



Neutral Citation: [2024] UKFTT 00561 (TC)

Case Number: TC09217

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/00754

*INCOME TAX - information notice under Schedule 36 Finance Act 2008 – whether notice complied with – whether documents within Appellant’s power or possession – taxpayer obtaining documents from third parties - reasonable excuse while awaiting documents*

**Heard on:** 1 March 2024

**Judgment date:** 17 June 2024

**Before**

**TRIBUNAL JUDGE MALCOLM FROST  
SHAMEEM AKHTAR**

**Between**

**MARTIN HORSLER**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Mr Horsler represented himself

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

## DECISION

### INTRODUCTION

1. This is an appeal against HMRC's decision to impose penalties for failure to comply with an information notice issued under Schedule 36 of Finance Act 2008.
2. For the reasons set out below, the appeal is dismissed and the penalties upheld.
3. With the consent of the parties, the form of the hearing was V (video). 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.

### THE FACTS

4. The documents to which we were referred were an amended document bundle of 492 pages and a single page document relating to an issue of shares. HMRC provided a skeleton argument. Due to a shortage of hearing time, both sides provided closing submissions in writing following the hearing.
5. Mr Horsler gave evidence before the Tribunal. Officer Bishop also gave evidence for HMRC.
6. From the above evidence, we find the following facts.
7. On 29 March 2022, HMRC issued a notice ("the Notice") pursuant to Sch 36 Finance Act 2008 ("Sch 36") to provide information and documents in relation to tax year 2018/19. The Notice included a schedule setting out 15 separate information requests.
8. HMRC issued the Notice as:
  - (1) HMRC believe that Mr Horsler received funds from a company through the use of a Remuneration Trust scheme, and the amounts received were disguised remuneration. Any such sums received in the form of, or described as, loans, which had an outstanding balance on April 2019 would potentially be subject to a tax charge pursuant to Finance (No 2) Act 2017 known as 'the loan charge'.
  - (2) HMRC further believe that Mr Horsler may have used an arrangement referred to as 'Sunrise' in around 2019. The Sunrise arrangement is intended to avoid liability to the loan charge. Mr Horsler had an outstanding loan balance of at least £3,414,364 on 5 April 2019.
  - (3) HMRC requested information and documents in order to check whether the information included in Mr Horsler's tax return about disguised remuneration loans is correct.
9. On 4 April 2022, Mr Horsler sent an email to HMRC confirming that he had received the Notice and seeking additional time to comply.
10. On 22 April 2022, HMRC Officer Bishop agreed to the extension of the deadline until 31 May 2022.
11. On 1 June 2022 Mr Horsler's representative, Morr & Co LLP ("Morr's") responded to HMRC with a letter responding to the information notice. The letter contained a short list setting out Mr Horsler's response to the 15 information requests in the Notice as follows:

"1. Please see the enclosed copy of a Hypothecated Loan Memorandum. The entire amount received was repaid before 5 April 2019.

2. SLH input

3. N/A
4. Please see documentation uploaded to Dropbox.
5. N/A
6. Please see 3 above.
7. Please see 3 above.
8. N/A
9. N/A
- 9-15. Please see 3 above”

12. On 8 July 2022 Officer Bishop wrote to Morr’s explaining that the documents provided showed a total of £5,138,338 being transferred to Mr Horsler but that this did not match up with bank statements provided. Officer Bishop also commented on each of the responses to the 15 requests in the Notice.

13. The email in question sets out only 14 points, which was later acknowledged to be an error. The final item on the notice has at times been referred to as item 14 and at times as item 15 but, in each instance, there appears to have been a common understanding that reference was being made to the final item. We set out more detailed findings in relation to this final item later in this decision.

14. Officer Bishop indicated that the responses from Morr’s were not satisfactory, that all documents were to be provided by 1 August 2022 and in the absence of any response an initial penalty of £300 may be issued.

15. On 12 August 2022, an initial penalty notice for £300 was issued to Mr Horsler for failure to comply with the Notice.

16. On 12 August 2022, Morr’s sent an email request asking for an extension to respond to the Notice and asking that the penalty be reconsidered.

17. On 15 August 2022, Officer Bishop notified Morr’s that she had held the penalty in abeyance until 26 August 2022 and arranged for the initial penalty to be postponed until that date to enable Morr’s to send all the information and documents in accordance with the notice. Officer Bishop stated that if the full information and documents as requested in the Notice were not received by 26 August 2022 the initial penalty would stand.

18. On 26 August 2022 Morr’s sent an email to HMRC requesting a short extension until 2 September 2022 to provide a substantive response. HMRC agreed to the extension.

19. On 2 September 2022, Morr’s sent an email to HMRC providing a degree of further clarification in relation to the 14 points set out in Officer Bishop’s email of 8 July 2022 the email also attached a copy of Mr Horsler’s current account statement dated 14 April 2019.

20. On 4 October 2022, Officer Bishop sent an email to Morr’s seeking further clarification on the explanations given and noting that her view was that items 3, 9 and 15 from the original Notice (with item 15 in the Notice corresponding to item 14 in the email) remained outstanding. As such, Officer Bishop confirmed that the initial penalty would be released.

21. On 5 October 2022, a daily penalty notice was issued to Mr Horsler and copied to Morr’s. The notice imposed daily penalties of £20.00 per day for the period 16 August to 14 September 2022 for 30 days in the sum of £600.00. The penalty notice included a schedule setting out items 3, 9 and 14 from the original Notice, all of which HMRC considered remained outstanding.

22. On 5 October 2022, Morr's sent a letter to HMRC via email appealing the penalties and setting out grounds for appeal. The letter also noted that Morr's had been able to locate, via enquiries made to third parties, documents they believed to be pertinent. The letter asked for an electronic drop box facility to be made available so those documents could be transferred. The letter also indicated that other hard copy files had also been requested from a third party's storage facility and would be forwarded when provided.

23. Both the initial penalty and the daily penalties were appealed. Following an internal HMRC review upholding the penalties, the appeal was notified to this Tribunal.

#### **THE LAW**

24. The overarching power for HMRC to obtain information and documents from a taxpayer is set out in paragraph 1 of Sch 36. It provides (so far as is relevant):

1 Power to obtain information and documents from taxpayer

(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.

25. That power is then circumscribed by a number of other provisions of Sch 36. Relevant to the present appeal is paragraph 18, which provides:

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

26. HMRC drew our attention to case law on the meaning of this provision, which we consider later in this decision.

27. The relevant penalty provisions are to be found in paragraphs 39 and 40 of Sch 36.

28. Paragraph 39 provides (so far as is relevant):

39 Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who-

(a) fails to comply with an information notice, or

(b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal

(2) The person is liable to a penalty of £300

29. Paragraph 40 provides:

40 Daily default penalties for failure to comply or obstruction

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

30. The legislation provides for a reasonable excuse defence to a penalty, in the following terms:

#### 45 Reasonable excuse

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

(2) For the purposes of this paragraph–

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased

#### **THE ISSUES**

31. Mr Horsler does not take issue with the procedural requirements for the issuing of penalty notices and we find that these have been complied with.

32. Mr Horsler's grounds of appeal can be separated into the following heads:

- (1) Issues as to the validity of the Notice
- (2) Overall compliance with the Notice
- (3) Suggestions that documents are not within Mr Horsler's power or possession
- (4) Reasonable excuse

33. We deal with each of these areas in turn.

#### **VALIDITY OF THE NOTICE**

34. Mr Horsler's grounds of appeal under this head are as follows:

(1) A Schedule 36 Information Notice, whether or not it has been appealed against, can only require a taxpayer to provide information or documentation which is reasonably required for the purpose of checking the taxpayer's tax position and is in the taxpayer's power, possession or control. If such documentation is not required for that purpose or is not in the taxpayer's power, possession or control, the failure to provide it cannot amount to a failure to comply.

(2) The Notice relates to contributions ("the Contributions") made to a Remuneration Trust by Checkmate New Home Warranty Ltd ("the Company"), which is now in liquidation.

(3) Mr Horsler was a director and shareholder of the Company.

(4) HMRC have already assessed the Company to Corporation Tax, NI and Income Tax in relation to the same Contributions which are the subject of the Notice.

(5) Accordingly, unless HMRC withdraws the assessments against the Company, it must necessarily have already reached a decision as to the tax position of those contributions and the information/documentation requested cannot therefore be reasonably required.

(6) Alternatively, HMRC has clearly stated in several of its Spotlights that they do not accept that arrangements such as the Sunrise arrangements work and accordingly, the documents at Item 14 cannot be reasonably required by HMRC.

35. HMRC for their part say the validity of the information notice is outside the jurisdiction of the Tribunal where a taxpayer has a right of appeal against the information notice that has either been exhausted or not used by the Appellant (referring us to *PML Accounting Ltd v HMRC* [2017] EWHC 733 (Admin) at [67])

36. HMRC's submission appears to read rather too much into the *PML* judgment. We would agree that these proceedings cannot strike down the Notice as invalid. However, that does not imply that we are bound to uphold penalties for non-compliance with a notice that was issued outside of HMRC's powers.

37. That point is acknowledged in the *PML* decision itself at [43]:

“43. PML relied on the well-known principle exemplified by *Wandsworth LBC v Winder* [1985] A.C. 461 that the invalidity of a public body's prior action may be relied upon as a defence. This principle has been relied on by tribunals in penalty appeals which have held that an appellant cannot be penalised for not complying with an invalid information notice, see *Spring Capital Ltd v HMRC* [2015] UKFTT 8(TC) (Judge Mosedale) and *Spring Capital Ltd v HMRC* [2016] UKFTT 232 (TC) and *Birkett t/a Orchards Residential Home v RCC* [2017] UKUT 80 (TC) (Nugee J and Judge Greenbank) para 30(3). None of these cases, however, had the feature that there had already been a determination (or deemed determination) that the notice was in fact a valid notice. Such a determination must, on principle, operate as either an estoppel per rem judicatam or at least an issue estoppel precluding any further questioning of the validity of the notice.”

38. In this case there has been no prior determination as to the validity of the notice and as such we consider that we are able to take into account arguments as to the validity of the Notice.

39. However, very little turns on HMRC's point as we do not accept Mr Horsler's arguments about the validity of the Notice. We can deal with those arguments fairly shortly.

40. We would agree that there is some case law to support the proposition that HMRC cannot issue a Sch 36 notice to check a position upon which they have already decided (e.g. *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010, or *Yerou v HMRC* [2022] UKFTT 79 (TC)).

41. However, Mr Horsler's arguments do not support the suggestion that HMRC have already decided the position.

42. The Notice was issued in relation to Mr Horsler's personal tax position. Therefore, in order to engage with the argument that HMRC's powers are limited by decisions they have already made, it must be demonstrated that HMRC have already formed a definitive view on Mr Horsler's tax position.

43. Mr Horsler's argument was put forward by reference to HMRC's position in relation to a company of which Mr Horsler was the director. The Company is a separate legal person, with separate tax liabilities to Mr Horsler. There appears to be no evidence that HMRC's position in relation to the Company would necessarily dictate HMRC's position in relation to Mr Horsler personally.

44. In the absence of evidence that HMRC has already formed a settled view in relation to Mr Horsler, this ground of appeal cannot succeed and is dismissed.

## COMPLIANCE WITH THE NOTICE

45. Mr Horsler's grounds of appeal in relation to overall compliance state that:
- (1) The documents and information in Mr Horsler's power, possession and control were supplied to HMRC within agreed extended time frames.
  - (2) The remainder of the information/documentation requested was no longer in Mr Horsler's power, possession or control as they were provided to the Insolvency Service/liquidators of the Company.
46. We have therefore first considered overall compliance with the Notice before going to separately consider the question of power or possession.
47. The initial penalty was issued on 15 August 2022.
48. HMRC argue that at this time, items 2 – 15 on Notice were outstanding. HMRC support this argument by noting that the issuing of the penalty prompted Morr's to request additional time to comply with the information notice until 26 August 2022 and 2 September 2022. We assume HMRC to be suggesting that Morr's were in agreement that the notice had not been complied with and that further information and documents fell to be provided.
49. The daily penalty notice was issued on 5 October 2022. HMRC argue that on that date items 3, 9 and 15 of the Notice remained outstanding.
50. Therefore, if we find that any of items 3, 9 or 15 were outstanding on 5 October 2022, it follows that there was non-compliance with the notice both at the date of the initial penalty notice and the daily penalty notice.
51. We therefore first consider whether, on a basic level, material that fell to be disclosed pursuant to the items listed above was not disclosed. We then go on to consider whether such non-disclosure is nonetheless not a breach of the notice as a result of the relevant documents being outside Mr Horsler's possession, power or control.
52. Item 15 of the Notice requested:
- “If you have used arrangements involving hypothecated loans (arrangements sometimes referred to as Sunrise), all documents relating to those arrangements including, but not limited to:
- hypothecated loan memorandums
  - loan discharge memorandums
  - memorandums of receipt
  - share subscription memorandums
  - bank statements demonstrating the movements of money referred to in the various memorandums
  - all promotional, marketing or explanatory material provided to you
  - all correspondence (whether by letter, email or other method) to or from you”
53. The parties agree (and we find) that Mr Horsler provided the Hypothecated Loan Memorandum, Loan Discharge Memorandum and Memorandum of Receipt alongside Morr's letter dated 1 June 2022.
54. However, on 4 October 2022 Officer Bishop emailed Morr's indicating that the following items from item 15 remained outstanding:
- (1) share subscription memorandums

- (2) bank statements demonstrating the movements of money referred to in the various memorandums
- (3) all promotional, marketing or explanatory material provided to Mr Horsler relating to the Sunrise arrangements
- (4) all correspondence (whether by letter, email or other method) to or from Mr Horsler relating to the Sunrise arrangements

55. We would raise a note of caution as to whether promotional or marketing material can be said to be reasonably required to check the tax position (within the meaning of Sch 36). Such materials are undoubtedly of interest to HMRC, but in many cases the question of how the arrangements were sold will not (and cannot) make any difference to the tax outcome. There may be exceptions to this (such as where a motive defence or anti avoidance rule requires consideration of a taxpayer's state of mind). Nothing turns on this point as HMRC need only show one area of non-compliance with the Notice for the penalties to be upheld.

56. Mr Horsler does not seek to deny that the above documents were not supplied. He however maintains that the documents were not in his possession or power. We now turn to consider this argument.

#### **POSSESSION OR POWER**

57. As noted above, paragraph 18 of Sch 36 provides that an information notice only requires a person to produce a document if it is in the person's possession or power.

58. As a result, if a document is outside a person's possession or power then it is also outside the scope of the Notice. Put another way, this means that Mr Horsler's argument that documents were not in his power or possession is an argument that the Notice did not oblige him to provide them, and so he cannot be said to be in breach of the Notice by not providing them. This can be contrasted with a prima-facie breach that is relieved by a reasonable excuse or other defence.

59. The significance of this is that, because it is generally for HMRC to prove a breach, it means that it is for HMRC to prove that the relevant documents were within Mr Horsler's possession or power.

60. The point was considered by the FTT in *HMRC v Parissis* [2011] UKFTT 218 (TC). At paragraph [19], Judge Mosedale said:

“19. 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.”

61. We do not read the above references to a 'prima facie case' as suggesting that HMRC must do anything less than discharge the burden of proof placed upon them.

62. However, where HMRC satisfy the Tribunal that, on the face of it, a particular document is one that would be expected to exist and be within the taxpayer's power or possession then, in the absence of any rebuttal from the taxpayer, a Tribunal would normally be entitled to conclude that HMRC have proven their case on the balance of probabilities.

63. With this in mind, we consider HMRC's evidence and weigh it in the balance with Mr Horsler's evidence in order to make the relevant findings.



## Relevant evidence

64. Officer Bishop, in her evidence, said the following about two of the documents sought under point 15 of the Notice:

“For clarity, my rationale for deciding that the documents shown above under point 15 exist, and are within Mr Horsler’s power to obtain is as follows:

### Share subscription memorandum

This is a document which records the Trustees subscribing to a share in LCS Finance Ltd in exchange for the “subscription amount”, where the “subscription amount” is the sum advanced to the Borrower (in this case Mr Horsler) by LCS Finance Ltd under the Hypothecated Loan Memorandum. Further, the document requires the signature of the Borrower. HMRC and me, personally, have seen this document in numerous other Sunrise cases, as it is part of the “standard” scheme documentation. I believe that the onus is on Mr Horsler to establish whether the arrangements he had entered into were implemented correctly, establish who holds the key documents and obtain copies.

### Bank statements demonstrating movement of money mentioned in the various memoranda

The Loan Discharge Memorandum Mr Horsler produced contains a signed declaration stating that “The Company has made payment in money at the order of the Relevant Person of the Paragraph 3 Sum to the Payee Trustee, In accordance with Paragraph 3(3)(b), Schedule 11 of the Finance Act (No2) 2017 of the United Kingdom parliament. The Company is LCS Finance Limited, and the Relevant Person is Mr Horsler.

According to this document, a transfer of money occurred, and a copy of the transaction should be available from either LCS Finance, as the transferor or the Trustees as payee. Given that the transfer took place at the order of Mr Horsler, and he has an outstanding loan with LCS Finance for which he incurred a fee, and continues to accrue interest, I find it difficult to accept that he is unable to obtain a copy of the document recording the transfer of money. I also do not consider and have not seen evidence that Mr Horsler has made serious attempts to obtain the outstanding documents required by the Notice from other parties involved in the arrangements, such as LCS Finance Limited, or the Trustees, if not in his possession.”

65. In response to questions at the hearing, officer Bishop also said that both promotional material and correspondence had not been supplied. Officer Bishop also said that it would be highly improbable that a scheme of this sort could be entered into without any correspondence being produced.

66. Mr Horsler gave evidence that he had retired in 2017, at which time he was working for Lockton LLP and using a computer and email account provided by Lockton. Following his retirement he no longer had access to any work emails. He said that he had no indication at the time that he needed to provide such information and so had not retained it.

67. HMRC counter Mr Horsler’s suggestion by pointing out that the enquiry does not relate to the years in which Mr Horsler used the scheme that resulted in loans being generated. The

enquiry relates to Mr Horsler's outstanding loans in the year ended 5 April 2019, and Mr Horsler's use of the Sunrise arrangement designed to avoid Mr Horsler being liable to the loan charge in that year. As such, the material sought relates to periods after Mr Horsler's retirement.

68. Mr Horsler said that any documentation he did have had been provided to the liquidator (of the Company). Mr Horsler stated that the liquidator would not provide materials due to an ongoing dispute. Mr Horsler did not provide any documentary evidence as to his interactions with the liquidator, the documents provided and his attempts to obtain them.

69. Mr Horsler said that his co-director had handled the majority of the correspondence and that it had been sent to the liquidator. When asked why the co-director had not provided any witness statement or other documentation to support this explanation, Mr Horsler said he had not anticipated the need to do that.

70. In relation to this point, HMRC submitted that the documents sought relate to arrangements which Mr Horsler entered into as an individual. The company of which he was a director was not party to the arrangements. As such, HMRC say, no documents related to the arrangements would have been required by the liquidator. Equally, Mr Horsler's former partner would not hold any scheme documents unless he entered into the same arrangements in his own right.

71. In relation to the Share Subscription Memorandums in particular, Mr Horsler maintained that he had never seen such a document and therefore did not have (and never has had) this in his possession.

72. In relation to the bank statements sought, it was common ground between the parties that these were statements relating to transfers of funds between third parties and as such Mr Horsler would not ordinarily hold copies of such documents. HMRC's argument on this point rests upon showing that Mr Horsler has power to obtain them.

73. Mr Horsler contended that he had provided all the statements he had available to him. He maintained that any other bank statements would belong either to the Trustees of the Remuneration Trust or LCS Finance.

74. Mr Horsler maintained that he has no legal right to demand production of the statements or memorandums and accordingly it is not within his power, possession, or control.

75. HMRC submitted that, given that the transfer took place at the order of Mr Horsler, and he has an outstanding loan with LCS Finance for which he incurred a fee, and continues to accrue interest, HMRC find it difficult to accept that he is unable to obtain a copy of the document recording the transfer of money.

76. Mr Horsler submitted that he acted reasonably in trying to discover the missing information and that he believed that HMRC officers acted unreasonably by asking for information that they assumed he should have, but did not and never had or was not entitled to have.

77. Mr Horsler provided the following evidence of his attempts to obtain the information.

78. Mr Horsler provided a copy of an email from his solicitors to "finance@icsfinance.com" seeking a copy of the share subscription memoranda.

79. The email reads:

"Dear Sirs

Our Clients entered into Hypothecated Loan Memorandums with you on 4 April 2019, but do not have copies of the share subscription memorandums which we understand formed part of this paperwork. We would be extremely grateful if you could provide us with copies by return.

We would also ask that you provide us with paperwork evidencing your payment to Costa Corporate Services Ltd. Kind Regard”

80. Mr Horsler provided no indication that any response was received, nor that any attempt was made to chase up the email.

81. Mr Horsler also stated that he had made attempts to obtain bank statements from Nat West Bank. He said that in 2022 he was only in the UK 19 May until 30 June, 15 Sept until 22 Sept, 3 Oct to 7 Oct and 27 Nov until 30 Nov. Mr Horsler said that during his visits to the UK he tried to obtain statements for Tranton Investments Ltd from Nat West Bank in person but had not been successful.

### **Discussion and conclusion**

82. HMRC drew our attention to Upper Tribunal decision in the case of *HMRC v Mattu* [2021] UKUT 245 (TCC), where the Tribunal (at [101]) adopted what the First-tier Tribunal said in *HMRC v Parissis* [2011] UKFTT 218 (TC) that:

“[79] ... documents are within a person’s power if they can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them.”

83. This is lent a little more colour in *H A Patel & K Patel (a partnership) v HMRC* [2014] UKFTT 167 (TC), where the Tribunal said (at [15]) that:

“15. On the basis of the evidence provided, I find that the Appellants’ only asked the Trustee to provide the information and documents specified in the information notice in the letter dated 11 October 2012 which, if it was received, the Trustee ignored. The Appellants made no attempt to obtain a reply to their letter until the email of 16 October 2013. Having received the Trustee’s reply, the Appellants do not appear to have made any effort to persuade the Trustee to reconsider its refusal to provide the documents and information. From the language of the letter and the fact that no attempt was made to follow it up for more than a year (and then only in response to my earlier decision) and the passive acceptance of the Trustee’s refusal to provide the documents and information, I conclude that the Appellants have not made any serious attempt to obtain the relevant information and documents from the Trustee.”

84. HMRC place particular emphasis on the phrase “serious attempt to obtain the relevant information and documents” in the above extract.

85. We would emphasise that we do not consider that the law requires Mr Horsler to put undue pressure on a third party in order to persuade the third party to do something they have clearly indicated they do not wish to do. The approach put forward in *Mattu* and *Parissis* is in the context of a situation where the third party has a legal right to refuse to provide material and the Tribunal must respect that third party’s rights.

86. In considering whether a serious attempt has been made to obtain documents, we would expect that a taxpayer seeking documents from a third party would:

- (1) Make a clear written request for the documents, if necessary explaining the reasons why they are needed
- (2) Follow up to ensure the request has been received

(3) If the request is refused, making reasonable attempts to address any issues giving rise to the refusal. This might encompass dealing with practical or logistical concerns, or a refusal based on a misunderstanding. It should not be construed as an obligation on a taxpayer to enter into protracted correspondence where a third party has taken a clear decision not to provide the documents.

87. In the present case, we find that HMRC have raised a prima facie case that the Share subscription memorandum, bank statements and the correspondence are in Mr Horsler's power or possession. Mr Horsler provided the Hypothecated Loan Memorandum, Loan Discharge Memorandum and Memorandum of Receipt – these provide clear evidence that Mr Horsler entered into the Sunrise arrangements. We accept HMRC's evidence that the share subscription memorandum would be part of the document set. We also accept that it is entirely improbable that no correspondence was generated. We further accept that bank statements would exist to show movements of money and that those in possession of the bank statements carried out the relevant transaction on the instructions of Mr Horsler, meaning that he would be likely to be able to seek the statements as confirmation that his instructions had been carried out.

88. It is therefore for Mr Horsler to rebut what HMRC have put forward.

89. Mr Horsler's evidence largely consists of adamant denials that he has any of the information. The tax arrangements in question involve the potential extraction of many millions of pounds from his company without payment of tax, followed by the recent use of a scheme intended to avoid the imposition of the loan charge in respect of the same sums. We would expect a taxpayer entering into such arrangements to have a substantial degree of documentation relating to it. Such a taxpayer should be able to give a transparent account of what happened to such documentation.

90. Mr Horsler's evidence relating to his retirement in 2017 does not appear to be relevant to arrangements implemented in 2019. In respect of the 2019 Sunrise arrangements Mr Horsler has not provided evidence of what steps he took in implementing the arrangements and what documents he did and did not receive. In particular, to suggest that simply no correspondence exists is difficult to believe without evidence providing the full picture of what documents were exchanged.

91. Mr Horsler's suggestions that he simply hasn't held onto any of the outstanding documents (or has given them to a liquidator despite the liquidation being unrelated to the use of the Sunrise scheme) and has no means of obtaining them is inherently unlikely and unsupported by any third-party evidence.

92. Mr Horsler's evidence as to his attempts to obtain materials from third parties is thin. We have seen an email sent on his behalf, but no response or follow up.

93. HMRC have provided clear evidence that the arrangements were entered into and of the documents they would expect to be held. We accept this evidence.

94. We do not accept Mr Horsler's evidence by way of rebuttal. We do not consider we have been provided with a full picture as to the information and documents available to Mr Horsler and what has happened to them. As such, Mr Horsler's denials, however strongly expressed, lack an element of credibility.

95. Mr Horsler must understand that he has some way to go to address this credibility gap and persuade the Tribunal that the documents are beyond his power or possession.

96. Accordingly, we find that the relevant materials were in Mr Horsler's power or possession and the Notice was not, and has not been, complied with.

## REASONABLE EXCUSE

97. HMRC submit, and we agree, that this Tribunal is required to approach the question of reasonable excuse in line with the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) at paragraph [81]:

“When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer’s own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

98. In addition to the matters put forward as reasons why documents were not in his power or possession, Mr Horsler raised the following additional points by way of reasonable excuse:

(1) He was living in Latvia with his wife during the period in question and only returned to the UK infrequently.

(2) During that period his wife was ill and was in and out of hospital undergoing treatment. His wife subsequently died. This has been a very stressful experience at a very difficult and emotional time for him. The tribunal hearing took place only 3 days after the first anniversary of his wife’s death.

(3) HMRC had not issued the information notice and penalties by email, thereby resulting in delayed communications (exacerbated by Mr Horsler’s limited presence at his UK address).

(4) HMRC have continually been unclear about the importance and actual relevance to them of the information.

(5) He had only received the bundle of documents for the hearing a few days before the hearing.

99. We focus on applying the third part of the *Perrin* test to these points.

100. In relation to the first three points, although we have sympathy for the stress caused by his wife’s illness and death, they do not appear to have in fact prevented Mr Horsler from complying with the notice.

101. As we have found above, the Notice was issued on 2 March 2022 and Mr Horsler responded on 4 April 2022 confirming receipt of the notice, explaining the logistical difficulties due to his presence in Latvia and seeking more time. HMRC granted the additional time sought. Mr Horsler then appointed an agent who communicated with HMRC on his behalf,

102. On this basis, we consider that the first three points above do not constitute a reasonable excuse within the *Perrin* test.

103. Furthermore, we do not understand that Mr Horsler suggests his continuing non-compliance is the result of those same logistical difficulties. Accordingly, any reasonable excuse that did exist has come to an end.

104. The fourth point above does not give rise to a reasonable excuse. Mr Horsler has the right to appeal against the notice on the basis that the information sought was not reasonably required for the purposes of checking his tax position. Mr Horsler is not entitled to withhold documents on the basis that HMRC have not explained the point to his satisfaction. In any event we are entirely satisfied that the documents sought (relating to the implementation of tax-motivated arrangements) were properly sought.

105. The fifth point does not relate to compliance with the notice but to the fairness of the Tribunal proceedings. We do not make a finding that Mr Horsler was provided with the documents late. In any event, we are entirely content that Mr Horsler was able to fully participate in the proceedings.

#### **Reasonable excuse when seeking documents from third parties**

106. We have set out our views in relation to Mr Horsler's evidence as to whether or not documents were in his power or possession above. However, there is an aspect of this issue that falls to be considered in the context of reasonable excuse.

107. The definition of 'power or possession' extends to situations where a taxpayer does not have a particular document, but can obtain a copy from a third party.

108. There is therefore the possibility that a document falls within the scope of a Sch 36 notice (as it is technically within the taxpayer's power or possession) but the taxpayer does not yet have a copy to supply to HMRC as the taxpayer has yet to receive one from a third party. More properly, the document is in the taxpayer's power but not yet in their possession.

109. In cases where a taxpayer is making genuine attempts to obtain information or documents from third parties, the Tribunal would generally accept that a taxpayer has a reasonable excuse for delays in compliance arising as a result of the taxpayer not yet having the relevant material in hand. A taxpayer ought not to be penalised for delays that are out of their control and we would hope that HMRC would not seek to impose penalties whilst active attempts to obtain documents were ongoing.

110. However, such a reasonable excuse would only last whilst those attempts were ongoing. Once those attempts are complete, the reasonable excuse would cease.

111. In the present case, Mr Horsler does not suggest that enquiries are ongoing, but that nothing further can be obtained. As such he is unable to maintain an argument that such enquiries give rise to a reasonable excuse.

112. Overall, we do not consider that any of the explanations put forward by Mr Horsler amount to a reasonable excuse.

#### **CONCLUSION**

113. For the reasons set out above, we dismiss Mr Horsler's appeal and uphold the penalties.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

114. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**MALCOLM FROST  
TRIBUNAL JUDGE**

**Release date: 17<sup>th</sup> JUNE 2024**