



TC06824

**Appeal number: TC/2017/08336
TC/2017/08337**

*PROCEDURE – Information Notices – Schedule 36 Finance Act 2008 –
documents and information required – whether statutory records – whether
reasonably required – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**(1) CAROL HOLMES
(2) ANDREW KNIGHT**

Appellants

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Leeds on 10 September 2018

Mr S Nicholls for the Appellant

Mr F Karnohan of HM Revenue & Customs for the Respondents

Background

1. These two appeals relate to information notices issued to the appellants pursuant to Schedule 36 Finance Act 2008. The information notices were issued to each appellant on 13 April 2017 and both were amended following statutory reviews dated 26 October 2017. The bases on which the information notices were issued, amended on review and appealed by each appellant are identical.

2. The appellants are both directors of a company called Seal Designs Limited. They each made individual self-assessment tax returns for 2015-16 disclosing identical income from employment and dividends from UK companies. On 23 March 2017 HMRC opened enquiries into both returns. The letter opening the enquiries requested each appellant to provide certificates of bank accounts operated, and also required the documents and information which became the subject matter of the information notices. Both appellants provided certificates identifying a number of bank current accounts, savings accounts and a joint mortgage account. They both object to being required to provide the remaining documents and information.

3. The amended information notices require the appellants to provide the following documents and information:

(1) All bank and/or building society books or statements for any account into which any personal income or from which any personal expenditure was paid for the period 6 April 2015 to 5 April 2016.

(2) Certificates or statements of any investment accounts held personally such as ISA's or bonds, showing any interest received and movement of capital from 6 April 2015 to 5 April 2016. For each deposit into each investment account, please give a description of the source of funds. In addition, please provide any documentation which exists to corroborate the description given to that deposit.

4. The respondents maintain that the documents and information required are part of the appellants' statutory records and as such there is no right of appeal against the information notices. In the event that the documents and information are not statutory records the respondents maintain that they are reasonably required for the purpose of checking each appellant's tax position.

5. The grounds of appeal relied on by the appellants may be summarised as follows:

(1) The documents and information required are not statutory records.

(2) The documents and information are not reasonably required to check the appellants' tax positions.

6. Before addressing the grounds of appeal in detail, I set out below references to the relevant statutory provisions.

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Statutory Provisions

7. Paragraph 1 Schedule 36 Finance Act 2008 (“FA 2008”) provides that an officer of HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer’s tax position.

8. Paragraph 29 Schedule 36 provides that a taxpayer can appeal against an information notice or any requirement in an information notice unless the requirement is to provide information or produce documents which form part of the taxpayer’s statutory records.

9. Paragraph 62 Schedule 36 provides that information or documents will form part of a persons “statutory records” for present purposes if:

“...it is information or a document which the person is required to keep and preserve under or by virtue of -

(a) the Taxes Act, or

(b) any other enactment relating to tax”

10. The relevant enactment relating to tax to which I was referred is section 12B Taxes Management Act 1970 (“TMA 1970”) which in so far as relevant provides that any person who may be required by section 8 to make and deliver a self-assessment return shall keep and preserve “all such records as may be requisite for the purpose of enabling him to make and deliver a correct return...”.

11. I was also referred to various extracts from HMRC manuals which do not have the force of law. In so far as relevant I refer to them below.

Statutory Records

12. The issue in relation to the first ground of appeal is whether the documents and information required by the information notices amount to statutory records for the purposes of Schedule 36. There is also a prior issue as to who has the burden of proof in relation to this aspect of the appeal. Whether the respondents must show that the documents and information are statutory records, or whether the appellants must show that they are not statutory records.

13. Once it is accepted that a document is a statutory record, Schedule 36 provides no right of appeal against an information notice requiring production of that document. The reason for that is clear. If a taxpayer is legally required by the Taxes Acts to keep and preserve a document, there is no reason for the taxpayer to resist production of the document to HMRC. In those circumstances HMRC are entitled to production of the document as a matter of course. They are not required to justify to a tribunal that the document is reasonably required in order to check the taxpayer’s tax position. The nature of the document, as one that is required to enable the taxpayer to make a correct and complete return, leads to what is in effect an irrebuttable

presumption, at least as far as the tribunal is concerned, that it is reasonably required for the purposes of checking the taxpayer's tax position.

14. Questions have arisen in previous cases before the F-tT as to whether documents and information required by an information notice amount to statutory records, and if so where the burden of proof lies. The issue as to the burden of proof in such circumstances was canvassed but not resolved by the F-tT in *Joshy Mathew v HM Revenue & Customs [2015] UKFTT 0139 (TC)* at [88] to [92] as follows:

10 “ 88. There is a further point, raised by neither party: who has the burden of proof in the context of statutory records? In other words, if HMRC assert that a document is a statutory record, is the burden on the appellant to prove the contrary? This is important, because, as we have already noted, if the documents/information are “statutory records,” the appellant has no right of appeal.

15 89. In the context of a company, or even a self-employed business, it is usually relatively straightforward to identify statutory records. These will include a business bank accounts, invoices, purchase orders, till rolls etc. But it is more problematic for individuals. What documents/information does a person require in order “to make and deliver a correct and complete return for the year or period?”

20 90. Consider some of the Items required under the Notices issued to Mr Mathew. He sold a property in Stanmore. HMRC asked for documents/information to establish whether he had received rental income, and whether or not the disposal gave rise to a capital gain. If Mr Mathew did receive rental income, and/or there was a capital gain, many or all of the documents/information requested by HMRC via the Sch 36 Notice will be statutory records, because they will be required for the correct completion of Mr Mathew's SA return. But HMRC do not know if there was rental income, and they do not know if there is a capital gain: only Mr Mathew knows these facts. The citation from *Nicholson v Morris*, set out at §83 above, is apposite.

25 91. If the burden is on the appellant in relation to statutory records, he can of course appeal to the Tribunal if he considers that an item which HMRC assert is a statutory record is not such a record, and provide the relevant evidence.

30 92. However, as we had no submissions on this point, we have taken the same approach in relation to statutory records as we have as in relation to the “reasonably required” test, namely that HMRC have the burden of showing that the documents/information constitute a statutory record. If our approach would have meant that or more documents/information would be removed from the Notices, we would have adjourned the case for further submissions. But as the rest of our decision makes clear, this was not the position.”

40 15. The respondents in the present appeal acknowledged the difficulty in a case such as the present. The appellants' position is that their tax returns are correct, save for the omission of certain trivial amounts of interest. Hence their sole incomes for tax purposes come from employment earnings, dividends and interest. The respondents acknowledge that if that is right, then the records required to be kept by section 12B TMA 1970 may be limited to the end of year P60, dividend counterfoils and certificates of interest. It is only if the tax returns are incorrect and fail to show an

additional source of income that bank statements may be necessary for the purpose of delivering a correct return.

16. The respondents argued, based on the observations in Joshy Mathew, that the burden is on the appellants to show that the documents and information are not statutory records. It was submitted that at this stage only the appellants know what sources of income they had in 2015-16. However, the respondents also acknowledged that it is not for the tribunal on an appeal against an information notice to determine whether the tax return is correct or incorrect. I agree with the latter point. It is difficult to see how the tribunal can resolve what documents it is necessary to keep without making a finding as to what sources of income the appellants had.

17. I note that paragraph 29 Schedule 36 provides specifically as follows:

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

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

18. Paragraph 29(1) gives taxpayer's a general right of appeal against an information notice, subject to the exclusion in paragraph 29(2) in relation to statutory records. My provisional view would be that it is for the respondents to make out a case that the request falls within the exclusion in paragraph 29(2) because the documents and information being requested are statutory records. Having said that, I did not hear any submissions on the point beyond reference to what was said in Joshy Mathew. I do not consider it appropriate therefore to make any finding as to where the burden of proof lies in relation to statutory records on an appeal against an information notice.

19. Further, the respondents accept that it would not be right for me to express any view on this appeal as to whether the appellants' tax returns correctly identify all their sources of income. Neither party invited me to make any such finding. In the absence of such a finding I cannot say whether the documents and information amount to statutory records. What I can say is that I am not satisfied on the basis of the material before me that the documents and information required by the information notices are statutory records of either appellant.

Reasonably Required

20. The burden of proof on an appeal against an information notice requiring documents and information which are not statutory records was also considered by the F-tT in Joshy Mathew. In particular whether there is a burden on the appellant to show that the documents and information are not reasonably required, or on the respondents to show that they are. I was not referred to any other decisions on the issue, although there have been a number of F-tT decisions since Joshy Mathew which consider the burden of proof. The absence of any authoritative consideration of

the issue is no doubt due to the fact there is no appeal from a decision of the F-tT in relation to information notices.

21. In the event it was not necessary for the F-tT in Joshy Mathew to decide the issue as to burden of proof. It approached the appeal on the basis that the burden lay on the respondents and found that the information and documents were reasonably required. I shall take the same approach and assume, in the first instance and for present purposes only that there is a burden on the respondents to show that the documents and information in the information notices are reasonably required.

22. The respondents adduced evidence before me that there was reason to believe that the appellants' tax returns for 2015-16 may not show their total income. That evidence comprised material from third parties to suggest that the appellants' level of personal expenditure including the level of mortgage payments was not matched by their declared income. There was also evidence of capital introductions made by the appellants into Seal Design Ltd.

23. The respondents relied on what was said by Tribunal Judge Mosedale in *Spring Capital Ltd v HM Revenue & Customs [2015] UKFTT 0008 (TC)* in the context of an appeal against a penalty for non-compliance with an information notice. In that case the appellant maintained that the underlying information notice was invalid because the documents and information were not reasonably required. One argument was that the information notice was a "fishing expedition". This was considered at [33] and [34] as follows:

“ 33. A Fishing expedition? By using the term 'fishing expedition' I understood Mr Thomas to mean that HMRC were seeking to investigate the appellant's tax return without having any reason to suspect that it was wrong.

34. So did HMRC exceed its powers in issuing the information notice? Paragraph 1 of Sch 36 provides that an HMRC officer can issue an information notice 'if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position' (see §2 above). There is nothing in this section that requires HMRC to suspect that the return is incorrect before issuing an information notice. HMRC are entitled to check taxpayer's tax position and they are entitled to any documents or information reasonably required for the purpose of doing so. In other words, HMRC are entitled to undertake 'fishing expeditions' when checking returns: they do not need suspicion in order to check a tax return.”

24. It must be right that the respondents can check a tax return, and they do not need to have any suspicions in relation to that return before checking it. In carrying out an enquiry however, Schedule 36 imposes a test of reasonableness in relation to the documents and information that taxpayers can be required to provide. In my view it is not possible to lay down any general rule as to what will be considered to be reasonable in enquiries generally. What is reasonable will depend on all the circumstances of the case.

25. The appellants make the point that in forming the view that there was a disparity between declared income and expenditure the respondents must have made various

assumptions about the appellants' financial affairs which they have not disclosed. The appellants say that they have utilised sources of funds including historic income and family money.

5 26. The appellants drew my attention to the respondents' internal guidance in relation to the conduct of enquiries. In particular, the Compliance Handbook which I understand used to state at CH223430:

10 "The over-riding test is based on what is reasonable (that is, fair and sensible) in the circumstances. The question of whether it is reasonable to request private documents including bank and building society accounts can only be determined by reference to the facts in each individual case.

'Non-business bank details should not be requested in the opening letter as a matter of course...'

27. My attention was also drawn to the current Enquiry Manual at EM1570 which states as follows:

15 **" Opening the Enquiry: Information Request: Full Enquiry - Non Business Taxpayer**

As with a return for a business taxpayer, you should only ask to see private bank statements at this stage if you can demonstrate their relevance to the return and that you reasonably require them for the purpose of checking its accuracy."

20 28. In the present case, the letters opening the enquiries requested the appellants to provide their private bank statements. That request was repeated as a requirement in the information notices. The appellants contend that the documents and information are not reasonably required because:

25 (1) The respondents do not need them to check the accuracy of returns which comprise only employment income, dividends and, although omitted, small amounts of interest.

(2) Information as to movements of capital have no relevance to what is contained in the appellants' tax returns.

30 (3) There is no real evidence of inaccuracy in the tax returns, save in respect of minor amounts of bank interest.

(4) The appellants have a right to privacy under the Human Rights Act 1998 and the requirements of the information notices are disproportionate.

(5) The request in the opening letters was not consistent with the respondents' own internal guidance.

35 29. Clearly the respondents can check the employment income, dividends and interest received by the appellants by reference to P60's, dividend counterfoils and interest certificates. However, that is not the extent of the respondents check into the appellants' tax returns. There is evidence before me of a disparity between the appellants' declared income and their personal expenditure, which forms part of the

respondents' legitimate enquiries. There may be another source of taxable income which, for whatever reason, has been omitted from the returns.

30. There may be a perfectly proper explanation for the apparent disparity between income and expenditure, consistent with the tax returns made. The respondents are at the stage of gathering documents and information. One method of enquiry may be to ask for specific explanations from the appellants before seeking documentation. However, that is not the only reasonable approach. In my view the respondents can in the present circumstances reasonably require the appellants to produce the documents and information in the amended information notices, including personal bank statements for the year of enquiry, details of investment accounts and explanations as to movements of capital and sources of deposits in relation to those investment accounts for the year of enquiry.

31. The appellants argue that the information notice is disproportionate and is using a sledgehammer to crack a nut. A proportionate approach would be to ask the appellants for their explanations for the apparent disparity before asking for personal bank statements. I do not accept that argument. In my view it would place an unreasonable constraint on the manner in which the respondents are seeking to conduct a legitimate enquiry. There is nothing disproportionate in the appellants being required to provide personal bank statements for a year where the respondents are enquiring into the self-assessment return for that year and where they have identified the apparent disparity referred to above. I am not satisfied that the requirement is a disproportionate interference with the appellants' right to privacy.

32. As far as the internal guidance is concerned, the current guidance appears to be in Enquiry Manual EM1570. I accept that if the enquiry was conducted in a way which was inconsistent with that guidance then that may be an indicator that the information and documents are not reasonably required. However, I do not consider that the request for documents and information was inconsistent with the guidance. I consider that the respondents have demonstrated that the documents and information are relevant to the returns and are reasonably required for the purpose of checking the returns.

33. On the evidence before me and for the reasons given above I consider that the documents and information in the amended information notices are reasonably required by the respondents for the purpose of checking the appellants' tax returns.

Conclusion

34. For the reasons given above I dismiss the appeals.

35. Pursuant to paragraph 32(5) Schedule 36 Finance Act 2008 there is no right of appeal against this decision.

TRIBUNAL JUDGE CANNAN

RELEASE DATE: 16 November 2018