



[2019] UKFTT 0553 (TC)

TC07347

Schedule 36 Finance Act 2008 – notice to provide detailed chronological directors’ loan account –penalty - whether reasonable excuse for failure to comply - no

**Appeal number:
TC/2018/03866**

FIRST-TIER TRIBUNAL

TAX CHAMBER

BETWEEN

MATHARU DELIVERY SERVICE LTD

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE IAN HYDE

ANDREW PERRIN

Sitting in public at Birmingham on 23 October 2018

Mr M Patara for the Appellant

Mr Khan, presenting officer, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns a notice served on the appellant under paragraph 1 of Schedule 36 of the Finance Act 2008 (“Schedule 36” and “a Schedule 36 notice”) and penalties raised for failure to comply with the notice.

2. The nature of the appellant’s appeal was ambiguous but we have treated it as being as to whether the information requested under that notice was reasonably required and whether, in respect of the penalty, the appellant has a reasonable excuse for failing to comply.

THE FACTS

3. Mr T Patara, the appellant’s accountant and a relative of Mr N Patara appearing for the appellant, gave evidence in the hearing. Mr T Patara is a chartered accountant and prepares and maintains accounts for the company, including it’s directors’ loan account. We would observe that the bundle prepared for the hearing by HMRC was incomplete, confused the correspondence relating to the notices served on appellant and Mr Matharu and caused the Tribunal some difficulty in establishing the facts.

4. Nevertheless, based on Mr T Patara’s evidence and the documents produced to the Tribunal we find the facts as set out below.

5. The appellant is company owned by a sole shareholder, Mr Bapinder Matharu.

6. The Schedule 36 notice issued to the appellant that is the subject of this appeal was issued in the context of enquiries into the tax affairs of both Mr Matharu and the appellant. A Schedule 36 notice was also issued to Mr Matharu and it may have been the intention that that Schedule 36 notice was also to be appealed but it was not and it was accepted in the hearing that this appeal is concerned solely with the notice issued to the appellant.

7. However the nature of the enquiry into Mr Matharu is relevant to this appeal and we make findings as to that enquiry to the extent relevant.

Appeal History

8. HMRC issued a letter on 20 November 2017 opening a check on Mr Matharu’s personal tax position for the tax year ended 5 April 2016. By separate letter HMRC issued a request for information and documents relating to Mr Matharu’s dividend, salary and other income in the year together with copies of bank statements.

9. On 10 August 2017 HMRC issued a letter opening an enquiry into the appellant’s corporation tax return for the period ending 28 February 2016 and requested a number of items of information including the appellant’s bank statements and “a copy of the DLA [Directors’ Loan Account], showing dates, amounts and descriptions of each transaction, for each director”.

10. On 20 September 2017 a Schedule 36 notice was issued repeating the request for the detailed directors’ loan account

11. On 27 September 2017 information was collected by HMRC from the appellant’s offices, including a copy of a directors’ loan account as maintained by the appellant.

12. On 2 November 2017 HMRC advised that the directors’ loan account provided was not the fully itemised, chronological version that had been requested

13. On 7 November 2017 the appellant’s agent advised HMRC that the version provided was the only one held by the appellant.

14. On 22 December 2017 a second schedule 36 notice was issued to the appellant requesting the detailed directors' loan account be provided by 29 January 2018.

15. On 16 January 2018 HMRC issued a Schedule 36 notice to Mr Matharu in respect of his personal tax affairs.

16. HMRC took the view that the information requested from the appellant had not been provided and on 2 February 2018 HMRC issued a £300 penalty under paragraph 7 of Schedule 36.

17. The appellant appealed to HMRC the imposition of the penalty, requested a review which was upheld by HMRC on 18 May 2018.

18. On 13 July 2018 HMRC informed the appellant of further daily penalties accruing at £10 a day, being initially calculated for the period 24 February to 10 July 2018 and being in total £1,370.

19. On 6 August 2018 the appellant appealed to the Tribunal.

the directors' loan account

20. During the hearing in the course of Mr T Patara's evidence and cross examination and questions from Mr Perrin, there was extended discussion as to how Mr Matharu was paid by the appellant and the significance of entries in the Matharu directors' loan account. Based on that examination and the documents produced to the hearing, we set out our findings of fact below.

21. The Matharu directors' loan account for the year ended 28 February 2016 consisted of a month by month summary of debits and credits adjusting the carry forward position from the previous month. Some adjustments were made for events that happened in that month, so

- (1) two small payments of £129 and £110 to specific third parties were recognised,
- (2) two payments to 32 Red, a gambling company;
- (3) a dividend payment of £23,000 made in January 2016;
- (4) a cheque, described as "unknown" and for £1,200, paid out; and
- (5) two amounts of cash, bring £8,000 and £2,093 banked.

22. However, all the other items in the directors' loan account were apportioned evenly across each month of the year with no recognition of the date of actual payment. Thus;

- (1) An amount of £8,695 described in the loan account as "salary" was credited to Mr Matharu at £725 a month. However, on being shown in cross examination the bank statement for October 2015 and an entry of £2,000 described in as "wages" being paid to Mr Matharu, Mr T Patara accepted that the amount of £2,000 was paid to Mr Matharu on account of salary and dividends
- (2) cash withdrawals of £6,000 were recognised at £500 a month;
- (3) over the year the company borrowed from Mr Matharu in aggregate £71,150. This amount was borrowed in different amounts and a different times in the year but was recognised in the Matharu directors' loan account at an even £5,929 a month.
- (4) Mr Matharu had a gambling habit and over the year used the loan account to pay BetFred £158,153 but received in winnings £153,560. For the purposes of the loan account the payments out and the receipts were spread evenly over 12 months as £13,167 and £12,797 a month respectively. However, these payments were made unevenly over the year; and

(5) A notional £43 a month was credited for “use of home”.

23. As accepted by Mr T Patara, we find that due to the averaging the carried forward balance at the end of each month did not represent the balance owed by or to Mr Matharu at the end of that month.

24. Accordingly, Mr T Patara accepted that the Matharu directors’ loan account could not be used to calculate any interest on outstanding directors’ loan account as at the year end.

SCHEDULE 36

25. Paragraph 1 Schedule 36 provides;

“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 taxpayers tax position.

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

26. Paragraph 7, insofar as is relevant to this appeal, provides;

“7(1) where a person is required by an information notice to provide information or produce a document, the person must do so-

- (a) within such period, and
- (b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice....”

27. Paragraph 29 provides;

“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, for producing any document, that forms part of the taxpayer’s statutory records.

(3) sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3”

28. Paragraph 39, insofar as is relevant to this appeal, provides;

“39(1) this paragraph applies to a person who –

- (a) fails to comply with an information notice....
- (2) [the person] is liable to a penalty of £300...
- (3)”

29. Paragraph 45, insofar as is relevant to this appeal, provides;

45(1) liability to a penalty under paragraph 39.... does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure...

(2) For the purposes of this paragraph-

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

LATE APPEAL

30. The appellant appealed late to the Tribunal on 6 August 2018. However, HMRC stated at the hearing that they are not objecting to the late notification, and so we give permission under section 49G(3) of The Taxes Management Act 1970 for the appeal to be notified late.

THE APPELLANT'S ARGUMENTS

31. The appellant argues that it is unnecessary for them to provide a more detailed directors' loan account. The appellant's accountant, Mr T Patara, prepared only a summary directors' loan account because the appellant did not pay him to do any more.

32. It was possible for HMRC to establish the detailed position by reconciling the directors' loan account provided to HMRC with the appellant's bank statements and other working papers provided. Accordingly, if they wanted, HMRC could construct a detailed directors' loan account, as indeed they have done for a number of categories of expenditure. If they could not do so they could have asked the appellant and they would have helped, without the need to incur the additional costs of preparing the detailed director's loan account. Indeed the appellant offered to do so several times.

HMRC'S ARGUMENTS

33. As part of their enquiries into the taxation affairs of the appellant and Mr Matharu, HMRC wished to understand the taxation treatment of the payment arrangements between the appellant and Mr Matharu. In the course of correspondence between HMRC and Mr Patara acting as Mr Matharu's agent, HMRC justified the Schedule 36 request to Mr Matharu on the basis that Mr Matharu's personal tax return showed a salary of £8,786 and dividend of £23,000 totalling £31,786 but the records showed £40,060 in wages. In this context, HMRC requested a copy of the detailed directors' loan account.

34. However, HMRC were unhappy that the directors' loan account provided by the appellant was only a monthly summary and did not constitute the fully itemised and chronological account of all the transactions that had been requested. Specifically the investigating officer, Mr Patel, could not reconcile the directors' loan account as provided with bank statements and could not establish the timing of payments, which could affect the tax treatment of the arrangements.

35. HMRC argued that under the Companies Act a company must keep adequate records to disclose with reasonable accuracy the financial position of the company. The amounts loaned to Mr Matharu were sufficiently large that HMRC would expect the appellant to keep note of the dates moneys were loaned and received.

36. HMRC argued that it could have in any event have asked for the individual information but chose to do so by asking for the detailed directors' loan account.

37. Accordingly, HMRC insisted on the detailed directors' loan account as being reasonably required for the purpose of their enquiries and that there was no reasonable excuse for the appellant's failure to provide the information.

DECISION

38. The issue in this appeal are whether HMRC have properly requested the detailed directors' loan account in the Schedule 36 notice, that is to say whether it was "reasonably required" within paragraph 1 of Schedule 36, and whether the appellant is liable to a penalty for failing to comply with it or, as the appellant argues, it had a reasonable excuse within paragraph 45 of Schedule 36.

39. HMRC have not argued that the director's loan account in the detailed form required by the Schedule 36 notice was part of the appellant's statutory records so that by virtue of paragraph 29(2) of Schedule 36 (statutory records being defined in paragraph 62) the appellant was not entitled to appeal the Schedule 36 notice. Accordingly, we make no decision on that point.

Reasonably required

40. No analysis was put to us as to the meaning of "reasonably required" within paragraph 1 of Schedule 36. However, in our view "reasonably required" must impose a limitation on HMRC's issue of notices to the extent that each item of information requested must be required for the purposes of an enquiry into the taxpayer's tax affairs and that it is objectively reasonable for HMRC to do so. If HMRC had the information already it would not be required nor would it be reasonable for HMRC to ask for it again. Similarly HMRC must be pursuing a legitimate purpose in issuing the notice, so HMRC cannot undertake a fishing exercise where HMRC have no reason to believe tax has been understated.

41. However, where HMRC are inquiring into the tax affairs of a sole shareholder and his company including as to the salary, dividends and other payments made between the two, information as to the nature, size and timing of payments made between the company and the individual is "reasonably required" by HMRC.

42. We accept HMRC's evidence that could not reconcile the information they held and in effect create their own detailed directors' loan account. Further, we accept HMRC's argument that it could have asked the appellant for detailed information on each item of the directors' loan account, in particular the amount actually paid in each month for each item in the directors' loan account. The Schedule 36 request for a detailed directors' loan account in substance asked for the same information as would have been requested by HMRC asking legitimate individual questions.

43. Finally, we do not accept the appellant's argument that it is a defence for the appellant that providing the detailed directors' loan account would have required the appellant to incur costs. The appellant accepted, as it must do, that it must respond to requests for information from HMRC and the appellant has not produced any evidence that HMRC's formal request would be any more expensive to provide than the individual requests. There may be a point where the burden of requests becomes excessive and so the information is not "reasonably" required but there is no evidence that that point has been reached here.

44. We therefore find that the requested for the detailed directors' loan account in the Schedule 36 notice was "reasonably required" for the purposes of paragraph 1 of Schedule 36.

reasonable excuse

45. Paragraph 45 of Schedule 36 provides a defence to a penalty if the taxpayer had a reasonable excuse. For this purpose the test of reasonable excuse is as set out in the decision of Judge Medd QC in *Clean Car Co Ltd* [1991] BVC 568;

“the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

46. We have found, taking into account the factors set out at paragraphs 41 to 43 above, the detailed directors’ loan account was reasonably required. In our view, those factors cannot then be taken into account in determining whether there was a reasonable excuse.

47. In any event we cannot identify any factor in this appeal, whether previously considered or not, which would amount to a reasonable excuse. Paragraph 45(2)(a) of Schedule 36 prescribes that insufficiency of funds, which must encompass the cost of responding to the HMRC’s request, is in any event not a reasonable excuse. The appellant refused to comply with HMRC’s request for information and had no good reason to do so.

48. We therefore conclude that HMRC’s Schedule 36 notice requesting a detailed director’s loan account was reasonably required and that the appellant had no reasonable excuse for not providing it.

49. We therefore dismiss the appellant’s appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**IAN HYDE
TRIBUNAL JUDGE**

RELEASE DATE: 29 AUGUST 2019