



TC06116

Appeal number: TC/2017/01597

VAT –Information Notice – whether notice valid –information requested for periods more than four years prior–whether non-statutory information requested reasonably required- HELD – Notice not valid – not reasonable to request information for earlier periods – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

The Barty Party Company Limited

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE Rachel Short
Mr William Haarer (Member)**

Sitting in public at Bristol Magistrates' Court, Marlborough Street, Bristol on 22 August 2017

Mr Ian Gillard of Pethericks and Gillard Limited, accountants for the Appellant

Mrs Sharon Hancox, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by The Barty Party Company Limited against an information notice (“the Information Notice”) issued to the Appellant by HMRC on 10 November 2016 under Schedule 36 of the Finance Act 2008.

2. The Appellant appealed to this Tribunal on 14 February 2017 saying that the Information Notice had been incorrectly issued in law and requesting that HMRC be instructed to withdraw the Information Notice.

10 *Preliminary issues*

3. It was agreed between the parties that the £300 penalty which had been charged on the Appellant on 21 December 2016 for failure to comply with the Information Notice had been withdrawn by HMRC pending the outcome of this appeal and was not to be considered by the Tribunal.

4. On behalf of the Appellant Mr Gillard provided a written skeleton argument on the morning of the hearing. The respondents took time to consider this and did not object to Mr Gillard relying on it at the hearing.

The law

5. The relevant legislation at Schedule 36 Finance Act 2008 provides that HMRC can issue a notice on a taxpayer requesting information or documents which are reasonably required by the officer for the purpose of checking the taxpayer’s tax position.

6. A taxpayer has the right of appeal against the notice, or any requirements of the notice under paragraph 29 of Schedule 36:

7. “s 29(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal..... against the notice or any requirement in the notice.

8. (2) sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or to produce any document, that forms part of the taxpayer’s statutory records.

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

10. The right of appeal against the requirements of the notice is restricted to documents which do not form part of a taxpayer’s statutory records.

11. The meaning of “statutory records” in this context has been considered in two tribunal decisions: *Concrete Flooring Limited v Revenue & Customs* [2015] UKFTT 135 (TC) and *Drinks Stop Cash and Carry* [2016] UKFTT 0730 (TC).

12. We were also referred by the Appellant to the tribunal decision in *Stephens & Anor* [1993] BVC 998.

Background information and facts

5 13. The Appellant runs a public house business in Bath, called the Wheatsheaf, and has two directors, Mr and Mrs Barton.

10 14. HMRC selected the Appellant for a VAT check on 26 May 2016. Arrangements were made to visit the Appellant's premises on 31 May 2016 and the Appellant was asked to produce specified information at that meeting. After two postponements, this visit eventually took place on 12 July 2016. At that visit the Appellant could not produce a current drinks price list or a complete set of purchase invoices for the 04/16 VAT period, stated that no VAT account was kept for the business and that the VAT returns were not checked by the Appellant's accountant before they were submitted.

15 15. An information notice was first issued to the Appellant on 21 July 2016. This was withdrawn on 9 November 2016 because of what HMRC described as an administrative error; no schedule setting out the information required had been attached to the information notice.

16. A replacement information notice, including the missing schedule, was issued on 10 November 2016 and is the Information Notice which is the subject of this appeal.

20 17. As at the date of this hearing none of the information originally requested by HMRC had been provided by the Appellant.

18. HMRC raised a "best of judgment" assessment on the Appellant for the 01/11/12 to 31/01/13 period on 30 January 2017.

The issues in dispute

25 19. The Information Notice served on the Appellant on 10 November 2016 set out the information to be provided as;

"Please provide the statutory records for 01/02/2012 to 30/04/2016 as follows:

The VAT account and any related working papers

Sales and purchase daybooks

30 *Cash books*

Petty Cash books

Sales and purchase invoices, this includes Purchase invoices that were missing from your records in the VAT period ended 30/04/16 in relation to Butcombe and Otter Brewery.

Bank and Building Society statements for period 01/01/2013 – 30/04/2016 for all accounts through which business funds are transacted, where so ever in the world these are held.

Other documents or information that we need

5 *[In this context document means.....]*

Annual accounts for the year ended 30/04/2014 and 30/04/2015 including the profit and loss account and balance sheet.

A drinks price list (including wine) relevant to the VAT period ended 30/04/16.”

10 20. The Appellant is appealing both against (i) the Information Notice on the basis that the information requested was not reasonably required by HMRC and (ii) the specific requirements of the Information Notice to provide the drinks price list.

21. It was accepted by the parties that if the Information Notice itself was not valid, there was no need to consider whether specific, non-statutory information requested in the Information Notice had been reasonably requested.

15 22. It was accepted by the parties that the drinks price list was non-statutory information.

Evidence

23. We did not hear any evidence from the directors of the Appellant.

20 24. We heard witness evidence from Mrs Sarah Deane for HMRC, the HMRC officer who was in charge of the Appellant’s case and who issued the Information Notice. Mrs Deane provided a witness statement dated 27 July 2017, gave oral evidence to the Tribunal and was cross-examined by Mr Gillard.

25 25. She told us that she first contacted the Appellant on 26 May 2016 to arrange a VAT assurance check visit. It was initially agreed that this would take place on 28 June 2016 followed by a visit to Mr Gillard’s office where all business records were said to be held.

26. A letter was sent to the Appellant on 31 May 2016 setting out the records which needed to be made available for that visit:

“Annual accounts and bank statements

30 *The VAT account and any working papers*

Books of account:

- (1) *Sales and purchase day books*
- (2) *Cash books*
- (3) *Petty cash books and ledgers*

(4) Sales and purchase invoices.

Supporting documents such as contracts and correspondence

Your VAT registration certificate if this is your first VAT visit’.

5 The letter went on to say “*if it is difficult to get some of the records together by the date of the visit, please phone me as soon as possible. I may be able to rearrange the visit for another date or may arrange to see those records at another time*”

27. That meeting was postponed by Mr Gillard due to pressure of work on 22 June 2016 and re-arranged for 12 July 2016.

10 28. At the meeting on 12 July Mrs Deane was told that (i) there was no VAT account for the Appellant (ii) purchase invoices were not entered into the SAGE accounting system regularly, but only occasionally (iii) Mr Gillard did not check the Appellant’s VAT records prior to submitting returns.

15 29. Mrs Deane asked for a drinks price list to allow her to test the credibility of the sales records. She was told by Mr Barton that no list was available, because prices were just pre-programmed into the till, but Mr Barton agreed to compile and send a drinks price list to Mrs Deane.

30. Mrs Deane explained that she wanted the drinks list so that she could do a weighted mark up exercise to verify the credibility of the Appellant’s VAT returns.

20 31. Mrs Deane also agreed to use the period 01 February 2016 to 30 April 2016 as a representative period for her check.

25 32. When Mrs Deane went to Mr Gillard’s offices on the same day she was told that the only business records available were for the May 2015 to April 2016 period, all other records were at the Appellant’s premises where they had been returned in error. Mr Gillard said that he would obtain the missing records for Mrs Deane to review at a later date. Mrs Deane agreed to look at the representative period (February to April 2016) but that she would return to review missing purchase invoices.

30 33. Mrs Deane said that her understanding was that although the February to April 2016 had been agreed as a representative period, she had made clear that she needed statutory records for all of the periods requested from the Appellant or its agent, Mr Gillard.

35 34. Mrs Deane called Mr Gillard on 13 July 2016 to arrange a return visit on 18 July 2016 and Mr Gillard agreed to try and have the requested records available for that date. Mr Gillard emailed Mrs Deane on 15 July 2016 to say he could not contact the Appellant. Mrs Deane telephoned Mr Gillard on 18 July to ask for a response to her request by 21 July 2016.

35. Mrs Deane issued an information notice on 21 July 2016 to the Appellant, giving a deadline for providing the missing information of 6 September 2016. Mrs Deane said that she decided to issue the information notice because she wanted to formalise a deadline for the production of the information needed, she was worried
5 about the time being taken to provide this. She had been surprised that she had not been able to obtain the information from Mr Gillard at the meeting on 12 July and did not understand why the Appellant had not informed her that the information was not at Mr Gillard's offices at that meeting.

36. Mr Gillard replied to the information notice from HMRC of 21 July 2016
10 describing the information notice as an "aggressive act".

37. Mrs Deane wrote to Mr Gillard on 5 September 2016 to explain why she had requested the drinks price list and extended the deadline for providing the information requested to 20 September 2016.

38. Mrs Deane visited Mr Gillard's premises on 20 September 2016. She was told
15 that Mr Gillard was not at the office and the receptionist told her that he had not agreed to her visit.

39. On 9 November 2016 the 21 July 2016 information notice was withdrawn on the grounds that an administrative error had occurred. Mrs Deane issued a replacement Information Notice on 10 November 2016 with a deadline for
20 compliance of 14 December 2016.

40. Mrs Deane wrote to the Appellant to advise that she would visit the business premises on 14 December 2016. Mr Gillard responded on by letter on 2 December and email on 9 December cancelling the visit.

We also saw:

25 41. A meeting note compiled by Mrs Deane of the meeting at the Appellant's and Mr Gillard's premises on 12 July 2016 (which had not been seen or signed by the Appellant or his agent).

42. The information notices of 21 July 2016 and 10 November 2016, listing the requested information (set out above) and requesting that the information be provided,
30 in the case of the 21 July information notice, by 6 September at the client's accountants offices and in respect of the 10 November 2016 Information Notice, by 14 December 2016 at The Wheatsheaf, Combe Hay, Bath. Both notices went on to say "*If the company feels it cannot do what this notice asks, or the company cannot respond within the timescale it sets out, please contact me as soon as possible on the*
35 *above number*".

43. Various correspondence between the parties including HMRC's review conclusion letters of 9 November 2016 and 20 January 2017.

Appellant's arguments

44. On behalf of the Appellant Mr Gillard appealed against the Information Notice of 10 November 2016 for a number of different reasons, saying that:

HMRC's unreasonable behaviour

5 45. (i) It was unreasonable for HMRC to issue the information notice of 20 July 2016 when they did. It was issued at this time, rather than waiting for the information to be provided voluntarily, only because Mrs Deane was about to go on extended leave. It was an aggressive and bullying act by HMRC to issue the information notice on 20 July and expect a response less than a week after the meeting on 12 July.

10 46. (ii) It was unreasonable for HMRC to insist on visiting the Appellant's office on 20 September 2016, this meeting had not been agreed with HMRC. HMRC do not have a right to make multiple visits to a taxpayer's premises without an invitation. Also, the 14 December 2016 visit was scheduled for the taxpayer's busiest period.

15 47. (iii) HMRC have not explained why the information notice of 20 July 2016 was withdrawn and there is a risk that similar errors have been made in the re-issued Information Notice of 10 November 2016. The deadline of 14 December was provided by Mrs Deane for a review of the case alongside continued requests for the information, which was a further aggressive act. Despite the Appellant's appeal and the independent review of 20 January 2017, Mrs Deane continued to press for the information requested. The Appellant did not want to provide the information requested "under duress".

The VAT periods covered by the Information Notice of 10 November 2016

25 48. Mr Gillard points out that for enquiry purposes HMRC can only go back four years. Therefore the only information which could have been reasonably requested as at 10 November 2016 was for VAT periods starting after 1 November 2012. The Information Notice requested records for periods starting 01.02.2012.

49. The Appellant has already undergone a VAT control visit which considered all periods up to 30 April 2012, which should therefore be treated as closed.

30 50. The Information Notice should request records for correct periods and take account of all relevant factors, which the Information Notice of 10 November 2016 failed to do.

35 51. The fact that the legislation at Schedule 36 Finance Act 2008 allows HMRC to request information for up to six years, when they can only go back for four years when raising an assessment unless they allege mistake or failure to take reasonable care (which had not been raised in this case), indicates that the two legislative procedures have not been properly aligned.

The non-statutory information requested in the Information Notice of 10 November 2016

52. Mr Gillard argued that the drinks price list was not reasonably required for Mrs Deane's enquiry, all that was reasonably required were the purchase invoices.

HMRC's arguments

53. HMRC stress that the onus of proof is on the Appellant to demonstrate that the Information Notice of 10 November 2016 was incorrectly issued.

VAT periods covered by the Information Notice of 10 November 2016

54. HMRC referred to the legislation at Schedule 36 Finance Act 2008 paragraph 20 which allows HMRC to request documents which originate less than six years before the date of the Information Notice and say that, aside from the drinks price list and the annual accounts requested, all of the information requested from the Appellant is made up of statutory records within six years of the date of the Information Notice.

55. HMRC explained in response to questions from the Tribunal that they usually asked for records going back for six years in these circumstances because although they are limited to raising assessments for more than four years, they can in some circumstances go back for longer periods. They also pointed out that no closure notice had been issued for the Appellant's 04/12 VAT period.

Reasonableness of HMRC's behaviour

56. HMRC point out that the legislation in Schedule 36 does not require that a taxpayer agrees to the place where documents should be reviewed by HMRC; paragraph 7 is in the alternative, documents must be produced at a place agreed by the taxpayer or at such as place as HMRC specify. The Appellant could have proposed a different meeting place, but did not do so.

57. HMRC say that the Information Notice issued to the Appellant made clear that the Appellant should contact HMRC if it could not comply with the requests for information within the timescales stated. In correspondence with HMRC dated 14 November 2016 Mr Gillard said that he was able to provide HMRC with the requested information within 20 days, suggesting that the Appellant was in a position to comply with the information request. The information has been withheld pending withdrawal of the Schedule 36 Notice.

58. In HMRC's view the Information Notice of 10 November 2016 was properly issued.

The request for non-statutory information

59. HMRC stress that Mrs Deane had requested the drinks price list in order for her to verify the Appellant's tax position and that this was a reasonable request in these circumstances. The case referred to by the Appellant (*Stephens & Anor*) does not support their position, but considers the use of a weighted mark up based on stock purchases to come to a "best judgment" assessment.

Findings of fact

60. On the basis of the evidence given to the Tribunal we make the following findings of fact:

- 5 (1) There were inadequacies in the Appellant's VAT records shown to Mrs Deane at her meeting with the Appellant on 12 July 2016.
- (2) The Appellant had been subject to a previous VAT check for periods up to 30 April 2012.
- (3) The non-statutory information requested by HMRC (the drinks price list) was available to be provided to HMRC within 20 days of 14 November 2016.
- 10 (4) HMRC have not suggested that the Appellant has failed to take reasonable care or deliberately brought about a loss of VAT.

Decision

HMRC's unreasonable behaviour

15 61. We pointed out to Mr Gillard at the commencement of the hearing that the Tribunal's powers were limited and that we had no powers to consider the reasonableness of how HMRC handled their administrative affairs, including errors made in issuing information notices and bullying or aggressive behaviour.

20 62. The test of reasonableness which is contained in Schedule 36 goes only to whether the information requested is reasonably required for checking the Appellant's tax position. The question of whether it would have been more reasonable for HMRC to obtain the information in a "consensual manner" or the reasonableness of HMRC's handling of the process of issuing the Information Notice, is, in our view, outside the scope of this consideration.

The periods covered by the 10 November 2016 Information Notice

25 63. On this point we agree with the point made by Mr Gillard for the Appellant. HMRC need to demonstrate that the information which they have requested is reasonably required to "check the taxpayer's tax position". In normal circumstances HMRC can go back no more than four years to issue an assessment (s 77 Value Added Tax Act 1994). In our view if HMRC are requesting information to "check the taxpayer's tax position" for more than that four year period, they need to have a specific reason why information is required for those earlier periods. In this instance
30 no such specific explanation was given, HMRC's response was merely that "they usually asked for six years worth of information".

35 64. Our view is that if HMRC wish to ask for information which goes beyond the four year enquiry window, they need to give a reason why, which we would expect to be that there is some suggestion of deliberate error on the part of the taxpayer. No such suggestion was made in this case. In fact, the Appellant had already been subject to a VAT check for earlier periods (up to April 2012), which HMRC seemed to have

failed to take account of in issuing their information notice for periods going back to the 01.02.2012 VAT period.

65. For this reason we have concluded that the scope of the information requested in the Information Notice of 10 November 2016 went beyond what was reasonably
5 required to check the taxpayer's tax position and that Information Notice was not validly issued.

66. We have considered whether, in coming to that decision, we have effectively given the Appellant a right of appeal which he does not have; to appeal against a requirement to provide statutory records, which is blocked by paragraph 29(2) of
10 Schedule 36.

67. The drafting of paragraph 29 which sets out the Appellant's rights of appeal against an Information Notice makes a distinction between appealing against the notice in its entirety and appealing against a requirement of the notice.

68. We have taken the approach that the need for the information requested to be
15 reasonable in the whole context in which the notice is issued should be considered in priority to the restriction on appealing against a specific requirement of the notice to provide statutory information. Our view is that any other interpretation would be in danger of nullifying any rights of appeal against the notice as a whole in circumstances where statutory records were requested, however reasonable or
20 unreasonable that request might be.

69. In our view requesting information for periods outside the normal four year assessment period and for which a VAT check had already been made without providing a specific reason why information was required for those periods, is a sufficiently fundamental flaw to render the whole information notice invalid.

70. Having come to that decision, we do not need to consider other elements of the Information Notice, but given the amount of time which has already been spent on attempting to obtain this information, we are including some guidance about what non-statutory information might properly be requested in any future information notice served by HMRC on the Appellant.
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71. Our view is that it was reasonable for HMRC to request the drinks price list in the Information Notice of 10 November 2016 in the face of the lack of information provided to Mrs Deane at her meeting of 12 July 2016 and the lack of any further information provided in subsequent correspondence.
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72. HMRC also refer to the Appellant's accounts for the 30.04 2014 to 30.04.2015 period, which were included as "non-statutory" material in the 10 November 2016 Information Notice. Our view is that these should properly be treated as statutory material on the basis of the tribunal decisions, *Concrete Flooring* and *Drinks Stop Cash and Carry*, and as suggested by HMRC in their letter of 20 January 2017.
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73. For these reasons this appeal is allowed and the Information Notice issued on 10
40 November 2016 is not treated as validly issued.

74. 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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 20 SEPTEMBER 2017

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