



[2019] UKFTT 0528 (TC)

Schedule 36 Notice – company statements show large cash movements between company and personal bank accounts – company wages exceed director’s P60 and dividends – grounds for reason to suspect – Notice to produce all private bank and/or building society accounts – Betts [2013] TC 02824 distinguished – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07324

Appeal number: TC/2018/03865

BETWEEN

BHAPINDER MATHARU

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR DEREK ROBERTSON**

**Sitting in public at Tribunal Room 15, Centre City Tower, 5-7 Hill Street, Birmingham,
B5 4UU on Wednesday 7 August 2019 at 10:00 AM**

Mr T S Patara, Patara Chartered Accountants, for the Appellant

**Mr S MacLeod, Litigator, of HM Revenue and Customs’ Solicitor’s Office, for the
Respondents**

DECISION

INTRODUCTION

1. This is an appeal against a schedule 36 notice issued by HMRC on 16 January 2018. The Notice of appeal dated 18 June 2018 included an appeal against a penalty notice of £300.00 issued by HMRC on 23 February 2018. However during the hearing Mr Patara indicated his client was not appealing the penalty notice.

2. The grounds of appeal are as follows:

The appeal is against Notice to Provide Information and produce documents under Paragraph 1 of Schedule 36 to the Finance Act 2018

Under Paragraph 21 “Taxpayer Notice” can only be issued if any of conditions A to D is met.

Condition A is not met because Notice of Enquiry was given outside the window of enquiry (2015/16 tax return submitted and received by HMRC on 31st October 2016 – Notice of Enquiry given on 20th November 2017.

Condition B is not met because no non-disclosed source of income has been identified. All information to collaborate the entries on the tax return has been provided.

We support our above contention by reference to First-tier Tribunal’s statement in Betts [2013] TC 02824 at [22].

“We agreed with (counsel for the appellant) that it appeared to be the wrong way round to seek the documents in order to satisfy condition B. The position appeared rather to be that condition B must be satisfied in order for the documents to be validly sought.”

Condition C – Not applicable to this case.

Condition D – Not applicable to this case.

Matharu Delivery Service Ltd

The only item of dispute at the company’s Tribunal Appeal hearing was that HMRC wanted the Director Loan Account analysed in chronological date order. This was provided on the 26th October 2018 and no further query has been raised to date into the company’s tax enquiry by HMRC.

The dis-generous interpretation of entries on the company books and record is being used to support Condition B. The whole matter of this interpretation was argued before the Tribunal of the Company’s Appeal Hearing where the Judge accepted the terminology of the client in describing certain entries as the terminology commercially used. Every entries in the company records has been accounted for as either expenses or debited to Directors Loan.

BACKGROUND

3. Mr Shafiq Patel, an officer with HMRC wrote to Mr Matharu on 20 November 2017 stating that HMRC believed his Self-Assessment tax return for 2015/16 may be inaccurate. The letter included a schedule of information and documents needed to carry out HMRC’s check as follows:

Information and documents

Directorship of Matharu Delivery Service Ltd year ended 5 April 2016”

1. Provide evidence to support the dividends of £23,000 received, as stated on your Self-Assessment return such as dividends statement.

2. Provide evidence to support the pay from employment of £8,786 received, as stated on your Self-Assessment return, such as a P60.

Other information and documents year ended 5 April 2016

3. Details of any other income received during the year.
4. All private bank and/or building society accounts, bank statements, cheque book stubs, and deposit book counterfoils, for any account into which any personal income or expenditure was paid during the period of the accounts.

The letter requested that the information be supplied by 5 January 2018.

4. As Mr Matharu failed to submit the information requested, HMRC issued an information notice on 16 January 2018 under Paragraph 1 of Schedule 36 to the Finance Act 2008 in substantially similar terms to the schedule attached to their letter dated 26 November 2017.

5. Patara Chartered Accountants replied by email dated 19 February 2018 attaching Mr Matharu's P60 for the year ended 5 April 2016 showing income of £8,786.76, a dividend voucher for £23,000.00 and a West Bromwich Building Society statement showing interest for the year ended 5 April 2016. The email also referred HMRC to Part 4 of Schedule 36 of the Finance Act 2008.

6. However as Mr Matharu had not supplied the documents requested in paragraph 4, HMRC issued a Penalty Notice for £300.00 on 23 February 2018. Further correspondence ensued between Mr Patel of HMRC and Mr Matharu's accountants. Patara & Co. Ultimately HMRC sent a Review letter dated 18 May 2018 which included the following:

"I note Mr Patel has advised the [all private bank and/or building society accounts] are statutory records, however I do not agree that your personal bank statements are statutory records. Despite this, aside from statutory documents, paragraph 1 Sch 36 FA 2008 provides that where information or documents are reasonably required to check a person's tax position, an officer of HMRC may issue a notice in writing requiring a person to provide the information or documents."

The Review letter also included the following:

"Mr Patel discovered discrepancies between the amount of income declared by you in your self-assessment tax return, and the amounts, described as "wages", transferred from the company bank account to your personal account."

The Review letter concluded that there was no fishing exercise by HMRC but the personal bank statements were reasonably required to check Mr Matharu's tax position.

7. Patara & Co, on behalf of Mr Matharu issued the Notice of appeal on 18 June 2018 which was technically one day late. However, HMRC has not taken this point nor has this Tribunal.

THE LEGISLATION

8. Paragraph 1 of Part 1 of Schedule 36 to the Finance Act 2008 is as follows:

(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.

9. Paragraph 18 of Part 4 of Schedule 36 states:

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

10. Paragraphs 19(2) and (3) of Part 4 of Schedule 36 states:

“(2) An information notice does not require a person to provide or produce personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984) or information contained in such records, subject to sub-paragraph (3).

(3) An information notice may require a person –

(a) to produce documents, or copies of documents, that are personal records, omitting any information whose inclusion (whether alone or with other information) makes the original documents personal records (“personal information”), and

(b) to provide information contained in such records that is not personal information.”

11. Finally paragraph 21 of Part 4 of Schedule 36 states:

“(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12 AA of TMA 1970 (returns for the 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.

Sub-paragraph (2) relates to company tax returns and sub-paragraph (3) then states:

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of the conditions A to D is met.

The relevant condition upon which HMRC relies is condition B:

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

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

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.”

THE EVIDENCE

12. While carrying out a review of Mr Matharu’s company bank statements, HMRC identified discrepancies. Summaries of these discrepancies were included in the bundle of documents provided by HMRC to the Tribunal. These showed that Mr Matharu had borrowed £71,150.00 from his company and had repaid £48,950.00. However under the heading of “wages” the company had paid Mr Matharu £40,060 whereas his P60 showed a salary of £8,786.76. A dividend voucher indicated Mr Matharu had received a dividend of £23,000.00. In addition the summaries showed that the company had paid out to Betfred a total of £158,000 and to 32Red a total of £26,000 and had received £153,360 from Betfred.

13. At the hearing Mr Patara produced a chronological schedule of the company’s director’s loan account for the period 17 March 2015 to 29 February 2016 (although only pages 1, 3 and

5 were given to the Tribunal). The chronological schedule appears to contain the same information as appears in the summaries in the bundle before the Tribunal.

14. Mr Matharu gave oral evidence to the Tribunal in support of his witness statement dated 20 March 2019. His witness statement confirmed that he is a director of and sole shareholder of Matharu Delivery Service Ltd and that as a sole trader he does not get a wage and that the amount he takes out is called “drawing on account of profit which will be calculated at the end of the year when accounts have been prepared”. He continued by saying that any capital introduced into the company, salary earned and dividends declared were credited to his director’s loan account while any amount allocated to himself withdrawn from the company or his private expenditure is debited to the same loan account. Mr Matharu understood that this was in accordance with accepted accountancy principles and that his director’s loan account should always be in credit otherwise a charge to corporation tax might arise.

15. At paragraph 15 of his witness statement Mr Matharu states:

“These disingenuous interpretation of description of transaction in the books and records of Matharu Delivery Services Ltd were discussed at the appeal hearing for the Company at the First Tier Tribunal hearing on the 22nd October 2018. The Judge experienced in accountancy affairs accepted that description as “wages” was a common commercial description meaning that the amount is for the private use of the director.”

16. At the hearing Mr Patara produced unaudited financial statements for the company for the year ended 28 February 2018 which included the comparative figures for the year ended 28 February 2017. The 2017 figure for turnover was £60,949 with staff costs of £11,018 and net profit of £19,846. Mr Patara stated this latter amount was available for Mr Matharu to receive as a dividend.

17. Mr Patara also referred the Tribunal to the checklist for directors’ loan accounts, part of HMRC’s Directors’ Loan Accounts Toolkit. He maintained that the company’s loan account complied with all the requirements detailed in the checklist.

18. Mr Patel gave oral evidence in support of his amended witness statement dated 29 July 2019. His witness statement states that after speaking to his manager and agreeing there were grounds to open Mr Matharu’s case under discovery, as per policy and guidance, as he believed his self assessment return may be inaccurate. Large sums of money were being deposited from the company’s bank account to online gambling websites and money was interchanging between the company’s bank account and a bank account under Mr Matharu’s control. As the source of these funds was unknown Mr Patel requested Mr Matharu’s personal bank statements.

19. Mr Patel confirmed there was a discrepancy between “wages” paid to Mr Matharu as evidenced by the company’s bank statements (£40,060) and the salary declared on his P60 (£8,786) which together with the dividend of £23,000 only totalled £31,786. Mr Patel quoted from CH207320 from the compliance handbook:

“where financial accounts are not based on a robust and effectively operated record keeping system which is supported by adequate and appropriate safeguards and/or include unvouched or unverified sums, it would be reasonable to request private bank details with the other records.”

20. In his statement Mr Patel records that he received a telephone call from Mr Matharu on 19 July 2018 which was the first time he had spoken to him. Mr Matharu informed Mr Patel that he had provided all his personal bank statements to his agent but his agent was refusing to provide them to HMRC. Mr Matharu said that he could not understand why his agent was not

providing the bank statements. Mr Matharu informed the Tribunal that he did not agree with this version of the telephone conversation.

CASELAW

21. Although the Bundle of Documents provided to the Tribunal contained 13 different decisions Mr MacLeod informed the Tribunal that he was not going to rely on any of them.

22. Mr Patara referred to only one decision – *Betts* [2013] UKFTT 430 (TC) which he had quoted in his client’s grounds of appeal and which is referred to in paragraph 2 above. However in *Betts* the Tribunal stated at paragraph 90:

“But it is clear, in our judgment, that in order for condition B to be met, there has to be reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant. That is the plain and ordinary meaning of paragraph 21(6)(a) and we see no reason to go behind that. Seeking information or documents in order to meet condition B is simply the wrong way round in our judgment.”

23. In *Betts* HMRC had agreed that none of the information held by HMRC either singly or taken together, gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed

DECISION

24. Mr McLeod relied on the discrepancies between Mr Matharu’s reported income and the “wages” recorded by the company together with the considerable amounts transferred between the company and an account or accounts under the control of Mr Matharu to cause Mr Patel to have “reason to suspect” that Mr Matharu’s self assessment tax return for the 2015/16 tax year might be incorrect.

25. Mr Patara maintained that HMRC did not have sufficient information to suspect any inaccuracy. It was quite normal for small companies to describe drawings by a company director as wages and a First-tier Tribunal when dealing with an appeal by the company had accepted that “wages” covered more than pure salary. However Mr Patel did not produce any evidence to support this view. This Tribunal considers that HMRC was entitled to consider the description “wages” at face value and thus have reason to suspect that Mr Matharu’s tax return might not be correct. Even if Mr Patara is correct in his claim that at the company’s appeal the judge accepted “wages” was a common commercial description meaning that the amount is for the private use of the director, this decision is not binding on this Tribunal.

26. While the decision in *Betts* is only persuasive, it can be distinguished from the present case. In *Betts* HMRC accepted that before it issued a section 36 notice it did not have information which gave it “reason to suspect”. In the present appeal HMRC clearly had evidence which gave Mr Patel “reason to suspect” in accordance with condition B as laid down in paragraph (6) of paragraph 21 of Part 4 of Schedule 36 to the Finance Act 2008.

27. As the Tribunal holds that condition B had been met at the time the section 36 notice was issued, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

**Alastair J Rankin
TRIBUNAL JUDGE**

Release date: 12 August 2019