



[2021] UKFTT 110 (TC)

**TC08091**

*Keywords: Appeal against taxpayer information notice,*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number:  
TC/2020/01251/01252/02026/02027**

BETWEEN

Thomas Perring and Michael Perring

Appellants

-and-

THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE Heather Gething  
MEMBER Noel Barrett**

**The hearing took place on 23 March 2021. With the consent of the parties, the form of the hearing was V (video) all parties attended remotely using the Tribunal video platform. A face-to-face hearing was not held because of the restrictions imposed by the Covid 19 pandemic. The documents to which I was referred were contained in a trial bundle of 443 pages and an authorities bundle of 258 pages, a witness statement of Mr Gilbert Scott, a letter from Gilbert Scott dated 30 October 2020 and attachments and further authorities were provided on the day.**

**The hearing was open to the public.**

**Mr Baig, counsel for the Appellants, instructed by Gilbert Tax.**

**Mr Asuelimen of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This is an appeal by the Appellants against:
  - (1) information notices issued to the Appellants by an officer of HMRC on 23 May 2019 under Para 1 Schedule 36 Finance Act 2008 (FA 2008) for the years 6 April 2012 to 5 April 2018, and
  - (2) assessments issued on 3 July 2019 to the Appellants in respect of penalties for non-compliance with those notices, within the prescribed period.
2. The following issues had to be determined:
  - (1) Whether the burden of proof was on HMRC to satisfy the Tribunal that the notices had been issued in accordance with provisions of Schedule 36 or whether HMRC simply had to show a prima facie case, following which the burden of proof shifted to the Appellants to show that the information notices did not comply with the provisions of Schedule 36.
  - (2) As a return had been filed by the Appellants for all years in respect of which a request had been made, and the period for making an enquiry into those returns had past (save in respect of 2017/2018), whether to satisfy the reasonable grounds to suspect test in section 21(1) Schedule 36, HMRC must have, for each year to which the notice applied, some evidence to indicate that tax assessments had become deficient.
  - (3) Whether the information/documents requested fall within the term “Statutory Records” against which there can be no appeal.
  - (4) Whether information can be said to be reasonably required for the purposes of checking a tax position where the tax year to which it relates has not been the subject of an enquiry and no assessment may be made by HMRC, or where the information was already in the possession of HMRC.
  - (5) Whether information or documents requested are protected by legal professional privilege.
  - (6) Whether the notices were valid notices to the extent that they require documents which were created more than 6 years before the date of the notice where there is no evidence or suspicion of deliberate behaviour. This refers to the tax year 2012/ 2013.
3. We determined the issues as follows:
  - (1) The burden lies with HMRC to satisfy the Tribunal that the notices issued satisfied the requirements of Schedule 36.
  - (2) It is a well-established principle that HMRC may not use information notices for the purposes of a “*fishing-expedition*”. The evidence given by Officer Hammond confirmed that she had a particular concern in 2016/17 because of an undisclosed disposal of a barn and the possible non-inclusion of rental income in 2015/17. She had no particular concern of a deficiency in the remaining years but had a general concern and wished to understand the background, in particular how the Appellants financed the purchase of the assets acquired by them in the period.
  - (3) Statutory records include the information necessary to compute a person’s tax liability and file a return. In relation to capital gains tax, that would include in relation to an asset disposed of, the purchase price, the sale price and all deductible expenses. In relation to a property rental, that activity is a business activity, and the statutory

records would comprise the records of receipts and expenses and that will include personal bank statements, if and only to the extent that, the personal bank account has been used for the purpose of paying expenses or receiving rent.

(4) Information and documents cannot be said to be reasonably required to check a taxpayer's position where there is no evidence of dishonesty and:

(a) they relate to a tax year in relation to which HMRC may not raise an assessment.

(b) HMRC already has the information and documents in its possession.

(5) All correspondence between the Appellants and their solicitor in connection with the purchase of property and the fact that legal advice has been taken in that connection is protected by legal professional privilege. In the absence of evidence of fraud in which the solicitor is implicated, the details of the Appellant's solicitors cannot therefore be reasonably required.

(6) The request for information in relation to the tax year 2012/13 is invalid as the authorising officer's recorded reason indicates that the basis of his approval was that there was a serious risk of tax evasion. Officer Hammond had no reason to suspect dishonesty at the date of issue of the notices or subsequently.

## **EVIDENCE**

4. The Tribunal received a Trial bundle of 443 pages which included a witness statement of Officer Hammond, who issued the information notices, a witness statement of Mr Gilbert of Gilbert Tax who represented the Appellants. We heard evidence from both Officer Hammond and Mr Gilbert and both witnesses were cross examined by the opposing party's representative. The Tribunal also received skeleton arguments for both parties, a Bundle of Authorities, skeleton arguments of both parties and some supplementary authorities.

## **THE FACTS**

5. We find the following facts:

(1) The Appellants filed tax returns for all periods covered by the information notices.

(2) Officer Hammond made an enquiry in time into the return of the Appellants for the tax year ended 5 April 2018, by letters dated 21 March 2019. Having reviewed sources available to HMRC she recognised that there had been a disposal of an asset by the Appellants (who are brothers), and no gain had been reported. In that letter Officer Hammond made a wide-ranging request for information relating to the tax year ended April 2018 to check the tax position of the taxpayer for that year. Officer Hammond also sought information for the years 2012 to 2018 which "*I require to check your tax position*". The information list was set out in an appendix. The information in the categories numbered 1-3, in the section dealing with the year 2017/18, had been provided to HMRC after 30 June 2019, the deadline for the provision of the information. The disputed sections are listed below:

### *Documents related to the period 6 April 2017-5 April 2018*

*"4. Provide details of the property from which rental income of £5,578 arose, to include [the address-this is no longer required], the date of acquisition, cost, and evidence of the source of funding.*

*5. Copies of all bank statements through which any rental income or expenditure passed during the year of enquiry together with paying in books and cheque counterfoils.*

6. All books and records, to include sale invoices, expense receipts etc. to support the rental income and expenditure declared.”

Documents related to the period 6 April 2012-5 April 2018

“1. For every property in which you hold or have held an interest in any capacity (including freehold, leasehold and any beneficial interest) held solely or jointly, in the UK and abroad at any time since 6 April 2012 please advise:

- Full postal Address
- Acquisition date(s) and costs
- The source of acquisition funds
- Type of interest held
- Use of the property
- Disposal date(s) and proceeds
- The destination of disposal funds
- Where the property was/is jointly owned, your clients proportion of the legal and beneficial interest
- The names and addresses of each conveyancing solicitor and any legal documentation relating to the acquisition and disposal of all properties.”

“2. Provide details of any other sources of income both taxable and non-taxable that you were in receipt of during the period, i.e. dividends, interest, and rental income.

“3. Provide evidence to support the amounts received of other sources of income listed above and any expense incurred in earning these monies.

“4. Provide details of and copies of documents for all private vbank accounts held both solely, jointly or that you had the power to operate both in the UK and worldwide during the period.

“5. Provide an interest certificate for each period of account held showing the amounts received during the period.

“6. Provide details of any offshore assets you held during the period, to include dates of acquisitions, amounts paid, dates of disposal amounts received etc.

“7. Copies of directors’ loan accounts in relation to any Directorships you held during the period.

“8. A completed certificate of bank accounts operated (template enclosed).

“9. A dated. Descriptive list of assets and liabilities covering the period 6 April 2012 to date.”

(3) Officer Hammond required the authorisation of a senior officer to issue a schedule 36 notice requiring documents/information over 6 years old. The senior officer whose authorisation was sought and given was Mr Dave Hill.

(4) A form was completed to record the request and the approval. “Part 2.1a” had to be completed by the case worker Officer Hammond and Part 2.1 of the form requires the Officer to explain why the schedule 36 notice requesting documents more than 6

years old was the most appropriate way to address the risk. Officer Hammond stated that *“This case has recently been opened due to the fact that Mr Perring appears to have omitted rental income and his declared earnings do not appear to be sufficient to fund the property investments he had made. These issues are historic and therefore require me to request information over 6 years old.”*

(5) Part 2.1b was completed by the Line Manager, Mr Dave Hill indicates that, *“I have discussed this case in detail with Grade 7 case worker and agree that in view of the potential high value, high risk prima facie offence of evasion it seems apparent the request is both reasonable and proportionate.”* There is a further note to explain that Officer Hill is Officer Hammond’s line Manager and the Grade 6 Officer.

(6) Officer Hammond confirmed in cross examination that she did not provide any documents to Officer Hill but would have discussed the case with him. She also confirmed that she did not suspect tax evasion at the time the notices were issued and nor does she currently suspect tax evasion.

(7) Officer Hammond had obtained information about the properties referred to below from the Land Registry, Stamp Duty Land Tax Returns and the Valuation Office.

(8) Officer Hammond confirmed her concerns in relation to Mr Thomas Perring were as follows:

(a) There was a possible omission from the returns of the disposal of the Barn at Passfield Farm which was disposed of in 2016/17.

(b) In relation to the acquisition of the property known as Prowtings for £1,750,000 in April 2016, she wished to understand the source of funds because the income declared did not seem to support such an acquisition

(c) In relation to the acquisition of 34 Alexandra Road in May 2017 for £395,000 she wished to know the source of funds.

(d) The possible omission of bank interest: to the extent the properties had been financed out of income, the interest income had not been declared.

The request for the period 2012 to 2018 had been made because she “had reason to suspect” that some of the issues occurred prior to the enquiry window. She had no specific piece of information that caused her to have this reason to suspect but she had a general concern about the source of funds to finance the purchase of the properties.

(9) Officer Hammond confirmed her reasons to suspect in relation to Mr Michael Perring were as follows:

(a) The possible omission of the gain on the disposal of the Barn at Passfield Farm in 2016/17

(b) The possible omission to declare rental income in the year 2016/17 when two properties were owned in that period. 26 Clitheroe Road had been owned for the entire period and 37 Corrence Road was owned until 16 November 2016.

(c) In 2016/17 37 Corrance Road was disposed of and principal private residence relief had been claimed as well as lettings relief. It was unclear from the information HMRC held from the electoral roll exactly when the property had been rented.

(d) The joint acquisition of 34 Alexandra Road in May 2017 for £295,000 and the source of funds used for this.

(e) The request for the period 2012 to 2018 had been made because she “had reason to suspect” that some of the issues occurred prior to the enquiry window. She had no specific piece of information that caused her to have this reason to suspect but she had a general concern about the source of funds to finance the purchase of the properties.

(10) In relation to both Appellants, Officer Hammond had concerns about

(a) Losses made by a company in which both were directors and how they were funded.

(b) The “Other Creditors” in the accounts of the company, whether there were loans from the Appellants and if so, how were the loans funded given the level of income declared.

(11) The Appellants representative had obtained an extension of time for the provision of the information until 30 June 2019, but the information had not been provided by that date and in consequence a penalty assessment of £300 had been issued.

(12) The Appellants appealed the assessments on the grounds that there had been insufficient time to comply and that the level of information sought had been excessive and infringed their human rights.

(13) A meeting was held on 7 August 2019 to provide the information required at which Mr Thomas Perring and his adviser were to attend. In the event Mr Thomas Perring did not attend but his adviser agreed to send information upon his return to the office.

(14) Officer Hammond rejected the appeals against assessment of penalty on the ground that it is not a reasonable excuse to refuse to provide statutory records. Some of the information is still outstanding.

#### **POSITION OF MR THOMAS PERRING**

(15) Information was provided to Officer Hammond in relation to the specific issues she had raised in relation to Mr Thomas Perring as follows:

##### **The Barn**

(16) The Appellants had had an interest in an outbuilding to a farm referred to as the “Barn”. The farm had been acquired by their mother in 1998 and they and their other brothers had had an interest in the title. Following the reconstruction of the buildings to create a residence for a disabled grandchild and a small residence for herself, the Appellants’ mother required the Appellants to reconvey their interests in the Barn to the mother in 2016/2017. The Appellants had had little sight of the transactions as they were orchestrated by their mother and carried out by the Appellants’ brother. The Appellants had received no consideration for the transfer of their interests in the Barn and were unaware that a gain, on a deemed disposal at market value was required to be declared in the return for the tax year 2016/17. Having regard to the date of acquisition of the interest by the Appellants mother, the cost of acquisition and the date of transfer to the Appellants and their retransfer of their interest to their mother the deemed gain was £44,300 which equates to £11,075 for each of the Appellants. The failure to make a return of the deemed gain was not deliberate.

##### **Prowtings, GU 34 1SD**

(17) This property was bought by T Perring on 1 April 2016 for £1,750,000. Mr T Perring financed the purchase (including stamp duty, solicitor’s fees etc) with the sale proceeds of his former home at Arodene Road of £1,218,583.81 and the balance of

£658,637.65 was part funded by his mother who was selling Passfield Farm and partly from the redemption of an investment fund managed by S&W Invest.

(18) As for Officer Hammond's concern as to the ability of Mr T Perring to afford to live in the property referred to as Prowtings, the combined income and gains of Mr and Mrs T Perring for 2017 and 2018 as derived from their tax returns for the period and Mrs Perring's accountant, was £84,734 and £25,071 respectively, which if allocated equally across the 24 months period would result in an after-tax income of more than £4,575.00 per month. The Appellant's consider that there is no reason to suppose that that would be insufficient.

### **Alexandra Road**

(19) This property was acquired jointly with other family members and Mr Thomas Perring's contribution was £60,723.00. This was funded from the disposal of a property at Herne Hill owned by Mr T Perring and his wife for £382,500. This information is shown in the 2017 return.

### **Interest**

(20) Interest was declared where received. The Appellants assert that Officer Hammond's concern that if the property acquisitions were financed by interest the interest has not been returned is erroneous.

(21) The information notices have been updated since the date of issue and the current forms of the information notices are set out in the Appendix to this decision.

### **POSITION OF MR MICHAEL PERRING**

#### **The Barn**

(22) The situation concerning the Barn at Passfield farm is set out at (16) above and Mr M Perring's failure to return the deemed gain of £11,075.00 was not a deliberate omission.

#### **Rental Income**

(23) Mr Perring returned rental income for each of the tax years beginning 6 April 2012 to 5 April 2015. No rental income was declared for the years 6 April 2015 to 5 April 2016 and 6 April 2016 to 5 April 2017. The property that had been let was that in Clitheroe Road. It had been let until June 2015, but a loss had been generated in the year. Mr Michael Perring moved into Clitheroe Road from August 2015 and paid 50% of the rent to his mother. Corrance Road was eventually sold in 2016/17 and principal private residence relief was claimed. The Electoral Role shows that Mr Michael Thomas was registered to vote at both Corrance Road and Clitheroe Road.

#### **Alexandra Road**

(24) Mr Michael Perring contributed £120,912 of the £395,000 cost of the property that was acquired in May 2017.

#### **Corrance Road**

(25) This property was sold in 2016/17 for £689,650 as shown in the capital gains pages of the relevant tax return and would have provided sufficient monies to fund the purchase of Alexandra Road the following year.

#### **Perring London Limited (the company)**

(26) The company made the following losses in the following periods

Accounting period	Profit /loss in £	Creditors due within 1 year in £	Non-trade Creditors in £
31 March 2015	(27,648)	(94,231)	Not known
31 March 2016	(45,716)	(74,732)	(35,400)
31 March 2017	(05,701)	(66,087)	(26,062)
31 March 2018	(11,113)	(62,777)	(33,377)
Total	(90,178)	(297,827)	(94,839)

The Appellants advisors have been working to try to minimise the number of issues for the Tribunal to determine and have provided much information in 2020 in a meeting in August and a letter of 30 October.

### THE JURISDICTION OF THE TRIBUNAL

6. Under Para 32(2) of Schedule 36, the Tribunal may:

- “(a) confirm an information notice or a requirement in the information notice; or  
(b) vary the information notice or such a requirement, or  
(c) set aside the information notice.”*

Where a notice is confirmed or varied by the Tribunal, Para 32(4) requires the person to whom the notice is addressed to comply with the notice within the period specified by the Tribunal or, if no period specified, within such period specified by the Officer of HMRC.

### THE LEGISLATIVE BACKGROUND

#### Schedule 36 to the Finance Act 2008 (“Schedule 36”)

7. The following Paras of Schedule 36 are relevant to this appeal:

(1) Para 1 of Schedule 36 to Finance Act 2008 (“**FA 2008**”) permits an HMRC officer to issue a notice (“**an information notice**”) in writing requiring a taxpayer to provide information and/or produce a document if the information or document is,

*“reasonably required for the purposes of checking the tax player’s tax position.”*

(2) “*Checking*” is defined in Para 56 as “*including carrying out an investigation or enquiry*” and “*tax position*” is defined in Para 64 in relation to any person as regards any tax, including the person’s position as regards that tax as including, “*past, present and future liability to pay tax*”.

(3) There is no requirement for an officer to seek permission from the Tribunal or a senior officer to enable a notice under Para 1 to be issued. This is in contrast with the requirement to have notices approved by the Tribunal where the notices are issued to third parties about the records of a taxpayer. Para 7 of Schedule 36 requires that a taxpayer in receipt of an information notice must comply with the notice within the period specified in the information notice:

(4) There are some restrictions on the ability of an officer to issue an information notice:

- (a) Para 20 provides that a notice may not require a person to produce a document,



*“if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer.”*

(b) Para 21(1) provides that where a person has filed a tax return for a tax year for the purposes of income tax and capital gains tax,

*“a taxpayer notice may not be given for the purposes of checking that person’s income tax position or capital gains tax position in relation to”*

the tax year. But a notice may be issued where any of conditions A to D are satisfied. Two conditions are as follows:

(i) Condition A enables notices to be issued where an enquiry into the return has been made and the enquiry has not been completed.

(ii) Condition B enables notices to be issued where, as regards the person, *“an officer has reason to suspect in respect of [the tax year] that “an amount that ought to have been assessed has not been assessed”, or “an assessment may be or have become insufficient“, or “relief from tax for the [tax year] may be or have become excessive”*

(c) Para 23 deals with privileged communications and provides that an information notice does not require a person to provide privileged information or produce any document that is privileged, i.e., information or a document to which a claim for legal privilege may be maintained in legal proceedings.

(5) Para 29(1) provides that an Appeal may be made against an information notice or a requirement in such a notice that had been issued by an officer (but not one issued by the Tribunal), and Para 29(2) provides that no appeal may be made against a request for production of information or a document that forms part of a taxpayer’s statutory records. The term Statutory Records is defined in para 62 as information or documents that a person is required to keep and preserve under or by virtue of the Taxes Acts, or any other enactment relating to tax.

(6) Para 32(3) sets out the powers of the Tribunal in relation to an appeal against a taxpayer notice. The Tribunal may “confirm an information notice or a requirement in an information notice”, “vary the notice or a such requirement” or “set aside the notice or such a requirement”. And where the Tribunal confirms or varies a notice para 29(4) provides that the Tribunal may indicate a time for compliance with the varied notice. A decision of the Tribunal on appeal under Part 5 of Schedule 36 is final notwithstanding anything in sections 11 and 13 of the Tribunals Courts and Enforcement Act 2007.

### **Enquiry into returns: Section 9A Taxes Management Act 1970 (“TMA”).**

8. In relation to a return required to be made by an individual in respect of income tax and capital gains tax under section 8 Taxes Management Act 1970, an officer of HMRC may make an enquiry into the return under section 9A(1) if the officer gives notice to do so of the officer’s intention to the taxpayer *“within the time allowed”*. The time allowed, where the return is delivered before the filing date to do so, is up to the end of the period of twelve months after the date on which the return is filed. If the return is filed later than the filing date the 12 months period begins on the quarter date after the return is filed.

### **Discovery assessments: section 29 TMA**

9. Where a return had been filed in respect of a tax year, but no enquiry made into the return before the expiry of the period to do so, and an officer of HMRC discovers that any income

that ought to have been assessed to income tax and any chargeable gains that ought to have been assessed to capital gains tax, have not been assessed, an assessment has become insufficient or a claim for relief has become excessive, the officer may make an assessment of an amount or further amount which ought to have been assessed if one of a number of conditions is satisfied (See section 29(1) TMA 1970).

10. The relevant conditions where a return has been filed (otherwise than in accordance with prevailing practice) are set out in section 29(4) and relevantly the condition in section 29(4)(a) is satisfied if:

*“the situation has been brought about carelessly or deliberately by the taxpayer or a person acting on his behalf”.*

11. The general rule is that an assessment to income tax and capital gains tax may not be made more than 4 years after the end of the year of assessment to which it relates (see section 34(1) TMA. There are exceptions to this rule. Where the loss of income tax or capital gains tax has been brought about carelessly by the taxpayer, an assessment may be made not later than 6 years after the end of the tax year in question. (See section 36(1) TMA), and where the loss of tax has been brought about deliberately, an assessment may be made at any time not more than 20 years after the end of the year of assessment to which it relates (see section 36(1) TNMA).

12. It is clear from the above that where an enquiry into a return for a year has been made HMRC may assess a loss of tax and must generally do so within 4 years of the end of the tax year. Where no enquiry has been made into a return, before the expiry of the period to do so, HMRC may issue an assessment in respect of income and chargeable gains that have not been assessed but only if HMRC makes a discovery and then it must raise an assessment within 6 years of the end of the tax year in question, if the issue is brought about due to carelessness, or within 20 years of the end of the tax year if the loss of tax is brought about deliberately, i.e. dishonestly.

### **Issue 1- Information and Documents Reasonably Required - Burden of Proof**

13. HMRC considered that the burden of proof passed to the Appellant to show the information and documents were not reasonably required after HMRC had demonstrated a prima facie case that the documents were reasonably required.

14. The Appellants considered that the burden rests on HMRC.

15. As there is no appeal from the determination by the Tribunal of an appeal under Para 29 against the issue of a taxpayer information notice, there is no authority of the Upper Tribunal directly on this point. The Upper-Tier and Court of Appeal authorities relate to judicial review of third-party notices where the third-party notice had been issued with the prior approval of the Tribunal and so those decisions are not on point. I note that a number of First-tier Tribunal decisions recite that the parties agreed the burden lay with HMRC and in others the Tribunal determined that the burden lay with HMRC. I consider the burden lies with HMRC for the following reasons:

(1) The rules of statutory construction require that the meaning of any provision is dependent of the context and the context can be an Act or series of Acts or a part of an Act. In this case, the provisions under consideration are within Schedule 36 FA 2008 and the context in this case includes the provisions of Schedule 36.

(2) Para 1 of Schedule 36 allows an information notice to be issued by an Officer of HMRC to a taxpayer (*“a taxpayer notice”*) without reference to the Tribunal provided the document or information requested *“is reasonably required for the purposes of*

*checking the taxpayer's position*". Para 29 allows a taxpayer to appeal to the Tribunal against such a notice or some of the content of the notice, once an information notice has been issued.

(3) Para 2 provides that an Officer may issue an information notice to a third party requiring the production of information or documents that are "*reasonably required for the purpose of checking*" a named taxpayer's tax position ("third-party notice").

(4) Para 3(1) allows an Officer of HMRC to issue a third-party notice with the taxpayer's consent or, in the absence of that consent, with the prior approval of the Tribunal.

(5) Para 3(2) allows an Officer to seek the prior approval of the Tribunal before a taxpayer notice is issued.

(6) Para 3(3) requires that the Tribunal may not approve a notice unless an application for approval is made by or with the approval of an authorised officer of HMRC and the Tribunal, "*is satisfied that, in the circumstances, the officer giving the notice is justified in doing so*" and the Tribunal has been given a summary of the third party's representations."

(7) It is clear in a case where prior approval of the Tribunal is required before a notice is issued, that the Officer of HMRC wishing to issue the notice has the burden of satisfying the Tribunal that the Officer giving the notice is justified in doing so and, in satisfying itself, the Tribunal must take into account the representation of the taxpayer.

(8) A notice which has been issued with the prior approval of the Tribunal may not be appealed (see Para 29(3)), although a taxpayer may seek judicial review of such a decision.

(9) There is no indication in Para 29, which allows an appeal against a taxpayer notice that has been issued without prior approval of the Tribunal, that Parliament relieved the Officer of HMRC of the burden of satisfying the Tribunal that the information notice issued satisfies the statutory criteria and the officer was justified, in all the circumstances, in issuing the notice. All that is different in an appeal to the Tribunal against a taxpayer notice issued by an Officer, is that the proceedings before the Tribunal are not '*ex parte*', and the taxpayer is able to make its own representations rather than rely on HMRC to inform the Tribunal of those representations. The Officer must therefore satisfy the Tribunal that:

(a) the information or document is reasonably required by the Officer to check the taxpayer's tax position **in a year in question** - this requires that the Officer explains her position and that objectively the information requested is required to check the tax position of the taxpayer in that year.

(b) where a notice requests documents that originate more than 6 years before the date of the notice, that an authorised officer has agreed to the issue of the notice.

(c) where a return has been made by the taxpayer and no enquiry has been made into the return before the expiry of the statutory window to do so, that the officer *has reasonable ground to suspect* that either

(i) an amount that ought to have been assessed to tax in a tax has not been assessed,

(ii) an assessment to tax for the tax year has become insufficient, or

(iii) a claim for relief from tax in a year has become excessive.

16. The burden of proof therefore lies with HMRC to satisfy the Tribunal. There is no question of HMRC providing *prima facie* evidence only and it being for the taxpayer to demolish that *prima facie* case. The taxpayer's role is to inform the Tribunal of the circumstances. HMRC role is to satisfy the Tribunal that the relevant provisions of Schedule 36 are satisfied.

**Issue 2- reasonable grounds to suspect – requirement for evidence**

17. HMRC consider that the test of “*reasonable grounds to suspect*” is a subjective test and the test is met for the period 6 April 2012 to 5 April 2017 because Officer Hammond did suspect that amounts that ought to have been assessed had not been assessed. Officer Hammond's suspicions were:

(1) 2016/17 - The disposal of the interest in the barn had not been returned by either of the Appellants in 2016/17.

(2) 2015/16 -The ability of Mr T Perring to fund the acquisition of “Prowtings” on 1 April 2016 in view of the low level of income reported in the returns. She suspected that income had not been returned and that undeclared income had been used to fund the acquisition of Prowtings. There was therefore a possible omission of by Mr T Perring of bank/investment income if the purchase of the properties was funded from investments held.

(3) 2017/18 The ability of Mr T Perring and Mr M Perring to fund the acquisition of Alexandra Road in May 2017, in view of the low level of income reported in returns. Officer Hammond considered she had reasonable grounds to suspect that income not returned may have been used to fund the purchase.

(4) 2016/17 -The possible omission by Mr M Perring of rental income owing to his owning more than one property at a time in 2016/17.

(5) 2016/17 - The need to verify the gains on the disposal by Mr M Perring of 37 Corrance Road and the claim for Principal Private Residence relief.

(6) 16/17 The purchase of Alexandra Road had been made without a mortgage. Cash must have been used but there were no returns of interest on bank deposits or other investment income had been returned. Officer Hammond considered she had reasonable grounds to suspect that not all investment income had been returned.

(7) The ability of both Appellants to fund a company which had made losses having regard to their declared income.

18. The Appellants admit that they failed to file a return in relation to the gift of the Barn to their mother in October 2016. That was an omission but was not deliberate. The Appellants provided the information requested by HMRC in relation to the disposal of the Barn. Based upon their voluntary disclosure of the arrangement concerning the Barn during the course of the enquiry into the return for 2017/18, Officer Hammond sought to obtain information in relation to the period 2012 to 2018. The appellants consider that:

(1) The omission in 2016/17 is not evidence of an omission in relation to any other tax year as the legislation requires.

(2) To satisfy the test that the officer had reasonable grounds to suspect, HMRC must show that Officer Hammond held the suspicion and that objectively it was reasonable by reference to evidence. HMRC had failed to produce a single piece of evidence to justify Officer Hammond's suspicions.

(3) The suspicion that income had not been disclosed and that the undisclosed income was used to finance the acquisition of Prowtings and Alexandra Road is not reasonably held because Officer Hammond knew, from Land Registry records, that properties had been sold and those properties had not been financed by mortgage, so that the entire proceeds, not just the gains, could be used to finance the subsequent acquisition.

(4) Further in relation to the income and gains of Mr Thomas Perring and his spouse is considered over the period, as declared in their returns, the average monthly “income” in the period was £4,500 which the Appellants say is sufficient to enable them to occupy Prowtings.

(5) In relation to the company losses, there was a net loss over the period of 4 years – the accounting periods ended 31 March 2015 to 31 March 2018 of £10,000, which was manageable.

(6) The absence of evidence to justify the suspicion means that the objective element of the test reasonable grounds to suspect had not been satisfied in relation to 2012/13 to 2015/16.

19. We consider that:

(1) the requirement that an Officer has reasonable grounds to suspect that an assessment has become deficient requires not only that the Officer to have formed that view but in addition that it must also be objectively reasonable to hold that view and that means that there must be some evidence to indicate a deficiency in relation to each year in respect of which the notice has been issued.

(2) 17/18 Officer Hammond’s general suspicion about the source of funding of Alexandra Road by Mr M Perring could not be sustained when the timing of disposal of Corrance Road and the availability of disposal proceeds was considered which information HMRC would have had available through the land registry returns.

(3) 2016/17 There was a reasonable ground to suspect in relation to the disposal of the barn as no return of the disposal had been made by either Appellant.

(4) 2015/16 Officer Hammond had a reasonable ground to suspect the non-disclosure of income given the apparent lack of income and lack of ability to afford Prowtings as Mr T Perring required to redeem non-taxable ISA investments to meet the shortfall in funding. In the event, this was explained by the disposal of non-taxable ISA investments which information was not available to Officer Hammond.

(5) 2015/16 onwards Officer Hammond’s suspicion about the inability of Mr T Perring to afford to occupy Prowtings cannot be sustained when the income and gains of Mr T Perring and his wife are considered over a period of two years which would provide monthly income of in excess of £4,500.

(6) 2016/17 There was a reasonable ground to require an explanation of the sale Corrance Road and the purchase of Alexandra Road, the verification of the rental income returned and the verification of the PPR, because of the overlap in ownership.

(7) 2014/15, 2015/16, 2016/17, 2017/18, the overall loss position of the company of which the Appellants were directors in the period would have been known in March 2019, when the notice was issued. A net loss of £10,000 as suggested by the Appellants would have been easily absorbed by the Appellants but that figure does not seem to be borne out by the financial statements provided to the Tribunal. If the Appellants were the non-trade creditors as is common in private limited companies, they would have had to fund losses of £35,000, £26,000 and £33,377 in each of the years 2015/16

2016/17 and 2017/18. Plus, the unidentified amount in 2014/15. That would be in excess of £50,000 for each of the Appellants over the period of 4 years. It is not unreasonable for the Officer to ask for an explanation of how the losses were met given the limited income returned by the Appellants. This would in our view be a sufficient ground for suspicion that income may not be included in the return. There may be a simple alternative explanation but it is reasonable for HMRC to question whether loans were made to the company by the Appellants and if so, how they were funded.

(8) There was no evidence to justify any suspicion in relation to the years 2012/13 to 2013/14.

### **Issue 3 - Whether the information/documents requested fall within the term “Statutory Records” against which there can be no appeal**

20. HMRC’s position in relation to 2017/18, in respect of which an enquiry had been made before the expiry of the period to do so, is that where information falls within the category of statutory records, that information must be provided because Para 29(2) indicates that there is no right of appeal against such a request for information. Statutory records are those which are required to be kept to support the Appellants’ tax returns. The general rule is that information must be kept until an enquiry into a return is completed. However, where the records support a business such as property rental business, the records must be retained until the fifth anniversary of the 31 January following the end of the tax year (See section 12B (2) TMA), which in this case would be until 31 January 2024.

21. For the period 2017/18 the following information would form part of the statutory records of Mr T Perring in respect of which Mr T Perring has no right to appeal:

(1) Information about rental income and expenditure, address of the property to which it relates, date of acquisition and acquisition costs and source of funding (Item 4 of the Notice),

(2) Bank Statements showing income and expenditure referred to above, paying in books and cheque counterfoils. (Item 5 of the Notice).

(3) Books and records showing sale invoices and expense receipts to support the rental income and expenditure (Item 6 of the Notice)

22. HMRC’s position in relation to the period 6 April 2012 to 5 April 2018 in relation to Mr T Perring and Mr M Perring is as follows:

(1) Details of all properties, (including interest, acquisition cost and date of disposal) in which the Appellant had an interest at any time in the period (Item 1 of the second Part of the notice). This information in relation to the period from 2016 onwards forms part of the statutory records of the letting business. These records must be kept until 31 January 2022 or later.

(2) Item 7 relates to the directors’ loan accounts (“DLA”). These relate to tax year ended 5 April 2016 and later years and form part of the taxpayer’s statutory records. There is no requirement for the enquiry to relate to the tax in respect of which the obligation to maintain records arises, per the FTT decision in *Beckwith v HMRC* at [57]. HMRC say the DLAs are a statutory record of any company as they must be kept to enable a company to file its returns and they form part of the Appellant’s statutory records. These records must be kept until 31 January 2022 or later. The Appellant is therefore barred from appealing the information notice.

23. The Appellants accept that statutory records must be preserved and that generally a taxpayer may appeal against an unreasonable notice but that no appeal can be made if a document forms part of the statutory records that the Appellant must keep.

(1) In relation to Mr T Perring, in relation to 2017/18

(a) The information concerning the dates of acquisition of the properties let, their cost of acquisition and source of funding are not statutory records of the letting business as they are not required to file the return of income for the business (Item 4). There are no cheque counter foils or paying in books and redacted personal bank statements have been provided (item 5) and all information about rental income received and expenses claimed had been disclosed in the tax returns (item 6).

(2) In relation to the period 6 April 2012 to 5 April 2017,

(a) HMRC has failed to satisfy Condition B of Para 21 of Schedule 36 (reasonable ground to suspect deficiency), and so the issue of statutory records does not arise.

(b) Even if Condition B of Para 21 were satisfied, HMRC has most of the information requested from the tax returns and the Land Registry records and so the “*reasonably required*” test cannot be satisfied.

(c) In relation to the bank accounts, HMRC has no right to personal bank records and where business income or expenses have been paid into or out of a personal bank account HMRC is entitled only to redacted form of bank statements.

(d) The Appellants consider that the DLA is a statutory record of the company but not of the individual director. However, HMRC has had access to all the records of the company and have been provided with an electronic record of all the company’s records. The reasonably required tests cannot be satisfied.

24. We consider that:

(1) In relation to 2017/18 -Mr T Perring

(a) Letting Business - Where an enquiry has been made into the return within the prescribed period to do so (which is the case for 2017/18), information, books and records relating to a letting business and which would be required to complete the tax return, form part of the statutory records of that business and must be retained by a taxpayer until the fifth anniversary of the 31 January next following the end of the tax year, per section 12B(2) TMA. In consequence:

(i) Details of rent and expenditure relating to a property would be statutory records and that would include the address. That would include the house number where more than one house in a road is owned. Requesting the house number where only one house in the street is owned by the Appellant and the number is known to HMRC from the Land Registry records would be an unreasonable request, albeit one which is not difficult to comply with and it is difficult to understand why this is the subject of an appeal.

(ii) Details such as the date of acquisition or disposal of a property where the date occurs in the year under consideration would be information and records forming part of the statutory records of the business as it would

determine the period for which rental payments and expenses would be receivable and payable. Where the acquisition or disposal occurs in a prior year, those records do not form part of the statutory records of the business for the year in question.

Personal bank statements do not form part of a statutory record of a property rental business except to the extent that payments have been made through the account. A redacted set of bank statements would be sufficient to meet the reasonable requirement of an Officer enquiring into a tax return, except in a case of suspected dishonesty.

(2) In relation to the period 2012 to 2018 for Mr T Perring and Mr M Perring

(a) Dates of acquisition and disposal can be part of a statutory record for a rental business where the acquisition or disposal occur in a year in respect of which the rental business was carried on. The source of funding is not relevant to the computation of the rental business profits. It can only form part of the statutory records of the rental business in a year if the cost of finance would be a deductible item in that year.

(b) Personal bank account statements are not part of the statutory records of a rental business except to the extent that business income or expenses have been paid into or out of the bank account, but a redacted version of the statements would be sufficient to satisfy the requirement to retain records.

(c) A DLA is certainly a record of a limited liability company that must be kept and recorded for the protection of creditors generally. A DLA is therefore a statutory record of a company. A company's records belong to the company and are not in the possession and power of a director. A director's duties are owed to the Company. A director who wished to oblige an Officer of HMRC to produce a copy of the DLA would have to obtain permission of the company to do so and the company would not be obliged to agree to the request. The details of a loan to a company could form part of an individual's statutory records where interest is payable on the loan and the director would be obliged to report the interest income in a tax return. There is no suggestion in this case that interest was payable on the loans to the company. (In any event, we understand that HMRC has all of the Company's statutory records and the request in the information notice cannot be reasonably required.)

**Issue 4 – when are documents reasonably required.**

25. When construing the provisions of Schedule 36 and in particular when determining what Parliament meant by "*reasonably required for the purpose of checking a taxpayer's position*". it is necessary to consider the whole of Schedule 36 and the provisions of the TMA dealing with assessment.

26. It seems to us obvious that the purpose of the information powers is to enable HMRC to obtain information concerning income and gains that have not been assessed to tax. And it seems equally clear that the objective is to enable HMRC to raise assessments to collect any tax where the assessment is insufficient.

27. Where in any tax year, an enquiry has been made into a return, an Officer may reasonably require information to be produced to consider the taxpayer's self-assessment and to assess any under assessed income and gains. The usual period for raising an assessment is 4 years after the end of the tax year in question. However, where the Officer is out of time to raise an assessment, it would be unreasonable for an Officer to issue information notices. The



information and documents cannot be reasonably required for the purpose of assessing the right amount of tax if an assessment cannot be issued.

28. The same principle would apply where the period for making an enquiry into the return has lapsed. Schedule 36 and sections 29 and 36 of the TMA (as mentioned at [8] above) require further conditions to be satisfied:

(1) Para 21(1) of Schedule 36 requires that one of a number of conditions must be satisfied. Condition B is in point. It enables notices to be issued where, as regards a person,

*“an officer has reason to suspect in respect of [the tax year] that “an amount that ought to have been assessed has not been assessed”, or “an assessment may be or have become insufficient“, or “relief from tax for the [tax year] may be or have become excessive”*

(2) Section 29(1) TMA enables an officer who has made a “discovery” that any income and gains that ought to be assessed have not been assessed to raise an assessment but only if section 29(4) is satisfied namely that the situation has been brought about carelessly or deliberately by the taxpayer or a person acting on his behalf

(3) Section 36(1) TMA requires the assessment to be made within 6 years of the end of the tax year in question where the situation has been brought about carelessly and within 20 years where the situation has been brought about deliberately.

29. In our view, in the absence of a discovery, which requires evidence of an assessment being an under assessment, or compelling mismatches of income and expenditure, it would be unreasonable for an Officer to issue an information notice for a tax year in respect of which no enquiry has been made and therefore no assessment may be made. A desire for background information is not sufficient to justify the issue of an information notice. An information notice cannot therefore be issued in respect of:

(1) 2012/13 as that is more than 6 years prior to the issue of the notice, and in the absence of dishonest conduct, no assessment can be made.

(2) 2013/14 as there was no evidence to amount to a discovery to justify an assessment under section 29 TMA.

30. In our view, a mismatch of income and expenditure can be sufficient to justify a suspicion to enable a notice to be issued for each of 2014/15, 2015/16 2016/17. And 2017/18

31. Further, as an Officer must require the information and document to check a taxpayer’s position, we consider the general rule is that an Officer cannot reasonably require information or documents that the Officer already has. In this case, Officer Hammond already had details of all the properties in which the Appellants had a direct interest from the Land Registry and SDLT returns and the Appellants’ tax returns. There may be an exception to this general rule where for example, the Officer suspects dishonest conduct where HMRC may wish the taxpayer to volunteer information to check whether the suspicions of dishonesty are well founded. It would have been reasonable for Officer Hammond to ask if the Appellants had an indirect interest in any property other than those that she was aware of from the Land Registry, SDLT Returns and the tax returns filed by the Appellants.

#### **Issue 5- Whether information or documents requested are protected by legal professional privilege.**

32. It is beyond doubt that correspondence between an individual and his solicitor for the purposes of obtaining legal advice, in this case pertaining to the purchase of an asset, is

protected by legal professional privilege. That privilege is a fundamental human right as was recognised by Lord Hoffmann in *R oao (Morgan Grenfell) v Special Commissioner for Income Tax* [2002] UKHL 21. The fact that legal advice has been taken is also privileged. As HMRC may not obtain the correspondence between the Appellants and their solicitors concerning the purchase of the asset, requiring the name and address of the solicitor would be futile. A request for that information cannot in the circumstances be reasonable. The position would be different if the Appellants had committed fraud and Solicitor had been involved in the commission or concealment of the fraud such that there would be no valid claim for privilege, but Officer Hammond accepted that there was no evidence of fraud or wrongdoing.

**Issue 6 - Whether the notices were valid notices to the extent that they require documents which were created more than 6 years before the date of the notice in circumstances where there is no evidence or suspicion of deliberate behaviour. This refers to the tax year 6 April 2012 to 5 April 2013.**

33. HMRC consider that the information notices were appropriately issued as Officer Hammond had sought and obtained the consent of a Officer Hill, a senior officer, to issue the information notice in relation to the period 2012/13 under Para 20 of Schedule 36.

34. The Appellant considers that the senior officer could only approve of the issue of a notice requesting documents which originate more than 6 years before the date of the information notice if there was evidence of wrongdoing. Officer Hill's reasons for approving the issue of the notices are set out in Form Part 2.1b. The form records that there had been a discussion with Officer Hammond and Officer Hill concluded that, "*in view of the potential high value, high risk prima facie offence of evasion that seems apparent the request is both reasonable and proportionate.*" The Senior Officer's note is effectively saying that there was evidence of wrongdoing. This is inconsistent with Officer Hammond's view that there was no evidence of deliberate conduct or wrongdoing. The notices do not comply with Paragraph 20 Schedule 36 and no notice can now be issued requiring documents which originated before 2012/13.

35. We consider that the conditions for the issue of a notice requesting documents which originate in a period more than 6 years before the date of the notice are not satisfied and were not satisfied when the notice was issued. Officer Hammond did not and still does not suspect dishonest conduct. We note that this requirement is consistent with the need for the Officer to be able to raise an assessment.

**DECISION**

36. In view of our conclusions on the above issues and in view of the fact that some information has been provided to HMRC in the meeting of August 2020 and by letter of 30 October 2020, and that in some years there seems to be limited income and significant obligations, we make the following order:

- (1) We set aside the following requests for the period 2017/18:
  - (a) Items 4, 5 and 6.
- (2) We set aside all requests for the periods 2012/13 and 2013/14
- (3) We vary the following requests for the periods 2014/15 to 2017/18 as follows
  - (a) Item 1- Please confirm that the Appellants do not and have never owned any properties other than those listed in the table below and that the percentage ownership interests of each of the Appellants as shown in the land registry are accurate:

Mr Thomas Perring	Mr Michael Perring
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The Barn at Passfield Farm	The Barn at Passfield Farm
Prowtings	37 Corrance Road
34 Alexandra Road, SW19 7IZ	34 Alexandra Road SW19 7IZ
Arodene Road, SW2 2BG	93 Klea Avenue, SW4 9HZ
Melbourne Grove, SE22 8SA	Melbourne Grove, SE22 8SA
77b Herne Hill, SE24	26 Clitheroe Road, SW9 9EA
Leander Road, SW2	

(b) Item 2 - Please confirm that you had no sources of income or profits or gains in the UK or off-shore other than those disclosed in the returns filed for the periods.

(c) Item 4 -Please confirm that you have provided copies of all bank statements with entries revealed showing all receipts and expenses of letting businesses caried on by you and please provide copies of all bank statements appropriately redacted to show all other receipts of income, profits and gains received by you in respect of which a return ought to have been made..

(d) Item 8- Please confirm how the Appellants funded the loan accounts to the Company in the period

(4) We set aside the following requests for the periods 2014/15 to 2017/18:

Items 3, 5, 6,7 and 9.

37. The Appellants shall have 30 days to provide the information or documents from the date of this decision.

38. The appeal against penalties fails as the Appellant accepted that there was no reasonable excuse for failing to provide the information by the agreed extended time-period to do so.

**HEATHER GETHING  
TRIBUNAL JUDGE**

**RELEASE DATE: 15 APRIL 2021**