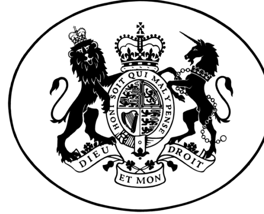

TC04014

Appeal number: TC/2013/09279

INCOME TAX – Information notice – Whether document reasonably required for the purposes of checking the taxpayer's tax position – Finance Act 2008, Schedule 36 paragraph 1 – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KARIM MAWJI **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR MOHAMMED FAROOQ

Sitting in public in Cardiff on 8 August 2014

Mr Martyn F Arthur of Martyn F Arthur Ltd, Forensic Accountants, for the Appellant

Miss Moira Brown, Presenting Officer, for the Respondents

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DECISION

Introduction

1. The Appellant appeals against a taxpayer notice dated 7 February 2013, issued by HMRC under paragraph 1 of Schedule 36 to the Finance Act 2008.

Applicable legislation

2. Paragraph 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.
>
> (2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

3. Paragraph 6 of Schedule 36 relevantly provides that:

> (1) In this Schedule, "information notice" means a notice under paragraph 1 ...

4. Paragraph 7 of Schedule 36 relevantly provides that:

> (1) Where a person is required by an information notice to provide information or produce a document, the person must do so–
>
> (a) within such period, and
>
> (b) at such time, by such means and in such form (if any), as is reasonably specified or described in the notice.
>
> ...

5. Paragraph 29 of Schedule 36 relevantly provides that:

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

6. Paragraph 32(5) of Schedule 36 relevantly provides that:

> (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.

Factual background

7. From the documents bundle produced for the hearing, the following matters emerge.

8. On 5 December 2011, HMRC opened an enquiry into the Appellant's self-assessment tax return for 2009-10. The letter requested the Appellant to provide certain information and documents relating to UK bank accounts and interest thereon, and of foreign income remitted to the UK.

9. By a letter dated 4 January 2012, the Appellant's accountants, McAk & Co ("McAk") responded that all UK bank accounts had been disclosed in the Appellant's return and that no case had been made for requiring the bank statements. The letter enclosed a schedule of foreign income and supporting monthly payslips.

10. In letters dated 31 January 2012 to the Appellant and McAk, HMRC stated that they were in receipt of information under section 17 of the Taxes Management Act 1970 ("TMA") that the Appellant was in receipt of interest in 2008-09 which did not appear to have been declared in his return for that year. The letter reiterated a request for details of bank accounts and copies of bank statements, both in relation to 2008-09 and 2009-10.

11. HMRC notes of telephone conversations held on 14 February 2012 and 20 March 2012 indicate that in these conversations, the Appellant's agent stated that the agent believed that the Appellant had declared all interest, and that any omissions from the return would be an oversight. In relation to a specific account about which HMRC enquired, the agent said that the Appellant had no knowledge of that account, and that the Appellant thought that it might relate to another individual with a similar name who lived in the same area as the Appellant.

12. By a letter dated 13 April 2012, McAk forwarded to HMRC certificates from HMRC Private Bank showing that interest had been paid in 2008-09 (£19,956.06) and 2009-10 (£511.48) in respect of a particular account held jointly in the names of the Appellant and Mrs S Mawji. The letter apologised on behalf of the Appellant for not including this interest in his 2009 return "as all his documents were stolen when he had a robbery in his apartment in Switzerland".

13. By letters dated 10 May 2012 to the Appellant and McAk, HMRC noted that the bank interest of £19,956.06 in 2008-09 indicated that the Appellant held a substantial amount on deposit in that year. On that basis, the letter requested the Appellant to provide the passbook or statements for the account in question showing funds paid into the account, and an explanation for the source of capital held in the account.

14. In a letter dated 24 May 2012, McAk responded that the bank statements for the account had been stolen when thieves stole the complete safe from his flat in Switzerland. An e-mail from the Appellant's colleague was provided as evidence of the theft. The letter from McAk pointed out that in the Appellant's 2006-07 return, he had £655,000 from his disposal of a flat (the "Clipper" flat). The letter stated: "During 2008 he had foreign income of £250,000 remitted to the UK. All these funds were retained initially in the current account for possible investment but were later transferred to a deposit account where the interest of £19,956.06 was earned."

15. A letter dated 20 June 2012 from HMRC to McAk stated as follows. It was understood from McAk's letter that the source of capital held in the account was the proceeds from the sale of the Clipper flat and £250,000 remitted from abroad. However, the Appellant's 2006-07 return indicated that after disbursements and settlement of a mortgage, his net proceeds from the sale of the Clipper flat were only £169,326.24. It was reasonable to assume that the sum of capital held in the account would have to be well in excess of that to generate gross interest of £19,956.06. Even if the bank statements had been stolen, the bank should be able to provide copies on request. The letter requested statements for the account, as well as "an analysis in the form of banking evidence tracing the source of the capital to the property sale and foreign remitted income".

16. An HMRC file note indicates that on 5 July 2012, an HMRC official had a telephone conversation with Mr Kassam of McAk. Mr Kassam stated that source of capital held on deposit was the proceeds of an £850,000 gain realised in approximately 2003. When it was put to Mr Kassam that no bank interest had been declared by the Appellant from 2003 to 2009, Mr Kassam said that the capital was held in a current account during that period earning little or no interest. When it was put to Mr Kassam that the requested bank statements could confirm this, he said that the bank statements had been requested.

17. Under cover of a letter to HMRC dated 3 August 2012, McAk provided certain bank statements for March 2007 to April 2009. These show funds in question being regularly deposited into interest bearing fixed deposits. The letter stated: "Please note Mr & Mrs Mawji sold their shares in Montague Goldsmith Ltd ("MGL") for £800,000 in 2003/04 and as stated in our previous correspondence Mr Mawji also had foreign income of £250,000 and net funds from the disposal of Flat 1, Clipper".

18. A letter dated 17 August 2012 from HMRC to McAk noted that although bank statements had now been provided, the Appellant had still not provided one of the items requested in the 20 June 2012 letter, namely "an analysis in the form of banking evidence tracing the source of the capital to the property sale and foreign remitted income". This was requested by 28 September 2012.

19. An internal HMRC e-mail indicates that on 24 August 2012, Mr Kassam of McAk called HMRC and stated that he had provided HMRC with all relevant statement information.

20. A letter dated 20 September 2012 from McAk to HMRC states as follows. The Appellant is non-domiciled in the UK. He was working in Switzerland and retained the proceeds from disposal of MGL in Switzerland and remitted the capital as and when needed. The proceeds from the sale of MGL and from the Clipper flat plus the foreign income of £250,000 amount to over £1,000,000, so that McAk were at a loss with the HMRC enquiry. The Appellant regretted the omission of the interest from his tax return and suggested that an assessment be raised by HMRC for McAk's review.

21. A letter dated 1 November 2012 from HMRC to McAk stated as follows. The statements for the HSBC Private Bank account indicate that on 4 April 2008 it held a capital sum of £1,140,000 made up of two cash deposits of £890,000 and £250,000. HMRC were aware that during 2008-09 the Appellant deposited a further sum of £650,000 into a separate account held in the joint names of his two daughters. The onus was still on the Appellant to evidence that this capital was from the sources claimed by him, and he had still not done so. The Appellant was requested to provide an explanation of the source of the £650,000 deposited into his daughters' account, and an analysis in the form of banking evidence tracing all of these amounts to the sources claimed.

22. Under cover of a letter dated 28 November 2012 to HMRC, McAk provided bank statements showing deposits into the accounts of the sums in question.

23. A note of a phone call between Mr Kassam of McAk and an HMRC official on 5 December 2012 indicates that in that phone call, the HMRC official expressed the view that the Appellant had not done enough to demonstrate that the amounts in the accounts were sourced from previously declared UK gains. It was further noted that as the Appellant was a non-domiciled taxpayer who pays the remittance charge, in relation to amounts remitted to the UK from abroad, consideration would need to be given to whether remittances had been made from mixed funds.

24. On 7 February 2013, HMRC issued the information notice against which the Appellant now appeals. This required the Appellant to provide the following information:

> …
>
> 1. Bank statements for all overseas account(s) where any remittances to the UK were made from during year ended 5 April 2008. … These statements should be provided for the complete 2007-08 tax year showing all debits and credits to and from the accounts *and* any balance carried forward figure(s) from 5 April 2007.
>
> 2. Please also supply an accompanying analysis of the contents of the account(s) for the year, summarising the nature of any transaction and the source of any credits to the account or destination of any debits from it.

25. A letter dated 7 February 2013 from HMRC to McAk gave an explanation for the information notice, noting amongst other matters as follows. The Appellant is not domiciled in the UK and from 5 April 2008 onwards has elected for the remittance basis of taxation. He made remittances to the UK from overseas of £630,000 on 25 March 2008, £260,000 on 3 April 2008 and £250,000 on 26 March 2008. Land Registry information shows that the Appellant bought a property for £1.5 million in 2005. It is not clear if this property is mortgaged or if the Appellant used any of the proceeds from the sale of MGL in connection with this purchase. In the telephone conversation on 5 December 2012, the Appellant's agent had said that the account from which these sums were remitted to the UK contained more than one type of income source. Remittances from such a "mixed fund" will be presumed to be income to the extent that there is income existing in the fund at the time that

remittances were made. To establish the taxable amount (if any) of the remittances made in 2008, the contents of the overseas accounts need to be analysed.

26. A letter to HMRC dated 10 April 2013 from the Appellant's representatives, Martyn F Arthur Ltd ("MFAL"), stated that the Appellant had invested funds with HSBC in a non-interest bearing account and was unaware that HSBC had placed them in an interest bearing account. The letter disputed HMRC's right to require the information in the information notice.

27. HMRC responded in a letter dated 30 April 2013, which noted that the 30 day time limit for appealing against the information notice had now expired and that the onus was on the Appellant to demonstrate grounds for a late appeal.

28. In a letter dated 7 May 2013, MFAL sought to make a late appeal against the information notice. In letters to the Appellant and MFAL dated 22 May 2013, HMRC rejected the appeal, and advised the Appellant that he could request a review of that decision within 30 days or appeal to the Tribunal.

29. On 31 July 2013, HMRC issued a penalty notice imposing a £300 penalty in respect of the Appellant's failure to comply with the information notice.

30. In a letter dated 1 June 2013 (but sent to HMRC by e-mail on 11 August 2013), MFAL requested a review of the 22 May 2013 decision rejecting the appeal against the information notice. A letter from HMRC to MFAL dated 14 August 2013 acknowledged that letter as being "a late request for a review of my appeal decision". A letter dated 20 August 2013 from MFAL stated that the Appellant also appealed against the penalty notice. Letters from HMRC to MFAL dated 23 August 2013 and 5 September 2013 indicated that the review was in progress. However, in a decision dated 24 September 2013, HMRC concluded in respect of the information notice that the legislation does not allow HMRC to accept a late request for a review outside of the statutory time limit. Therefore no review was undertaken of the 22 May 2013 decision rejecting the appeal against the information notice. The decision undertook a review of the penalty notice, but concluded that the penalty stands.

31. In a letter dated 3 October 2013, MFAL indicated that it was intended to appeal to the Tribunal, but noted that there would be a delay due to a member of the firm having a family bereavement and another member of the firm being seriously ill.

Application for permission to bring a late appeal

32. At the outset of the hearing of this appeal, the Tribunal heard and determined the Appellant's application for permission to bring a late appeal. The Tribunal granted the application, and gave its reasons orally. The parties indicated that they were prepared to proceed immediately with the hearing of the substantive appeal.

Submissions of the parties

33. In relation to the merits of the appeal, no witnesses were called. At the hearing, HMRC further produced documentary evidence from the Land Registry that in 2005, the Appellant and S Mawji had purchased a property for £1.5 million.

34. The submissions of HMRC were as follows.

35. The Appellant has not provided evidence showing the source of the funds in the overseas accounts which were remitted to the UK. There is presently no documentary evidence showing that the source of the funds in the overseas accounts was, as claimed, the proceeds from the sale of MGL and the Clipper flat. Because the Appellant is not domiciled in the UK, he can pay tax on overseas income on the remittance basis. This is an advantageous form of taxation. However, it does bring with it the burden that the Appellant must keep records and be able to demonstrate the source of overseas funds remitted to the UK, to show that they are not taxable in the UK. If the position were otherwise, HMRC would be powerless to carry out checks of any amounts brought into the UK on the remittance basis.

36. If the source of the remitted funds is overseas income that has not been taxed in the UK, then the funds become taxable in the UK when they are remitted to the UK. Even if the capital sum in the overseas account has already been taxed in the UK, any interest earned on that account is income, and if that interest is paid into the same account, the account becomes a "mixed account". If funds are remitted to the UK from a "mixed account", they will be presumed to be income to the extent that there is income existing in the fund at the time that the remittances are made.

37. It is therefore important for HMRC to know, apart from anything else, whether the overseas account from which the funds were remitted to the UK earned interest. The Appellant's claim that they did not earn interest cannot be accepted without further explanation. He previously denied that an account in the UK earned interest, and then subsequently acknowledged that it did (paragraphs 9-12 above). His claim that his bank put these funds into an interest bearing account without his authority (paragraph 26 above), while not impossible, seems unlikely. The Appellant's claim that the overseas accounts from which the funds were remitted were non-interest bearing (paragraph 16 above) is also inconsistent with the fact that these funds, once transferred to the UK, were put into fixed deposits that were interest bearing (paragraph 17 above).

38. Another reason why the Appellant's explanation cannot be accepted without further explanation is that his explanation has been changing as it has been going along. Originally, the Appellant said that the funds in the overseas account were the proceeds of the Clipper flat (paragraph 14 above). When it was put to him that the proceeds of the Clipper flat would be insufficient to generate that level of interest, he then said that the source of the funds also included the proceeds of the sale of shares in MGL (paragraphs 16-17 above).

39. Furthermore, there is evidence that in 2005 the Appellant paid £1.5 million for his present residence (paragraph 33 above). It is not known what deposit the

Appellant paid for the house. It could be that this purchase swallowed up some or all of the funds which the Appellant now claims were the source of the remittances in 2008, in which case these funds could not be the source of the remittances.

40. In light of the above, HMRC have reason to query what the Appellant has said about the source of the remittances to the UK, and reason to suspect that the tax position stated in the Appellant's tax returns may not be correct. The information required by the taxpayer notice is therefore "reasonably required … for the purpose of checking the tax position" of the Appellant within the meaning of paragraph 1 of Schedule 36.

41. Even if the Appellant no longer has the relevant bank records, they are still within his power to obtain if he can get copies of them from his bank. If his bank no longer has them, it is not unreasonable to expect him to provide evidence of that. In any event, under paragraph 18 of Schedule 36, the Appellant is only required to produce documents within his possession or power. The fact that the Appellant may no longer be required by section 12B of the TMA to retain documents is therefore immaterial.

42. It is also immaterial that some of the documents required by the information notice are more than 6 years old, as authorisation has been obtained under paragraph 20 of Schedule 36 (which states that "An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer").

43. Mr Arthur who appeared for the Appellant, said that he was not involved in the Appellant's business, did not know what the Appellant does, and did not know anything about him. His main submission on behalf of the Appellant were as follows.

44. It is for HMRC to prove that its request is reasonable, and HMRC have not done so. HMRC is putting the Appellant to endless hassle with hypothesis after hypothesis. It is not reasonable to expect someone to attest to something five years after the event. It is not reasonable to expect someone to produce documents which by law they are not required to keep. Under section 12B TMA, the Appellant is only required to keep records that are "requisite for the purpose of enabling him to make and deliver a correct and complete return for the year", and not records about his private situation generally. Many of the Appellant's documents were lost in a robbery on his apartment in Switzerland, and the Appellant would be prepared to give evidence on oath to this effect. Any documents that the Appellant is capable of providing at this stage would be insufficient to satisfy all of what HMRC is requiring. If the Appellant is required to produce such incomplete information as he is able to do, HMRC may make best of judgment assessments based on that incomplete information. The burden would then be on the Appellant to prove that HMRC's assessment is wrong, which the Appellant would not be able to do.

The Tribunal's finding

45. The Tribunal has given careful consideration to the material presented by the parties, and the arguments of both parties.

46. The terms of the information notice appealed against is set out in paragraph 24 above. The information notice is limited to a single tax year 2007-08, which is the year in which it appears significant remittances were made to the UK. The information notice is specifically limited to those accounts from which any remittances to the UK were made from during the tax year in question.

47. The Tribunal accepts the Appellant's argument that these statements alone are unlikely to be sufficient to trace the sums in the account back to the source claimed by the Appellant, and that these statements and the requested "analysis of the contents of the account(s) for the year" are likely to lead to further requests by HMRC for additional documents and information. However, while this may mean that the information notice is likely to make HMRC's enquiries even more troublesome from the Appellant's point of view, this of itself does not mean that the requested information is not "reasonably required" for purposes of paragraph 1 of Schedule 36.

48. Having considered the evidence and arguments as a whole, the Tribunal considers that the considerations in paragraphs 36 and 37 above are sufficient to establish that the information specified in the information notice is "reasonably required". The considerations in paragraphs 38-40 above strengthen that conclusion. The Tribunal also accepts the HMRC arguments referred to in paragraphs 41-42 above.

Conclusion

49. For the reasons above, this appeal is dismissed.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 16 September 2014