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First-tier Tribunal (Tax)

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INCOME TAX AND CAPITAL GAINS TAX - information notice made up of text of two earlier notices - penalty for failure to comply - statutory deadline for issuance of penalties - whether HMRC can refresh that deadline reissuing the notice –held, no - penalty invalid to the extent that related to requirements on first notice - in relation to the other requirements, HMRC failed to meet their burden of proof - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04311

BETWEEN

SADIQ AHMED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 4 August 2020 without a hearing under the provisions of Rule 26 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first received Notice of Appeal dated 19 June 2019 (with enclosures), HMRC’s Statement of Case (with enclosures) dated May 2020 and a witness statement from Mr Md Mudabbir Hussain of MHC Accountants Limited dated January 2020 and provided to the Tribunal on that date, and provided again on 8 June 2020 by way of Reply

DECISION

INTRODUCTION

1. On 11 October 2017 and 30 July 2018 HM Revenue & Customs (“HMRC”) sent Mr Ahmed information Notices (“the First Notice” and “the Second Notice” respectively). On 23 January 2019 HMRC issued a notice (“the Third Notice”) containing identical requirements to those in the First and Second Notices. All Notices were issued under Finance Act 2008, Schedule 36 (“Sch 36”).
2. On 19 March 2019, HMRC issued Mr Ahmed with a £300 penalty under para 39 of Sch 36 for failing to comply with the Third Notice. Mr Ahmed appealed the penalty.
3. I allowed his appeal and cancelled the penalty because:
 - (1) Sch 36, para 46 provides that a penalty can only be issued within the twelve months after a person becomes liable to a penalty. The penalty was issued more than twelve months after the First Notice. HMRC cannot refresh the twelve month time limit by the simple device of reissuing the notice or repeating the information requirements. To the extent that the penalty related to a failure to comply with the requirements to those in the First Notice, it is invalid.
 - (2) To the extent that the penalty related to information requests which were previously in the Second Notice, it was issued within the twelve month time limit. However, HMRC have the burden of proving that Mr Ahmed did not comply with those requirements, and Sch 36, para 18 provides that a notice can only require a person “to produce a document if it is in the person's possession or power”.
 - (3) After the issuance of the Second Notice, Mr Ahmed’s accountant and tax adviser, Mr Md Mueen Hussain of MHC Accountants Limited, emailed HMRC saying he was attaching “all” the relevant documents other than those which were no longer in Mr Ahmed’s possession or power, and he confirmed this in a witness statement. In contrast, HMRC have not provided the Tribunal with the documents themselves, or any explanation or witness evidence as to why they did not satisfy the requirements of the Third Notice, especially as there can be no failure to comply if documents are not in a person’s possession or power. HMRC therefore failed to meet their burden of proof in relation to the remaining information requirements in the Third Notice.

THIS APPEAL

4. The wording on the face of the Notice of Appeal clearly states that it is an appeal against two penalties totalling £600. This appeal therefore is not against the information notice itself.
5. One of the two penalties was dated 12 December 2017. HMRC said in their Statement of Case that they were withdrawing that penalty because they accepted it had been sent to the wrong address. That part of the appeal therefore lapsed.

THE EVIDENCE AND THE LEGISLATION

6. The Tribunal was provided with a Bundle of documents by HMRC; this contained the correspondence between the parties. Mr Hussain provided a witness statement which set out his evidence, although it concerned the appeal by making submissions on behalf of Mr Ahmed.
7. In coming to the findings of fact in the next part of this decision notice, I have considered all the evidence in the Bundle and that in Mr Hussain’s witness statement.
8. The legislation relevant to this appeal is set out as an Appendix to this decision.

THE FACTS

9. On 24 July 2017, HMRC wrote to Mr Ahmed, saying they had received information that he had “purchased and disposed of a number of properties going back over a number of years” and had failed to disclose these to HMRC.

10. No response was received, and on 11 October 2017, Mr O’Kane of HMRC issued Mr Ahmed with 36 Notice (“the First Notice”) requiring him to produce the following by 20 November 2017:

- (1) under the heading “statutory records”:
 - (a) purchase and sale documentation relating to a property in Bromley;
 - (b) all invoices for costs incurred in relation to that property which are allowable for tax purposes and
 - (c) bank statements showing the lodgement of the sale proceeds.
- (2) under the heading “other documents or information”:
 - (a) a schedule of the positions Mr Ahmed has held, with details of remuneration;
 - (b) details of the source of funds used to purchase the properties;
 - (c) mortgage statements for each of the properties;
 - (d) details of rents received, and bank statements showing the rental income;
 - (e) details of any source of income not notified to HMRC; and
 - (f) the reason why the tax returns had not been submitted.

11. On 20 December 2017, Mr O’Kane issued Mr Ahmed with a penalty notice. As noted above, this has since been cancelled because HMRC accept it was sent to the wrong address.

12. On 11 January 2018, Mr Hussain called Mr O’Kane to say he would be representing Mr Ahmed. Mr Hussain followed this with an email of the same date stating that Mr Ahmed had an income tax liability; UK property income and a capital gains liability from disposal of one property. He also told Mr O’Kane that Mr Ahmed had moved house and did not have all the receipts, but would try and obtain duplicate invoices from suppliers. Mr Hussain asked for an extension of time to 31 March 2018, which was granted.

13. On 6 April 2018, Mr Hussain filed Mr Ahmed’s tax returns for the tax years 2013-14 to 2016-17. Mr Hussain sent schedules of rental income for the three prior years to Mr O’Kane, and said there was no tax liability as a result of the figures on those schedules.

14. On 21 May 2018, Mr O’Kane asked for supporting evidence for:

- (1) the rental income for 2011 through to 2013; and
- (2) the capital gain made in 2014-15.

15. At some point, Mr O’Kane passed the case to Ms Rafferty. On 30 July 2018 she sent a second 36 Notice (“the Second Notice”) to Mr Ahmed. This comprised the requests for information made by Mr O’Kane on 21 May 2018, as follows:

- (1) supporting evidence for the rental statements for 2011 to 2013, to include:
 - evidence of building insurance/service charges;
 - mortgage statements; and
 - receipts for repairs and maintenance; and
- (2) with regard to the capital gain in 2014-15, supporting documentation of the sale and the expenses.

16. Ms Rafferty agreed an extension of time for Mr Hussain to gather those documents, and on 17 September 2018, he sent her an email with attachments. The email said he was sending “all the documents” about the properties covered by the Second Notice, but that some documents had been lost when Mr Ahmed moved house and the figures for repairs and maintenance were estimated. The Bundle contained none of the documents referred to in Mr Hussain’s email.

17. Ms Rafferty did not respond for over four months (see below), and Mr Hussain assumed the case had settled, other than in relation to penalties for late payment, which were dealt with separately. There were copies of that late payment penalty correspondence in the Bundle.

18. On 23 January 2019, Ms Rafferty sent Mr Ahmed another Sch 36 Notice (“the Third Notice”). It combined the text of the two previous notices, word for word.

19. On 14 February 2019, Mr Hussain called Ms Rafferty. Her contemporaneous note of the call records Mr Hussain said he had “sent everything apart from those lost in a house move, for these amounts, he estimated the figures”. Ms Rafferty told Mr Hussain that the earlier responses were “not complete and not sufficient to provide the figures on the tax return” and “stressed the importance of providing bank statements as none have been supplied to date”. Mr Hussain said he would need time to try and obtain the earlier bank statements. Ms Rafferty said she would clarify the information still outstanding.

20. On 18 February 2019 Ms Rafferty wrote to Mr Hussain repeating the content of the Third Notice. Mr Hussain accepted that he had “provided some invoices, receipts and statements” about the properties, and added “where you are unable to provide any more, or are unable to obtain copies from suppliers, please confirm this in writing”. In relation to the list of “other documents” previously listed on the First Notice, she said “please provide as much information as possible and any supporting documentation”. She extended the date for compliance to 4 March 2019.

21. On 26 February 2019, Mr Hussain informed Ms Rafferty that Mr Ahmed had ordered historic bank statements from 2010 to 2015 but these would take between 4 and 6 weeks to arrive (so between the end of March and early April 2019).

22. On 28 February 2019, a third HMRC officer, Ms Hughes, wrote to Mr Hussain saying she was taking over the case.

23. On 2 March 2019, Ms Hughes wrote again. Her email said:

- (1) she had reviewed the information provided by Mr Ahmed;
- (2) repeated the information list from the Third Notice;
- (3) noted that bank statements had not been provided; and
- (4) stated that she was not granting any further extension to comply with that Notice.

24. On 19 March 2019, Ms Hughes issued the penalty notice under appeal. On 23 April 2019, Mr Hussain wrote to Ms Hughes, expressing his frustration. He said there had been three officers on the case; he had submitted a lot of documents to the previous two officers and [does] not know exactly what documents you are looking for and that Mr Ahmed had submitted his tax returns following the First Notice and his tax affairs are up to date. This letter was treated as an appeal against the penalty notice, which was refused. On behalf of Mr Ahmed, Mr Hussain notified the appeal to the Tribunal.

THE TIME LIMIT FOR A PENALTY

25. One of Mr Hussain’s grounds of appeal was that the Third Notice was simply a repeat of the First and Second Notices. HMRC responded to that submission in their Statement of Case by stating that the Third Notice was “not identical” to the Second Notice.

26. That HMRC response was disingenuous, because the Third Notice also included the text from the First Notice. Mr Hussain was entirely correct: the Third Notice simply repeated the requirements in the first two Notices: it added nothing and it subtracted nothing.

27. The reason this matters is because:

- (1) Mr Ahmed was required to comply with the First Notice by the date on that notice, or such later date as was agreed by HMRC, see Sch 36 paras 1 and 44. As no extension was agreed, the date for compliance was the date on the First Notice.

with the First Notice was 20 November 2017.

(2) A person who fails to meet the compliance deadline becomes “liable” to a penalty under Sch 36, para 39. Mr Ahmed was therefore liable to the penalty from 21 November 2017.

(3) Where a person is liable to a penalty, HMRC are required by Sch 36, para 46(2) to assess the penalty within twelve months of that liability, unless the person has appealed the information notice (which was the case here). Thus, HMRC had to issue the penalty by 20 November 2018.

28. I considered whether HMRC had the power to extend that twelve month time limit by the simple device of issuing a new notice which repeated the text of the out-of-time notice. It is clear that the answer to that question must be no. It would entirely defeat the purpose of the statutory provision.

29. It follows that HMRC had no legal power to issue a penalty on 19 March 2019 for failure to comply with the requirements in the Third Notice which simply restated those in the First Notice, because the statutory twelve month deadline had already passed. A failure to comply with the information requirements in the Third Notice which simply repeated those in the First Notice does not provide a legal basis for the issuance of a penalty.

WHETHER THE INFORMATION NOTICE HAD BEEN COMPLIED WITH

30. The Second Notice was issued on 30 July 2018, so on 19 March 2019 HMRC were within the time limit to issue a penalty for a failure to meet those information requirements.

31. However, a penalty can only be issued if Mr Ahmed has failed to comply with the requirements set out in the Second Notice and repeated in the Third Notice. In considering that issue, it is relevant that:

(1) HMRC have the burden of proof in penalty cases, so must show there has been a failure to comply with the requirements and

(2) Sch 36, para 18 provides that an information notice can only require a person to provide documents or information if they are in that person’s “possession or power”.

32. On the basis of the evidence provided, I have already found the facts set out below, along with my observations:

(1) On 17 September 2018, Mr Hussain sent HMRC what he said were “all the documents” necessary to satisfy the Second Notice, with the proviso that some had been lost when Mr Ahmed moved house, and confirmed this on 14 February 2019, when according to Ms Rafferty’s contemporaneous records Mr Hussain told her he had “sent everything apart from those lost in a house move, for these amounts are my estimated figures”.

(2) On 18 February 2019 Ms Rafferty accepted that Mr Hussain had “provided some invoices, receipts and statements” about the properties, and added “if you are unable to provide any more, or are unable to obtain copies from suppliers, please confirm this in writing”. This request was made despite Mr Hussain having already said, on two previous occasions, that he had provided all the property-related invoices and receipts in Mr Ahmed’s possession or power.

(3) Ms Rafferty also asked for “as much information as possible and any supporting documents” about the list of “other documents”, but as these had previously been included on the First Notice, HMRC were out of time to issue a penalty.

(4) It was common ground that the early bank statements had not been provided, but as these too were required by the First Notice, HMRC were out of time.

33. Mr Hussain’s witness statement entirely supported his earlier oral and written statements as to the nature and extent of Mr Ahmed’s compliance.

34. However HMRC, on whom the burden of proof rests, did not provide the documents sent in by Mr Hussain on 17 September 2018. They did not file witness evidence from Ms Rafferty and/or Ms Vigney explaining why in their view the documents did not constitute compliance with the information requirements.

especially given that there can be no failure to comply if the requested documents are not in a person's "possession or power". Ms Rafferty's letter of 18 February 2019 is the only relevant evidence, and that does not assist HMRC: she was inviting further confirmation from Mr Hussain that the outstanding documents were in Mr Ahmed's "possession or power".

35. I find that HMRC have failed to prove that Mr Ahmed has not complied with those information requirements in the Third Notice which repeated those in the Second Notice. Since a penalty can only be imposed under para 39 if there has been a failure to comply with an information notice, HMRC's failure to prove its case means that the penalty cannot be upheld.

THE TRIBUNAL'S CONCLUSIONS

36. Mr Ahmed's appeal therefore succeeds because:

- (1) HMRC are out of time to issue a penalty for failure to comply with the information requirements in the Third Notice which had also been set out in the First Notice; and
- (2) HMRC had failed to prove that Mr Ahmed had not met the remaining requirements in the First Notice.

OTHER GROUNDS

37. Mr Hussain put forward other grounds of appeal, relating to HMRC's email protocol and HMRC's alleged failures to communicate with him. Given my conclusions above it is not necessary to address these other grounds.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 17 AUGUST 2020

FINANCE ACT 2008, SCHEDULE 36

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.

- (2) In this Schedule, “taxpayer notice” means a notice under this paragraph.

....

6. Notices

- (1) In this Schedule, “information notice” means a notice under paragraph 1, 2 or 5.

- (2) An information notice may specify or describe the information or documents to be provided or produced.

7. Complying with notices

- (1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

...

18. Documents not in a person’s possession or power

An information notice only requires a person to produce a document if it is in the person's possession or power.

...

39. Penalties for failure to comply or obstruction

- (1) This paragraph applies to a person who—

(a) fails to comply with an information notice,...

- (2) The person is liable to a penalty of £300.

....

44. Failure to comply with time limit

A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39...if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

45. Reasonable excuse

- (1) Liability to a penalty under paragraph 39...does not arise if the person satisfies HMRC or (on an application notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction, as determined by an officer of Revenue and Customs.

- (2) For the purposes of this paragraph—

- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,
- (b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and
- (c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

46. Assessment of penalty

- (1) Where a person becomes liable for a penalty under paragraph 39...-
 - (a) HMRC may assess the penalty, and
 - (b) if they do so, they must notify the person.
- (2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).
- (3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39...must be made within the period of 12 months beginning with the latest of the following:
 - (a) the date on which the person became liable to the penalty,
 - (b) the end of the period in which notice of an appeal against the information notice could have been given, and
 - (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

47. Right to appeal against penalty

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

- (a) a decision that a penalty is payable by that person under paragraph 39..., or
- (b) a decision as to the amount of such a penalty.

48. Procedure on appeal against penalty

- (1) Notice of an appeal under paragraph 47 must be given—
 - (a) in writing,
 - (b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and
 - (c) to HMRC.
- (2) Notice of an appeal under paragraph 47 must state the grounds of appeal.
- (3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or vary the decision.
- (4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

- (a) confirm the decision, or
 - (b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.
- (5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to appeals against an assessment to income tax.

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