



[2019] UKFTT 637 (TC)

TC07413

PENALTY – failure to comply with information notice issued under Schedule 36 FA 2008 – mistaken failure to provide bank statements – whether reasonable excuse – no - whether documents held by third party in possession or power – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02460

BETWEEN

MOHAMED SAHBIR

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE JEANETTE ZAMAN
NOEL BARRETT**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 23
September 2019**

The Appellant did not attend and was not represented

**Miss Hannilee Fish, litigator of HM Revenue and Customs' Solicitor's Office, for the
Respondents**

DECISION

INTRODUCTION

1. Mr Sahbir appealed against a £300 penalty imposed by HMRC on 4 December 2018 for non-compliance with an information notice issued by HMRC on 4 September 2018.

2. Mr Sahbir gave Notice of appeal to the Tribunal on 18 April 2019.

NON-ATTENDANCE OF APPELLANT

3. Mr Sahbir did not attend the hearing and was not represented. We reviewed the Tribunal file and were satisfied that he had been informed of the date and location of the hearing. There was no evidence that a request for postponement had been made, and the file showed that he had been informed that he must assume that the hearing of the appeal is going ahead unless he is notified otherwise.

4. We were satisfied that the postal address and email address being used by the Tribunal for communications were those that had been provided by Mr Sahbir in his Notice of appeal to the Tribunal. Accordingly, and having regard to Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) we concluded that it was in the interests of justice that the hearing should proceed.

RELEVANT FACTS

5. We find the following on the basis of the bundle of papers prepared by HMRC.

6. Mr Sahbir submitted his self-assessment return for the tax year 2014-2015 on 8 July 2016.

7. On 23 January 2017 HMRC opened an enquiry under s9A Taxes Management Act 1970 into that self-assessment return, requesting a response to an informal request for information by 27 February 2017.

8. On 21 July 2017 HMRC wrote to Mr Sahbir asking for a response to that letter of 23 January 2017 by 25 August 2017.

9. With no response having been received, on 30 May 2018 HMRC wrote to Mr Sahbir stating that HMRC were considering asking the Tribunal to approve the issue of an information notice. That letter enclosed a revised schedule of information and documents required. HMRC requested that the information and documents be provided by 30 July 2018. If Mr Sahbir had any representations he would like to be provided to the Tribunal then he should please let HMRC know by that same date.

10. On 24 July 2018 Mr Sahbir wrote to HMRC disagreeing with an approach being made to the Tribunal and making representations to be shown to the Tribunal in respect of this matter.

11. A Schedule 36 information notice was issued on 4 September 2018 (the “Information Notice”) in a form which had been approved by the Tribunal, requiring a response by 16 October 2018. That notice states that “If you do not do what this information notice asks, you may have to pay a penalty of £300.” The Schedule of records, information and documents was substantively the same as that which had been sent to Mr Sahbir on 30 May 2018 as referred to at [9].

12. The documents required by the Information Notice included the following:

- (1) at 1, “full, original bank or building society statements for any account held in your name, including any joint account, building society account or savings account for the period of your employment with Equip MS Ltd for the period covering your first date of

employment with Equip MS Ltd until 1 calendar month after your last date of employment with them”; and

(2) at 7, “a copy of any correspondence between you and any end user or client for the first 3 months of your provision of services to them (or the whole period if shorter), and any correspondence received prior to providing your services to them”.

13. On 11 October 2018 Mr Sahbir called HMRC to request an extension of time for responding to the Information Notice. An extension was granted to 30 October 2018.

14. On 26 October 2018 Mr Sahbir wrote to HMRC enclosing “all documents and information that have been requested in the information notice that I possess and/or have been able to attain”.

(1) in response to a request for documents other than those now in issue, Mr Sahbir stated as follows:

“4. The majority of correspondence between myself and Equip-MS was done on my Internal Equip-MS email address. I have contacted Phillip Galbraith [director of Equip-MS] for access to these emails and been made aware that they are no longer available as the email server for Equip-MS become corrupted after running out of Microsoft Support due to its age and has thus been scrapped. Please see enclosed email from Phil confirming this. However, I have enclosed copies of emails that were exchanged using my personal email address.”; and

(2) in response to item 7 he stated:

“7. The majority of correspondence between myself and Societe Generale was done on my internal Equip-MS email address, as previously stated these emails are no longer available to me.”

15. On 4 December 2018 HMRC wrote to Mr Sahbir:

(1) asking further questions in the light of information received;

(2) stating that bank statements he had provided covered the period from 15 September 2014 to 15 May 2015 whereas his employment with Equip MS was from 1 September 2014 to 31 March 2015. The Information Notice had requested statements for the period of employment covering the first date of employment until one calendar month after the last date of employment – please could he provide bank statements covering 1 to 14 September 2014;

(3) issuing a penalty notice to Mr Sahbir (the “Penalty Notice”) for failing to comply with the Information Notice in full as the bank statements in [14(2)] had been requested as part of the schedule;

(4) noting that it is within his power to obtain correspondence and documents from Société Générale. Please could he provide evidence to show that he had attempted to obtain this information; and

(5) asking Mr Sahbir to provide a full response by 13 January 2019.

16. On 13 December 2018 Mr Sahbir wrote to HMRC to appeal against the Penalty Notice.

17. On 22 January 2019 HMRC sent a “view of the matter” letter to Mr Sahbir explaining that as the Information Notice had not been fully complied with by the extended deadline the penalty had been imposed and the penalty was proportionate and reasonable. That letter clarified that two items had not been fully complied with:

(1) bank statements had not been provided for the full period of the employment – those for 1 to 14 September 2014 were missing; and

(2) Mr Sahbir had not provided a copy of any correspondence between him and any end user or client for the first three months of his provision of services to them, or any correspondence received prior to providing his services to them. It is within his power to obtain correspondence and documentation from any end user or client.

18. That letter noted that HMRC had still not received these items as at the date thereof and offered a review of the decision and setting out the right to appeal to the Tribunal, noting that the time limit in either instance was 30 days from 22 January 2019.

19. On 23 January 2019, Mr Sahbir responded to HMRC’s letter of 4 December 2018. He provided answers to the questions, enclosed the missing bank statement covering the period from 1 to 14 September 2014 and enclosed a copy of the letter he had sent to Société Générale requesting access/copies of his emails for the period he was working there. He had not received any response to date. The letter to Société Générale was dated 10 December 2018 (the “SocGen Letter”).

20. On 19 February 2019 Mr Sahbir requested a review of the matter by an independent officer, and confirmed at that time that he had not received the old emails requested from Société Générale.

21. On 2 April 2019 HMRC concluded their review and upheld the penalty. We note that this letter states:

“I note you have since provided the outstanding documents and information. This reinforces that the information and documents were within your possession and power to produce them with the original response of 26 October 2018.”

22. At the hearing Miss Fish confirmed that whilst HMRC had received the missing bank statement they had not received any material which had been obtained in response to the SocGen Letter. We accept and find that this was the case, and therefore it was not correct for HMRC to have stated on 2 April 2019 that they had now received the outstanding documents.

RELEVANT LEGISLATION

23. The relevant provisions are set out in Schedule 36 to Finance Act 2008 (“Schedule 36”), paragraphs 1, 3, 7, 18, 21, 29, 39, 45, 46 and 62 of which provide as follows:

“1 Power to obtain information and documents from taxpayer

(1) An officer of Revenue and Customs may by notice in writing require a person (“the taxpayer”)–

(a) to provide information, or

(b) to produce a document,

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

(2) In this Schedule, “taxpayer notice” means a notice under this paragraph.

3 Approval etc of taxpayer notices and third party notices

(1) An officer of Revenue and Customs may not give a third party notice without–

(a) the agreement of the taxpayer, or

- (b) the approval of the tribunal.
- (2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).
- (2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).
- (3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless–
 - (a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,
 - (b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
 - (c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,
 - (d) the tribunal has been given a summary of any representations made by that person, and
 - (e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.
- (4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.
- (5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax.

7 Complying with notices

- (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.

(4) The production of a document in compliance with an information notice is not to be regarded as breaking any lien claimed on the document.

18 Documents no in person's possession or power

An information notice only requires a person to produce a document if it is in the person's possession or power.

21 Taxpayer notices following tax return

(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of—

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates (“relevant tax”),

and the enquiry has not been completed so far as relating to the matters to which the taxpayer notice relates.

(5) In sub-paragraph (4), “notice of enquiry” means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that , as regards the person, an officer of Revenue and Customs has reason to suspect that—

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking the person's position as regards any tax other than income tax, capital gains tax or corporation tax.

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments of tax or withholding of income referred to in paragraph 64(2) or (2A) (PAYE etc).

(9) In this paragraph, references to the person who made the return are only to that person in the capacity in which the return was made.

29 Right to appeal against taxpayer notice

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

(2) Sub-paragraph (1) 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.

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3.

39 Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who—

(a) fails to comply with an information notice, or

(b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.

(2) The person is liable to a penalty of £300.

(3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.

45 Reasonable excuse

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

(2) For the purposes of this paragraph—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

46 Assessment of penalty

(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A, —

(a) HMRC may assess the penalty, and

(b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

- (a) the date on which the person became liable to the penalty,
- (b) the end of the period in which notice of an appeal against the information notice could have been given, and
- (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

(4) An assessment of a penalty under paragraph 40A must be made—

- (a) within the period of 12 months beginning with the date on which the inaccuracy first came to the attention of an officer of Revenue and Customs, and
- (b) within the period of 6 years beginning with the date on which the person became liable to the penalty.

62 Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is 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,
- subject to the following provisions of this paragraph.

(2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—

- (a) does not relate to the carrying on of a business, and
- (b) is not also required to be kept or preserved under or by virtue of [any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.”

24. References to paragraphs are to paragraphs of Schedule 36.

SUBMISSIONS

25. We have carefully considered the arguments set out in Mr Sahbir's appeal to HMRC on 13 December 2018, his letter of 19 February 2019 requesting a review of HMRC's decision and his Notice of appeal to the Tribunal. Between those documents he sets out the following arguments:

- (1) the missing bank statement was omitted accidentally and he provided this as soon as he was notified of the mistake. This was a small oversight when considering the large amount of documents that were requested and provided;
- (2) the data requested from a previous employer was not in his possession so this could not be provided. He did subsequently provide to HMRC a copy of the SocGen Letter as evidence that he had made contact with the end client, and confirmed in his letter of 19

February 2019 that he still did not have these emails. He highlighted that such old emails would be likely to have been backed up on tape (if kept at all) and it is neither simple nor inexpensive to recover them. It is not within his power to demand that Société Générale provide this; and

(3) the penalty of £300 is unfair, unreasonable and disproportionate.

26. HMRC submitted that the Information Notice was valid, and that in any event the scope of the Tribunal's jurisdiction in this appeal is limited to considering whether Mr Sahbir had provided all of the information required by the Information Notice in time and, if not, whether he had a reasonable excuse for failing to comply or that items were not in his possession or power. The validity of the Information Notice and whether it was reasonable for HMRC to expect Mr Sahbir to provide the information cannot be appealed.

27. The two items specified in the "view of the matter" letter at [17] were outstanding following the extended deadline for compliance, and this is not disputed.

28. HMRC do not accept that there is a reasonable excuse for failing to provide the bank statements, and they treat the SocGen Letter as evidence that it was within Mr Sahbir's power or possession to obtain the information before the extended deadline.

DISCUSSION

29. The burden of proof is on HMRC to establish that the penalty was properly assessed. If this is established, then the burden of proof is on Mr Sahbir to demonstrate that the relevant documents were not in his possession or power or that he had a reasonable excuse for non-compliance with the Information Notice.

30. The Information Notice given by HMRC on 4 September 2018 had been approved by the Tribunal under paragraph 3(2). The consequence of the Tribunal having approved this notice is that a taxpayer may not appeal against either the notice or any requirement in the notice (paragraph 29(3)). We therefore do not have jurisdiction to consider whether the Information Notice was valid.

31. Paragraph 39 provides that a person who fails to comply with an information notice is liable to a penalty of £300. Paragraph 46 then provides that where a person becomes liable to a penalty under paragraph 39, HMRC may assess the penalty and if they do so they must notify the person. An assessment must be made within 12 months of the date on which the person became liable to the penalty.

Bank statement covering period 1 to 14 September 2014

32. Mr Sahbir was employed by Equip MS from 1 September 2014 to 31 March 2015, but provided bank statements covering the period from 15 September 2014 to 15 May 2015.

33. Mr Sahbir has not denied that the Information Notice (as set out at [12(1)]) required him to produce bank statements covering the two-week period from 1 to 14 September 2014 or that he had failed to do so. He therefore failed to comply with the Information Notice and was thus liable to a penalty under paragraph 39, which was properly assessed by HMRC in accordance with paragraph 46.

34. The question is then whether Mr Sahbir has established that he had a reasonable excuse for this failure within paragraph 45. Paragraph 45 provides that liability to a penalty does not arise if a person satisfies HMRC or the Tribunal that there is a reasonable excuse for the failure which was remedied without unreasonable delay after the excuse ceased. For this purpose:

- (1) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control; and
- (2) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure.

35. Mr Sahbir argues that this was a mistake, a small oversight, and that he provided the missing statement as soon as he was informed of the mistake. This reason for non-compliance is not excluded from being a reasonable excuse by paragraph 45(2).

36. In *The Clean Car Co Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

"One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?..."

It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

37. That this is the correct test has recently been confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

Second, decide which of those facts are proven.

Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default. In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the Tribunal should again decide the matter objectively, but taking into account the experience and other relevant attributes of the

taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

38. Applying that approach here, we note that the schedule of information which formed part of the Information Notice was the same as that which had been sent to Mr Sahbir on 30 May 2018. The Information Notice was not issued until 4 September 2018, and the extended deadline for responding was 30 October 2018. We have no doubt that this afforded Mr Sahbir plenty of time to put together the information and documents requested, notwithstanding that the schedule was lengthy (comprising 25 questions seeking information and 18 requests for documents, and in both categories several of these numbered items were broken down even further). However, Mr Sahbir has not said he did not have time to locate this bank statement – he omitted it by mistake. HMRC have not challenged his statement that this a simple oversight, and we accept that.

39. We have considered whether, viewed objectively, this mistake amounts to a reasonable excuse for the default. We consider that the following statement of Judge Hellier in *Garmoss Ltd (t/a Parham Builders) v HMRC* [2012] UKFTT 315 (TC) (which concerned the imposition of the default surcharge) is apt:

“12. What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse...”

40. We have concluded that the mistake made by Mr Sahbir does not constitute a reasonable excuse – the Information Notice set out an extensive yet clear list of documents which were to be produced and specified the period which the bank statements were required to cover. We do not consider that a mistake, however innocently made, constitutes a reasonable excuse in this situation.

41. Mr Sahbir has also argued that the penalty of £300 is unfair, unreasonable and disproportionate.

42. The £300 penalty is a fixed penalty imposed by paragraph 39, irrespective of whether the level of non-compliance with the Information Notice was large or small when viewed in the context of the amount of information required and that actually produced.

43. In *Edwards v HMRC* [2019] UKUT 0131 (TCC), the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were “special circumstances” which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 Finance Act 2009 established a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

44. Schedule 36 does not contain a similar relieving provision for “special circumstances”, but we consider that the reasoning of the Upper Tribunal in *Edwards* can also be applied to the fixed penalty imposed under paragraph 39. Fixed penalties establish a fair balance between the public interest in ensuring that taxpayers comply with their obligation to respond fully to

information notices and the financial burden that a taxpayer who fails to comply has to bear. Accordingly, we reject this ground of appeal.

45. In light of the above we do not need to consider the second allegation of non-compliance by HMRC, but we do so as we heard HMRC's submissions on the matter and have carefully considered Mr Sahbir's position.

Information from previous employer

46. Mr Sahbir accepts that he did not provide correspondence as required by item 7 of the list of documents, as set out at [12(2)]. He has, however, provided:

(1) an explanation of his inability to obtain any emails from Equip MS, as set out at [14]; and

(2) the SocGen Letter which shows that he has sought to obtain the information from the end client, Société Générale. We note that this was dated after the deadline had passed for responding to the Information Notice, and was sent shortly after he received the letter from HMRC informing him that he had not provided this information.

47. From the papers provided by Mr Sahbir in response to the Information Notice and the explanations given by HMRC as to why they had opened the enquiry and were seeking additional information, we find that at the relevant time Mr Sahbir was employed by Equip MS and Equip MS was providing his services to Société Générale. To the extent that the correspondence required by HMRC comprised emails, these would have been between Mr Sahbir's email address at Equip MS and Société Générale.

48. Paragraph 18 provides that an information notice only requires a person to produce a document if it is in the person's "possession or power". HMRC accept that this documentation sought by [12(2)] was not in Mr Sahbir's possession. The only question is whether it is within Mr Sahbir's power to produce the document.

49. This limb of paragraph 18 is directed at the situation where a taxpayer does not have the required documentation themselves but has the right to require that a third party who does have that document provides it to them. In the present instance, such third party could potentially be either Equip MS or Société Générale.

50. We have reviewed Mr Sahbir's contract of employment with Equip MS and that contract provides no basis to support a conclusion that he would have any power to require them to give him access to emails he had sent or received from his Equip-MS during his period of employment. Notwithstanding this, Mr Sahbir did ask Equip-MS for a copy of these emails and provided HMRC with evidence of this which included an explanation as to why nothing had been forthcoming. This was provided to HMRC on 26 October 2018.

51. From the surrounding facts which are before us we assume that any contract relating to Mr Sahbir's provision of services to Société Générale would have been between Equip MS and Société Générale. We do not have a copy of that contract (unsurprisingly given that Mr Sahbir would not have been a party to it). We do not therefore know whether any provision was made for access to information or emails after Mr Sahbir's services were no longer provided to Société Générale.

52. Mr Sahbir has asked Société Générale for access to emails which would, if provided, enable him to provide HMRC with the documentation they have requested. We have seen the SocGen Letter, and accept that as at 19 February 2019 (when Mr Sahbir requested a review of HMRC's decision) the requested information had not been provided by Société Générale to

Mr Sahbir. By the date of the hearing Mr Sahbir had not provided this information to HMRC. His non-attendance means that we do not know if he has received it himself and not sent it to HMRC or if he has not received anything. Nor do we know if he has sought to pursue Société Générale further to chase for a response. We make no findings on either matter.

53. HMRC assert that the fact that Mr Sahbir wrote to Société Générale to request the information evidences that it was in his power to obtain this information before the extended deadline. We disagree. We can all ask anything of anyone – that does not mean that we have a right to it, or that it is in our power to require that they provide it. We have no basis on which to conclude that Mr Sahbir had power to obtain correspondence or documentation from Société Générale. As noted above, he could ask them for such correspondence, and did so.

54. We conclude that the correspondence requested at [12(2)] was not within Mr Sahbir's possession or power. It is therefore not required to be produced by the Information Notice, and his failure to provide it was not a failure to comply with the Information Notice. If this had been the only act of non-compliance on which HMRC relied we would have allowed Mr Sahbir's appeal.

CONCLUSION

55. We uphold the penalty of £300 and dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

RELEASE DATE: 18 OCTOBER 2019