Neutral Citation: [2023] UKFTT 00744 (TC)

Case Number: TC08924

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal references: TC/2023/14187
TC/2023/14188

PROCEDURE- information notice and penalty notice - application to make late appeals – application allowed in respect of the information notice but rejected in respect of the penalty notice –statutory records?- directions given re strike out for lack of jurisdiction

Heard on: 25 July 2023
Judgment date: 31 August 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

CONTRACTORS SUPPORT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Colin Smith of The Independent Tax and Forensic Services LLP

For the Respondents: David Street litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. These appeals are concerned with an information notice issued by HMRC on 12 May 2022 under paragraph 1 of Schedule 36 Finance Act 2008 ("**Schedule 36**") for the accounting periods ended 21 November 2017, 30 November 2017, 30 November 2018 and 30 November 2020 ("**the information notice**"). The appellant (or "**the company**") appeals against the requirement to provide the information set out in the information notice. HMRC have also issued a penalty notice to the appellant for failing to comply with that information notice in the sum of £300 ("**the penalty**"). The appellant appeals against the penalty.

2. However, the hearing which took place on 25 July 2023 was restricted to a consideration of whether I should give permission to the appellant to make late appeals against the penalty and the information notice.

THE LAW

3. There was no dispute about the relevant statutory or case law which I summarise below.

Information notices

4. Paragraph 1 to Schedule 36 provides that an officer of HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer's tax position.

5. Paragraph 29 Schedule 36 provides that a taxpayer can appeal against an information notice or any requirement in an information notice unless the requirement is to provide information or produce documents which form part of the taxpayer's statutory records.

6. Paragraph 62 Schedule 36 provides that information or documents will form part of a persons "statutory records" for present purposes if:

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

7. Paragraph 21 Schedule 36 provides for a duty on companies to keep and preserve records for the purpose of making company tax returns. In so far as relevant it provides as follows:

> "(1) A company which may be required to deliver a company tax return for any period must —
>
> (a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and
>
> (b) preserve those records in accordance with this paragraph.
>
> ……..
>
> (5) The records required to be kept and preserved under this paragraph include records of—
>
> (a) all receipts and expenses in the course of the company's activities, and the matters in respect of which the receipts and expenses arise, and
>
> (b) in the case of a trade involving dealing in goods, all sales and purchases made in the course of the trade".

8. In the decision in *Couldwell Concrete Flooring Ltd v HMRC* [2015] UKFTT 0136 ("***Couldwell***"), Judge Cannan made the following observations regarding statutory records:

> "23. In our view paragraph 21(1)(a) requires a company to keep all records which are necessary to establish, without doubt, that a return is accurate. That will include all documents and information necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period. The requirement that the return must be correct and complete

implies a requirement that the documents and information to be kept must evidence that the return is correct and complete.

24. What is needed may depend to some extent on the nature of the company's business. The Appellant's business is laying concrete floors for garages, industrial units and supermarkets. We were told that the Appellant uses a Sage computerised accounting system, but not for all accounts. It maintains some manual records including those for petty cash and excel spreadsheets for various purchases. To some extent it is a cash business.

25. In our view it is plainly necessary for any company seeking to prepare a correct and complete tax return to have records of sales, purchases, receipts, payments, trade debtors and other debtors. If a business operates a bank account it will need to keep a record of transactions on the account and of the balance on the account at any particular time to ensure that receipts and expenditure have been properly recorded. Not just in the company's accounting records but also that the transactions and balance on the account have been properly recorded by the bank".

9. 7. A person who fails to comply with an information notice may be liable to an initial penalty of £300 under paragraph 39 Schedule 36.

Late appeal

10. Any appeal against an information notice or a requirement within it must be brought within 30 days of the date on which that information notice is issued. The same is true of the penalty. However, under section 49 Taxes Management Act 1970, a late notice may be given after that date if HMRC agree, or if HMRC do not agree, the tribunal gives permission.

11. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which we should follow when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), ("*Martland"*) in which the Upper Tribunal considered an appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

"44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for

statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal".

12. In *HMRC v BMW Shipping Agents* [2021] UKUT 0091, the Upper Tribunal relevantly said this:

"52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated".

THE INFORMATION NOTICE

13. The information requested by the information notice which was issued on 12 May 2022 is set out below:

- Confirmation as to whether Contractors Support Limited held any bank and/or building society accounts, at any time during the accounting periods ending 21 November 2017, 30 November 2017, 30 November 2018 and 30 November 2020.
- If any bank and/or building society accounts were held, copies of all statements for each account held, relating to the accounting periods ending 21 November 2017, 30 November 2017, 30 November 2018 and 30 November 2020.
- Details of all clients for whom Contractors Support Limited provided services for during the accounting periods ending 21 November 2017, 30 November 2017, 30 November 2018 and 30 November 2020, whether or not you received payment for the services you provided. The list should include the name of the client, a description of the work undertaken, the date(s) when the services were provided and where no payment was received or no charge for the services made, please provide the reason why.

THE EVIDENCE AND THE FACTS

14. I was provided with a bundle of documents which included relevant authorities. No oral evidence was adduced by either party. From the documentary evidence I make the following findings:

(1) The appellant is a limited company. Its website indicates that it provides services to contractors in respect of their relationship with HMRC. In particular, in respect of enquiries raised by HMRC. In the appellant's published view, HMRC has adopted a very heavy-handed approach towards enquiries, and sends a large number of speculative and often confusing correspondence to contractors. To take the stress out of dealing with HMRC, the appellant's team can apparently assist on a range of matters including compliance checks,

self-assessments, HMRC communications and investigations. It will also act as a contractor's agent.

(2) The director and sole shareholder of the company, Mr Jamie Johnston ("**Mr Johnston**") acquired the shares and became a director in the appellant on 15 April 2021. At the time of acquiring the appellant, he understood that it, and its subsidiaries, were dormant companies.

(3) On 14 May 2021, HMRC received the appellant's tax returns for the accounting periods ending on 21 November 2017, 30 November 2017, and 30 November 2018. On 18 June 2021, HMRC received the tax return for the accounting period ending on 30 November 2020.

(4) On 14 October 2021, HMRC opened enquiries into these returns and requested, informally, certain information. In response, they were told by Mr Johnston that during the periods in question, he was not involved in the company, he had contacted the former director who told him that the company was dormant and that none of the documents requested could be provided.

(5) Between January 2022 and May 2022, there were communications between the appellant and HMRC in which HMRC sought clarification regarding the information, and the appellant responded.

(6) On 12 May 2022, HMRC issued the information notice.

(7) On 10 June 2022, Mr Johnston responded to the information notice. That email response is set out below:

> "Good afternoon Mr Henton,
> Thank you for your letter dated 12 May 2022.
> As stated in my previous communication, my involvement in the company only commenced on 15 April 2021. For all intents and purposes, I took over a dormant shelf company as it was convenient and easy to do and then changed its name.
> The former director has previously informed me that the company never charged for any service so it never received any payment nor incurred or paid for an business expenses. I have no reason to not believe that, so I really do not know what more I can do for you.
> For the avoidance of any doubt, I have no access whatsoever to anything that predated 15 April 2021.
> Therefore, I am unable to provide any company bank and/or building account statements, or details of any clients or services during the periods outlined in your letter, as I was not involved with the company during the applicable periods.
> I believe that I have made reasonable enquiries and fully cooperated with you. If you disagree, please explain how and on what basis you believe I need to do more, specifically within the scope of Paragraph 1 of Schedule 36 to the Finance Act 2008 and insofar as my circumstances apply.
> As always, I will gladly cooperate if I reasonably can.
> Kind Regards".

(8) In June and July 2022 there were further communications between HMRC and the appellant. Mr Johnston, having been contacted by telephone, promised to respond to HMRC but failed to do so. HMRC was seeking clarification as to how Mr Johnston was able to sign off the company tax returns if he had no information and no access to the company records.

(9) On 19 August 2022, HMRC issued a penalty notice for the Penalty ("**the penalty notice**").

(10) On 27 September 2022, HMRC issued penalty notices for daily penalties amounting to £380. These are not in issue in these appeals.

(11) On 27 October 2022, The Independent Tax & Forensic Services LLP ("**Independent Tax**") appealed to HMRC on behalf the appellant against the information notice, penalty notice and daily penalties notice.
(12) In HMRC's view, Independent Tax had no authority to make this appeal on behalf of the appellant and told them so on 31 October 2022. On 3 November 2022, Independent Tax provided a signed letter of authority indicating that it acted on behalf of the appellant.
(13) That letter of authority is dated 26 September 2022 and was signed by Mr Johnston on behalf of the appellant.
(14) On 28 November 2022, HMRC indicated that it would not accept that the appeals were in time but that they would treat a letter dated 14 November 2022 from Independent Tax (asking that HMRC consider that appeal of 27 October 2022 as the appeal), as the date on which a valid appeal had been made.
(15) On 23 December 2022, appeals were submitted to the tribunal against the information notice and the penalty notice.

ISSUES

15. There are four issues that I need to decide. Firstly, as regards information notice, whether the email from the appellant to HMRC on 10 June 2022 comprised a valid in time appeal. Secondly, whether the information requested by the information notice comprises statutory records. Thirdly, if the email of 10 June 2022 was not a valid in time appeal, whether I should give permission for the appellant to make an out of time appeal against the information notice. Fourthly, whether I should give permission for the appellant to make an out of time appeal against the penalty notice.

DISCUSSION

Information notice

16. It is the appellant's application that the appeal against the information notice is in time or, if it is out of time, that permission should be granted for it to make a late appeal.
17. It is the appellant's view that: The email of 10 June 2022, in the context of what had gone before, comprised valid notice of appeal; the term appeal is not defined in any tax statute; it could be defined as a "request for a decision to be changed"; HMRC's appeals manual indicates six criteria that must be satisfied for an appeal to be valid; it must be in writing, sent to HMRC, within the time limit, by the appropriate person, against appealable decision, and contain the grounds of appeal; the email of 10 June 2022 fulfils these criteria; the reasonable recipient of that email would have construed it as an appeal against the information notice; there is no requirement that an appeal should include the word "appeal"; HMRC accept this.
18. HMRC's view is that the reasonable recipient of the email would not have treated it as a valid notice of appeal and indeed the recipient officer did not do so. In HMRC's view the text of that email shows that the appellant was not challenging the notice ("I believe that I have made reasonable enquiries and fully cooperated with you"). There is nothing in the email specifically challenging the information notice.
19. To my mind this is finely balanced. In the context of an organisation which professes to provide a variety of services to clients to take the stress away from those clients when dealing with HMRC, I find it somewhat surprising that the appellant was not able to submit what would clearly be a notice of appeal. If the appellant's team had the range of expertise which it professes to have, it would not have been difficult to simply say at the head of the email "We wish to appeal against the information notice dated 12 May 2022". And that would have been that. But it didn't.

20. I agree that the rule of thumb is whether the email of 10 June 2022 is to be treated as an appeal by a reasonable recipient of that email. However, whether the officer receiving it so treated it, is neither here nor there. I have no supervisory function here. My role is to decide afresh whether it was a notice of appeal.
21. On balance, but only just, I agree with Mr Smith, that in the context of the previous communications between HMRC and the appellant, the email of 10 June 2022 does comprise a valid appeal against the information notice. It is written in response to the information notice. It sets out why the appellant is not able to comply with it (essentially it sets out the appellant's grounds of appeal which is the important element of an appeal). The appellant has re-emphasised that it has tried to obtain the information sought by the information notice, but has been unable to do so. He was not involved with the appellant during the applicable periods. He asks what more he can do in the circumstances.
22. The appellant therefore is addressing, head on, the issues raised in the information notice. That notice seeks information which the appellant has already told HMRC it cannot obtain. The email 10 June 2022 re-emphasises that. To my mind that is a fair and square challenge to the information notice.
23. I therefore find as a fact that the email of 10 June 2022 was a valid in time appeal against the information notice.
24. However, I am also of the view that the information sought by the information notice comprises statutory records and so the appellant's victory on the in time appeal is somewhat Pyrrhic given that it has no appeal right against the request for information sought by the information notice
25. Mr Smith did not seriously challenge the claim that the information regarding the bank and building society accounts was not part of the appellant's statutory records and I agree. The information is clearly required in order to enable the appellant to deliver complete and accurate tax returns for the periods in question. However, Mr Smith suggests that the client details for whom the appellant provided services during the relevant accounting periods, and whether the appellant received payment for the services so provided, was not necessarily part of the appellant's statutory records. To provide this information the appellant was required to do something (namely compile the list). Essentially, statutory records are limited to existing documents, and do not extend to creating information based on primary evidence (for example, invoices).
26. I disagree with Mr Smith. Schedule 36 enables HMRC to obtain documents (the primary evidence) as well as information. So a secondary source is disclosable provided it is the statutory records. The information sought by HMRC in the third bullet of its information notice comprising details of the clients (by way of a list) the name, work, dates, and details of any payment made, is, to my mind, part of the statutory record. It is information which is required to enable the appellant to deliver an accurate tax return for the period in question. As was said in *Couldwell*, a trading company must be able to verify trade debtors and other debtors in order to deliver a correct tax return. The same is true of trade creditors. Information in this regard is not restricted to the primary documentation (for example invoices). It includes an analysis of who has been charged what, and whether they have paid.
27. I find as a fact therefore that the information sought by the information notice comprises statutory records of the appellant and as such the appellant has no right of appeal against the request for this information.
28. The tribunal therefore has no jurisdiction in relation to the proceedings relating to the information notice and must strike them out. However, under Rule 8(4) of the First-tier Tribunal Rules, I cannot strike out the proceedings without giving the appellant an opportunity to make representations in relation to the proposed striking out. I do not believe that, even though the appellant has made submissions in this hearing regarding the

information, that it has been given that opportunity. I therefore give directions at the end of this decision regarding the strike out.

Penalty notice

29. I now turn to the consideration of whether I should exercise my judicial discretion in favour of the appellant and permit it to make a late appeal against the penalty notice.

30. I consider the three stage *Martland* test. Firstly, whether the delay in making the appeal is serious or significant.

31. The penalty notice was issued on 19 August 2022 and an appeal against that notice should have been made on or before 18 September 2022. The earliest date on which an appeal could be treated as having been submitted is 27 October 2022.

32. It is HMRC's view that at that date, Independent Tax had no authority to make an appeal on behalf of the appellant, and although they received the signed letter authority, dated 26 September 2022, on 3 November 2022, a valid appeal was only brought on 14 November 2022 when Independent Tax asked HMRC to consider their letter of appeal dated 27 October 2022.

33. To my mind it is clear that as at 27 October 2022, Independent Tax had authority to make an appeal against the penalty notice by dint of the authority letter dated 26 September 2022. The fact that this was not sent to HMRC until November 2022 does not affect its validity. Indeed, HMRC do not seriously challenge its validity.

34. I find therefore that a valid appeal was made by the appellant against the penalty notice on 27 October 2022, which is some 39 days after the expiration of the statutory time limit.

35. Even in the context of an appeal right which must be exercised within 30 days, I do not find that the delay 39 days in the context of the appeal against the penalty notice to be per se serious or significant. However, it is not "very short" and so it weighs in the balance at the final evaluation stage. And it means I must consider both that and the second stage of the *Martland* test, namely an assessment of the reasons for the delay.

36. There are a number of reasons given as to why the appeal was not made in time. The first, somewhat oddly, is that the appellant thought that it had made a valid appeal on 10 June 2022. Mr Johnston did not give this evidence, it is something which was reported to me by Mr Smith. I attribute no weight to this assertion. This is not only because there was no primary evidence from which I can draw any form of inference, but must clearly be wrong given that the penalty notice was not issued until after 10 June 2022. So the appeal of 10 June 2022 could not possibly have been thought by anyone to have been an appeal against the later assessment.

37. A second reason given for that delay is that the appellant did not have the skills to deal with the appeal (even though it holds itself out as being competent to provide advice to contractors in their dealings with HMRC, and in particular during the enquiry process) and so needed to appoint tax advisers who did have the relevant skills. And the delay was caused by the onboarding of the appellant by that firm of tax advisers. I do not find this a particularly compelling reason. Mr Smith seeks to make a distinction between the skills to deal with the enquiry process on the one hand (which the appellant possessed) and the skills required to deal with an appeal on the other (which the appellant did not possess). I do not accept this distinction especially when the penalty notice makes itself expressly clear that there is a 30 day appeal period within which an appeal must be made. That does not require any specialist skills, merely an understanding of plain English.

38. Furthermore, there is no evidence that following the receipt of the information notice, the appellant sought professional advice. It sent the email of 10 June 2022 to HMRC which it intended to be (and which I have found to be) a notice of appeal. If it felt itself capable of appealing against the information notice, I cannot see why it felt itself incapable of doing what the penalty notice told it to do, namely appealing it within 30 days.

39. Finally, the appellant claims, (again second-hand through Mr Smith, there is no primary evidence of this) that it takes time to undertake all the necessary checks in order to enable a professional tax advisor to take on a client. Yet whilst the penalty notice was issued on 19 August 2022, the letter of authority was not signed until 26 September 2022, and the appeal was not made until 27 October 2022. It seems likely to me that the onboarding arrangements would have been completed by 26 September 2022, and it surprises me that it took a further month for an appeal to be lodged against the penalty notice which would have been a simple matter to do and would have taken little time.

40. Furthermore, the appellant cannot be excused from delays by its agent which are, generally speaking, attributable to the appellant. They are not a good reason for the delay (although such delays by an agent may be taken into account when considering the third evaluative stage of the *Martland* process).

41. I now turn to the third stage. This is an evaluation of all the circumstances of the case in which I must conduct a balancing exercise. I should assess the merits of the reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. And when undertaking this balancing exercise, I must be conscious of the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected. I can also have regard to any obvious strengths and weaknesses of the parties' respective cases.

42. In my view the delay is not serious and significant but does require to be explained. I do not think that the explanations given by the appellant are particularly meritorious for the reasons I have expressed above. The appellant is not an innocent abroad when it comes to the tax system. It holds itself out as having the competencies of dealing, regularly, with HMRC. It was capable of appealing against the information notice without professional advice, so I can see no reason why it was not capable of appealing against the penalty notice without such advice. Nor can I see why it took two months from the date of the notice on 19 August 2022 until the appeal was made by the appellant's agent on 27 October 2022. Statutory time limits should be respected, and the appellant was fully aware that there was a statutory time limit to appeal against the penalty notice as it was clearly set out in words of one syllable in the penalty notice itself. And this is irrespective of the fact that an organisation which holds itself out as competent to deal with HMRC on matters such as enquiries, could, and should, know not only of the time limit itself, but that it should be respected. This failure to respect the time limit outweighs, in my view, any prejudice that will be caused to the appellant by rejecting its application. There are no obvious strengths to the appellant's position. However, that is compensated for by the fact that there are no obvious strengths to HMRC's position. Nor do I think that HMRC have made out much of a case that it will be prejudiced (and indeed other more compliant taxpayers will be prejudiced) if I allow the appellant to appeal out of time. But the amount at stake is modest (£300) and in the context of the issues which I have discussed above, means that when undertaking the balancing exercise, I am unable to find that the prejudice which would be caused to the appellant by denying the application is sufficient to outweigh the lack of meritorious reasons for the delay.

CONCLUSION

43. Drawing the threads of this decision together. I have found that the appellant made an in time appeal against the information notice on 10 June 2022. I have also found that the information notice requests statutory information against which the appellant has no right of appeal. I have also come to the conclusion that I should reject the appellant's application to make a late appeal against the penalty notice.

DECISION

44. I allow the appellant's application to make an out of time appeal against the information notice.

45. I reject the appellant's application to make an out of time appeal against the penalty notice.

DIRECTIONS

46. I direct that within 28 days from the date of release of this decision the appellant shall send to HMRC and to HMCTS written representations as to why its appeal against the information notice should not be struck out for want of jurisdiction under Rule 8(2) (a) of the First-tier Tribunal Rules by dint of the fact that the information notice requests information and documents which are statutory records.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 31st AUGUST 2023