



**TC03866**

**Appeal number: TC/2014/00635**

*Penalties – imposed for failure to comply with direction made pursuant to Schedule 36 Finance Act 2008 to produce documents – documents said not to exist – it is unlikely that this is correct – appeal against fixed penalty dismissed – appeal against the imposition of daily penalty dismissed but amount of daily penalties reduced*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DR R M HUGHES**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE Judith Powell  
MEMBER Mr John Nisbet**

**Sitting in public at Bedford Square, London on 23 April 2014**

**Mr Peter Massey officer with HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant was not present in person nor through his representative. The Respondents were confident the Appellant was aware of the date and location of the hearing because he had asked for the bundle to be sent to his Representative and had requested the appeal should be heard in London. The Respondents applied for the appeal to be heard notwithstanding the absence of the Appellant and the Tribunal granted the application. The Tribunal also accepted a copy of an agreement dated 19 February 2009 which had been sent to the Respondents by the Appellant and which was not in the bundle. This was a copy of a loan agreement dated 19 February 2009 between Dr Hughes as Borrower and PFT Management Ltd of 7 New Road Belize City as nominee of the trustees in which the Lender agreed to provide the Borrower with Loan Finance of £9,000.
2. This is an appeal against a decision of the Respondents made on 8 January 2014 upholding their earlier decision to impose a penalty of £5,620 on the Appellant for his failure to produce documents to them as requested by an information notice issued to him on 7 June 2011. The reason given by the Appellant for his appeal is that the documents which have been requested from him and which he has not produced do not exist.
3. Mr Massey stated at the outset that the Respondents have the burden of proof and must satisfy us on the balance of probabilities but later on he altered his position on this and referred us to the case of *Edward Behague v The Commissioners for Her Majesty's Revenue and Customs* [2013]UKFTT 647 (TC). The present case is less complex than that one but did involve the Appellant arguing that some of the documents which had been requested did not exist. It was suggested there that it was for HMRC to prove otherwise and in answer to this Judge Mosedale said at paragraph 20 "I consider that the burden of proof rests on the taxpayer." She went on later in that same paragraph to say "only the taxpayer can know what information he possesses and therefore the taxpayer has the burden of proof". Judge Mosedale concluded in the case before her that she was not satisfied that the documents did not exist. She found it was reasonable to assume there would have been documents to show the existence of an obligation and its discharge given that was stated to be the purpose of the trust. I believe what Mr Massey was saying here is that where the Respondents can show it was reasonable to assume that documents exist it is for the Appellant to show that they did not. It might be sufficient for the Appellant merely to say that they do not exist (which is what they have done in this case) and whether we accept this rather depends on the documents said not to exist.
4. The penalties are made up as follows. The initial penalty of £300 was imposed on 15 November 2011 for the Appellant's failure to comply with a notice issued on 7 June 2011 pursuant to Schedule 36 Finance Act 2008 requiring production of documents so that the Respondents could check into the Appellant's tax position. The balance of £5320 is made up of daily penalties for his continuing failure at the rate of £40 per day for the period 16 November 2011 to 27 March 2012.
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5. The information notice was issued in connection with expenses claimed by the Appellant in his accounts as a dentist for the year to 31 December 2008. The expenses mainly consist of payments in that year the Appellant made to a trust set up by IFP Consulting on 25 March 2008 to which he executed a deed of adherence; in this case the deed of adherence is dated 11 February 2009 and we were shown copies of both the trust deed and of the deed of adherence. We noted that the deed of adherence was entered into after the end of the year in which the payment was made to the trust but no point was made in this appeal about the dates of the documents. Expenses of £160,000 – described as “other expenses” were claimed by the Appellant as deductions in calculating his profits. This deduction had the effect of reducing the net profit shown in the accounts from £180,000 down to £26,192 for the year ending 31 December 2008. The precise nature of the payments gave rise to an enquiry into the Appellant’s tax return for 2008/09.

6. We heard oral evidence from Mr Evill an officer with HMRC dealing with direct taxes as an investigator. He is a member of counter-avoidance which is a new department of HMRC that deals with marketed avoidance. Mr Evill is the lead investigator for remuneration trusts. He told us that the trust in this case was marketed by Baxendale-Walker which is an organisation that provides wealth management services aimed at sole traders and partnerships. The Appellant is a dental surgeon.

7. Mr Evill explained that where a number of taxpayers are perceived by him to be "doing the same thing" he tries to adopt a collaborative approach and he puts together an information request to them and, where possible, meets with them to further his enquiries. He expressed concern about the Baxendale-Walker trust and told us he has tried without success to meet and discuss the arrangements with the relevant taxpayers. None of the taxpayers (including the Appellant) has agreed to meet with him. He has received responses from Baxendale-Walker and from Mr Freeman (the Appellant’s representative) although he told us that Mr Freeman said his responses were drafted by Baxendale-Walker.

8. The Respondents say they rarely know exactly what documents exist in connection with the arrangements involving the remuneration trusts and the list of required documents is made up of documents which might reasonably exist in the context of contributions to a trust.

9. The matters leading to the information notice being issued are as follows. We have confined this summary to the documents which form the subject matter of the information notice.

10. On 18 November 2010 the Respondents wrote to the Appellant stating their intention to enquire into his self-assessment return for the year ended 5 April 2009. In that letter they stated that, unless they found it necessary to extend their check into the return, they only intended to look at the telephone, fax, stationery and other office costs deduction of £161,089 claimed in his self-assessment pages in respect of his business as a dental surgeon. This letter was copied to his advisers, Freeman and Co, and the Appellant was sent a copy of the letter that the Respondents wrote to Freeman

and Co. The letter to Freeman and Co gave details of what the Respondents required to carry out their check including a list of documents.

11. Freeman and Co responded to the request on 16 February 2011 and sent some of the requested documentation being a copy of the Remuneration Trust Deed, Written Resolutions dated 12 February 2009 and Deed of Adherence. They stated that the reason why the business needed to enter into the arrangement and make payments to the trust is explained in the February 2009 Resolutions. One of the Resolutions states that the trust was established for the purpose of funding the provision of discretionary benefits to providers of services products custom or finance to the Business and of finance to the trustees and their respective wives widows and dependants. It was also resolved that providers of finance to the trust and their respective wives widows and dependants be included as discretionary beneficiaries. They promised to provide copy bank statements and copy accounts in due course. They claimed legal professional privilege for one of the requested group of items (copies of all correspondence relating to the creation and the use of the remuneration trust).

12. Except as far as they were enclosed with the letter dated February 16 2011 the Appellant denied the existence of anything further which appeared on the list of documents requested by the Respondents in their November 2010 letter using the lettering (f) to (i). These were “(f) correspondence and invoices between Dr Hughes and all other parties concerning the creation and operation of the remuneration trust (g) reference material/information considered in making the decision to create and make contributions to the trust (h) documents showing the communications between Dr Hughes and the Trustees outlining how the funds and assets held by the Trustees were used or might be used.” The item referred to at (i) ( a report from the Trustees to Dr Hughes setting out the funds received assets held, amounts paid out and the remaining cash and assets held, covering the period from the creation of the trust until the accounting period ended on 31/12/2008) elicited the response that the Appellant was not aware that any such report exists and suggested that contact be made with the Trustees direct.

13. The Respondents issued an information notice on 7 June 2011. This Notice contained a list of what they required. This commenced with a request for "Copies of all correspondence relating to the creation and use of the Remuneration Trust". This is the same item for which legal professional privilege was originally claimed by Freeman and Co when responding in February 2011 to the Respondents November 2010 letter. The Notice went on to illustrate items that might be within this description (which are broadly similar to the other items mentioned in the November 2010 letter) being, but not limited to, Promotional and Reference material about the arrangement, Introductory letters, Financial Services Authority Regulatory communications, Communications with trustees and letters of wishes, Guidance and communications on implementing the arrangements, payment advice and instructions, anti-money laundering communications and invoices relating to advice given and work done. The Notice mentioned legal privilege and asked for a list of documents for which privilege was claimed.

14. Freeman and Co responded to the Notice on 5 September 2011. Included in the letter was confirmation that legal and professional fees of £3450 had become payable to IFP Consulting - this was an item which fell within the information notice of June 7 2011 and no supporting invoice was provided. With their September letter  
5 Freeman and Co also sent additional information and documents such as copy bank statements and working papers and a journal for capital introduced on the drawings schedule. On 19 October 2011 the Respondents reiterated their request for the required documents and warned that they would issue a penalty if the documents were not received by 1 November 2011. Nothing was sent. A penalty notice for £300 was  
10 issued on 15 November 2011.

15. On 21 November 2011 Freeman and Co appealed against the Information Notice and the Penalty Notice on the basis they were unreasonable and an abuse of process and claimed that correspondence subject to Legal Professional Privilege may not be the subject of such Notices. The Respondents replied to this letter on 21  
15 December 2011 explaining that they did not accept there were valid reasons for the appeal against the penalty and that they had invited the Appellant to itemise the documents they claimed were covered by legal professional privilege but this had not been done. On 28 March 2012 further daily penalties were imposed. These covered the period from 16 November 2011 to 27 March 2012. Freeman and Co wrote to the  
20 Respondents on 27 April 2012 and said that they had provided all the documents that existed and so there were no outstanding documents and thus there could be no list of documents covered by privilege.

16. Mr Evill told us that, based on his experience of users of apparently the same arrangements, further documents are likely to exist. He pointed us to answers given  
25 in a questionnaire provided as one of the February 2009 documents. One of the replies to the questions acknowledged the trader was taking independent professional advice on the creation of the incentive arrangement. The Respondents say they have not been shown copies of this advice.

17. He said it is likely that other documents in existence and in the possession of the  
30 Appellant or available to him would include an engagement letter addressed to Dr Hughes, a report explaining the details of what was involved in making payments to the trust, invoices for associated advice from Baxendale-Walker or the company which set up the trust, a letter of wishes to the trustees, instructions or requests from the Appellant to the trustees concerning the use of funds. Although the Respondents  
35 have some copy bank accounts from the Appellant they do not relate to the period for which the deductions are claimed in making up the accounts to 31 December 2008.

18. Mr Evill explained that the further documents requested in the June notice would assist in two areas of enquiry. First, whether the Appellant's accounts had been prepared in accordance with GAAP as required, and secondly whether the  
40 contributions were made wholly and exclusively for the purposes of the trade which is a requirement if they are to be deductible for tax purposes. Mr Evill accepted that the information notice wrongly referred to statutory records and that nothing of this description exists.

19. The Respondents submit that the Appellant is a professional man who is required to keep records of his patients and it seems to them incredible that he would pay £160,000 to a trust without receiving (and retaining) a record of how it would achieve the purpose for which it was made. The Appellant has explained through his advisers that the trust to which he has adhered is the means by which he discharges a non-legal obligation.

20. We did not have the opportunity of hearing from the Appellant and so we reached our decision on the basis of what he said in his Notice of Appeal that the documents which he had been asked to produce and which he had been penalised for failing to produce did not exist. As this was his submission we do not have to consider legal professional privilege.

21. Mr Massey said it is reasonable to assume that further documents exist. The Appellant says that nothing further does exist.

22. Mr Massey says, the invoice for the fee of £3450 payable to IFP Consulting must exist since the existence of the fee was acknowledged in the Freeman and Co letter of 5 September 2011. This was not provided in accordance with the Notice of June 2011. He suggested it was incredible if the Appellant had nothing to guide him about contributions to the trust since the amount of these is considerable in terms of the Appellant's position.

23. The 7 June request was expressed in different and less precise terms than that contained in the initial enquiry made in November 2011 and we found this unhelpful. Despite this, we cannot accept what the Appellant says that there are no additional documentation in existence falling within the scope of the June 7 request. There must be an invoice for the IFP fees and this has not been produced. This was within the scope of the Notice and means that the £300 penalty imposed by the first penalty Notice is payable and the appeal against that must be dismissed for that reason if for no other.

24. However, we believe must have been engagement terms and contracts and invoices in addition to the IFP invoice relating to advice given. These have not been produced. Importantly we accept what Mr Massey said that the Appellant is unlikely to have paid over such a sum of money to the trust without any guidance about how the payment would be used and how it would affect his position (and particularly his tax position) especially since the stated purpose of the trust is to satisfy commercial obligations of the business. We do not accept the Appellant did not receive something in writing to explain this and that it would have gone beyond the questionnaire produced as part of the February 2009 documents.

25. The Appellant's failure to produce these documents which he must have or must be able to obtain means that he fails in his appeal against the initial penalty of £300 imposed under paragraph 39 Schedule 36 Finance Act 2008. This failure continued and he became liable for daily penalties. We conclude he fails in his appeal against the imposition of daily penalties but we did consider the amount of the daily penalty imposed by the 28 March penalty notice. Paragraph 40(2) Schedule 36 Finance Act

2008 allows for the imposition of further penalties not exceeding £60 per day where a person continues his failure to produce documents after the date on which the initial penalty is imposed. The amount imposed in this case was £40 per day. This tribunal may, on appeal, either confirm the decision or substitute for the decision another decision that the officer of revenue and Customs had power to make and this includes the power to adjust the daily penalty amount. (Paragraph 48 Schedule 36 Finance Act 2008). We have taken into account on the one hand the documents that the Appellant provided to the Respondents and on the other hand the documents which should have been provided and as we announced at the conclusion of the hearing we have decided that the daily penalty should be £20 rather than £40.

26. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**JUDITH POWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 1 August 2014**

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