



TC03339

Appeal number: TC/2013/06146

INCOME TAX – Information Notice; whether document reasonably required for the purposes of checking the taxpayer’s tax position; patient confidentiality; Finance Act 2008, Schedule 36 paragraph 1

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Dr KATHLEEN LONG MBChB, MPH

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE J GORDON REID QC FCI Arb

Sitting in public at George House, Edinburgh on 17 January 2014

John Cahill CA, Carl Jack Associates, Airdrie for the Appellant

William Kelly, Officer of HMRC, for Respondents

DECISION

Introduction

5 1. This is an appeal against a statutory information notice relating to an enquiry into the Appellant's (Dr Long) 2010/11 self-assessment tax return requiring production of Dr Long's business appointments diary, which contains confidential clinical information about some of her patients, but is said to contain no financial information.

10 2. The appeal was heard at George House, Edinburgh, on 17 January 2014. John Cahill, CA, of Cahill Jacks Associates, Chartered Accountants, Airdrie, appeared on behalf of Dr Long. Dr Long gave evidence. William Kelly, an experienced tax officer, appeared on behalf of the Respondents (HMRC). He led no evidence. A bundle of documents was produced. There was no dispute about the authenticity of
15 the documents.

General Background

3. Dr Long is a General Practitioner and has been in practice for many years. She has acted as a locum GP in Millport, Isle of Cumbrae, Islay and Braemar. She also has a private practice in Glasgow where she provides a range of hypnotherapy
20 services and cosmetic treatments, including migraine treatments, dealing with patients with low esteem, and acupuncture. Throughout the tax year 2010/11 she was a locum principally at Braemar, and Islay and carried on her private practice at Glasgow.

4. Dr Long submitted her 2010/11 Self Assessment Tax Return showing details of *inter alia* her employment income as a General Practitioner, and her self-employment
25 income. She there describes her business as *cosmetic practitioner*.

5. An enquiry under section 9A of the Taxes Management Act 1970 was opened on 6 December 2012. HMRC sent Dr Long a schedule of information and documents required to check the self-employment figures in the return. A meeting was arranged. Before the meeting, Dr Long discovered that there was an error in her return. The
30 error was picked up by a friend with accounting experience who looked through her books and records.

6. The meeting took place on 15 March 2013. Dr Long was accompanied by the friend. Dr Long made the HMRC official aware of the error and explained how it had occurred. There was a cash recording error unwittingly made by Dr Long's personal
35 assistant. Dr Long trusted and still trusts the personal assistant who remains in her employment at her Glasgow premises. This error was not initially noticed by Dr Long's accountant when preparing her accounts and tax return. The result was that, although all cash receipts were disclosed and recorded, the manner of recording led to some cash income from private patients being omitted from the return.
40 Although it was not entirely clear this seemed to relate to various entries being recorded in the incorrect column of the software template used for record keeping

purposes. Some receipts were recorded in petty cash but were not recorded as sales. Out of a total income of about £190,000, some £7,300 of cash sales had been omitted from the return ie a little less than 5%. Dr Long's return declared a turnover of £183,084.00.

5 7. Following the meeting, HMRC wrote to Dr Long on 19 March 2013 enclosing a schedule requesting further information and documents. This included Dr Long's business appointments diaries.

8. Dr Long responded by letter dated 15 April 2013 stating that the diaries contained confidential patient information. This led to the issue of an information
10 notice on 7 May 2013 under paragraph 1 of Schedule 36 to the Finance Act 2008 requiring information and documents by 31 May 2013. The notice included the following:-

"Business Income and expenditure

.....

15 11 Please send me your business appointment diary or diaries which cover the period 06/04/10-05/04/11."

In an accompanying letter, also dated 7 May 2013, HMRC stated that

"The appointments diary will help me check your income and expenditure."

9. Further correspondence ensued and Dr Long engaged the services of a VAT
20 consultant as there was also an on-going debate or discussion as to whether Dr Long's hypnotherapy services and/or cosmetic treatments should be subject to VAT.

10. Each side maintained its position. HMRC offered an internal review under
TMA s49C, which Dr Long accepted. The decision on review (dated 25 July 2013)
25 confirmed that the information notice was justified. The view was taken that Dr Long's duty of confidentiality was overridden by the statutory provision authorising the information notice.

Statutory Background

11. Paragraph 1 of Schedule 36 to the Finance Act 2008, provides *inter alia* as follows:-

30 (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,

35 if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's position.

.....

Further Facts

12. The nature and contents of Dr Long's business appointments diaries for the period in question were discussed in evidence. From that evidence I find as fact that (1) the diaries were approximately A4 size and contained two days to a page, (2) they
5 contained some patient details such as names, phone numbers and some further clinical details in relation to their treatment, (3) names recorded on particular days recorded arranged appointments, (4) the recording of names did not necessarily indicate that the patient attended on the due date, and received treatment or services, (5) the diaries contained no financial information whatsoever, and (6) the information
10 contained in the diaries does not enable a calculation of income from the patients identified therein to be made.

13. Dr Long has been co-operative in relation to HMRC's enquiries. She immediately admitted the under-declaration when this was discovered by her friend with accounting experience. She was co-operative at the meeting on 15 March 2013.
15 She has explained her position fully in correspondence and produced all her business records as requested. The only exception relates to the business diaries. She is particularly concerned about the confidentiality aspects. She consulted the General Medical Council and the British Medical Association and corresponded with them. The GMC did not provide legal advice but the BMA expressed general support for her
20 stance on the question of confidentiality.

Submissions

14. Mr Cahill submitted that the diary was of no relevance or use to HMRC. They had all Dr Long's records. The case of *Guyer*, referred to by HMRC, was different. Here, there was nothing in the diaries which would assist HMRC in checking
25 Dr Long's tax position. The diaries contained clinical and personal information but no financial information.

15. Mr Kelly helpfully took me through the relevant parts of the bundle of documents. His principal submission was that Schedule 36 overrides the duty of confidentiality. He relied on *Guyer v Walton* SPC 274/01, 21/2/01, which in relation
30 to confidentiality, he submitted was unaffected by more recent case law on legally privileged documents. He also referred to *R v CIR (ex p Taylor) (No 2)* 62 TC 578 at 587 and 588. He also referred to HMRC's obligations of confidentiality under s19 of the Commissioners for Revenue and Customs Act 2005. He submitted the diaries were a record of business activity and therefore reasonably required.

35 Discussion

16. The two issues are (i) whether the business diaries are *reasonably* required to check Dr Long's tax position, and (ii) whether the confidential information about patients contained in the business appointments diaries entitles or indeed obliges her to decline to produce them to HMRC.

40 17. I found Dr Long to be wholly credible and reliable. She gave her evidence in a straightforward manner. She did not intend to be difficult or obstructive. She has

acted in good faith throughout, co-operating with HMRC, and answering fully their queries in correspondence and at the meeting in March 2013. She is seriously concerned, in particular, about the aspect of confidentiality raised in this appeal.

5 18. In light of the findings of fact, it seems to me to be impossible to hold that the business appointments diaries are reasonably required in order to check the taxpayer's position. They contain no financial information. They are not necessarily an accurate record of patients seen and services provided or charged for. On the evidence, there is no way of correlating the numbers of patients with the turnover generated.

10 19. The evidence discloses that all turnover has been recorded but the manner in which it was recorded during the particular year in question, shows that it was not fully accounted for as sales. The shortfall was identified from Dr Long's records.

15 20. While most business records may have some possible bearing on taxpayer's position, in the present circumstances I do not see what use HMRC can make of these business appointments diaries. It was suggested that some sort of calculation could be made by reference to numbers of patients to identify a minimum turnover. However, given the variety of services provided by Dr Long that seems to me to be a remote and speculative possibility which does not make the requirement for the production of the business appointment diaries reasonable. No other method of checking Dr Long's tax position with these diaries was suggested. In particular, these diaries are not required to reconcile existing entries in Dr Long's books and records as was the case in *Guyer* (paragraph 22).

20 21. Dr Long's evidence is sufficient to conclude that HMRC's requirement was unreasonable. They did not lead evidence to show that it should not be accepted or that some specific use of the diaries could be made to check Dr Long's tax position. 25 HMRC have not established that the business appointments diaries are reasonably required. Dr Long has established that they are not reasonably required. On this basis, the appeal succeeds.

30 22. As for the question of confidentiality, it is at least questionable whether *Guyer* covers the point. On one view, it does if the contractual duty of confidence applies and is always overridden by the general law (paragraphs 27 and 28). Convention rights may be relevant. These were considered in *Guyer* (at paragraphs 36-45). For example, the European Court of Human Rights observed in *Z v Finland* 25 EHRR 371 at 405-406, paragraph 95, that

35 "Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general."

40 23. Questions of proportionality may arise. However, I did not hear full argument from either party on these matters. I do not think it would be prudent to express a concluded view on this delicate topic in the absence of full submissions from both sides when it is not essential that I do so. While I am inclined to the view that, in certain circumstances, the statutory provision referred to above in Schedule 36 will

prevail over the duty of confidentiality, it is unnecessary to decide whether this is such a case.

Result

24. The appeal is allowed. Dr Long does **not** have to produce her business
5 appointments diaries to HMRC.

25. 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
10 than 56 days after this decision is sent to that party. The parties are referred to
“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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**J GORDON REID QC
TRIBUNAL JUDGE**

RELEASE DATE: 14 February 2014

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