[2018] UKFTT 513 (TC)

TC06682

Appeal number: TC/2018/02870

INCOME TAX – check into income tax position – notice under paragraph 1 Schedule 36 FA 2008 – whether officer had "reasonable grounds to suspect" underassessment: no, as not supported by any evidence – whether certain items statutory records: no, as the time limit had passed – notice set aside.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAURICE NEWTON **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DEREK ROBERTSON

Sitting in public at Alexandra House, Manchester on 14 August 2018

Mr David Bedenham, instructed by Rainer Hughes & Co, for the Appellant

Mrs Mary Donnelly, litigator in Solicitor's Office and Legal Services, HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Mr Maurice Newton ("the appellant") against a notice issued to him by an officer of HMRC under paragraph 1 Schedule 36 Finance Act ("FA") 2008. The notice as modified on a statutory review under s 49E Taxes Management Act 1970 ("TMA") required the appellant to provide to HMRC information under three headings for the years ended 5 April 2013, 2014 and 2015. Below where the decision refers to Schedule 36 without more it is a reference to Schedule 36 FA 2008.

The hearing

2. At 10 am, the time given to the parties and to the members of the Tribunal for the hearing of the appeal, no one for the appellant was present. Enquiries were made of the appellant's solicitors who informed our clerk that Mr Bedenham of counsel had been told that the hearing was at 2 pm and that he was about to catch a train which would arrive at Manchester Piccadilly station at about 1245.

3. It was not clear on what basis and by whom Mr Bedenham's chambers had been told that the hearing was at 2 pm. The problem we had was that another case had been listed for the afternoon starting at 2 pm, and the problem Mrs Donnelly had was that she had booked a flight to Belfast in the late afternoon which meant she would need to leave Alexandra House by 2.30 at the latest.

4. We decided to adjourn the hearing to 1 pm and made it clear that we would expect the case to last no more than an hour as we were not prepared to inconvenience the parties listed for 2 pm.

5. The hearing resumed shortly after 1 pm and finished at about 2 pm. We had been able to read all the papers including both parties' skeletons and we are grateful to both Mr Bedenham and Mrs Donnelly for the succinctness of their submissions.

The issues

6. The parties were agreed that there were three issues.

7. First, were the notices invalid because they did not meet Condition B in paragraph 21(6) Schedule 36 (the only relevant condition) in that the officer of HMRC who gave the notice did not have reason to suspect an underassessment of income or gains by the appellant.

8. Second, was any of the information required by the notice "statutory records". If it was it would have the effect that the Tribunal had no jurisdiction to hear an appeal against that requirement in the notice.

9. Third, was the information, so far as it was not a "statutory record", reasonably required to check the appellant's tax position.

Facts

10. We had no witness evidence from HMRC, a matter we comment on later.

11. We therefore had only the bundle consisting of correspondence between the parties from which we could discern the basic facts of what happened. We narrate what this correspondence said and find as fact that it said it, without coming to any finding about the truth of what it said.

12. On 25 May 2017 Mrs Sharon Sifleet, a Fraud Investigation Officer based in HMRC's Fraud Investigation Service, Alcohol Team 3 based in Wolverhampton, wrote to the appellant. The letter was headed "Check of your tax position for the year ended 5 April 2015". Any thoughts that the appellant's tax position might relate to alcohol products duty or customs duties or VAT were dissipated by the first line of the body which said that Mrs Sifleet was checking the appellant's "Self Assessment tax calculation" for the year ended 5 April 2015 as her check showed that there may be inaccuracies. This alleged inaccuracy required her to examine earlier years to see if similar inaccuracies arose.

13. To assist Mr Sifleet in her check the appellant was asked to provide the items listed in an enclosed schedule by 28 June 2017. Failure to provide them might lead to an assessment under s 29 TMA 1970 or a notice that legally required the appellant to give the information. The letter said that a variety of Factsheets were enclosed. Our bundle contained a document headed "Schedule of information and documents needed to carry out our check" and under the heading "information and documents" it listed:

> "1. A detailed listing of all shareholdings for the years ended 5 April 2013, 5 April 2014 and 5 April 2015.
>
> 2. A detailed listing of all dividends received in the years ended 5 April 2013, 5 April 2014 and 5 April 2015.
>
> 3. A listing of all bank accounts operated, solely or jointly, by you in the (*sic*) 5 April 2013 5 April 2014 and 5 April 2015.
>
> 4. Please therefore (*sic*) provide me with all private bank/BS and credit card statements operated (*sic*) by you either in your own name or names in which you have been interested (*sic*) (whether solely or jointly with any other person or persons) or which you had power to operate (whether solely or jointly with any other persons); and which are in existence now or which existed at any time during the period from 6 April 2012 to 5 April 2015.
>
> 5. If you have drawn any funds from a director's loan account in the years ended 5 April 2013, 5 April 2014 and 5 April 2015, please provide a full breakdown of the loan account for years ended 5 April 2013, 5 April 2014 and 5 April 2015 showing each transaction in chronological order.
>
> 6. Please provide documentary evidence of any capital introduced."

14. Also in our bundle immediately after this schedule was a blank certificate on which we presume the appellant was required to enter a complete list of all banking accounts, saving accounts, loan accounts, deposit receipts, safe deposit boxes, building

society and co-operative society accounts, and credit card, charge card and store card accounts, whether in the United Kingdom or outside the UK territorial waters that were in the appellant's own name, in the name of his children or in any name or names in which he had been interested or was now interested (whether solely or jointly with any other person or persons) or which he had power to operate (whether solely or jointly with any other persons) which are in existence now or which existed at any time during the period from 6 April 2015 to 5 April 2015. The columns on the certificate were for "Bank etc and branch", "Nature of account (e.g. current, deposit)", "Account number", "Account name" and "Period Operated".

15. There is no reference to this certificate in the letter or the schedule (and see §47(1) below).

16. On 17 July 2017 (after Mrs Sifleet's deadline) Rainer Hughes emailed her to ask why the information was required. They were asked by email on 18 July 2017 to complete an authorisation 64-8 so that Mrs Sifleet could correspond with them about the appellant's affairs.

17. On 20 July 2017, two days later, Mrs Sifleet wrote to the appellant a letter with the heading "Notice to provide information and produce documents".

18. It stated it was a legal request for information and documents. Because Mrs Sifleet had not received the items asked for she was issuing the notice under paragraph 1 Schedule 36. The attached schedule, she said, showed what was needed. No schedule was in our bundle. Mrs Donnelly wanted us to assume that the schedule attached to the notice was identical to the schedule attached to the letter of 25 May 2017.

19. In a letter of 25 July 2017 to a firm of tax consultants Mrs Sifleet said that "based on information I hold there appears to be a shortfall between your client's income and expenditure for the year ending 5 April 2015".

20. On 18 August 2017 Rainer Hughes said their client disputed the notice and requested an independent review.

21. On 3 October 2017 Rainer Hughes said their client still wished to appeal the notice and in particular contended that the documentation was not reasonably required by HMRC for the purposes of checking the appellant's tax return and HMRC had not made any effort to explain why it was. They also said that paragraph 21 Schedule 36 prohibited the issue of a notice in the appellant's circumstances.

22. On 31 October 2017 Mrs Sifleet replied to the appellant with a copy to Rainer Hughes concerning their legal arguments about the notice. She helpfully included the text of paragraph 21 Schedule 36 in her letter "for your reference". She then referred to Condition A and went on:

> "and in addition Condition B says if you have reason to suspect that 'an amount which ought to have been assessed to relevant tax for the chargeable period may not have been assessed' … you can issue a notice".

Then:

> "Having reviewed your Self-Assessment tax returns I have evidence to suggest that income you received has been omitted from your tax return".

She then asked for the information and documents to be provided by 28 November 2017.

23. On 16 November 2017 Rainer Hughes asked what evidence she had.

24. On 30 November 2017 Mrs Sifleet replied to Rainer Hughes. She said:

> "I need to allow your client the opportunity to make a disclosure (for penalty abatement reasons) and therefore do not want to be specific about precise risks identified at this stage of the enquiry, however I have concerns about his ability to fund his lifestyle.
>
> I suggest that your client check everything that has been included on his Self-Assessment returns, including Dividends paid (either directly to him or credited to a Directors Loan Account) for any company of which he was a Director or Shareholder, any interest payments received from savings or investments, any income from other sources. These are just a few examples."

25. She postponed the date for compliance to 3 January 2018 and then later to 17 January and 31 January.

26. On 30 January Rainer Hughes replied. They said that none of the material is statutory material and therefore their client was not required to provide it. They added that the request was no more than a fishing expedition. They asked for the statutory authority that allowed Mrs Sifleet to require the documentation. They repeated their request for an independent review.

27. On 2 February 2018 Mrs Sifleet replied saying that the appeal had been referred to a review officer. She said that she still considered details of the dividends to be statutory records as they:

> "would be required to assist your client in the completion of his Self-Assessment tax return. (Sch 12B (*sic*) TMA 1970 refers). Please now provide me with details of all dividends received by your client for the tax years …
>
> If you are still of the opinion that details of Dividends are not a statutory records (*sic*) please provide me with your reasoning along with reference to relevant legislation, case law and guidance (*sic*) in support."

28. Rainer Hughes replied on 8 February, noting that Mrs Sifleet appeared to accept that all items except dividend information were not statutory records, and asking for withdrawal of the notice. They offered without any admission of liability to obtain their client's instructions in relation to dividends.

29. On 14 February Mrs Sifleet gave her "view of the matter" as required "by law" (which we take to be s 49B(2) TMA). She referred to each of the 6 items in the notice and in relation to items 1 and 2 (detailed list of shareholdings of dividends received) she said that:

> "We have reason to believe that you have omitted dividends from your income tax returns and therefore need to be satisfied that all dividend income has been returned by you".

30. She said that item 1 was not statutory, but item 2 was. In relation to items 3 to 6 she said:

> "From the information and documentation available to us we do not believe that the income returned to HMRC by you is sufficient to fund your lifestyle"

She said that all those items were not statutory.

31. On 29 March 2018 Mr A R Potts in the Reviews and Litigation section of HMRC's Solicitor's Office wrote to the appellant with the conclusions of his review.

32. His conclusion was that the notice should be varied. This was to be done by removing items 4 to 6 because they were not worded in a clear enough way to enable compliance (items 4 and 6) or because the item was not reasonably required to check the appellant's tax position (item 5).

33. As to items 1 to 3 he concluded:

(1) The information in item 1 is a "statutory record" as it would be required to ensure a complete and accurate return of income and/or capital gains for each of the years in question.

(2) The information in item 2 is a "statutory record" as it would be required to ensure a complete and accurate return of income for each of the years in question. Should the Tribunal decide they are not statutory records, they were nonetheless reasonably required to check the appellant's tax position.

(3) The information in item 3 is reasonably required to check the appellant's tax position.

34. On 19 April 2018 Rainer Hughes notified the appellant's appeal to the Tribunal.

The law

35. The relevant parts of Schedule 36 are here set out.

> "**1**—(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—(1) In this Schedule, "information notice" means a notice under paragraph 1, 2, 5 or 5.

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

…

8—(1) Where an information notice requires a person to produce a document, the person may comply with the notice by producing a copy of the document, subject to any conditions or exceptions set out in regulations made by the Commissioners.

…

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

21—(1) Where a person has made a tax return in respect of a chargeable period under section 8 … 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.

…

(3) Sub-paragraph[ ] (1) … do[es] not apply where, or to the extent that, any of conditions A to D is met.

…

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

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

…

…

…

29—(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.

32— …

(3) On an appeal the that is notified to the tribunal, the tribunal may—

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

(6) Subject to this paragraph, 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 an appeal against an assessment to income tax.

58 In this Schedule—

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

"the Commissioners" means the Commissioners for Her Majesty's Revenue and Customs, "document" includes a part of a document (except where the context otherwise requires),

"HMRC" means Her Majesty's Revenue and Customs,

"tribunal" means the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal.

60—(1) In this Schedule (subject to regulations under this paragraph), references to carrying on a business include—

(a) the letting of property,

…

61 In this Schedule "chargeable period" means—

(a) in relation to income tax or capital gains tax, a tax year, and

(b) in relation to corporation tax, an accounting period.

62—(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.

(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."

64—(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,

…"

36. Section 12B TMA (not Schedule 12B) provides relevantly:

(1) Any person who may be required by a notice under section 8 ... of this Act ... to make and deliver a return for a year of assessment or other period shall—

(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below ….

(2) The day referred to in subsection (1) above is—

(a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company, the fifth anniversary of the 31st January next following the year of assessment or (as the case may be) the sixth anniversary of the end of the period;

(b) otherwise, the first anniversary of the 31st January next following the year of assessment ...

…

(4) The duty under subsection (1) ... 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 subsection (4A).

(4A) Subsection (4)(b) does not apply in the case of the following kinds of records—

(a) any statement in writing such as is mentioned in—

(i) subsection (1) of section 1100 of CTA 2010 (amount of qualifying distribution and tax credit), or which is furnished by the company or person there mentioned, whether after the making of a request or otherwise;

(ii) section 495(1) or 975(2) or (4) of ITA 2007 (statements about deduction of income tax),

…"

The submissions of the parties

37. Mrs Donnelly's skeleton for HMRC says in relation to paragraph 21 Schedule 36 that HMRC have advised the appellant on a few occasions that they have reason to suspect there are omissions from the returns. In this regard HMRC refer to:

(1) The opening letter of 25 May 2017 stating that "there may be inaccuracies" in the 2014-15 return.

(2) The letter of 25 July 2017 stating that on the basis of information there appears to be a shortfall between the appellant's income and expenditure.

(3) The letter of 30 November 2017 giving a few examples of the possible risks identified by HMRC.

(4) The view of the matter letter of 14 February 2018 saying that HMRC have reason to believe that the appellant omitted dividends from his "income tax returns" [*our emphasis*] and that the income returned by the appellant is not sufficient to fund his lifestyle.

38. HMRC therefore have reason to believe that an amount which ought to have been assessed has not been assessed.

39. As to statutory records HMRC say that items 1 and 2 are statutory records as they are required to ensure a complete and accurate return of income (and of capital gains) for each year.

40. If they are not statutory records, they are, with item 3, reasonably required for the purposes of checking the tax returns of the appellant.

41. Mr Bedenham's skeleton says:

(1) In relation to paragraph 21 Schedule 36 HMRC have served no evidence in the case to support their assertion that there was "reason to suspect". The Tribunal is invited to conclude that there was no reason to suspect and the notice should be set aside. This may be done whether or not the items were statutory records (and *Barty Party Co Ltd v HMRC* [2017] UKFTT 697 (TC) was cited in support).

(2) In relation to statutory records the appellant notes that HMRC had previously conceded that only item 2 is capable of being statutory records, and he says that HMRC was correct to do so.

(3) As to whether they are reasonably required, items 1 and 3 are mere listings of shareholdings and bank accounts which do not of themselves establish or evidence amounts on which the appellant is chargeable to income tax or capital gains tax, because the list would not contain financial data relevant, or of assistance, to the calculation of tax. The same applies to the list in item 2.

42. In his oral presentation Mr Bedenham prefaced the submissions in his skeleton by pointing out that when issuing a third party notice HMRC are required to seek the leave of this Tribunal. When issuing a first party notice, as in this case, they have the option of seeking the leave of the Tribunal, and if they do there is no right of appeal given to the person served with the notice.

43. Where the Tribunal is involved at this early stage paragraph 3(3) Schedule 36 requires the Tribunal to be satisfied that in the circumstances the officer is justified in

giving the notice and that the notice has been approved by an authorised officer, one with suitable experience and seniority.

44. The lack of oversight by the Tribunal in the giving of a first party notice such as this one means that on appeal to this Tribunal, HMRC have the burden of proof and must therefore show the evidence that demonstrated that they are justified in seeking the notice. Mr Bedenham commended the decision of this Tribunal in *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 231 (TC) (Judge Victoria Nicholl) ("*Cliftonville*") on this matter.

Discussion

Preliminary remarks

45. We accept Mr Bedenham's contentions in §44 for the reasons he has given and for the reasons given in *Cliftonville* with which we respectfully agree, and we note that we are not alone. Judge Anne Redston, who had previously taken the view that strictly, though usually not in practice, the burden was on the appellant, changed her mind in *Mahmood v HMRC* [2018] UKFTT 297 (TC) and *Duncan v HMRC* [2018] UKFTT 296 (TC) (sitting in both with Mr Toby Simon) on the basis of Judge Nicholls' decision in *Cliftonville*.

46. For this reason we asked Mrs Donnelly to start. Before she did so we asked her where her witness (who we assumed would be Mrs Sifleet) was. We should say as this was a basic case we had no details of possible witnesses until the start of the hearing. Mrs Donnelly said that Mrs Sifleet would not be attending but she had spoken to her to obtain further information.

47. We had also noticed in our pre-reading certain documents in the bundle which had not been mentioned in the correspondence. These were:

(1) The blank certificate of banking etc accounts (see §14).

(2) A list of current and previous directorships of the appellant and the result of a Companies House search about those directorships, created on 5 July 2018 and 19 October 2017 respectively.

(3) Information about what we assume was the appellant's private residence with details of its cost and registered charges on it, details of his wife and children and "Taxpayer sources". These were details of his one PAYE employer of which he was a director but not it seems a shareholder, and against "Other Companies" the form is blank. This document is undated. Both this document and those in (2) above were placed in the bundle behind Mrs Sifleet's letter of 31 October 2017.

(4) A note of a telephone call on 2 February 2018 between Mrs Sifleet and a Mr Tony Eve who was in "accountants". As the note was headed "FreshTrade (UK) Ltd" we assume Mr Eve was in the firm of accountants acting for that company, which is one of the companies of the list of directorships at (2) above. In the note Mrs Sifleet had said to Mr Eve that she had "loan acct for

Dobson/Newton to 31/12/15 but needed dates of transactions". This note is behind her letter of 2 February 2018 but is not referred to in it.

(5) A document headed "Fresh Trade (UK) Ltd Directors loan account movement: M Dobson". "Dobson" appears to have crossed out and the word "Newton" handwritten next to it. The note shows transfers to and from "private account" and cash withdrawals. None of the entries are annotated and they are all round sums. This document appears immediately after Rainer Hughes' letter of 8 February. We surmise that it was supplied by Mr Eve in response to Mrs Sifleet's request in (4) above.

48. We asked Mrs Donnelly what these documents were and why they were in the bundle. She said that the Tribunal might find them useful. She had not offered them as evidence in support of any of her contentions or explained where they came from or when they were created.

49. We turn now to the three issues.

Whether HMRC have shown that they had reason to suspect that income or capital gains had been unassessed.

50. Paragraph 21(6) Schedule 36 containing Condition B is closely related in its wording to s 29(1) TMA, which used the word "discover" rather than "has reason to suspect". To make a "discovery" is to surmount a relatively low bar and we consider that "reason to suspect" sets the bar at around the same height. There is ample authority that the similar phrase "has reasonable grounds for suspicion" sets a low hurdle – see eg *Michael Parker (aka Michael Barrymore) v Chief Constable of Essex Police* [2017] EWHC 2140 (QB) (Stuart Smith J) at [33] citing inter alia the House of Lords decision in *O'Hara v Chief Constable of the RUC* [1996] AC 286 ("*O'Hara*").

51. "Has reasonable grounds to suspect" is the term used in s 317 Proceeds of Crime Act 2002 where the National Crime Agency ("NCA") wish to take over functions of HMRC. That which the NCA has to show they have reasonable grounds to suspect is that:

> "income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly)"

52. In *Khan v Assets Recovery Agency* [2006] UKSpC 523, the Special Commissioners, Judge Stephen Oliver QC and Mr Theodore Wallace, said in their conclusions of s 317:

> "The qualifying condition under section 317(1) of 'reasonable grounds to suspect' does not involve proof of criminal conduct but a genuine suspicion which is reasonable viewed objectively, see *O'Hara* … (paras 36 to 39)."

53. Earlier they had referred to the skeleton argument of counsel for the appellant in that case. They then said:

> "Whether the qualifying condition has been satisfied in the present circumstances will ultimately depend on the evidence from Mr Archer [of the ARA]. *But if his evidence were to embody the matters set out in the above extract*, our provisional reaction is that the qualifying condition would be more than satisfied." [our emphasis]

54. What is important about this extract is the stress on the evidence and that can also be seen in *Barrymore* and *O'Hara*.

55. As to cases on Condition B in paragraph 21 Schedule 36 we note *Kevin Betts v HMRC* [2013] UKFTT 430 (TC) (Judge Rachel Perez and Lesley Stalker). In that case it was accepted by both parties that HMRC had the burden of showing that any of the conditions in paragraph 21 were met. It was only Condition B that was in issue, and it is clear that a great deal of evidence was given by the HMRC investigator to seek to explain why he had reason to suspect omission of income.

56. Other cases where Condition B was in point and where evidence was given by an officer of HMRC include *Nijjar v HMRC* [2017] UKFTT 726 (TC) at [15] (Judge Jonathan Richards) and *Spring Capital Ltd v HMRC* [2016] UKFTT 246 (TC) at [49] to [54] (Judge Barbara Mosedale).

57. What evidence, as distinct from assertion, did we have to suggest that there was unassessed income or gains? None that we could rely on. As Mr Bedenham pointed out we had no witness statement from Mrs Sifleet or even a less formal document setting out what was the evidence she had to suspect non-assessment. The only concrete item she referred to was that for 2014-15 she had reason to suspected that the appellant had omitted dividends from his return. HMRC have not shared the grounds or given us any evidence that might enable us to see that Mrs Sifleet was entitled to have that suspicion and that it was objectively reasonable for her to have it. It cannot have been difficult to share with the Tribunal the return in question, even if just a printout of electronic entries, to show the absence of entries for dividends and especially to produce the piece of evidence that shows or suggests that the appellant did receive a dividend from the company concerned.

58. The only other suggestion that there might be omitted income or gains derives from a comparison Mrs Sifleet seems to have made between the appellant's known income and his lifestyle or expenditure. The only thing we have that touches on that is the document concerning the house purchase and the loans charged on it. But no one put that document in evidence before us, let alone explained its relevance and its significance.

59. We therefore hold that Condition B in paragraph 21 Schedule 36 is not met as no evidence has been produced to show that Mrs Sifleet had reason to suspect omission of income. We therefore must quash the notice.

Statutory records

60. It is not necessary for us to come to a conclusion on this, especially as our decision is final. In theory we might be judicially reviewed so we go on to consider this issue.

61. We consider that, contrary to the approach in some other cases in this Tribunal, we should take a restrictive approach to the question of what amounts to statutory records. This is for two main reasons. First, a recipient of a Schedule 36 notice is denied any right of appeal to an independent body (except for the difficult and costly possibility of seeking judicial review) where the demand is for the production of what HMRC characterise as statutory records. Thus they are not able to contest HMRC's assertion that the document or information was reasonably required by HMRC for checking the tax position of the appellant. Second, the provisions of the Taxes Acts which require the keeping and retention of records contain substantial penalties for failure to keep them. In these circumstances what counts as statutory records and when they so count should be as clear as possible.

62. In the course of her submissions we asked Mrs Donnelly if she was aware of the time limits in s 12B TMA. She said she was not. Mr Bedenham had not mentioned the time limits either in his skeleton. But it seems to us that there is in s 12B TMA provision which undermines any claim that what is sought in items 1 and 2 constitute statutory records, and it is the time limit.

63. Paragraph 39 Schedule 36 provides that no appeal may be made against a requirement to provide statutory records. Paragraph 62(3) says:

> "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."

64. Section 12B sets two time limits for the keeping of records in cases where as here there was no enquiry into the returns on foot when the notice was issued. Where the recipient of the notice carries on a trade, profession or business the limit is the fifth anniversary of 31 January after the tax year concerned. Where there is no trade, profession or business carried on by the recipient in any tax year, the limit is the *first* anniversary of 31 January after the tax year concerned.

65. HMRC have given no evidence that this appellant carried on any such trade, profession or business. The hints from HMRC are that his income consists of employment income from directorships, dividends and possibly interest. Dividends and interest can only be trading income if the appellant personally or in partnership carried on the business of banking, insurance or share dealing and there is no evidence that he has done so.

66. The limit therefore, in relation to the latest tax year involved, 2014-15, is 31 January 2017 (and correspondingly one and two years earlier for the earlier years). The notice was issued on 20 July 2017, so none of what was asked for can be statutory records.

67. It is therefore not necessary for us to consider whether items 1 and 2 would have been statutory records had the time limit not passed. We note that what was required was not a document that could have been used or consulted by the appellant when making his return, but is a requirement to give information about his shareholdings and dividends by creating a "detailed listing". We would certainly accept that any dividend

vouchers were statutory records (see s 12B(4A)(a)(i) TMA) and that documentary (including electronic) evidence of purchases and sales of shares in the period would be.

68. In other decisions this Tribunal has held that information can be a statutory record, even information that is not written down. The decisions are based, in part at least, on a scrutiny of the definition of "record" in eg the OED. In our view that is the wrong term to consider. The search should be for the meaning of "statutory records" and what that phrase means in the context of s 12B TMA and of other similar provisions for taxes and duties and in other statutes such as Evidence Acts.

69. In our view it is telling that not only must a taxpayer "keep" records but must "preserve" them, and that s 12B(4) allows records to be preserved by any means or alternatively allows the preservation of the information in them by any means (eg by copying, digitising etc). This suggests to us that, in s 12B cases at least, "information" is only a statutory record if it is information which is in, or taken from, a document. A list of items which does not exist and which has not been kept and preserved is not in our (provisional) view a statutory record.

Reasonably required?

70. Had it been necessary to decide we would probably have held that item 2 was reasonably required but that items 1 and 3 were not.

Observations

71. When we asked Mrs Donnelly about whether HMRC had witnesses she replied, very fairly, that this was a basic case and that it was not normal in such cases for an HMRC witness such as the officer in the case to give evidence.

72. It is certainly correct that this was classified as a basic case. That arises from the Practice Statement "First-Tier Tribunal Categorisation of Tax Cases in the Tax Chamber" issued by the President, Judge Colin Bishopp, on 29 April 2013. Direction 2 says:

> "**Basic cases**
>
> When the Tribunal receives a notice of appeal, application notice or notice of reference in one of the following types of cases, the Tribunal will allocate the case to the Basic category unless the case is of a type listed in paragraph 1 (Default Paper cases) or the Tribunal considers that there is a reason why it is appropriate to allocate the case to a different category.
>
> (a) Appeals—
>
> …
>
> (iv) against information notices and penalties for non-compliance with information notices; …
>
> …"

73. Rule 23(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) says of basic cases that they:

> "… will usually be disposed of after a hearing, with minimal exchange of documents before the hearing" [1 SEP]

74. Mrs Donnelly was correct to say that basic cases are ones where people "turn up and talk" without undue formality. Often in these cases, particularly where they involve only the question whether an appellant has a reasonable excuse for not filing returns or making payments on time, the Tribunal takes an inquisitorial approach especially where the appellant is a litigant in person. But this was not a case of that sort.

75. The Practice Statement says in its introduction:

> "Nothing in it affects the powers or discretion of the Tribunal in relation to case categorisation generally, nor the ability of any party to an appeal to make any application regarding categorisation of that appeal. The fact that a case falls within the descriptions set out in this Practice Statement for a particular category does not mean that the case must, or will, be allocated to that category."

76. Rainer Hughes, who are familiar with this Tribunal but usually in standard or complex cases, seemed to act as if this was a standard case. We think it would have been a good idea for either them or HMRC to have sought (under Rule 23(3)) to have the Tribunal recategorise this case as a standard one, involving as it did three not entirely simple issues of statutory interpretation of Schedule 36 and the application of that law to the facts, and where counsel was instructed.

Decision

77. Under paragraph 32(3)(c) Schedule 36 FA 2008 we set aside the notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 24 AUGUST 2018