



Neutral Citation: [2024] UKFTT 00924 (TC)

Case Number: TC09320

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2023/10068

*SCH 36 Finance Act 2008 information request – reasonably required for checking tax position – yes – appeal dismissed*

**Heard on:** 11 October 2024

**Judgment date:** 16 October 2024

**Before**

**TRIBUNAL JUDGE AMANDA BROWN  
MOHAMMED FAROOQ**

**Between**

**MARY SIMPKINS**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: no one appealing

For the Respondents: Asif Razzak litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. With the consent of the parties this appeal was listed to be heard by way of video hearing using Microsoft Teams. A face-to-face hearing was not listed because it was more expedient to hear the appeal virtually. Prior to the hearing we were provided with a hearing bundle containing the Notice of Appeal served on behalf of Mary Simpkins (**Appellant**), the Statement of Reasons prepared by HM Revenue & Customs (**HMRC**) together with the relevant documents, correspondence, legislation, and case law.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

### ISSUE UNDER APPEAL

3. This appeal concerns an information notice (**Notice**) issued to the Appellant on 11 April 2023 under paragraph 1 of Schedule 36 Finance Act 2008 (**Sch 36**).

4. HMRC were, and are, concerned that the Appellant had entered into arrangements with her employer Olympus Consulting Ltd (**OCL**) pursuant to which her liability to income tax on her earnings from that employment were reduced so as to avoid tax. HMRC were keen to make the Appellant aware of their concerns and give her an opportunity to address them. They wrote to the Appellant on 16 February 2023 requesting information and documentation from her concerning her employment arrangements with and receipts from OCL or other parties in connection to her employment. The Appellant did not provide the requested information when informally requested resulting in HMRC issuing the Notice.

5. Paragraph 1 Sch 36 permits HMRC to issue a notice in writing requiring a taxpayer to provide information or documents if that information/documentation is “reasonably required by the officer for the purposes of checking the taxpayer’s tax position”. Paragraph 58 provides that “checking” is to include “carrying out an investigation or enquiry of any kind”. Paragraph 63 includes within the concept of “tax”, income tax. The concept of “tax position” is explained in paragraph 64 which refers to “(a) past, present and future liability to pay any tax” and/or “Penalties ... that may be payable ... in connection with any tax”. Also included within the scope of a taxpayer’s tax position are deductions required under PAYE regulations.

6. Paragraph 7 requires that the notice must reasonably specify the period and form in which the information or documents are to be provided. Paragraph 18 limits the scope of a notice issued under paragraph 1 to documents in the taxpayer’s possession or power.

7. A Sch 36 notice issued to a taxpayer can be appealed (paragraph 29). The scope of such an appeal is limited to determining the validity of the appealed notice i.e. whether it meets for formalities required by Sch 36. Whilst there is no binding authority in the issue the burden, the current consensus (see *Surat Singh Sangha v HMRC* [2024] UKFTT 00564 (TC)) is that, at least initially, rests with HMRC to show that the information or documents are reasonably required in order to check their tax position.

8. In contrast to a notice issued to a third party requiring the production of documents to check the tax position of a taxpayer there is no appeal on the grounds that the requirement to produce is unduly onerous.

### **RULE 33 APPLICATION**

9. The notice of hearing was sent to the parties on 12 September 2024 providing 4 weeks' notice of the listed hearing. On 13 September 2024, the Appellant emailed the Tribunal to say that the date listed was not one convenient to her. She requested that the hearing be vacated, and the matter be relisted. HMRC objected to the postponement request. On 18 September 2024 I refused the request on the basis that the Appellant had failed to comply with directions requiring her to provide listing information; the directions clearly stating that a failure to provide such information would mean that the appeal would nevertheless be listed.

10. On 30 September 2024, the application for postponement was renewed on the same basis but now also contending she had never been asked to provide inconvenient dates. I again refused the application. Not only had the directions required the provision of the information, by letter dated 11 July 2024, the Appellant had been reminded that she had not complied and requested to provide the information. Despite this no inconvenient dates were provided by her and so the hearing was listed without reference to them. The Appellant has provided no explanation as to why the date is inconvenient nor why her advisors cannot attend.

11. No one attended the hearing on behalf of the Appellant.

12. Rule 33 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**) provides that where a party fails to attend a hearing the Tribunal may proceed with the hearing if satisfied that the party had been notified of the hearing date and considers it in the interests of justice to so proceed.

13. The Appellant had plainly been notified of the hearing as she had applied on two occasions to have the matter postponed. We considered whether it was in the interests of justice to proceed with the hearing and concluded that it was. We did so taking account of the relevant factors:

(1) The issue under appeal is the validity of the Notice. To that extent therefore it relates to an administrative matter and not a substantive determination of an amount of tax.

(2) The basis on which such a notice can be issued is prescribed by law. The burden is on HMRC to show that the information and documents are reasonably required and thus we felt able to thoroughly test HMRC's position in this regard by reference to the matters raised by the Appellant is correspondence without the Appellant being present.

(3) This appeal represents the "lead case" for similar challenges to schedule 36 notices issued by HMRC to other individuals employed by OCL and it was therefore important to progress this matter in the interests of the other appeals stayed behind the present one.

(4) The Appellant had been informed that her postponement applications had been refused and that she was expected to attend the hearing. No explanation had been given for her failure to provide inconvenient dates or the nature of the matter which precluded her (or OCL acting as her representative) from attending.

### **THE NOTICE**

14. The Notice was issued on 11 April 2023. It provides that the information requested relates to the Appellant's employment by OCL and was required for the purposes of checking her tax position, in particular whether the employment arrangements involved tax avoidance. The information and documents required are stated to relate to the period 6 April 2021 (the

beginning of the tax year in which the Appellant's employment with OCL commenced) to 16 February 2023 (the date on which the information request to produce information was made). A copy of the Notice is attached as an annex to this judgment. But, in summary, what was requested was:

- (1) Information about the terms on which the Appellant was employed by OCL, what she was told about the terms of employment and how her earnings from that employment would be paid.
- (2) Details of the payments received in connection with the employment.
- (3) The details and circumstances of each end user/client of OCL on which she worked and the intermediaries through whom her services were provided, together with charge out rates and details of the payments received by whatever means relating to the work undertaken.
- (4) Copy bank statements showing deposits of all amounts received associated with the employment.
- (5) Copies of contracts and agreements relating to the employment including copies of loans, grants of credit, bonuses etc.
- (6) Copy payslips.
- (7) Copies of all correspondences received from and provided to any person involved in the operation or facilitation of the employment including clients and intermediaries.

15. The Notice required the information and documentation to be produced no later than 11 May 2023 and to be sent by email or post. Details were provided to facilitate a decision on how to produce the required information and documentation.

#### **THE APPELLANT'S CHALLENGE TO THE NOTICE**

16. Distilled from the correspondence and notice of appeal the Appellant challenges the validity of the Notice as follows:

- (1) The Notice requires information and documents in respect of a then current tax year (tax year ended 5 April 2023) and no enquiry had been opened in respect of the tax year ended 5 April 2022 it could not therefore be for the purposes of checking a tax position.
- (2) The request was onerous, replicated across other employees of OCL more properly obtained by way of a request made to OCL.
- (3) The Notice was used as a vehicle to intimidate and instil fear in the Appellant.
- (4) The information requested is not reasonably required by HMRC particularly vis a vis a tax year not yet ended and/or in respect of which there was or could be an enquiry.
- (5) The documentation requested is not reasonably required because there was no "sensible or reasonable possibility of HMRC imposing any liability to pay tax.
- (6) The requirement to produce documents was unduly onerous.

#### **HMRC'S EVIDENCE**

17. We had the benefit of a witness statement prepared by Ms L Robertson concerning the process undertaken to issue the Notice and the purpose for which it was issued. We read the statement and asked Ms Robertson a number of questions. In the absence of the Appellant we put to Ms Robertson that she had issued the Notice in order to intimate the Appellant, she responded that was not her motivation.

18. From the evidence available to us we find the following facts:

(1) HMRC have a concern that individuals employed by OCL may have under declared income tax in consequence of the employment arrangements through which they receive their remuneration for their services.

(2) The Appellant was employed by OCL from 20 December 2021 and therefore for part of the tax year ended 5 April 2022 and throughout until 16 February 2023.

(3) In order to understand the nature and terms of Appellant's employment arrangements with OCL together with her understanding of those arrangements, the basis on which she was paid, and the receipts paid to her as a consequence of those arrangements HMRC issued an informal request that she provide information and documents as specified in a letter dated 16 February 2023.

(4) The Appellant failed to respond to the informal request.

(5) The Notice was issued on 11 April 2023 to compel the production of the information and documents for the same reason as the informal request was made. Requiring production by post or email not later than 11 May 2023.

(6) Ms Robertson was not motivated to intimidate the Appellant when issuing the notice.

#### **DISCUSSION**

19. We must decide whether the Notice has been validly issued. In doing so, and by reference to the Appellant's concerns/challenge, we consider:

(1) Given that there was no open enquiry into the tax year ended 5 April 2022 and the tax year to 5 April 2023 had not ended was there a "tax position" to "check".

(2) If so, does it appear, on the evidence made available, that the information and documentation was reasonably required to undertake that check.

(3) Were the formal requirements for a valid Notice met.

(4) Whether the Notice should more properly have been issued as a third party notice pursuant to other provisions of Sch 36 as the tax position with which HMRC were concerned in asking for the information and documentation was, in reality, that of OCL.

20. As the Notice is a taxpayer notice and not a third party notice it is valid even where there is an onerous obligation placed on the taxpayer in complying with it.

#### **Checking a tax position**

21. As indicated above Sch 36 defines the word "check" expansively as including any investigation or enquiry. HMRC are not required to open a formal enquiry (under section 9A Taxes Management Act 1970) into a tax return in order to be entitled to check a tax position. This conclusion is plainly evident when the concept of checking is considered in conjunction with the definition of "tax position" which includes a reference to tax and penalties past present and future".

22. As we have found, HMRC were and remain concerned that the Appellant has been employed by OCL under arrangements which facilitate her receiving income from her employment without deduction (and thereby payment) of income tax and national insurance contributions from the commencement of her employment in December 2020 to 16 February 2023 and therefore in both tax years ended 5 April 2022 and 5 April 2023.

23. It is the Appellant who is liable for the payment of income tax and class 1 national insurance contributions on any sums she earns from her employment. Such tax is usually

collected by way of deductions made by an employee's employer under the Pay As You Earn, the employer paying over the tax deducted to HMRC. However, the primary liability to account for and pay the correct amount of income tax rests with the Appellant.

24. Thus, if the Appellant's employment arrangements resulted in an underpayment of income tax in any year "past, present or future" HMRC are entitled, in the wide sense articulated in Sch 36, to "check" that "tax position".

25. It does not therefore matter that there was no open enquiry or that information and documents were requested for a then current tax year.

26. On the basis of our finding at paragraph 18.(6) above we consider there is no basis that the real purpose of requesting the information was to intimidate the Appellant. HMRC requested the information for the purposes of checking the Appellant's tax position.

### **Reasonably required**

27. In order to check whether the Appellant had received payments from or by way of employment, from which income tax and national insurance contributions which should have been deducted but was not, HMRC did reasonably require a full understanding of the employment arrangements under which the Appellant worked and from which she received payments and the nature and amount of such payments. Given the restrictions which apply under the Income Tax (PAYE) Regulations 2003 regarding collection of sums which should have been deducted from earnings directly from an employee and the potential for the imposition of penalties it is also entirely reasonable that HMRC require information which will help them to understand, should tax avoidance arrangements be ultimately identified, whether the Appellant was aware of them and the extent of such awareness.

28. We have carefully considered each of the heads of information and documentation requested and consider that they were reasonably required in order to establish whether the Appellant has received payments on which no tax has been deducted, whether tax should have been so deducted and her knowledge and appreciation of being paid under arrangements that bought that situation about.

### **Formal requirements**

29. HMRC allowed a month in which to provide the information and documentation. We consider that to be a reasonable period to specify given the nature of the information and documentation required. Given that the Appellant was employed from December 2021 she would, in all probability, have received payments from OCL (or others) over a period of approximately 13 months. The production of documents over this relatively short period, within 1 a month is not, in our view, unreasonable.

30. Every employer is required to give employees a written statement of the terms of their employment. We would expect a reasonable taxpayer to retain that document together with correspondence leading to the offer of employment and otherwise in connection with the basis on which payments for work undertaken would be provided. We consider, based on our experience in the workplace, that most employees principal concern in connection with their employment is to understand what and when they will be paid. It is therefore entirely reasonable that such information and documentation would be readily to hand or able to be obtained within a month of being asked.

31. All of the documents requested were of a type that the Appellant should have retained and/or could have requested copies of from OCL. We therefore consider that they were within her possession or power.

32. The Appellant was given the option of sending by post or by email and thus the means of production was reasonable.

33. Accordingly, we determine that all the formal requirements of Sch 36 have been met.

**Should the Notice have been a third-party notice?**

34. We required HMRC to address the question as to whether the information and documents requested were more properly to be considered to be for the purposes of checking OCL's tax position and thereby whether they should have issued a third party notice to the Appellant.

35. Ultimately, whilst the deductions made from employment income are made by the employer and, in accordance with paragraph 64 Sch 36 HMRC were also entitled to check OCL's tax position in this regard, that does not negate that they are also entitled to check the Appellant's tax position as we have determined in paragraph 26 above. Accordingly, a taxpayer notice under paragraph 1 Sch 36 was appropriate.

**DISPOSITION**

36. For the reasons set out above we determine that the Notice meets the relevant requirements of Sch 36 and is therefore valid. We communicated this outcome at the hearing.

37. HMRC invited us to make an order requiring compliance within 30 days of the date of this decision. In the hearing I indicated that the period of compliance would be set at 57 days from the date of this decision. I did so failing to remember that there is no right of appeal against this decision. However, and as set out below, as the Appellant was not present at the hearing there is a right to apply (rather than a right to be granted) for this decision to be set aside. As any application to set aside must be made within 28 days I consider it appropriate to maintain the period of compliance to be 57 days. If there is an application to set aside made, I will aim to determine it within 28 days of receipt. Should the Appellant satisfy me that the decision should be set aside she will not have been required to comply before that decision is communicated to her. In the event that it is not set aside she will have had 57 days in which to comply.

38. The Appellant is thereby required to comply with the Notice within 57 days of the date of this judgment.

**TIME LIMIT FOR APPLICATION TO SET ASIDE**

39. In accordance with rule 38 of the FTT Rules, where a party was not present at a hearing the party may apply for the decision to be set aside. The application must be made no later than 28 days after the decision is sent to the parties. The application must be made in writing. The Tribunal will only set the decision aside the decision if it is in the interests of justice to do so.

**NO RIGHT OF APPEAL**

40. Paragraph 31(5) Sch 36 provides that the decision of the Tribunal on an appeal in respect of a Sch 36 notice is final and there is no right of appeal.

**AMANDA BROWN KC  
TRIBUNAL JUDGE**

**Release date: 16<sup>th</sup> OCTOBER 2024**