



[2021] UKFTT 0438 (TC)

TC 08322/V

Taxpayer Notice, whether documents reasonably required, whether statutory records must be produced, whether non statutory records must be produced, Appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/05250

BETWEEN

**METROPOLITAN INTERNATIONAL SCHOOLS
LIMITED**

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE GETHING
SONIA GABLE**

The hearing took place on 19 October 2021. With the consent of the parties, the form of the hearing was V (video). All parties attended remotely and the remote platform was the Tribunal video platform. A face to face hearing was not held because of covid restrictions. The documents to which we were referred are a Hearing Bundle of 737 pages and an Authorities Bundle of 420 pages, skeleton arguments of the parties and a witness statement of Mr David Pedley.

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.

Mr Hillier counsel instructed by Reynolds Porter Chamberlain for the Appellant, ("MIS").

Mr Simon Bracegirdle litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents, ("HMRC").

DECISION

INTRODUCTION

1. This is an appeal against two information notices referred to below as the “first notice” and the “second notice” issued by HMRC on 25 July 2016. The substantive issues before the Tribunal were:

(1) Issue 1 – The Burden of Proof. Whether the burden of proof lies with HMRC to show the requirements of Para 1 Schedule 36 to Finance Act 2008 are met (“Para 1”, and references to Paras below are to Paras in Schedule 36 unless otherwise specified) before considering other issues or, whether the burden is initially on MIS to establish that the condition in Para 21(2) is satisfied and that Para 21(3) is not satisfied and that the Records are not Statutory Records within Para 29(2), before HMRC must satisfy the requirements of Para 1.

(2) Issue 2 – Statutory Records. Whether Statutory Records must be produced even if the requirements of Para 1 were not satisfied and whether all Statutory Records must always be produced; whether the request must be proportionate and relate to the issues to be checked; when Statutory Records cease to be statutory records.

(3) Issue 3 – Para 21 exception. Whether Para 21(2) can apply to prevent the notices being issued.

(4) Issue 4 – Reasonably Required. Whether the information and documents requested by HMRC in the first notice and the second notice, were “reasonably required by the officer for the purpose of checking the taxpayer’s tax position” as specified in Para 1. In addition, whether HMRC may request documents which are already in the public domain.

2. A preliminary procedural issue was raised by MIS in relation to certain paragraphs of Ms Powell’s witness statement which included notes of telephone conversations with Mr Pedley, an advisor to MIS, which notes may not have been sent to or agreed by Mr Pedley. HMRC had not called Mr Pedley as a witness. MIS applied for a witness summons requiring the attendance of Mr Pedley and sought to exclude paras [8] to [40] of Ms Powell’s witness statement. Although we recognise that as a result of Ms Powell’s evidence to the Tribunal about the reasons for the issue of the notices, this issue had become insignificant, the Tribunal was asked to decide the issue as there would be potential cost implications of HMRC refusing to remove the paragraphs before the start of the hearing. Paras [8] to [40] record HMRC’s view of the exchanges between the parties leading up to the hearing and was the only information that HMRC had given prior to the hearing to justify issuing the taxpayer notices. MIS suggested that the paragraphs ought to be excluded because they were the subjective views of the officer and were challenged in part by Mr Pedley and MIS. The test is indeed an objective one. Objective reasons were offered at the hearing which had never been communicated to MIS. It was in our view necessary for MIS to call Mr Pedley in the circumstances to challenge some of those paragraphs. Although we do not consider it necessary to exclude the Paras [8] to [40], we do consider MIS was put to unnecessary expense because of HMRC’s failure to indicate that they had reasons to issue the notices which were not those listed in paras [8] to [40]. HMRC should bear the cost consequences of MIS’s witness summons and the cost of this application.

THE FACTS

3. We had the benefit of a witness statement from Ms Powell the investigating officer for HMRC, and Mr Pedley a director with Grant Thornton. Both Ms Powell and Mr Pedley were cross examined. We did not have the benefit of a current witness statement of a director of

MIS or witness evidence. We were pointed to a witness statement made by Mr Bradik in a recent appeal by MIS concerning VAT. As neither the Tribunal nor HMRC had the opportunity to challenge that statement we do not place any weight upon it. We find the following facts.

4. HMRC had received a risk assessment about MIS from colleagues in HMRC who had considered the statutory accounts and had identified some issues which indicated that there may be a risk of loss of tax. Those issues were:

- (1) The fact that royalties were paid to an overseas company which bear no relationship to the turnover of MIS.
- (2) Unusual finance arrangements with an overseas company which provides interest free loans to students, but MIS pays the cost of finance. There are significant amounts of MIS's money being retained by the finance company and reflected as deferred income in the accounts.
- (3) Contracts to provide course content and training were given to a company for whom a director was a former employee rather than there being an invitation to tender.
- (4) The overseas finance company was said to be owned by, or under common ownership with, MIS.
- (5) An officer of the company was described as a consultant and receiving fees of £30,000 which may be a device to avoid employer's NIC.

Issues (1) to (4) affect MIS's corporation tax but could also have VAT consequences. Issue (5) has a potential PAYE consequence.

5. Ms Powell did not inform MIS that she was concerned about these issues. She informed the Tribunal that it was not HMRC practice to inform taxpayers of HMRC's concerns. This is consistent with Ms Powell's witness statement at [43] where she indicates that she considered the issue of the notices was appropriate as she was encountering difficulty in obtaining the documents and information she requested. However, Ms Powell informed the Tribunal that she took these issues into account in deciding to:

- (1) open an enquiry into the corporation tax return of MIS for the period of account ended 31 March 2015, on 25 July 2016,
- (2) open "*cross enquiries into the whole of the Company's business and operations*" covering corporation tax for the period ended 31 March 2015, VAT for MIS's most recent years including enquiries into the VAT returns for VAT periods ended in the immediately preceding four-year period and a review of the employer records for the deduction year 2014-15 and subsequently,
- (3) request information and documents at meetings and in correspondence before the issue of the notice, and
- (4) issue two taxpayer information notices under Para 1 on 19 December 2017. The first notice requested information and documents in relation to MIS's corporation tax, VAT and PAYE positions and the second notice related to the corporation tax position of MIS. The detailed requests are set out in the appendix below.

6. Mr Pedley had no recall of specific conversations he had with Ms Powell during her investigation into MIS. He considered it unlikely he would have made the comments set out in those paragraphs as the comments revealed confidential information. He considered it common for parties to a call to form different impressions of the call and the issues discussed. He had not had access to his file but thought it unlikely the notes would have been shared

with him/MIS but given it was policy of Grant Thornton at the time not to comment on notes of meetings and calls prepared by HMRC, he is certain that he would not have agreed the content of the notes even if they had been sent to him.

7. HMRC accepts that MIS has not been dishonest.

LEGISLATION

Schedule 36 Finance Act 2008

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

(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.

In this Schedule, “taxpayer notice” means a notice under this paragraph

3 Approval etc of taxpayer notices and third party notices

(1) An officer of Revenue and Customs may not give a third party notice without–

(a) the agreement of the taxpayer, or

(b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third-party notice unless–

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

21 Taxpayer Notices following tax return

(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, **any** of conditions A to D is met. [Emphasis added]

(4) Condition A is that a notice of enquiry has been given in respect of–

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates (“relevant tax”), and the enquiry has not been completed so far as relating to the matters to which the taxpayer notice relates.

(5) In sub-paragraph (4), “notice of enquiry” means a notice under–

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that, as regards the person, an officer of Revenue and Customs has reason to suspect that–

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking the person's position as regards any tax other than income tax, capital gains tax or corporation tax.

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments of tax or withholding of income referred to in paragraph 64(2) or (2A). (PAYE etc).

(9) In this paragraph, references to the person who made the return are only to that person in the capacity in which the return was made.

29 Right to 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.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

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

58 General interpretation

In this Schedule—

“checking” includes carrying out an investigation or enquiry of any kind,

“document” includes a part of a document (except where the context otherwise requires),

“enactment” includes subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30)),

“...”

“the Taxes Acts” means—

(a) TMA 1970,

(b) the Tax Acts, and

(c) TCGA 1992 and all other enactments relating to capital gains tax,

“...”

62 Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

(2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—

(a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

63 Tax

(1) In this Schedule, except where the context otherwise requires, “tax” means all or any of the following—

(a) income tax,

- (b) capital gains tax,
- (c) corporation tax,
- (ca) diverted profits tax,
- (cb) apprenticeship levy,
- (d) VAT,

(3) In this Schedule “VAT” means—

- (a) value added tax charged in accordance with VATA 1994,
- (b) value added tax charged in accordance with the law of another member State, and
- (c) amounts listed in sub-paragraph (3A).

(3A) Those amounts are—

- (a) any amount that is recoverable under paragraph 5(2) of Schedule 11 to VATA 1994 (amounts shown on invoices as VAT), and
- (b) any amount that is treated as VAT by virtue of regulations under section 54 of VATA 1994 (farmers etc)

64 Tax position

(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 the person's position as regards—

- (a) past, present and future liability to pay any tax,
- (b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and
- (c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax,

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.

(2) References in this Schedule to a person's tax position include, where appropriate, a reference to the person's position as regards any deductions or repayments of tax, or of sums representing tax, that the person is required to make—

- (a) under PAYE regulations,
- (b) under Chapter 3 of Part 3 of FA 2004 or regulations made under that Chapter (construction industry scheme), or
- (c) by or under any other provision of the Taxes Acts.

(2A) References in this Schedule to a person's tax position also include, where appropriate, a reference to the person's position as regards the withholding by the person of another person's PAYE income (as defined in section 683 of ITEPA 2003).

(3) ...

(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.

Finance Act 1998 Schedule 18

21.— Duty to keep and preserve records

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

(a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and

(b) preserve those records in accordance with this paragraph.

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

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

(a) the sixth anniversary of the end of the period for which the company may be required to deliver a company tax return, or

(b) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases).

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

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

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

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

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

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

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

(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)

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

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

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

(5B) ...

(6) ...

“Supporting documents” includes accounts, books, deeds, contracts, vouchers, and receipts

VAT Act 1994 Schedule 11

6.— (1) Every taxable person shall keep such records as the Commissioners may by regulations require,

(2) Regulations under sub-paragraph (1) above may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases).

(4) The duty under this paragraph to preserve records may be discharged— (a) by preserving them in any form and by any means, or (b) by preserving the information contained in them in any form and by any means, subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

(5) The Commissioners may by regulations make provision about the form in which, and means by which, records are to be kept and preserved.

(6) Regulations under sub-paragraph (5) may—

(a) make different provision for different cases;

(b) provide for any provision of the regulations to be subject to conditions or exceptions specified in writing by the Commissioners;

(c) include incidental, supplemental, consequential, saving, transitional or transitory provision.

...

(10) Regulations under sub-paragraph (5) requiring records to be kept or preserved in electronic form may (among other things) make provision—

(a) as to the electronic form in which records are to be kept or preserved,

(b) for the production of the contents of records kept or preserved in accordance with the regulations,

(c) as to conditions that must be complied with in connection with the keeping or preservation of electronic records,

(d) for treating records as not having been kept or preserved unless conditions are complied with,

(e) for authenticating records,

(f) about the manner of proving for any purpose the contents of any records (including provision for the application of conclusive or other presumptions).

(11) Regulations under sub-paragraph (5) requiring records to be kept or preserved in electronic form may—

(a) allow any authorisation or requirement for which the regulations may provide to be given by means of a specific or general direction given by the Commissioners,

(b) provide that the conditions of an authorisation or requirement are to be taken to be satisfied only where the Commissioners are satisfied as to specified matters

VAT Regulations 1995 SI 1995/2518

31.—

(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a) his business and accounting records,

(b) his VAT account,

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him,

(3)....”

Income Tax (PAYE) Regulations 2003 SI 2003/2082

97.— Retention by employer of PAYE records

(1) 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 by other provisions in these Regulations.

(2) The duty under paragraph (1) to keep and preserve PAYE records may be discharged by preserving them in any form or by any means.

(3) “PAYE records” means the following documents and records—

(a) all wages sheets, deductions working sheets, documents completed under regulation 46 (Form P46), information provided under regulation 40A(1) (duty of employee to assist with completion of new employee fields in returns under regulations 67B and 67D) and other documents and records relating to—

(i) the calculation of the PAYE income of the employees,

(ii) relevant payments to the employees, or

(iii) the deduction of tax from, or accounting for tax in respect of, such payments, and

(b) all documents relating to any information which an employer is required to provide to HMRC under regulation 85 [Form P11D]

Issue 1- The Burden of Proof.

8. HMRC considered that where the burden of proof lies depends on the issue under consideration. HMRC bears the burden of showing that the documents are reasonably required in accordance with Para 1, but first the taxpayer must demonstrate that (a) none of the Conditions in Para 21 of Schedule 18 to Finance Act 2008 is satisfied and (b) that a document is not a Statutory Record. Further HMRC considers that the presumption of regularity means that HMRC has discharged that burden. HMRC rely on FTT decision in *Cliftonville Consultants Ltd v HMRC* [2018] UKFTT 231 (TC) at [39].

9. MIS considers that the burden of showing that a valid notice has been issued rests with HMRC. It is an objective test. It is for HMRC to prove that a record is a Statutory record.

Discussion of Burden of proof in relation to Paras 1, 21 and 29

Para 1

10. It is beyond doubt that HMRC may only obtain information and records from a taxpayer about the taxpayer’s affairs (otherwise than by voluntary disclosure), if HMRC issues a notice that satisfies the conditions of Para 1 of Schedule 36, i.e. that the documents and information requested by the notice are reasonably required to check the taxpayer’s tax position.

11. Schedule 36 makes clear that when an officer applies to the Tribunal for approval to issue a taxpayer notice under Para 3 it must satisfy the Tribunal that the officer is justified in issuing the notice (see Para 3(b)). There is no indication that the burden of proof is different when the taxpayer is represented at an appeal against a notice issued by an officer without the prior approval of the Tribunal under Para 1, and logic requires that it should be the same.

12. In relation to the presumption of regularity relied upon by HMRC, given that:

Para 3(3)(b) of Schedule 18 requires that “the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so”, and

Para 1 requires the information or document requested to be “reasonably required by the officer for the purpose of checking the taxpayer's tax position”,

it is clear Parliament intended that the Tribunal must enquire into the circumstances to determine whether the documents requested were reasonably required and indicates that the presumption of regularity should be in abeyance in a case such as this.

13. The Tribunal must enquire into the circumstances which caused the officer to consider the notice was required and as the documents must be reasonably required, the test is an objective, not a subjective, test.

Para 21

14. Each of Para 21(1) and (2) sets out an exception to Para 1. As the burden is on HMRC to satisfy the Tribunal that Para 1 is satisfied, it is for the taxpayer to demonstrate that that one of these exceptions is met and that the notice may not be issued.

15. Further as Para 21(3) indicates that there are exceptions to the Para 21(1) and (2) exceptions and as the burden rests with the taxpayer to satisfy the Tribunal why Para 21(1) and (2) should apply to prevent the notice from being issued, it is for HMRC to demonstrate that one or more of the exceptions referred to in Para 21(3) are satisfied and that the notices may be issued.

Para 29

16. Para 29(1) sets out the general rule that a taxpayer may appeal against a notice issued under Para 1. Para 29(2) sets out an exception that no appeal may be made where what is required to be produced is a “Statutory Record. It is for HMRC to demonstrate to the Tribunal that the information and documents required to be produced by the notice are Statutory Records and that the taxpayer is prevented from appealing against the notice in that respect.

17. In relation to non-statutory records, once HMRC has explained to the Tribunal why the information and documents are required it is for the taxpayer to indicate why any particular information request or document or category of document is not reasonably required.

18. The standard of proof in each case is on a balance of probabilities.

Issue 2 – Statutory Records. Whether all Statutory Records must always be produced if requested or whether the request must be proportionate and/or relate to the issues to be checked. Who bears the burden of proving a document is a statutory record and how are they to be identified?

19. HMRC consider that as Para 29(2) provides that a taxpayer has no right to appeal against a notice requesting the production of information and documents that comprise Statutory Records, a taxpayer must produce all Statutory Records requested by an Officer. The Burden is on the taxpayer to prove that the records being requested are not Statutory Records. HMRC consider that all the records relating to Corporation tax, VAT and PAYE listed in the first notice are Statutory Records and must be produced. MIS has not discharged the burden of proof.

20. MIS consider that it is for HMRC to show that the notices have been validly issued and that the burden is on HMRC to prove that what is being requested are Statutory Records. HMRC must explain why each document answers the description. HMRC has not done so.

Discussion on Statutory Records

21. It seems to us that the legislation is clear, HMRC may only obtain documents requested in a taxpayer notice if the notice satisfies the requirements of Para 1 and they are reasonably required. To be reasonably required the Statutory Records requested must be relevant to the issues that have prompted the enquiry and be capable of enabling the officer to check the tax position. Para 64 indicates that the tax position to be checked can be any period, past present or future, unless indicated otherwise. We consider that a request may be unreasonable where for example all the Statutory Records relating to all employees of the company are being requested to verify the position of a single employee, or where all the Statutory Records are being demanded but the issue under consideration is only one aspect of the Corporation tax return or VAT return.

22. The term Statutory Records is defined in Para 62 of Schedule 36 as information or a document which a person is required to “*keep and preserve under the Taxes Acts or any enactment relating to a tax.*” Records cease to be Statutory Records if the period for which documents and information must be preserved has expired. The definition of statutory records is different for each tax under consideration.

23. We note that the Taxes Acts means the Taxes Management Act 1970, the Tax Acts and the Taxation of Chargeable Gains Act 1992. The Tax Acts includes The Income Tax Acts and Corporation Tax Acts.

Statutory Records for Corporation tax Purposes

24. The Finance Act 1988 (“FA 88”) sets out the filing and record keeping obligations for companies in relation to corporation tax. Para 21(1) of Schedule 18 to FA 88 (“**Schedule 18**”) imposes on a company that is required to deliver a tax return (i.e. a UK resident company with a profit), a duty to “*keep such records as are needed to enable it to deliver a correct and complete return for the period*”.

25. It seems to us logical that as Statutory Records are those necessary to prepare a complete and correct corporation tax return, they will assist in a check of the tax return. As HMRC will be unaware of the precise form of the records a taxpayer has used to prepare the return, a generic description of records to check particular issues in a return should be sufficient to discharge HMRC’s burden to identify the category of information or document required. If the taxpayer records are in a form or use a different label to that used by HMRC, the taxpayer should disclose the name and provide the records that are required.

26. As to the time for which records must be preserved, the obligation in relation to company tax return is that they should be preserved until the end of the “*relevant day*”. The relevant day is generally the sixth anniversary of the date on which a company may be required to file a return but where an enquiry has been made into a return before the expiration of the six-year period, the obligation to preserve records continues until the enquiry is closed (see Para 21(2A) and (3) to Schedule 18). In this case an enquiry has been made into the return for the accounting period of MIS for period ended 31 March 2015, those records must be preserved until the enquiry has closed.

Statutory Records for VAT purposes

27. Para 6(1) of Schedule 11 to the VAT Act 1994 provides that a taxable person must keep such records as the Commissioners may by regulations require and relevantly Regulation 31(a) to (c) of the VAT Regulations 1995 SI 1995/2518 require that a taxable person must, “*for the purpose of accounting for VAT, keep the following records—*

(a) *his business and accounting records,*

(b) *his VAT account,*

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him, ”

28. The period for which VAT records must be preserved is set out in Para 6(3) as a period not exceeding 6 years. It seems this time limit is assessed at the date of the notice, or in a case where the notice is the subject of an appeal from the date of the decision of this Tribunal. That would mean the records for the VAT periods ended before 31 December 2015 are no longer statutory records.

As to whether a particular request for statutory records for VAT is reasonable, this seems to us to depend on the scope of the enquiry into the return. In this case Officer Powell explained the payment of royalties to a connected person outside the UK also had potential VAT implications and justified the request for VAT Statutory Records. To request that MIS provides every VAT record to check the VAT treatment of royalties seems to us unreasonable. A sample period or periods in which the royalty payments were made would be more reasonable. But if it is possible for MIS to identify and provide all the invoices and VAT records relating to the royalties in the four-year period under consideration then that would also be reasonable.

Statutory records for PAYE purposes

29. Regulation 97 of the PAYE Regulations SI 2003/2082 deals with the requirements for the retention of PAYE records. They can be preserved in any form and by any means. The records that must be kept are those set out in Regulation 97(3)(a) and (b) and include all wages sheets, deductions working sheets, documents completed under regulation 46 (Form P46), information provided under regulation 40A(1) (duty of employee to assist with completion of new employee fields in returns under regulations 67B and 67D) and other documents and records relating to the calculation of the PAYE income of the employees, relevant payments to the employees, or the deduction of tax from, or accounting for tax in respect of, such payments, and all documents relating to any information which an employer is required to provide to HMRC on Form P11D.

30. 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. Records that pre-date April 2018 are no longer statutory records.

Conclusion on Time frame

31. As indicated above, the Statutory Records supporting the corporation tax for the period ended March 2015 remain statutory records as an enquiry into the return has been made. But in relation to VAT and PAYE some records have ceased to be Statutory Records, but they may still be reasonably required to check a tax position.

32. In relation to VAT, the records for the periods ended before 31 December 2015 are no longer statutory records. In relation to PAYE, all records for the years ended prior to April 2018 are no longer statutory records. As in relation to VAT non statutory records may still be needed to check a tax position although they may not be available.

Issue 3 – Para 21 Restrictions. Whether Para 21(2) may apply to prevent the issue of a notice

33. HMRC consider that Para 21(2) may not prevent the issue of a notice where any of the conditions A to D are satisfied. In this case:

- (1) Condition A is satisfied, because a notice of enquiry into the company's tax return under Para 24 Schedule 18 Finance Act 1998 had been made by letters dated 25

July 2016. In consequence neither the first nor the second notice is prevented from being issued.

(2) Conditions C and D are also satisfied in relation to the first notice because it requests information relating to VAT and PAYE.

34. MIS initially raised issues about the application of Para 21 but withdrew them.

35. We consider Conditions A, C and D were satisfied and that neither of the notices was prevented from being issued by Para 21(2).

Issue 4 – Reasonably Required. Whether the information and documents requested by HMRC in the first notice and the second notice, were “reasonably required by the officer for the purpose of checking the taxpayer’s tax position” as specified in Para 1.

36. HMRC consider that the reasonably required test is satisfied if the documents are needed to check a tax position. Ms Powell had explained the issues of concern affecting corporation tax, VAT and PAYE liabilities of MIS, and in consequence that test is satisfied. All the records requested, statutory and non-statutory, are reasonably required.

37. HMRC also note that MIS may not appeal against a request for statutory records but as the notices were issued almost 4 years ago some of the records that were statutory records at the date of the issue of the notice are no longer statutory records. HMRC accept that certain records are non-statutory records such as:

- (1) VAT records for the periods ending 31 December 2014- 31 December 2015.
- (2) Employer duty records requested.
- (3) Management accounts for the period ended 31/3 2015.
- (4) Copies of board minutes held in the period ended 31/3/15 at which strategic issues facing the business were discussed, including pricing policy, and customer and supplier relationships. Explanation of how the issues were discussed and recorded if not at Board meetings.
- (5) Board meetings and other communications concerning the agreement, decisions, consideration and commercial analysis of all royalty agreements, including variations to those agreements in place during the period ended 31/3/15.
- (6) Minutes of board meetings and correspondence regarding the decision, consideration and commercial analysis of all finance company agreements, including any variations to these agreements in place during the period ended 31/3/15.

38. HMRC withdrew the requests for bank and building society account information for which no accounting period had been identified set out in the first notice at para ii, 1, 2 and 3.

39. MIS considers that:

- (1) the burden was on HMRC to show the documents and information were reasonably required. Whether a document is reasonably required depends on the context see *Avonside Roofing Ltd v HMRC* [2021] UKFTT 158 (TC) (“Avonside”) at [71].
- (2) It is relevant to consider whether the documents will provide anything useful per *Long v HMRC* [2014] UKFTT 199 at [18].
- (3) HMRC may not use their powers for a fishing expedition, preparing a broadly drafted notice in the hope of finding an issue see *Joshy Matthew v HMRC* [2015] UKFTT 139 (TC) at [185].

- (4) The Tribunal must balance giving HMRC sufficient latitude to allow them to properly do their job with the taxpayer's right to finality and privacy see *Perfectos Prancing Inks Co Ltd v HMRC* [2019] UKFTT 388 at [29] ("*Perfectos*"); and accept that the taxpayer is honest unless there is reason to believe otherwise see *Perfectos* at [29].
- (5) Whether the documents are reasonably required incorporates an obligation to consider whether the requests are proportionate see *Gold Nuts Ltd v HMRC* [2017] UKFTT 84 (TC) at [2014], and per *Avonside* at [84].
40. MIS concludes that none of the following are reasonably required:
- (1) Categories of documents that have no bearing on MIS's Corporation tax, VAT or PAYE liabilities. In particular:
- (a) The documents listed under Miscellaneous records and details in the first notice under para iii.
 - (b) All board Minutes
 - (c) All internal and external correspondence
 - (d) All copy agreements with marketing providers, sales representatives, finance houses and similar suppliers; and
 - (e) Computer records.
- (2) The volume requested is excessive, oppressive, and disproportionate. Together the documents amount to virtually every document the company may have in relation to the periods.
- (3) HMRC are requesting documents that may not exist. The breadth of documents shows HMRC are on a fishing expedition.
- (4) The Notices request student records and information relating to individual students, and calculations of sums due from finance houses providing credit to students. Specific students are not identified. There are many types of courses provided to many students over many years and the records may be difficult to find. To provide all student records would be oppressive. Each individual student's documents have no bearing on MIS's tax position.
- (5) To the extent that the records are not statutory records, MIS may not have retained them as there was no duty to do so.
- (6) The documents requested in relation to VAT in the notices issued on 19 December 2017 cannot be reasonably required to check a tax position as HMRC has raised an assessment and the assessment is subject to appeal.
41. Further in relation to Disputed Items 1 to 7 annotated on the list of documents contained in the notices as set out in the appendix MIS says:
- (1) **Disputed item 1** – HMRC request the management accounts to identify issues. This is a fishing expedition.
 - (2) **Disputed Item 2** – HMRC request board minutes to identify the strategic direction and financing of the company which has no bearing on the tax position. This would illustrate the level of involvement of the directors in the decision making.
 - (3) **Disputed Item 3** – HMRC request copies of board minutes, internal and external correspondence regarding the royalty arrangements (a) because they are a substantial

expense, and the calculation of the payments is unclear and (b) to explain the commercial rationale of the arrangements. This is burdensome, documents may not exist, and the strategic importance has no bearing on the tax position.

(4) **Disputed Item 4** – HMRC request board minutes and internal and external correspondence relating to the finance agreements, to illustrate the commercial rationale for the arrangement. This is onerous, is a fishing expedition and commercial rationale for an arrangement with a third party can have no bearing on MIS's tax position.

(5) **Disputed Item 5** – HMRC want copies of agreements with

(a) Marketing Providers – to assist HMRC to understand the relationship between marketing costs and sales. MIS say HMRC has not been able to explain why this is relevant to MIS's tax position

(b) Customers (or a single sample standard agreement) because it will allow HMRC to understand the terms and conditions and how they should be accounted for. MIS say this is explained in the accounts and in a witness statement of Mr Bradik in the VAT appeal.

(c) Caledonian Consumer Finance Ltd and Carnegie Consumer Finance to show the relationship between MIS and the finance houses. MIS say the relationships are explained at a meeting on 6 March 2017 and MIS has already provided documents between MIS and other funding partners.

(6) **Disputed Item 6** – HMRC require explanations and supporting documents concerning:

(a) Consultancy fees paid to Mr Butler because there is an employer duty risk. MIS explained that he had ceased to be an employee of the company and now provided consultancy services. There is no reason to assume the taxpayer is being dishonest. The costs are accounted for in the accounts.

(b) Sundry receipts of £2,644,224 in the period ended 31/3/2015. This was accounted for in the accounts and there is no reason to suspect dishonesty.

(c) Other interest of £180,000 shown as a finance cost for the AP ended 31 March 2015. HMRC say there was an increase in costs, and they require the information. MIS says an increase in financing costs is not a valid reason to doubt a filing position. Mr Bradik had explained in his witness statement that MIS had ceased to sell courses because of the issues concerning the VAT appeal.

(d) Other operating lease costs of £120,000 in the period ending 31 March 2015. This has been charged to MIS profit and loss account in the normal way and there is no reason to suspect dishonesty.

(7) **Disputed Item 7** – to the extent that these are confined to primary accounting records MIS accepts these form part of the Statutory records or are reasonably required.

Discussion of Reasonably Required

42. We note that HMRC had received a risk report on MIS and had become aware of various aspects of MIS's business operations that could affect its tax position.

43. We make the following general observations:

(1) A particular piece of information or a document can only be reasonably required if it is relevant to one of the issues raised and can assist to check the tax position of MIS in relation to those issues.

(2) Paras 3 and 4 of Schedule 18 FA 1988 indicate what a company must provide to HMRC when it files a “company tax return” for a period. Para 3 indicates that the return includes “*such information, accounts, statements and reports-*

(a) relevant to the tax liability of the company, or

(b) otherwise relevant to the application of the corporation tax Acts to the company, as may reasonably be required by the notice.”

(3) As the company tax return delivered by MIS will have been accompanied by the statutory accounts filed at Companies Registry and a computation of the tax due on the profits shown in the accounts (see Para 4 Schedule 18), the documents HMRC can ask the taxpayer to produce to enable HMRC to check a taxpayer’s tax position cannot be confined to the statutory accounts. The documents needed to check the tax return are the supporting records used to create the accounts and prepare the tax computation.

(4) Where income is deferred and does not appear in the profit and loss or other similar account of the Statutory Accounts, the accounting advice indicating that deferral of income is the correct accounting treatment would be required as part of the return. If HMRC wish to check the return and therefore the accounting treatment set out in the report, HMRC would naturally require sight of the underlying contract that gave rise to the advice. Where production of all of the contracts would be burdensome, a sample of the category of contracts which require income deferral would be reasonably required coupled with a description of the number of contracts in that category and sufficient detail to enable a check to be conducted.

(5) Where MIS has contracted with other companies that are under the control of MIS or under common control, MIS would be required to provide as part of the company tax return a transfer pricing report unless it is exempt from doing so. HMRC would be entitled to request a copy of the report or an explanation as to why no report is required, to check MIS’s tax position. The explanation would need to be supported by necessary evidence as to the factual issues supporting the claim that transfer pricing was inapplicable, such as evidence of the owners of shares and evidence that the owners are not related or the level of turn over makes it below the threshold. In a case of suspected diversion of income to overseas company the information may reasonably be required even if transfer pricing is not in point.

(6) In relation to the deduction of finance costs, as the statutory provisions relating to the deduction of finance costs require consideration of the purposes of the parties entering the transactions. The presence of tax avoidance motives may cause the relief to be denied. We therefore consider that the records HMRC can reasonably request to check MIS’s tax position include the loan agreement and records (such as Board minutes or internal and external correspondence) which show the motive of MIS and other parties.

(7) We agree with MIS that the strategic direction of MIS has no bearing on the tax position of MIS.

(8) In relation to the issue of the consultancy fee payable to the director who was previously a full-time director and taxed as an employee, we consider that HMRC is entitled to require MIS to demonstrate there has been a change of status and provide an

explanation of the current duties to demonstrate the director should no longer be treated as an employee.

(9) In relation to documents already in HMRC's possession a request for those documents is unreasonable, but the fact that a document may be available elsewhere is not a barrier to HMRC's ability to request the document from MIS.

(10) As Officer Powell did not give any explanation as to why brochures were required or the records of students, or suppliers and customers (other than the arrangements under which interest is paid or payable or deferred or royalties are payable) we do not accept that these are reasonably required. However, as MIS secures interest free finance for the students the contracts with the students must form part of MIS's considerations in entering the Loans and we consider it reasonable for HMRC to obtain an anonymised sample of the contracts with the students.

(11) Other issues were identified post the risk assessment received by HMRC which prompted the enquiry into the return and were discussed by HMRC and MIS at a meeting on 6 March 2017. Specifically in relation to the operating lease the accounting record justifying the treatment in the statutory accounts is required to check the tax position of MIS. The information and documents requested are reasonably required.

(12) It seems to us to be unreasonable for HMRC to demand all computer records and details of entries unless there is a reasonable ground to believe that the records are inaccurate or there is a reasonable ground to believe that MIS is dishonest. We understand HMRC does not assert that MIS and or its directors are dishonest.

DECISION

44. We have considered each request in the first and second notices and set out below a modified form of each notice as approved by this Tribunal.

45. The First Notice

A. Business records

- i. In relation to royalties paid by MIS in the accounting period ended 31 March 2015 ("the Royalties")
 - a. a calculation of the royalties paid or accrued in the period.
 - b. all the entries in MIS's internal books and prime records relating to the Royalties paid in the period
 - c. extracts from the cash book, nominal ledgers, sales and purchases ledgers and day books relating to the Royalties
 - d. copies of the sales and purchase invoices along with credit notes relating to the Royalties.
 - e. vouchers and receipts evidencing expenses claimed in relation to the Royalties.
 - f. details of any commission paid in relation to the Royalties
 - g. an explanation of the agreement and obligation to pay Royalties and a copy of the Royalty Agreement and any other agreement necessary to understand the entire arrangement.
- ii. In relation to all loans or other credit agreement entered into by the MIS in respect of which deduction in computing the profits for the period ended 31 March 2015 have been claimed or in respect of which income under the loans or other credit

agreement has been recognised or deferred in the period ended 31 March 2015 including agreements between MIS and Caledonian Consumer Finance Ltd, and Camegie Consumer Finance and the Radio Tetry Debenture (“the Loans”):

- a. All agreements documenting the Loans (including those documents entered into in connection with the Loans other than the agreements with students), or particulars of the Loan agreements if no written agreement exists.
 - b. All board minutes and correspondence recording the purpose of MIS entering into the Loans, remaining party to the Loans in the period, and fixing the terms of the Loans and their inter-relationship with the agreements with the students.
 - c. All accounting advice or reports concerning the recognition or deferral of income arising under the Loans in the period.
 - d. A calculation of amounts accrued or due to and from MIS under or in respect of the Loans in the period.
 - e. Details of all bad debts written off in the period ended 31 March 2015 in respect of the Loans.
- iii. VAT records
- a. VAT records for four VAT quarters in the periods between 31/12/2015 to 31/12/2017, which sample is to be agreed by the parties and contains the payment of royalties, and any documentation of VAT record relating to the royalties if not already provided under para i. above.
- iv. Employer Duties records and Consultancy fees
- a. All Employer Duties records relating to Mr Butler for the years 2014-15 and 2015-16, including, but not restricted to his former contract of employment,
 - b. A copy of Mr Butler’s current consultancy agreement, an explanation of why it is considered Mr Butler is no longer an employee and details of consultancy fees paid and in respect of what duties in the period ended 31 March 2015. The records of other personnel that ceased to be employees and became a consultant to MIS in 2014-15 and 2015-16.

The information requested may be provided in hard copy or in electronic form.

46. Second notice

Information and documents that we need to see:

- i. A sample copy of the contract between MIS and each category of student in respect of whom interest free finance is provided in the accounting period ended 31 March 2015.
- ii. A detailed explanation of the nature, and supporting documentation for the sundry receipts of £2,664,224 in the accounting period ended 31 March 2015.
- iii. Accounting advice or reports and calculations concerning the recognition of the provision in respect of an operating lease of £120k in APE 31 March 2015.

47. This document contains full findings of fact and reasons for the decision. There is no right of appeal against the Tribunal’s decision on the Notice, see Schedule 36, para 32(5).

**HEATHER GETHING
TRIBUNAL JUDGE**

Release date: 23 NOVEMBER 2021

First Notice

Information and documents that we need to see

a. Business records

i. All the company's internal books and prime records covering the accounting period 31/3/15, including:

1. Cash book and petty cash records, nominal ledgers, sales and purchases ledgers and day books,
2. Sales and purchase invoices along with credit notes.
3. Vouchers and receipts evidencing expenses claimed.
4. Wages/commission records

ii. The company's external financial records, including:

1. Statements or passbooks, cheque book stubs and paying in counterfoils in respect of all Bank and Building Society accounts maintained by the company.
2. Credit card statements for all accounts maintained by the company.
3. Copies of any items mentioned at 2a. or 2b. above for accounts not maintained by the company but which contain evidence of company transactions not reflected in the company's own bank or building society records.
4. Details of any loans in place during the accounting period 31/3/15, whether made by the company, or made to the company, including copies of the loan agreements, and any supporting documentation.

iii. Miscellaneous records and details to include:

1. All course brochures, student enrolment records, and progress records or similar records in which the company's business activity was recorded. If any such items were maintained but cannot be provided, please list them and state why they are no longer available. If no such items were maintained, please specifically state so.
2. For the accounting period 31/3/15, all calculations and supporting documentation quantifying the royalty payments due from the company.
3. For the accounting period 31/3/15, all calculations and supporting documentation quantifying the sums due to the company from the various finance companies who provide credit finance to the students of the company in respect of course fees.
4. For the accounting period 31/3/15. all calculations and supporting documentation quantifying the creditor and debtor figures with regard to deferred income during the accounting period.
5. For the accounting period 31/3/15, all calculations and supporting documentation in relation to bad debts written off during the accounting period.
6. Copies of all customer contracts for the year in question.
7. Copies of all supplier contracts for the year in question.
8. Any records you consider are not covered by the requests above, but which were used in drawing up the company's accounts and return. If the request under headings 1) to 4e) cover all of the records used to draw up the accounts and return, specifically state so.
9. Details of any estimates or balancing figures included in drawing up the company's accounts and return. If none were included, please specifically state so.
10. Details of any items in the accounts/return for which documentary evidence is not available, including items about which director's assurances were considered sufficient. If there were no such items, please specifically state so.

b. VAT records

i. VAT records for all VAT return periods ended 31/12/2014 to 31/12/2017, including the VAT return summaries, and all underlying business records and supporting documentation required to produce these VAT returns.

c. Employer Duties records

i. All Employer Duties records for the year for the years 2014-15 and 2015-16, including, but not restricted to:

1. All payroll and benefits documentation.
2. All reimbursed travel and expense documentation
3. All documents relating to any redundancy payments, to include compromise agreements.
4. Company credit cards - to include receipts.
5. Details of use or transfer of any company assets.

d. Other documents or information that we need

In this context 'document' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.

i. **(Disputed Item 1)** Copies of management accounts drawn up in the period ended 31/3/15.

ii. **(Disputed Item 2)** Copies of the minutes of board meetings held in the period ending 31/3/15, at which the strategic direction and financing of the company was discussed, along with other important areas such as course content, pricing policy and customer and supplier relationships. If board meetings were not held during the year in question please specify this, and provide details of how these matters were discussed at director level and recorded.

iii. **(Disputed Item 3)** Minutes of board meetings and all internal and external correspondence regarding the agreement, decision, consideration and commercial analysis of all royalty agreements, including any variations to these agreements, in place during the APE 31/3/15.

iv. **(Disputed Item 4)** Minutes of board meetings and all internal and external correspondence regarding the agreement, decision, consideration and commercial analysis of all finance company agreements, including any variations to these agreements, in place during the APE 31/3/15.

Second notice

Information and documents that we need to see

a. **(Disputed item 5)** Copies of any agreements in place in the accounting period ended 31 March 2015 between Metropolitan International Schools Ltd and:

- i. Marketing Providers
- ii. Customers (a single sample standard agreement in the APE 31 March 2015 would be acceptable)
- iii. Finance Houses - Caledonian Consumer Finance Ltd, and Camegie Consumer Finance
- iv. Self-employed sales reps (a single sample standard contract in the APE 31 March 2015 would be acceptable)
- v. Radio Tatty SRO - Debenture and any associated documents relevant to the debenture.

b. **(Disputed Item 6)** A detailed explanation of the nature, and supporting documentation for each of the following points discussed at our meeting of 6 March 2017:

- i. Consultancy fees provided to Mr Butler in APE 31 March 2015
- ii. Sundry receipts of £2,664,224 in APE 31 March 2015
- iii. Other interest of £180k shown as Finance Cost in APE 31 March 2015
- iv. Other operating lease of £120k in APE 31 March 2015

c. **(Disputed item 7)** Computer records, to include:

- i. The precise name and version of any software package used
- ii. A copy of the original system backup disk.
- iii. A full copy of the code listings for each transaction type.