



Neutral Citation: [2023] UKFTT 475 (TC)

Case Number: TC08835

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2020/00680

*Information notice under Schedule 36 Finance Act 2008 – whether validly issued – yes –
whether information sought reasonably required – yes – appeal dismissed*

Heard on: 26 September 2022

Judgment date: 12 January 2023

Before

**TRIBUNAL JUDGE MARK BALDWIN
MR MICHAEL BELL**

Between

FOREIGN NATIONAL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For FN: Robert Maas of counsel, instructed by Walji & Associates

For HMRC: Alex Barrett litigator of HM Revenue and Customs’ Solicitor’s Office

[NOTE: This decision notice was issued to the parties on 12 January 2023 with a direction that it should not be published for the reasons given in paragraph [105]. Following an application by HMRC on 27 April 2023, the Tribunal directed that this anonymised version of the decision notice should be published.]

DECISION

INTRODUCTION

1. This is an appeal by Foreign National (“FN”) against an information notice (the “Notice”) dated 23 July 2019 issued under Schedule 36 Finance Act 2008 (“Schedule 36”) for the tax years 2014/15, 2015/16 and 2016/17. The Notice was varied on review on 17 January 2020. The requirements of the Notice have been partially complied with, but certain items remain outstanding.
2. The dispute relates to whether the Notice was validly issued and whether the outstanding information and documents are ‘reasonably required’ for the purposes of checking FN’s tax position.

FACTUAL BACKGROUND

3. FN is a citizen of Jurisdiction X who is neither resident nor domiciled in the United Kingdom. FN has entered into property transactions in the UK.
4. FN was also a director of a building construction company (“Company Y”) a UK private company. He held 47% shareholding in 2013 which increased to 50% in 2016. He ceased to be a director in 2021 but still held the 50% shareholding.
5. FN owned the following properties:
 - (1) Flat 7, ABC Court (“ABC Court”), this was bought with his daughter for £320,000 in November 2009 and was said to have been rented from November 2010.
 - (2) Flat 10, DEF Court (“DEF Court”), this was bought with FN’s wife for £490,000 in October 2009 and disposed of in May 2014 for £690,000.
 - (3) Flat 85 GHI Court (“GHI Court”) bought with FN’s son-in-law in August 2010 for £495,000.
 - (4) 30, JKL Court (“JKL Court”) was bought by FN for £780,000 in October 2014 and disposed of in May 2015 for £1,325,000. The refurbishment on the property was carried out by Company Y.
6. On 10 January 2018, Walji & Associates (“the Agent”) sent an NR1 dated 19 December 2017 to HMRC. It stated that FN’s property income business (“PIB”) started in November 2010 when ABC Court was rented. The Agent stated that FN wished to receive rental income without the deduction of tax.
7. On 24 January 2018, FN was issued notices to file tax returns for 2014/15 and 2015/16.
8. On 1 February 2018, FN was issued a notice to file a tax return for 2016/17.
9. On 26 April 2018, FN submitted self-assessment returns for the years 2014/15, 2015/16 and 2016/17.
10. On 7 September 2018, HMRC called the Agent stating that they had concerns that ABC Court had been rented from February 2010, other properties had been rented and not reported, and several property disposals had not been reported.
11. On 11 September 2018, HMRC emailed the Agent requesting rental income schedules for ABC Court and any other UK properties and details of the sale of JKL Court and DEF Court.
12. On 16 December 2018, the Agent sent an email clarifying that FN was not domiciled or resident in the UK throughout all tax periods under consideration. As a result, the Agent

maintained, FN did not have to declare the capital gains and rental information had been provided.

13. On 15 January 2019, a telephone meeting was held between the parties. It was put to the Agent that FN's dealings in JKL Court met numerous 'badges of trade' and could be considered property trading.

14. On 6 March 2019, the Agent sent a letter stating that the property sales were investments and rental income from DEF Court had not been returned.

15. On 27 March 2019, HMRC opened enquiries into the 2014/15, 2015/16 and 2016/17 tax returns under Section 9A Taxes Management Act 1970 ("TMA 1970").

16. On 8 May 2019, HMRC wrote to the Agent requesting information on property transactions, banking records, rental income, and residence status pertaining to the 2014/15, 2015/16 and 2016/17 tax years.

17. On 28 June 2019, the Agent wrote to HMRC outlining that FN would not be subject to a 'fishing expedition' and not all the information requested in the letter of 8 May 2019 would be provided, FN was in Jurisdiction X during that year and capital gains tax was not in point. Some documents were provided relating to expenditure for ABC Court.

18. On 23 July 2019, HMRC issued the Notice requesting various information and documents for the years 2014/15 to 2016/17 relating to FN's property transactions, banking records, rental income, and residence status.

19. On 19 August 2019, HMRC made a "jeopardy amendment" under Section 9C TMA 1970 for the tax year 2015/16.

20. On 22 August 2019, the Agent appealed against the Notice on the grounds that the items were not reasonably required, and the notice did not meet the statutory requirements of Schedule 36.

21. On 4 September 2019, the Agent appealed and requested a postponement of the jeopardy amendment.

22. On 24 September 2019, HMRC emailed the Agent to acknowledge the appeal against the jeopardy amendment but indicated that they would not accept the postponement application against the tax charged by the jeopardy amendment.

23. On 24 September 2019, HMRC telephoned the Agent and explained that the grounds of appeal against the Notice were too vague, and further clarification was given on the Notice.

24. On 30 September 2019, the Agent provided some information and documentation namely invoices, sale records, completion statements and UK stay dates.

25. On 10 October 2019, a 'View of the Matter' in relation to the Notice was issued by HMRC, a review was offered and accepted by the Agent on 4 November 2019.

26. On 17 October 2019, FN appealed to the Tribunal against HMRC's decision not to postpone the collection of the jeopardy amendment.

27. On 17 January 2020, HMRC issued a Review Conclusion which varied the Notice.

28. On 13 February 2020, FN appealed the varied Notice to the Tribunal.

29. Between 14 February 2020 to 16 March 2022, parties have been exchanging correspondence and the parties accept that:

- (1) FN was non-UK resident during the 2009/10 to 2016/17 tax years inclusive.

(2) A property purchase and sale completion statement has been provided for JKL Court therefore FN has partly complied with item 4b and 4e of the varied Notice.

(3) A property sale completion statement has been provided for DEF Court therefore FN has partly complied with item 9a.

(4) FN has wholly complied with items 1, 4c, 4f, 4g, 4h, 5, 6a, 6b, 8, 9b, and 9c of the varied Notice.

30. On 2 February 2021, FN withdrew his appeal relating to the postponement of the jeopardy amendment.

THE LAW

31. Schedule 36 gives HMRC a number of powers to obtain information and inspect premises. Paragraph 1 gives an HMRC officer power to issue an information notice to obtain information and documents that are 'reasonably required' for the purpose of checking that person's 'tax position'.

32. HMRC has other powers, including to obtain information from third parties in relation to the affairs of a taxpayer and from financial institutions. The process for exercising these powers is different and may require the approval of the Tribunal.

33. Paragraph 64 defines "tax position" in relation to a person to include that person's position as regards past, present and future liability to pay any tax (the extensive list of the taxes and levies included in the definition of "tax" is in paragraph 63).

34. There are certain restrictions on HMRC's exercise of its powers in paragraph 1. So far as relevant, paragraph 21(1) states that a notice may not be given in relation to any chargeable period where the taxpayer has submitted a tax return, but subsection (3) provides that those restrictions do not apply if any of the conditions A to D are satisfied. Condition A applies where there is an open enquiry into the tax return. Paragraph 19 provides that an information notice does not require a person to produce "information that relates to the conduct of a pending appeal".

HMRC'S SUBMISSIONS

35. HMRC submit that the requirements of paragraphs 1 and 21 are satisfied.

36. HMRC submit that enquiries are currently open into the tax years 2014/15, 2015/16 and 2016/17 and the conditions of paragraph 21 have been met.

37. Paragraph 1 of Schedule 36 provides that an officer of HMRC can require a person to provide information or produce a document if the information or document is "reasonably required by the officer for the purpose of checking the taxpayer's tax position." They say, for the reasons discussed separately below in relation to each item of information requested, that the information they seek is "reasonably required".

THE OUTSTANDING INFORMATION

38. We set out below the items in the varied Notice where information is still outstanding together with HMRC's explanation as to why the information is needed.

Items 2 & 3

"2. Provide a schedule of all bank and credit card accounts operated reporting all UK accounts in existence during the 2015-16 period. Alternatively your client may wish to let me have his own schedule reporting the same information.

“3. Provide sight of his UK bank and credit card account statements covering the 2015-16 period reported at point 2. This also includes providing sight of any chequebook and paying-in book foils relevant to the period.”

39. HMRC submit that this information/documentation is reasonably required to understand whether the sale of JKL Court in 2015/16 was in the nature of investment or trade. The property sale was not included within the 2015/16 tax return and the bank statements would enable HMRC to decide on the financial arrangements of the transaction such as who managed the bank accounts and enable them to see the timing and location of transactions on a day-to-day basis. Additionally, as the property has been omitted HMRC require sight of bank statements to ensure that there have been no further omissions of UK taxable income.

40. FN has provided conflicting accounts on time spent within the UK and has omitted to report rental income. The bank statements would enable HMRC to check there have been no further omissions or inaccuracies pertinent to FN’s tax position.

41. In addition, bank records will help to validate that costs/expenses were incurred.

42. HMRC have raised concerns on the beneficial owner of the JKL Court, this needs to be checked through the property transactions to ensure that FN’s tax position is correct as to whether he or somebody else owned the property. A review of FN’s banking records will enable HMRC to consider the recipient of and who benefited from the proceeds from the sale of JKL Court.

43. FN failed to report his UK source bank interest. His tax liability on the bank interest is limited by Section 811 Income Tax Act 2007 (“ITA 2007”). HMRC submit that he has an obligation to declare all income and gains in order to establish the correct tax liability. These documents are therefore reasonably required to satisfy HMRC that no further interest or other income has been missed.

Items 4a, 4b, 4d and 4e

“Property disposal Flat 30, JKL Court, during the 2015-16 tax period

4. In respect of the above property:

a. Please let me have sight of any invoices, statements, agreements between your client and The Estate Company in respect of any services, dealings, sale, etc. of the property.

b. ... evidence to show where the proceeds from the sale was deposited.

d. Please let me details along with evidence as how the refurbishment works were funded. If the works were funded by loans please let me have sight of the loan application(s), agreement(s), and statement(s).

e....evidence to show how the purchase was funded.

44. HMRC submit that these documents/information are reasonably required to check whether the transaction is property trading or an investment.

45. If it is decided from the facts that FN was trading, then there is an Income Tax charge on profits from the non-resident’s trade carried on wholly or partly in the UK. HMRC submit that the documents/information will enable them to ascertain what, if any, trading activities were carried on in the UK, where these activities were carried on from in the UK, and who (UK personnel) carried on the non-resident’s trading activities within the UK.

46. The consequence in regard to the tax treatment for trading and investment would differ and documents/information would enable HMRC to determine whether the transaction meets the ‘badges of trade’.

47. FN provided conflicting accounts of intending to rent JKL Court and it is clear that the information is reasonably required to check the tax position. FN failed to declare the sale of JKL Court on his 2015/16 return. He was required to do so by Section 14B TCGA 1992. Contrary to FN’s contentions, the charge to capital gains on UK property by non-residents was introduced by Section 37 and Schedule 7 Finance Act 2015 with effect from 6 April 2015. Therefore, the sale of the property has not been reported and the return is inaccurate. Information is reasonably required to ensure the correct calculation of the capital gain if it is decided on the facts that the nature of the transaction is investment.

48. HMRC consider that the documents/information would enable them to understand who the beneficial owner of the property is, this would ensure whether FN or any other individual is the appropriate taxpayer who should be declaring the sale. HMRC do not consider that this is a third-party request. No documents/information have been requested from a third party, only FN. A concern over beneficial ownership naturally means that other individuals are involved but it does not restrict HMRC from checking the FN’s tax position as to whether he owned the property. This will ensure the accuracy of the return and that the correct tax liability is charged.

49. Evidence on the works are needed to ensure that they have been properly incurred and understand how they were funded as these are considerations of the badges of trade, and clearly these are again reasonably required to check the tax position.

Item 6c

“PIB prime records to support the figures reported in your client’s 2015-16 tax return: Management fee of £1,521 relating to [FN’s son].

Please let me have:

- details of the individual relationship to your client,
- sight of expense invoice(s),
- sight of contract/agreement for services provided,
- details of duties along with timesheet showing duration of the services carried out,
- evidence of payment being made to the individual,
- and evidence that the payment was at commercial rates.”

50. HMRC submit that they need to check that this expense claim was incurred wholly and exclusively for the purposes of the property investment business. Given the familial connection, HMRC need to ascertain if the claim is allowable or if it was of a personal nature, therefore it is reasonably required.

Item 7

“Property Income Business (PIB) covering the 2015-16 tax period

7. Please let me have sight of statements for bank and/or credit card accounts used wholly or partially for the PIB covering the 2015-16 tax period. This should include sight of any relevant chequebook and paying-in book foils for the period.”

51. HMRC submit that the bank statements requested relate to the rental property of ABC Court and these are reasonably required to confirm the rental figures reported in FN’s

2015/16 tax return and confirm that no other related income or expense reimbursement has been received by FN.

52. HMRC will be able to ascertain the expenses and whether they were incurred wholly and exclusively for the purposes of that business. HMRC submit that ABC Court is a property that FN jointly owns with his daughter. The documentation requested will enable HMRC to ascertain who managed and organised the business and who the taxable profits fall upon. HMRC reiterate that this is not a third party request, the information has been requested from FN to ascertain if he is the beneficial owner and that relates to his tax position and it is therefore reasonably required.

53. HMRC submit that rents have been omitted from DEF Court and the banking records will enable HMRC to be satisfied that any further rents have not been omitted.

Item 9a

“Other UK property disposals

In respect of your client’s 2014-15 tax return (which is under a S9A TMA1970 enquiry) covering the period 6 April 2014 to 5 April 2015 please let me have the following:

9. In respect of the disposal of Flat 10, DEF Court, please let me have:

a. ...evidence to show where the proceeds from the sale were deposited.”

54. HMRC submit that they reasonably require evidence of the where the proceeds from sale were deposited to help understand the background and transaction details so that the sale of DEF Court can be confirmed as an investment or trade.

55. HMRC submit that this evidence will enable HMRC to confirm from the property disposal if the proceeds were received by, belonged to, and used for the benefit of FN, and not a UK resident family member.

56. In addition, HMRC submit that the evidence would allow HMRC to better understand the later JKL Court transaction.

57. HMRC submit that the outstanding items consist of nine items total, all of which are not onerous requests. FN has been asked to provide bank statements and details of financial transactions which would not be onerous or time consuming to provide. Many of the items are simple pieces of information which could be easily obtained.

58. On 19 August 2019, HMRC issued a jeopardy amendment to the FN for the tax year 2015/16 under Section 9C TMA 1970. HMRC submit that a jeopardy amendment is not appealable but the decision not to postpone collection of the tax is. HMRC originally partially suspended the collection and the FN appealed the postponement to the Tribunal.

59. FN has made submissions on this point, but there is no ongoing appeal against the postponement as the Agent withdrew from the appeal on 2 February 2021. The full amount of the jeopardy amendment is now postponed, therefore there is no pending tax appeal within the meaning of paragraph 19 Schedule 36.

60. HMRC further submit that the amendment was raised to prevent any loss of tax based on the information which was held at that time. HMRC are still able to close the enquiry under section 28A TMA 1970 and may have a different view on the tax position if the information and documents are provided. Therefore, the issuing of a section 9C “jeopardy amendment” does not mean that further information/documentation are not required, and it does not mean that its conclusions are final as the enquiry is still open and ongoing

MR AHMED'S EVIDENCE

61. We heard evidence from Mr Maruf Ahmed, an officer of HMRC, who has worked in the Technical & Specialist Team since April 2015. He provided a witness statement and, in addition to giving oral evidence (in which he primarily drew attention to the key reasons why HMRC are seeking the information in the Notice), he was cross-examined by Mr Maas. Without repeating Mr Ahmed's exposition of HMRC's explanation of why particular items were sought (which is summarised above), we set out below the main points to emerge from Mr Ahmed's evidence (including Mr Maas' cross-examination).

62. Mr Ahmed explained that he had structured the Notice as a formal notice together with an accompanying letter requesting information and documents because he considered it to be a better way of conveying to FN and the Agent the reasons why the remaining items are reasonably required, whilst at the same time addressing the points raised by the Agent's letter of 28 June 2019.

63. Turning the items requested, as far as items 2 and 3 are concerned (banking information relating to the 2015/2016 tax year) Mr Ahmed's view was that FN's failure to report the sale of JKL Court as a chargeable gain (the CGT regime extended to residential property gains from 6 April 2015) meant that his return was inaccurate. He also took the view that FN's return was inaccurate in that it failed to include UK source income (even where the UK interest income was not chargeable to tax). He had also mis-reported the amount of time he had spent in the UK.

64. Having established that FN filed inaccurate returns for 2014/2015, 2015/2016 and 2016/2017, Mr Ahmed took the view that he needed to look at outstanding bank and credit card information and statements in order to check whether anything else had been omitted. During Mr Ahmed's compliance check, FN has disclosed failures to declare rental income. In his view, an enquiry into a tax return is not limited to checking what has been declared in the returns; the enquiry is to ensure that there are no other relevant omissions of income or gains or relevant information.

65. Looking at the banking records will also enable him to confirm that the various property expenses for JKL Court were actually incurred by FN. It will also help him to consider whether property trading or investment activities were carried on in the UK as these may provide details of transactions relating to JKL Court.

66. Mr Ahmed considers it "essential" that he makes a holistic examination of all the financial records relating to JKL Court in order to have a full picture of the background about how the property transaction was managed and organised. This is because, if FN is trading, he will need to charge income tax on profits.

67. Reviewing FN's banking records will also help to consider whether he was a recipient of the proceeds of the sale and whether the proceeds belong to him and were used by him. For a number reasons Mr Ahmed has concerns about the beneficial ownership of the properties in FN's legal ownership. The outstanding banking information and records will help him to come to an overall view on FN's tax position.

68. As far as item 4 is concerned, Mr Ahmed is again concerned about whether the property is an investment or trading transaction. To decide whether a transaction is trading involves looking at all the surrounding facts and circumstances and the information sought will help him to do this. A letter from The Estate Company provided by FN contradicts the explanations offered by the Agent and Mr Ahmed needs to review the outstanding documents and correspondence between FN and The Estate Company prepared at the time of the property transaction to help him understand the thinking behind the transaction.

69. Again, Mr Ahmed has concerns about whether FN was the sole beneficiary of the property and the information requested under items 4b, 4d and 4e are required to enable him to confirm whether FN funded the purchase and refurbishment and whether he was a beneficiary of any profit or gain on the sale. That will enable him to consider whether FN is the right person to be assessed for tax.

70. Mr Ahmed needs the items at 4d and 4e to enable him to ascertain the method and source of finance for the property. This is part of his review of the badges of trade. A connected company (Company Y) invoiced over £110,000 of refurbishment costs relating to JKL Court. Mr Ahmed needs to understand the debt and payment arrangements between FN and the connected company. All the information sought at items 4a, 4b, 4d and 4e are required to facilitate an holistic examination of the JKL Court transaction. This is particularly important given that a linked company (Company Y) describes its activities as construction of domestic buildings. As a result of Company Y's involvement, the refurbishments appear to have made the property significantly more valuable. The involvement of a real estate trading company in the transactions raises an inference that this may be a trading transaction to.

71. As far as items 6c and 7 are concerned, Mr Ahmed needs the banking records to check payments. He had seen various estimated invoices/costs and also claims for costs by FN's son. He needs to check all of these and banking records provide a reliable, objective source of information. He needs to confirm the level of income and wants to be sure that the figures for rents in the tax return are correct.

72. Again, there are issues around beneficial ownership of the property and Mr Ahmed needs financial information in order to see who receives the rent and who it really belongs to. FN has provided conflicting documents in relation to ownership of the property and the financial information will help to clarify the position.

73. As regards item 9a, the DEF Court transaction shows a similar pattern of what was later repeated with JKL Court (purchase, refurbishment, sale). Mr Ahmed's needs evidence to show where the proceeds from the sale were deposited to help understand the background to this transaction. An examination of the evidence will enable him to confirm that the proceeds were received wholly by and belong to FN.

74. As far as his questions around beneficial ownership are concerned more generally, Mr Ahmed's view is that this is not a third party request. He is checking FN's position and comparing his assertions of 100%, outright ownership with records that show there may be joint ownership. Mr Ahmed wants to be sure that FN is paying the right amount of tax. The information may show that someone else is taxable on an amount, but fundamentally Mr Ahmed is checking FN's position.

75. As far as the jeopardy amendment is concerned, this was issued because Mr Ahmed had engaged in protracted correspondence with the Agent. Various assertions were made for which no supporting evidence was ever provided. Mr Ahmed kept asking for information and getting extension requests. Particularly given FN's residence in Jurisdiction X, Mr Ahmed took the view that this could be a delaying tactic enabling FN to get rid of all of his assets by the time an assessment was raised. The section 9C jeopardy amendment was made to forestall the risk of this. After he made the jeopardy amendment he started to get a flow of information on JKL Court. As far as Mr Ahmed is concerned, the jeopardy amendment is not the end of the story. He made the amendment on the basis of what he knew at the time (essentially being presented with assertions and no cooperation). The Agent had previously said that he was not going to provide any information. The section 9C amendment has now been postponed. FN has made a payment on account and Mr Ahmed is comfortable that if

any tax is ultimately assessed it will be paid. As far as the Notice is concerned, Mr Ahmed's enquiries are still ongoing. He hasn't had all the information documents he needs. In particular, he isn't able to conclude his analysis of the JKL Court and DEF Court transactions, consider all the facts and circumstances and close his enquiries. He regards his enquiries as ongoing and needs the banking records to make an objective review and reach a conclusion.

FN'S SUBMISSIONS

76. Mr Maas submitted that here are two issues: has the assessment been validly raised and, if it has, is the information requested "reasonably required by HMRC for the purpose of checking FN's tax position".

77. Paragraph 1 of Schedule 36 entitles an HMRC Officer to require a taxpayer to provide information or produce a document but only if "the information or document is reasonably required by the Officer for the purpose of checking the taxpayer's tax position". If HMRC think that FN does not have a tax liability but someone else does, they cannot issue a paragraph 1 notice to require FN to provide information in relation to someone else's affairs. This raises an important issue, namely does paragraph 1 entitle HMRC to information that they require partly to enquire into FN's affairs and partly to enquire into someone else's affairs. Mr Maas submits that the answer must be, No, it does not. It is clear from later provisions of Schedule 36 that if HMRC seek information about a third there is a completely different process which may involve seeking the prior permission of the Tribunal. If HMRC were able to bypass that judicial oversight that Parliament clearly intends by finding some way in which the third party information impacts the affairs of the taxpayer, that would undermine the distinction that Parliament has drawn between first and third party information. This suggests that the HMRC's enquiry referred to in para 1 must be solely into the affairs of the taxpayer. In this case, HMRC has opened an enquiry into FN's tax returns for the three years 2014/15, 2015/16 and 2016/17. Mr Ahmed has raised the information notice in connection with that enquiry. Accordingly, the issue is whether the information requested in the information notice is reasonably required for the purpose of Mr Ahmed's enquiry into FN's tax returns for those three years. In their Statement of Reasons dated 18 March 2022, HMRC indicate that they "... have concerns about who benefited from the property transactions and/or the beneficial ownership of the properties in FN's legal ownership given the familial connections associated with FN's property transactions and FN's UK company Company Y that carried out the refurbishments to the JKL Court property."

78. This position was confirmed in *Metropolitan International Schools Limited* (TC 08322) where the FTT said that a particular piece of information can only be reasonably required if it is relevant to one of the issues raised and can assist to check the tax position of the taxpayer in relation to those issues. The parts of the information requested that FN accepts is reasonably required have been supplied to HMRC. FN has no objection to providing reasonable information. What he objects to is HMRC mounting a fishing expedition into his personal life.

79. Under Article 8 of Schedule 1 to the Human Rights Act 1988, FN is entitled to protection for his private and family life except to the extent that it "is necessary in a democratic society in the interests of ... the economic wellbeing of the country". Mr Maas emphasised the word "necessary". Simler J in *R (aoDerrin Brother Properties Ltd) v HMRC* [2014] EWHC 1152 (Admin) made clear at paragraph 20 that HMRC are not entitled to use Schedule 36 powers for a fishing expedition.

80. An important aspect of this case is that FN is not, and never has been resident in the UK. He is a citizen of Jurisdiction X living in Jurisdiction X. This is important because there seems to be a difference of opinion between Mr Ahmed and FN's advisors as to the tax obligations of a non-resident individual. As these are pertinent to what information might be reasonably required for the purposes of checking FN's tax returns, Mr Maas addressed those obligations.

81. Section 8(1) of the Taxes Management Act 1970 ("TMA") imposes an obligation to submit a tax return. More precisely, "for the purpose of establishing the amount in which a person is chargeable to income tax and capital gains tax for a year of assessment ... he may be required by a notice given to him by an Officer of the Board (a) to make and deliver to the Officer a return containing such information as may reasonably be required in pursuance of the notice". FN's advisors interpret this as meaning that he is required to make a return of the amounts chargeable to income tax and capital gains tax. Mr Ahmed appears to interpret this as meaning that he must make a return of all income arising in the UK irrespective of whether or not it is chargeable to income tax.

82. Section 811 of the Income Tax Act 2007 ("ITA") imposes a limit on the liability to income tax of non-UK residents. A non-UK resident's liability to income tax for a tax year is limited to the sum of amounts A and B. Amount A is withholding taxes, which are not relevant in this case. Amount B is the amount that would be the non-resident's liability to income tax if his "disregarded income" were left out of account. Disregarded income is defined in section 813. Sub-section (1)(a) lists disregarded savings and investment income, which is defined in section 825. Section 825(2) disregards interest income.

83. This is relevant because Mr Ahmed criticises FN for not having included UK bank interest on his return, whereas the reason it was not included is that FN's advisors do not believe that there is any obligation to declare disregarded interest on the tax return. It has no relevance to the amount in which he is chargeable to income tax. However, the real issue in dispute is that Mr Ahmed believes that FN has taxable profits from a trade of property dealing whereas FN denies ever having carried on such a trade. The starting point in deciding what is reasonably required for the purpose of checking FN's tax position must be what HMRC are checking. They are checking three of his tax returns in accordance with section 9A TMA.

84. Mr Maas started his analysis with section 28A TMA, which deals with the completion of enquiries into a personal tax return. Sub-section (2) sets out the purpose of an enquiry. It states that a closure notice must state the Officer's conclusions and ... make the amendments of the return required to give effect to his conclusions". In other words, the Officer's task in relation to an enquiry is to reach conclusions and make the amendments of the return required to give effect to those conclusions. That is the goal of Mr Ahmed's enquiry; to enable him to reach conclusions.

85. Section 9C TMA allows for an amendment of self-assessment during an enquiry to prevent loss of tax. Sub-section (2) states

"If the officer forms the opinion

a) that the amount stated in the self-assessment contained in the return as the amount of tax payable is insufficient, and

b) that unless the assessment is immediately amended, there is likely to be a loss of tax to the Crown, he may by notice to the taxpayer amend the assessment to make good the deficiency".

86. Mr Ahmed has in fact amended FN's returns under section 9C to make good the amount that he considers is insufficient in relation to the alleged property dealing. FN is not entitled to appeal against a section 9C amendment until the enquiry is completed but certainly intends to do so at that stage. He can apply for the tax assessed to be postponed and has done this. The reason Mr Maas raises this is that if the purpose of the enquiry is to enable HMRC to make a decision as to whether FN's return requires amendment and they have already amended it to reflect an opinion that the surpluses on FN's property transactions constitute trading profit, it is hard to see how they can reasonably require any further information to enable them to decide whether the return needs to be amended. They have already decided that it does, and made the appropriate amendments. Mr Ahmed does not need to enquire any further into these issues. He has already reached his conclusion in relation to them. When he closes his enquiry and FN is able to appeal the amendments, the onus will be on FN to displace Mr Ahmed's amended amount. It will not be for HMRC to prove anything.

87. Mr Maas drew our attention to *Avonside Roofing Limited* [2021] UKFTT 158 where the Tribunal said that a person's tax position is not being legitimately checked or enquired into if the position is one that cannot be corrected by an enforceable assessment. As Mr Ahmed has already raised the equivalent of an assessment, he clearly cannot raise another as a result of the Notice.

88. Mr Maas also referred us to the recent FTT decision in *Jack Yerou* [2022] UKFTT 00079 (TC) where the Tribunal said there is no point in upholding an information notice where it is obvious that the substantive issue will be disputed on an appeal. This is FN's position as well.

89. Turning to the Notice itself, Mr Maas criticised it for not directly telling the taxpayer what the law requires from him, but instead refers him to an enclosed letter to his agent. That letter is not solely a request for information. It also contains arguments. Accordingly it is not easy for FN to work out what the law requires from him. In *R D Utilities Limited* [2014] UKFTT 303(TC) the Tribunal said that section 36 notices need to be expressed in clear terms so that it should be a straightforward matter for both parties to know whether an information notice has been complied with. Mr Maas does not think the notice meets that test.

90. The major items that Mr Ahmed contends he reasonably requires are UK bank statements and credit card statements. In view of the very limited items chargeable to UK tax on a non-resident, Mr Maas cannot see how such statements can be reasonably required. Clearly very little of the personal information on these items can relate to the UK properties in dispute. This is not a case where a taxpayer has intermixed his business and personal life. In such circumstances he does not think the intrusion into FN's personal affairs can possibly be justified. In any event, Mr Ahmed already has the completion statements on both the purchase and sale of the two properties that he is contending constitute a trading transaction. Require means "needs", not "would be interested in seeing". HMRC cannot "need" information that they already have and have already found to be sufficient to support an amendment under section 9C.

91. Mr Maas also drew our attention to paragraph 19 of Schedule 36. The only reason that FN does not have a pending appeal against Mr Ahmed's amendment is that section 9C defers his right to appeal against until HMRC close their enquiry. He does however have a pending appeal against HMRC's decision not to postpone the tax arising from Mr Ahmed's amendment, and that, Mr Maas submits, is a pending appeal relating to tax.

92. Mr Maas' final point was that FN is resident in Jurisdiction X. It is well known that the view of human rights in Jurisdiction X is significantly different from that in the UK. In particular, capital punishment in Jurisdiction X remains a matter of international concern. Mr

Maas' reason for mentioning it is that, although the UK does not have a double tax treaty with Jurisdiction X, it is understandable that FN might worry that information he provides to HMRC might find its way to the government of Jurisdiction X. Mr Maas submits that this is a factor that we ought to bear in mind when deciding what information is reasonably required

DISCUSSION

93. We will deal first of all with Mr Maas's submission which goes to matters other than whether the information requested is "reasonably required" by Mr Ahmed for the purposes of checking FN's tax position.

94. Mr Maas' principal point focused on the interaction between the jeopardy amendment and the Notice. As we have observed, paragraph 21 does not allow an information notice to be issued for a period in relation to which a person has made a tax return unless a notice of enquiry has been given and the enquiry has not been completed. Section 9C (which allows an officer to make a "jeopardy amendment") applies "where an enquiry into a return is in progress" and for these purposes the period during which an enquiry is in progress starts when the notice of enquiry is given and ends with the issuing of a closure notice. Section 9C clearly contemplates that an enquiry may continue to be in progress after the making of the jeopardy assessment; that section does not provide that the making of the amendment ends the enquiry but rather makes it very clear that it is a closure notice which does so. Mr Maas is undoubtedly right when he says that the purpose of an enquiry is to enable an officer to reach conclusions (which are required to be set out in a closure notice), but section 28A TMA provides that an enquiry is completed when the officer informs the taxpayer of this by notice (a partial or final closure notice). Mr Ahmed has not served a closure notice on FN and therefore his enquiry is continuing. That addresses Mr Maas' point on *Avonside Roofing Limited* [2021] UKFTT 158. This is a valid enquiry because HMRC are in a position to issue a closure notice to correct FN's returns in the light of the outcome of their enquiries.

95. Mr Maas had a secondary point here that, whatever the position on whether a jeopardy assessment ends an enquiry, Mr Ahmed cannot reasonably require any more information on matters to which the jeopardy amendment relates as he has clearly made up his mind. In order to be able to make a jeopardy amendment, an officer must "form an opinion" that the amount of tax stated in a self-assessment return is insufficient and that, unless there is an immediate amendment, there is likely to be a loss of tax to the Crown. Mr Ahmed has explained how he formed that opinion, but he has also made it crystal clear that he has not reached a definitive conclusion on FN's tax position and is open to receiving (indeed very keen to receive – hence the Notice) further information and take it fully into account in considering FN's tax position.

96. Mr Maas appeared to suggest that there was a pending appeal relating to tax and, as a result, paragraph 19 precludes the Notice from requiring FN to produce any information that "relates to the conduct" of that appeal. The first point to make here is that there is no appeal on foot. FN withdrew his appeal relating to the postponement of the jeopardy amendment on 2 February 2021. Even if an appeal were on foot, paragraph 19 provides that a person is not required by an information notice to produce information which "relates to the conduct of the appeal". A document 'relates to the conduct of a pending appeal' if it has been brought into existence as part of the preparation for the presentation of an appeal. This phrase is not apt to cover information or documents which may be used in presenting the appeal, for example as evidence, but which existed before the appeal process began. Mr Maas has not suggested that there are any documents within this description and so, to the extent he is making a point on paragraph 19, it fails.

97. Linked to this is Mr Maas' point on the recent FTT decision in *Jack Yerou*, [2022] UKFTT 00079 (TC). In that case the taxpayer submitted (as summarised at paragraph [35]) that

“... the requests for information were unreasonable as HMRC had already reached final conclusions and issued discovery assessments which have been appealed. It was submitted that to allow HMRC to continue to issue and enforce information notices after the issue of an assessment and the submission of a related appeal would usurp the powers of the Tribunal, including those relating to disclosure and witness summons, which apply to both parties in equal measures.”

98. In relation to this, the Tribunal observed (at paragraphs [54] and [55]):

“On the facts of this particular case and taking into account the overriding objective, we do not consider that any useful purpose would be achieved by prolonging matters by ordering that the information notice be complied with before any Tribunal proceedings are entered into. We do not consider that the information is therefore reasonably required, in context, for the purpose of checking (prior to any appeal to this Tribunal) the appellants' tax position or their explanations as to what they consider to be their tax position.

Whilst it will often be desirable for matters to be resolved without recourse to the Tribunal, the appellants in this case have effectively demonstrated that they do not wish to facilitate an early resolution to the disputes.”

99. The position here is, of course, very different. Mr Ahmed is, as his evidence made clear, keen to continue his enquiries and reach a conclusion. He has not raised any assessments and is open to considering further material and argument. It is not the case that FN or HMRC have “effectively demonstrated that they do not wish to facilitate an early resolution to the disputes”. When served, the Notice was not an attempt to usurp the powers of the Tribunal to regulate proceedings before it, nor is it performing such a function now.

100. Next, Mr Maas suggested that Mr Ahmed is really looking for information about members of FN's family. He suggested that Mr Ahmed was trying to find out if others had UK taxable income and gains under the guise of checking FN's own position. That is why he is so interested in the beneficial owners of property. There are, Mr Maas submits, different procedures in Schedule 36 for obtaining information about people other than the taxpayer in question and Mr Ahmed is trying to get round these by asking for information that appears on the surface to be relevant in relation to FN but is much more relevant in relation to someone else. We agree with Mr Maas' observation that Schedule 36 sets out different procedures for obtaining information from one person which is required to check the tax position of someone else. However, we do not consider that this is what Mr Ahmed is doing. It is only requests 4b and 9a which are in point here. HMRC are asking for information about where the proceeds of disposing of two properties were deposited. Mr Ahmed explained that this information was needed because it would help to validate the funding of the property (for example, if the money was all deposited with a lender, it might suggest a very high level of gearing, which is one of the badges of trade). If it was paid to a different third party, it might help to resolve the true ownership of the property and indicate whether FN's tax position is that he is liable for tax on all the profit or gain. As Mr Ahmed put it, checking FN's tax position means checking that his position is correct, not merely checking that a particular return does not understate his liability. Inevitably, whenever HMRC ask for information from a taxpayer that relates to their dealings with another person, they will learn something about that other person. Provided the information HMRC seek is “reasonably required” to check the tax position of the taxpayer in question, the fact that the information will also tell

HMRC something about someone else does not mean that they cannot seek that information from the taxpayer. Mr Ahmed has satisfied us that he needs this information to resolve uncertainties in his understanding of FN's tax position.

101. As to FN's ECHR rights, in particular his right under Article 8 to respect for his private and family life, Mr Maas did not expand his submission beyond observing that FN has rights under the ECHR that we should be mindful of. In *R (oao Derrin Brother Properties Ltd and others) v Revenue & Customs Commissioners*, [2014] EWHC 1152 (Admin), Simler J addressed the interaction of Article 8 and HMRC's Schedule 36 powers as follows:

“[71] I am in little doubt that the Notices interfere with the privacy and confidentiality rights the Claimants have in respect of their business documents so that art 8 is engaged by these facts. The interference is however at a relatively low level because although confidential, it is not suggested that the material is personal, privileged or commercially sensitive. Further, HMRC (and the ATO) are restricted in their use and disclosure of such documents—HMRC may only use the documents in connection with their statutory tax collection, management and enforcement functions and may not disclose information held in connection with their functions save as expressly provided for by the Commissioners for Revenue and Customs Act 2005. Furthermore, if measures are taken against taxpayers by reference to documents so obtained (because they have failed to pay tax in accordance with their obligations to do so), they have the right of legal challenge at that stage.

[72] Moreover art 8 expressly envisages that interference with the right to respect for privacy might be necessary in a democratic society in the interest of the economic well-being of the country, or for the protection of the rights and freedoms of others. So to the extent that Sch 36 notices interfere with rights of privacy, such interference will be justified where the notice is issued according to law, in pursuit of a legitimate aim, and necessary in a democratic society for protecting the taxation system and revenue.... In addition to a person's right to maintain privacy and confidentiality of business documents there is a public interest in the prompt, fair and complete collection of tax revenue which falls well within art 8(2) as ample ground on which the right to respect for private correspondence might in a proper case be abrogated. Parliament has recognised these competing interests in the Sch 36 scheme and has in the provision of adequate and effective safeguards against oppressive action by HMRC struck the balance appropriately so that a notice issued in accordance with Sch 36 will be a proportionate interference. Moreover, I am satisfied on the material that has been placed before me that the Notices were issued according to law, in pursuit of a legitimate aim, and were necessary in a democratic society for protecting the taxation system and the revenue.”

102. In our opinion, provided the Notice is issued in accordance with the law and is reasonable and proportionate to the underlying purposes of Schedule 36, it will not infringe FN's Article 8 rights. As will become apparent, we consider that the Notice was validly issued in accordance with the requirements of Schedule 36. So, provided its requirements are reasonable and proportionate, which we equate with it only seeking information which is “reasonably required” to check FN's tax position, we do not consider that the Notice will infringe FN's Article 8 rights.

103. Mr Maas has a secondary point here too. He says that Mr Ahmed is not permitted to go on a “fishing expedition” and cites in support of that position a passage (paragraph [20]) from Simler J's judgment in *Derrin* (supra), where she observed:

“Finally, HMRC may not use their Sch 36 powers for a fishing expedition—whether for their own or the purposes of another revenue authority. A broadly drafted request will not be valid if in reality HMRC are saying 'can we have all available documents because they form so large a class of documents that we are bound to find something useful'. What is required is that the request is genuinely directed to the purpose for which the notice may be given, namely to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position. It is no objection however, to the issue of a third party notice that it seeks disclosure of 'conjectural' documents; in other words documents that might not exist.”

104. Mr Maas' statement of the law is, of course, entirely correct. A request such as Simler J described is unlikely to be reasonable or proportionate. She described a “fishing expedition” in terms redolent of indiscriminate bottom trawling ('can we have all available documents because they form so large a class of documents that we are bound to find something useful') rather than an angler sitting patiently by the riverbank with a single carefully positioned rod. The Notice prepared by Mr Ahmed does not ask indiscriminately for everything available but is a carefully drawn-up list of material which Mr Ahmed, after careful thought which he explained when he gave evidence, sees as necessary to check what he regards as the areas of doubt and uncertainty he has identified in his understanding of FN's tax position. Mr Ahmed cannot go on a fishing expedition, but we do not consider that this is what he is doing.

105. We have noted Mr Maas' observation that FN is resident in Jurisdiction X. When invited to do so, Mr Maas did not make anything much of this point. When pressed, he eschewed any suggestion that HMRC might not be a secure repository for any information that FN might furnish in response to the Notice. FN has (as Mr Maas was anxious to make us aware of) already provided HMRC with a lot of information in response to the Notice, so it seems rather late in the day for points around information security to be raised, particularly in a tribunal which sits in public and publishes its decisions. Mr Maas did not make much of this point, nor will we. That said, we have no wish to cause FN any difficulty in his home country. There is no need for this decision notice to be published and we will direct that it should not be published. [NOTE: The Tribunal subsequently agreed to an anonymised version of this decision notice being published.]

106. Mr Maas criticised the format of the Notice, relying on *R D Utilities Ltd*, [2014] UKFTT 303 (TC). Here Judge McKenna commented (at paragraph [10]) as follows:

“The Tribunal takes the view that Information Notices should be expressed in clear terms and that it should be a straightforward matter for both parties to know whether an Information Notice has been complied with. That is why HMRC guidance states that the Information Notice should request facts and not opinion. In this case, the built-in assumptions on which the requests for information were based made it impossible for the parties to know whether the Notice had been complied with because the accuracy of the assumptions was disputed by the Appellant. In those circumstances, I have concluded that it would be fair and just to set aside the request for “information” in the Information Notice. I do so under paragraph 32 (3) (c) of Schedule 36 to the Finance Act 2008 because, in my view, information that it is impossible to supply cannot be “reasonably required” by HMRC. It is unnecessary for the Tribunal to make any order in respect of the request for documents in the Information Notice, which the Tribunal is satisfied has been complied with by the Appellant in any event.”

107. As set out at paragraph [62] above, Mr Ahmed explained that he had structured the Notice as a formal notice together with an accompanying letter requesting information and documents because he considered it to be a better way of conveying to FN and the Agent the reasons why the remaining items are reasonably required, whilst at the same time addressing the points raised by the Agent's letter of 28 June 2019. The requirements of the Notice itself (which we have directly copied into this decision notice where items are outstanding) are perfectly clear. It is not the case that the Notice is asking for opinions, nor are its requests impossible to understand because they are based on disputed assumptions. The Notice seeks particular, clearly identified pieces of information or documents.

108. Linked in some ways to his criticism of the format of the Notice was Mr Maas's focus on FN's returns (on income and gains from residential property). Particularly in his cross-examination of Mr Ahmed, Mr Maas placed great emphasis on what FN might (or might not) be required to return and how gains on residential real estate were reported by non-residents. That seems to us to miss the point that the power paragraph 1 confers is to obtain information reasonably required to check a person's "tax position". The power is not to obtain the information thought necessary to check the sufficiency of tax self-assessed in a particular return, but rather the information needed to check the overall position of the taxpayer. For example, JKL Court was disposed of shortly after the scope of CGT was extended to gains on residential real estate made by non-residents, which included a "re-basing" of affected properties to current market value. The transaction was considered to be a disposal of an investment and it is, therefore, quite likely that no gain was made, but that does not mean that obtaining information about the transaction was irrelevant to considering whether it gave rise to a trading profit, which is part of the consideration of FN's overall tax position.

109. It will be apparent from this discussion that we do not accept Mr Maas' criticisms of the validity of the Notice overall. It remains for us to consider whether the particular items sought are "reasonably required" for the purposes of checking FN's tax position and we deal with these briefly as follows:

110. Items 2, 3 and 7 require FN to produce statements for all his UK bank and credit card accounts for 2015-16 and all similar accounts used wholly or partly for his PIB in that period. We imagine that there may be some overlap here. HMRC say that, given the inconsistencies in some of FN's statements, his repeated disclosure failings and this information is needed in order to provide some objective measure against which to check the accuracy of FN's disclosures to date in particular that nothing else remains undisclosed and that the submitted figures for income and expenditure are correct. As (it is now agreed) FN is and was at relevant times non-resident and there is no suggestion that he has UK income or gains other than from UK real estate, we considered carefully whether items 2 and 3 are reasonably required, given that item 7 should disclose all UK real estate income. Item 7 will not, however, necessarily give HMRC bank and credit card statements relating to UK real estate acquisitions and disposals, as opposed to rental income derived during the period of ownership. For that reason, and more generally because of the inconsistencies in previous accounts given by the Agent and FN, we accept that Mr Ahmed has cause to approach FN's statements with a degree of circumspection and that sight of all PIB-related and other UK bank and credit card statements is reasonably required to "check" (which we interpret as coming to a sound, evidenced conclusion as regards) FN's tax position.

111. As to Items 4a, 4b, 4d and 4e, we have dealt with item 4b at paragraph [100] above. The other items here are clearly necessary to come to a robust conclusion as to whether the transaction is property trading or an investment. All the information sought is relevant to the "badges of trade". There is a suggestion that a letter from The Estate Company provided by FN contradicts the explanations offered by the Agent and Mr Ahmed needs to review all the

outstanding documents and correspondence between FN and The Estate Company prepared at the time of the property transaction to help him understand the thinking behind the transaction.

112. Item 6c is relatively modest. Nevertheless, given the familial connection, HMRC submit that they need to check that this claim was a valid, bona fide claim for a cost incurred wholly and exclusively for the purposes of the property investment business. Their information requests all go to this point, and we accept on that basis that the information sought is reasonably required in order to check FN's tax position.

113. We have dealt with item 9a at paragraph [100] above.

DISPOSITION

114. We consider that

- (1) the Notice was validly given; and
- (2) the information HMRC seek in the Notice is reasonably required for the purposes of checking FN's tax position.

115. It follows that this appeal is dismissed and the Notice confirmed.

RIGHT TO APPEAL

116. This document contains full findings of fact and reasons for the decision. Paragraph 32(5) of Schedule 36 provides that the decision of the Tribunal regarding an appeal made by a taxpayer is final.

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 12 January 2023