[2016] UKFTT 100 (TC)

TC 04891

Appeal number: TC/2015/5565

INFORMATION NOTICES – whether certain documents and information required were statutory records- yes – whether notices issued other than to check the taxpayer's tax position – no – whether the appellant's offer of conditional compliance was compliance – no – whether reasonable excuse for non-compliance – no – appeal against notices and penalties dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

QUALAPHARM LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, Strand, London on 11 and 17 December 2015

J Onalaja, Counsel, for the Appellant

H Jones, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Matters under appeal

1. The appellant had not been entirely clear in its earlier notice of appeal as to it was that it was appealing. I referred to this in an earlier appeal by this appellant (the written decision in respect of which is recorded at [2015] UKFTT 579 (TC)): the uncertainty was resolved by the appellant filing a new notice of appeal (TC/2015/5565) against certain information notices and penalties.

2. The earlier hearing and decision concerned an application by the appellant for disclosure in and a stay of its application for a closure notice of enquiries into APE 31 December 2011 ('the 2011 enquiry') and into APE 31 December 2012 ('the 2012 enquiry'). I refused the disclosure and stay applications in the course of that hearing and would have proceeded to consider the closure applications except that at that point in the proceedings the appellant withdrew the closure applications. I therefore dismissed the proceedings.

3. Since then, the new appeal TC/2015/5565 against the information notices and penalties has now come on for hearing. In particular this appeal concerns:

(1) an information notice issued on 14 April 2014 under Sch 36 of Finance Act 2008 (FA 2008) for APE 31 December 2011 ('the 2011 information notice');

(2) an information notice issued on 14 April 2014 under Sch 36 of FA 2008 for APE 31 December 2012 ('the 2012 information notice');

(3) a penalty for £300 issued on 16 July 2014 for failure to comply with the 2011 information notice;

(4) a penalty of £300 issued on 16 July 2014 for failure to comply with the 2012 information notice.

The evidence

4. HMRC called as their only witness Mr James Moss. Mr Moss was an HMRC officer who specialised in corporation tax and was attached to the team undertaking the enquiries into the appellant and the other companies mentioned above; since August 2014 he has been team leader. He attended the hearing and was cross examined: I found his evidence credible and considered him a reliable witness.

5. Mr Sachin Coosna, who was sole director of the appellant, made two witness statements on behalf of the appellant. The directions of the Tribunal provided that witnesses must attend the hearing in order to be cross examined on their witness statements. Nevertheless, Mr Coosna did not appear: all his counsel said was that Mr Coosna was away on (unspecified) urgent business.

6. Originally HMRC said they objected to the first witness statement coming in due to Mr Coosna's failure to appear but they did not (for reasons not explained to

me) object to Mr Coosna's second witness statement coming in. I did not consider it sensible to admit one statement but not the other and it was Ms Jones' position then that she did not object to the witness statements being in evidence as long as the Tribunal put less weight on them. As there was no objection to the admission of the second, I admitted them both (in so far as they were evidence of fact) subject to saying that HMRC were free to make representations to me on the weight I should place on them in view of Mr Coosna's failure to attend for cross examination.

7. Both Mr Coosna's witness statements went through the letters referred to below at §§17-30 in some detail; they also stated why he was concerned with the enquiry and information notices, those concerns being repeated in this hearing by Mr Onalaja. Both, but particularly the second, contained a number of allegations as to HMRC's motives in opening various enquiries and issuing various information notices. While Mr Coosna presented this in some places as 'fact', I put no weight on these statements in his witness statement as evidence of fact: I consider that they could be nothing more than opinion or beliefs which Mr Coosna had formed.

8. HMRC largely accepted Mr Coosna's evidence about what had actually happened (eg as to other tax enquiries being opened into linked companies), while rejecting Mr Coosna's views on HMRC's motives. There were some minor points on which they did not accept Mr Coosna's factual evidence, such as Mr Coosna's evidence that the same HMRC team opened the enquiries into the individual directors as well as those into the linked companies. I accept the evidence of HMRC's witness, Mr Moss, that there were two teams involved, one for the companies and one for the directors, as it was rational for HMRC to have teams specialising in either corporation tax or personal tax rather than both. Wherever there was a conflict between Mr Moss' and Mr Coosna's evidence, I preferred Mr Moss' evidence as he was present and his evidence was credible, whereas I found that Mr Coosna had chosen not to attend the hearing and had not given me a good reason for not presenting himself for cross examination. Moreover, I also did not consider all that he said in his witness statements to be reliable when compared to the documentary evidence: in particular I did not consider his summary of his letters to be a fair reading of what they actually said in that he represented them as offering compliance when I find for reasons I explain below (§§79-80) that they did nothing of the sort.

The facts

9. From the documents before me and the evidence of Mr Moss, and to the extent accepted as explained above, the evidence of Mr Coosna, I find as follows:

10. The appellant deals as a wholesaler in the grey market in pharmaceuticals. It has a close relationship with other companies in the same market, with premises in close physical proximity to its own. One of these companies was Chemistree Homecare Ltd, which the appellant described as its main customer in the UK. All the companies other than the appellant were in common ownership and were described by both parties as 'the Gold Nuts group'.

11. In 2010, an 'aspect' enquiry was opened into Chemistree Homecare Ltd. In February 2010, the team of which Mr Moss is now team leader took over this enquiry,

extended it into a cross-tax enquiry and opened enquiries into other companies in the Gold Nuts group. An enquiry was also opened into another company (Eurobay Homecare Ltd) which was also described as a customer of the Gold Nuts group. Mr Coosna, due to his close relationship with these companies, became aware of these enquiries. When the same team at HMRC opened the 2011 enquiry into the appellant he formed the opinion HMRC were undertaking an unwarranted fishing expedition and/or intending to disrupt trade between those companies and his own. Mr Coosna also alleged that, because some of the first companies in the Gold Nuts group to have an enquiry opened complained to HMRC's complaints department about how the enquiries were carried out, HMRC chose as a retaliatory measure to open enquiries into other connected companies, including the 2011 enquiry into the appellant.

12. HMRC opened the 2011 enquiry into the appellant on 6 December 2013. Thereafter, HMRC wrote to the appellant on a number of occasions asking for information which they did not obtain: I describe the exchange of correspondence below at 'the letters' §§17-30.

13. The appellant lodged a complaint with HMRC's complaints department on 25 February 2014 about the conduct of the 2011 enquiry. On 3 March 2014 HMRC issued an information notice seeking the information which they had informally requested but not received. I will refer to this as the first information notice. HMRC did not obtain the information required by this information notice; on 14 April 2014 it was withdrawn and replaced by the 2011 information notice referred to above, and set out below at §§33-34, which is one of the matters under appeal.

14. On the same day, HMRC opened the 2012 enquiry into the appellant and issued the 2012 information notice referred to above, and set out at §35 below, being one of the matters under appeal. Mr Coosna alleged that the 2012 enquiry was opened because of the complaint lodged by the appellant over the 2011 enquiry.

15. By letter dated 2 June 2014 HMRC notified the appellant that the date for compliance with the 2011 and 2012 information notices was extended from 30 May 2014 to 22 June 2014, and on 2 June 2014 HMRC further extended the date of compliance to 9 July 2014. Both parties accept that HMRC has still not received the information sought in the two information notices

16. On 16 July 2014 HMRC issued the two penalties which are also the subject of this appeal.

The letters

17. In response to HMRC's letter opening the 2011 enquiry the appellant wrote to HMRC on 22 January 2014 ('the first letter') and said (in summary):

(1) they considered the enquiry outside the law as 'motivated by recent compliance check investigations into our corporate customer Chemistree and its Directors..."

(2) it had had VAT inspections by HMRC and its accounts were audited;

(3) the documents requested were excessive and HMRC should obtain tribunal sanction before proceeding.

(4) refused to meet with HMRC as they did not feel a meeting would be 'productive' and 'your requests for records are excessive and clearly requested for purposes other than those detailed in…the Act'

The last paragraph, as many later letters were to do, appeared to contradict other paragraphs in the letter:

> "We look forward to receiving notice of the application to the FTT with sufficient notice to allow representations. We are however open to inspection of our tax records within the scope of the Act only...Please let us know when you would like to review the records for the computation of corporation tax, directors' remuneration, expenses and benefits."

18. HMRC replied on 27 January 2014, clearly treating the letter of 22 January 2014 as a refusal to provide the information although they noted the last, seemingly contradictory, paragraph. In their letter, HMRC reiterated the request for documents, threatening the formal issue of an information notice if they were not forthcoming and stating HMRC's view that the enquiry was validly opened.

19. The appellant replied on 29 January 2014 ('the second letter'). The appellant stated that they did not refuse inspection of their statutory records and indeed offered to pay for a room in which they might be inspected off-site; however, the letter went on to say, however, that HMRC would not be allowed to take wholesale copies of the records and indeed would only be allowed to copy records relevant to the compliance check. The appellant also said they would want a list of the copies HMRC required and the reason why HMRC wanted them.

20. HMRC replied on 6 February 2014. HMRC suggested the impasse might be resolved and the need for a physical inspection being avoided if the appellant were simply to post to HMRC a copy of all the records required. The letter said that HMRC were also prepared to attend the appellant's premises to inspect the documents but only if the appellant confirmed in writing that all the records HMRC had requested were made available both for inspection and copying.

21. The appellant replied on 12 February ('the third letter') repeating the allegation that the enquiry was opened for improper purposes and stating that HMRC must prove they met the 'mandate'. It also stated HMRC had no power to copy electronic data (HMRC having made it clear that they intended to do this) and indeed that the appellant would not permit the copying of electronic data without the express permission of UK courts. The appellant also refused to provide copies of data to HMRC and said that HMRC must come and inspect the records. It said wholesale copying of records at such inspection would be resisted and indeed it said only 'appropriate' copying of printed records would be permitted. It also required HMRC to provide an undertaking under the Data Protection Act.

22. HMRC replied on 3 March 2014. HMRC said that in light of the differences between the parties of their rights under the legislation, HMRC would issue a formal information notice, and the first information notice (see §13 above) was indeed attached.

23. The appellant replied on 27 March 2014 ('the fourth letter'). The letter repeated the earlier offer with limitations. Additionally, the letter implied that any HMRC officer attending the inspection would be under constant CCTV surveillance.

24. HMRC replied on 14 April 2014 refusing to provide the requested DPA undertaking on the basis that HMRC's confidentiality obligations were contained in the Commissioner for Revenue and Customs Act 2005 and HMRC had no obligation to offer any more than they were required by law. It also said HMRC were unable as a matter of policy to agree to CCTV surveillance of their officers. It withdraw the original reissued the information notices in order to give the appellant more time to comply and to amend the requirement so that the notice could only be complied with by posting copies of the documents to HMRC.

25. As I have already said, on the same date, HMRC opened an enquiry into APE 31 December 2012 and issued an information notice in respect of that year similarly only permitting compliance by copies of the documents and information requested being posted to HMRC.

26. The appellant replied on 7 May 2014 ('the fifth letter'). It again repeated the allegation that the enquiry was opened for ulterior motives and repeated its concerns about data protection. Although the appellant said it would make available for inspection all the requested information it went on to repeat that it would not provide copies unless provided with an undertaking about how the information would assist the enquiry. The letter repeatedly said that HMRC would be welcome to come to the premises to inspect the records.

27. HMRC replied on 2 June. The letter maintained that the enquiries were validly opened and HMRC did not have to tell the taxpayer why they were opened. It repeated what HMRC had said in earlier letters about data protection and being unable to agree to the conditions the appellant imposed on inspections of its records. It advised of the right to appeal and warned that HMRC would impose penalties for non compliance.

28. The appellant replied on 6 June ('the sixth letter'). The appellant reiterated their point of view that the enquiry and information notices were invalid and asked HMRC to take the matter to court. The appellant said it would no longer insist on videoing the officers and invited HMRC to inspect the records 'on the terms we have set'.

29. HMRC replied on 18 June. HMRC refused the appellant's offer but said they would be prepared to inspect the records at the appellant's premises if the appellant undertook that it would not record the officers, that all information requested would be made available, that HRMC could copy any documents including make electronic copies of electronic data and remove and retain documents.

30. There was no reply to this letter.

31. On 16 July HMRC issued the penalty notices under appeal.

32. On 24 July the appellant wrote to HMRC objecting to the penalty notices maintaining that they had always been prepared to accept an on-site inspection and had agreed to allow officers to attend without being recorded. HMRC replied on 13 August to draw the appellant's attention to HMRC's letter of 18 June to which the appellant had not replied and did not refer in its letter of 24 July. HMRC repeated the offer made in the letter of 18 June. There was no reply to this offer, just a letter from the appellant on 10 October informing HMRC it was seeking closure of the enquiries.

The content of the information notices

33. The 2011 information notice required the following, described in the notice as statutory records or information:

1. The company's trial balance and extended trial balance
2. the linking papers showing how the figures in the trial balance are reflected in the final statutory accounts. These should include -

   a) the detailed rationale behind all journal adjustments made post trial balance and full supporting paperwork

   b) the final nominal ledgers produced by any accounting software used in preparation of the statutory accounts
3. Schedules supporting the figures for the principal Balance Sheet items
4. A copy of the company's fixed asset register
5. for corporation tax purposes all electronic accounting records, including any spreadsheets or other schedules maintained for account purposes, downloaded in a format compatible with our systems for the accounting period ended 31 December 2011
6. for employer compliance purposes all electronic payroll, benefits and expenses records covering the period from 6 April 2011 to 5 April 2013 inclusive
7. for VAT purposes all electronic accounting records, including any spreadsheets or other schedules maintained for account purposes, downloaded in a format compatible with our systems for the period from 1 January 2011 to 30 November 2013

A note stated that HMRC could accept electronic data in various forms and that its Computer Audit officer would tell the company which types of media were acceptable and would held in its secure transfer to HMRC.

34. HMRC also required other documents and information as follows:

Other documents or information that we need

1. Fully annotated copies of any loan and/or current account operated by the Directors
2. Full details of the other income in relation to the fixed price contract £410,211 ie what these represent and the purpose behind the payments. All documentation associated with the charging of these fees.
3. Full details of the Product Licence Fees £560,000 ie what these represent and the purpose behind the payments. Full details of any payments made and the bank accounts of the principals paid together with all documentation and schedules associated with the charging of these fees.
4. A detailed analysis of the other debtors figure of £710,638 broken down by the individual amounts and parties involved.
5. A detailed analysis of the accrued expenses figure of £858,527 broken down by the individual amounts and parties involved.
6. Full details of the Pharmacy Introduction and Consultancy fees £211,535 and Pharmacy Consultancy fees £29,308 ie what these represent and the purpose behind the payments broken down by individual amounts and parties involved. Full details of any payments made and the bank accounts of the principals paid together with all documentation associated with the charging of these fees.
7. Full details of the Management Consultancy fees of £120,000 to include details of any payments made and the bank accounts of the principals paid together with all documentation associated with the charging of these fees.

35. The 2012 information notice was rather shorter. It contained the same definition of 'document' but, in respect of APE 31 December 2012, only required:

> Fixed rate supply contract debtor - £25,544,087
>
> full details of how this figure was arrived at and copies of the fixed price supply contract(s)/agreement(s) to which the creditor relates
>
> Trade creditors - £25,800,871
>
> A detailed analysis to show the name of each trade creditor and the amount the company owed them
>
> Management Consultancy fees and charges
>
> Reconciliation of the management fees and charges incurred and received by the company detailing the parties involved together with full details including dates, amounts and recipients of any payments.

All invoices supporting the management fees and charges incurred and received

All contracts/agreements describing the services received by the company

Subcontractor fees

Reconciliation of subcontractor fees expenditure detailing the parties involved together with full details including dates, amounts and names and addresses of the recipients of payments.

36. The appellant did not deny having possession of the various records sought by HMRC. And although it objected to electronic copies being taken of its electronically held records, it did not deny, and indeed its various letters appeared to accept, that it held the information requested at items 5-7 of the 2011 information electronically. I find that it did hold that information electronically.

The appeal against the issue of the information notices

37. Sch 36 Finance Act 2008 (FA 2008) Paragraph 29 gives the taxpayer a right of appeal against the issue of information notice and any requirement in the information notice. There are two exceptions to this right of appeal:

(1) where the requirement is to provide any information or produce any document that forms part of the taxpayer's statutory records (paragraph 29(2)); and

(2) where this Tribunal approved the giving of the information notice (paragraph 29(3)).

38. Paragraph 29(3) is irrelevant here as the two information notices in question were not issued with the approval of this Tribunal. The taxpayer is therefore able to appeal against the issue of the two notices except to the extent that the information or documents required by them comprised statutory records. I will deal with the question of what are statutory records and whether the information and documents required by the notices comprised wholly or partly statutory records first.

Statutory records exception

39. Statutory records are an exception because there is no right of appeal against the issue of an information notice in respect of statutory records.

Paragraph 29(2)

'…[the right of appeal] does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records'

40. The appellant did not accept that that meant that there was no remedy in this Tribunal against in an information notice requiring statutory records which was issued for an improper purpose. The appellant referred me to public law cases such as *Winder v Wandsworth* [1985] UKHL 2 where a public authority was held unable to enforce against a member of the public a rent increase which had been unlawfully implemented. Mr Onalaja's view was that if an information notice was issued for improper motives then this enabled me to allow the appeal against it even if it applied to statutory records.

41. I am unable to agree. Parliament has specifically excluded the Tribunal from having any jurisdiction over an information notice in so far as it requires the production of statutory records. Although they may be situations where this Tribunal is entitled to take into account public law (eg see views I have expressed in *Garrod* [2015] UKFTT 353 at 49-89) it is clear to me that the Tribunal was given no such jurisdiction here: Parliament has expressly excluded it.

42. The Tribunal might have jurisdiction under *Winder* to discharge a penalty for non-compliance with an information notice if the notice was issued unlawfully even if it related to statutory records because there is no similar exclusion of jurisdiction in relation to penalties, but I do not need to consider this point as, for reasons explained below, I do not consider that the notices were issued unlawfully or for any reason other than to check the appellant's tax position. I also note in passing that Ms Jones said HMRC would not seek to rely on an information notice if this Tribunal considered it was issued unlawfully, irrespective of the question of whether this Tribunal had jurisdiction to consider the matter.

43. As a matter of law, therefore, I find I only have jurisdiction in an appeal against the issue of the notice to consider the appellant's arguments that the notices were unlawfully issued if and to the extent some part of the information notices related to information and documents that were not part of the appellant's statutory records. Statutory records are defined in Sch 36 paragraph 62 as:

> ...'information or a document which the person is required to keep and preserve under or by virtue of
>
> (a) the Taxes Acts, or
>
> (b) any other enactment relating to a tax.

44. The 'Taxes Acts' are defined in paragraph 58 of Sch 36. This definition includes 'the Tax Acts'. The Tax Acts are defined in the Interpretation Act 1978 as including the Corporation Tax Acts; the Corporation Tax Acts are defined in the same Act as meaning enactments relating to the taxation of the income and chargeable gains of companies. Ms Jones was of the opinion that information required to be kept by s 285 Companies Acts were statutory records. I cannot agree. Mr Onalaja was right to say that the Companies Act was neither one of the Taxes Acts nor any other enactment relating to tax.

45. However, the Finance Act 1998 is one of the Taxes Acts as it deals with the taxation of income and chargeable gains of companies. And Schedule 18 of that Act at para 21 requires the following records to be kept:

> (1) A company which may be required to deliver a company tax return for any period must -
>
> (a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and
>
> (b) preserve those records in accordance with this paragraph.

Records within para 21(1) are, in my view, statutory records. So how much of the 2011 information notice required information or documents covered by para 21?

46. Items 1-4 of the 2011 Information Notice related to information that formed part of the accounts or was used to create the accounts: either way it was required to enable the company to deliver a correct tax return and was therefore statutory records.

47. Item 5 simply required the company to deliver up 'all electronic accounting records, including any spreadsheets or other schedules maintained for account purposes'. My view is that these are, as Ms Jones said, statutory records. Accounting records are necessary to create the accounts; the accounts are necessary in order to create a tax return. If they are held electronically, they are still accounting records and therefore still statutory records.

48. Item 6 related to returns due as an employer and Item 7 to returns related to VAT. Neither of these are within Sch 18 which refers only to a company tax return (defined in para 3 Sch 18 as a return relevant to the tax liability of the company).

49. But so far as Item 6 is concerned, an employer is obliged to keep and preserve information by the Income Tax (PAYE) regulations 2003 at reg 97. These regulations are not part of the Taxes Acts, but I find that they are another 'enactment relating to a tax' as per (b) of para 62 Sch 36 (above at §43), albeit in this case they relate to tax due to be paid by the employer's employees or by the employer on behalf of the employees. While the PAYE regulations are only secondary legislation, they are still an ‘enactment’ by Parliament, albeit by an instrument under an Act of Parliament. I find that the information required by Item 6 (payrolls and benefits/expenses) was all information required to be kept and preserved by Reg 97 (in particular reg 97(3)(a) for payroll and (b) for expenses and benefits.) Item 6 of the 2011 Information Notice therefore required production of statutory records.

50. Item 7 related to VAT. Reg 31 of the VAT Regulations 1995 required every taxable person to keep and preserve 'his business and accounting records'. That is what Item 7 required to be produced. As the VAT Regulations are enactments relating to tax, Item 7 therefore required the production of statutory records.

51. In conclusion, items 1 to 7 of the 2011 Information Notice under heading 'statutory records' did relate to statutory records. I find that the items required under the heading 'other' in the 2011 information notice and all the documents and information required by the 2012 information notice were not statutory records because they went beyond what was needed for the appellant to compile its accounts. To that extent, therefore, the appellant can appeal the issue of the information notices.

52. I can consider in respect of the information and documents which were not statutory records whether the notices were lawful. The appellant's grounds of appeal were that

> (a) the issue of the notices was unlawful because HMRC were (said the appellant) influenced by an ulterior motive of harassing the appellant and influencing its trading activities;
>
> (b) the company had had VAT inspections and its accounts were independently audited;
>
> (c) the notices should not have required the information to be posted to HMRC;
>
> (d) the notices should not have required electronic copies of the information to be made available to HMRC.
>
> (e)in so far as the information notices were seeking to check its corporation tax position, there had to be a valid open enquiry and the appellant's case was that there was no valid enquiry as the enquiry had been opened (alleged the appellant) with the ulterior motive of harassing the appellant and influencing its trading activities.
>
> (f) HMRC had to explain its reason for requiring the information and documents before the appellant was liable to comply with the notice.

I will deal with each of these grounds in turn.

(a) Purpose of information notices

53. Paragraph 1 of Sch 36 FA 2008 provides that an officer of HMRC may require a taxpayer to provide information or documents

> "if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position"

54. So I accept the appellant's premise that, ***if*** the information notices, were issued for the purpose of harassing the taxpayer and/or affecting its trading arrangements, then they would not have been issued for the requisite purpose and the appeal (in so far as the information notices did not require statutory records) must be allowed. So as a matter of fact, why did HMRC issue the two information notices?

55. The appellant's case was that the enquiries would harass it and disrupt its trading activities and were intended to do so. I queried with Mr Onalaja his statement that there would be inevitable disruption of the appellant's trading activities arising

out of the tax enquiry. It was certainly not obvious to me why allowing HMRC to inspect its records would in any way disrupt any trade carried on by the appellant. I did not get a direct answer but was invited to draw my own conclusions from the appellant's trading model as described in Mr Coosna's witness statement. Mr Coosna's explanation of the appellant's trading model is that it trades in the grey market for pharmaceuticals. That left me no wiser as to the basis for any concern that allowing HMRC to inspect and copy records could in any way inhibit a genuine trading activity. I have to conclude that the appellant's suggestion that the enquiry would disrupt its trade was unfounded in any rational basis. Mr Moss' evidence was that none of the enquiries were opened with the intention of disrupting trade or with any ulterior motive. I accept that evidence as the appellant offered no credible alternative and I had found Mr Moss to be a reliable witness.

56. So far as harassment is concerned, I accept, and it appeared that HMRC also accepted, that tax enquiries could be onerous in the sense of requiring the business to spend time in making records available; in this case, it would take time to copy and package up the records, and the appellant would also have the expense of posting the records to HMRC. The term harassment is perjorative and I think would only apply if the burden of a tax enquiry was inflicted on a taxpayer for an improper motive. The mere fact an enquiry is burdensome on a taxpayer is not a reason to allow an appeal against an information notice as it is clear that Parliament intended (for obviously good reasons) HMRC to have power to investigate the tax affairs of taxpayers and Parliament must have understood that cooperating with such investigations would be burdensome on taxpayers.

57. So I have to consider the appellant's case whether in this case the burden of the enquiry was inflicted on the appellant for an improper motive and could properly be described as harassment.

58. Linked enquiries: The evidence of improper motive on which the appellant relied was largely the fact that there were a number of simultaneous enquiries into linked companies and their directors as I have recorded at §11 above. Yet it is difficult to see why that evidence could prove the appellant's allegation of an improper motive for the enquiry. The appellant suggested that HMRC wished to disrupt the trade between these companies, and hinted that in particular HMRC wished to prevent the appellant filing input tax reclaims.

59. There was very little logic in these allegations. If HMRC were concerned that the appellant was not entitled to the input tax reclaims it made the only really effective method of preventing them would be a thorough investigation into the supply chain *before* any repayment was made: merely opening a tax enquiry could have no effect.

60. The taxpayer's case seemed to be that there were no reasons why HMRC would open simultaneous enquiries into connected or linked companies and their directors and therefore the fact that they had done so was itself evidence that they had done so for improper motives. But that is quite wrong. If it was HMRC's case that these were random enquiries, then it would be difficult to believe that all these linked companies

had had a randomly opened enquiry at the same time. But HMRC did not suggest the enquiries were random. They had concerns about whether the appellant as well as those other companies and their directors had declared the right amount of tax.

61. I find that Mr Moss gave a coherent and rational explanation for why each item of the information sought in the Information notices would enable HMRC to check the tax return and other tax liabilities of the appellant. In brief summary, the company's tax return revealed a company with an unusual profile as it had achieved a massive turnover (£29 million) from a nil base in less than a year, increasing to £43 million in the second year, and where (as trade creditors and debtors were very large, and in roughly equal figures of £25 million) it appeared the company maintained this turnover by not paying for its stock nor requiring it to be paid for when sold. The company's trade also generated a £500,000 profit but the director was only paid £5,000. In these circumstances, HMRC had concerns and I accept those concerns were rational. It was Mr Moss' evidence that the enquiries were opened to check the appellant's tax liabilities and not with the intention of harassment and I accept that evidence, and reject the appellant's case on this.

62. Retaliation? The appellant also alleged that HMRC's motive in opening the enquiries was retaliation. It pointed out that, in respect of the enquiries into the Gold Nuts group as a whole, some of the enquiries were opened in point of time after complaints were made about the opening of earlier enquiries. So far as the appellant was concerned, it claimed that the enquiry into 2012 was opened after and in retaliation for a complaint lodged by the appellant into the 2011 enquiry and that this was therefore evidence that the information notices were also issued for an improper motive.

63. I find that the 2012 enquiry was opened at a time after the appellant had lodged a complaint with HMRC's complaints team over the 2011 enquiry (see §§13-14). But was it opened because of the complaint?

64. I asked Mr Moss why the 2012 enquiry was opened, as this direct question had not been put to him by either counsel. His answer, as I understood it, was that HMRC needed to protect its position on the tax year 2012 as they had been unable to allay their concerns over the 2011 tax year, and although they did not need to open the 2012 enquiry until just before the closing of enquiry window, that because of the lack of cooperation they had received over the 2011 enquiry, he took the decision to formalise the position with the 2012 tax year earlier rather than later.

65. Mr Onalaja's interpretation of this evidence was that it was an admission that the enquiry was opened in retaliation. I find that was to misunderstand what was said by Mr Moss. All Mr Moss said was that an enquiry, which would have been opened anyway in order to protect the revenue, was opened earlier rather than later due to HMRC forming the view that the taxpayer was not cooperating with the enquiry for the previous year. It was certainly not an admission that the second enquiry was opened in retaliation to a complaint.

66. I find that, where an enquiry was open for the earlier years because of concerns over the general accuracy of the taxpayer's returns, HMRC are virtually bound in the course of their duty, to open an enquiry into the later years as errors in tax declarations in one year might reasonably be supposed to continue in later years: it was therefore quite reasonable for HMRC to open the enquiry into 2012 during the enquiry into the previous year. I also find that the taxpayer had failed to provide HMRC with any information sought during the 2011 enquiry and so it was also reasonable for HMRC to open the 2012 enquiry six months before the closing of the enquiry window as it was reasonable for them to form the view that the taxpayer was not cooperating with the 2011 enquiry and were therefore unlikely to cooperate with an enquiry into 2012. I accept Mr Moss's unchallenged evidence over the reasons why the 2012 enquiry was opened and I reject the appellant's case that either enquiry was opened in retaliation for complaints being made or in retaliation for anything else.

67. I reject this ground of appeal. I find that the tax enquiries were opened lawfully and that the information notices were issued because the information and documents sought by them were reasonably required for the purpose of checking the taxpayer's tax position.

(b) the company had had VAT inspections and its accounts were independently audited

68. Putting aside the issue of the VAT inspections, the appellant's submission that it was not necessary for HMRC to seek information to verify tax returns when the taxpayer is independently audited is difficult to take seriously and indeed Mr Onalaja did not develop it. Not surprisingly, the appellant did not produce any authority to support its case on this. Auditing is no guarantee in practice or in law that the company's tax returns are accurate. I reject this ground of appeal.

69. Returning to the question of the VAT inspections, Mr Coosna's evidence was that these had been numerous. As he gave no more detail and was not present to be cross-examined, I accept as correct Mr Moss' summary of the VAT investigations which had taken place and they were as follows:

1. January 2011 – a sample exercise carried out by HMRC for that period (without visit) when appellant requested switch from quarterly to monthly returns;
2. February 2011 – a sample exercise carried out by HMRC for that month (without visit) when appellant requested very large repayment of input tax
3. June 2011 – a sample exercise carried out by HMRC for that month following a visit;
4. April 2014 – a sample exercise for that month carried out by HMRC following a visit to do a pre-credibility check before repayment of input tax (of about £37 million)

70. It seemed to be the appellant's case that these sample exercises were enough for HMRC to be satisfied as to the accuracy of the appellant's VAT returns and HMRC's

request for almost 3 years' worth of complete records (albeit only electronically) (see item 7 of the 2011 information notice at §33) was therefore made to harass them. I do not accept that that deduction is logical. In any event the April 2014 visit is irrelevant as it post dated the issue of the information notice, and even if it was relevant, samples for 4 months out of some 36 months may well not paint an accurate figure.

71. Mr Onalaja also suggested that the enquiry was opened without HMRC considering whether the information garnered in the 2011 exercises was sufficient to allay their concerns. Mr Moss had not in fact seen the information arising from those exercises as he was not in charge of the team undertaking the enquiry at the time and would not have had involvement at that time with the decision about what information was requested on the VAT front. I do not accept Mr Onalaja's case here: there is no evidence that HMRC asked for more information than they required and indeed it seems obvious to me that mere sample exercises could not give HMRC the complete picture it was quite reasonable for HMRC to require when faced with the concerns outlined at §61 above.

72. I reject this ground of appeal; I accept that the information required by the information notices was reasonably required by HMRC for the purpose of checking the taxpayer's tax position.

(c) Were the notices wrong to require records to be posted?

73. The first information notice had given the appellant the option of permitting HMRC to attend the appellant's premises in order to inspect and copy the records or alternatively permitting the appellant simply to post copies of the records to HMRC. That notice was withdrawn and replaced by the 2011 information notice and the 2012 information notice, both of which required the appellant to post copies of the required records to HMRC. The information notices under appeal did not give the appellant the option of having HMRC attend the premises to inspect the originals and take copies.

74. Paragraph 1 of Sch 36 merely requires the taxpayer 'to provide' the information and 'to produce' the documents. More details are given in Paragraph 7 which states:

> (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.
>
> (2) Where an information notice requires a person to produce a document, it must be produced for inspection -
>
> (a) at a place agreed to by that person and an officer of Revenue and Customs, or
>
> (b) at such place as an officer of Revenue and Customs may reasonably specify.

> (3) An officer of Revenue and Customs must not specify a place that is used solely as a dwelling. *(my emphasis)*

75. I find that these rules permit HMRC, where it is reasonable to do so, to require the documents to be produced for inspection at HMRC's offices (paragraph 7(2)(b)) and produced by means of post (paragraph 7(1)(b)). The only question which remains is whether as a matter of fact it was reasonable in this case for HMRC to insist on the posting of the records to HMRC and not to offer the appellant the alternative of inspection at its own offices.

76. Mr Onalaja relied on by-the-way (obiter) comments made by Judge Poole in the case of *Telng Ltd* [2015] UKFTT 0327 (TC) where he said:

> [42] In the present case, we were informed that the sum total of documents required under the notice was a bundle about 2cm thick, In such a case, HMRC might quite properly form the view that it was unnecessary to complicate the wording of the notice so as to provide for the option of personal production as referred to above, In the absence of anything to show that it was unreasonable to specify post or email as the means of production in the present case, we do not disagree with that view. We would however observe in passing that in different circumstances, a notice which failed to provide an option for physical production at a 'place' might be found invalid, on the basis that the requirement to post or email the documents involved was not, in all the circumstances, a reasonable one.

77. Mr Onalaja did not really make any representations to me about why posting to HMRC was unreasonable in the sense he did not suggest that posting was too difficult, too expensive or that the records were too voluminous. I certainly had no evidence on this. Indeed, the appellant's evidence was that despite their very high turnover, the number of transactions were small, which indicates that the records of these transactions would therefore not be voluminous. I did not find that it was due to size or expense unreasonable for HMRC to ask for the records to be posted to them.

78. Mr Onalaja's case was that it was unreasonable not to permit the appellant the option of producing the documents for inspection at their premises. And as I have said it relied on the above observation in *Telng Ltd* at [42]. I agree with the observation made by the Judge in [42]: a failure to give the option of production of the documents rather than posting them may in some cases be unreasonable. It is a question of fact whether it was unreasonable in this case. Whether something is reasonable in any particular case requires the Tribunal to consider the specific facts of this case and so I proceed to do so.

79. I find the original letter had given the appellant the option of personal delivery or inspection by HMRC at the appellant's place of business. Between the first request for the information and the re-issue of the 2011 information notice and issue of the

2012 information notice, the appellant had written four letters to HMRC. Mr Onalaja's case was that read properly the letters from the appellant said HMRC could not only inspect all the records but take copies of anything they required for their compliance check. I find Mr Onalaja's readings of the letters was a selective reading and not one they could properly bear. The first letter must be read as a refusal by the appellant to comply with the information notice. While the final paragraph might be read as contradicting the earlier parts of the letter, the only reading of it consistent with the rest of the letter is that, although the appellant said they would cooperate with a lawful inspection notice, as the appellant believed the entire enquiry to be unlawful, they would not cooperate with this inspection notice.

80. The subsequent letters modified the appellant's position. In the second letter, the appellant said they would allow inspection but only if satisfied as to HMRC's reasons and only if no copies were taken. The third letter modified this position slightly more: while maintaining the enquiry was invalidly opened and requiring HMRC to state their reasons for opening the enquiry, the appellant agreed to inspection but only on terms that:

(a) no copies would be taken of electronic records;

(b) only limited copies of the paper records were taken ; and

(c) HMRC gave a prior undertaking on confidentiality and data protection.

The fourth letter increased the list of the appellant's conditions in that it appeared in addition to state that the HMRC officers attending the premises would be videoed.

81. That was the position as it stood when the information notices at issue in this appeal were issued. The appellant did write two subsequent letters but the contents of these were unknown to HMRC when the notices were issued. I will return to their relevance at §88.

82. By requiring the records to be posted to HMRC without the option for attendance HMRC impliedly rejected all the conditions imposed by the appellant and outlined above. So the question is whether it was reasonable for HMRC to do this, or whether, alternatively they ought to have accepted the appellant's conditions and attended the appellant's premises to inspect the records. And that depends on what rights the appellant had to impose conditions. I consider the conditions in turn.

83. Condition 1: Limitations on copies of paper documents: Paragraph 15 of Sch 36 provides:

> "Where a document (or copy of a document) is produced to, or inspected by, an officer of Revenue and Customs, such an officer may take copies of, or make extracts from, the documents."

84. It is therefore quite clear that the appellant was not entitled to set any limits on HMRC's right to copy documents when inspecting them. HMRC had unlimited rights to copy documents and indeed it would be difficult to see how they could do their job without such a right: while it is true HMRC can only exercise their powers for the purpose for which they were given them, the decision on what should be copied was clearly a matter for HMRC.

85. The appellant in its letters said HMRC could not make wholesale copies and could only copy where it was 'justified' or 'appropriate'. In my view the only reasonable inference from the letters was that the appellant meant that it, the appellant, would be the one to determine what copying was justified or appropriate. Moreover, having repeatedly stated that the appellant considered the enquiry unlawful, the only reasonable inference must be that what documents the appellant considered justified and appropriate for HMRC to copy was likely to be considerably less than HMRC wished to copy.

86. Mr Onalaja also suggested that a fair reading of the correspondence was that the appellant had only attempted to restrict HMRC's copying of electronic material and had never said there would be any restrictions on copying paper records. This is unsustainable on a fair reading of the letters; for instance, the third letter specifically said that only 'appropriate copies of printed documents' would be allowed.

87. Therefore, in these circumstances, I find it would have been reasonable for HMRC to expect, had they decided to attend the appellant's premises in order to inspect the documents in these circumstances, that they would have had a wasted journey in that the appellant would refuse to allow HMRC to take all the copies of the paper records HMRC wished to take. There was a clear refusal by the appellant to comply voluntarily with the law which entitled HMRC, having served the notice, to attend the premises and take what copies HMRC considered appropriate. In these circumstances, it was entirely reasonable for HMRC to specify a different means of production (post) in order to avoid a potentially wasted journey by the officers and/or confrontation with the appellant, even if that alternative means of compliance (post) would have involved the appellant in more inconvenience and expense than an inspection.

88. Moreover, following the appellant's fifth and sixth letters, HMRC sent the letter of 18 June (§29) in which they sought to clarify whether, if they inspected, they would be given unrestricted ability to copy: I find it significant that the appellant never replied. This only fortifies me in my conclusion that my findings in the above paragraph are right and Mr Onalaja's interpretation of the correspondence was quite wrong: the appellant never agreed that HMRC could have unrestricted right to copy the documents which the information notice asked to be produced to them.

89. I find that the appellant's stated intention to control what copying was undertaken by HMRC at an inspection by itself justified the postal requirement in the two notices in issue. Therefore, I do not need to consider whether the postal requirement was also justified by the imposition by the appellant of the other conditions and limitations on an inspection, but for the sake of completeness I do so.

90. Condition 2: no electronic copies of electronic data: I deal with electronic data separately below as it was itself an objection to the legality of the information notice as items 5-7 of the 2011 information notice required information to be provided electronically.

91. As can be seen from the rules discussed below, to the extent that information is held electronically, HMRC have the right to take copies by whatever media they chose. The appellant therefore was wrong to say that it would not permit this: by attempting to make this a condition of the inspection it would be preventing HMRC doing what HMRC were entitled to do. HMRC were therefore right to refuse to accept the condition and in these circumstances, and irrespective of the other objections, HMRC were quite reasonable to require compliance by post in order to avoid a wasted journey to the appellant's premises.

92. Condition 3: DPA warranty: The appellant never explained exactly what warranty it required HMRC to give; it does not matter. HMRC are not obliged to give any warranty. Their duty of confidentiality is set out in statute and they are not obliged to offer any more than required by statute nor are they even required to give a warranty in terms that go no further than their statutory obligations.

93. The appellant therefore was wrong to say require a warranty on confidentiality from HMRC before permitting inspection: by attempting to make this a condition of the inspection the appellant was preventing HMRC doing what HMRC were entitled to do. HMRC were therefore right to refuse to accept the condition and in these circumstances, and irrespective of the other objections, HMRC were quite reasonable to require compliance with the information notices by post rather than risk a wasted journey to the appellant's premises.

94. Condition 4: videoing of officers: No reason was given to HMRC why the appellant wished to video the officers and none was given to the Tribunal. In the absence of any good reason, I do not consider that this was a reasonable requirement and one in response to which it was quite reasonable for HMRC to require the documents to be delivered by post, those avoiding any need for their officers to be on the appellant's premises and at risk of being videoed for unspecified purposes.

95. In conclusion, I reject the appellant's case that it was unreasonable for HMRC to require compliance by post and not to give the option of compliance by production of the records at the appellant’s own offices. In the particular circumstances of this case, it was entirely reasonable for HMRC to require compliance only by post.

96. In conclusion, the imposition of any or all of these four conditions justified HMRC’s requirement that records and information be posted to them. I reject the appellant’s appeal against the two information notices on the ground that HMRC ought not to have imposed the postal requirement. I move on to consider the next ground of appeal.

(d) HMRC not entitled to electronic copies of electronic data?

97. The appellant's case was that HMRC were not entitled to electronic copies of data held on their computers (although it said it would allow inspection of the information held on the computers and would allow some records to be printed out). This ground of appeal affected only items 5-7 inclusive of the 2011 information notice, so was not in any event a challenge to the 2012 information notice nor the whole of the 2011 information notice.

98. S 113 of FA 08 brought into effect Schedule 36 and HMRC's powers to issue information notices. S 114 FA 08 dealt with 'computer records, etc'. It said, in so far as relevant:

> This section applies to any enactment that, in connection with an HMRC matter -
>
> (a) requires a person to produce a document or cause a document to be produced,
>
> (b) requires a person to permit the Commissioners or an Officer of Revenue and Customs -
>
> (i)to inspect a document, or
>
> (ii) to make or take copies of or extracts from or remove a document,
>
> ….
>
> (2) An enactment to which this section applies has effect as if -
>
> (a) any reference in the enactment to a document were a reference to anything in which information of any description is recorded, and
>
> (b) any reference in the enactment to a copy of a document were a reference to anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

There are other provisions allowing HMRC officers to inspect computers etc but I did not understand HMRC to be relying on these provisions so I do not refer to them.

99. HMRC's case was that the provisions read together entitled HMRC to demand that the appellant deliver an electronic copy (eg on a USB stick) of its computer records of the various matters listed at items 5-7 of the 2011 information notice. The appellant did not accept that it was liable to do anything more than provide print outs.

100. I find that the effect of s 114 when read with Schedule 36 is that quite literally the reference to 'document' in para 1 of Sch 36 must be read as a reference to the appellant's computers in which information resides. But HMRC have not required the appellant to deliver up its computer, a requirement which might well be thought unreasonable at the outset of an enquiry; all they have asked for at item 5 and 7 is an electronic copy of the information held on the computer. Are they entitled to this?

101. S 114 clearly refers to information held on electronic media, although it no doubt encompasses other methods of storage too. So 'document' in Sch 36 actually means something in which information is recorded; and a reference to a copy of such a document is a reference to something on which that information has been copied. So the effect of s 114 is that Sch 36 applies not only to paper documents but things, such as computers, hard drives, USB sticks etc onto which information has already been stored or copied. Sch 36 entitles HMRC to require the taxpayer to deliver the originals or permit HMRC to take copies. It also entitles the appellant to comply by delivering copies: paragraph 8:

> Where an information notice requires a person to produce a document, the person may comply with the notice by producing a copy of the document,....

102. But the 2011 information notice went further than this. It required the appellant to deliver the information/documents in electronic form. Items 5 and 7 specifically required the appellant, not to deliver the original records (ie their computer) but to download them onto media compatible with HMRC's computer systems. However, as I have already said, Paragraph 7 of Sch 36 provides:

> Where a person is required by an information notice to provide information or provide 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.

103. I find HMRC have specified a form. The records are to be produced electronically by being downloaded onto compatible media. As Paragraph 7 allows them to specify such a form, I find, that as long as the requirement was reasonable, they are entitled to demand downloaded copies of electronic information.

104. Was this requirement reasonable? As HMRC have only asked for records held electronically in items 5-7, in my view it is quite reasonable to ask for them to be supplied electronically as that is not only likely to be the easiest and cheapest method of production for the appellant, it enables HMRC to use computers to interrogate the data, which is likely to be more efficient and effective.

105. I note that Items 5 -7 are statutory records and there is in any event no right of appeal against an information notice requiring their production. But this information effectively requires the appellant to produce an electronic copy so my view is that that part of the information notice does not actually relate to the statutory records themselves but the form in which they are produced, and could therefore be appealed. But that is irrelevant as I have decided that such an appeal is not well founded. HMRC have the right to specify form and they have reasonably specified electronic form. I reject this ground of appeal and move on to consider the next.

(e) Corporation tax return exception?

106. In so far as the information notices were seeking to check the appellant's corporation tax position, it was accepted that under paragraph 21 of Sch 36 there had to be a valid open enquiry; it was the appellant's case, although Mr Onalaja did not really pursue this, that there was no valid enquiry as the enquiry had been opened (alleged the appellant) with the ulterior motive of harassing the appellant and influencing its trading activities.

107. I find, as it was not in dispute, that there was an open enquiry. I reject the appellant's case that it was opened for any ulterior motive for all the reasons stated in respect of the information notices at §§53-67 above.

108. Moreover, while I was not specifically addressed on this matter, there is an issue to what extent findings of fact and law I made in the first Qualapharm decision ([2015] UKFTT 479 (TC)) are relevant to this second Qualapharm case. It seems to me that as both proceedings concerned not only the same parties but arise out of the same tax enquiries and to a large extent involve related submissions, albeit a different subject matter (information notices rather than closure notices) it would be an abuse of process to allow either party to re-open decided matters. So far as I am aware the appellant has made no attempt to appeal that decision and therefore my conclusions in that case stand. I found there that the appellant had failed to make out its case that the enquiry was opened for an improper motive: [35-38].

109. I reject this ground of appeal and move on to consider the last.

(f) Did HMRC have to explain its reason for requiring the information and documents before the appellant was liable to comply with the notice?

110. Again, although this was put forward by the appellant has a ground for refusing to comply with the notice and for why the appeal ought to be allowed, it was not really pursued by Mr Onalaja in the hearing. I agree that HMRC did not really explain why the enquiries were open until just before the hearing in the first appeal (see [33] of [2015] UKFTT 479 (TC)). But there is no legal requirement for them to do so. While para 1 of Sch 36 does limit HMRC's ability to seek information to cases where the information is reasonably required for the purposes of checking taxpayer's tax position, the law does not require HMRC to explain to a taxpayer why it wishes to check their tax position. Indeed, as explained in my earlier decision at [13-20] there are good reasons why this is so.

111. I reject this ground of appeal. I have therefore rejected all the appellant's grounds for appealing against the issue of the two information notices. It follows that I dismiss that part of its appeal and move on to consider the remaining matter, which is the appellant's appeal against the two penalties for non-compliance with the information notices.

The penalties

112. The appellant appealed against the two £300 penalties issued by HMRC on 14 April 2014 for non-compliance with the 2011 and 2012 information notices. I have found, and it was not in dispute, that at the date of the hearing HMRC had still not received any of the information sought. The appellant was at first sight liable to the penalties. However, the appellant's grounds of appeal were:

> (1) it was not in breach of the information notices as it had complied with the information notices as it had offered compliance and it was HMRC's failure to accept the offer that meant that it had not received the records;
>
> (2) even if it was in breach it had a reasonable excuse for that breach because:
>
> (a) it had offered compliance and it was HMRC's failure to accept that offer which meant HMRC had still not received the records;
>
> (b) the appellant's state of mind and suspicion of ulterior motive justified non-compliance
>
> (c) HMRC's failure to explain its reasons for the enquiries and issue of the information notices justified the appellant's non compliance and provided it with a reasonable excuse.

Had the appellant offered compliance in whole or part?

113. I find for the reasons given above that there was no compliance. In other words, the appellant had done no more that agree to permit an inspection subject to conditions which it had no right in law to impose. Even if the information notices had permitted compliance by inspection, the appellant would not have complied. In fact the information notices required the information and documents to be posted. None of the required information and documents had been posted. This is a clear case of total non-compliance.

Reasonable excuse

114. Paragraph 45(1) of sch 36 provides that the appellant is not liable to a penalty if it can satisfy this Tribunal it had a reasonable excuse for its failure to comply with the information notices. Both parties agreed with the test for reasonable excuse was as set out in *Clear Car Company* [1991] VATTR 239: the test is whether what the taxpayer did was reasonable thing for a responsible taxpayer conscious of and intending to comply with its obligations relating to tax, but having the experience and other attributes of the taxpayer and placed in the situation that the taxpayer found itself at the relevant time.

115. The appellant put forward three grounds which it considered amounts to a reasonable excuse and I will consider each in turn.

116. <u>It had complied or believed it had complied with the information notices.</u> As I have said, it had not complied. There was total non-compliance.

117. Did it believe that it had complied and if it did, would that be a reasonable excuse? Although Mr Coosna did not attend for cross examination and Ms Jones in those circumstances would have been free to object to admission of his witness statements or challenge what he said about his beliefs and concerns in his witness statement, she did not suggest that Mr Coosna's motives and views were not genuine. In these circumstances, I proceed on the basis that the appellant's concerns over the legality of the enquiry and the issue of the information notices were genuine.

118. However, I consider that the question for reasonable excuse is whether the concerns were held reasonably as well as whether held genuinely. Indeed, this is the test in *Clean Car Company.* The taxpayer must act reasonably.

119. And I find that its concerns were not held reasonably. The law is clear and, even if ignorance of law could be a reasonable excuse (which I do not accept), Mr Onalaja did not make any real attempt to engage with the law and to suggest (for instance) why paragraph 7 did not permit HMRC to require electronic copies or why s 114 FA did not apply to the facts of this case. The appellant's ignorance of the law was not reasonable.

120. Moreover, HMRC wrote as I said at §29 on 18 June to try and arrange an inspection but asking for the appellant's assurance that HMRC would be allowed to do what in law it was entitled to do, in other words to inspect all the records and take paper and electronic copies of those it wished. The appellant never replied to this letter, nor to the reminder in a later letter (§32). That was not the response of someone seeking to act reasonably within the law.

121. Moreover, to the extent that this proffered excuse is made on the basis that the appellant did not understand the law and in particular did not understand that it was not able to seek to impose the conditions on inspection which it sought to impose, as a matter of policy such ignorance cannot amount to a reasonable excuse. Ignorance of the law cannot be a reasonable excuse as that would result the law in favouring persons who chose to remain in ignorance of the law over those who sought to know the law in order to obey it. In any event, in the face of the statutory law, there was no reasonable belief that it had complied with the law and therefore I reject this ground as a reasonable excuse.

122. Its belief in HMRC's ulterior motive for enquiry and information notices: If this belief were reasonably and honestly held I accept that it could be a reasonable excuse because HMRC only have the right to open and enquiry and issue an information notice where their purpose is to check the taxpayer's tax position. Any other reason would be unlawful and taxpayers are not obliged to comply with unlawful information notices.

123. HMRC appeared to accept that the appellant's beliefs in its ulterior motives were honestly held but I do not find they were reasonably so held. It is for the appellant to satisfy me its excuse was reasonable. It has satisfied me that companies connected by trading and/or ownership and their directors were the subject of simultaneous enquiries but that does not by any reasonable thought process justify a

belief that the enquiries were for an improper motive. HMRC have satisfied me that the appellant's own returns gave cause for concern and the appellant must be taken to know its own tax returns and financial position, and in particular the elements of them that would concern a tax authority (see §61). While HMRC were not required to and did not explain to the taxpayer at the time why the enquiries were opened, I am satisfied that in these circumstances there was no reasonable foundation for any belief the enquiry into the appellant was opened for an improper motive.

124. I reject this ground as a reasonable excuse.

125. HMRC's failure to give reasons: As I have said at §110, HMRC were not required to give reasons for either the opening of the enquiries or the issuing of the information notices. It was therefore not reasonable for the appellant to refuse to comply with the information notices on the grounds that HMRC had not provided reasons. Ignorance of the law is not a reasonable excuse for the reasons stated above.

126. I reject this ground as a reasonable excuse.

Conclusion

127. I reject the appellant's appeal in its entirety and uphold the information notices and the assessment of the penalties.

128. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2016