



TC06898

Appeal number: TC/2017/03829
TC/2018/02351

INCOME TAX/CAPITAL GAINS TAX – taxpayer information notice issued under paragraph 1 of Schedule 36 to Finance Act 2008 – validity of notice – whether documents in the Appellant’s possession or power – were the documents reasonably required – effect of amendments to information notice on review – validity of assessment/notification of penalty for non-compliance with information notice – whether Appellant had a reasonable excuse for failure to comply

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RONNIE HANAN

Appellant

- and -

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Taylor House, London on 29 October 2018

Albert Fox for the Appellant

Ross Kernohan, Officer of HM Revenue & Customs, for the Respondents

DECISION

Background

- 5 1. The appellant, Mr Hanan, owns a company which carries on a jewellery business.
2. As a result of information received by HMRC in respect of bank accounts held by Mr Hanan in Switzerland, they launched an investigation into his tax affairs in May 2011. The investigation is being conducted under Code of Practice 9 (cases of suspected serious fraud).
- 10 3. In order to carry out their investigation, HMRC requested Mr Hanan to provide a large amount of information. Some information was provided but, despite a number of further requests, some information remained outstanding.
- 15 4. As a result of this HMRC issued a taxpayer information notice under paragraph 1 of schedule 36 to Finance Act 2008 (“schedule 36”) on 12 November 2015 (the “Original Information Notice”) which contained a schedule setting out 37 points in respect of which HMRC required Mr Hanan to provide information/documents.
5. Mr Hanan appealed against the Original Information Notice on 1 March 2016 and on 20 June 2016 accepted HMRC’s offer of a review of its decision in relation to the Original Information Notice.
- 20 6. On 12 October 2016, the reviewing officer set out the conclusions from her review which were as follows:
 - (1) The validity of the notice was upheld.
 - (2) 19 items from the schedule forming part of the Original Information Notice were however removed on the basis that the information had already
25 been provided.
 - (3) Some amendments were made to the remaining 18 items to take account of queries raised by Mr Hanan in his correspondence with HMRC prior to the review.
 - (4) The reviewing officer attached the updated list of the remaining 18
30 questions (as amended) as an appendix to the review conclusion letter headed “Appendix A – Information Notice” (the “2016 Appendix”).
 - (5) Mr Hanan was given a further 30 days (i.e. until 11 November 2016) to comply with the revised information notice.
- 35 7. HMRC subsequently agreed to extend the time for compliance with the information notice to 2 December 2016.
8. As Mr Hanan had not complied with the information notice by that date, HMRC wrote to him on 5 December 2016 to notify him that they had charged a penalty of £300 for non-compliance with the information notice.

9. Mr Hanan appealed to HMRC against the penalty on 7 December 2016. The penalty was however upheld on review on 28 February 2017.

10. Mr Hanan appealed to the Tribunal against the penalty on 5 May 2017.

5 11. Mr Hanan subsequently appealed to the Tribunal against the information notice on 22 March 2018.

Late appeals

12. Both of Mr Hanan's appeals to the Tribunal were made outside the statutory time limit.

10 13. As far as the appeal against the penalty is concerned, this was just over a month late and the Tribunal has previously given permission for this appeal to be notified to the Tribunal out of time.

15 14. Mr Hanan's appeal to the Tribunal against the information notice itself was lodged following encouragement from HMRC on the basis that Mr Hanan's grounds of appeal against the penalty to a large extent consisted of grounds of appeal against the information notice. HMRC do not object to the late appeal against the information notice.

15. It is nevertheless up to the Tribunal to consider whether it is in the interests of fairness and justice to allow the late appeal.

20 16. In this case, the appeal against the information notice should have been made to the Tribunal by 11 November 2016 and was only notified to the Tribunal on 22 March 2018, approximately 16 months late. This is clearly a serious and significant delay.

25 17. In the intervening period, HMRC and Mr Hanan have continued to correspond in relation to the information which has been requested and Mr Hanan has provided a certain amount of further information requested in the notice. It might therefore be said that it would be wrong to allow such a late appeal against the validity of the information notice in circumstances where it appears that Mr Hanan has treated it as a valid notice and has made some efforts to comply with it.

30 18. It is however clear that matters have now reached something of an impasse and I have come to the conclusion that the best way for the Tribunal to assist the parties to progress the investigation is to allow the late appeal and to make a decision in relation to the validity and requirements of the information notice.

19. The Tribunal therefore gives permission for Mr Hanan's appeal against the information notice to be notified to the Tribunal outside the statutory time limit.

Written submissions

20. At the end of the hearing, the Tribunal invited the parties to make written submissions on two points which arose during the course of the hearing and which the parties had not come prepared to deal with in detail. These are as follows:

5 (1) Mr Fox suggested on behalf of Mr Hanan that the reviewing officer of HMRC did not have any statutory power in conducting her review to make changes to the scope of the information requested (as opposed to confirming or deleting specific requests). The first matter on which I asked for written submissions is therefore the extent of a reviewing officer's power to vary an
10 information notice.

(2) Mr Fox drew attention to the fact that the penalty notice sent to Mr Hanan refers to an information notice dated 12 October 2016. As will be seen below, part of his case is that the document issued by the reviewing officer on 12
15 October 2016 did not constitute an information notice (or was not a valid information notice). Mr Kernohan asserts that the reference in the penalty notice to an information notice dated 12 October 2016 is an error and that the penalty notice should have referred to the Original Information Notice issued on 12 November 2015. The second area on which I asked for written submissions is whether such an error in the penalty notice invalidates the penalty.

20 21. I have received written submissions from HMRC and have taken those submissions into account in reaching my decision.

Taxpayer information notices – requirements, restrictions and appeal rights

22. HMRC may require a tax payer to provide information or documents which are reasonably required in order to check a taxpayer's tax position (paragraph 1 of
25 schedule 36).

23. Schedule 36 does not provide any particular form which the notice should take. Paragraph 6(2) of schedule 36 permits the notice either to specify or to describe the information or documents which are required.

24. HMRC have discretion as to the period which is to be allowed for compliance with the notice (paragraph 7 of schedule 36). This is normally (and was in this case)
30 set at 30 days from the date of the notice. HMRC may however allow further time for compliance before a penalty becomes payable (paragraph 44 of schedule 36).

25. HMRC may not require the production of documents which are more than six years old unless an "authorised officer" of HMRC agrees (paragraph 20 of schedule
35 36).

26. A taxpayer is only required to produce a document if it is within the taxpayer's possession or power (paragraph 18 of schedule 36).

27. If (as in this case) a taxpayer has filed a self-assessment tax return, HMRC may only issue an information notice if one of four conditions (conditions A – D) is met.

In this case, only conditions A and B are relevant. Condition A is that there is an ongoing enquiry into the relevant tax return. Condition B is that an officer of HMRC has reasons to suspect that there has been an under assessment to tax (paragraph 21 of schedule 36).

- 5 28. A taxpayer who receives an information notice has the right to appeal either against the notice itself or against any requirement in the notice (paragraph 29 of schedule 36). There is an exception to this if the information/documents required form part of the taxpayer’s “statutory records” (in respect of which there is no right of appeal). HMRC do not however rely on this exception.
- 10 29. On an appeal, the Tribunal may confirm, vary or set aside the information notice or any requirement of the notice (paragraph 32 of schedule 36).
30. Where the Tribunal confirms or varies the notice or any requirement of the notice, it may specify the date by which the taxpayer must comply. If it does not do so, HMRC, acting reasonably, may specify a period for compliance (paragraph 32(4) of schedule 36).
- 15 31. Unlike most decisions of the First-tier Tribunal, there is no right of appeal to the Upper Tribunal against the First-tier Tribunal’s decision in relation to the information notice (paragraph 32(5) of schedule 36).
32. Where a taxpayer fails to comply with an information notice, they are liable to a penalty of £300 (paragraph 39 of schedule 36).
- 20 33. A daily penalty of up to £60 per day is payable for continued failure to comply after the date on which the initial £300 penalty is imposed (paragraph 40 of schedule 36).
34. There is no liability to a penalty if the taxpayer has a reasonable excuse for the failure to comply (paragraph 45 of schedule 36).
- 25 35. Where a taxpayer becomes liable to a penalty, HMRC may assess the penalty and, if they do so, they must notify the taxpayer (paragraph 46 of schedule 36).
36. A taxpayer has the right to appeal against HMRC’s decision that a penalty is payable or against the amount of the penalty (paragraph 47 of schedule 36).
- 30 37. If the appeal is against the penalty itself, the Tribunal may confirm or cancel HMRC’s decision. If the appeal is against the amount of the penalty, the Tribunal may confirm HMRC’s decision or substitute that decision for any other decision which HMRC could have made (paragraph 48 of schedule 46).

Validity of the information notice

- 35 38. This section deals with the overall validity of the information notice rather than the individual requests for information/documents which are dealt with below and

where I discuss whether the information is in the possession or power of Mr Hanan and/or whether it is reasonably required by HMRC to check his tax position.

39. There is no dispute as to delivery or receipt of the Original Information Notice.

40. In arguing that the Original Information Notice is valid, Mr Kernohan focused first on the restrictions in paragraph 31 of schedule 36 which, as described above, requires one of four conditions to be satisfied where, as in this case, the taxpayer has filed self-assessment tax returns for the relevant years.

41. Mr Kernohan stated that HMRC had opened an enquiry into Mr Hanan's tax return for the tax year ended 5 April 2012 and so condition A is satisfied in relation to that year. I was not however given a copy of the notice opening that enquiry nor confirmation that the enquiry remained open.

42. Mr Kernohan however relied principally on condition B which is satisfied where an officer of HMRC has reason to suspect that an amount which ought to have been assessed for a particular tax year has not been assessed or that an assessment for a particular tax year is insufficient.

43. In support of this, Mr Kernohan referred to the notes of the initial meeting with Mr Hanan and his adviser which took place on 21 June 2011. In answer to HMRC's standard questions in these types of tax investigations, Mr Hanan accepted that his personal tax returns were not "correct and complete".

44. In addition, HMRC had obtained a certain amount of information from Mr Hanan (either directly or through his agents) as a result of the initial meeting and subsequent information provided in correspondence. From that information, HMRC had put together what they had described as a "timeline" which analysed, on the basis of the information so far provided, the funds available to Mr Hanan compared to the assets/bank balances disclosed by him. This timeline, although admittedly incomplete, reveals a possible shortfall in funds of approximately £2.2 million. HMRC suspect that all or part of this shortfall may relate to UK or to overseas income/gains which have not been declared but which are taxable.

45. In respect of any overseas income/gains, it is relevant to mention that Mr Hanan claims to be non-UK domiciled. HMRC accepted his non-UK domicile status in 2001. From 6 April 2001, Mr Hanan has filed his tax returns on the basis that he is not UK domiciled and therefore is able to benefit from the remittance basis of taxation.

46. HMRC however make the point that Mr Hanan did not claim the remittance basis of taxation before 2001. They intend to assess tax liabilities going back 20 years from when they started their investigation (i.e. starting with the 1991/92 tax year) on the basis that any loss of tax is due to deliberate behaviour on the part of Mr Hanan. They also make the point that Mr Hanan has not paid the remittance basis charge which was introduced in 2008 and so cannot benefit from the remittance basis after that date.

47. In any event, HMRC have reviewed Mr Hanan's domicile position and have concluded that he is domiciled in the UK. They do not consider themselves bound by their earlier acceptance of his non-domicile status on the basis that they were given either misleading or incomplete information at the time that confirmation was given.

5 48. HMRC therefore intend to assess any non-UK income/gains whether or not
there have been any remittances to the UK. Both parties accept that Mr Hanan's
opportunity to defend his domicile status will be part of an appeal against any
assessments which are raised by HMRC and not as part of this appeal. The only
10 relevance of Mr Hanan's domicile for the purposes of this appeal is that HMRC
consider overseas income/gains to be taxable.

49. Mr Kernohan referred briefly to the decision of the First-tier Tribunal in *Kevin
Betts v HMRC* [2013] UKFTT 430. In that case, the Tribunal found [at 89-96] that
HMRC did not have grounds for suspecting that there had been an under assessment
to tax but instead was seeking information in order to decide whether or not it should
15 have such a suspicion. Mr Kernohan was at pains to point out that, in this case,
HMRC have clear evidence to support their suspicion that there has been an under
assessment of tax. The purpose of seeking the information is to quantify the amount
of that under assessment.

50. A significant part of the documents requested by HMRC were more than six
20 years old at the date of the Original Information Notice. They have however
produced evidence showing that the issue of the information notice was agreed by an
"authorised officer" of HMRC, Mr Andy Armitt. This deals with the requirement in
paragraph 20 of schedule 36 referred to above.

51. Mr Fox did not directly challenge Mr Kernohan's conclusion that condition B in
25 paragraph 21 of schedule 36 is satisfied but instead argued that the information on
which HMRC have based their suspicions is unreliable and cannot therefore
legitimately form the basis of any such suspicion.

52. As far as the notes of the initial meeting with HMRC are concerned, Mr Fox
30 makes the point that, whilst these notes are signed by the relevant HMRC officers,
they are not signed by Mr Hanan or his agent who attended the meeting. HMRC
cannot therefore, he says, rely on anything contained in these notes.

53. Not long after the investigation commenced, Mr Hanan appointed a new tax
adviser, Brian White who continued to advise him until early 2014. During this
period, Mr White provided HMRC with a significant amount of information including
35 a handwritten statement of assets and liabilities for Mr Hanan as at April 2012. Much
of HMRC's timeline document is based on the information provided by Mr White.

54. Mr Fox suggests that, as the information provided to HMRC did not come direct
from Mr Hanan but instead came from Mr White, it may be unreliable as there is no
evidence as to where the information came from or whether it was verified with Mr
40 Hanan before it was sent to HMRC. Mr Fox emphasised that he was not saying that
the information was necessarily wrong, simply that it could not be relied on.

55. Mr Fox explained that attempts have been made to get in touch with Mr White in order to discuss the information with him but it did not prove possible to obtain any assistance from him.

56. As far as the statement of assets and liabilities is concerned, Mr Fox referred to the fact that HMRC had on more than one occasion, provided a blank form for Mr Hanan to complete which was HMRC's standard form statement of personal assets and liabilities and business interests. This form contains a certificate to be signed by the taxpayer confirming that the statement is complete and accurate. Instead, what Mr White provided to HMRC was a fairly scruffy handwritten statement with no signature. When HMRC have requested a serious document which carries with it potential criminal consequences, Mr Fox submits that they should not be relying on any information contained in such an informal document.

57. Turning to HMRC's timeline itself, Mr Fox complains that there is no explanation as to how or when this was produced or the source of the information contained in it. In his view, it is therefore a flawed document, the information derived from it should be discounted and all information requests based on that document should be ignored.

58. Having considered all of this, I am quite satisfied that HMRC have good grounds for suspecting that there has been an under assessment of tax. Mr Hanan admitted as much in his initial interview with HMRC. Whilst the notes that meeting are not signed by Mr Hanan, there has been no suggestion that his answer to the relevant questions has been recorded incorrectly.

59. As far as the information provided by Mr White is concerned, HMRC are entitled to proceed on the basis of information provided by a taxpayer's agent, unless informed to the contrary, and to assume that that the information provided has been approved or verified by the taxpayer. It has at no time prior to the hearing being suggested by Mr Hanan either that the information provided by Mr White was incorrect or that he did not have authority to act on Mr Hanan's behalf.

60. Although it was not a point raised by either party at the hearing, in this particular context, I do note that the reviewing officer in her letter of 12 October 2016 makes a point that some of the information subsequently provided by Mr Hanan himself contradicts information previously provided by Mr White. However, there is no suggestion that these discrepancies detract from HMRC's fundamental point that they cannot account for all of Mr Hanan's assets/cash balances based on his known sources of funds.

61. My conclusion on this point therefore is that HMRC have good grounds for their suspicions and are entitled to rely on the information provided to them both by Mr Hanan and by his agents.

The effect of HMRC's review

62. Mr Fox however also put forward a second reason as to why the information notice is invalid and this relates to the purported variation of the Original Information Notice by the reviewing officer in October 2016 and in particular, the status and effect of the 2016 Appendix (the revised list of information requests attached to the review conclusion letter).

63. Mr Fox's starting point is the Original Information Notice which he commended as being an excellent example of how an information notice should be presented. There was a covering letter which clearly states that it is a formal legal notice requiring the production of certain information and documents and that it is issued under paragraph 1 of schedule 36 of the Finance Act 2008. It also refers to the penalties which are payable if the notice is not complied with as well as rights of appeal, etc. The schedule which contains the actual information requests is on an HMRC standard form and has Mr Hanan's name on it as well as HMRC's reference. Mr Fox's only slight criticism of the schedule was that it was not dated.

64. The schedule attached to the review conclusion letter however is quite different. It is not in HMRC's standard form. It does not have Mr Hanan's name on it and it is undated. It is headed "Appendix A – Information Notice" and refers to a number of points which have "been removed from this notice". It is therefore completely unclear in Mr Fox's view whether it purports to be a separate information notice or whether it is intended to be an amendment to the Original Information Notice.

65. Mr Fox then refers to HMRC's penalty notice dated 5 December 2016. The opening part of this letter states:

"On 12 October 2016 we sent you a notice to provide information and produce documents. The notice told you that you would have to pay a £300 penalty if we did not receive what the notice asked for within 30 days of the date of the notice."

66. Mr Fox argues that it is clear from this that HMRC were treating the 2016 Appendix as a new and separate information notice.

67. Assuming this is right, Mr Fox submits that the 2016 Appendix either on its own or taken together with the review conclusion letter is not a valid information notice. As well as the defects in the 2016 Appendix itself when compared with the Original Information Notice, Mr Fox drew attention to the fact that the review conclusion letter does not purport to be a new information notice. It does not, for example, have the formality of the covering letter for the Original Information Notice which, as mentioned above, stated that it was a legal notice, that it was issued under paragraph 1 of schedule 36 and contained references to penalties and appeal rights.

68. In addition, Mr Fox criticised the 12 October 2016 review conclusion letter as being very unclear. In his view there is no reason to remove information requests simply because they have been complied with. They could have been left in on the basis that no further compliance was necessary in respect of these particular items. Mr Fox also criticises that the review letter for referring to contradictory information

without explaining what contradictions there are, the fact that the letter contains advice rather than just the conclusions of the review and that there was no indication which part of the information requests had been amended.

5 69. In relation to these changes to the Original Information Notice, Mr Fox asserted at the hearing that there is no legislative support for such changes to be made by a reviewing officer.

10 70. Mr Fox was not completely clear as to how his conclusions in relation to invalidity of the 2016 Appendix affected the Original Information Notice. However, his submission was that it polluted or contaminated the whole information request with the effect that any purported information notice is invalid.

71. My inference from this is that Mr Fox is saying that the 2016 Appendix purported to be a new information notice (which was invalid) and that the Original Information Notice is therefore no longer in existence as it was effectively substituted by the 2016 Appendix.

15 72. Mr Kernohan's response to this was that even if the 2016 Appendix constitutes a new information notice, it does meet the requirements of schedule 36, although in his view the information notice is still the notice issued on 12 November 2015 but as amended by the review conclusion letter and the accompanying 2016 Appendix.

20 73. Mr Kernohan submits that, in accordance with s 49E(5) Taxes Management Act 1970 ("TMA") the reviewing officer may vary HMRC's decision and that this therefore gives them power to vary the information requests contained in the information notice.

25 74. On this basis, Mr Kernohan takes the view that the reference in the 5 December 2016 penalty letter to the information notice dated 12 October 2016 is a mistake and that it should have referred to the Original Information Notice dated 12 November 2015. In his view, this is not however fatal to the validity of the Original Information Notice (its effect on the penalty is discussed below).

30 75. In my view, Mr Fox's argument is misconceived. This is because Mr Hanan's appeal is (and can only ever be) against the Original Information Notice. What HMRC does or does not do throughout the appeal process cannot affect the question as to whether the Original Information Notice was itself valid.

76. This can be tested by looking in more detail at the appeal process.

35 77. At the time of Mr Hanan's appeal to HMRC against the Original Information Notice, it is clear that this was the only notice in existence and therefore the only notice against which he could appeal.

78. Subject to HMRC's ability to settle the appeal by an agreement with Mr Hanan under s 54 TMA, HMRC is required to offer a review of the matter and, in order to facilitate this, must provide its own view of the matter (s 49C TMA). In this case, the "matter in question" is both that the validity of the notice itself as well as the

requirements contained in the notice (this follows from the appeal rights contained in paragraph 29 of schedule 36).

79. S 49E(5) TMA provides that the review may conclude that HMRC's view of the matter in question is to be upheld, varied or cancelled. However, the conclusions of a review by HMRC have no effect if the appellant notifies their appeal to the Tribunal (s 49F(4) TMA).

80. What Mr Hanan is saying in notifying his appeal to the Tribunal is that he does not accept HMRC's review conclusions and that he is asking the Tribunal to make a decision in relation to his initial appeal against the Original Information Notice.

81. Therefore, whether the review conclusion letter purported to be new information notice or whether it attempted to vary the Original Information Notice is irrelevant as, once Mr Hanan notified his appeal to the Tribunal, it simply had no effect.

82. My conclusion on this point is therefore that HMRC did issue a valid information notice (the Original Information Notice) and that this has not somehow been invalidated by the subsequent review conclusion letter and the attached 2016 Appendix.

Is the information requested reasonably required

83. As stated above, HMRC may only seek information which is reasonably required in order to check a taxpayer's tax position.

84. Mr Kernohan submits that all of the information requested is needed in order to identify the precise income/gains which they believe to be taxable and which have not yet been assessed during the 20 year period which they are entitled to assess if Mr Hanan's compliance failures are deliberate.

85. In support of this, Mr Kernohan referred to the decision of the First-tier Tribunal in *Steven Price v. HMRC* [2011] UKFTT 624 where the Tribunal observed [at 10] that:

“HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return”

86. Mr Kernohan further submits that what is reasonable for HMRC to require depends on the complexity of the relevant taxpayer's affairs. I infer from this that Mr Kernohan is inviting the Tribunal to conclude that their requests for information in this case which are both wide ranging and which go back many years are justified by the complexity of Mr Hanan's affairs.

87. Mr Fox did not seriously suggest that the information and documents which HMRC are requesting are not required in order to check Mr Hanan's tax position. He also did not specifically argue that any of the information requests were unreasonable, although some of the points he put forward as to why the documents which had been
5 requested are not in Mr Hanan's possession or power (and which I discuss below) might be said to be relevant as to whether HMRC's requests are reasonable.

88. I therefore turn to the parties submissions as to whether the documents requested by HMRC are in Mr Hanan's possession or power.

Possession or power

10 89. It is important to note that the question of "possession or power" is only relevant to documents and not to information which is not contained in a document, (see paragraph 18 of schedule 36). However, it is of course self-evident that an individual cannot be compelled to provide information which he does not possess.

15 90. It is also worth noting that, by the time this stage of the hearing had been reached, only 11 of HMRC's original 37 points remained. As mentioned above, HMRC agreed to remove 19 of the original requests during the review process. HMRC accept that a further three points have been dealt with by information subsequently provided by Mr Hanan. HMRC informed the Tribunal at the outset of the hearing that there were an additional three points which they no longer wished to
20 pursue and one further point was withdrawn during the course of the hearing.

91. Mr Kernohan submits that all of the documents requested by the remaining 11 points are within Mr Hanan's possession or power. With one exception, they all relate to bank or loan accounts in Mr Hanan's name or in the name of a nominee where Mr Hanan is the beneficial owner or to transactions undertaken by Mr Hanan
25 (for example documentary evidence showing the source of funds for the purchase of a property or for a loan made to a trust established by Mr Hanan).

92. The one request which is in a slightly different category is a request to provide more information in relation to the methodology adopted in calculating foreign exchange gains and losses set out in schedule produced by an employee of Mr Hanan
30 including in particular details of the asset disposed of, the disposal proceeds and the cost. Mr Kernohan however argues that, as the figures were produced by Mr Hanan's employee, he must be able to obtain the calculations on which those figures are based.

93. In relation to the items in question, Mr Fox made the following points:

35 (1) The first two items relate to bank accounts with HSBC in Switzerland. Mr Hanan has provided some of the bank statements which HMRC have requested. The information notice requires Mr Hanan to provide "statements for all HSBC accounts under the reference [.....]". Mr Fox infers from this that HMRC already have some of the statements. Mr Fox submits that Mr Hanan has provided everything that he can and suggests that HMRC should

approach HSBC direct. If HMRC cannot get the statements from HSBC how, he asks, can Mr Hanan be expected to get them.

5 (2) The next three items relate to accounts with Mizrahi Bank in Tel Aviv. Mr Fox asserted that Mr Hanan had already provided information about when these accounts were opened and closed and that he would also have provided any statements which he had been able to get hold of. There is however no evidence of this in the bundle of documents provided to the Tribunal. Indeed, in Mr Hanan's email to HMRC dated 14 February 2017, he specifically states "as far as I can tell, I never had a Mizrahi Israeli bank account in my personal name". This is contradicted by the statement of assets and liabilities provided by Mr White earlier in the investigation and Mr Hanan also made it clear at the hearing that he had held accounts with Mizrahi Bank in the past but that these had been closed many years ago.

15 (3) An additional objection put forward to this request was that banks in Israel are difficult to deal with and that it is impossible to get historic information. No evidence was however provided as to what attempts had been made to obtain the information which HMRC have requested other than a suggestion that Mr Hanan may have visited the bank when he was in Israel recently for his father's funeral.

20 (4) The next request relates to a bank account which Mr Hanan held in Jersey. It appears that the account was maintained with one bank which was then taken over by another bank. The information requested goes back to 2002. Mr Fox told the Tribunal that Mr Hanan had tried to obtain this information but that it is simply not available. Again, no evidence was provided as to what efforts had been made to obtain the information.

25 (5) In relation to a request for documentary evidence in respect of the source of funds for the purchase of a property in Israel in 2005, Mr Fox again made the point that the availability of information in Israel is very different to what might be expected in the UK.

30 (6) As far as the request for documentary evidence of the source of funds for Mr Hanan's loan to his trust is concerned, Mr Fox simply stated that Mr Hanan has tried to find this information but has been unable to do so.

35 (7) Mr Fox explained that the employee who prepared the schedule of foreign exchange gain/losses parted with Mr Hanan on difficult terms. Mr Sammy Noe who was assisting Mr Fox in presenting Mr Hanan's case confirmed that he had been to see the relevant individual on two occasions that he had refused to co-operate unless he was paid a large amount of money.

40 (8) The final request relates to contract notes for two sample foreign exchange transactions in 2008/2009. Mr Fox stated that the employee in question has the relevant information and/or that Mr Hanan cannot find it as it is too old.

94. Mr Hanan briefly gave evidence that he had spent significant amounts of time trying to obtain all the information requested by HMRC.

What information should now be provided?

95. As previously mentioned, the Tribunal has a wide discretion to either confirm, vary or set aside any requirement of an information notice.

96. I have considered carefully the points which Mr Fox has made on behalf of Mr Hanan as well as the efforts which Mr Hanan says he has already made to try to obtain the information/documents which have been requested by HMRC. In my view, however, the remaining information which HMRC is seeking is reasonably required for the purposes of their investigation in order to check Mr Hanan's tax position and, to the extent that the request is to provide documents, they are in principle in Mr Hanan's possession or power. It is no answer to say, for example, that HMRC could issue a third party notice against HSBC in Switzerland when, on the face of it, Mr Hanan must have a right to obtain the relevant statements himself.

97. The remaining 11 items sought by HMRC are therefore confirmed subject to the variations proposed as a result of HMRC's review and some further very small variations to take account of points raised during the hearing.

98. I attach as an appendix to this decision an amended schedule which is to be treated as the schedule to the Original Information Notice dated 12 November 2015. For reasons of confidentiality, I have removed the account numbers for the relevant bank accounts. These are however the same account numbers as those referred to in the Original Information Notice and the 2016 Appendix.

99. HMRC accept and I would reiterate that if Mr Hanan is genuinely unable to obtain the documents which have been requested and can provide evidence as to what efforts have been undertaken in order to try and obtain those documents, he will not be treated as having failed to comply with the amended information notice as he will have a reasonable excuse for the failure. It is not however sufficient simply to assert that he has attempted to obtain the information without providing any evidence as to what steps he has taken to do so.

100. The period within which the revised information notice must be complied with is the period ending 45 days after the release date of this decision.

Penalty

101. HMRC have charged a penalty of £300 under paragraph 39 of schedule 36 in respect of Mr Hanan's failure to comply with the information notice. Mr Hanan has appealed against the penalty. Mr Hanan's grounds of appeal as set out in his notice of appeal to the Tribunal are principally that he has provided everything he can but he also appeals against the penalty on the basis that the information notice was flawed.

Has the penalty been properly charged?

102. HMRC has the burden of showing that a penalty has been properly charged even though Mr Hanan has not challenged the assessment of the penalty in itself.

103. I have already found that the Original Information Notice was valid. As a result of the appeal against that notice, I have varied it, as set out above.

104. However, there is a separate question as to the nature of the information notice which was in existence at the time the penalty was assessed in December 2016. This is relevant to Mr Hanan's objection to the penalty on the basis of a mistake in the penalty notice.

105. As Mr Hanan had not notified any appeal to the Tribunal against the information notice at that stage, the reasoning set out at paragraphs [75-82] above does not apply as this depends on the appeal against the information notice having been notified to the Tribunal (which then, in effect, overrides the conclusion of any review by HMRC).

106. In his written submissions, Mr Kernohan submits that the review conclusion letter constitutes a variation of the Original Information Notice rather than a new information notice.

107. Mr Kernohan refers first of all to s 49E(5) TMA which provides that the review may conclude that HMRC's view of the matter in question is to be upheld, varied or cancelled.

108. He then draws attention to s 49F(2) which states that HMRC's conclusions of a review are to be treated as if they were an agreement in writing under s 54(1) TMA.

109. Mr Kernohan points out that s 54(1) TMA treats an agreement in the same way as if the Tribunal had determined the appeal and had itself upheld, varied, discharged or cancelled the assessment or decision.

110. Finally, Mr Kernohan refers to paragraph 32(3) of schedule 36 which, as stated above, gives the tribunal power to confirm, vary or set aside an information notice or a requirement in an information notice.

111. Drawing all of this together, Mr Kernohan's conclusion is that, as the Tribunal clearly has power to vary an information notice, HMRC has a similar power to vary an information notice as part of the review process.

112. Mr Kernohan goes on to submit that, if the Tribunal were to conclude that the variation of an information notice as part of a review could, in principle, constitute a new notice, the amendments made in this case were not sufficiently significant to amount to a new notice.

113. I agree with Mr Kernohan that it is possible for a reviewing officer to vary the requirements of an information notice given their ability to conclude that HMRC's view of the matter in question should be varied. HMRC's view of the matter must include the question as to what information is "reasonably required" for the purposes of checking the taxpayer's tax position and so if the reviewing officer concludes that the information which has been requested does not reflect what is reasonably

required, it must be possible to vary the information notice in order to give effect to the reviewing officer's conclusions.

114. This conclusion is reinforced, as Mr Kernohan suggests, by the fact that the Tribunal clearly does have the power, on an appeal against the requirements of an information notice, to vary those requirements. It would be very odd if parliament were to give the Tribunal power to vary the requirements of the information notice but did not give HMRC the ability to vary those requirements as part of its review process.

115. Although Mr Fox has argued that the review conclusion letter is confusing and that it does not make it clear whether it is intended to vary the original information notice or whether it is intended to be a new information notice, it seems clear to me that, taken as a whole, the review conclusion letter and the 2016 Appendix are intended to vary the Original Information Notice. This is for the following reasons:

(1) The opening paragraph of the review conclusion letter states "I have now completed my review, and my conclusion is that the Information Notice should be varied. A new copy of the varied notice is included at Appendix A".

(2) The reviewing officer has power to uphold, vary or cancel HMRC's view of the matter in question. As explained above, this in my view gives the reviewing officer power to vary the requirements of an information notice. It is less clear that it would give the reviewing officer power to issue a completely new information notice (although, given point (1) above, I make no decision on this point).

116. It follows from this that, at the date the penalty was imposed, the Original Information Notice was still in existence albeit varied in accordance with the conclusions of the review which covered both the information which still needed to be provided and the date by which it had to be provided.

117. There is no dispute that Mr Hanan did not comply with the amended information notice within HMRC's final deadline of 2 December 2016. There is of course a separate question as to whether the reasons for his failure to comply with it amount to a reasonable excuse, as to which, see further below.

118. On the face of it, HMRC is therefore entitled to charge a penalty of £300.

119. In the circumstances, HMRC have the right to assess the penalty and, if they do so, they must notify the individual in question (paragraph 46(1) of schedule 36).

120. On the basis that the information notice which was in existence at the time the penalty was charged was the Original Information Notice as amended by the 2016 Appendix, there was a mistake in the notice sent to Mr Hanan on 5 December 2016 informing him of the imposition of the penalty as it referred to an information notice dated 12 October 2016 (the date of the review conclusion letter). The question is whether this invalidates the penalty.

121. In his written submissions, Mr Kernohan accepts that the correct date of the information notice is 12 November 2015 rather than 12 October 2016 as stated in the penalty notice but submits that the penalty notice is saved from invalidity through the operation of s 114 TMA.

5 122. Section 114(1) TMA provides that an assessment shall not be affected by reason of any mistake if it is in substance and effect in conformity with the intent and meaning of the Taxes Acts.

123. Mr Kernohan's argument is that, despite the mistake, the penalty notice is still in substance and effect in conformity with the intent and meaning of the relevant provisions of schedule 36 which are to penalise the taxpayer for non-compliance with an information notice.

124. Mr Kernohan points out that the reference to a letter dated 12 October 2016 could clearly be understood as a reference to the review conclusion letter containing the amended information requirements and that it is not credible that Mr Hanan would have been unable to establish why the penalty was charged, despite the error in the information notice.

125. In support of this, Mr Kernohan refers to subsequent correspondence sent by HMRC to Mr Hanan after the review letter was issued but before the penalty was charged. In particular, he draws attention to an email sent by HMRC to Mr Hanan on 25 November 2016 which states:-

“As I said in my last email if you do not comply with the notice a penalty will be issued, but no penalty has been issued yet (although see below). The decision which Stephanie Woods issued was to confirm the information notice (in a varied form).”

126. Mr Kernohan also makes the point that Mr Hanan appealed to HMRC against the penalty on 7 December 2016. That letter focused on the fact that the information and documents were not in his power or possession to supply. There was no mention of any confusion or misunderstanding about the reason the penalty had been charged.

127. Based on all of this, Mr Kernohan submits that Mr Hanan was aware of the effect of the review conclusion letter on the Original Information Notice and that he understood that the penalty was being charged for failure to comply with the varied notice.

128. The scope of s 114 TMA 1970 has been considered recently by the Court of Appeal in *HMRC v. Donaldson* [2016] EWCA Civ 761 and *the Queen (on the application of Archer) v. HMRC* [2017] EWCA Civ 1962.

129. It is clear from those cases that a mistake may be too fundamental to be saved by s 114(1). It is also clear that in assessing whether a mistake is fundamental, the question is whether the mistake, viewed objectively, might have been misleading or confusing (see the decision of Lewison LJ in *Archer* [at 35]).

130. Based on the evidence before the Tribunal, it is clear to me that Mr Hanan was under no misapprehension as to why the penalty had been charged. Whilst, as submitted by Mr Fox, there is room for confusion as to whether the 2016 Appendix attached to the review conclusion letter constituted a new information notice or whether it simply varied the Original Information Notice, Mr Hanan was left in no doubt that the reason for the penalty was his failure to comply with the combined effects of those documents.

131. Strictly, the question is whether, viewed objectively, the mistake may have led to confusion (and not whether Mr Hanan himself was confused). This does not however change my conclusion as, viewed objectively, the mistake does not give rise to any confusion as to why the penalty was being charged. Indeed it is quite clear that the penalty is being charged for failure to comply with the outstanding requests for information and documents which were contained in the 2016 Appendix which was attached to the review conclusion letter dated 12 October 2016. The fact that this constituted a variation of the Original Information Notice rather than being a separate information notice in its own right does not, to my mind, make any difference as far as this point is concerned.

132. Mr Kernohan has quite correctly referred to the decision of the special commissioner in *Jacques v Revenue and Customs Commissioners* (2005) Sp C 513. In that case the special commissioner decided that a penalty notice relating to failure to comply with an information notice was invalid on the basis that the date of the information notice was wrongly stated and also that the description of what was required by the information notice was incorrect.

133. Mr Kernohan distinguishes *Jacques* on the basis that the defect in the penalty notice in Mr Hanan's case is only as to the date of the information notice and that there is no mis-description of the requirements of the information notice. He points out that the special commissioner stated [at 7] that he might have accepted the argument that there was no confusion about the date of the information notice given that only one notice had ever been issued but that too great an ambiguity had been created as a result of the failure to describe the requirements of the notice correctly.

134. Although, as I have said, there is scope for some confusion as to whether the original information notice had been varied or whether the review conclusion letter together with the 2016 Appendix constituted a new information notice, there is no doubt that it was objectively clear that the penalty was imposed for failure to comply with the outstanding requirements. In my view, the notice was therefore in substance in effect in conformity with or according to the intended meaning of the Taxes Acts, as required by s 114(1) TMA. The mistake in the penalty notice does not therefore invalidate the assessment of the penalty.

135. On the basis that the penalty notice is valid, I need to address the other points made by the parties in relation to the penalty.

Reasonable excuse

136. Mr Kernohan submits that Mr Hanan has no reasonable excuse for the failure to comply with the notice. He reminded the Tribunal that the request for information had been outstanding both formally and informally for a significant period of time.
5 Whilst Mr Hanan may have had difficulty in obtaining the information, Mr Kernohan's position is that Mr Hanan has provided no evidence of his efforts to try and obtain the information.

137. Mr Fox on the other hand argues that Mr Hanan does have a reasonable excuse for the failure to comply with the notice as he has been unable to obtain the
10 documents which have been requested. The documents are simply not in his power or possession as they are unavailable.

138. The burden of proof is clearly on the taxpayer to show that there is a reasonable excuse for any failure. Whilst I accept that it may be difficult to obtain the documents which HMRC have requested, Mr Hanan cannot discharge his burden of proof
15 without providing some evidence as to what he has done in order to try and obtain the information and what response he has received from the relevant institutions.

139. As such evidence has not been provided, I cannot accept that Mr Hanan has a reasonable excuse for his failure.

140. In this context, I do also note that Mr Hanan has on a number of occasions when
20 asking for extensions to the time for complying with the information notice stated that he is in the process of putting together all the information and that large parts of this have almost been completed. There is on the face of it a clear conflict between these statements and the subsequent statements that the information which is being requested is not available.

25 Can the penalty be reduced?

141. Mr Fox suggested that the penalty should be reduced in proportion to the number of items which have been removed from HMRC's original list of 37 points. On the basis that there are now only 11 outstanding points, Mr Fox suggests that the Tribunal should reduce the penalty to $11/37^{\text{ths}}$ of £300.

30 142. It is however clear that the Tribunal has no such power. As far as the amount of the penalty is concerned, paragraph 48(4)(b) of schedule 36 only gives the Tribunal the power to substitute for HMRC's decision another decision which the officer of HMRC could have made. The £300 penalty is a fixed amount. HMRC have no discretion to charge a different amount and so the Tribunal also has no discretion to
35 reduce the amount of this penalty.

Conclusion in relation to the penalty

143. The conditions for Mr Hanan to be liable to a penalty have been satisfied.

144. The penalty has been correctly assessed.

145. Mr Hanan does not have a reasonable excuse for the failure.

146. There is no basis on which the Tribunal is able to reduce the amount of the penalty.

147. The penalty of £300 is therefore confirmed.

5 **Appeal rights**

148. This document contains full findings of fact and reasons for the decision. There is no right of appeal against the Tribunal's decision in relation to the information notice (paragraph 32(5) of schedule 36). Any party dissatisfied with the Tribunal's decision in relation to the penalty 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.

15

**ROBIN VOS
TRIBUNAL JUDGE**

20

RELEASE DATE: 20 December 2018

Appendix

Revised Schedule to the Taxpayer Information Notice dated 12 November 2015 addressed to Mr Ronnie Hanan

5

(1) Provide statements for all HSBC accounts under the reference [.....], client number [.....], from the date they were opened to the earliest of the date they were closed, or 5 April 2014, in whatever currency they existed. The documents already provided by your agent (included with the letter sent by HMRC on 18 April 2016 at D18) and the documents listed in appendix 1 to HMRC's letter of 18 April 2017 are not required in your response.

10

(2) Provide statements for all HSBC accounts Birling Corporation, client number [.....] from the date they were opened to the earliest of the date they were closed, or 5 April 2014, in whatever currency they existed. The documents already provided by your agent (included with the letter sent by HMRC on 18 April 2016 at D18) and the documents listed in appendix 1 to HMRC's letter of 18 April 2017 are not required in your response.

15

(3) Provide the date(s) when any Mizrahi Israeli bank account was opened in your name.

20

(4) If applicable, provide the date(s) the account(s) at Mizrahi Israeli bank referred to at (3) above were closed.

(5) Provide statements for the Mizrahi Israeli bank account(s) referred to at (3) above from the date they were opened to the earliest of the date they were closed, or 5 April 2014.

25

(6) Your statement of assets and liabilities shows a liability of £420,000 owed to the Mizrahi bank. Provide statements for the above loan account(s) from the date the loan(s) were obtained.

30

(7) Your agent has stated previously that you opened a bank account with Abbey in Jersey in 2002. The original sum deposited is not known. However, there was a bank balance of £103,416 in 2005. Provide an explanation for the source of this amount. Provide any documentary evidence you have to support your explanation. A copy of the email where your agent provided this information was included in HMRC's 18 April 2016 letter at D4.

35

(8) Your agent stated previously that you purchased a property in Akriov Tower in 2005 for \$900,000 (approximately £494,640). Provide an explanation for the source of this amount. Provide any documentary evidence you have to support your explanation.

40

(9) Your agent has stated that you made a loan to the Exhibit One Settlement of £850,000. Provide an explanation for the source of this amount. Provide any documentary evidence you have to support your explanation.

(10) Provide copies of the calculations underlying the figures in Schedules C1-C6 provided by your agent in a letter dated 22 January 2014 (a copy was provided in HMRC's 18 April 2016 letter at D18). In each case, identify the asset disposed of, the disposal proceeds, and the cost.

(11) Provide the following contract notes for the transactions in the Birling Corporation Account listed at C6 and described as Birling \$Euro deals.

(a) 28/11/08 - €1,262,400 – FX 050-001-07481-00284EUR

(b) 20/05/09 - \$50,000 – FX 050-001-07601-01294EUR

5