[2020] UKUT 194 (TCC)

Appeal number: UT/2019/0053

INCOME TAX – whether subsequent grant of permission to notify a late appeal against an information notice invalids a penalty imposed for non-compliance with that information notice – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

RONNIE HANAN **Appellant**

-and-

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

TRIBUNAL **JUDGE JONATHAN RICHARDS**
JUDGE GUY BRANNAN

Sitting in public by way of telephone hearing treated as taking place in London on 8 June 2020

The Appellant in person with assistance at the hearing from Albert Fox

Emma Pearce, instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

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DECISION

1. This appeal involves points of detail arising out of the legislation set out in Schedule 36 of Finance Act 2008 ("Schedule 36") that permits HMRC to issue information notices requiring taxpayers to provide them with specified information and documents and to charge penalties where a taxpayer fails to comply with an information notice. Very broadly, Mr Hanan received an information notice, appealed to HMRC against it and requested, and obtained, a review of HMRC's decision. He did not notify his appeal to the First-tier Tribunal (the "FTT") within applicable time limits and, in December 2016, HMRC imposed a penalty in respect of his failure to comply with the information notice. Mr Hanan appealed against the penalty and also obtained permission from the FTT to notify his appeal against the information notice late. The FTT released its decision on both the information notice and penalty notice appeals in December 2018 and, in the information notice appeal, the FTT approved the notice with some minor amendments. The question raised by these proceedings is whether HMRC were entitled to rely on the penalty assessment imposed in December 2016 in circumstances where, as events transpired, it was only in December 2018 that the FTT adjudicated on the validity of the information notice.

2. Prior to the hearing, we asked the parties for their views on the appropriate format for the hearing. HMRC submitted that the hearing should take place "remotely", either by telephone or video-conference. Mr Hanan argued that the hearing should be postponed until such time as it was practicable for it to take the form of a "face to face" hearing at which all parties were physically present at the same location. In Directions released on 18 May 2020 we decided that the hearing would take the form of a fully remote audio hearing at which all parties participate from separate locations by telephone and we gave reasons for that decision. We will not repeat those reasons in this decision.

The statutory scheme as applicable to the information notices that Mr Hanan received

3. To put the issue in context, we start with a summary of the applicable statutory scheme as applicable to the information notice that Mr Hanan received. References in square brackets are to paragraphs of the decision (the "Decision") that is under appeal, namely *Ronnie Hanan v HMRC* [2019] UKFTT 2 (TCC).

4. Paragraph 1 of Schedule 36 permits HMRC to issue information notices requiring taxpayers to provide documents or information within such reasonable period as is specified in the notice (paragraph 7 of Schedule 36). On 12 November 2015, HMRC sent Mr Hanan such an information notice requiring him to provide documents and information relating to 37 points set out in a schedule ([4]). HMRC initially required Mr Hanan to provide the documents and information by 14 December 2015, but then agreed to extend that deadline to 19 February 2016.

5. Since HMRC had not obtained advance approval of the information from the FTT, and since the information notice did not seek only "statutory records", paragraph 29 of Schedule 36 gave Mr Hanan a right of appeal against the information notice. That right

of appeal had to be exercised by giving notice of appeal to HMRC. By paragraph 32 of Schedule 36, Mr Hanan had 30 days beginning with the date the information notice was given to appeal to HMRC the information notice. Mr Hanan did not meet that deadline. However, he appealed to HMRC against the information notice (late) on 1 March 2016 ([5]).

6. By paragraph 32 of Schedule 36, the provisions of the Taxes Management Act 1970 ("TMA") relating to appeals were applied to Mr Hanan's appeal against the information notice. That meant that, under s49(2) of TMA, HMRC had power to accept Mr Hanan's late appeal against the information notice. HMRC exercised that power and, on 16 June 2016, HMRC accepted that late appeal and explained their "view of the matter", namely that the information notice should stand as issued.

7. HMRC's letter of 16 June 2016 offered Mr Hanan a review of that decision which he accepted. On 12 October 2016, HMRC notified Mr Hanan of the outcome of that review. That review concluded ([6]) (i) that the information notice was validly issued (ii) that Mr Hanan had provided information on 19 of the items set out in the schedule to that notice and so information and documents relating to those matters would be removed from the information notice and (iii) that some amendments would be made to the request for documents and information relating to the remaining 18 items. HMRC's review decision attached an "Appendix A" setting out the scope of the information and documents required in respect of those 18 matters and stated that Mr Hanan had 30 days from the date of the review decision (until 11 November 2016) to provide the information and documents set out in that Appendix A. HMRC subsequently agreed to extend that deadline to 2 December 2016 ([7]).

8. By s49G of TMA, Mr Hanan had until 11 November 2016, 30 days from the date of HMRC's review decision, to notify his appeal against the information notice to the FTT. He did not meet that deadline. Accordingly, by virtue of s49F of TMA, the conclusions set out in HMRC's review fell to be treated as if they were an agreement in writing under s54(1) of TMA settling the appeal against the information notice. Section 54(1) of TMA in turn provides that, where an appeal is settled by agreement:

> … the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

9. Pursuant to paragraph 39 of Schedule 36, if Mr Hanan did not comply with the information notice by any extended deadline that HMRC had agreed (paragraph 44 of Schedule 36), he was liable to a civil [1]penalty of £300.

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[1] Penalties under Schedule 36 are of course civil, not criminal, penalties.

10. Paragraph 46 of Schedule 36 sets out requirements that HMRC must satisfy in order to impose a penalty under paragraph 39 which is at the heart of this appeal and provides, so far as relevant:

> **46 Assessment of penalty**
>
> (1) Where a person becomes liable for a penalty under paragraph 39…
>
> (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 … must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).
>
> (3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—
>
> (a) the date on which the person became liable to the penalty,
>
> (b) the end of the period in which notice of an appeal against the information notice could have been given, and
>
> (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

11. Since Mr Hanan had a right of appeal against the information notice, the relevant period within which HMRC had to assess the penalty was given by paragraph 46(3). On 5 December 2016, having formed the view that Mr Hanan had not complied with the information notice as varied following their review, HMRC assessed Mr Hanan to a penalty of £300 ([8]).

12. By paragraph 47 of Schedule 36, Mr Hanan had a right of appeal against the penalty with paragraph 48 requiring that he give notice of an appeal to HMRC in the first instance. On 7 December 2016, Mr Hanan made an in-time appeal to HMRC against the penalty.

13. On 17 January 2017, HMRC set out their "view of the matter" in relation to the penalty appeal, namely that the penalty should stand. They offered Mr Hanan a review of that decision, which he accepted. On 28 February 2017, HMRC notified Mr Hanan of the outcome of that review which left the penalty unaltered.

14. By s49G of TMA, Mr Hanan had 30 days from 28 February 2017, the date of HMRC's review decision, to notify his appeal against the penalty to the FTT. He did not meet that deadline. Therefore, Mr Hanan's appeal against the penalty was treated as settled by agreement, under s54 of TMA, on the terms of HMRC's review decision in the same way as his appeal against the information notice.

15. On 5 May 2017, later than the permitted deadline as we have noted, Mr Hanan notified his appeal against the penalty to the FTT. The Decision refers, at [13], to the FTT giving permission (under s49G(3) of TMA) for the penalty appeal to be notified

late. The effect of the FTT giving that permission was that the penalty appeal was, by s49F(4), of TMA no longer treated as settled by agreement under s54 of TMA.

16. Mr Hanan's grounds of appeal against the penalty raised a number of criticisms of the information notice. To enable those criticisms to be addressed, HMRC suggested to Mr Hanan ([14]) that he should also notify to the FTT his appeal against the information notice. Mr Hanan followed that advice and, on 22 March 2018, more than 16 months after the deadline specified by s49G of TMA, Mr Hanan notified his appeal against the information notice to the FTT. Since the notification of the information notice appeal was late, Mr Hanan needed the permission of the FTT under s49G(3) of TMA.

17. Mr Hanan's appeals against both the information notice and the penalty came before the FTT on 29 October 2018. At the hearing before the FTT, HMRC did not oppose the FTT exercising its discretion under s49G(3) of TMA to permit Mr Hanan to notify his appeal against the information notice late and the FTT exercised that discretion ([19]). That meant that, pursuant to s49F(4) of TMA, the appeal against the information notice was no longer treated as settled by agreement. It followed, therefore, that the FTT had before it "live" appeals by Mr Hanan against both the information notice and the penalty.

18. The FTT's powers in relation to Mr Hanan's appeal against the information notice were set out in paragraph 32 of Schedule 36 as follows:

> (3) On an appeal [against an information notice] that is notified to the tribunal, the tribunal may—
>
> > (a) confirm the information notice or a requirement in the information notice,
> >
> > (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 officer of Revenue and Customs following the tribunal's decision.

19. The FTT's powers in relation to Mr Hanan's appeal against the penalty were, by paragraph 48 of Schedule 36:

> (3) On an appeal under paragraph 47(a) [i.e. an appeal to the effect that no penalty is payable], that is notified to the tribunal, the tribunal may confirm or cancel the decision.
>
> (4) On an appeal under paragraph 47(b), [i.e. an appeal as to the amount of a penalty] 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.

The FTT's decision

20. Before the FTT, Mr Hanan challenged a number of aspects of HMRC's decisions to issue both the information notice and the penalty. We can summarise these challenges briefly since Mr Hanan has not, for the most part, been given permission to renew them in the appeal that is now before us. The essence of Mr Hanan's arguments before the FTT was:

(1) The original information notice was invalid as Mr Hanan had submitted a tax return for the tax years in respect of which HMRC were requesting information and none of Conditions A to D set out in paragraph 21 of Schedule 36 was satisfied.

(2) The effect of HMRC's review decision of 12 October 2016 was that they issued a new information notice (requiring information on just 18 items, rather than the original 37). HMRC's penalty decision was, accordingly, invalid as it referred to the "original" information notice issued on 12 November 2015 rather than the "new" information notice of 12 October 2016.

(3) Some of the documents requested were not in Mr Hanan's "possession or power".

(4) Mr Hanan had a "reasonable excuse" for failing to comply with the information notice and so should not be charged a penalty by virtue of paragraph 45 of Schedule 36.

(5) Mr Hanan had provided some of the information and documents required by the information notice. The £300 penalty should be reduced by a proportion that reflected the extent of his compliance with the notice.

21. The FTT dismissed Mr Hanan's arguments summarised at [20(1)], [20(2)], [20(4)] and [20(5)] above and since Mr Hanan does not have permission to challenge the FTT's conclusions on those issues, we need say nothing more about the FTT's reasons for doing so.

22. As we have already noted at paragraph [7] above, HMRC's review resulted in a reduction of the number of items on which information was sought from 37 to 18. At the start of the FTT hearing, HMRC explained that they no longer wished to pursue their requests for information on three items and they withdrew their request for information on one item during the hearing itself. They also explained that Mr Hanan had, by the time of the hearing provided information on a further three items. Therefore, by the time of the hearing before the FTT, HMRC were seeking only to uphold the request for information in relation to 11 of the 37 items set out in the original information notice ([90]).

23. Mr Hanan was unsuccessful in his arguments that HMRC should not be entitled to require information and documents on the remaining 11 items. The FTT's ultimate

conclusion on these matters, which also contains its decision as to how the appeal against the information notice should be disposed of, is set out in the following paragraphs of the Decision:

> 95. As previously mentioned, the Tribunal has a wide discretion to either confirm, vary or set aside any requirement of an information notice.
>
> 96. I have considered carefully the points which Mr Fox has made on behalf of Mr Hanan as well as the efforts which Mr Hanan says he has already made to try to obtain the information/documents which have been requested by HMRC. In my view, however, the remaining information which HMRC is seeking is reasonably required for the purposes of their investigation in order to check Mr Hanan's tax position and, to the extent that the request is to provide documents, they are in principle in Mr Hanan's possession or power. It is no answer to say, for example, that HMRC could issue a third party notice against HSBC in Switzerland when, on the face of it, Mr Hanan must have a right to obtain the relevant statements himself.
>
> 97. The remaining 11 items sought by HMRC are therefore confirmed subject to the variations proposed as a result of HMRC's review and some further very small variations to take account of points raised during the hearing.
>
> 98. I attach as an appendix to this decision an amended schedule which is to be treated as the schedule to the Original Information Notice dated 12 November 2015. For reasons of confidentiality, I have removed the account numbers for the relevant bank accounts. These are however the same account numbers as those referred to in the Original Information Notice and the 2016 Appendix.
>
> 99. HMRC accept and I would reiterate that if Mr Hanan is genuinely unable to obtain the documents which have been requested and can provide evidence as to what efforts have been undertaken in order to try and obtain those documents, he will not be treated as having failed to comply with the amended information notice as he will have a reasonable excuse for the failure. It is not however sufficient simply to assert that he has attempted to obtain the information without providing any evidence as to what steps he has taken to do so.
>
> 100. The period within which the revised information notice must be complied with is the period ending 45 days after the release date of this decision.

24. The FTT clearly realised in the Decision that Mr Hanan had been charged a penalty for his failure to comply with the information notice as in existence on 5 December 2016, the date when HMRC assessed the penalty, but that the effect of the Decision was to vary the scope of the information required to be provided. For example, it said at [102] to [104]:

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

> 103. I have already found that the Original Information Notice was valid. As a result of the appeal against that notice, I have varied it, as set out above.
>
> 104.However, there is a separate question as to the nature of the information notice which was in existence at the time the penalty was assessed in December 2016. This is relevant to Mr Hanan's objection to the penalty on the basis of a mistake in the penalty notice.

25. Moreover, the FTT noted at [105] that, at the point that HMRC imposed the penalty, Mr Hanan had missed the time limit for notifying his appeal against the information notice to the FTT so that, at that time, Mr Hanan's appeal against the information notice was to be treated as settled on the terms set out in HMRC's review letter. Therefore, the effect of the FTT's reasoning at [104] to [106] was that Mr Hanan's liability to a penalty had to be determined by reference to the information notice as it existed in December 2016.

26. With that approach in mind, the FTT concluded at [113] that HMRC had power to vary the information notice when performing that review and had exercised that power. It followed, therefore, that the question whether Mr Hanan was liable to a penalty depended on the extent to which he had complied with the information notice as varied following HMRC's review (see [116] and [117]).

27. At [117], the FTT noted that it was common ground that Mr Hanan had not complied with the information notice as varied by 2 December 2016, the "final deadline" specified in HMRC's review decision. Accordingly, the FTT decided that Mr Hanan was in principle liable to a penalty. Having rejected the other arguments to which we have referred at paragraph [20] above the FTT dismissed Mr Hanan's appeal against the penalty.

The grounds of appeal against the Decision

28. Mr Hanan has permission to appeal, granted by this tribunal after an oral hearing, against the Decision on two grounds:

> (1) The FTT made an error of law by failing to conclude that the penalty was issued outside the period specified in paragraph 46(3) of Schedule 36.
>
> (2) The FTT made an error of law by upholding the penalty in circumstances where the FTT varied the information notice and directed Mr Hanan to comply with it within 45 days of release of the Decision.

29. We should make it clear that the grant of permission to appeal merely indicated that the above two grounds of appeal raised points of law which were considered arguable. It did not, however, signal that the tribunal considered that these grounds were likely to succeed. We make this point because in his oral submissions Mr Fox seemed to indicate that the grant of permission to appeal on these grounds indicated this tribunal's affirmation of their correctness. We explained that this was not so and that it was necessary for Mr Hanan, with Mr Fox's assistance, to make good his case on both grounds.

Discussion – Ground 1

The respective positions of the parties

30. Ground 1 takes as its starting point the fact that, pursuant to paragraph 46(3) of Schedule 36, a penalty can only be made within a 12-month period starting with the latest of three dates. One such date is, by paragraph 46(3)(a), the date on which Mr Hanan "became liable to the penalty". Another such date, applicable in circumstances where, as here, Mr Hanan has given a notice of appeal against the information notice is by paragraph 46(3)(c) "the date on which the appeal is determined or withdrawn".

31. Mr Hanan's argument on paragraph 46(3)(c) is straightforward. He gave a notice of appeal against the information notice to HMRC on 1 March 2016 which HMRC agreed to accept late. That appeal was not determined until 20 December 2018 when the FTT released the Decision. The penalty assessment was made on 5 December 2016 and so, in his submission, was invalid as being earlier than the date specified in paragraph 46(3)(c).

32. In a similar vein, Mr Hanan submits that he could only become "liable to the penalty", for the purposes of paragraph 46(3)(a) if and when he failed to comply with the information notice as varied by the FTT in the Decision. Therefore, the date specified in paragraph 46(3)(a) was, in Mr Hanan's submission, the date falling 45 days after release of the Decision (since, in paragraph [100], the FTT gave him 45 days to comply) and, accordingly, the penalty assessment that was made on 5 December 2016 was made earlier than the date set out in paragraph 46(3)(a) as well. This second argument, therefore, overlaps with similar points that Mr Hanan makes in connection with his Ground 2.

33. HMRC argue that Mr Hanan's approach to paragraph 46(3) wrongly considers matters with the benefit of hindsight. The correct approach, HMRC argue, is to consider whether the penalty assessment was made in the appropriate period by reference to facts and circumstances in existence on the date the penalty assessment was made (i.e. on 5 December 2016). On that date, they argue, Mr Hanan's appeal against the information notice was, by s49F of TMA, treated as settled by agreement since, by that date Mr Hanan had neither sought, still less obtained, permission from the FTT to notify that appeal late. Therefore, as matters stood on 5 December 2016, Mr Hanan's appeal was "determined" and the date in paragraph 46(3) had passed. Moreover, on 5 December 2016, Mr Hanan had failed to comply with the information notice as varied following HMRC's review with the result that Mr Hanan had, by that date, become "liable to the penalty" for the purposes of paragraph 46(3)(a).

34. In support of their argument, to the effect that the periods of time specified in paragraph 46(3) needed to be determined by reference to facts and circumstances in existence when the penalty assessment is made, HMRC provided us with a detailed analysis of relevant case law (primarily *R (PML Accounting Ltd) v HMRC* [2019] 1 WLR 2428) and references to other decisions of the FTT relating to penalties for failure to comply with Schedule 36 notices. They provided an analysis of anomalies that they argued would arise if the time limits were to be determined with retrospective effect some two years after the penalty was assessed. They set out a detailed analysis of what

they regarded as the purpose of the relevant provisions of Schedule 36 and why their approach was consistent with that purpose.

35. It was unfortunate that in neither Mr Hanan's written submissions, nor in the oral submissions of Mr Fox, was the detail of HMRC's submissions engaged with. It was not, therefore, clear to us whether Mr Hanan even accepted that Issue 1 reduced to a consideration of whether the time limits in paragraph 46(3) of Schedule 36 were to be approached by reference to facts and circumstances in existence when the penalty was issued, or "after the event". Nor did Mr Hanan provide his own competing analysis of the purpose of the relevant provisions, whether the anomalies to which HMRC referred existed, or whether the existence or otherwise of those anomalies was relevant to the construction of paragraph 46(3).

36. We make this observation, not as a criticism of Mr Hanan or Mr Fox. Mr Hanan's written submissions, as amplified by Mr Fox's oral advocacy, made it clear that Mr Hanan based his case on what he regarded as the clear and obvious meaning of paragraph 46 of Schedule 36. However, we would have benefited from a more searching analysis of the strengths or otherwise of HMRC's case given that we are being asked to establish a binding precedent on the correct interpretation of paragraph 46.

37. The reason why we did not obtain a searching analysis of HMRC's case was clearly because Mr Hanan who, until the date of the hearing was representing himself, lacked the necessary legal and tax expertise to provide it. Mr Fox clearly had some experience of tax matters but he explained in his oral submissions that Mr Hanan had only asked him to get involved in the day or so before the hearing. We were faced, therefore, with a material difference between the level of detail in Mr Hanan's submissions as compared with those of HMRC which was most apparent in their respective skeleton arguments: Mr Hanan's ran to just two pages with HMRC's running to 35.

38. Neither Mr Fox nor Mr Hanan asked us to make any particular direction in the light of the clear disparity in the detail of the parties' submissions. Nevertheless, given that the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 is to deal with cases "fairly and justly" we have considered for ourselves whether the proceedings before us were fair. We have concluded that they were for the following reasons:

(1) Neither Mr Hanan nor Mr Fox suggested at the hearing that the proceedings were unfair.[2]

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[2] As we have noted, Mr Hanan did apply, in advance of the hearing, for it to be postponed until it could take the form of a "face to face" hearing. We have given separate reasons for refusing that application. However, that was a request as to the <u>form</u> of the hearing. Even if the hearing before us had been a "face to face" hearing, the same disparity between the details of the parties' submissions would have been present.

(2) Mr Hanan has chosen to bring to this tribunal an appeal against a penalty of just £300. As Mr Fox observed, that was his prerogative. However, having chosen to bring the appeal, the responsibility for prosecuting it lay with Mr Hanan. In the ordinary course, Mr Hanan should bear the consequences of a decision not to engage professional advisers or to involve Mr Fox soon before the hearing. Put another way, there is nothing inherently unfair in HMRC choosing to devote more effort to defending the appeal than Mr Hanan chose to devote to pursuing it.

(3) If the appeal was of great significance to Mr Hanan, we might have considered tempering the strict approach outlined at (2) above. However, the appeal involves a penalty of only £300 and it was not suggested to us that it had any greater significance than this.

(4) The most obvious way of dealing with the disparity between the detail of the parties' submissions would be to postpone the hearing to give Mr Hanan more time to prepare more detailed submissions. Mr Hanan did not, at the hearing, ask us to make such a direction. In any event, HMRC's overall case was set out in their Response to the appeal served on 12 December 2019. That Response was not as detailed as their skeleton argument, but made their overall position clear and we therefore consider that Mr Hanan has had adequate time to meet that case. In those circumstances, it would be disproportionate for a hearing of an appeal against a £300 penalty to be postponed to give Mr Hanan further time to prepare particularly given the costs what would be thrown away by such an action.

Analysis

39. Given the points we have just made, we will not engage in our own detailed analysis of all aspects of HMRC's arguments. Such an approach would run the risk of this tribunal assuming the role of Mr Hanan's advocate. Rather, we will give reasons for accepting HMRC's overall case on Ground 1 without necessarily accepting all the constituent components of it.

40. We start by observing that, on 5 December 2016, when HMRC assessed the penalty it would have appeared to a dispassionate observer that the assessment was made within the period specified by paragraph 46 of Schedule 36 for the following reasons:

(1) While Mr Hanan had appealed against the information notice, he had not notified his appeal to the FTT within the applicable time limit with the result that his appeal was treated for the purposes of s54(1) of TMA as settled by agreement on the terms of HMRC's review decision. That deemed settlement by agreement took place on 11 November 2016 (see paragraph [7] above). Moreover, s54 of TMA treated that settlement by agreement in the same way as a determination of the FTT. Therefore, judging matters on 5 December 2016, the date specified in paragraph 46(3)(c) of Schedule 36 was 11 November 2016.

(2) HMRC's review decision varied the information notice by specifying a final deadline for compliance of 2 December 2016. Therefore, judging matters on 5 December 2016, Mr Hanan became liable to the penalty, for the purposes of paragraph 46(3)(a), on 3 December 2016.

(3) The date specified in paragraph 46(3)(b) was 12 December 2015, 30 days after the information notice was issued.

(4) HMRC assessed the penalty on 5 December 2016: less than 12 months after the latest of the three dates set out above.

41. We do not understand Mr Hanan to dispute the analysis set out at paragraph [40] above. Rather, his point is that even if the penalty <u>appeared</u> to be assessed within the appropriate time limit when first issued, the FTT's decision to allow him to notify his information notice appeal late altered that outcome with retrospective effect. He submits that the obvious and clear effect of paragraph 46(3) is that the date specified in paragraph 46(3)(c) is 20 December 2018 (the date the FTT released the Decision) and the date specified in paragraph 46(3)(a) is 4 February 2019 (45 days after the FTT released the Decision given the 45 days that the FTT gave him to comply with the information notice as varied in the Decision).

42. We do not accept Mr Hanan's overarching submission that Ground 1 must obviously succeed based on the clear and natural meaning paragraph 46. We quite agree that paragraph 46 can be read as inviting an examination of circumstances <u>after</u> the penalty assessment is made. However, paragraph 46 can also be read as setting out time limits that must be tested <u>at the time</u> that penalty is imposed. There are, therefore, two potential interpretations of paragraph 46 and it is necessary to decide which is correct having regard to the overall scheme of the legislation and its purpose.

43. We accept Ms Pearce's submission in her skeleton argument that paragraph 46 is necessary to enable all parties to "know where they stand". If an HMRC officer is contemplating issuing a penalty assessment, he or she needs to know <u>at the time</u>, the period within which it must be issued. Similarly, a taxpayer who receives a penalty assessment needs to understand, at the time whether it was issued within applicable time limits since, if it was not, that would be a ground for resisting payment of the penalty. Assessments can be the subject of enforcement proceedings in the county court. A county court judge being asked to approve particular methods of enforcing a penalty might legitimately expect a clear answer to the question of whether the penalty was validly issued within applicable time limits rather than an answer to the effect that if, at any time in the future, the FTT grants permission to make or notify a late appeal, the penalty assessment will retrospectively be rendered invalid. These considerations suggest that the time limits in paragraph 46 should be approached in the light of circumstances in existence when the penalty is issued.

44. Moreover, if Parliament had intended that events occurring after a penalty notice is issued could, with retrospective effect, invalidate that notice by treating it as issued outside the period specified in paragraph 46, one might have expected the legislation to deal with consequences that arise as a consequence. For example, if the penalty has been paid, the legislation might be expected to deal with the question whether, on retrospectively becoming invalid, the penalty is to be repaid and, if so, on what date.

That Schedule 36 contains no such machinery is a suggestion that the time limits in paragraph 46 are to be considered once and for all when the penalty is issued.

45. The scheme of the legislation itself indicates that Mr Hanan's argument based on paragraph 46(3)(c) is not correct. On Mr Hanan's argument whenever the FTT grants permission to make, or notify, a late appeal against an information notice the result of that decision is automatically to invalidate any penalties previously issued irrespective of whether the appeal is successful (or even pursued). That this is not the intended result of paragraph 46(3)(c) is seen most obviously in the context of daily penalties that HMRC are entitled, by paragraph 40 of Schedule 36, to impose where a taxpayer fails to comply with an information notice over a protracted period. The evident purpose of those daily penalties is clearly both to punish non-compliance while giving a taxpayer the opportunity to stop further penalties accruing by complying. The effectiveness of the daily penalty regime would be substantially undermined if such penalties were retrospectively rendered invalid if a taxpayer obtained permission to make or notify a late appeal, whether or not that appeal is successful and indeed whether or not it is pursued.

46. In a similar vein, we do not consider that paragraph 46(3)(a) of Schedule 36 is intended to defer HMRC's power to issue a penalty until the point in time at which the FTT conclusively determines whether a taxpayer has failed to comply with an information notice or not. The clear purpose of paragraphs 39 and 40 of Schedule 36 is to enable HMRC to penalise non-compliance in "real time" both to punish non-compliance and to incentivise taxpayers who have previously not complied to mend their ways. That purpose would be frustrated if HMRC could not act in the face of what they considered to be non-compliance. The earliest Mr Hanan could be liable for a penalty was 3 December 2016, the day after the final deadline specified following HMRC's review decision. That fixed the relevant date for the purposes of paragraph 46(3)(a) of Schedule 36. Of course, if HMRC issued a penalty, it would then be for the FTT to decide whether Mr Hanan had actually failed to comply with the information notice and, if he had not, the FTT would set the penalty aside. But HMRC were not obliged to wait until the FTT had pronounced on whether Mr Hanan had, or had not, failed to comply before assessing a penalty.

47. We are reinforced in that interpretation of paragraph 46(3)(a) by Ms Pearce's explanation that it was enacted in order to make changes associated with HMRC's power to charge daily penalties under paragraph 40 of Schedule 36. Until amended with effect from 21 July 2009, the time limit that was applicable in cases where, as here, a taxpayer had a right of appeal against the information notice was set as one year after the later of (i) the end of the period in which a timely notice of appeal against the information notice could have been given and (ii) the date on which any appeal is determined or withdrawn. If that provision had been left unamended, and a taxpayer persistently refused to provide information without submitting an appeal against the information notice, HMRC would, 12 months after the last date on which a timely appeal could have been made, cease to be entitled to impose daily penalties. The amendment effected by paragraph 46(3)(a) ensured that HMRC could continue to impose daily penalties in these circumstances so long as they did so no more than 12 months after the day on which the taxpayer became liable to each daily penalty.

Understood in those terms, the purpose of paragraph 46(3)(a) was not to require HMRC to await the FTT's decision in an information notice appeal before issuing penalties for failure to comply with that notice.

48. HMRC referred us to the decision of the Court of Appeal in *PML Accounting Ltd*. In that case, the taxpayer received an information notice but, having appealed to HMRC against it, agreed a settlement with HMRC under s54 of TMA. The taxpayer did not comply with the information notice and HMRC imposed a penalty, against which the taxpayer appealed. In the penalty appeal, the FTT concluded that the information notice was invalid and set aside the penalty. The question arose whether the FTT had jurisdiction, in the penalty appeal, to consider the validity or otherwise of the information notice in circumstances where an appeal against the information notice had already been settled under s54.

49. The majority (Henderson LJ dissenting) held that the FTT had no such jurisdiction. At [47] of the reported judgment, Longmore LJ, having quoted paragraph 46 of Schedule 36 said:

> It is therefore only after appeal rights in relation to the Notice have been exhausted (or not utilised) that any right to appeal against penalties can come into existence. This suggests very strongly that a tribunal considering an appeal against penalties has no jurisdiction to consider the validity of a notice which can only be determined by an appeal which has to be brought before any appeal against (or indeed any assessment of) a penalty can occur.

50. Longmore LJ then expanded on this point saying, at [49] and [50]:

> 49. PML argued that the fact that a late appeal could be made pursuant to section 49 of the 1970 Act showed that a tribunal hearing a penalty appeal did have jurisdiction to consider the validity of the Notice since any such late appeal would be made to the tribunal and there was no reason to suppose that the tribunal hearing the penalty appeal could not also be the tribunal to which application for permission for a late appeal could be made.
>
> 50. This contention cannot be correct. The true position is that any tribunal considering a penalty appeal would have to defer its determination of such penalty appeal until the question, whether a late appeal against validity was to be entertained, had been resolved. It might well be that the same tribunal could consider that question but until the question of permission for a late appeal was determined and, if it was permitted, was itself determined, the tribunal could not go on to determine the penalty appeal.

51. These passages can be read as providing some support to Mr Hanan's case. If the FTT deferred <u>all</u> consideration of Mr Hanan's penalty appeal until after the resolution of the information notice appeal, it would only consider the paragraph 46 time limits after having decided to allow a late notification of the information notice appeal. That, in turn, might be read as pointing against the conclusion that the paragraph 46 time limits are to be considered as of the date when the penalty notice was issued.

52. However, neither party suggested that the decision in *PML Accounting Ltd* set out a binding determination of Mr Hanan's appeal. In the passages we have quoted, the Court of Appeal was concerned with a question of jurisdiction. We do not, therefore, consider that the judgment can be read as giving guidance on how to approach the very different question arising in these proceedings. Moreover, if the Court of Appeal had been intending to state that a late appeal against an information notice could retrospectively render invalid an earlier penalty assessment, there might have been a fuller explanation of the point.

53. Overall, we consider that *PML Accounting Ltd* sheds little light on Ground 1. Therefore, for the reasons we have given, we consider that the better view is that the question whether the penalty was issued within the paragraph 46 time limits is to be determined in the light of circumstances existing at the date of issue of that penalty. As we have explained at [40], judged at the time of its issue, the penalty was issued within the paragraph 46 time limits. That, of course, does not mean that it was necessarily correctly imposed: the FTT still had to consider whether Mr Hanan had failed to comply with that notice (which is the province of Mr Hanan's Ground 2). However, the FTT made no error of law in failing to conclude that the information notice was issued outside the time limits set out in paragraph 46 and Ground 1 fails.

Ground 2

The respective positions of the parties

54. Mr Fox set out Mr Hanan's position in his oral submissions. He argued that, in the Decision, the FTT exercised its power to vary the information notice. It gave Mr Hanan 45 days after the release of its decision (i.e. until 4 February 2019) to comply with the information notice as varied. In effect, it issued a brand new information notice and could not uphold a penalty based on alleged non-compliance with the unvaried information notice.

55. In response, HMRC make the following points, among others which it is not necessary to address:

> (1) In the Decision, the FTT did not exercise its power under paragraph 32(3)(c) of Schedule 36 to set aside the information notice. Nor did it exercise its power under paragraph 32(3)(a) to confirm the entire notice. Rather, it adopted a middle course, permitted by paragraph 32(3)(b) of Schedule 36, to "vary" the information notice so as to remove items that HMRC were no longer seeking or that Mr Hanan had already provided. The FTT, therefore, was not issuing a completely new information notice, not least since Schedule 36 gave the FTT, as distinct from HMRC, no power to issue information notices.
>
> (2) On any view, Mr Hanan had failed to comply with at least part of the information notice as it existed following HMRC's review. Moreover, there were aspects with of that information notice with which Mr Hanan had

failed to comply that were left unaltered in the Decision. Mr Hanan was appropriately penalised for his failure to comply with those parts.

(3) No significance can be attached to the fact that the FTT, in paragraph [100] of the Decision gave Mr Hanan 45 days to comply with the information notice. In any situation in which the FTT confirms or varies an information notice, a new time for compliance will be specified in accordance with paragraph 32(4) of Schedule 36 which runs from the date of the FTT's decision. This cannot be intended to absolve a taxpayer from any penalty that accrued prior to the date of the FTT hearing or decision.

Analysis

56. The FTT had to decide whether Mr Hanan had failed to comply with the information notice for the purposes of paragraph 39 of Schedule 36. That task necessarily invited a consideration of the information notice, and Mr Hanan's response to it, in the period after it was issued and prior to the FTT hearing.

57. At points in her submissions, Ms Pearce on behalf of HMRC appeared to be arguing that the question whether the FTT made any variations to an information notice, in an information notice appeal, was completely irrelevant to the question whether a taxpayer had "failed to comply" with the information notice in a penalty appeal. HMRC appeared to accept that if, in an information notice appeal, the FTT made wholesale changes to that notice, the extent of those changes would be relevant when deciding whether the taxpayer had a "reasonable excuse" for failing to comply. However, in HMRC's submission, if a taxpayer failed to comply with the information notice as issued by HMRC, that crystallised liability to a penalty subject only to considerations of reasonable excuse.

58. We would prefer to leave open the question of whether or not that broad submission is correct until a time when a tribunal can address it with the benefit of full submissions from both sides. We do, however, broadly accept the more limited submissions that HMRC made as outlined at [55] above.

59. First, we agree that, in the circumstances of this appeal, nothing turns on the fact that the FTT specified a further 45 days in which Mr Hanan had to comply. As HMRC observe, unless an information notice is set aside, paragraph 32(4) of Schedule 36 will inevitably result in a new deadline for compliance, including in situations where the notice is simply confirmed. That new deadline will either be set by the FTT (in exercise of its power under paragraph 32(4)(a)) or will be set by HMRC (pursuant to paragraph 32(4)(b)) but in either case will run from the date of the FTT's decision. Parliament cannot have intended that the setting of a new deadline should necessarily absolve a taxpayer from a penalty imposed by reason of previous non-compliance.

60. We acknowledge that, if the FTT concluded, in an information notice appeal, that the timescale that HMRC gave for the provision of information was too short, it might vary the deadline for compliance. Alternatively, it might hold that the category of documents that HMRC had requested was too broad and specify a completely new set of documents to be provided and a timescale for their provision. In such cases, we leave

open the question whether FTT might hold that a taxpayer who did not provide the documents requested, or did not provide them within the timescale HMRC requested, had not "failed to comply"[3].

61. However, the FTT made no such significant variations to the information notice at issue in this appeal: it upheld the information notice, but updated it to remove information that HMRC were no longer seeking and information that Mr Hanan had already provided. There is no suggestion that, in exercising its power under paragraph 32(4)(a), the FTT was making a determination that Mr Hanan had not failed to comply with the information notice.

62. Nor do we accept that, when it varied the information notice, the FTT effectively issued a new information notice with the result that Mr Hanan could only be penalised if, after the Decision was released, he continued to fail to comply with that new notice.

63. In its Decision, the FTT included an Appendix containing all the information and documents that Mr Hanan was obliged to supply. It is clear from the Decision that, in preparing that Appendix, it considered the extent to which Mr Hanan had already provided information and documents as set out in the information notice as varied by HMRC's review. It follows that all the documents and information set out in the Appendix were (i) within the scope of HMRC's information notice as varied by their review but (ii) had not previously been supplied. Therefore, the Appendix does not constitute a "new" information notice with which Mr Hanan was to be given further time to comply. On the contrary, the Appendix reveals the full extent of Mr Hanan's previous non-compliance which continued from 2 December 2016, the deadline specified by HMRC's review decision, to 29 October 2018, the date of the hearing before the FTT. We are quite unable to interpret the Decision as containing a conclusion that Mr Hanan had not failed to comply with the information notice particularly when it had recorded, at [117] of the Decision that there was no dispute that Mr Hanan did not comply with it.

64. In conclusion, the FTT found that Mr Hanan had not complied with the information notice as varied by HMRC's review. It found that Mr Hanan had no reasonable excuse. It therefore made no error of law in concluding that Mr Hanan was liable to a penalty. Ground 2 of Mr Hanan's appeal fails.

Disposition

65. The appeal is dismissed.

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[3] In HMRC's submission outlined at [55] above, a taxpayer in such a situation would not be subject to a penalty for a different reason: namely the existence of a reasonable excuse for the failure to comply with the information notice as issued. As we have said, we should not be taken as either accepting or rejecting that submission.

JUDGE JONATHAN RICHARDS

JUDGE GUY BRANNAN

RELEASE DATE: 22 June 2020