[2021] UKFTT 0357 (TC)

TC08291

PROCEDURE – Schedule 36 FA 2008 Information Notice – whether information reasonably required – yes – appeal dismissed – notice and requirements confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04492

BETWEEN

SARAH THOMAS **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: CELINE CORRIGAN

The hearing took place on 20 May and 15 September 2021. With the consent of the parties, the form of the hearing was video.

Michael Upton and Tim Haddow, Advocates, instructed by Russell & Aitken for the Appellant on 20 May 2021 and Mr Upton alone on 15 September 2021

Sadiya Choudhury, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal under paragraph 29 of Schedule 36 of Finance Act 2008 ("Schedule 36") against a taxpayer notice issued by HMRC under paragraph 1 of Schedule 36 on 21 March 2019.

2. Paragraph 32 of Schedule 36 provides that:-

> "(3) On an appeal that is notified to the tribunal, the tribunal may –
>
> (a) confirm the information notice or a requirement in the information notice,
>
> (b) vary the information notice or such a requirement, or
>
> (c) set aside the information notice or such a requirement".

Mrs Thomas' motion was that the Tribunal should set aside the information notice ("the Notice") and the requirements in it, or alternatively, to vary the notice or the requirements.

3. The Schedule to the Notice requested the following information and reads as follows:-

> "**Documents or information that we need**
>
> In this context 'document' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.
>
> **In relation to the £250,000 paid by Mrs Sarah Thomas to Thomas Maclennan Ltd on 20 November 2007**
>
> 1. What was the source of the £250,000 Mrs Thomas paid to Thomas Maclennan Ltd on 20 November 2007?
> 2. How did the funds to make this payment accumulate in Mrs Thomas's bank account and specifically provide details of any material deposits above £20,000 for the 12 months prior to the payment being made on 20 November 2007 setting out dates, amounts and identifying the source of the deposits.
> 3. If any gifts or funds have been provided by other parties, provide particulars of what dates and by whom these gifts were made and the reason for these gifts or funds.
>
> **In relation to the £650,000 paid by Mrs Sarah Thomas to Spring Seafoods Ltd from ********** [********] on 3 February 2010**
>
> 4. What was the source of the £650,000 Mrs Thomas paid to Spring Seafoods Ltd on 3 February 2010?
> 5. How did the funds to make this payment accumulate in Mrs Thomas's bank account and specifically details of any material deposits above £20,000 for the 12 months prior to the payment being made on 3 February 2010 setting out dates, amounts and identifying the source of the deposits.
> 6. If any gifts or funds have been provided by other parties, provide particulars of what dates and by whom these gifts were made and the reason for these gifts or funds.

In relation to the £2,135,713 debt assignment by Mrs Thomas on 1 February 2010 to Spring Seafoods Ltd

7. How was the figure of £2,135,713 calculated as being the amount due to Mrs Thomas in respect of her shareholder fund together with an explanation of how this figure was arrived at, who computed this figure and what correspondence or papers exist to demonstrate this?

8. Who acted for Mrs Thomas in drawing up the deed of assignments and the debenture agreement? Please provide any correspondence that exists sent to Mrs Thomas concerning the assignment.

9. Who agreed to the assignment of the debts on behalf of Thomas Maclennan Ltd and what evidence exists of this? Is there any evidence of any meeting of the Thomas Maclennan Ltd board to ratify this decision?

10. Copy of the director's loan accounts for the year ending 31 October 2007 and 31 October 2008 for Thomas Maclennan Ltd – these should be within the working papers for the accounts prepared for these years. If not available, can you please confirm the reason why the information is not available?

11. What was the reason for the failures in submitting the accounts for Thomas Maclennan Ltd for any periods after APE 31 October 2008 and before company (sic) was dissolved in February 2011?

12. Were any draft accounts or management reports retained or are there existing accounting records of Thomas Maclennan Ltd for periods beyond 31st October 2008?

13. In relation to the mortgage of £1,000,000 on 19 March 2007, please provide an explanation of how the mortgage payments were met and if payments were made from other sources (for example from Spring Seafoods Ltd or Spring Capital Ltd) and how these payments have been treated for accounting purposes in respect of Mrs Sarah Thomas.

14. What were the terms and conditions in relation to the debts assigned by Mrs Thomas to Spring Seafoods Ltd on 1 February 2010? If interest was not earned, what was the reason Mrs Thomas would make this assignment, particularly as she was liable to the interest only mortgage and the capital repayment of the sum borrowed?

15. A copy of the assignment deed and related correspondence in respect of the Thomas Maclennan Ltd assignment to Mrs Thomas on 1 February 2010."

The hearing

4. Mrs Thomas did not appear. She had lodged a witness statement dated 9 October 2020 stating that in reference to her husband, Mr Roderick Thomas ("Mr Thomas"):

> "At all material times he has looked after my financial affairs. He has my authority to speak on my behalf in respect of this appeal. I have read his witness statement and can confirm that to the best of my knowledge and belief it is correct."

5. Mr Thomas and Officer Sartaj Gill both gave evidence. Very unusually for a case in which HMRC bear the burden of proof, examination-in-chief of Mr Thomas who had lodged two witness statements lasted two hours but there was no cross-examination of Officer Gill.

We found Officer Gill to be an entirely credible witness and since there was no cross-examination his evidence stands as unchallenged.

6. We had an amended joint document bundle extending to 430 pages, the appellant's supplementary document bundle extending to 7 pages being a supplementary statement of Mr Thomas, HMRC's supplementary bundle extending to 46 pages, a joint authorities bundle extending to 259 pages and several other authorities which were lodged subsequently. In addition we had Skeleton Arguments for both parties and written submissions for the appellant for the second hearing.

The facts

7. In large measure the facts were not in dispute.

8. This matter does not arise in isolation. Mr Thomas and his brother, Stuart, have litigated a number of issues before the Tribunal and other courts as individuals, as partners and as directors of various companies, including Spring Salmon & Seafood Ltd ("SSS") and Spring Capital Limited ("SCL"), which was formerly known as Spring Seafoods Ltd ("SSL") until a change of name on 12 February 2010.

9. During the course of enquiries into the tax affairs of Mr Thomas and the trust and companies with which he is associated, HMRC had become aware that the appellant had:

(1) taken out a mortgage of £1 million and loaned the funds thus obtained to a company, Thomas Maclennan Limited ("TML") on 19 March 2007;

(2) made a loan of £250,000 to TML on 20 November 2007; and

(3) made a loan of £650,000 to SSL on 3 February 2010.

10. HMRC had also become aware that on 1 February 2010, TML had assigned two debts due to it by Nine Regions Limited and by two individuals ("the 9RL loans") in the sums of £319,070.39 and £1,477,455.44 (but described by TML as a total of £2,135,713) to Mrs Thomas and she reassigned that debt to SSL on the same date. It was secured by a debenture from SSL in her favour. We explain the detail below.

11. On 13 December 2018, HMRC Officer Gill notified Mrs Thomas that he had opened a compliance check under Schedule 36 into her personal tax affairs as well as an enquiry into her self-assessment tax return for the year ended 5 April 2018 under section 9A Taxes Management Act 1970 ("TMA"). This appeal and the Notice relate only to the compliance check.

12. A covering letter to Mr Thomas, in his capacity as his wife's representative, intimated that the enquiry and compliance check would be worked under Code of Practice 8 ("COP8"). It went on to state that the compliance check related to the source of the capital introduced into SCL on 1 and 3 February 2010 being a total of £2,785,713. That letter made it explicit that HMRC required evidence in particular in respect of two separate transactions, namely:-

(a) The source of the £650,000 paid from Mrs Thomas' bank account on 3 February 2010; and in particular asked for the information requested at paragraphs 4, 5 and 6 of the Notice.

(b) How the debt assignment of £2,135,713 on 1 February 2010 was calculated and requested the information set out at paragraphs 7 to 15 of the Notice.

13. The officer also made it explicit that: "I need to understand and establish how the difference, £885,713, has arisen and establish the source of the £250,000 loan.

14. On 25 January 2019, Mr Thomas responded stating that the matters that had been raised had already been comprehensively addressed in correspondence and meetings and that they had "nothing further to add". He went on to state that HMRC had been provided with compelling evidence that the shareholders including his wife had more than adequate means to finance the capital injections made by them. Officer Gill responded on the same day stating that he would continue his enquiries with or without the co-operation of the appellant.

15. On 21 March 2019, having received no further information from or for Mrs Thomas, Officer Gill, issued the Notice referencing the letter of 13 December 2018, stating that he was seeking information and documents that were over six years old on the basis that "… there are reasonable grounds to suspect that there may have been a deliberate error in your tax returns." He stated at the sixth paragraph that:

> "In this case, my reason to suspect deliberate error relates to the potential omission of taxable income (for example, loan interest or distribution from company for asset owned (sic) etc) for the tax year 2009/10 or earlier on all or part of the £885,713 difference between the amounts originally introduced into Thomas Maclennan Ltd of £1,250,000 in March 2007 and the assignment back to Mrs Thomas of £2,135,713 in February 2010".

16. He stated that the purpose of the Notice was to establish if there is any additional tax liability and whether it arose out of deliberate behaviour.

17. The appellant appealed, first by email to HMRC on 16 April 2019 and then to the Tribunal by Notice of Appeal dated 25 June 2019.

TML

18. Mrs Thomas was company secretary of TML from incorporation on 3 October 2005 until 12 September 2006 when her brother-in-law Mr Stuart Thomas became company secretary. Mr Thomas was the sole director of TML from incorporation until dissolution on 15 February 2011. He was also a director of SSL and, of course, SCL.

19. Mrs Thomas was the majority (80%) shareholder at all material times in TML. Her husband was the other shareholder (20%).

20. The principal activity of TML is described in its accounts as "The company is engaged in monetary intermediation, business and management consultancy and literary creation". Mr Thomas explained that the first activity was the provision of commercial loans to other companies "alongside" loans made by SCL and SSS. In examination-in-chief, Mr Thomas said that the business of TML was "largely driven by me".

21. In or about the latter part of 2009 Mr Thomas decided to restructure some of the family business interests including TML and decided to effectively amalgamate TML and what was to become SCL.

22. In or about February 2010, SCL acquired TML's money lending business by assignment. We have not seen any documentation in that regard. The assignment of the 9RL loans to and

by Mrs Thomas occurred on 1 February 2010. Mr Thomas said that thereafter TML had no significant trade.

23. We had what were described as accounts for TML for the accounting periods ending ("APE") 31 October 2007 and 2008. The accounts for the former did not include a profit and loss account or details of interest paid. No accounts were filed thereafter. TML was dissolved on 15 February 2011.

24. Those accounts show "Shareholders loans" of £12,000 in APE 31 October 2006, £1,281,797 in APE 31 October 2007 and £1,759,480 in APE 31 October 2008. The accounts stated that the loans were repayable on demand and "earn interest at commercial rates". In the accounts for APE 31 October 2008 Note 3 discloses interest payable on shareholders' loans of £150,000 in 2008 and £91,891 in 2007.

SCL (formerly SSL)

25. SCL is actually at the heart of this matter since it is the enquiry into its affairs and the subsequent litigations that triggered the enquiry into the appellant. Mr Thomas says at paragraph 28 of his first witness statement that: "The whole chapter of HMRC's enquiries into SCL are discussed by the FTT's decision in Spring Capital Limited v HMRC …dated 20 May 2019 at paragraphs 12 to 75".

26. That was in fact my decision (hereinafter referred to as the "2019 Decision") and it was produced in the bundle, albeit for inexplicable reasons it appears that it has not yet been published. It seems to be an oversight by the Tribunal administration but its inclusion in the bundle and the recognition that it has not been published means that it will shortly be published and will join the extensive canon of SSS and SCL decisions familiar to tax practitioners. For the purposes of this decision I annex a copy since the appellant relies upon it.

27. That decision related to an application for costs by SCL because 12 days before a scheduled hearing of two appeals HMRC withdrew from the litigation. I refused the application because I accepted that HMRC had only been successful in eliciting from Mr Thomas and SCL information about the source of funds in SCL in July 2018 after more than six years and three litigations.

28. As I narrate at paragraph 58 of the 2019 Decision it was only on 29 June and 10 July 2018 that the relevant information relating to the injection of £650,000 into SCL by Mrs Thomas was furnished (as also for the £650,000 injection of funds by Mr Stuart Thomas). Until then HMRC only knew that SCL had received the funds but there was no audit trail evidencing the movement of monies. Unsigned copies of the 9RL loans were only provided to HMRC on 21 February 2018 and at an unspecified date before 20 June 2018 signed copies were provided.

29. The assignation of the 9RL loans by the appellant to SCL states at paragraph 2 that "In consideration for a credit in the amount of £2,135,713 to her shareholder account with the Assignee, the Assignor hereby assigns the Debt, (the value of which is £2,135,731) and all rights in relation to it, with limited title guarantee, to the Assignee".

30. The Schedule to the Deed identified that that debt comprised two loans from TML to 9RL and two other men in the sums of £319,070.39 and £1,477,455.44 totalling £1,796,525.83. No explanation of the substantial discrepancy of £339,187.17 was provided to me. It has still not been clarified.

31. In summary on 24 February 2012, HMRC had opened an enquiry into SCL and one of the issues was the increase in the shareholders' loans in the APE April 2010 of £3,454,913.

32. Lengthy correspondence ensued and that does not require to be narrated here.

33. On 24 November 2016, Mr Thomas wrote to HMRC stating that Mrs Thomas' self-assessment tax returns ("SATRs") disclosed qualifying interest payments from TML in relation to the loans she had made to it of £6,001 in 2006/07, £50,000 in 2007/08, and £50,402 in 2008/09.

34. On 8 March 2017, Officer Stewart wrote to Mrs Thomas with a copy to Mr Thomas, stating to the latter that RSM had said that much of the information that he required was in the gift of Mrs Thomas. He said to her that he wished to avoid discovery assessments and went on to ask many of the questions in the Notice.

35. On 28 March 2017, RSM UK Tax and Accounting Ltd ("RSM") wrote to HMRC stating that the appellant's 2008/09 SATR disclosed interest of £150,000. They also stated that she had received interest of "over £300,000" from TML.

36. On 25 April 2017, Officer Stewart responded agreeing that in APEs 31 October 2007 and 2008 there was interest paid by TML to Mrs Thomas but pointing out that thereafter no interest, either from TML or SCL, was returned by her in her SATRs for the six years to 5 April 2015.

37. Mr Upton relied on the fact that the Officer stated in that letter that he thought it probable that Mrs Thomas would not have copies of the shareholder's loan accounts with TML. He did but he went on to say that he expected that Mr Thomas or the accountant would have the information and he asked for it. He also asked some of the questions in the Notice.

38. On 10 May 2017, RSM responded and the gist of their letter was that Mr Thomas was the source of much of the funding. There was very little detail.

39. As Officer Stewart pointed out in a letter to RSM dated 2 June 2017, by then it had taken "…nearly five years, including litigation and the incurring of daily penalties" to finally be told that the source of a large part of the monies credited to Mrs Thomas was Mr Thomas.

40. Correspondence ensued as Officer Stewart wished to reconcile that information with Mrs Thomas' SATRs in the context of his enquiry into the shareholders' loan accounts. He was clear that his concern at that time was SCL and there was not then an enquiry into Mrs Thomas' affairs.

41. He was concerned that he knew only that Mrs Thomas' SATRs showed interest from TML of £120,000 net in 2007/08 and £150,000 gross in 2008/09 but nothing thereafter.

42. In an email to RSM dated 6 February 2018 which was forwarded to HMRC, Mr Thomas narrated very general details of his and his brother's wealth, disclosing Mrs Thomas' £1million mortgage to part finance TML's loan to 9RL, stating that "In the two years 2007-09" Mrs Thomas had "…self assessed on income of £350,000". That figure is now conceded by Mr Thomas to be overstated. He attributes it to an error and stated that it had no connection with the figure of £350,000 repeatedly (and erroneously) stated to be interest paid to Mrs Thomas by TML.

43. On 2 November 2017, Officer Stewart wrote to RSM, noting that Mr Thomas declined to answer a number of his questions, stating that the explanations given by Mr Thomas "…do

not begin to reconcile with Mrs Thomas' tax returns" and he pointed out clearly, yet again, that he was dealing with SCL and not Mrs Thomas.

44. As can be seen Officer Stewart's enquiry terminated when Mr Thomas finally provided credible evidence of the source of the funds in June and July 2018.

Grounds of Appeal

45. The appellant argues that:-

(a) The appellant has provided all the information which is within her power or possession to supply.

(b) HMRC have no reasonable basis to suspect that there are any omissions in the tax returns.

(c) HMRC have failed to provide any reason for suspecting that the appellant has deliberately submitted an inaccurate tax return. The officer concerned had not reviewed the relevant tax returns.

(d) HMRC have not specified any particular year in relation to which there are putative omissions of income.

(e) Some of the information requested relates to other taxpayers and is not within the power and possession of the appellant.

(f) The matters at issue have been the subject of a protracted investigation and on 23 November 2016, HMRC had decided that the amounts at issue should be assessed as the income of SCL. HMRC had given an undertaking that they would not investigate the appellant's tax affairs and they have no right to resile from that undertaking.

(g) The appellant has cooperated with HMRC and has provided extensive evidence of her wealth.

The issues

46. In HMRC's letter of 21 March 2019, HMRC argued that there were reasonable grounds for suspecting a deliberate error on the part of the appellant. The appellant contends that there were no reasonable grounds.

47. The second issue is whether the 15 demands in the Information Notice meet the tests of:

(1) being information or documents reasonably required to enquire into that suspected deliberate error; and

(2) are in the power and possession of the appellant.

The Law

48. Paragraph 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".

49. A taxpayer's "tax position" for the purposes of Schedule 36 is defined in paragraph 64 as:-

"….the person's position as regards any tax, including the person's position as regards –

(a) past, present and future liability to pay any tax.

(b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax,

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly".

50. Paragraph 21 of Schedule 36 provides that, for a taxpayer notice to be valid, one or more of conditions A to D must be met. Paragraph 21(6) reads:

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

(a) an amount 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."

Discussion

51. For the avoidance of doubt the assertions in the Grounds of Appeal that Officer Gill had not looked at Mrs Thomas' relevant tax returns and that he had not specified a year or years with which he was concerned are unfounded and simply not accepted.

52. Mr Thomas argued that he and his wife had reasonably relied on what he described as an "undertaking" by HMRC in November 2016 that they would not pursue any enquiries into her affairs. Firstly, this Tribunal has no jurisdiction in relation to issues of legitimate expectation but secondly, and more importantly, we do not accept that there was any such undertaking. Officer Stewart repeatedly stated that he was not enquiring into her returns but he was trying to find out the source of the shareholders' loan accounts, in order to exclude the possibility that they were derived from SSL, but with very little success. As can be seen that remained the situation in 2017 and well into 2018. When that credible evidence was produced in 2018 it proved that, with the exception of £650,000 furnished by Mr Stuart Thomas, the remaining funds had been provided by Mrs Thomas. That raised the entirely different question of the source of her funds.

53. We found Officer Gill's evidence to be entirely credible and, of course, it was not challenged. From his perspective, having reviewed the level of income and sources declared by Mrs Thomas in her SATRs from 2007/08 to 2016/17 he formed a view that that did not stand up to scrutiny against the £885,713 difference (the "Difference") referred to at paragraph 13 above. He was also concerned about the affordability of the mortgage and the source of capital introduced. As far as the mortgage was concerned he wished to know how it had been secured, given Mrs Thomas' relatively low income by comparison, and how she had serviced it. Hence the letter of 13 December 2018. All that he had were general and vague assertions from Mr Thomas about family wealth and gifts to Mrs Thomas from her father.

54. He had reviewed a table that had been produced in another SCL litigation which bears to be a series of intercompany loan balances between SCL and various corporate entities including TML. That showed the introduction of the £1 million and the £250,000 by Mrs Thomas. Officer Gill was concerned that by adjusting the balances to 1 February 2010 being the date of the assignments between TML and Mrs Thomas and then to SCL the figure is precisely £2,135.713. He could not ascertain why Mrs Thomas' original investment of £1,250,000 had grown so as to precisely equal the intercompany balance. He was understandably concerned about possible tax consequences.

55. Officer Gill was also aware of the decision of the Tribunal in *Rebecca Thomas and Sarah Thomas v HMRC*[1] ("the 2014 Decision") where Judge Anne Redston and Sonia Gable had found that Mrs Thomas had been paid interest of £150,000 gross by TML in 2007/08 but in her SATR, prepared by Mr Thomas, she had declared a net receipt of £120,000. The Tribunal found that the discovery assessments had been properly made and increased the level of penalty.

56. The discovery assessment had been issued on 22 October 2010 and on 28 October 2010 Mrs Thomas amended her 2008/09 SATR to show a gross receipt of £150,000. There was no disclosure of any interest payment in 2009/10 yet it was only on 1 February 2010 that Mrs Thomas was repaid in the form of the assignment. That raises the question as to whether any part of the Difference was an interest payment that was not declared.

57. Officer Gill was concerned that there might be further inaccuracies since Mr Thomas had argued for a long time that Mrs Thomas had received £350,000 in interest payments from TML.

58. For the avoidance of doubt, we agree with Mr Upton that fishing exercises are not permitted and in particular that HMRC cannot use the Notice to request documents and then form suspicions from a taxpayer's refusal or reluctance to supply them. That is not what happened in this case. Officer Gill investigated fully before framing the questions in the letter of 13 December 2018. The Notice followed on from the lack of response to that letter.

59. In summary, we find that the Notice is valid. What then about the information and documents sought?

60. Mr Upton relied on the Tribunal decision in *Avonside Roofing Limited v HMRC*[2] ("Avonside") where the Tribunal relied on Judge Redston's decision in *Gold Nuts Limited v HMRC*[3] for the proposition that when considering whether the information sought is "reasonably required" one must consider whether it is proportionate. *Avonside* was concerned with penalties and a different test. It is not really in point but proportionality would always be a factor. It is not in dispute that HMRC bear the burden of proof and Miss Choudhury agreed with Judge Redston's point at paragraph 71 that "The question of whether information is 'reasonably required' should be considered in the context of what the officer is seeking to check."

61. The Condition with which we are concerned is Condition B and it is whether there is reason to suspect an underpayment of tax.

[1] [2014] UKFTT 980 (TC)
[2] [2021] UKFTT 158 (TC)
[3] [2017] UKFTT 84 (TC)

62. Mr Upton relied on the sixth paragraph of the Notice stating that that set the parameters of the Notice and when considering if HMRC's requirements in the Notice were reasonable then it could only be by reference to that, ie only the Difference, whether that was £885,713 or less.

63. We disagree fundamentally. The Notice must be read as a whole. What Mr Upton skated over was that the two opening paragraphs read:

> "This letter is an information notice. It is a legal request for information or documents.
>
> I wrote to you and Mr Thomas (as your agent) on 13 December 2018 to ask for some information and documents. I believe these are reasonably required….".

64. The letter of 13 December 2018 was very clear in its terms and asked the questions set out in the Schedule to the Notice (and indeed asked for more in terms of bank statements etc). It made it explicit that he was concerned about "the source of the capital introduced" to SCL. The information sought in the Notice all relates to that. We use the word information advisedly since, with only two exceptions being requests 8 and 15, Officer Gill is seeking only information.

65. Certainly in the sixth paragraph Officer Gill did articulate one of his concerns being the concern that had triggered the referral of the case to him but in his investigations he had then also focussed on the £650,000, the mortgage and the £250,000.

66. Unlike the position for third party notices under Schedule 36 where at paragraph 3(3)(e) there is a requirement to give the taxpayer a summary of the reasons that the information is required, there is no such requirement for paragraph 1. Officer Gill complied with the legislation when he explained that he had reason to believe that tax had been under assessed and that he suspected a deliberate error. That was consistent with his unchallenged evidence.

67. In summary, looking at the totality of the evidence we find that Officer Gill had a number of reasons to suspect that there may have been an underpayment of tax so Condition B is satisfied. He did not need to go beyond that.

68. The question then is whether the 15 requests for information are reasonably required for the purpose of checking Mrs Thomas' tax position. Whilst we accept that the Notice cannot test the plausibility of taxpayers[4], the statutory test is whether a request is reasonably required to ascertain whether there has been a loss of tax. We find that in this case HMRC had good grounds to worry that there might have been a loss of tax and that it was caused deliberately.

69. Although his submissions were very lengthy, in summary, Mr Upton argued that the Notice is absurdly wide, relates to other taxpayer(s) and as we have indicated, detached from its stated purpose. We have already dealt with the last point which we reject for the reasons given.

70. Miss Choudhury argues that HMRC are only seeking information, not documents, and as Mrs Thomas was a party to each of the transactions that information should be within her knowledge or because she was the controlling shareholder of TML, in practical terms, it should be accessible to her.

[4] R D Utilities Ltd v HMRC [2024] UKFTT 303 (TC)

71. As we point out at paragraph 34 above, RSM told HMRC long ago that the information sought was in the gift of Mrs Thomas. In this case, Mr Thomas told the Tribunal that, although he acted for his wife and assisted her, she was a free agent and made her own decisions. She was at all times the controlling shareholder of TML. An accountant prepared the accounts for TML. We find that she has *de facto* power, as Officer Stewart argued, to seek further information and documents.

72. That raises the argument on power and possession. Mr Upton relies on *Lonhro Limited v Shell Petroleum*[5] ("Lonhro") for the proposition that for a document to be within a person's power means that they must have an enforceable legal right to obtain the document from whomever holds it. He argues that Judge Mosedale "erred" in taking a different approach in *HMRC v Parissis*[6] ("Parissis"). We disagree. *Lonhro* deals with different legislation and different wording. We are not bound by *Parissis* but we agree entirely with Judge Mosedale's reasoning starting at paragraph 55.

73. Where, as here, HMRC is primarily seeking information, there is no reason why HMRC should have to issue third party notices with all that that entails. Mrs Thomas should know the answers to some of the questions and should be able to access information in regard to others.

74. There are three headings in the Schedule to the Notice so we will deal with each type of funding in turn.

75. Before doing so as a general observation, we note Miss Choudhury's objection to the fact that this hearing was the first time that it had been argued that the Notice was ambiguous in its terms. Firstly, we make it clear that we do not find the Notice ambiguous, as Mr Upton alleged for this hearing. Clarification could have been sought from HMRC a long time ago since the same points were raised in the 13 December 2018 letter. It was not.

76. Furthermore, in the 2019 Decision at paragraph 75 I quoted Judge Mosedale in a 2016 decision about penalties incurred by SCL in relation to failure to comply with an information notice where she clearly pointed out that such issues should be raised before an appeal reaches the Tribunal. They should.

£250,000

77. The first request is a straightforward question about the source of these funds. It is a significant sum. The only information given to date is that Mrs Thomas' husband is wealthy and a general and unparticularised statement that he gave her money as did her father. As Mr Thomas found out in the 2019 Decision (and Judge Mosedale's earlier 2016 decision) a statement, and even a bank statement, is not in itself necessarily relevant evidence.

78. We agree with Miss Choudhury that Mr Upton's analogy of a bank account being like a barrel into which one pours several buckets of water and it is impossible to identify the water that comes out is flawed. It is not a demand for a full account of all income Mrs Thomas ever received. All HMRC want to know is, if the monies came from Mr Thomas or her father then evidence should be provided showing large sums being transferred.

79. It is for that reason that the second request seeks evidence of material transfers to her with "material" meaning payments in excess of £20,000. That is proportionate in the context

[5] [1980] 1 WLR 627
[6] [2011] UKFTT 218 (TC)

of £250,000. Mrs Thomas had comparatively little taxable income so it is reasonable to seek a plausible explanation.

80. The third request is not seeking a full accounting of all gifts or funds received by Mrs Thomas at any time as argued by Mr Upton. In the face of a bland assertion that she received gifts but no details, HMRC simply seek details of any gifts or funds that contributed to the £250,000.

£650,000

81. Exactly the same arguments apply to requirements 4-6. The only difference is that it is an even bigger sum of money. At least some of the transfers to her must have been five or six figure sums. She should have some knowledge as to their derivation.

82. Whilst we accept that, as far as the first six requirements are concerned, Mrs Thomas has retained no bank statements and that is not what HMRC are requesting. She must have had the money in order to make the payments. The issue is from whom, and when and whence the money came to her.

£2,135,713 DEBT ASSIGNMENT

83. We do accept Mr Upton's argument that HMRC do not expect Mrs Thomas to have copies of the loan accounts for TML. However, we do not accept that this makes request 7 unreasonable. The fact that the figure matches precisely the figure in the table for the intercompany loans reasonably requires explanation. Thus far all that has been said is that TML owed her at least that amount. Again there is a lack of information. It would have been in her interests to have known how much she was owed at any stage.

84. We were interested in the argument at paragraph 11 of the submissions for the second hearing that "….the market value of the assigned loan was not necessarily the same as its face value…". It was not as is evident from the 2019 decision. The problem is why. The value described in the Schedule was much lower than the alleged value of the assignment. There is no evidence about accrued interest, or not.

85. It has been argued that £300,000 of interest from TML would have been included in that figure. The need for more information is emphasised by two facts. Firstly, in declaring that she had only received net interest of £120,000 when the reality was that if the accounts for TML were relied upon, the figure was £150,000, as the Tribunal found, and secondly for a long time it was argued that the total figure was £350,000, suggests a considerable element of doubt. That is not assisted by Judge Redston quoting Mr Thomas' explanation in cross-examination in relation to this matter that "accounts are not necessarily the truth." In this litigation he argued that he was "100% confident that the accounts are correct". Both statements about the same accounts cannot be true. HMRC have every reason to want further information about the calculation.

86. As I pointed out in the hearing, and Ms Corrigan agrees with me, this is a specialist Tribunal and we simply do not accept Mr Upton's assertion in regard to request 8 that, since HMRC know the identity of the solicitor instructed by Mrs Thomas, inevitably all correspondence would be covered by legal professional privilege so the request is unreasonable. Mr Upton argued that the question as to who acted for Mrs Thomas can only mean Who is her solicitor? Even when there is a lawyer we have frequently seen advice on such matters from tax advisors and/or accountants working with the lawyer. The request is

entirely reasonable. To the extent that legal professional privilege might be involved the appellant is entirely protected by paragraph 23 of Schedule 36. Paragraph 23(3) has a mechanism to decide if material is privileged and there are detailed regulations covering that. If no-one else was involved Mrs Thomas should know. If, as seems likely, others were involved then she should disclose that information.

87. As far as request 9 is concerned this comes back to power and possession. Mrs Thomas controlled the company. HMRC is not looking for documents. Her husband was the sole director. The answer is probably that it was her husband but it is not unreasonable to ask the question. It has not been answered thus far.

88. Requests 10, 11 and 12. Mr Upton argues that she was merely a shareholder in TML and this should be posed to TML. As we have said she was the controlling shareholder. She simply has to answer the questions. They are straightforward. There was a professional accountant involved who should have working papers. Everyone has known since 2012 that HMRC had questions about this. We find that it is reasonable to ask for explanations from Mrs Thomas.

89. Request 13. This is a basic enquiry. How did a taxpayer with a comparatively small income secure and service such a large mortgage? The application with sources of supporting wealth has never been produced. We do not accept that HMRC should be forced to seek a third party notice when this should be within Mrs Thomas' knowledge and if not she could obtain it from the Bank of Scotland. Did her husband guarantee it? All she has told HMRC is it was because she had a wealthy husband. That does not suffice.

90. Mr Upton has a remarkable red herring in his arguments on this point. He argues that Mrs Thomas would never have her payments "treated for accounting purposes" as she is an individual. Of course, but that is to miss the point of the request. The issue is that if SCL or SSL provided the funding, then the question is how was that accounted for in their accounts.

91. Request 14. Mr Upton argued at the hearing for the first time that this request was ambiguous. Notwithstanding our point on the tardy introduction of that argument, we do not agree. Patently HMRC were attempting to understand if there was a commercial reason for the assignment to SCL.

92. Mr Upton is correct to say that the actual loan agreements have been produced but they do not help since they provide for accrual of interest or alternatively payment. There is no evidence.

93. If there was no interest payable why would she make the assignment given the substantial sums of money involved? A sensible question. Was it a device? Is there a loss of tax? Why was it done? No-one knows. HMRC are again simply trying to ascertain the facts in order to decide whether there was a loss of tax. Undoubtedly, the letter of 20 May 2017 discloses payments of £42,385 and £43,000 by SCL to Mrs Thomas on 9 May and 19 October 2016. Although Mr Upton relies on those two isolated payments, firstly they are not described as interest but rather as funding and secondly the preceding sentence states that due to the "significant decrease in interest rates generally, the monthly payments are now substantially below the original amounts of £4,000" . That does not square with total payments of £85,385 in 2016. Further those receipts are not disclosed in Mrs Thomas' relevant SATR.

94. Lastly, we have request 15. The written submissions state that this was provided by RSM on 27 October 2017. It was not and has never been provided. Nor has any correspondence been

produced. The professionals who acted for both Mrs Thomas and TML may well have access to these documents. No evidence has been produced to establish the position

Conclusion

95. In summary, we find that Mrs Thomas has not co-operated with HMRC and has not provided extensive evidence of her wealth. She has not provided all of the information which is within her power or possession to supply. She has provided vague and unsupported assertions some of which, such as both the persistent assertion that she had received £350,000 of interest from TLL and the assertion that her income from TML was also £350,000, were wrong. The evidence from the 2014 Decision shows that at least two of Mrs Thomas' SATRs were inaccurate and the omissions of the receipts in 2016 bolster Officer Gill's concerns about potential loss of tax. We note Mr Upton's observation that 2016 is after the event, so to speak, as the sources of funding being investigated arose on or before February 2010 but it is relevant in considering the reliability of Mrs Thomas' assertions, via her husband, that the SATRs and accounts are reliable.

96. Her continued failure to provide specific information, answer basic questions and provide documentation which she could recover from third parties concerning transactions to which she was a party is extensive. Those transactions were clearly identified not only in the letter of 13 December 2018 and in the Notice which falls to be read with the Schedule.

97. We find that the Notice is intelligible, the information is reasonably required to check Mrs Thomas' tax position, and Officer Gill has good reason to suspect that self-assessments by the appellant may be or have become insufficient.

Decision

98. For all these reasons the grounds of appeal are dismissed and we confirm both the Notice and the requirements in the Notice.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 04 OCTOBER 2021

Annex

[2019] UKFTT ** (TC)**

TC ***

COSTS - judicial discretion - complex case - what is success? - was withdrawal of defence reasonable and timely – yes - application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/01479
TC/2018/00728

BETWEEN

SPRING CAPITAL LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondent**

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on 24 April 2019

Mr Michael Upton, Advocate instructed by Russel + Aitken LLP, for the Appellants

Mr Graham McIver, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

100. The appellant had lodged an application in respect of costs relating to:

(a) Appeal reference TC/2016/01479 in regard only to the respondents' ("HMRC's") conclusions in its Closure Notice dated 5 October 2015 for the period ended 30 April 2010 assessing £3,454,913 as chargeable profits ("the substantive appeal"); and

(b) Appeal reference TC/2018/00728, against the penalty of £537,667.39 imposed by the Penalty Notice dated 24 November 2016 ("the penalty appeal").

101. The application was made under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and was vigorously opposed.

102. The parties sought a decision in principle only.

Summary of the appellant's argument

103. Although the paperwork was voluminous with the appellant's bundle relating to the costs application extending to some 37 folios with further representations referring thereto extending to 11 pages, nevertheless the essence of the appellant's case was relatively straightforward, albeit in the context of complex appeals.

104. In summary it was argued that:-

(a) These two appeals were categorised as complex cases in terms of the Rules.

(b) The Notice of Appeal dated 8 March 2016 had indicated that:

> "There is no reasonable basis for construing that the sums injected by the shareholders (and associate) into the company in the year were anything other than loans. … The company invites the Tribunal to accept the appellant's evidence and dismiss the Revenue's recategorisation (sic) of the shareholder loans as income".

(c) In the Stated Grounds of Appeal lodged by the appellant in response to Tribunal Directions dated 9 October 2017, Ground 3 read: "3.H.M.R.C. (sic) erred in treating the injections of shareholder funds in 2010 as income."

(d) Although the Closure Notice issued by HMRC dated 5 October 2015 was issued on the ground that the appellant had not provided information in relation to shareholders' funds the appellant argued that that information was outwith the scope of what was required by both the original Notice of Enquiry and the formal Information Notice.

(e) HMRC's original Statement of Case dated 31 May 2016, at paragraph 31, referring to the appellant's Ground of Appeal stated "It is the respondents' contention that the source of the sums recorded as having been introduced by shareholders remains unclear." and that was restated as follows in the consolidated Statement of Case dated 21 December 2017 at paragraphs 93 and 94 which read:-

> Injection of shareholder funds – the Respondents' Case
>
> 93. It is the Respondents' contention that the source of sums recorded as having been introduced by shareholders remains unclear or otherwise must be evidenced by the appellant to the satisfaction of the Tribunal.
>
> 94. The Respondents have reviewed the income declarations made within the shareholders' personal tax returns and have been unable to identify or verify any likely income stream or savings that would enable them to transfer the amounts in question to the Appellant. It is submitted that, until such time that the Respondents' (sic) have been able to fully trace the origin of the amounts in question they should be treated as taxable income to the Appellant."

It was unreasonable of HMRC to maintain that stance in the face of the decision of the Tribunal in *Spring Capital Limited v HMRC*[7]("the 2016 Decision").

(f) The appellant had furnished HMRC with all relevant information by no later than December 2016 having provided information in emails dated 24 and 25 March 2015, 24 July 2016, 24 November 2016 and 9 December 2016.

(g) It was only on 20 June 2018 that HMRC, at paragraph (h) on page 5 of a very long letter, intimated that £2,153,713 would not be treated as income of the appellant. There remained the issue of two payments of £650,000 and, following correspondence on 12 July 2018, 12 days before a hearing, HMRC wrote to the appellant stating:

> "I can now confirm that HMRC will in respect of Spring Capital Ltd not be contending that these three transactions allocated to capital introduced were income of Spring Capital Ltd.
>
> HMRC will not therefore be pursuing this argument and the resultant tax and penalties that arose on the treatment of this being Company income will now fall away".

That was far too late.

(h) In terms of Section 54 Taxes Management Act 1970 ("TMA") the matter was therefore treated as settled and therefore "… the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Tribunal had determined the appeal".

(i) The appellant having succeeded, then costs should follow success.

(j) Those costs should include the costs of the appellant's application to strike out HMRC's defence on this issue (being paragraphs 93 and 94, see (e) above).

Summary of HMRC's argument

105. HMRC lodged a four page letter dated 25 September 2018.

106. HMRC's argument is more straightforward and that is that the *2016 Decision* made it explicit that the appellant had not furnished the relevant information and that it was only in July 2018 that HMRC had sufficient information to come to an informed view that there was evidence of the source of the funds.

107. HMRC had therefore only been successful in eliciting the relevant information after more than six years and three litigations. They had been put to considerable cost due to the dilatory behaviour of the appellant. (At the Case Management Hearing on 24 July 2014 the appellant withdrew their then incomplete Costs Application and HMRC intimated that they were considering whether to lodge a counter application. In the event they did not.)

The Law

108. Both parties relied on *Versteegh Ltd and Others v HMRC*[8] ("Versteegh") at paragraphs 9, 10 and 11, the relevant parts of which read as follows:-

> "9. Each of the appeals was designated as a Complex case in respect of which none of the Appellants has opted-out. Accordingly, under Rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tax Tribunal Rules"), this Tribunal has a full costs-shifting jurisdiction. The matter is therefore one of discretion for the Tribunal.
>
> 10. … it is clear to me, and indeed it was common ground, that the principles applicable under the Civil Procedure Rules ('CPR'), and the relevant authorities in that respect, are equally applicable to the exercise by this Tribunal of its power to award costs. These are a reflection of the same overriding objective, namely to deal with cases fairly and justly.

[7] [2016] UKFTT 232 (TC)
[8] [2014] UKFTT 397 (TC)

11. I start therefore with the more detailed guidance that is afforded by the CPR. Under CPR 44.2, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the Court is required to have regard to all the circumstances, including, relevantly, whether a party has succeeded on part of its case, even if that party has not been wholly successful. Conduct is to be taken into account, including whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. Orders may be for a party to pay a proportion of another party's costs or costs relating only to a distinct part of the proceedings."

109. Neither party referred me to paragraphs 20 and 21 which I also consider to be pertinent. The relevant parts read as follows:-

"20. The identification of the successful party is only the starting point. It does not determine the costs order. Whilst the general rule is that a successful party is normally entitled to its costs, it is necessary to take account of all the circumstances. In doing so, it is appropriate, in my view, to consider the individual elements of the case, and the success or failure by each party in those respects.

21. One of the circumstances to which the Court is directed by the CPR to have regard is the conduct of the parties, including, as I mentioned earlier, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue."

110. Of course the exercise of judicial discretion always requires that the Tribunal should have regard to the overriding objective which is set out in Rule 2 of the Rules and a copy is annexed hereto at Appendix 1. I have done so.

The Facts

111. The appellant's Unaudited Financial Statements for the year ended April 2010 were submitted to HMRC on 28 April 2011. At page 9, Note 13 of the Notes to the Financial Statements read:

13	Other shareholders' funds	2010 £	2009 £
	Shareholders' loans to the company secured by debentures and repayable on demand	6,628,707	3,173,794
	Shareholders' loans would be expected to be repaid only as funds permit.		

112. It is apparent from that, that in that year there was an injection of capital from shareholders in the sum of £3,454,913.

113. On 24 February 2012, within the 12 months allowed, HMRC issued a Notice of Enquiry in terms of paragraph 24 Schedule 18 Finance Act 1998. Ten matters were identified for investigation but item 7 is pertinent to this application and reads:-

"Note 9 to the accounts refers to a net increase in shareholders loans of £3,454.913. This is a material sum. Please provide—

(a) An analysis of the net amount of £3,454,913 as between the shareholders.

(b) Copies of the shareholders loan accounts with the company to show the amounts introduced and withdrawn, and the dates introduced and withdrawn.

(c) Your advice as to the source of all introductions/loans over £20,000."

114. On 14 March 2012, the appellant appealed to the Tribunal and the Notice of Appeal stated that the decision being appealed was the said Notice of Enquiry. That appeal[9] (the *"2013 Decision*") is discussed in more detail at paragraphs 61 and 62 below.

115. On 29 March 2012, HMRC issued an Information Notice in terms of paragraph 1 Schedule 36 Finance Act 2008 ("Schedule 36") requesting information about the 10 items specified in the Notice of Enquiry.

116. On 13 April 2012, HMRC applied to strike out the appeal which is the subject matter of the *2013 Decision*.

117. At the hearing of the strike out application on 17 October 2012, both parties confirmed that there had been no compliance with the Information Notice.

118. The decision of the Tribunal in the *2013 Decision,* striking out the appeal, was issued on 28 December 2012.

119. A further Information Notice in terms of Schedule 36 was issued on 5 March 2013. It sought 11 items of information and documents which had to be lodged with HMRC by no later than 14 April 2013.

120. Paragraph 8 of that Information Notice was in precisely the same terms as paragraph 7 of the Notice of Enquiry. That Information Notice required only statutory documents and could not be appealed to the Tribunal.

121. On 30 August 2013, HMRC issued a £300 penalty under paragraph 39 of Schedule 36 on the basis that the appellant had failed to comply with the Information Notice.

122. The appellant appealed to the Tribunal. The hearing was on 22 December 2014 and the decision was released on 12 January 2015 *(*the *"2015 Decision").* Before the appeal was heard, the appellant provided to HMRC the information and documents in items 2, 10 and 11. There was compliance with item 1 in the course of the hearing.

123. The appeal was dismissed and the penalty upheld. I comment on that decision in greater detail at paragraphs 63-68 below.

124. In the face of continued failure by the appellant to comply with items 3-9 of the Information Notice, on 20 February 2015, HMRC issued daily penalties under paragraph 40 of Schedule 36 for the period 20 August 2013 to 19 February 2015 totalling £16,110. The appellant appealed and on review the penalties were reduced to £10,950 covering only the period 20 February 2014 to 19 February 2015 on the grounds that HMRC had been out of time to assess the earlier non-compliance to daily penalties (paragraph 46(2) Schedule 36). HMRC charged the penalties at the rate of £30 a day.

125. In an email to HMRC dated 13 March 2015, the appellant complied with items 3-7 and 9 but claimed to be unable to provide an analysis of the £3,454,913. Indeed it was stated that: "separate analyses of the amounts as between shareholder are not available".

126. However, on 24 March 2015, the appellant wrote to HMRC stating that the following "injections" of capital had been made, namely, Mrs Sarah Thomas had contributed £2,135,713 on 1 February 2010 and £650,000 on 3 February 2010 and Stuart and Rebecca Thomas had jointly injected £650,000 on 3 February 2010.

127. On 24 March 2015, HMRC accepted that the analysis of the £3,454,913 had provided the information required by item 8(a) of the Information Notice but pointed out that items 8(b) and (c) remained outstanding. On the same day, because those were still outstanding, HMRC

[9] 2013 UKFTT 041 (TC)

imposed further penalties at the maximum daily rate of £60 for the period 21 February to 22 March 2015, totalling £1,800.

128. The appellant responded the following day arguing that items 8(b) and (c) could not possibly be viewed as forming part of the company's statutory records and that nothing further was required from them. In those circumstances the penalty notice issued the previous day should be vacated.

129. On 9 June 2015, HMRC wrote to the appellant having reviewed the two decisions imposing daily penalties. That letter quoted paragraphs 13, 25, 36, 45, 48, 52 and 63 of the *2015 Decision* in support of its position that HMRC reasonably required all of the information specified in the Information Notice.

130. In the face of continued failure by the appellant to comply with items 8(b) and (c), further daily penalties at the maximum rate of £60 per day were imposed on 9 July 2015 for the period 25 March 2015 to 9 July 2015, totalling £6,420.

131. On 5 October 2015, HMRC issued a Closure Notice, referring at page 2 to both of the *2013* and *2015 Decisions* and, in particular, to Judge Mosedale's finding in the *2015 Decision*, at paragraph 63, that the appellant did not have a reasonable excuse for its non-compliance with the Information Notice.

132. The Closure Notice made it clear that HMRC still required compliance with items 8(b) and (c) evidencing the sums claimed to have been introduced by the shareholders.

133. The appellant appealed that Closure Notice on 3 November 2015.

134. On 8 February 2016, HMRC wrote to the appellant concluding the review and upheld the relevant part of the Closure Notice. It stated in particular that:

> (a) "The onus will be upon the company to prove to the tribunal that the closure notice under appeal is excessive."
>
> (b) "The company have been given ample opportunity to provide evidence to support the accounts entry regarding the shareholder loans during the enquiry."
>
> (c) "Given the company's unwillingness to comply with the information notice, HMRC have been left with no alternative but to conclude the enquiry on the basis that the credit of £3,454,913 has been mis-described as an increase in shareholder loans in the accounts for APE 30/04/10; and should be re-categorised as income."
>
> (d) "It is not for HMRC to demonstrate that the revised figure for the company's income is reasonable; it is for the company to provide evidence to demonstrate that the revised figure is incorrect."
>
> (e) That decision was in line with the findings of the Tribunal in the previous appeals.

135. On 8 March 2016, the present substantive appeal was lodged with the Tribunal.

136. The appellant's appeal against the daily penalties, (the "*2016 Decision*"), was heard by the Tribunal on 6 April 2016 and the penalties upheld. That decision was issued on 13 April 2016.

137. On 7 June 2016, HMRC again wrote to the appellant in relation to the shareholder loan account pointing out that in the *2016 Decision*, Judge Mosedale had found as fact that "item 8(c) remained outstanding to this day" and she had stated at paragraph 110 that "… I do not consider that the appellant had a good reason for 8(c) being outstanding in the period for which the third daily penalties were assessed".

138. On 20 July 2016, the appellant wrote to HMRC in regard to shareholder capital injections stating that it intended to rely on:

> (a) a Deed of Assignment between Sarah Thomas and the appellant dated 1 February 2010 "assigning her Nine Regions Ltd loans" to the appellant,

(b) a debenture from the appellant securing amounts owed to Sarah Thomas dated 1 February 2010,

(c) bank statements for the appellant showing receipt of £650,000 from Sarah Thomas on 3 February 2010, and

(d) bank statements for the appellant showing receipt of £650,000 from Stuart and Rebecca Thomas on 3 February 2010.

139. On 21 October 2016, HMRC wrote to the appellant with a Penalty explanation letter stating that penalties of £537,667.39 would be issued for the period 1 May 2009 to 30 April 2010 for deliberate behaviour which was "Failure to disclose source of credits to shareholders loans". The covering letter reiterated the points made in the letter of 7 June 2016 referring to the *2016 Decision* (see paragraph 38 above).

140. The appellant responded at length on the same day stating that it was "…a simple matter of fact that the shareholders injected the capital into the company…" arguing that HMRC had failed to adduce any evidence in support of their stance.

141. On 24 November 2016, a penalty determination in that sum was issued to the appellant.

142. On the same day the appellant sent HMRC three emails. The first of those referred to a £1m mortgage taken out by Mrs Thomas who introduced those funds to TML (see paragraphs 49 and 50 below). The second email enclosed a bank statement dated 31 March 2010. The third email referred to the two earlier emails and asked that the assessment be adjusted or alternatively HMRC should explain why they refuse to do so.

143. Although the email of 20 July 2016 (see paragraph 39 above) referred to bank statements, the appellant enclosed only a copy of one page of a bank statement in the name of Spring Seafoods Ltd dated 31 March 2010 and covering entries from 4 January 2010 to 17 February 2010.

144. However, there had been a change of name to Spring Capital Ltd on 12 February 2010. The statement showed two credits of £650,000 described as "additional new secured shareholder loan advance" from each of Stuart James Thomas and Sarah Jane Thomas but there is no mention of Rebecca notwithstanding the fact that the covering email referred to her again. It is now accepted that she was not the source of any of those funds.

145. There is then an entry for a debit of £2,100,000 on 5 February 2010 which, after a number, reads "… re Nine Regions Ltd Loan Advance in respect of agreement dated 4.2.10". Although there are numerous other entries on that page no other entry except one for bank fees carries an explanation and only eight carry even a name.

146. A copy of the unsigned Deed of Assignment was also lodged (the signed version was provided on 9 December 2016 but I have not had sight of it).

147. The unsigned Deed of Assignment stated at paragraph 2:

> "In consideration for a credit in the amount of £2,135,713 to her shareholder account with the Assignee, the Assignor hereby assigns the Debt, (the value of which is £2,135,731) and all rights in relation to it, with limited title guarantee, to the Assignee".

148. The Schedule to the Deed identified that that "Debt" comprised loans totalling £1,796,525.83 from a Thomas McLennan Ltd ("TML") to Nine Regions Ltd (and two other men). In the email dated 24 November 2016 the appellant had explained that TML had assigned the Nine Regions debt to cover capital injections by Mrs Thomas into TML and "…thus Spring Capital Ltd".

149. It subsequently transpired that TML was jointly owned by Mr Rod Thomas (a Director of the appellant) and his wife Mrs Sarah Thomas, no company accounts had been filed after 31 October 2008, the appellant had acquired TML's money lending business in February 2010, no accounting records existed and Mrs Thomas had apparently lent TML £1,250,000 in 2007. In February 2010 she was owed £2,135,713. TML had assigned debts due to it by Nine Regions Ltd to Mrs Thomas in consideration of that indebtedness. (No explanation has been provided to me as to the discrepancy between the £2,135,713 and the £1,796,525.83).

150. On 19 December 2016, HMRC responded pointing out that:

(a) Those documents should have been lodged during the course of the enquiry.

(b) This was the first intimation, 13 months after issue of the Closure Notice, that TML had furnished Mrs Thomas with the £2,135,713.

(c) TML had been struck off the company register in February 2011.

(d) The bank statement reflected the loan of £2,100,000 from the appellant to Nine Regions Ltd on 5 February 2010.

(e) Further information was requested such as copies of the loan agreements between TML and Nine Regions Ltd referred to in the Deed of Assignment.

151. On 23 January 2017, the appellant's then agent responded disputing the need for that information.

152. There was correspondence in 2017 including on 8 March 2017 when HMRC wrote to the individual directors.

153. Until March 2018, further correspondence ensued with the appellant and appellant's agent, which has not been produced to the Tribunal but which is referred to in HMRC's submissions and is reported in a letter from HMRC dated 20 June 2018 on which both parties relied and to which no exception was taken. Essentially it appears from the terms of paragraph 24:

> " Subsequent correspondence focussed on the fact that HMRC had seen no evidence concerning the source of the claimed capital introduced and requested this documentation whereas your letters focused on the requirements of Spring Capital Limited."

154. Eventually, on 21 February 2018, HMRC were furnished with unsigned copies of the loan agreements relating to the loan, agreements between TML and Nine Regions Ltd (see paragraph 51(e) above).

155. The original loan agreements were furnished to HMRC at an unspecified date thereafter.

156. The letter of 20 June 2018 made it explicit at paragraph (h) on page 5 that it was only on sight of those signed documents and in the context of information provided latterly that HMRC could accept that the relevant information had been furnished to them.

157. In that letter HMRC yet again requested further information in relation to the two payments of £650,000 referring to, and relying on, paragraphs 50 to 62 of the *2016 Decision*.

158. The relevant information was ultimately provided in the form of a copy bank statement and a bank account number on 29 June 2018 and 10 July 2018.

159. On 12 July 2018 HMRC confirmed that the matter was now settled.

The 2013 Decision

160. The appellant argued that the Notice of Enquiry was both a Notice of Enquiry and a Closure Notice which failing it was an amendment or an assessment and there was a right of appeal. The Tribunal found that:

(a) The Notice of Enquiry did not simultaneously close the enquiry.

(b) There is no right of appeal against a Notice opening an enquiry.

(c) It was not an amendment or assessment.

(d) The appellant had nothing to appeal.

(e) The appeal was struck out for lack of jurisdiction.

161. At paragraph 34, in discussing a possible application for a Closure Notice, Judge Mosedale stated very clearly that "I…note that a Tribunal is unlikely to order closure where it is satisfied that the taxpayer has not yet provided answers to relevant questions about its tax affairs under enquiry.".

The 2015 Decision

162. The appellant argued that:

(a) The Information Notice had been appealed and that the penalty for non-compliance could not be issued until that appeal had been resolved.

(b) Compliance with items 8 and 9 would breach the Data Protection Act ("DPA").

(c) The Information Notice was a "fishing expedition".

(d) There had been partial compliance with the Information Notice and that had been very time consuming.

163. Judge Mosedale confirmed at paragraph 25 that there can be no appeal against an Information Notice and that all of the information demanded at items 3-9 inclusive of the Information Notice comprised part of the appellant company's statutory records. That therefore included item 8.

164. She had also observed at paragraphs 10 and 62 that it was conceded that there had been no compliance with *inter alia* item 8. At paragraph 35 she stated:

> "From what Mr Stewart said at the hearing, it appeared to me that he did have concerns about some of the entries in the accounts which he considered to be unusual (the introduction of £3.5million from shareholders in particular). Mr Thomas considered these concerns groundless as (he said) similar loans had been made in respect of this and other companies controlled by the same shareholders. I do not need to decide the point, because I do not consider it relevant. HMRC do not need suspicions in order to lawfully issue an information notice. They are entitled to check <u>any</u> taxpayer's tax return and to reasonably require reasonable information to that end."

165. At paragraph 44 Judge Mosedale concluded that compliance with the Information Notice would not involve a breach of the DPA.

166. At paragraph 60 Judge Mosedale stated:

> "While it is clear from the correspondence that from the first the appellant had questioned HMRC's right to demand the information, nevertheless I had no evidence the appellant genuinely believed HMRC did not have the right to demand the information. And I do not accept that even if it genuinely believed this, that it was reasonable for it to believe this. There is no evidence that it took any steps to check what HMRC was entitled nor did it present a case to me at Tribunal as to why HMRC should not be entitled to randomly check their accuracy of tax returns. ".

167. Lastly, in the context of a possible reasonable excuse for non-compliance, at paragraphs 61 and 62 Judge Mosedale rejected the argument that the appellant had not had the time to comply with items (3)-(9). Item 1 had been complied with at the hearing in one sentence.

The 2016 Decision

168. The relevant issues in this context were:

(a) Whether there was no non-compliance with item 8(b), and

(b) Whether there was no non-compliance with item 8(c).

Item 8(b)

169. It was a matter of agreement that individual shareholder loan accounts did not exist. The appellant had hinted at that on 13 March 2015 and said so outright on 2 April 2015. Judge Mosedale found that item 8(b) asked for documents that did not exist and therefore could not be produced (paragraph 29). Accordingly the appellant could not be in breach.

Item 8(c)

170. At paragraph 49 Judge Mosedale found that the appellant could not argue that item 8(c) was invalid.

171. At paragraph 55 in looking at what was required by item 8(c) she stated:

> " … the natural meaning of the words …is that HMRC wanted to know from where the company obtained the money".

She saw nothing ambiguous in item 8(c) and said it had the meaning stated at paragraph 52 namely:

> "…to know the origin of the credit and in particular whether it was transferred in from an outside source or was money already held by the company."

172. At paragraph 62 she indicated that, at most HMRC had suggested that production of bank statements alone might not suffice and that, as at the date of the hearing the appellant had not specified the source of the funds shown as loans from shareholders.

173. At paragraph 68 she stipulated that: " …item 8(c) did not require the company to state from where its lenders obtained the funds, only from where the company obtained the funds."

174. At paragraph 110 she stated:-

> "110. However, item 8(c) remained outstanding as it does to this day. The appellant actively disputed with HMRC what 8(c) required, giving it the wider meaning they put in this hearing and refusing to provide what Mr Stewart said it meant, which is what I have found it meant. I see no good reason why the appellant did not provide the more limited information which is what Mr Stewart said, and I have found, the information notice required to be provided. It said it found it ambiguous but I consider that no explanation of (a) why it did not seek to clarify the meaning much earlier and (b) why it did not provide HMRC with the information on the basis of the narrow meaning HMRC ascribed to it. In conclusion, I do not consider that the appellant had a good reason for 8(c) being outstanding in the period for which the third daily penalties were assessed."

Discussion

175. At first glance, and at a superficial level, it appeared that the appellant had been successful in that at, effectively, the "eleventh hour" HMRC had withdrawn their defence so the effect was that the appellant's appeal on Ground 3 succeeded. Closer examination, and in particular the litigation history, showed that that was far from the whole story. It is for that reason that I have therefore set out the history at length and in detail.

176. As paragraph 20 of *Versteegh* makes clear, the starting point is to identify the successful party. Although in one sense the appellant is successful, nevertheless there is an argument that, in fact, HMRC were successful. Their objective in instigating the enquiry on the shareholder point was to obtain answers to relevant questions about the appellant's tax affairs.

177. That was made explicit in the *2013 Decision* (see paragraph 62 above). The appellant should have been aware of that since 28 December 2012.

178. Furthermore, from the date of the issue of the *2015 Decision* on 12 January 2015, which was almost ten months before the issue of the Closure Notice, the appellant should also have

been aware that the Tribunal considered that the request at item 8(c) was not only relevant but valid; as was the request at item 8(b) since at that juncture the appellant had not disclosed that no shareholders' loan accounts existed.

179. I am clear that the *2016 Decision*, which was issued on 13 April 2016, should have left the appellant in no doubt about what was required and HMRC pointed that out on 7 June 2016 (see paragraphs 38 and 72 above).

180. Whilst I understand Mr Upton's argument that HMRC were at all times looking for the source of the source of the funds, I do not accept that and for the same reason that Judge Mosedale did not accept that. It seems to me that all HMRC has ever wanted to establish is that the money came from an external source; in other words that the shareholders had indeed provided the funds. That is a subtly different point.

181. I have no information on the point, and simply do not understand why the appellant stated in March 2015 and July and November 2016 (see paras 27, 39 and 45 above) that some of the funds were derived from Rebecca Thomas. Furthermore, the argument (see paragraph 41 above) that HMRC should simply accept a bald statement that it was a fact that shareholders had injected capital into the company (without any evidence), is indefensible in a context where the statements made repeatedly by the appellant about Rebecca Thomas were quite simply inaccurate and unsupportable.

182. In the same email as Rebecca Thomas was mentioned for the second time on 20 July 2016 (see paragraph 39 above), the reference to the assignment of the Nine Regions Ltd loan did not make the link to the associated company, TML (see paragraphs 49 and 50 above) and that link only became apparent in November 2016.

183. If everything had been at arm's length there might well have been no need to mention TML. However, it is unsurprising that HMRC had reservations about the quality or accuracy of the information that was belatedly provided. The context is that it had been made explicit by the Tribunal that HMRC were entitled to establish that the injection of funds had come from the shareholders and, by implication, not circuitously from the appellant, and not only that it had been established that the information about Rebecca Thomas was inaccurate but that all of the parties named were closely linked.

184. There has been no explanation why, for example, on 21 October 2016 (see paragraph 41 above), the appellant was still declining to produce evidence of the shareholder injection. Instead the appellant continued to rely on mere assertions and did so in the face of Judge Mosedale's commendably clear statements six months earlier that that would not suffice.

185. I am wholly unsurprised that HMRC wished, and were entitled to request, evidence establishing that the funding had been provided by Mr Stuart Thomas and his sister-in-law Mrs Sarah Thomas and had not been provided by the appellant whether directly or indirectly. This is a specialist Tribunal and in my experience, even where everything is at arm's length, bland assertions, unsupported by solid evidence will rarely suffice.

186. The evidence of the appellant's bank statement (see paragraphs 45 and 46 above) is not proof of anything beyond the fact that quite possibly, and in my view on the balance of probability, the appellant had furnished the information to the bank. The Bank is unlikely to have been aware of the agreement or the date of it or why the monies had been advanced.

187. In the absence of verification that it was indeed Mrs Thomas who had provided the funds, in a situation where there was very limited information about TML and indeed what was available raised what appear to be relevant questions (see paragraph 50 above) it was reasonable for HMRC to seek clarity as to source of the funds to the appellant.

188. I do not accept that by the end of 2016, HMRC had credible evidence showing from whence the appellant had derived the funds.

189. I find that it was only when the signed loan agreements were produced in 2018 that HMRC could reasonably find that Mrs Thomas was in fact the source of the major part of the funds.

190. The provision of the evidence that the two payments recorded on the appellant's bank statement came from Mr and Mrs Thomas was only produced thereafter. It was suggested that HMRC should have specifically asked for that long before then. I do not accept that, not least because Judge Mosedale had put the appellant on clear notice that there was a possibility that something more than the appellant's own bank statements alone might be required.

191. The appellant has been successful but only to the pyrrhic extent that by producing information that the Tribunal had repeatedly stated was reasonably required by HMRC, HMRC no longer required to litigate on that point. In reality, it was HMRC who were ultimately successful. They acted promptly once they had the relevant information and their withdrawal of the defence was timely.

Decision

192. In all these circumstances the application for costs is refused.

Right to apply for permission to appeal

193. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2019

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.