



[2021] UKFTT 0198 (TC)

TC08148

*INCOME TAX – Schedule 36 information notice –non-compliance - daily penalties–
reasonable excuse*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/03824

BETWEEN

COTSWOLD FINANCIAL PLANNING LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

The Tribunal determined the appeal on 5 February 2021 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 29 October 2020, HMRC’s Statement of Case and the further documents contained within the document bundle.

DECISION

INTRODUCTION

1. This is an appeal by Cotswold Financial Planning Limited (“**CFPL**”) against daily penalties for failure to comply with an information notice issued under Schedule 36 to Finance Act 2008.

FINDING OF FACTS

2. Based on the documents in the document bundle, I find the following facts.

3. HMRC opened an enquiry into CFPL’s corporation tax returns for the years ended 31 December 2016 and 2017 under paragraph 24(1) of Schedule 18 to Finance Act 1998 on 29 March 2018. By way of the same letter, HMRC also notified CFPL that it was conducting a compliance check of the company’s PAYE and NICs position for the same periods, but also including the year ended 31 December 2015. This letter identified remuneration trusts referred to in the relevant sets of accounts as the areas being checked.

4. As part of that enquiry, HMRC informally requested information and documents from CFPL, via its agent, with a deadline of 6 July 2018.

5. During the course of 2018, CFPL’s agent challenged the validity of HMRC’s checks into CFPL’s tax affairs. CFPL did not provide any of the information or documents in response to the informal request.

6. On 7 December 2018, HMRC issued a taxpayer notice under Sch 36 to Finance Act 2008, without the approval of the Tribunal, formally requesting a list of documents and information, with a deadline of 31 January 2019.

7. On 22 December 2018, CFPL produced some of the documents requested and made an appeal against elements of the information notice to HMRC.

8. On 11 January 2019 HMRC provided its response to the appeal; upholding the information notice in its entirety and dismissing CFPL’s appeal. The response offered a review of the decision if requested within 30 days.

9. CFPL’s agent accepted the offer of a review on 31 January 2019.

10. On 15 March 2019, HMRC provided its review conclusion, again upholding the information notice in its entirety. The letter gave a further 30 days for compliance with the information notice and also detailed CFPL’s option to appeal to the tribunal (which they did not do at that stage).

11. On 10 April 2019, some further documents on the list in the information notice were provided by CFPL to HMRC.

12. On 16 May 2019, HMRC set out in a letter what remained outstanding for the information notice. The letter gave a new deadline of 16 June 2019 and highlighted that a penalty of £300 would arise without further warning if this deadline was not complied with. The letter also referred to the possibility of daily penalties of up to £60 per day if the notice was not complied with by the time the initial penalty is issued.

13. On 22 May 2019, CFPL produced all the remaining documents and information requested, save for the trust deed of the Buckingham Administrators Limited Remuneration Trust dated 28 April 2014 (the Trust Deed).

14. Enclosed with the 22 May 2019 letter were two letters from CFPL's agent (also dated 22 May 2019) to Buckingham Administrators Limited in Belize and Costa Corporate Services Limited, also in Belize, requesting a copy of the Trust Deed.

15. On 27 June 2019, HMRC issued a letter identifying the Trust Deed as the only remaining item and enclosing a fixed penalty of £300 for the failure to comply with the information notice. The penalty notice set a new deadline of 29 July 2019 and stated that if the company did not meet this deadline, daily penalties of up to £60 a day could be charged from the date of the penalty notice.

16. CFPL appealed against that penalty to HMRC on 1 July 2019. The grounds of that appeal were that the document was not in the possession or power of CFPL and that they had made 'numerous and serious attempts to obtain the Trust Deed from the relevant parties and will continue to do so'.

17. On 16 August 2019, HMRC provided its view of the matter, being that the Trust Deed was in the power of CFPL and that CFPL had not provided any evidence to demonstrate what it had done to obtain the documents (other than a letter dated 22 May 2019 written to the Trustees) or considered whether persons other than the Trustees might be able to provide the documents to CFPL.

18. On 28 November 2019, HMRC provides its response to the statutory review, being that, until CFPL could show that the request for the Trust Deed had been refused, HMRC considers the document to be in CFPL's power. The penalty was upheld in the review.

19. On 28 February 2020, HMRC issued daily penalties covering the period from 28 June 2019 to 27 February 2020 at a rate of £10 per day, amounting to a total of £2,440.

20. On 12 March 2020, CFPL appealed to HMRC against the penalty notice. In the same letter, CFPL also enclosed a copy of the Trust Deed.

21. On 21 May 2020, HMRC:

- (1) Provided its view of the matter that the penalty notice was validly issued, and
- (2) confirmed that the information notice had been complied with in full and no further penalties would be raised.

22. On 10 June 2020, CFPL requested a review of the matter.

23. That review was concluded on 22 October 2020 and the daily penalties were upheld.

24. CFPL submitted an appeal against the daily penalties notice to the Tribunal on 29 October 2020.

25. Further findings of fact are made within the discussion below where they are relevant to particular elements of the appeal.

LAW

26. The information notice was issued by HMRC under the powers given in schedule 36 to Finance Act 2008. Paragraph 1 of Schedule 36 provides:

- (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.

27. Paragraph 6 sets out the requirements for the notice:

(1) In this Schedule, “information notice” means a notice under paragraph 1, 2, 5 or 5A.

(2) An information notice may specify or describe the information or documents to be provided or produced.

(3) If an information notice is given with the approval of the tribunal, it must state that it is given with that approval.

(4) A decision of the tribunal under paragraph 3, 4 or 5 is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

28. Paragraph 7 sets out the compliance requirements including:

(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.

29. Part 4 of Schedule 36 sets out restrictions on the scope of information notices, including:

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

30. Paragraph 29 sets out appeal rights against information notices and restrictions on such rights:

29—

(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.

31. Paragraphs 39 and following deal with penalties and provide (to the extent relevant to this appeal):

(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.

40—

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

45—

(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—

(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).

32. Paragraph 47 makes provision for appeals against penalties:

47

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

(a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

33. Paragraph 48 provides the powers of this tribunal in such an appeal:

(3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

PARTIES' ARGUMENTS

Taxpayer's arguments

34. The taxpayer argues, in the notice of appeal and the subsequent letter dated 26 November 2020, that:

(1) CFPL did not have the information or the legal or practical power to obtain it. The efforts taken to obtain the document were as follows:

(a) CFPL is not a settlor or protector of the Trust and has no power or influence over the third parties to compel them to provide the Trust Deed

(b) Neither CFPL nor their advisers had ever held a copy of the Trust Deed,

(c) A request was made to the legal agent and the trustees;

- (d) The only response was a short message stating that they “were not obliged to disclose or supply any such information”;
 - (e) CFPL made numerous and serious attempts to obtain the Trust Deed;
 - (f) After a telephone call with HMRC on 24 February 2020, CFPL’s agents decided to “become aggressive” in their requests and rang the trustees, on which phone call the trustees stated that “we will think about it”;
 - (g) Within a few days of that conversation, they received a copy of the trust deed and forwarded it to HMRC.
- (2) The supply of the information was beyond their control, which was demonstrated by the time it took them to persuade the third parties holding the information to release it;
 - (3) It is wrong to penalise someone for not complying with something that is outside their control;
 - (4) If CFPL had been able to obtain the information earlier they would have done so;
 - (5) The delay related only to a single document of many;
 - (6) The size of the penalty seems harsh, particularly given the information notice was ultimately complied with;
 - (7) HMRC has sent a significant number of requests and pieces of correspondence to CFPL over recent years and it is becoming increasingly difficult to comply with all of them;
 - (8) None of the delayed information has resulted in any additional questioning from HMRC and therefore nothing has been affected by the delay.

HMRC arguments

35. HMRC’s arguments can be summarised as follows:

36. CFPL’s opportunity to raise its concerns about whether the Trust Deed was in its power or possession was during its appeal against the information notice itself and not as part of its appeal against the penalties. CFPL raised power and possession arguments about other documents on the list during its appeal to HMRC in December 2018 noted in paragraphs 7-10 above, but not in relation to the Trust Deed.

37. CFPL did not elect to appeal against HMRC’s decision on review to the Tribunal and it is therefore treated as settled under section 54 of the Taxes Management Act 1970 once 30 days from the decision has elapsed.

38. The authority in *R (oao PML Accounting Ltd) v HMRC* [2018] EWCA Civ 2231 at paras 42-51 supports the conclusion that CFPL is not entitled to raise issues on the validity of the information notice on an appeal against penalties only.

39. HMRC accept that the Trust Deed was not in CFPL’s possession.

40. Even if CFPL were able to raise an argument based on the document not being in its power, HMRC submit it would fail. The reasons for this are explained in the paragraphs below about reasonable excuse.

41. The daily penalty notice was validly issued under paragraph 40 of Sch 36 to FA 2008 because there had been an initial failure to comply with the information notice under paragraph 39 (which gave rise to the £300 penalty issued on 27 June 2019) and the failure continued until the day before the para 40 notice was issued, ie 27 February 2020.

42. The penalty rate of £10 was at the lower end of the scale of potential penalties, which can be up to £60 per day pursuant to paragraph 40 of Sch 36 to FA 2008. HMRC reduced the penalty amount to this level based on the amount of tax at risk and concluded that it was proportionate.

43. The penalty notice was issued to CFPL in accordance with para 46 of Schedule 36.

44. CFPL did not have a reasonable excuse for its failure to comply.

45. The document was within its power as evidenced by the fact that the document was eventually submitted and the cause of its failure to obtain the document earlier appears to have been inaction, rather than actual difficulty in obtaining the document.

46. CFPL's either made a mistake or showed a lack of care in contacting the wrong trustees and did not remedy the situation quickly after that information came to light and therefore even if it had had a reasonable excuse, it had not submitted any evidence that it was remedied without unreasonable delay once the excuse ceased.

47. CFPL had not submitted any grounds that demonstrate why there was such a delay or what precise steps were taken to obtain the Trust Deed and that there was no objectively reasonable excuse for the delay pursuant to the approach in *Perrin v HMRC* [2018] UKUT 156 (TCC).

DISCUSSION

Jurisdiction of this Tribunal in this appeal

48. It is very clear from the decision of the Court of Appeal in *PML Accounting* that the validity or otherwise of the information notice itself is outside the jurisdiction of this Tribunal in circumstances where the taxpayer has a right of appeal against the validity of the information notice that has either been exhausted or that the taxpayer has decided not to use.

49. In this case, the taxpayer did appeal to HMRC against a number of matters in the information notice. Following HMRC's refusal of the appeal, the taxpayer accepted a review, which was also refused, in a letter dated 15 March 2019. Since the taxpayer did not appeal further to this Tribunal, that matter is deemed to have been settled after 30 days pursuant to section 54 of TMA 1970.

50. Therefore, this decision will not consider the validity of the information notice.

51. The appeal will also not consider the validity of the assessment of the first £300 penalty under paragraph 39, other than as a pre-cursor to the application of the penalty under paragraph 40.

52. This appeal will also not consider the appellant's assertions regarding either the volume of correspondence HMRC has entered into with CFPL and their advisers or the fact that the delivery of the Trust Deed has not had any impact on the further enquiries that HMRC have undertaken since it was delivered. Neither of these issues amounts to a ground of appeal against the imposition of the penalty or the quantum of the penalty. CFPL's avenues for addressing those concerns would include making a complaint to HMRC and requesting that HMRC issue a closure notice in relation to the enquiry.

Was the penalty notice validly issued?

53. HMRC must show that the penalty notice under appeal has been validly issued.

54. I find as a matter of fact that CFPL failed to comply with the information notice until 12 March 2020, when the final document, the Trust Deed, was delivered to HMRC. Therefore the first condition in paragraph 39(1) for the assessment of a penalty was met at the time of the issue of that first penalty (27 June 2019) and continued after that date. This continued failure means that the first condition in paragraph 40(1) for the assessment of daily penalties was met at the date of the issue of the daily penalties (28 February 2020).

55. The daily penalties were charged in respect of the 244 days between 28 June 2019 (being the day after the penalty was imposed under paragraph 39) and 27 February 2020 (being the day before the daily penalty notice was issued). The charging of the daily penalties over this period complies with the requirements of paragraph 40(2).

56. Under paragraph 46(1), when HMRC has made an assessment of a penalty under paragraph 40, HMRC must notify the person. I find as a matter of fact that the penalty notice was issued to CFPL and that the notification requirement has therefore been met.

57. Finally, under paragraph 46(3), I find that HMRC assessed the penalty within 12 months of the date on which the appeal against the information notice was determined under section 54 of TMA 1970. The date on which the appeal against the information notice is treated as determined is 30 days after the letter in which HMRC refused the appeal on review, which was 15 March 2019, i.e. the appeal against the information notice is treated as determined on 14 April 2019. The issue of the penalty notice on 28 February 2020 falls within 12 months of that date.

58. I therefore find that the penalty assessment and notice meet all the statutory requirements.

Did CFPL have a reasonable excuse?

59. However, the penalty can still be removed if CFPL can show that it had a reasonable excuse for its failure to comply with the information notice.

60. As set out in Upper Tribunal, in *Christine Perrin v HMRC* [2018] UKUT 0156, I must take a three-step approach to considering whether CFPL has a reasonable excuse:

- (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse;
- (2) Second, decide which of those facts are proven; and
- (3) Third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, eg by asking the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”.

61. The burden of proof is, by virtue of paragraph 45(1) of Schedule 36 to FA 2008, on CFPL to satisfy the Tribunal that it had a reasonable excuse for its failure to comply with the information notice.

62. As noted above, HMRC accept that the Trust Deed was not in CFPL’s possession until it was provided to them by the Trustees shortly before it was forwarded to HMRC.

63. CFPL however argues that the document was also not in their power since they were not in a legal or practical position to require the trustees to furnish them with a copy of the Trust Deed.

64. Noting that the opportunity to challenge to the validity of the information notice has passed and this Tribunal cannot consider it again, it is undoubtedly the case (and it was inferred in HMRC’s statement of case that HMRC accepts this) that the fact that a document is not in a person’s power could amount to a reasonable excuse for not complying with the information

notice. I therefore consider that the case law relating to the meaning of a document being within a person's power is instructive in assessing whether CFPL had a reasonable excuse.

65. The case law I considered were decisions of the First-tier Tribunal in *Parissis* [2011] UKFTT 218 (TC) and *Alvi* [2016] UKFTT 0201 (TC).

66. The Tribunal in *Parissis* stated that (para 79):

“We consider, in the context of information notices where the emphasis is on the present and future, and contrary to the conclusion reached in *Lonrho* in the context of disclosure for litigation where the emphasis was on the present and past, that documents are within a person's power if they can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them.”

67. The Tribunal went on to state that (para 82):

“HMRC have raised a prima facie case that the documents are within the power of the Respondents and we therefore think it is for the Respondents to show that they have asked the trustee for the documents and been refused. They have not done this. They are therefore liable to a penalty.”

68. The Tribunal in *Alvi* noted that the taxpayer had a legal right to call for information from trustees because the taxpayer was a settlor and borrower from the trust.

69. As CFPL notes in its submissions, it is not a settlor or protector of the trust. However, I find from the evidence before me that it did sign a deed of adherence to the trust, which required CFPL to comply with the terms of the trust, and made significant contributions to it. It is therefore not unreasonable for HMRC to assert that the document is within CFPL's power.

70. I therefore find that HMRC had raised a prima facie case that the Trust Deed was within the power of CFPL.

71. As a result, following the reasoning in *Parissis*, it is for CFPL to show that they have taken reasonable steps to obtain the document and if unsuccessful to provide evidence of the refusal of the requests (if there is such a refusal).

72. CFPL makes several assertions about the numerous and serious and even ‘aggressive’ attempts to obtain the documents.

73. However, there is very little evidence supplied about these attempts or of the responses from the Trustees. The following assertions are made:

(1) Letters were sent to Buckingham Administrators Ltd and Costa Corporate Services Limited (who were the Trustees named on the Trust Deed and deed of adherence that were ultimately supplied) on 22 May 2019 (on the same day as the letter back to HMRC enclosing other documents under the information notice);

(2) the only response received from the Trustees was a “short curt message” that they “were not obliged to disclose or supply any such information” – there is no such message in evidence or any indication of when this message was received by CFPL;

(3) CFPL informed HMRC on 15 December 2019 that they had “just found out” that they had been chasing the wrong trustees (Costa Corporate Services) and should have been requesting the information from BOSL trusts team at Belize Offshore Services Limited (BOSL). They enclosed an email exchange, which:

(a) started with CFPL's advisers on 11 December 2019 requesting ‘a copy of the trust deed’. This request was apparently made via an attachment, which was not enclosed and I therefore do not know whether this request referred to the original 2014 trust deed, the deed of adherence or some other deed; and

(b) included BOSL's response (strangely not dated other than to say Friday at 21:51, but assumed to be on Friday 13 December 2019 since it was forwarded by Sunday 15 December 2019) attaching the deed of adherence and fiduciary services agreement (but not the Trust Deed) and stating that "all other documents are confidential".

(4) A telephone call was made to the trustees at some point after 24 February 2020, when CFPL decided to "become aggressive" in their requests. The telephone call ended with the trustees saying they would think about it.

(5) The Trust Deed was then provided, presumably by BOSL, at some point before 12 March 2020, when it was provided to HMRC.

74. In accordance with the approach in *Perrin*, I consider that CFPL is asserting that these attempts to obtain the Trust Deed and the trustee's refusal or unwillingness to supply them amount to a reasonable excuse.

75. I must then consider which of those facts are proven. I find that:

(1) CFPL's advisers sent letters to Buckingham Administrators Ltd and Costa Corporate Services Limited on 22 May 2019 requesting a copy of 'the trust deed', under the heading "Costwold Financial Planning Limited – Remuneration Trust";

(2) CFPL's advisers sent an email to BOSL on 11 December 2019 requesting a copy of 'the trust deed';

(3) BOSL replied with other documents on 13 December 2019 and stated that all other documents are confidential; and

(4) CFPL's advisers made a telephone call between 24 February 2020 and 12 March 2020 to BOSL making a further request for the Trust Deed.

76. Having identified these proven facts, I must then decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, eg by asking the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?".

77. I conclude that what the taxpayer did was not objectively reasonable in the circumstances. Given that the argument that the document was not in CFPL's power is central to the appeal, remarkably little by way of evidence has been put before me.

78. CFPL waited over 5 months from the initial information notice (7 December 2018 to 22 May 2019) before making its first request to the trustees. This was despite providing several other documents and despite the fact that it did not, in its initial appeal against the information notice, argue that the Trust Deed was outside its power or possession.

79. No evidence at all has been provided of the responses of those trustees, save for the brief email from 13 December 2019 (over a year from the initial information notice), which is ambiguous because I do not know the scope of the request made.

80. At some point it became apparent that the letters had been sent to the wrong trustees, but again, there is no evidence provided of when or how this discovery was made.

81. Ultimately, all it took was a phone call to the trustees to insist on the provision of the Trust Deed for it to be forthcoming within a few days.

82. It is a matter of fact that CFPL was able to obtain the Trust Deed, by influence or otherwise, and without great expense. However, I find that CFPL has not shown that it took sufficient steps to do that in a reasonable time frame, such that their actions might constitute a reasonable excuse.

83. I therefore find that CFPL did not have a reasonable excuse for the failure to comply with the notice.

The quantum of the penalty

84. In accordance with paragraphs 47 and 48, an appeal can be made as to the amount of the penalty and this tribunal can either confirm the decision or substitute another decision that HMRC could have made.

85. CFPL argue that the amount of the penalty is too high, particularly given that it relates to a single document out of a large number, the remainder of which were supplied within a shorter time frame.

86. HMRC set out in its statement of case that the following were factors considered by HMRC:

(1) The importance of the document – in that it is a fundamental scheme document and it informs HMRC’s decision making. The Appellant has claimed it contributed to this Trust in a commercial transaction and that the transaction was wholly and exclusively for the purpose of the Appellant’s trade, so it is an essential document;

(2) The Appellant was notified a number of times the items was outstanding but was not providing the missing item;

(3) The £300 penalty had not encouraged the Appellant to provide the missing document;

(4) It was almost two years since the enquiry had started and a key document was still missing;

(5) A penalty of £10 per day was at the lower end but based on the factors above was reasonable in the circumstances.

87. Although this was set out in the statement of case, the matters were not addressed in the witness statement of James Moss, the officer of HMRC who issued the penalty notice. The reasoning for setting the penalty at this level is therefore not a proven fact. However, my task is not to consider whether HMRC made a rational decision, but to decide on the appropriate level for the penalty.

88. While it is true that there was only one document outstanding that gave rise to the penalty, the number of documents is not the only relevant factor; the importance of the document is also relevant. The Trust Deed is an important document in HMRC’s enquiry, which relates to contributions made by CFPL to the trust.

89. The maximum daily penalty that can be imposed is £60 per day (although there are circumstances where this maximum can be increased to £1000 per day and where the penalty can be tax-geared, neither of which have been engaged here). A penalty at £10 is 16.6% of the maximum and is at the lower end of the amount that can be charged. The fact that the total sum amounts to a large sum of £2,440 derives from the period of time that the penalties are charged over, being 244 days.

90. The clear policy intent of a daily penalty regime is to encourage compliance with the information notice. CFPL were warned of the risk of daily penalties when the first £300 penalty was charged.

91. I note that some of the submissions from CFPL suggest that the amount of the penalty is disproportionate. It is not entirely clear the basis on which CFPL considers this is relevant, but I will deal with this challenge briefly. This Tribunal is a creature of statute and must take

the limits of its jurisdiction from the statute that has created it. The limits of what this Tribunal can decide in the context of an appeal against a penalty have been set out above.

92. However, this Tribunal is said to have the power to consider proportionality of penalties in some circumstances. The meaning of 'proportionality' in the context of penalties was explained in *International Transport Roth* [2002] EWCA Civ 158; a penalty can be disproportionate if it is 'not merely harsh but plainly unfair'. The leading cases on proportionality in cases involving tax penalties are *Total Technology* [2012] UKUT 418 (TCC), *Bosher* [2013] UKUT 579 (TCC) and *Trinity Mirror* [2015] UKUT 421 (TCC). None of them deals with penalties for non-compliance with an information notice.

93. These cases indicate that a penalty regime as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate in its particular circumstances, without the entire scheme of the legislation being disproportionate.

94. The late filing penalty regime in schedule 55 to Finance Act 2009 was considered in *Barry Edwards* [2019] UKUT 131 (TCC), where the Upper Tribunal found the regime as a whole to be proportionate, finding (paragraph 85):

“The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes 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.”

95. I find that the same fair balance exists in the penalty regime for non-compliance with the information notice regime.

96. I also note that there is no 'special circumstances' provision in the information notice regime (unlike the late filing regime) which would enable me to consider the question of proportionality of the penalty in the particular circumstances of CFPL. Even if I could, CFPL have submitted no evidence as to why such a penalty amount is disproportionate to the company's specific circumstances.

97. Taking all of these factors into account, I find that £10 a day was an appropriate penalty to impose.

CONCLUSION

98. For the reasons set out above, I confirm the penalty assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

RELEASE DATE: 01 JUNE 2021