



Neutral Citation: [2022] UKFTT 184 (TC)

Case Number: TC08509

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2019/06188

Taxpayer information notice – Schedule 36 FA2008 – whether reasonably required – application of Perring, Kotton, Lundberg cases - whether in possession or power – application of Mattu

Heard on: 11 March 2022

Judgment date: 9 June 2022

Before

TRIBUNAL JUDGE BOWLER

Between

ONE CALL INSURANCE SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Joseph Howard of counsel instructed under direct access.

For the Respondents: Karen Powell, litigator of HM Revenue and Customs Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant (“One Call”) appeals against an information notice (“the Notice”) issued under paragraph 1, Schedule 36 of the Finance Act 2008 (“Schedule 36”) seeking information and documents about the use of a remuneration trust by it. Some of the items requested have been provided, but One Call challenges the remaining items sought on the basis that they are not reasonably required for checking the company’s tax position and/or they are not within One Call’s power to obtain.
2. During the hearing HMRC accepted that some items had been provided. Otherwise I have decided that some variations to the Notice are required but, subject to those changes, to confirm the Notice.

FORM OF HEARING

3. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face to face hearing was not held because the hearing had been arranged at the time of pandemic restrictions and a change to its format would have caused delay. I was satisfied that all parties were able to fully participate in the hearing by video.
4. 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.

GROUND OF APPEAL

5. Various grounds of appeal were clarified at the hearing. In summary, One Call appeals against the Notice so far as documents or information have not yet been provided on the basis that:
 - (1) the documents or information are not reasonably required;
 - (2) in some cases the documents or information are not within One Call’s possession or power.

BURDEN OF PROOF

6. The burden of proof rests on HMRC to show that the Notice was validly issued and that the requirements set out in Schedule 36 for its issue were met. HMRC accept that the burden of proof to show that the items sought by them are reasonably required for checking One Call’s tax position rests with them.
7. The parties agreed that in relation to whether documents are in the power or possession of One Call HMRC need to show a prima facie case that the documents are in One Call’s power or possession; and it is then for One Call to show that a serious attempt to obtain them has taken place (see *HMRC v Mattu* [2021] UKUT 0245 (TCC) at [99]).
8. It is also for HMRC to demonstrate that any information or documents required to be produced by the Notice are statutory records (in relation to which there is an exception to a taxpayer’s ability to appeal as described in the section dealing with the law below).
9. The standard of proof in each case is the usual civil standard of the balance of probabilities.

EVIDENCE

10. I was provided with two bundles of 745 pages and 290 pages. In addition, during the hearing One Call provided a copy of a letter sent to the trustees of the remuneration trust dated

19 April 2021. I also heard evidence from Ms Natalie Jones for HMRC and Mr Broughton (legal director of One Call) for One Call whose evidence I have given full weight.

THE DISPUTED SECTIONS OF THE NOTICE

11. Prior to, and during, the hearing it was agreed by one or other of the parties that certain parts of the Notices were no longer in dispute. I have therefore generally omitted those items from the matters dealt with by this decision, save that I have retained reference to items 2 and 4 below as the evidence about those provides context to other matters:

- (1) Item 1 - A step by step summary, with dates (approximate if necessary), of the process which led to the company adhering to the remuneration trust (“RT”). Please start with the point at which the company first considered the use of a RT and indicate what first led the company to consider using a RT. Please include details of approaches to/by any advisers setting out who the advisor was, who made first contact and how that contact was made.
- (2) Item 2 - The dates and amounts of all contributions made by the company to the RT.
- (3) Item 3 - How exactly was the company placed under “a commercial obligation to provide benefits for the class of beneficiaries” (“Resolution (A)” refers)?
- (4) Item 4 - Copies of the company’s bank statements showing the contributions to the RT, and any money (including loans) received from the RT. HMRC said this information was partially provided but not all contributions were shown.
- (5) Item 5 - Copies of all written resolutions, minutes, notes or other records regarding any meetings or resolutions, of company officers, employees and/or shareholders, at/in which any matter relating to the RT was discussed or resolved. To include copies of any documents referred to in those written resolutions, etc.
- (6) Item 6 - Copies of any applications, agreements and other documents relating to loans made by the RT or their nominee/s, to or for the company and/or any person who was an officer or employee of the company (whether made to them in that capacity, as officer/employee, or not).
- (7) Item 7 - Copies of all correspondence and other documents, in connection with the company’s use of the RT, between the trustee/s and any Beneficiaries.
- (8) Item 8 - Copies of all correspondence and other documents, in connection with the company’s use of the RT, between any nominee/s of the trustee/s, and any Beneficiaries
- (9) Item 9 - Copies of any accounts prepared regarding the company’s contributions to the RT and their application by the RT.

FINDINGS OF FACT

The subject of HMRC’s investigation

12. The information sought by HMRC in the Notice relates to enquiries into One Call’s involvement with a remuneration trust called WUT No 1 Ltd (“the RT”) which was established on 21 February 2011 by a trust deed entered into between WUT No 1 Ltd (“the Founder”) and Bay Trust International Ltd (“the Original Trustees”), a company based in Belize.

The chronology

13. On 31 October 2013 as part of their enquiries HMRC wrote to One Call’s then representatives (“MPB”) asking for copies of documentation concerning the creation operation of the RT and payments into it from One Call. In subsequent correspondence MPB provided what HMRC have described as “some answers” to their queries.

14. By letters of 4 August 2014 HMRC issued notices opening enquiries into One Call's tax returns. Informal requests for information and documents regarding the contributions to the RT were also sent with the notices.
15. In a letter of 20 November 2015 HMRC advised One Call that they would shortly be issuing a determination of unpaid tax under Regulation 80 PAYE Regulations 2003 ("Regulation 80") for the years ending 5 April 2013 and 2014 and a decision under Social Security Contributions (Transfer of Functions) Act 1999 (a "Section 8 decision") in respect of contributions and/or allocations made to/by the RT for the period 6 April 2012 to 5 April 2014.
16. On 27 November 2015 the Regulation 80 determinations for 2012-2013 and 2013-2014 as well as a Section 8 decision for the period 6 April 2012 to 5 April 2014 were issued.
17. By letter dated 18 December 2015 One Call appealed against the decisions and determination issued on 27 November 2015.
18. In a letter of 23 June 2016 HMRC informed One Call that they were checking its PAYE and NIC liabilities in relation to the RT for the period ending 31 October 2012, 2013 and 2014 and were checking the Corporation Tax returns for periods ending 30 June 2012, 31 October 2012 and 31 October 2013. HMRC also informally requested information and documents from MPB in relation thereto.
19. MPB wrote on 3 August 2016 to query the opening enquiry letter of 23 June 2016 given that the determinations and decision had been issued and appealed. HMRC responded in a letter 30 August 2016, but MPB wrote again on 21 September 2016 to say their view was that the matter should be considered as sub judice and not subject to further investigation. HMRC responded on 11 May 2017 to say that it was considered that the matter was not sub judice as it was not before the tribunal and the information and documents requested were for the purpose of reviewing the Corporation Tax position as well as the PAYE and NIC position.
20. In a further letter dated 11 May 2017 HMRC issued a notice of enquiry into One Call's tax returns for periods ending 31 October 2014 and 31 October 2015 as well as its PAYE and NIC for the period ending 31 October 2015. HMRC informally requested information and documents in relation thereto.
21. A notice of enquiry has therefore been issued in respect of One Call's Corporation tax returns for each of the accounting periods ending 30 June 2012 to 31 October 2015. The enquiries have not yet been completed. As a result, HMRC can rely upon Condition A in paragraph 21 of Schedule 36 (as described later in this decision).
22. On 17 November 2017 HMRC issued the Notice which One Call appealed on 14 December 2017.
23. On 4 December 2017 HMRC issued a determination under Regulation 80 in respect of the use of the RT in the year ending 5 April 2015. This determination was appealed on 22 December 2017.
24. HMRC issued a "view of the matter" letter to One Call on 31 January 2018. One Call took up the offer of review and on 13 April 2018 the independent review was notified to One Call by letter, upholding the Notice.
25. One Call appealed to the tribunal against the Notice on 11 May 2018.
26. By letter of 3 March 2020, One Call's new representative, Chancery Court Tax Chambers, wrote to say that One Call had been advised that it would be beneficial if the Notice was complied with. The appeal was then stayed for several months during the pandemic under

the tribunal's general directions. In the meantime, correspondence continued between the parties.

27. On 30 June 2020 Chancery Court Tax Chambers wrote to confirm that it was believed it would be possible to provide all the documents to HMRC by the end of August 2020. A series of stays were agreed. They were granted to allow One Call additional time to comply with the Notice.

28. On 12 October 2020 Chancery Court Tax Chambers wrote to HMRC to say that One Call was in a position to comply substantially with the Notice, but needed a further month to ensure full compliance.

29. On 23 October 2020 some of the information and documents required by the Notice were provided, but in a covering letter Chancery Court Tax Chambers explained why it was considered that various items were not reasonably required and suggested that some of the information be sought via a third party notice. Correspondence followed between HMRC and Counsel for One Call as to whether outstanding items were "reasonably required".

30. In an email of 9 February 2022 One Call confirmed that its appeal was maintained against the entire Notice even though some information had been provided.

31. However, at the hearing Mr Howard confirmed that One Call was only appealing against the Notice so far as it related to information or documents which had not been provided.

Issues identified by HMRC

32. As a general matter Ms Jones explained that the use of remuneration trusts such as WUT No 1 Ltd has been identified by HMRC as being designed to allow tax deductible expenses in the accounts of companies without payments to employees being subject to PAYE or NICs.

33. In the accounting period ended 31 October 2012 One Call claimed deductions totalling £6 million for contributions to the RT. This was the first of a series of contributions which continued into subsequent years. The accounts for One Call show contributions of £46,784,000 in the accounting periods ended 31 October 2012 to 31 December 2017 inclusive. However, One Call has provided a summary of contributions showing only £29,115,000 had been paid. The bank statements provided by One Call only show £25,892,200 having been paid. Ms Jones has explained that HMRC wish to check that the RT contributions claimed as expenses in the accounts were fully paid within the accounting period.

34. Furthermore, as the company's accounts are prepared to 31 October the date of the contribution is relevant to determine in which income tax year a corresponding employment income tax charge may arise.

35. HMRC are investigating whether the amounts claimed as deductions can be deductible under the general deductibility principles which require that expenses are incurred wholly and exclusively for the purposes of trade. In the context of the provision of employee benefits there are also statutory limitations on deductibility of payments set out in sections 1290-1296 Corporation Taxes Act 2009 which may apply.

36. The amounts assessed in the Regulation 80 determinations and the Section 8 decision have been calculated on a "best judgement" basis. The amount claimed as deductions for contributions to the RT has formed the basis of the assessments.

Contact with the trustee

37. On 19 April 2021 Mr Broughton, as legal director of One Call, wrote to the Trustee of the RT in Belize. That letter was sent by tracked post to ensure that it was delivered. It starts

by, in effect, putting One Call's case for why it considers the Notice request to be flawed by stating:

“Under that Notice, HMRC has asked for information which we have said is third party information in the power and knowledge of the Trustees. HMRC have said that they expect us to ask the Trustees for the information, based on an assumption that we have influence and control over the Trustees pursuant to the Trust deed.”

38. No response has been received and One Call has taken no further action to seek information or documents to satisfy the Notice from the Trustee or any other person.

HMRC'S CASE

39. Ms Powell submits that the information required by the Notice relates to the checks into One Call's Corporation tax returns as well as its PAYE and NIC liabilities. The fact that One Call has decided that the remuneration trust scheme transactions have a particular tax treatment does not prevent HMRC from checking the position and reaching its own independent view. The information and documents are reasonably required for the purpose of checking the company's Corporation tax, PAYE and NIC position because they enable HMRC to build up a detailed picture of the matters under review and the background to them. HMRC's guidance does not prevent HMRC from checking PAYE and NIC in the periods for which Corporation Tax returns have been submitted. There is nothing in Schedule 36 that requires HMRC to restrict its request for information and documents to current year records. Similarly, there is nothing that prevents HMRC from checking the PAYE tax and NIC position following the appeal of the Regulation 80 determinations and the Section 8 decision. However, in any event, all of the documents and information requested in the Notice are relevant to Corporation Tax as well. There is nothing in the legislation which states that HMRC must distinguish between checks relating to different taxes.

40. In relation to the submission made by Mr Howard relying upon *Marlborough v HMRC* [2021] UKFTT 0304 (TC), Ms Powell referred to the decision in *Strategic Branding Limited v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 0474 which had reached the conclusion that the disguised remuneration provisions did apply.

41. Ms Powell submitted that the tribunal's decision in the case of *Stephen Price v HMRC* [2011] UKFTT 624 provides relevant guidance:

“...HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008).”

42. Ms Powell also relied upon *Phillipou v HMRC* [2017] UKFTT 20 and *HMRC v Ingenious Games LLP & Ors* [2014] UKUT 62. HMRC are entitled to test information provided to them.

43. In relation to documents which One Call say are not in their possession or power, it is incumbent on them to comply with the Notice where they are able to do so and their comments to date have given no indication that they had given the request the necessary full and serious consideration. It is for One Call to demonstrate that a request for documents has been seriously made and denied. *Patel & K Patel v HMRC* [2014] UKFTT supports such an approach.

ONE CALL'S CASE

44. Mr Howard submits that the burden is on HMRC to show that the information sought is reasonably required. The case of *Perring v HMRC* [2021] UKFTT 0100 (TC) shows that HMRC must demonstrate that the information directly relates to insufficiently assessed liability to tax.

45. In this case HMRC has issued assessments (the Regulation 80 PAYE and Section 8 NIC determinations) and therefore must consider that they have sufficient information to do so. Once that step is been taken the only information that is legitimately within the ambit of an information notice is information that allows HMRC to test whether the assessment is sufficient. As HMRC have already concluded that the payments were employment related it cannot be seeking the additional information to check that position. The only information that is relevant to this question is the amount of the loans that have been paid to directors.

46. The Corporation Tax position is not affected by the documents or information sought. The items do not specifically relate to the purpose of One Call in making each payment to the RT.

47. Moreover the case of *Marlborough* is relied upon to show that payments routed to shareholders through trust arrangements are distributions and not disguised remuneration.

48. One Call accepts that the Upper Tribunal has summarised the law on possession or power for the purposes of Schedule 36. Importantly, this was in the context of another remuneration trust case. However, One Call has no material power or influence over the trustees of the RT. It is not a beneficiary under the trust. The relationship is at an end. There are no further contributions being made to the trust and there is no substantive property comprised in the trust other than creditor rights of the loans which appear to be held by a nominee custodian and not the trustees. One Call is not a “provider” and therefore does not fall within the specific reasoning in *Mattu*. There is no correspondence history of One Call asking for, or being given, information by the trustees.

49. Despite these issues One Call has requested the items sought but no response has been provided. The Tribunal is therefore asked to give specific directions and guidance on what steps should be taken if it is concluded that there is a prima facie case that One Call has the power to obtain the information.

50. I have addressed specific submissions made by Mr Howard in relation to each disputed item in the discussion section of this decision.

THE LAW

The legislation

51. Schedule 36 provides, so far as relevant—

“1.(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 the purpose of checking the taxpayer's tax position. (underling added)...

...18 An information notice only requires a person to produce a document if it is in the person's possession or power. (underling added)

52. “Checking” is defined in paragraph 56 as “including carrying out an investigation or enquiry” and “tax position” is defined in paragraph 64 as including “past, present and future liability to pay tax”.

53. Limitations on the issue of a notice are set out in paragraph 21 which, so far as relevant, provides as follows:

...21(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met. [...]

(4) Condition A is that a notice of enquiry has been given in respect of:

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates (“relevant tax”), and the enquiry has not been completed so far as relating to the matters to which the taxpayer notice relates.

(5) In sub-paragraph (4), “notice of enquiry” means a notice under:

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

...(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments [of tax or withholding of income]¹ referred to in paragraph 64(2) [or (2A)]¹ (PAYE etc).

54. It is therefore not only necessary in a case such as this for HMRC to show that the documents identified in the Notice are reasonably required for the purpose of checking One Call's tax position, but also that one of the Conditions for issuing an information notice is met. HMRC have relied upon Conditions A and D.

55. It is stated in paragraph 19 that an information notice does not require a person to provide or produce information that relates to the conduct of a pending appeal relating to tax, or any part of a document containing such information. In this case there are ongoing appeals in relation to the Regulation 80 and Section 8 determinations, but Mr Howard confirmed that One Call was not relying upon paragraph 19 as its scope was too narrow in the circumstances of this case.

56. Paragraph 29 provides for appeals against notices issued under paragraph 1 Schedule 36, but paragraph 29(2) sets out an exception where the document sought by HMRC is a “statutory record”.

57. “Statutory records” are defined in paragraph 62 as information or document which a person is required to “keep and preserve under the Taxes Acts or any enactment relating to a tax”.

58. Paragraph 32 of Schedule 36 provides that on an appeal the tribunal may confirm the information notice or a requirement in the information notice, vary the information notice or such a requirement, or set aside the information notice or such a requirement.

59. 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 of requirement within such period as is specified by the tribunal, or if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of HMRC following the tribunal's decision.

Principles derived from caselaw

Reasonably required for checking tax

60. The extract from the decision in *Stephen Price* referred to by Ms Powell encapsulates the starting point for the application of Schedule 36. HMRC is entitled to know the full facts related to a person's tax position.

61. Mr Howard relies upon the case of *Perring* in relation to the limitations and considerations applying to determine whether information in a notice was reasonably required. That is not binding authority on me given that it is a first-tier decision, but as a matter of practice I would expect to apply relevant principles from another first-tier decision unless I identify good reason not to do so. I consider that the principles set out in *Perring* must be considered in the context of the particular circumstances. In that case taxpayers who were individuals had been issued with an information notice under Schedule 36. As a result HMRC were relying upon a different condition in paragraph 21, namely Condition B which is worded differently and in particular includes the condition that an officer "has reason to suspect" that, in essence, the taxpayer is liable to pay more tax. There is no such requirement in Conditions A or D. Furthermore, the tribunal in *Perring* had to address the extent to which HMRC was able to assess the individual taxpayers given the time limits applicable to them.

62. The "reason to suspect" requirement was therefore a core element of the decision in *Perring* on which Mr Howard relies. While I agree that there is, as stated in *Perring*, a general principle that HMRC may not use information notices for the purpose of a "fishing expedition", I do not consider that much of the rest of the case has direct application to this appeal.

63. I asked the parties to consider and address the cases of *Metropolitan International Schools Ltd* and *Avonside*, both of which relate to corporate taxpayers and which therefore have the advantage of being potentially more relevant. Mr Howard submitted that the cases showed that HMRC can only reasonably require information which relates to identified tax issues.

64. I agree that, as identified in those cases, HMRC can only reasonably require information which relates to identified tax issues. That principle recognises that, as stated, HMRC cannot go on fishing expeditions. Furthermore, it is consistent with the principles set out by Simler J in *R (Kotton) v First-tier Tribunal (Tax Chamber)* [2019] EWHC 1327 (Admin) (at [59-62]) and approved by the Court of Appeal in *Kandore* (at [73]).

65. While Simler J and the Court of Appeal were considering third-party information notices, and the Court of Appeal was focused particularly on whether tribunal hearings dealing with third party notice should be held inter partes, they were setting out the principles dealing with the application of the limitation to information or documents "reasonably required" for the purposes of "checking" the tax position of the taxpayer. (Paragraph 2 of Schedule 36 which empowers HMRC to issue third party notices uses the same "reasonably required for checking" phraseology as paragraph 1 governing taxpayer notices.) Obiter dicta of the Court of Appeal are highly persuasive if not binding on this tribunal and I can see no reason why the principles set out in relation to the application of those words should not similarly be applied in the context

of the same words for first person taxpayer notices such as that which is the subject of this appeal.

66. Accordingly, I refer, in particular, to the following statements quoted from Simler J's judgment:

“It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. That is unsurprising given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued. ...

Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax.

61. Nor is it necessary ... as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.”

67. Indeed, there are notable similarities with the argument presented by Mr Howard regarding the reasonableness of the requirements to provide information and that presented in the case of *Lundberg v First tier Tax Tribunal* [2022] EWHC 566 (Admin) heard by the High Court only one week before this case. In *Lundberg* a third party information notice had been issued to American Express in relation to Mr Lundberg for information to be provided to the Swedish tax authority. The taxpayer argued that the investigation being carried out was not reasonably required and was unjustified because the Swedish tax authority had already decided that he had unlimited liability. Linden J applied the principles quoted above and approved in *Kandore*. He concluded that there was no basis to find that the Swedish investigation was anything other than genuine and legitimate, or in bad faith, and there were rational reasons to continue to investigate issues concerning the taxpayer's claimed tax residency.

68. Linden J considered that it was not irrational even if one basis for liability was thought to be established, for the Swedish tax authority reasonably to seek to be as well informed as possible, in the best possible position to defend its view and in a position to rely on other grounds should the need arise. The authority may wish to carry out additional checks on the position which it had taken.

69. Again, whilst in the context of third party rather than first party notices, the judgement was addressing whether the information sought was reasonably required for checking the taxpayer's tax position.

70. Accordingly, I consider that HMRC must identify a tax issue to which the information sought relates and I must be satisfied that HMRC's investigation is genuine and legitimate and not in bad faith. Beyond that it is not for me to reach any conclusion regarding the tax issues or issues identified by HMRC; and, in particular, it is not necessary for it to be shown that a liability to tax will arise on conclusion of the investigation as a valid investigation may lead to the conclusion there is no liability.

71. I do not agree with Mr Howard that there is another level of restrictions beyond the rules provided in Schedule 36, limiting items which may be requested to, for example, financial information. The case of *Dr K Long v HMRC* [2014] UKFTT 199 TC) on which he relies was

decided on its own facts and does not describe any general principle about the need for items to consist of financial information. In that case the taxpayer was a GP and HMRC issued a notice under Schedule 36 requiring copies of her diaries. The Tribunal found that no use could be identified for the diaries. They were not indicative even of turnover given the range of services provided by the doctor. As a result, the decision is entirely consistent with the principles I have set out above: HMRC could not show that information in the diaries related to the identified tax issues. As the case of *Avonside Roofing Ltd v HMRC* [2021] UKFTT 158 (TC) decided, whether a document is reasonably required depends upon the context.

Possession or power

72. The parties agreed that the principles are set out by the Upper Tribunal in the case of *Mattu*. As noted therein the requirement for items to be in the possession or power of the recipient of the notices strictly only applies to documents and not information.

73. The Upper Tribunal approved the approach set out in the case of *Parissis* [2011] TC 01083 where it was said that:

‘It seems to us that it is HMRC’s application for a penalty and it is for them to satisfy us that the documents are in the respondents’ possession or power. We bear in mind it is hard to prove a negative. But, we think, although HMRC must raise a prima facie case that the documents are in the respondents’ possession or power then it is for the respondents to show that they are not.’

74. The Upper Tribunal also confirmed that the term ‘power’ means both legal power and de facto power to obtain documents (or information). The approach taken in the case of *Patel* which concerned documents within the possession of a professional offshore trustee was also approved. In that case Judge Sinfield concluded that there had not been any serious attempt to obtain documents from the trustee and as a result the taxpayer was unable to show that the documents were not in their possession or power.

DISCUSSION

75. It is generally recognised that remuneration trust structures have been used to seek to achieve a tax deduction for payments made by the company whilst avoiding taxation on payments made to employees. Mr Howard has argued that the decision in *Marlborough* has provided the answer to the tax treatment of the structure used by One Call. I do not agree: I am not in a position to reach any decision about the application of *Marlborough* to One Call’s circumstances given the evidence before me. In addition, the decision in *Marlborough* is just one of a range of potentially relevant decisions (including *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] BTC 22 and *Strategic Branding Ltd v HMRC* [2021] UKFTT 0474 (TC)). The decision in each case is highly fact specific.

76. As *Strategic Branding* shows, *Marlborough* is not necessarily the last word even on the matters which were common to the two cases. Indeed, the RT is the same remuneration trust which the taxpayer *Strategic Branding Ltd* used and in relation to which that company’s appeal was dismissed by the tribunal in the *Strategic Branding Ltd* decision. Without straying into consideration of the substantive issues, I would respectfully agree with Judge Zaman that the conclusions reached in *Marlborough* pose some difficulties.

77. It is instructive to note that in *Strategic Branding* and *Marlborough*, both of which considered the deductibility of contributions made by the company and the taxability of monies lent to a director via a remuneration trust structure, the tribunals made findings relating to the adherence to the remuneration trust by the taxpayer companies as recorded in a resolution in identical terms to that used by One Call and with the same questionnaire attached thereto.

78. In addition, the tribunal in *Strategic Branding* also made detailed findings about whether the transactions had been entered into a part of a marketed scheme and whether they were preordained. One of the factors addressed in that context was the understanding by the witness, who was a director of the appellant company, of the questionnaire referring to there being “a commercial but not a legal obligation” on the company to contribute funds. The tribunal referred to the case of *Scotts Atlantic* where the Upper Tribunal concluded that a deduction was not available because “one purpose was to implement a pre-arranged scheme in order to obtain a tax deduction; the purpose was not simply to benefit employees and directors through the medium of an employment benefit scheme”. Furthermore, the taxability of the loans under the anti-avoidance provisions contained in Part 7A ITEPA 2003 partly depended upon the findings made in relation to whether there was a preordained scheme.

79. These findings make clear (if there was any doubt) that HMRC has identified relevant tax issues in the context of One Call’s use of the RT.

80. I have focused particularly on the relevance of the information and documents sought by the Notice for the Corporation Tax assessments, but I would note that further information may assist HMRC in clarifying the extent to which amounts should be treated as taxable in the hands of one or more employees. As Linden J observed in the case of *Lundberg*, a tax authority may wish to check the position it has adopted or reasonably seek to be as well informed about it as possible.

The disputed items

81. As a general matter I feel bound to comment that, as in *Alvi v HMRC* [2016] TC 0201, I perceive the tenor of many of the responses to HMRC’s requests for evidence to have been at best what could be described as ‘stone walling’; in particular when stays of this action were sought in order for One Call to fully comply with the Notice, only to find several months later that the purported compliance which had been the basis of the stays was only partial.

82. Turning to the disputed items individually I conclude as follows.

Item 1 – the step by step summary, of the process which led to the company adhering to the remuneration trust (“RT”).

83. Mr Howard submitted that this is simply background information which *Perring* says is not a permitted subject of a Schedule 36 notice. It does not provide financial information as identified in the case of *Dr K Long* as being necessary.

84. I do not agree with Mr Howard and am satisfied that this is reasonably required for checking One Call’s tax position given the potential relevance of the process of implementing a remuneration trust for determining the resulting tax treatment. As noted above, the decision in *Strategic Branding* makes clear the potential relevance of the background implementing the structure, including identification of the adviser with reference to the issues concerning the use of marketed schemes.

85. Mr Howard put it to Ms Jones in cross-examination that it was not necessary for HMRC to obtain this information as HMRC know that the arrangements are promoted as tax avoidance arrangements and that they are always provided by Baxendale Walker or another set of advisers. I consider that it is wrong for HMRC to be told that they should make assumptions about what one taxpayer has done as a result of information about others. Even if HMRC have built up a picture about the promotion generally of arrangements such as that entered into by One Call, it is still reasonable to require the relevant information from One Call so that its specific circumstances can be addressed.

86. However, as recognised by Ms Jones at the hearing the information should be clearly limited to that which relates to One Call’s involvement with the WUT No 1 Trust. This means that the last two sentences of the item should be amended as follows:

“Please start with the point at which the company first considered the use of the RT and indicate what first led the company to consider using the RT. Please include details of approaches to/by any advisers in relation to the use of the RT setting out who the advisor was, who made first contact and how that contact was made.

Item 2 – The dates and amounts of all contributions made by the company to the RT.

87. This information is reasonably required by HMRC. However, the issue which became apparent at the hearing, seemingly for the first time, is that there is said by One Call to be a disparity between the amounts shown as expenses in the accounts for contributions and the amounts contributed to the RT (which is a lower figure than the accounts figure). It is, to say the least, disappointing that this was not previously explained by One Call in correspondence, or otherwise. HMRC had commented that the summary of trust contributions provided by One Call did not reconcile with the contribution shown in the accounts in a letter of 23 October 2020 and on 3 and 11 December 2020 Chancery Court Tax Chambers had written to say that a response would be forthcoming. There is no evidence of any such response. I recognise that One Call has now explained how it had complied with the request for the information as a result of the discrepancy between the amounts contributed and the amounts shown as expenses in the accounts, but the approach taken has not facilitated progress of the enquiries.

Item 3 - How exactly was the company placed under “a commercial obligation to provide benefits for the class of beneficiaries” (“Resolution (A)” refers)?

88. Mr Howard submitted that this is not financial information. Furthermore it seeks the opinion of One Call which requires specialist accountancy and/or trust law knowledge. Therefore, as concluded in the case of *RD Utilities Ltd v HMRC* [2014] UKFTT 303, it is not a valid request.

89. HMRC have recognised that the reference to “Resolution A” is incorrect. As a result Ms Powell said that it is recognised that the Tribunal may consider the request to be invalid or may decide to vary the request.

90. I note that Resolution A is referred to in the *Strategic Branding Ltd* and *Marlborough* cases and appears in exactly the same form in a resolution of the One Call board of directors dated 22 October 2012. However, the papers provided by One Call are not clear by themselves on their face. At the top of the page of written resolutions of the directors on 22 October 2012 there is a heading: “Resolution (A)”. On the next page the same heading, “Resolution (A)”, appears followed by a set of questions and answers. There has been no proper explanation of the questionnaire and its answers. I therefore find it understandable that in the Notice reference is made to “Resolution (A)” even though, in fact, the matter about which information was sought was not a resolution but the answer to a question provided with the resolution. This is particularly the case given that the question was asked before the clarification made by the findings in *Strategic Branding Ltd* and *Marlborough*. It is clear though that One Call and its advisers understood to what the Notice was referring and, indeed, there has been no challenge to the request on the basis of ambiguity or vagueness.

91. Instead, the challenge made by Mr Howard is that the information requires One Call to provide an opinion about the existence of a commercial obligation having been imposed on the company. I am satisfied that it is reasonable for HMRC to require One Call to explain what the was understood by the company (acting through its directors) by the statement that the company was placed under a commercial obligation to provide benefits for the class of

beneficiaries. This goes to the heart of what the directors were resolving on 22 October 2012. If the answer is that the company does not know the answer to the question, that is in itself relevant information for HMRC's enquiries (see *Strategic Branding Ltd* at [130-131]).

92. I therefore vary the item as follows to clarify the required information:

“How exactly was the company placed under “a commercial obligation to provide benefits for the class of beneficiaries” (the questionnaire attached to the Board meeting minutes of 22 October 2012 refers)?”

Item 4 - Copies of the company's bank statements showing the contributions to the RT, and any money (including loans) received from the RT.

93. During the course of the hearing, given the explanation of the difference between the amount shown in the accounts as having been contributed and the amount shown by a summary of contributions and bank statements (including clarification that no bank statement can be provided for one payment of £5 million), Ms Powell accepted that the information for this item had been provided.

Item 5 - Copies of all written resolutions, minutes, notes or other records regarding any meetings or resolutions, of company officers, employees and/or shareholders, at/in which any matter relating to the RT was discussed or resolved. To include copies of any documents referred to in those written resolutions, etc.

94. Mr Howard submitted that the request is extremely broad and goes beyond the scope of what is needed to ascertain the tax liabilities of One Call. To the extent that they have not been provided they are not within One Call's possession or power.

95. Ms Jones said that the scope of this item was clarified by HMRC in a letter on 3 December 2020 in which it was stated that the request related to copies of all written resolutions, board minutes, notes or other records regarding any meetings or resolutions, of one or more company officers and/or shareholders. Ms Jones says in her Witness Statement that the documents are required to understand the nature of the arrangements and evidence the company's intentions, as well as to assist in identifying recipients who were directors or employees of the company.

96. It was put to Ms Jones by Mr Howard in cross-examination that all such remuneration trust documentation is standardised and provided by Baxendale Walker and that the documentation often states a purpose which is incorrect (and therefore is of little use). He suggested more definitive evidence would be payment records of recipients and that implementation of remuneration trusts was often carried out badly such that the documents requested would provide little reliable information.

97. Again, I do not consider it appropriate for HMRC to be told to rely upon evidence in other cases. It was a rather unusual argument being put to Ms Jones that the documentation did not reflect reality and therefore is not relevant, but further consideration of that will no doubt take place at another time. For now the question for me is whether the information is reasonably required, having regard to the principles I have described earlier.

98. While I consider that a request for information which seeks to further explain the background to the implementation of the arrangements, their purpose and use is relevant and reasonably required, the item is not well worded; for example, it does not identify whose written resolutions are required and appears to be asking for matters such as notes or records held by employees or shareholders.

99. I have therefore decided that it should be reworded as follows:

“Copies of all written resolutions of One Call’s board or shareholders, and any minutes of such meetings or of any meetings between two or more One Call officers, in each case at which the RT was discussed together with any accompanying documents referred to in the meeting or considered by the meeting.”

Item 6 - Copies of any applications, agreements and other documents relating to loans made by the RT or their nominee/s, to or for the company and/or any person who was an officer or employee of the company (whether made to them in that capacity, as officer/employee, or not).

Item 7 - Copies of all correspondence and other documents, in connection with the company’s use of the RT, between the trustee/s and any Beneficiaries.

Item 8 - Copies of all correspondence and other documents, in connection with the company’s use of the RT, between any nominee/s, of the trustee/s, and any Beneficiaries

Item 9 - Copies of any accounts prepared regarding the company’s contributions to the RT and their application by the RT.

100. Ms Powell submits that the items are relevant to demonstrate the purpose or purposes of One Call in implementing the RT and whether employment income tax charges arise. For example, she submits that it is important to establish whether the contributions made by One Call were subsequently paid or lent onto its officers or employees and, if so, the nature of those payments for loans.

101. Mr Howard has responded by submitting that the items are not within the possession or power of One Call. He has not submitted that the documents are not reasonably required. For the avoidance of doubt, I am satisfied that the documents are reasonably required given that they relate to the operation of the RT.

102. In relation to the submission regarding possession or power, I would note initially that item 6 includes any documents held by One Call. The item includes documents relating to loans made by the RT, or a nominee thereof, to or for the company. I see no reason why One Call would not have documents in respect of such loans if any exist. If One Call does not because no loans were made to it for its benefit, it should say that is the position.

103. In relation to item 9, the wording does not identify whose accounts are being sought. Mr Broughton was able to confirm at the hearing that no such accounts had been prepared by the One Call. This therefore leaves accounts prepared by on behalf of the RT, any nominee or any other person (including corporate persons) connected to the RT arrangements.

104. In relation to these matters otherwise Mr Howard has not asserted that HMRC have failed to show a prima facie case that the documents are within One Call’s possession or power. However, again for the avoidance of doubt, I consider that such a prima facie case has been established. One Call adhered to the RT (as shown by the Resolution A Board Minutes). One Call then made very significant contributions to the trust. It is a remuneration trust which in some way, via loans or other transactions, provided monies directly or indirectly to employees of One Call. It is therefore an entirely reasonable assumption that One Call did not simply transfer money into a black hole and had some ability to obtain information regarding the use of that money, even if it does not have any power under the trust deed to compel the trustees to provide such information and had no economic influence after it ceased to use the arrangements. Furthermore, I would expect one or more of the other parties involved in the arrangements, including nominees, the promoter (who Mr Howard said was Westwood Trustees and to whom some of the contribution payments were paid) and a company referred to as “RSCP” (which Mr Howard said was owned by the principal shareholder of One Call and to whom a large proportion of the contributions were paid) would have some or all of the items

required by HMRC. Again there may be no legal right to require production of the documents but de facto power as referred to in *Mattu*.

105. Mr Broughton said that other potential holders of documents were not contacted as the items asked for correspondence between the trustee and the nominee. In fact, the items ask for a range of documents. Mr Broughton said that the money ended up with personal management companies of the individuals concerned, some of whom were directors of One Call. However, One Call has not written to any of them regarding these items. Only one letter has been sent – that sent to the trustee of the RT in April 2021. (It is notable that One Call did not provide a copy of that letter until part-way through the hearing, which is unfortunately consistent with what I have described as the stonewalling approach taken by them.)

106. The letter to the trustee starts by effectively referring to the basis on which One Call challenges the Notice so far as it relates to documents held by the trustee. It is far from an effort to persuade the Trustee to provide the documents. It does not attach a copy of the Notice. No attempt has been made to follow up the letter since April 2021, nearly a year before the hearing.

107. I therefore conclude that One Call has not made any serious attempt to obtain the items required by the Notice from the Trustee and has made no attempt to obtain the information and documents from others. As stated, I recognise that One Call may have no legal power to cause others to produce documents, but there has been no engagement with its de facto power – the power to obtain them by influence or otherwise from another person.

108. Mr Howard asked for directions if it was concluded that the items are within One Call's power. My conclusions should make clear that the law requires serious efforts to be made to obtain the documents from any relevant person involved with One Call's use of the remuneration trust arrangements.

CONCLUSION

109. It was agreed by HMRC that some items in the Notice were no longer in dispute. As regards some of the remaining items, I have varied the Notice but, save to the extent varied, the Notice is otherwise confirmed and the appeal dismissed.

NO RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. Paragraph 32(5) of Schedule 36 provides that a decision of the Tribunal regarding an appeal made by a taxpayer against a notice issued to the taxpayer is final.

**TRACEY BOWLER
TRIBUNAL JUDGE**

Release date: 14 JUNE 2022