the appellants and not to check the tax position of some other person who may have been trying to obtain benefits relating to corporation tax, national insurance contributions and/or income tax. They have therefore correctly been issued as taxpayer notices rather than third party notices.

107. Whether or not the appellants have been validly appointed as scheme administrators, the information notices have been validly issued as this question itself is relevant to the "tax position" of the appellants.

108. I therefore turn now to consider whether the information set out in the notices is "reasonably required".

IS THE INFORMATION REASONABLY REQUIRED?

109. As I have explained above, in my view, the correct approach is for the Tribunal to determine, as at the date of the hearing, whether the information and documents required by the information notice are reasonably required to check the relevant person's tax position. HMRC must be able to make a case that the information is required. If they are able to do this, it is up to the appellant to show why the information is not reasonably required.

110. Looking at the schedule to the information notice as amended following HMRC's review, there are 12 items. Mr Marks submits that items 1 and 8-11 (dealing with bank statements and the assets of the relevant pension schemes) are required in order to check whether there have been any unauthorised payments. Items 2 and 4-6 (asking for a copy of the deed appointing the appellants as scheme administrator and for information about the online declarations) he says relate to the question whether the appellants have been validly appointed as scheme administrators and (in the case of items 4-6) whether false declarations have been made to HMRC (in that the declarations were not made by the appellants personally) which would entitle HMRC to de-register the relevant schemes. Items 3 and 7 are requests for information which would, Mr Marks argues, allow HMRC to determine whether the appellants are fit and proper persons to act as scheme administrator which in turn gives rise to the possibility of a de-registration charge. Item 12 asks for information about any person or entity who advised or assisted the appellants in relation to the establishment of the pension schemes or advised in relation to the scheme investments. Mr Marks suggested that this information could be relevant to the question of penalties and also whether, if any of the appellants applied for relief from the scheme sanction charge, it would be just and reasonable for HMRC to grant that relief.

111. On the basis that HMRC accept that they cannot impose a de-registration charge in respect of a scheme which has been wound up, Mr Marks accepted that item 7 (being information in order to determine whether the appellants are fit and proper persons to act as scheme administrator) would no longer be relevant and would not therefore be reasonably required in relation to the appellants who are (or were) the scheme administrators of those schemes.

112. Mr Brothers' primary submission was that none of the information contained in the information notices was reasonably required by Mr Fulwood for the purposes of his investigation as his primary concern was the potential avoidance of corporation tax, national insurance contributions and/or income tax. Again, in support of this, Mr Brothers referred to

the “view of the matter” letter and also referred to certain sections in Mr Fulwood's witness statement which mention the possibility of the schemes being established as a vehicle “for tax avoidance and/or pensions liberation”.

113. Assuming Mr Brothers is right that the main focus of the investigation is why the pension schemes were established, he submits that the only possible requirement in the information notices which could be relevant to this is item 12 and even that only asks for the identity of the relevant advisers rather than directly asking why the pension schemes were established.

114. There are two reasons for rejecting Mr Brothers' submission. The first is that it is clear from the evidence that Mr Fulwood wishes to establish whether there have been unauthorised payments and/or whether there are grounds for de-registering the schemes either on the basis that they have not been set up for the main purpose of providing pension benefits, that false declarations have been made or that the appellants are not fit and proper persons to act as scheme administrator.

115. The second reason is that, irrespective of what Mr Fulwood thought at the time, I must consider, objectively, based on the situation at the date of the hearing, what information/documents it is reasonable for HMRC to require the appellants to provide. It is clear to me that there is a potential for scheme sanction charges and/or de-registration charges as well as the need to determine whether the appellants have in fact been validly appointed as scheme administrators. Therefore, subject to reviewing the individual items, the information is reasonably required to check the appellants' tax positions.

116. Turning to the individual requirements, Mr Brothers objected to items 2-7 on the basis that the “customer” was the scheme itself and not the appellants as scheme administrators and that, on this basis, they could not comply with the requirements. I have already explained my reasons for rejecting this. It is the appellants as scheme administrators who are required to provide the information and so there can be no objection to these requests, other than in respect of items 3 and 7 in relation to those schemes which have been wound up.

117. Mr Marks has accepted that item 7 is no longer required in relation to the schemes which have been wound up. Item 3 is a request for the reason why each appellant became scheme administrator. I struggle to see what relevance this has other than to determine whether the appellants are fit and proper persons to act as scheme administrator. As that is no longer relevant to the schemes which have been wound up, this information is no longer reasonably required in relation to the appellants who are the scheme administrators of those schemes.

118. As far as items 1, 8 and 11 are concerned, Mr Brothers objects to these on the basis that they ask for information which, either in whole or in part, relates to a period before the date on which the appellants became scheme administrators. Mr Marks' response to this is that, as provided in s 271(2) FA 2004, a new scheme administrator assumes the liabilities of the previous administrator. Therefore, if there were a tax liability in relation to an earlier period, the appellants would be liable. He accepts that, if the information cannot be obtained by the appellants, they will not be required to comply with those particular paragraphs (paragraph 18 of schedule 36). However, he argues that this does not invalidate the request or mean that the information is not reasonably required.

119. I agree with Mr Marks. The information is clearly relevant to potential tax liabilities for which the appellants would be liable in their capacity as scheme administrators. The information is therefore reasonably required, but the appellants will not have to comply with the requests if they can show that the information is not within their power or possession. It

might however be surprising if a new scheme administrator had no right to obtain information relating to the pension scheme from the previous scheme administrator.

120. Turning to items 9 and 10, these relate to information about the nature of the assets of the pension schemes. They do not however specify any dates. Mr Brothers therefore submits that the requests are not valid as they are not sufficiently clear.

121. Mr Marks explained that these two requests followed on from item 8 which requested a schedule of the assets of the pension schemes held as at 1 January 2017 and 1 January 2018. Items 9 and 10 were therefore intended to request further information about certain of the assets held on these two dates.

122. I accept that, in principle, the information contained in items 9 and 10 is reasonably required on the basis that it is linked to item 8. I will vary the requirements of the notice so that the word "including:-" is added at the end of item 8 and that items 9 and 10 are renumbered 8.1 and 8.2.

123. This leaves item 12 (details of advisers) in respect of which Mr Brothers made no submissions. In my view, the information requested in item 12 is not reasonably required by HMRC to check the tax position of the appellants. It has no bearing on whether there should be a scheme sanction charge or a de-registration charge nor on whether the appellants have been validly appointed as scheme administrators. It appears to me to be a fishing expedition designed to give HMRC information about other possible participants in what may be a tax avoidance scheme. Whilst I do not doubt that this is information which may be useful to HMRC and that there may indeed be a public interest in HMRC being able to obtain such information, they cannot do so under paragraph 1 of schedule 36 as it is not relevant to the tax position of the appellants.

124. I do not accept that the possibility of the information at item 12 being relevant to reducing penalties or to mitigate a scheme sanction charge is sufficient justification for requiring such information. As Mr Brothers pointed out, relief from a scheme sanction charge is only available if the appellants were to apply for it. No doubt they could put forward the reasons why it would be just and reasonable for relief to be granted at the time of any application. Similarly, it would be expected that HMRC would ask the appellants for further information as to why any penalty should be mitigated should the point arise.

125. In conclusion, the appeals are allowed in part. The information notices are upheld subject to the amendments made on review, the further amendments to items 8, 9 and 10 referred to above, the deletion of item 12 and, in respect of the schemes which have been wound up, also the deletion of items 3 and 7.

126. In accordance with paragraph 32(4) of schedule 36, I direct that the appellants must comply with the requirements of the amended information notices by no later than 28 days after the date of the release of this decision.

NO RIGHT TO APPLY FOR PERMISSION TO APPEAL

127. In accordance with paragraph 32(5) of schedule 36, the appellants have no right to apply for permission to appeal, or to appeal against this decision, to the Upper Tribunal.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2021

APPENDIX 1

Scheme Name	Appellant	Commencement of pension scheme	Scheme Status	Case Reference
Andhar Limited Pension Scheme	A Hargreaves	28/08/09	ACTIVE	TC/2018/07519
Baker Holidays Pension Scheme	R Baker	16/12/13	WOUND UP	TC/2018/07520
Coverdales Pension Scheme	S R Oxby	23/05/12	ACTIVE	TC/2018/07523
Davies Specialists Pension Scheme	L Davies	15/10/14	WOUND UP	TC/2018/07525
GT Cleaning Machines Pension Scheme	A Harrison	22/10/09	ACTIVE	TC/2018/07526
GT Hydraulics Pension Scheme	G Totton	13/12/11	WOUND UP	TC/2018/07527
Humpty Dumpty Day Nursery Pension	J Siddell	13/02/12	WOUND UP	TC/2018/07530
JR Bell Atkins Pension Scheme	D Atkins	18/11/10	WOUND UP	TC/2018/07531
Llane Pension Scheme	A Allen	26/03/12	WOUND UP	TC/2018/07532
Moore Pension Scheme	R N Moore	14/04/12	WOUND UP	TC/2018/07533
Newhull Limited (H) SIPP	D E Hull	15/12/08	WOUND UP	TC/2018/07534
Newhull Limited (N) SIPP	R Newman	15/12/08	WOUND UP	TC/2018/07536
Nigicia Limited SIPP	N Jones	19/01/09	WOUND UP	TC/2018/07537
PJB Pension Scheme	P E Breen	10/11/10	WOUND UP	TC/2018/07538
PPMK Pension Scheme	PP O'Brien	24/12/12	WOUND UP	TC/2018/07540
Bahamas Tracy Pension Scheme	T Smith	20/06/13	ACTIVE	TC/2018/07541
Allan Whiteford Pension Scheme	A N Whiteford	31/01/11	ACTIVE	TC/2018/07544
Rosenthal Pension Scheme	A Henman	15/07/14	ACTIVE	TC/2018/07546
S Jackson Pension Scheme	S Jackson	08/02/16	ACTIVE	TC/2018/07547
TCD Associates Pension Scheme	S Skipsey	20/03/12	ACTIVE	TC/2018/07550
Wren Pension Scheme	J Hefferman	01/12/11	WOUND UP	TC/2018/07551

APPENDIX 2

Name	Date of information notice	Appeal to HMRC
A Hargreaves	30/01/18	20/02/18
R N Baker	22/01/18	20/02/18
S R Oxby	25/01/18	21/02/18
L Davies	25/01/18	21/02/18
A Harrison	01/02/18	21/02/18
G Totton	22/01/18	20/02/18
P J Siddell	24/01/18	20/02/18
D Atkins	25/01/18	21/02/18
A Allen	25/01/18	21/02/18
R N Moore	29/01/18	21/02/18
D E Hull	29/01/18	21/02/18
R Newman	30/01/18	21/02/18
N Jones	30/01/18	21/02/18
P E Breen	24/01/18	21/02/18
P P O'Brien	23/01/18	20/02/18
Tracey Smith	23/01/18	03/08/18
A N Whiteford	30/01/18	17/08/18
A Henman	25/01/18	21/02/18
S Jackson	24/01/18	14/03/18
S T Skipsey	24/01/18	21/02/18
J Heffernan	25/01/18	20/02/18