



Neutral Citation: [2022] UKFTT 00203 (TC)

Case Number: TC08528

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/00929

INCOME TAX – appeal against information notices – Schedule 36, Finance Act 2008 – whether documents and information reasonably required to check tax position – whether burden of proof is on HMRC – information notices varied

Heard on: 24 January 2022
Judgment date: 28 June 2022

Before

TRIBUNAL JUDGE SUKUL

Between

MATTHEW JENNER

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For Mr Jenner: Matthew Jenner, Appellant

For the Respondents: Joshua Gyasi, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was video using the Tribunal's Video Hearing Service. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
2. Mr Jenner appeals against information notices issued on 9 July 2019 by the Respondents ('HMRC') under Schedule 36 Finance Act 2008 ('Schedule 36').
3. The documents to which I was referred were contained in hearing and authorities bundles.

BACKGROUND FACTS

4. Mr Jenner filed income tax returns for the years ended 5 April 2017 and 5 April 2018 on 26 April 2019. On 9 July 2019, HMRC issued notices of enquiry under section 9A Taxes Management Act ('TMA') 1970 and the information notices in respect of those years. Mr Jenner appealed against both information notices on 7 August 2019 and HMRC issued their 'view of the matter' letter and penalty notices on 27 September 2019. HMRC issued a statutory review conclusion letter on 28 January 2020 and Mr Jenner submitted an appeal to the Tribunal on 23 February 2020.

LEGISLATION

5. Paragraph 1(1) of Schedule 36 provides that:
 - (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
 - (a) to provide information, or
 - (b) to produce a document,if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
6. Paragraph 18 of Schedule 36 provides that:

An information notice only requires a person to produce a document if it is in the person's possession or power.
7. Paragraph 21 of Schedule 36 provides that:
 - (1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.
 - (2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in 10 relation to the chargeable period.
 - (3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.
 - (4) Condition A is that a notice of enquiry has been given in respect of—
 - (a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed.

(5) In sub-paragraph (4), "notice of enquiry" means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

...

8. 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.

...

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

INFORMATION SOUGHT – THE REQUIREMENTS

9. The information notices were not prevented from being issued under paragraph 21 of Schedule 36 because notices of enquiry under section 9A TMA 1970 had been issued on the same date, which satisfied Condition A.

10. The information and documents sought by the information notices, relevant to this appeal, (which I have categorised as household expenditure, financial information and personal accounts) are as follows:

Household Expenditure

Full details of your household and personal expenditure and explain how all of your household and personal expenditure is met. This should include, but need not be limited to:

- The total quantum of household expenditure.
- The total amount of rent paid for properties both inside and outside the UK.
- The total expenditure on utilities, including gas, electricity, council tax and satellite/cable.
- The total expenditure on food.
- The dates of any holidays taken during the period and the cost for each and the amount spent while on holiday.
- I appreciate that the precise amounts for each of the above is unlikely to be readily available and a reasonably accurate estimate will be acceptable.

Financial Information

For any company of which you were a director, please provide an analysis of any director's loan account for the period 6 April to 5 April which identifies:

- Each credit or debit transaction.
- The date of each transaction.
- The nature of each transaction in terms of whether it was cash, bank transfers, credits, or other forms, as relevant.
- Account details where any transaction was a transfer to or from a bank, building society, or other similar account.
- A brief description of each transaction.

Full details of any sums drawn down from any trusts, partnerships, other individuals or any other entity, to include:

- The amount of each separate sum.
- The date of each amount.
- Details of how it was credited. (That is, in cash, by way of bank deposit, by direct payment to a creditor etc.)
- Details of the arrangement, including whether it was a loan, a gift etc, and whether it is to be repaid and if so on what terms.

Personal Accounts

A schedule detailing all personal financial accounts (including bank, credit cards, loans, mortgages, investments or any other type of financial account) held in the United Kingdom or abroad, in your own name or in joint names or over which you had control or the power to operate including bank statements. Copies of statements for each bank, building society or similar account you operated; whether in the UK, or outside and whether in your name, or any other.

GROUND FOR APPEAL

11. Mr Jenner's notice of appeal against the information notice issued in respect of the tax year ended 5 April 2017 states his grounds are as follows:

"The information notice issued on 9 July 2019 for tax year 2016/17 (and/or requirements of such notice) is invalid in law. The information or documents requested (as stated in the Information Notice) is not reasonably required by the officer of HMRC for the purpose of checking my tax position for that year.

Further, the Information Notice should be expressed in clear terms and that it should be a straightforward matter for both parties to know whether an Information Notice has been complied with. In this case, the extremely broad scope of the requirements makes it impossible for the parties to know whether the Information Notice had been complied with. Information that it is impossible to supply (and/or known whether it has been supplied) cannot be "reasonably required" by HMRC. A broadly-drafted request is not valid.

Further, the broad scope of the information requested also demonstrates that HMRC is engaging in a fishing expedition. An Information Notice may not be issued for such purpose."

12. Identical grounds were submitted by Mr Jenner in his appeal against the information notice issued for the tax year ended 5 April 2018.

HMRC SUBMISSIONS

13. HMRC submit that:

“23. The information the Respondent held up until and during the period the tax returns for the years in question provided a context and reasoning for which the Section 9A TMA 1970 enquiry was opened.

23.1. The Appellant in his statement of affairs submitted in March 2015 for bankruptcy, presented living conditions and expenses that on inspection appear to be the same, based on the information currently held by the Respondent, to the living conditions and expenses of the Appellant during the 2016/17 and 2017/18 tax years.

23.2. A review of the tax returns submitted by the Appellant for 2016/17 and 2017/18 shows income that does not appear to be sufficient to meet the cost of living and any personal expenditure by a significant margin.

23.3. The notice was issued in order to specify what information and/or documents are required which would assist the Respondents in determining the appellants correct tax position.”

BURDEN OF PROOF

14. HMRC further submits that the burden of proof rests with them to show that the information sought by these taxpayer notices is reasonably required for the purposes of checking Mr Jenner’s tax position.

15. In *Joshy Mathew v HMRC* [2015] UKFTT 139 (TC) (*‘Joshy Mathew’*), which dealt with a third party notice rather than a taxpayer notice, Judge Redston considered the presumption that a statutory authority has acted lawfully meant that the ‘reasonably required’ burden rests with the appellant, but acknowledged that it remains arguable that the burden is with HMRC for notices provided to taxpayers. The basis for the difference is that the procedure for issuing a third party notice, unlike a taxpayer notice, requires an officer to obtain the Tribunal’s approval before a third party notice is issued.

16. With regard to taxpayer notices, I agree with Judge Nicholl’s remarks in *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 231 (TC) at [39] that if “the approval of the tribunal is not sought it still remains a condition that the information or document is reasonably required by the officer and this is to be established by HMRC when a taxpayer appeals to the tribunal”. I therefore accept HMRC’s submission that the burden of proof rests with them to show that the information requested is reasonably required in the circumstances of this case, which involves taxpayer notices.

EVIDENCE

17. In addition to the documents referred to by the parties, which were contained in hearing and authorities bundles, I heard testimony from Mrs Shasta Hussain, an officer of HMRC, who gave evidence that following her review of the background facts and Mr Jenner’s tax returns, she submitted her findings to a Manager, proposing that enquiries should be opened and information notices issued immediately. The Manager authorised the enquiries and agreed the issue of the information notices on 13 May 2019.

18. Mrs Hussain set out her findings from her review as follows:

“30. The only income declared on the 2016/17 tax return is self-employment turnover of £1 and foreign income from savings of £194.

31. The only income declared on the 2017/18 tax return is self-employment turnover of £1 and foreign income from savings of £2316.

32. I have seen no evidence which suggests there has been no material change to his lifestyle following the bankruptcy.

33. Self-assessment record shows he is still residing at... the same address as pre-bankruptcy.

34. MJ has informed me he lives in Canada for 6 months of the year and is currently living in Canada.

35. Income declared does not appear sufficient to meet the cost of living and any personal expenditure. There may be reasons for this, but to date no supporting information has been provided by MJ.

36. The amount of income is not enough to cover his personal expenditure as declared on the Statement of Affairs.

37. The annual rent totals £66,000 per year as per the Statement of Affairs.

38. He is travelling to and from Canada. My understanding is that he is in Canada at least 6 months of the year and is currently living there.

39. MJ has made a white note space entry on both tax returns confirming he is a Director of a number of companies but has received no income or remuneration. Companies House confirms he is a Director of 14 companies registered in the UK.

40. All the evidence I have seen suggests that MJ's expenditure greatly exceeds his reported taxable income. I concluded that HMRC should check whether the returns were complete and correct in view of this observation.

19. With regard to whether the documents and information sought are reasonably required, Mrs Hussain stated that the information is relevant to her enquiry because it would show her approximately what the total household expenditure amounted to and she believes the requirements to be reasonable and proportionate to check that no taxable income was missing from the returns.

20. On cross-examination, Mrs Hussain was unable to confirm how and when she had established several key points in her witness statement and stated that she could not be sure all the statements made were accurate. She was unable to confirm details regarding previous HMRC enquiries, although she was aware that previous enquiries had been settled. Mrs Hussain said that she did have access to some of the information previously provided by Mr Jenner to HMRC but, when asked about what information she had considered before arriving at her conclusion that the income declared does not appear sufficient to meet Mr Jenner's expenditure, she stated that she had not considered the financial position of Mr Jenner's husband, the value of Mr Jenner's family trusts or the substantial amounts of funding previously provided for daily expenditure by the trusts (which was shown in Mr Jenner's Statement of Affairs).

21. I stated my concern during the hearing that some aspects of the evidence given by Mrs Hussain appeared to be incorrect and potentially misleading. I have therefore limited my reliance on that testimony to aspects which are supported by the documents, as requested by Mr Jenner. I find, on the basis of the 'view of the matter' letter issued by Mrs Hussain on 27 September 2019, that the principle reason stated for issuing the information notices was to examine whether the whole of Mr Jenner's liability to tax for each year has been correctly and completely self-assessed, with a core feature of this examination being Mr Jenner's means position; that is, whether Mr Jenner's costs of living could be funded by his available wealth and income.

DISCUSSION

Fishing Expedition

22. Mr Jenner argues that the broad scope of the information requested demonstrates that HMRC is engaging in a fishing expedition and that an information notice may not be issued for such purpose. Mr Gyasi contends that even if they did not have a reason to suspect the tax returns were incorrect, the case of *Spring Capital Ltd v HMRC* [2015] UKFTT 0008 (TC) confirms that HMRC does not need to have a reason to suspect the return in order to validly inspect one. Mr Gyasi relies on the remarks of Judge Mosedale in that decision at [34], where she states:

“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.”

23. I consider the context of those remarks, set out by Judge Mosedale at [33], to be relevant:

“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.”

24. It seems to me that Mr Jenner’s submission does not concern whether HMRC must have a reason to suspect the tax returns were wrong to issue the notice but instead whether the broad scope of the information requested demonstrates HMRC’s engagement in an impermissible fishing expedition. On that point, I am guided by the remarks of Simler J in *Derrin Brother Properties Ltd v HMRC* [2014] EWHC 1152 (Admin), which concerned the issue of a third party notice, at [20]:

“Finally, HMRC may not use their Sch.36 powers for a fishing expedition – whether for their own or the purposes of another revenue authority. A broadly-drafted request will not be valid if in reality HMRC are saying “can we have all available documents because they form so large a class of documents that we are bound to find something useful”. What is required is that the request is genuinely directed to the purpose for which the notice may be given, namely to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer’s tax position.”

25. It follows that HMRC are not permitted to make broad requests for the purposes of fishing for information but that does not mean that they need suspicion in order to check a tax return. HMRC are entitled to any documents or information reasonably required for the purpose of carrying out an investigation or enquiry of any kind. Broad requests made for the purposes of fishing for information would not meet the ‘reasonably required’ test.

Reasonably Required

Household Expenditure

26. Mr Gyasi argues that information regarding Mr Jenner’s household expenditure is required in order to accurately understand his tax position. I consider the taxpayer should not be required to divulge details of his personal expenditure if that could be avoided (see *Taylor v Bratherton* [2005] STC (SCD) 230 at [7]). I do not accept HMRC’s argument on this point and I am not satisfied that this broadly-drafted request, in the circumstances of this case, is reasonably required to check Mr Jenner's tax position.

27. I consider the evidence presented by HMRC fails to demonstrate that the information sought is reasonably required to address an apparent insufficiency of declared income and I do not consider HMRC to have met their burden of proving that this information is reasonably

required for the purpose of carrying out an investigation or enquiry of any kind. Had I found that this burden rests with the appellant, I would consider, based on my assessment of the reliability of HMRC's witness testimony and my consideration of the documentary evidence and the relevant legal principles, that Mr Jenner has discharged that burden and that the 'reasonably required' test has not been met. I therefore set aside this requirement.

Financial Information

28. In *Joshy Mathew* Judge Redston commented at [110], when considering whether a schedule of interests held by the taxpayer was reasonably required, that:

“...Mr Mathew has accepted that there is a gap between taxable income and expenditure. Although it is Mr Mathew's case that he is living on loans, it is clearly reasonable for Mr Straughair to check whether there are other sources of income and/or gains which have contributed to filling the gap between Mr Mathew's incomings and outgoings.

111. We also find that it is reasonable for the requirement to extend to all entities in which Mr Mathew has an interest, not just those which relate to business: if there are dividends or gains from portfolio holdings this is relevant to the acknowledged gap between income and expenditure.

112. We do not accept Mr Onalaja's submission that, because HMRC may be able to find some of this information from other sources, it is unreasonable for Mr Straughair to require Mr Mathew to provide it. The law requires only that the “the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.” HMRC do not have to exhaust other information sources before turning to the taxpayer.”

29. I agree with Judge Redston's comments and find that, even though HMRC may be able to obtain some of the information sought from Mr Jenner from other sources, it is reasonable for HMRC to require Mr Jenner to provide it in these circumstances. Further, although Mr Jenner does not accept that there is a gap between his taxable income and his expenditure in this case, I also find that it is reasonable for HMRC to check whether there are other sources of income.

30. I consider the items sought by HMRC in this category to be basic financial information and I agree with Judge Citron's remarks in *Bemal Patel v HMRC* [2017] UKFTT 323 (TC) (*'Bemal Patel'*) at [46] on this point:

“We now turn to consider the contested items in the light of HMRC's statutory powers. Four of the items (1, 2, 8 and 9) relate directly to what can only be regarded as basic financial information - bank and other financial accounts, and financial assets and liabilities. The fifth (item 3) is also in our view basic financial information as it relates to amounts borrowed by the appellant from a “loan account” with a related company. Basic financial information of this kind shows the details of a person's income and expenditure. Income and expenditure are relevant to a person's income tax position. It seems to us that precisely this kind of basic financial information would be required to “check” the income tax position of a person in the appellant's position. The contested items do not answer to Simler J's description of a ‘fishing expedition’, being where the reality of the situation is that HMRC ask for “all available documents because they form so large a class of documents that [HMRC] are bound to find something useful”. The reality of the situation here is that HMRC are asking for a specific class of information and documents - basic financial information - so they can check that the tax returns are correct and complete.”

31. I therefore find that the requirement for Mr Jenner's basic financial information is reasonable.

32. I do however accept Mr Jenner's submission that the requirement for "details of any sums drawn down from any trusts, partnerships, other individuals or any other entity..." does not specifically refer to sums drawn down by Mr Jenner and does not necessarily limit the request to information within his power or possession. I have therefore varied the drafting of this requirement accordingly.

Personal Accounts

33. Mr Gyasi relies on the decision in *Bemal Patel* for his contention that basic private financial information is reasonably required to check the tax position of a taxpayer. I again agree with Judge Citron's remarks at [47] of that decision:

"We note that the contested items relate only to the "personal" accounts, etc, of the appellant; and this is because the appellant had already supplied HMRC with the financial information they required in respect of his "business" accounts etc. We do not think this affects the question of whether the contested items are required to check the appellant's income tax position. The fact here that the appellant has supplied HMRC with some (perhaps most) of his financial information – that which he earmarked as relating to his business accounts - does not in our view detract from the position that other basic financial information is reasonably required in order to check his income tax position."

34. I therefore find that the requirement relating to Mr Jenner's personal accounts amounts to a requirement for other basic financial information, which is reasonably required in order to check Mr Jenner's income tax position.

35. Mr Jenner suggests there is a lack of clarity on the difference between 'control' and 'power to operate' an account and how this applies to trust accounts. Ms Hussain disagreed on cross examination and stated that it simply meant statements for accounts under Mr Jenner's control. On the basis of this evidence on HMRC's behalf, I have varied the notices to reflect that wording and to limit repetition.

CONCLUSION

36. I therefore set aside the requirements relating to household expenditure and vary the other requirements in both notices (for the periods 6 April 2016 to 5 April 2017 and 6 April 2017 to 5 April 2018) as follows:

(1) For any company of which you were a director, please provide an analysis of any director's loan account which identifies:

- (a) Each credit or debit transaction.
- (b) The date of each transaction.
- (c) The nature of each transaction in terms of whether it was cash, bank transfers, credits, or other forms, as relevant.
- (d) Account details where any transaction was a transfer to or from a bank, building society, or other similar account.
- (e) A brief description of each transaction.

(2) Full details of any sums you have drawn down from any trusts, partnerships, other individuals or any other entity, to include:

- (a) The amount of each separate sum.

- (b) The date of each amount.
 - (c) Details of how it was credited. (That is, in cash, by way of bank deposit, by direct payment to a creditor etc.)
 - (d) Details of the arrangement, including whether it was a loan, a gift etc, and whether it is to be repaid and if so on what terms.
- (3) A schedule detailing all personal financial accounts (including bank, credit cards, loans, mortgages, investments or any other type of financial account) held in the United Kingdom or abroad, in your own name or in joint names or over which you had control and copies of statements for each bank, building society or similar account you operated.
37. I direct that Mr Jenner must comply with these requirements within 30 days of the release of this decision.
38. This document contains full findings of fact and reasons for the decision.
39. This decision is final pursuant to paragraph 32(5) Schedule 36 Finance Act 2008.

**KIM SUKUL
TRIBUNAL JUDGE**

Release date: 29 JUNE 2022