



[2016] UKUT 0363 (TCC)
Appeal number: UT/2015/0121

*PENALTY – non-compliance with information notice – Schedule 36,
Finance Act 2008 – notice requiring production of documents by post or
email – whether notice invalid for not specifying production for inspection
at an agreed or specified place – no – appeal dismissed*

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

TELNG LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ROGER BERNER
JUDGE JUDITH POWELL**

**Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 13
June 2016**

Mr David Knell, Director, for the Appellant

**Nicholas Chapman, of counsel, instructed by the General Counsel and Solicitor
to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. The Appellant ("TelNG") appealed to the First-tier Tribunal ('FTT') against an exercise by the Respondents ('HMRC') of their power under paragraph 1 of Schedule 36 to the Finance Act 2008 ("FA08") to require a taxpayer to produce documents. The power must be exercised by notice in writing. We shall refer to such a notice as an "information notice" or a "notice". There were two issues before the FTT.
10 TelNG argued, first, that the form of the notice itself was invalid and accordingly any penalty founded on it could not stand. Effectively, TelNG's argument was that Schedule 36 required the documents to be produced at a place and instead HMRC had required the documents to be sent either by post or by email. TelNG's second argument was that on the facts of the case it had a reasonable excuse for the supposed
15 failure to comply with the notice.

2. In a decision released on 30 June 2015 [TC/2014/05395] ('the Decision'), the FTT (Judge Poole and Mr Dee) dismissed TelNG's appeal. The FTT decided that the notice was valid and therefore any failure to comply with it resulted in a liability to the statutory penalties. It concluded that paragraph 7(1) of Schedule 36 FA08
20 (dealing with a person's obligation to produce documents by such means and in such form specified in a notice) was not limited by paragraph 7(2) of the same Schedule in such a way that the notice had to require production "at a place". In reaching this conclusion the FTT acknowledged that a liability might have been avoided if the Appellant had a reasonable excuse for its failure to comply with the notice but it also
25 decided that TelNG did not have such an excuse.

3. TelNG now appeals, with permission of the FTT, against the Decision in relation to the validity of the notice. In brief, the issue is whether the FTT made an error of law in concluding that a notice to produce documents solely by email or post is valid. TelNG does not appeal against the decision of FTT that it failed to comply with the
30 notice and did not have a reasonable excuse for its failure.

4. For the reasons set out below, we have decided that the FTT was right to conclude that a notice to produce documents solely by email or post is valid. Accordingly, TelNG's appeal is dismissed.

Background facts

35 5. References below to numbers in square brackets are, unless otherwise apparent, references to paragraphs of the Decision. The FTT described the evidence before it in [5] and its findings of fact at [6] - [31]. For the purposes of this appeal, the relevant facts may be summarised as follows.

6. By a letter dated 21 May 2014, HMRC notified TelNG that it was required by
40 information notice served pursuant to paragraph 1 of Schedule 36 FA08 to produce a

number of specified documents by 20 June 2014 “either by post to the above address or to me by email”.

7. The FTT found, at [55], that HMRC granted successive informal extensions of time up to at least 9 July 2014 as well as agreeing first to collect them from one place and then another but that TelNG failed to produce the documents as required and on 5 21 July 2014 HMRC informed it that they had decided to impose a £300 penalty pursuant to paragraphs 39 and 46 of Schedule 36 FA08. The FTT noted, at [48], that the notice did not require production at a particular place but that TelNG had indicated by email to HMRC on 22 May 2014 (in response to an earlier email rather than to the notice) that "pretty much any time" during the week commencing 2 June 10 2014 would be convenient for HMRC to collect the documents. HMRC specified 4 June 2014 at a stated address in Cambridge; at the request of TelNG the date and then the place were changed so that TelNG suggested that the documents should be picked up from its accountant. Further delays occurred and the penalty was imposed. 15 HMRC eventually collected the documents from TelNG’s accountants on 13 August 2014.

Legislation

8. Paragraph 1 of Schedule 36 FA08 is headed “Power to obtain information and documents from taxpayer”. It provides:

20 “(1) An officer of Revenue and Customs may by notice in writing require a person (‘the taxpayer’) –
(a) to provide information, or
(b) to produce a document,
if the information or document is reasonably required by the officer for
25 the purpose of checking the taxpayer’s tax position ...”

9. Paragraph 7 of Schedule 36 FA08 (“paragraph 7”) is headed "Complying with notices". It provides:

30 “(1) Where a person is required by an information notice to provide information or produce a document, the person must do so –
(a) within such period, and
(b) at such time, by such means and in such form (if any)
as is reasonably specified or described in the notice.
(2) Where an information notice requires a person to produce a
document, it must be produced for inspection –
35 (a) at a place agreed to by that person and an officer of Revenue and Customs, or
(b) at such place as an officer of Revenue and Customs may reasonably specify”

40 10. Paragraph 39 Schedule 36 FA08 provides amongst other things that a person who fails to comply with an information notice is liable to a penalty of £300 and

paragraph 49 of the same Schedule provides for assessment and notification of a penalty.

The Decision

5 11. The first issue in the appeal heard by the FTT was whether the notice issued on 21 May 2014 was valid because it required the documents to be sent (either by post or by email) rather than to be produced at a place. The FTT decided that it was. It is against that decision that TelNG brings its appeal.

10 12. The FTT observed, at [36] to [38], that the argument that the notice was not valid was founded on the content of paragraph CH23260 in HMRC's Compliance Handbook which included the statement:

“Produce’ means to bring something out from somewhere and show it. So the document must exist when the notice is given to the person

15 *The person does not have to send the document to you* (emphasis added). But they do have to show it to you and give you the opportunity to examine it.”

13. At [38], the FTT summarised TelNG's argument that, based on this statement, HMRC obviously accepted they had no right to require a taxpayer to send a document to them; in that case a notice requiring TelNG to do so must surely be invalid.

20 14. At [39] to [42], the FTT set out its conclusions on the validity of the notice. It decided that if paragraph 7 had stopped at the end of paragraph 7(1) then it would be quite clear that requiring “production” of a document by sending it to HMRC (either by post or email) would, in the absence of some extraordinary factor that made it unreasonable, fall within its terms. They noted that paragraph 8 of Schedule 36 FA08
25 makes it clear that copies of documents (rather than originals) will be sufficient so it would not be reasonable for a taxpayer to object on the grounds that he would be risking his original documents in the post.

15. The FTT then considered whether this conclusion was affected by the existence of paragraph 7(2) and decided that it was not. They decided, at [40],

30 “As we see it the purpose of paragraph 7(2) is to provide an alternative mechanism for actual physical inspection of the documents in person. If, for example, the volume of documents reasonably required by HMRC turns out to be so large that it would be unreasonable to ask the taxpayer to send them (or copies of them) then personal inspection may
35 be the only practical route. In such cases, a requirement in the notice to post or email all the documents could potentially render the notice itself invalid (on the basis that the “means” specified by that requirement would be unreasonable).”

40 16. At [42], the FTT observed that the sum total of documents required under the notice was a bundle about 2cm thick and concluded that HMRC might quite properly

form the view that it was unnecessary to complicate the wording of the notice so as to provide for the option of personal production as referred to above and in the absence of anything to show it was unreasonable to specify post or email as the means of production in the present case they did not disagree with that view. They did mention in passing, also at [42], that in different circumstances a notice which failed to provide an option for physical production at a “place” might be found invalid on the basis that the requirement to post or email the documents involved was not, in all the circumstances, a reasonable one.

Application for permission to appeal

17. TelNG applied to the FTT for permission to appeal on 25 August 2015. It did so on the basis that the decision at [40] and [41] contained an error of law by interpreting paragraph 7(2) as “providing an alternative mechanism for actual physical of the documents in person”. TelNG says that paragraph 7(2) specifies that “documents must be produced for inspection” and is clearly not intended to provide an alternative mechanism for the production of the documents and that the word “must” does not allow for this interpretation.

18. On 3 September 2015 the FTT (Judge Poole) granted permission to appeal on the basis that he considered that the application disclosed an arguable ground of appeal in relation to the question whether a notice to produce documents solely by post or email is valid.

Discussion

19. TelNG contends that the FTT’s conclusion, at [40] and [41], that paragraph 7(2) “provides an alternative mechanism for actual physical inspection of the documents in person” was wrong in law. It says that paragraph 7(2) sets out how documents must be produced where the information notice requires the production of documents. Consequently, Mr Knell argued, the imposition of a requirement in the notice that the documents be produced by post or email was an unlawful requirement which invalidated the notice.

20. The FTT found that, on its own, paragraph 7(1) contemplates that, where required, documents must be produced by such means as is reasonably specified or described in the notice so that requiring production of a document by sending it to HMRC (either by post or by email) would in the absence of some factor making it unreasonable be valid. It went on to conclude that paragraph 7(2) did not affect that analysis. It provided an alternative rather than setting out the only method for document production.

21. Although the FTT and HMRC's skeleton referred to the HMRC internal manuals and what they said about the meaning of "produce", both parties agreed at the outset of the hearing that they were not advancing any argument based on legitimate expectation. The appeal to this Tribunal was based on the single issue of the validity of the notice.

22. TelNG's case rested entirely on the wording of paragraph 7(1) and (2). Mr Knell submitted that the FTT's finding, at [41], that paragraph 7(2) provided an alternative rather than the only mechanism for the production of documents was an error of law as the word "must" in paragraph 7(2) makes clear. He argued that where
5 the information notice requires production of documents (rather than the provision of information) then "they must be produced at a place". He said that paragraph 7(2) is unnecessary if paragraph 7(1) allows HMRC to specify any reasonable method of production; one reasonable method of production might be at a place as contemplated by paragraph 7(2).

10 23. Mr Chapman, for HMRC, submitted that paragraph 7 dealt with compliance and that nothing in that paragraph could affect the validity of a notice; paragraph 1 dealt with the issue of a notice and paragraph 7 dealt with compliance with a notice issued in accordance with paragraph 1. A notice validly issued in accordance with paragraph 1 could not be rendered invalid by any provision of paragraph 7.

15 24. Mr Chapman referred us to the provisions of paragraph 1 which we have set out above. He submitted that this contains the essential requirements of a valid notice. It must be in writing and it must require a person to provide information or to produce a document subject to the proviso "*if the information or document is reasonably
20 required by the officer for the purpose of checking the taxpayer's tax position*". These elements, argues Mr Chapman, must all be satisfied for the notice to be valid. He submitted that nothing in paragraph 1 mandates the Respondents to require production of documents (or provision of information) in or at a specified period time, means, form or place. He accepted that a notice which failed to specify any of these things would be "without teeth" and would be unenforceable but he submitted it
25 would still be valid.

25. Mr Chapman had a further submission. He said that, even if he was wrong that nothing in paragraph 7 could affect the validity of a notice that complied with paragraph 1, paragraph 7 should not be interpreted in the way TelNG suggested. The notice which is the subject of this appeal did specify a time for production of
30 documents and a means of production – by email or by post. Mr Chapman says that the notice in question was valid even if its validity was partly dependent on whether the specified means of production did satisfy paragraph 7. He submitted that paragraph 7 (2) cannot be read as limiting the scope of paragraph 7(1) where the notice requires the production of documents by imposing a requirement that
35 production must be by inspection in a place agreed by the parties or reasonably specified by the parties. Paragraph 7(1) is limited in his submission only by the requirement of reasonableness.

26. We consider first the submission by Mr Chapman that the validity of a notice depends purely on satisfying the requirements of paragraph 1. Although irrelevant to
40 this case where the notice did contain compliance provisions, the answer does assist us in determining whether the compliance provisions are a part of the notice and affect its validity. Mr Chapman accepted that a notice which specifies no period, time, means, form or place had no "teeth". It seems to us that if such a notice is valid it is also purposeless because a person can never be said to have failed to comply with

it. That cannot have been the intention of Parliament in enacting that provision. The notice must be intended to contain means of compliance. A notice that contains no means of compliance cannot therefore, in our view, be a valid notice.

5 27. That conclusion, we consider, is supported by paragraph 39 of Schedule 36. That is the provision which imposes liability to a fixed penalty. It applies on failure to comply with an information notice. Accordingly, as the penalty is related to a compliance failure, it is clear that an information notice must, for that purpose, impose an obligation on a person to do something within a period of time. A penalty cannot arise unless there is a measurable breach of such an obligation. The obligations in question are provided for by paragraph 7, which must therefore be read in conjunction with paragraph 1. A notice will be incomplete if it fails to provide a means for compliance with the requirement for provision of information or production of documents itself. It follows that if a notice fails in this respect it will not be a valid notice.

15 28. This leads to the key issue, which is the proper interpretation of paragraph 7. We accept that there is some merit in Mr Knell's submission that paragraph 7(2), taken on its own, could be regarded as providing for the only available means of compliance with a notice where the requirement in the notice is for the production of documents, rather than the provision of information. The introductory words of paragraph 7(2):
20 "Where an information notice requires a person to produce a document", could be read as marking-out that paragraph as providing that the only permitted method of production of documents is that provided by paragraph 7(2), namely production of documents for inspection at an agreed or specified place.

25 29. Such a construction would involve taking a literal approach to an individual provision of the legislative scheme for information notices. However, principles of construction require paragraph 7(2) to be construed purposively and in its wider context. Regard must be had to the perceived reason for the enactment of paragraph 7 as a whole. Regard must be had to the fact that paragraph 7(1) is not confined to the provision of information, but expressly relates also to the production of documents.
30 That, in our view, demonstrates conclusively that paragraph 7(2) is not to be read as providing the only permissible means for production of documents generally, but must have a narrower import.

35 30. Applying a purposive approach to paragraph 7 as a whole, that paragraph is concerned with compliance. Although, as we have discussed, to be valid a notice must contain means by which it is to be complied with, it is not the purpose of paragraph 7 to prescribe those means; it is to require compliance with whatever reasonable requirements are imposed by the notice. A purposive construction of paragraph 7 as a whole would suggest that no part of it should be construed so as to limit, otherwise than by reference to reasonableness, the nature of the requirements to
40 be complied with either as regards the provision of information or the production of documents.

31. The reason for paragraph 7(2) itself is not difficult to ascertain. A requirement for production of documents by way of post or email is relatively easy to impose. It

5 simply requires the notice to contain details of HMRC's relevant postal or email address. That is something that is clearly within the scope of paragraph 7(1). On the other hand, as the statute recognises, a requirement for production for inspection may be more complex to impose, where what is required is physical production of documents at a particular place. That may be the case, for example, as the FTT observed at [40], if the volume of documents reasonably required by HMRC is of such a size that it would be unreasonable to require them to be produced by post or email. Complex arrangements to deal with physical production of documents, including possible agreement of a place for production, or absent agreement, the specification of a reasonable location by HMRC, may therefore require to be made. Paragraph 7(2) is apt to apply in those circumstances.

15 32. Adopting a contextual and purposive approach, in our judgment paragraphs 7(1) and 7(2) are compatible with one another and complementary. In this regard, we construe paragraph 7(1) as providing for compliance requirements in respect of all manner of production of documents, including by way of inspection. That would include cases such as where the means of production of an original document or a copy of it is by post and where the means of production is by email in respect of a document held in electronic form or, for example, a scanned copy of an original or copy document.

20 33. Paragraph 7(2) provides a separate and complementary compliance obligation where documents are required for inspection at a particular agreed or specified place. Paragraph 7(2) does not override paragraph 7(1) – it could not do so, as it makes no provision for compliance with a period in which or time at which the documents are to be produced – but operates only in relation to the means for compliance with the notice by way of production of documents for inspection in circumstances where a physical location at which the documents are to be produced for inspection has been agreed or specified. If no such physical location is agreed or specified, paragraph 7(2) will have no application, and the compliance obligations by reference to which compliance with the notice is to be tested will be those compliance with which is required by paragraph 7(1).

35 34. Further, in our view, if the notice provides for alternative means of compliance, of which production for inspection at an agreed or specified place is only one, it is only if the taxpayer avails himself of such production that compliance with paragraph 7(2) as to the place at which documents must be produced for inspection can come into play. Paragraphs 7(1) and 7(2) operate in tandem, and one does not supersede the other. It would remain open, in such circumstances, for a taxpayer to comply in any other way reasonably specified or described in the notice for production of the documents, such as by posting or emailing copies of them. That would represent compliance with the notice.

40 35. It follows that we do not accept Mr Knell's submission that paragraph 7(2) would be unnecessary if it merely supplemented paragraph 7(1) rather than replacing it. For the reasons we have outlined, paragraph 7(2) has a narrow focus which can apply only where a place for production of the documents for inspection has been agreed or

specified. In the scheme of the legislation, paragraph 7(2) must be regarded as augmenting paragraph 7(1) and as complementary to it.

36. Nor, contrary to Mr Knell's submission, do we consider that the word "must" in paragraph 7(2) mandates that production for inspection at a particular agreed or specified place can be the only lawful means specified for complying with a notice for production of documents, including for inspection generally. The mandatory requirements of paragraph 7(2) arise only in the circumstances to which paragraph 7(2) relates, namely where, in the case of documents required to be produced for inspection, there has been an agreement or specification of a place for production of the documents for that purpose, and the taxpayer has not otherwise complied with the notice by any other available means specified or described in the notice.

37. Paragraph 7(2), where it applies, imposes a separate, but complementary, compliance obligation to those imposed by paragraph 7(1). It does not provide the exclusive means for compliance with a requirement for production of documents, and accordingly the absence in an information notice of an agreed or specified place for production of the documents for inspection does not invalidate the notice.

38. In conclusion, we consider that the FTT did not make an error in law in concluding that an information notice that required the Appellant to produce documents by sending them by post or email was valid.

Disposition

39. We dismiss the appeal.

ROGER BERNER

UPPER TRIBUNAL JUDGE

JUDITH POWELL
DEPUTY UPPER TRIBUNAL JUDGE

RELEASE DATE: 12 AUGUST 2016