Neutral Citation: [2023] UKFTT 869 (TC)

Case Number: TC08946

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/12568

Schedule 36 Finance Act 2008 – whether information notice given for the purposes of checking a person's tax position – yes – whether information reasonably required for that purpose – yes – appeal dismissed

Heard on: 5 July 2023
Judgment date: 02 October 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

GARETH EVANS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Hammad Baig, of counsel instructed by Gilbert Tax Consultants

For the Respondents: Mrs Jennifer Mackay, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Schedule 36 ("Schedule 36") to the Finance Act 208 gives the Respondents ("HMRC") various powers to gather information for the purposes of checking a person's tax position.

2. Paragraph 1 of Schedule 36 provides HMRC with power, by notice in writing, to require a taxpayer to provide information or documentation that is reasonably required for checking the tax position of the taxpayer.

3. "Tax" is defined in paragraph 63 of schedule 36 and, particularly relevant in this case, includes income tax. Paragraph 64 of Schedule 36 defines a person's "tax position" as being: "the person's position as regards any tax, including the person's position as regards – (a) past, present and future liability to pay any tax,…". It is clear therefore that an information notice can be used to obtain information not only to determine whether a tax liability has already arisen but also whether a tax liability may arise in the future.

4. Paragraph 7 of Schedule 36 provides that, where a person is required by such a notice to provide information or documentation, the person must do so within such period (and by such means and in such form) as is reasonably specified in the notice.

5. Paragraph 29 of Schedule 36 provides a right of appeal to this tribunal "against the notice or any requirement in the notice". So far as appeals are concerned, paragraph 32 of Schedule 36 provides:

> "(3) On an appeal that is notified to the tribunal, the tribunal may-
>
> (a) confirm the information notice or a requirement in the information notice,
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> (b) vary the information notice or such a requirement, or
>
> (c) set aside the information notice or such a requirement.
>
> (4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement-
>
> (a) within such period as is specified by the tribunal, or
>
> (b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an Mr of Revenue and Customs following the tribunal's decision.
>
> (5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final."

6. The Appellant ("Mr Evans") was served with an information notice ("the Notice") under paragraph 1 of Schedule 36 on 6 January 2022. Following a statutory review, the decision to give the Notice was upheld, but the Notice was varied in one small way (to allow credit entries in bank statements to be redacted if they were unconnected with the employment arrangements in question – item 4 in the Schedule to the Notice, which is reproduced at the end of this decision notice).

7. Mr Evans appeals against the Notice (as so varied) on two grounds. First, he says that HMRC are not checking his tax position and have no real intention of doing so, and as a result the information they ask for is not reasonably required for the purposes of checking his tax position at all. Secondly, if this tribunal accepts that the notice was validly given, he contends that not all the information sought is "reasonably required" for that purpose.

8. At the hearing before me Mr Evans was represented by Mr Baig, of counsel, and HMRC by Mrs Mackay, a litigator of their Solicitor's Office. I read a witness statement from Mr Christopher Barclay, who has worked for HMRC since 2004 in various roles. Since 2020 he has been working in the Counter Avoidance Directorate ("CAD") as a technical lead with responsibility for leading on investigations into suspected tax avoidance schemes and users of such arrangements. Mr Barclay was cross-examined at some length by Mr Baig.

9. At the end of the hearing I gave my decision, that the Notice had been validly given and that, subject to certain minor amendments, I considered that the information sought was reasonably required for the purposes of checking Mr Evans' tax position. That notwithstanding, Mr Baig asked me to write a full decision notice, and this notice explains the reasons for the decision I announced at the end of the hearing.

10. Before I had finished writing up this decision notice, the Appellant raised a further point arising out of Mr Barclay's evidence, on which I invited a response from HMRC. I have considered the Appellant's submission and HMRC's response and these are outlined at paragraphs [51] and [46] respectively below.

MR BARCLAY'S EVIDENCE

11. The Notice was issued on behalf of CAD by Mr Barclay's colleagues in Campaigns & Projects ("C&P"). C&P is a department which works in partnership with CAD and is responsible for carrying out various tasks for CAD, including the issue of information notices under Schedule 36.

12. Mr Evans had been employed by Total Recruitment Services Ltd ("TRS") during the tax year ending 5th April 2022. Mr Barclay was responsible for investigating the users of TRS which CAD believes offers disguised remuneration tax avoidance arrangements to some or all of its employees.

13. The Early Interventions Project ("EIP") is a project within CAD which is responsible for investigating suspected users of tax avoidance arrangements when HMRC become aware of these. Their work includes an education and warning campaign, where HMRC highlight potential avoidance to suspected scheme users, as well as carrying out early compliance action to determine whether individuals have used avoidance arrangements.

14. On 21 January 2020 TRS was brought to the attention of EIP. The company was identified by CAD's risk team as a potential Pay As You Earn ("PAYE") tax avoidance arrangement. Mr Barclay explained that PAYE avoidance arrangements typically take the form of employees receiving more income from their employment than is declared to HMRC through PAYE. This risk had been identified prior to Mr Barclay's involvement in the scheme through sampling the PAYE information of some employees of TRS. The risk exercise had identified that a number of employees had moved to TRS from other suspected avoidance arrangements.

15. Mr Evans was identified from HMRC systems as having been an employee of TRS since July 2021. Information obtained through PAYE systems from July to November 2021 showed that Mr Evans had been receiving regular payments from TRS. Taxable pay of £6,990.55 had been declared to HMRC with no tax deducted. These amounts are broadly in line with a national minimum wage salary.

16. Mr Barclay explained that one of the aims of EIP is to act as soon as possible to discourage use of avoidance schemes which HMRC do not believe work. This approach was adopted as part of the government's response to the independent loan charge review. The government accepted the recommendation that it should provide targeted communications to taxpayers who are suspected of using tax avoidance arrangements to encourage them to stop.

With this is mind, as soon as HMRC became aware that TRS might be an avoidance arrangement, Mr Evans was issued with an education letter advising him that his employment may be avoidance arrangement and also making an informal request for information about the arrangements

17. Given that it was clear that Mr Evans had been employed by TRS and because HMRC believed TRS was facilitating PAYE avoidance arrangements, HMRC issued Mr Evans with an informal request for information and documents in relation to the then current tax year on 8th December 2021.

18. Because Mr Evans failed to reply to this request by the deadline (22 December 2021), the Notice was issued on 6 January 2022.

19. Mr Barclay explained his understanding of the TRS avoidance arrangements, as follows:

(1) The contractor takes up employment with an offshore employer TRS, signing:

(a) a contract of employment; and

(b) a separate commercial loan agreement.

(2) TRS then enter into a contract with an onshore intermediary which charges clients for the contractor's services.

(3) Contractors sign a "zero hours contract" with the onshore intermediary.

(4) The onshore intermediary would then enter into a contract for the services of the contractor with a UK client.

(5) The contractor or client would submit invoices/timesheets to the onshore intermediary The onshore intermediary would invoice the client.

(6) The client would then make payment to the onshore intermediary.

(7) TRS then invoice the onshore intermediary minus fees due to the onshore intermediary.

(8) Once TRS receive the invoice, they make one payment around the same date that compromises:

(a) a salary paid at the agreed "Pay Rate", which is equivalent to the national minimum wage. Payslips provided to the contractors confirm these amounts. These amounts are reported to HMRC via PAYE.

(b) an additional payment in the form of a loan that is paid around the same day.

(9) Given that loan payments are made alongside the contractor's salary, there is a direct correlation between the total remuneration paid and the client's payment terms. The loan agreement states the loans will become due and payable after ten years, but HMRC believe this is not the case in practice.

(10) Contractors are given loan indemnity agreements. The loan indemnity agreement is provided by a different onshore company. The Directors of this onshore company are known to HMRC as being involved in the operation of other established tax avoidance schemes. Although no contractors have been able to explain the purpose of the indemnity agreement, it is likely the agreement gives confirmation to the individual contractors that the loan will not need to be paid back. In line with other avoidance schemes, it is likely the loan would be reassigned from TRS to the onshore company and the loan 'written off' after payment of a nominal fee.

20. Mr Barclay explained his reasons for issuing an information notice to Mr Evans as follows:

> (1) He did not, and still does not, know whether Mr Evans has used similar arrangements to those outlined above. Mr Barclay does not know if Mr Evans has received the benefit of tax-free payments from TRS and if he has, to what extent. Clearly, the extent of his use of a scheme such as this will impact on his tax position at the end of the year.
>
> (2) The information and documents requested help to build a picture of the way Mr Evans' remuneration was structured, whether in fact there was an avoidance issue and, if so, whether he entered such arrangements knowingly or unwittingly. The end aim is to gain information to allow the correct tax treatment to be determined, either by agreement or in this Tribunal.

21. Mr Barclay gave his reasons for asking for particular pieces of information and these are discussed further below.

22. As I mentioned earlier, Mr Barclay was cross-examined at some length by Mr Baig.

23. Mr Barclay confirmed that the initial letter he wrote to Mr Evans was a mailshot designed to move him (and others) on from using the TRS scheme.

24. Mr Barclay had seen evidence, which HMRC had gathered together from a range of sources (collated in an "adpan" report), that enabled Mr Barclay to work out, as he had explained to the tribunal, how he thinks the scheme operates. When he was looking at Mr Evans, however, he was investigating his tax position, not looking for information about TRS.

25. Mr Barclay had explained that, following the criticism of HMRC by the Morse report (into the way HMRC dealt with the loan charge), HMRC have started to write to people they think are participating in avoidance schemes much earlier on and to warn and discourage them. Mr Baig put it to Mr Barclay that the real reason why he wrote to Mr Evans, and the real reason why he served the Notice, was to move him away from the TRS scheme. Mr Barclay was very clear that that was not the case at all. He wanted to check Mr Evans' individual position to see if he was using an avoidance scheme and how (if at all) he had benefited from it. If Mr Barclay concluded that Mr Evans has done that, then he would look to see how he could correct any tax underpayment. He accepted that he was looking to discourage actual or potential users of the TRS scheme, but he was adamant that he was also looking to check (and if necessary counter) the tax position of an individual who might have obtained an advantage from the scheme.

26. Mr Baig put it to Mr Barclay that he should start his enquiries by asking TRS for information. Mr Barclay's answer to that was that he was not sure what powers HMRC have to obtain information from an employer such as TRS. Mr Barclay's view was that he would look at the PAYE information supplied by TRS, but that would only be one part of the information he was looking to collect. There was nothing in Schedule 36, as far as he was aware, which forced him to start his enquiries with TRS rather than the taxpayer concerned. In any event, HMRC's general policy, when looking at the position of individuals, is to ask the individuals in question for information not third parties.

27. Mr Baig put it to Mr Barclay that the information that he needed was already available to him. Mr Barclay said this was not the case at all. The adpan report (and the material behind it) did not go into the level of detail needed to raise an assessment on an individual. He did not have full details of all the individuals involved and how much benefit they obtained from the scheme. To work that out, he would need to start by asking Mr Evans for information. Although HMRC had a good idea about how the TRS scheme worked, to be able to work out

what Mr Evans did and counter any avoidance advantages, HMRC would need to know exactly what he had done and what documents he had been party to.

28. Mr Barclay said he did not know where HMRC had got the generic TRS documents from. As far as he knew, no-one in HMRC had any information about Mr Evans' participation in these arrangements.

29. He wanted to see Mr Evans' timesheets to see what he was being paid and what fees his work was generating.

30. Mr Baig put it to Mr Barclay very firmly that he already had much of the information he needed through HMRC's PAYE real time information (RTI) reports. Mr Barclay accepted that the PAYE RTI reporting system produced a lot of information, but the essential point with PAYE avoidance arrangements like this is that they are designed to produce significant benefits for users which, according to the promoters at any rate, do not need to be reported through the PAYE system. It was simply wrong to suggest that Mr Barclay and his colleagues could obtain all the information they needed from the formal tax reporting systems. He needed to know what Mr Evans had received in order to understand the arrangements he was party to and the benefits he had (or claimed he had) obtained from them.

31. As far as information available within HMRC is concerned, Mr Barclay said that he had not made detailed enquiries to see what information HMRC had about Mr Evans and his participation in the TRS arrangements. Nothing in the papers he had (including the adpan report) suggested that HMRC had detailed information about particular individuals. Mr Barclay's position was that, if HMRC had this information, he would not be wasting time asking for it now.

32. Towards the end of his cross-examination, Mr Baig returned to Mr Barclay's motivation for serving the Notice and put it to him, in quite forceful terms, that his real intention in serving the notice was to move Mr Evans on from TRS and change his behaviour. Mr Barclay repeated, equally forcefully, that he wholeheartedly disagreed with this suggestion. Behavioural change is one aspect of what he was doing, but he was gathering information about Mr Evans as well.

33. Mr Barclay was happy that all the questions he had asked and that all the information he was looking to collect related to Mr Evans' tax position. Looking at the information, his view on the information sought in question 1 was that it was quite legitimate to ask questions of Mr Evans which were relevant to his understanding and his behaviour. This might be relevant to future penalties. Mr Baig suggested that, in asking for Mr Evans to give an account of what he had been told, Mr Barclay was really looking for information about TRS. Mr Barclay was insistent that the information he was looking for was relevant to Mr Evans' understanding and behaviour.

34. As far as point 2 is concerned, Mr Barclay accepted Mr Baig's point that these documents were not statutory records, but said (which is entirely correct) that whether they were statutory records or not is irrelevant so far as the Notice is concerned. Mr Barclay said that Mr Evans might very well summarise the effect of the amounts he received in his tax return, but the whole point of collecting this information was so that he could check that position and not be forced to take a summary number from the return. Mr Baig said that surely Mr Barclay could wait and Mr Barclay's response to that was that there was no particular reason why he should. He suspected that Mr Evans was involved in avoidance and he wanted to find out about it. There was no point waiting for PAYE RTI information, since that would be incomplete, if there were an avoidance scheme, and it was the shortcomings in that information that Mr Barclay wanted to investigate.

35. Some quite detailed information is asked for in item 3, but Mr Barclay's position again is that, if Mr Evans is involved in an avoidance arrangement, HMRC need to understand all the additional payments he receives and the roles and responsibilities not only of Mr Evans but of all those involved with him. Understanding what Mr Evans did and his level of seniority (particularly when measured against the fact that his ostensible employment income was no more than the national minimum wage) was important. For the same reason, it was important to understand what his charge-out rates were and the difference between the gross amount of income he generated and what he actually got paid. Surely, Mr Baig pressed, he could get this information from TRS, but Mr Barclay repeated that it was not unreasonable to ask a taxpayer to explain their employment income and in any event he wanted to check Mr Evans' position by comparing his narrative account, what the original documents showed and what TRS reported through the PAYE RTI system. In the same way, payslips and similar information (item 7) are important because they provide original source material.

36. In re-examination by Mrs Mackay, Mr Barclay stressed that he was investigating Mr Evans' tax position. No part of the adpan report or any other internal materials dealt with the position of Mr Evans. He had not asked any of his colleagues if they had information about Mr Evans, but the project was looking into the position of lots of people and there was nothing in the project documents to instruct him to ask, or point him towards, any colleagues who might have useful information already. The purpose of the notice was to establish Mr Evans' position, including beginning to enquire whether a penalty might be relevant. The whole idea was to build up a picture of Mr Evans' arrangements and his understanding of them. Although a penalty might be in point, he was nowhere near thinking about a penalty here.

37. We also heard briefly from Mr Craig Tully, an accountant advising Mr Evans. Mr Tully exhibited Mr Evans' PAYE information for 2021-2022, which he said had been submitted by Mr Evans to HMRC. He also exhibited a copy of Mr Evans' PAYE RTI information for the years 2021-2022. Again, he says that this shows that the information HMRC are asking for has long been available to them.

HMRC'S SUBMISSIONS

38. Mrs Mackay's position can be expressed quite briefly. At the time the notice was served, Mr Evans had not submitted a tax return for the relevant period, so the restrictions in paragraph 21 were not in point. The notice was validly served under paragraph 1, because Mr Barclay was checking Mr Evans' tax position so far as his arrangements with TRS were concerned. It is quite clear from paragraph 64 of Schedule 36 that checking a person's tax affairs includes their present and future tax position and the question of penalties.

39. Mr Barclay explained why the information was needed. He was clear that he was not investigating TRS; he was checking Mr Evans' position. The information HMRC are looking for is needed to enable them to understand and check Mr Evans' employment tax arrangements in full. The PAYE RTI information is clearly not sufficient; Mr Barclay needs to check the correctness of that information and see whether Mr Evans is receiving anything in addition. The PAYE RTI information, rather than allaying his concerns, exacerbated them, since it seemed to show that a highly skilled IT contractor was being paid the national minimum wage.

40. The information sought from Mr Evans is within his possession and control. By and large, all he needs to do is to explain, as best he can, his understanding of the position and provide the documents he has. HMRC are not required to try to get the relevant information from TRS first; they were not avoiding serving a third party notice on TRS at all. They were perfectly entitled to treat Mr Evans as their first port of call.

41. Turning to points raised by Mr Evans. Firstly, he said that he had not been given a reasonable period to reply and the deadline for responding to the initial letter was over the

holiday period. Mrs Mackay said that the deadline (22 December) fell before the Christmas holiday period and in any event Mr Evans had not applied for any extra time.

42. Mr Evans said HMRC had no reason to suspect that he would not fill in his 2021/22 tax return properly, but Mrs Mackay's position is that there is no reason why HMRC need to think that before they can serve the notice.

43. Mr Evans complained that he had only been given one opportunity to respond to the informal information request, but there is nothing in Schedule 36 which requires him to be given any opportunity at all, let alone a number of chances.

44. Mrs Mackay accepted that compliance can be burdensome, but Mr Barclay had explained what he needed and why. None of what was asked for should be particularly difficult to produce.

45. It may very well be, as Mr Evans states is the case, that his tax return will explain the position, but that does not prevent HMRC checking his position in advance.

46. As far as the point Mr Baig raised based on Mr Barclay's reference to the possibility of penalties, Mrs Mackay responds that, at the time of issuing the Notice (and at present), HMRC are not in a position to say they have found an underassessment of tax or that Mr Evans was using a tax avoidance scheme. At present there is only a suspicion, which receipt of the information and documents will help HMRC determine. Currently HMRC are not in a position to say that Mr Evans may be liable to a penalty, as an underassessment has yet to be identified. Therefore, the issuing of the Schedule 36 notice does not breach Mr Evans' human rights.

MR EVANS' SUBMISSIONS

47. Mr Baig submitted that HMRC were not really looking to check Mr Evans' tax position at all; they were looking to move him on from participating in the arrangements. Mr Baig submits that, if HMRC were launching a real enquiry, they would not have asked for a reply to their letter of 8 December 2021 by 22 December. They would have given Mr Evans longer to reply. The "haphazard" way HMRC have proceeded suggests that they are not really checking Mr Evans' position at all.

48. Relying on *Hargreaves v HMRC*, [2021] UKFTT 80 (TC), Mr Baig submitted that the Tribunal should review whether the information the Notice asked for was reasonably required in the light of the circumstances currently obtaining, not the position when the Notice was served. At [56] the Tribunal commented:

> " … the Tribunal's role is not simply to review the Mr's decision by determining whether their belief that the information is reasonably required is a reasonable one; instead it is to come to its own conclusion as to whether the information is, objectively, reasonably required. In doing so, it follows in my view that the Tribunal must assess this based on the circumstances at the time of the hearing. There would be little point in basing its decision on the circumstances prevailing at the date the notices were issued as this could lead to taxpayers being required to produce information which was no longer relevant or no longer reasonably required."

49. HMRC now have Mr Evans' tax return for the relevant period and he has conceded that items 4 (as varied on review), 5 and 6 are items he will produce. Mr Baig says that, with the information HMRC can get from TRS, is all they need.

50. Given the breadth of information required by the PAYE regulations, it is unreasonable and burdensome to ask an employee to provide information. Even if the employer did not provide the information through the PAYE system, HMRC could ask for it from TRS. Their first port of call should be the employer not the employee. In Mr Baig's submission, HMRC

can only use Schedule 36 for an employment-related enquiry if they cannot get the information they need from somewhere else, most obviously the employer.

51. The point that Mr Baig raised in writing after the hearing is that the "basket" of reasons Mr Barclay referred to included the possibility of issuing a penalty. This suggested that he was using the Notice for reasons other than the intended/stated purpose of checking Mr Evan's tax position and placing Mr Evans under duress to provide reponses to questions in relation to behaviour based penalties, without the protection of being issued with the appropriate warning letter from HMRC and HMRC fact sheet CC/FS9. Essentially, he says, HMRC have issued the Notice in contravention of Mr Evans' human rights and he could now be compelled to provide responses to questions relating to criminal penalties under threat of penalty or sanction by the Tribunal. This, he says, would be an abuse of process. He referred to *Avonside Roofing Limited v HMRC*, [2021] UKFTT 158 (TC) where (he says) this issue is discussed at paragraphs [65], [67] and [71].

DISCUSSION

52. Dealing first with the question whether any information is needed for the purposes of checking Mr Evans' tax return at all, I am satisfied that HMRC are checking Mr Evans' tax position. They were looking to establish exactly what Mr Evans had done with TRS and how that might impact on his tax position, and they still are. I accept that HMRC may also have been hoping that, by asking questions of Mr Evans in a forceful way, they might dissuade him from participating in this and future avoidance arrangements.

53. Schedule 36 allows HMRC to request information reasonably required for the purposes of checking the taxpayer's tax position. As Simler J explained in *Kotton v First-tier Tribunal (Tax Chamber)*, [2019] EWHC 1327 (Admin) at [60], this requires that "there is a genuine and legitimate enquiry or investigation of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith". Schedule 36 does not provide that checking the tax position of a taxpayer must be the only reason why an information notice is served, but there must be a genuine enquiry being carried on in good faith; if there is not, the information requested cannot be required "for the purpose of" checking the taxpayer's tax position. As I have explained, I am satisfied that Mr Barclay was (and still is) enquiring into Mr Evans' tax position. He was firm and clear in his evidence, including under forceful cross-examination, on that point. As long as that was the case, the fact that he might have hoped that the Notice would also have dissuaded Mr Evans from continuing his involvement with TRS or participating in other avoidance arrangements in the future does not matter.

54. I turn now to Mr Baig's submission that HMRC have issued the Notice in contravention of Mr Evans' human rights, because he could now be compelled to provide responses to questions relating to criminal penalties, which would be an abuse of process. He referred to *Avonside Roofing Limited v HMRC*, [2021] UKFTT 158 (TC) where this issue is (he says) discussed at paragraphs [65], [67] and [71].

55. I did not find the passages in *Avonside Roofing* Mr Baig referred me to particularly helpful on the question of Mr Evans' ECHR rights. They are, however, helpful in that they remind the Tribunal of the need to focus on whether the information requested is reasonably required in the context of what the Mr is looking to check. It is clear that a person's tax position includes the question of penalties, so Parliament clearly envisaged Schedule 36 powers being used to obtain information relevant to the question whether a person is liable to a penalty. The point in *Avonside* was that the information the inspector was looking for was about whether there had been carelessness in implementing certain arrangements, not whether there had been carelessness in completing a tax return (which is what would have triggered the penalty).

56. More helpful is the decision of this Tribunal in *Asset House Piccadilly Limited v HMRC*, [2023] UKFTT 00385 (TC), which Mrs Mackay pointed me to. (In parentheses I record that Mr Evans' representatives took issue with Mrs MacKay doing this, but I consider that she was entitled to do so, as she was responding to a post-hearing written submission from Mr Evans, Mr Baig did not suggest that the observation was incorrect and in any event the Tribunal's task is to reach the correct conclusion, provided it does so in a way which is fair and just, and I consider that this is what this process has achieved.) That case involved an appeal against a notice to provide information served on a person HMRC suspected was an "enabler" of certain abusive tax arrangements and therefore liable to a penalty. One of the arguments raised in that case was that the obligations imposed by the notice infringed the appellant's Article 6 ECHR privilege against self-incrimination. The Tribunal drew a distinction (at [123]) between checking whether a person is liable to a penalty and imposing a penalty and held that Article 6 is not engaged at the preliminary, investigative stage, only when a person has been "charged". At [136] the Tribunal endorsed Judge Redston's analysis (in *Gold Nuts Ltd and Ors v HMRC*, [2017] UKFTT 84 (TC), at [160]) of the cases on the use of incriminating information compulsorily obtained before a person has been charged. She said that:

> "160 … the position is clear; a person cannot refuse to answer questions on the basis that he might thereby incriminate himself. Article 6 is only engaged if there is a subsequent prosecution. The defendant can challenge the use of any such information on the basis that it would be unfair to rely on it."

57. I have not had the benefit of detailed submissions on this issue, but HMRC's enquiry here is at a very early, investigative stage and it is much too early for Mr Evans to raise his privilege against self-incrimination. As Mr Barclay explained, the Notice was not being issued with a view to collecting information that would help to determine whether Mr Evans might be liable to a penalty. That was all too far away. The immediate task is to ascertain Mr Evans' tax position and that is what the Notice is asking for information to help with. If the information indicated a behaviour that might attract a penalty, were there to be an underassessment of tax, that would need to be investigated further. If HMRC ultimately seek to impose a penalty on him on the basis of information provided in response to the Notice, that is the point at which Mr Evans should raise his Article 6 rights and argue that it would be unfair for HMRC to rely on that information.

58. I should add that, despite Mr Barclay's reference to a possible penalty as being among the "basket" of reasons for issuing the Notice, I find it hard to see how any of the information asked for (nearly all of which is simply a request for copies of documents) would be particularly helpful in deciding whether or not (were the question to arise) Mr Evans' behaviour were such as would attract a penalty. The only possibility I can see would be if Mr Evans' explanation of his understanding of the arrangements in answer to Item 1 raised a concern, but (as I have already indicated) that would still need more detailed investigation. As *Avonside* reminds us, penalties are principally incurred on the basis of behaviours (carelessness or worse) in relation to the preparation and submission of tax returns; having an incomplete understanding of the TRS arrangements will not of itself give rise to a penalty.

59. As to Mr Baig's point that HMRC now have Mr Evans' tax return, Mr Barclay has explained that Mr Evans' tax return will contain a summary of the position, whereas he needs a full narrative picture from Mr Evans and original documents to check what he did. I accept that receipt of Mr Evans' tax return does not of itself remove HMRC's need for the other information they ask for in the Notice.

60. I also accept that it is open to HMRC to look to obtain the information they need from Mr Evans in the first instance. It is, after all, his tax position they are checking. There is no requirement in Schedule 36 that, in employment tax enquiries, HMRC should start their enquiry

with the employer and only seek information from individual employees if they cannot obtain it elsewhere. If the information is reasonably required for checking Mr Evans' tax position, it is up to HMRC where they seek to obtain it. This is particularly so where, as HMRC say is the case here, the information they will obtain from Mr Evans needs to be compared against the information the employer has provided through the PAYE RTI system.

61. It is quite misleading for Mr Baig to suggest that the PAYE reporting system would give HMRC all that they need. The essence of employment-related tax arrangements, such as the one Mr Barclay considers Mr Evans is a party to, is that they suppress the amount which, according to the promoters, falls to be reported as employment income. In those circumstances, the PAYE reporting information is likely to be significantly deficient. On that basis it is necessary for HMRC to check what the employer has reported against the employee's understanding of the arrangements (hence the information sought in items 1, 2 and 3). Understanding Mr Evans' roles and responsibilities and measuring this against the report in the PAYE system that he is paid the national minimum wage seems to me to be an obvious avenue for HMRC to want to explore.

62. All the information sought in items 1, 2 and 3 goes to giving HMRC Mr Evans' view of the arrangements and a full picture of what he was doing and of all the benefits and rewards he was receiving, whether declared as employment income or not. The only item which to my mind is not strictly necessary is the request (in the second bullet under item 1) for the names and business addresses of everyone who told Mr Evans about the employment arrangements. Whilst I take Mr Barclay's point that understanding the quality of Mr Evans' information sources may in due course be relevant to the question of penalty, we are (as Mrs Mackay submits) at this point at a very early stage in the enquiry, a long way from the question of penalties, and it does not seem to me that knowing where Mr Evans got his information from is reasonably necessary to enable HMRC to check Mr Evans' tax position.

63. I understand that Mr Evans is now prepared to produce the information requested at items 4 (as varied on review), 5 and 6 of the Schedule.

64. Items 7 and 8 ask for payslips and similar notifications of amounts paid and correspondence from or to anyone involved in the employment arrangements. On their face, these requirements are quite broad, but we should remember that they relate only to a very short period of time (from the beginning of April to the end of November 2021) and that, at the time the request was made, that information was relatively current and should have been easy to obtain. I do, however, accept that the wording of item 8 is very broad, seeming as it does to stretch far beyond the economic aspects of Mr Evans' arrangements.

DISPOSITION

65. I determine the questions before me as follows:

(1) The Notice was validly given for the purpose of enabling HMRC to obtain information required for the purpose of checking Mr Evans' tax position;

(2) With two exceptions, the information sought was, and still is, reasonably required for that purpose. The only exceptions are the second bullet in item 1 (tell us the name and business address of each person or entity that told you about the employment arrangements) and item 8, which should be limited to the economic aspects of the arrangements, so that Mr Evans is not required to disclose personal or operational communications focused on the delivery of tasks, unrelated to the financial/economic operation of the arrangements.

66. Accordingly, I confirm the Notice (as varied on review) subject to the following two variations:

(1) The request in the second bullet under Item 1 in the Schedule is to be deleted.

(2) Item 8 in the Schedule is varied so that it reads as follows:

> "Copies of all correspondence that you received from, or that you sent to, any person involved in the operation or facilitation of the employment arrangements, so far as such correspondence might reasonably be thought to relate to the financial or economic aspects of such arrangements or the tax implications for you of participating in them. You should include anything sent to or received from your employer, end user or client, and any intermediary."

67. Mr Evans is to comply with the Notice (as so varied) within twenty-eight days of the date of the release of this decision notice.

NO RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. Paragraph 32(5) of Schedule 36 provides that the decision of the Tribunal regarding an appeal made by a taxpayer is final.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 02 October 2023

The Schedule to the Notice
(as varied on review)

The information we need

1 For these employment arrangements:

- give us a detailed explanation of what you were told about the employment arrangements - for example, your hourly rate, daily rate, retention rate, take home pay and any loans, credit or other payments
- tell us the name and business address of each person or entity that told you about the employment arrangements
- tell us everything you were told about how much of your earnings you would keep - for example, after tax or other amounts were taken off

2 Details of all amounts received relating to these employment arrangements, whether they were taxed or not, for the period 6 April 2021 to 8 December 2021. Please include the dates and the amount you received on that date.

3 For each separate contract or other agreement relating to these employment arrangements in the period 6 April 2021 to 8 December 2021, tell us:

- the name of the end user/client and the address of the premises where you worked
- what your roles and responsibilities were
- the name and address of each intermediary (sometimes called an 'agency')
- the name and address of your employer (you may know this as your 'umbrella company') - your employer's name should be on your payslip
- the start and finish date for each contract or agreement
- your daily 'charge out' rate to the end user or client
- the name and address of each person, company, trust, partnership or other organisation, that provide you with loans, credit, or any other income as part of the arrangements, and which has not been taxed - please also tell us the amounts of that income

The documents we need

4 Copies of bank statements for the period 6 April 2021 to 8 December 2021, showing the deposit of all amounts from these employment arrangements, redacting only debits to the account. All credits to the account must be unredacted.

5 A copy of each separate contract or other agreement you had relating to these employment arrangements in the period 6 April 2021 to 8 December 2021.

6 Copies of all agreements you had relating to loans, other forms of credit, advances of earnings, bonuses, annuities or other amounts (however they were described), for the period 6 April 2021 to 8 December 2021.

7 A copy of the payslip, letter, email or other notification you received, for each amount you received for the period 6 April 2021 to 8 December 2021.

8 Copies of all correspondence that you received from, or that you sent to, any person involved in the operation or facilitation of the employment arrangements. You should include anything sent to or received from your employer, end user or client, and any intermediary