Neutral Citation Number: [2017] EWHC 733 (Admin)

Case No: CO/575/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2017

Before:

SIR ROSS CRANSTON
(Sitting as a Judge of the High Court)

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Between:

PML ACCOUNTING LTD	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

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- -

Mr Stephen Cragg QC and Mr Ben Elliott (instructed by **Bird & Bird**) for the **Claimant**
Mr Akash Nawbatt QC and Mr Sebastian Purnell (instructed by **HMRC**) for the **Defendants**

Hearing date: 21 and 22 March 2017

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Judgment Approved

Sir Ross Cranston:

INTRODUCTION

1. In the course of an enquiry into whether some of the companies which are clients of the claimant are managed service companies, and whether the claimant itself is a managed service company provider under the relevant tax legislation, the Commissioners for Her Majesty's Revenue and Customs ("HMRC") issued an information notice to the claimant under the Finance Act 2008. As a result the claimant provided HMRC with some information and documents. In an appeal against the penalties imposed because the information and documents were incomplete, the First-tier Tribunal (Tax) ("the Tribunal") held that the information notice was invalid and therefore the penalties could not stand. Consequently, HMRC returned the documents to the claimant and undertook not to rely on them.

2. In this rolled up hearing for judicial review ordered by Langstaff J, the claimant's case is that HMRC (1) must delete or destroy information provided in response to the information notice and work product derived from the information and documentation provided, and (2) must undertake not to make use of the information and work product for any future purpose. HMRC has refused to do this and contends that it ought to be able to continue its enquiry and the separate criminal investigation it has

launched. An important plank of its defence is that the Tribunal had no jurisdiction to decide that the information notice was invalid.

3. Among the issues which arise for determination are (1) whether the Tribunal was estopped or otherwise lacked jurisdiction to consider the issue of the information notice's validity; (2) the status of the Tribunal's findings in this judicial review if it lacked jurisdiction; (3) whether HMRC's retention of information and work product is in breach of the rights of the claimant or its clients under Article 8 of the European Convention on Human Rights ("ECHR" or "the Convention"); and (4) whether in any event the court should refuse it relief as a matter of discretion.

BACKGROUND

4. The claimant is a company incorporated in 2007 providing accounting, tax and corporate services to contractors and consultants. That includes the preparation of accounts and financial records, PAYE and VAT registration, tax computation, the preparation and submission of tax returns, company formation and administration, pension and insurance assistance, invoicing services, and other accounting, tax and corporate services and advice. In 2012, the claimant had between 700 and 800 clients, many of whom were road haulage drivers. The claimant's sole director is Paul Hazell. The shares in the company are held equally by him and his two brothers. They play no role in its day-to-day business.

HMRC's civil enquiry

5. In early 2012 an inspector of taxes, Mr Mark Dootson, began investigating whether the claimant was a managed service company provider under Part 2 Chapter 9 of the Income Tax (Earnings and Pensions) Act 2003 ("the 2003 Act") and so potentially liable for tax debts owed by the personal service companies of its clients. As an alternative to employing the claimant's clients directly, national haulage firms and others engaged the services of the claimant's clients through their personal service companies.

6. Essentially Mr Dootson was concerned with how the claimant acted as regards those personal service companies. He examined material HMRC already had, public records such as those at Companies House, and information from third parties. Early in the piece he raised in an internal memorandum whether, in the event of issuing an information notice, HMRC should issue a first or third party notice, in other words, whether as explained further below it should approach the Tribunal first for approval for the notice to be issued.

7. Mr Dootson also considered early on that to conduct an enquiry it would be fairer to the claimant to establish whether it was a managed service company provider under the 2003 Act before commencing enquiries into the companies of the claimant's clients. He was conscious that adopting the latter approach could have had an adverse impact on the claimant's reputation since it could have given the impression to the claimant's clients that it was in some way operating inappropriately.

8. HMRC's formal enquiry began on 6 August 2012, when Mr Dootson wrote to the claimant stating that he was investigating whether the arrangements with its clients would bring it within the managed service company part of the 2003 Act. He

suggested a face to face meeting but there was no response. Eventually he made direct contact with Paul Hazell, who promised a letter. That letter, of 3 October 2012, said that the claimant's agents, Hazell Minshall & Co, a firm of accountants, would be dealing with the matter. The principal of that firm is Richard Hazell, the father of Paul and his brothers. In a letter of 24 October Mr Dootson again requested a face to face meeting or, in its absence, information and documentation.

9. With no response from the claimant or its accountants, on 26 November 2012 Mr Dootson issued an information notice to the claimant under Schedule 36 to the Finance Act 2008 ("the 2008 Act"). Before doing so he had obtained confirmation within HMRC, from his manager and from the Central Policy section, to this course of action. In his witness statement Mr Dootson explains that he was careful to restrict his request to documents which impacted on the claimant's own tax position and did not extend to that of the claimant's clients.

10. The notice stated its purpose as to "check the company's Chapter 9 ITEPA 2003 position... to give proper consideration to the application of the Managed Service Company Legislation". The notice went on to state that this meant that the information had to be provided, that the date for this was 11 January 2013 and that, in the event of non-compliance, penalties could be imposed. The claimant's appeal rights were also explained.

11. The information and documentation requested was set out in a schedule to the notice. It concerned the claimant's business and the manner in which it was marketed; information on advice to clients regarding whether to establish companies; financial records including the claimant's bank statements; financial records including bank statements of a sample of twelve of its clients; service agreements and contracts between itself and the sample clients; and schedules showing salaries, expenses, dividends, bonuses, tax liabilities and fees payable to it for the sample clients.

12. There was no response to the notice and Mr Dootson tried to make contact with the claimant and its accountants, Hazel Minshall. That was unsuccessful. On 7 December 2012 Hazel Minshall wrote that it wished to appeal against the notice, since it and the claimant needed more time to comply. The letter set out the reasons for the request.

13. In a letter of 11 December 2013 Mr Dootson agreed to an extension until 24 February 2013. Because Hazel Minshall had used the word "appeal" in its letter of 7 December, Mr Dootson also sought clarification as to whether the claimant was appealing the information notice itself or was requesting an extension of time. That same day Hazel Minshall replied that all it was seeking was an extension of time. Hazel Minshall said:

> "The appeal was in relation only to the request to extend the deadline."

14. On 28 February 2013 Hazell Minshall provided responses to the information requested in the information notice. On 8 March it delivered sixteen boxes of documents to HMRC's office in Sheffield. (Mr Dootson had in fact granted a further extension of time.) The documentation included the claimant's brochures, welcome packs, client application forms, administration forms, and marketing and advisory

material; its bank statements; an incomplete set of bank statements relating to its clients; an incomplete set of invoices it issued to clients for services provided; an incomplete set of client payslips; and client corporation tax statements and company accounts.

15. Following his review of the material, Mr Dootson wrote on 15 March 2013 to Hazell Minshall, with a copy to the claimant, that the information requested was incomplete in a number of respects, and that a number of documents were missing. In an attempt to assist he identified that these were the claimant's bank statements showing fees collected for the period 6 April 2011 to 6 April 2013; bank statements relating to eight of the sample clients; the records it used to calculate salaries, dividends, taxes and other items for four of the sample clients; its fee invoices for four of the sample clients; payment notifications for four of the sample clients; bank mandates; and sales invoices relating to five of the sample clients. In conclusion Mr Dootson added that he would issue a penalty notice and warned the claimant of its liability to daily penalties for continuing failures.

16. An initial penalty notice of £300 was issued on 20 March 2013. The claimant appealed the penalty notice on 15 April 2013 and the same day requested a further extension of time for compliance. Mr Dootson wrote on 2 May requiring full compliance in a fortnight. On 12 July 2013 Hazell Minshall wrote to Mr Dootson stating that it and the claimant intended to provide the information requested. It added that it would be premature for HMRC to contact the claimant's clients, which could have a damaging effect on its commercial relationships with those clients.

> "You are, of course, entitled to make contact with these companies but we have concerns that such an approach is premature given the fact that you still have not received all of the background information requested and are therefore not in a position to formulate a reasoned view of the applicability of the MSC legislation to our client company's position…Furthermore, PML Accounting Limited is very concerned that direct approaches to its clients by HMRC in these circumstances may have a damaging effect on its commercial relationships with those clients. Our client company, therefore, feels obliged to put HMRC on notice that it will, if necessary, seek legal redress should its commercial interests be adversely affected by HMRC's premature actions."

17. Compliance not having occurred, Mr Dootson had begun imposing daily penalties in May 2013. The claimant appealed these as well. Mr Dootson provided some leniency when there were illnesses in the Hazell family.

18. As a result of the appeals, there were statutory reviews of the penalties. These upheld the penalties imposed. Thus on 2 April 2014 the claimant made further appeals, this time to the Tribunal. As late as June 2014 the claimant continued to provide documentation to HMRC.

19. There had been internal discussion within HMRC during the period late 2013-early 2014 as to the Tribunal raising during the course of an appeal whether the claimant had a tax position to justify the issuing of an information notice. On 22 November

2013 one of Mr Dootson's team wrote that he expected to be challenged on this point. HMRC's Tax Administration Advice section was consulted. At the end of the month Mr Dootson said in an internal email that even though the claimant had not appealed the Schedule 36 information notice, the Tribunal judge might question its validity. In January 2014 Mr Dootson referred again to the issue of the claimant's tax position: "As we have said before the [Tribunal] Judge might just think of it as relevant."

20. In February 2014 Mr Dootson wrote in an internal email to HMRC's representative appearing before the Tribunal:

> "We want to make you aware of this issue in case the judge raises the question of whose tax position is the notice actually about…[The claimant] could have a tax position but it is not immediately apparent."

21. This email was sent to Hazell Minshall by mistake. Once this was discovered HMRC requested its return as a privileged document, a status the claimant has acknowledged. In short the document has never been returned and HMRC has never waived privilege. HMRC objected to its production in this judicial review. At the hearing I took the view that the email had no bearing on the outcome of the judicial review and, notwithstanding the claimant's breach of privilege, admitted it in evidence.

The Tribunal decision ("the penalties appeal")

22. The claimant's appeal in the Tribunal against the penalties HMRC had imposed was heard on 8 July 2014. Both sides were represented by non-lawyers. On 16 July 2014, after the hearing, the Tribunal issued directions that the claimant should make submissions about whether the information notice related to its tax position as required by paragraph 64 of Schedule 36, rather than that of its clients; the rights of those clients under the European Convention on Human Rights – articles 6 and/or 13, in conjunction with article 8 and/or article 1, protocol 1; and whether the claimant's failure to appeal the information notice prevented it from raising its validity thereafter. HMRC was to respond to these submissions. As a result both Hazell Minshall and HMRC made submissions to the Tribunal in September/October 2014.

23. The Tribunal released a draft decision on 27 April 2014. It requested further submissions on the issue of the validity of the information notice given what it characterised as the hitherto limited submissions by the parties on the issue. Following further submissions from the parties the Tribunal released its final decision on 10 September 2015, well over a year after it had heard the appeal. It was essentially the same as the draft decision.

24. After setting out the relevant legislation and the facts, the Tribunal first considered whether the claimant had complied with the information notice and held that it had not. Turning to the appeal against the information notice in December 2012, the Tribunal rejected the claimant's submission that that appeal had not been determined. There was no open appeal against the information notice. The Tribunal reasoned:

> "77. We consider that the exchange of correspondence between Mr Dootson and Hazell Minshall effectively settled the appeal – Hazell Minshall proposed that the filing deadline be

> extended, and Mr Dootson accepted the proposal. The agreement is evidenced in writing by the exchange of correspondence, and therefore satisfies the requirements of section 54, Taxes Management Act 1970 which permits tax appeals to be settled by agreement between the parties or their representatives. The fact that the correspondence does not expressly mention section 54 does not prevent section 54 from applying."

25. After a consideration of the evidence, the Tribunal further concluded that the claimant did not have any reasonable excuse for its failure to comply with the notice.

26. The Tribunal turned to the validity of the notice. It concluded that the notice did not meet the requirements of paragraph 1 of Schedule 36 of the 2008 Act since it related not to the tax position of the claimant but to that of its clients.

27. After canvassing jurisprudence on Article 8 of the Convention, the Tribunal concluded that the interference with the claimant's privacy rights by issue of the information notice was proportionate and necessary and did not breach any of its rights.

> "160. As regards PML, HMRC submit that the Information Notice was proportionate to the underlying need and necessary for the economic wellbeing of the UK. We agree, and PML's arguments as regards Article 8 were not in respect of its own rights.
>
> 161. We find that the Information Notice did not breach any of PML's rights under Article 8."

28. The Tribunal then considered the position under Article 8 ECHR of the claimant's clients and the individuals whose services were being provided through those companies. Interference with those rights had to be in accordance with law, which the Tribunal said required not mere statutory authority for interference with them but sufficient procedural safeguards in place such as external judicial control to ensure that any interference was adequately supervised. In this case, it held, HMRC had acted in breach of the rights of the claimant's clients under Article 8 by not proceeding through the third party route requiring prior approval by the Tribunal for the issue of an information notice.

29. Next, the Tribunal considered whether the validity of the information notice could be challenged in the appeal before it. HMRC had submitted that any challenge to its validity could only be made in an appeal under paragraph 29 of Schedule 36 and the time limit for making an appeal had passed, albeit a late appeal might be possible: para. 180. The Tribunal disagreed:

> "181. We disagree with HMRC's submissions. This is an appeal by [the claimant] against penalties, and the onus of proof is on HMRC to demonstrate that the penalties have been assessed in accordance with the law. If [the claimant] can show that the Information Notice to which the penalties relate was

> not valid, it follows that the penalties are also invalid, and the appeal must succeed."

30. Since the information notice was invalid, the Tribunal held, no penalties could be imposed for non-compliance.

31. The Tribunal finally considered what it termed ancillary matters, the return of documents and whether HMRC could rely on them. It said:

> "183. As we have found that the Information Notice was invalid, it follows that HMRC are in possession of documents and information to which they are not entitled. Save to the extent that they lawfully have these documents otherwise than pursuant to the Information Notice, they must therefore return the documents (and any copies they may have made) to PML, and cannot rely upon them.
>
> 184. However we recognise that HMRC may now wish to apply under paragraph 2 or 5 of Schedule 36 for the same documents and information. There are procedural requirements with which HMRC would need to comply, and the requirements include an application to this Tribunal. Should HMRC make such an application within a reasonable time of the release of this decision, then we would understand why HMRC might retain the documents and information, pending the decision of the Tribunal to grant the third party notice. However, in the interim HMRC could not rely upon or use the information obtained by the Information Notice.
>
> 185. We note that this Tribunal does not have any power to require HMRC to return documents, and in the event that HMRC should fail to do so, [the claimant] would need to pursue its remedy either by judicial review in the High Court (which could be transferred to the Upper Tribunal), or through the Revenue Adjudicator."

Aftermath of Tribunal's decision

32. The time limit for appealing the decision of the Tribunal expired in early November 2015 and HMRC did not seek permission to appeal. Nor, as the Tribunal had suggested, did it make an application under paragraphs 2 or 5 of Schedule 36 to the 2008 Act. Around September 2014 the civil enquiry had been suspended and all the information handed over for the criminal investigation, mentioned shortly.

33. After the Tribunal's decision Hazell Minshall wrote to HMRC requesting, inter alia, the return of the material provided in response to the information notice. In a pre-action protocol letter of 11 December 2015 the claimant challenged HMRC's failure to return the material. On 18 December 2015 HMRC responded, confirming that they would return the material with any copies on 19 January 2016. It said that it had no intention of relying on the material provided pursuant to the information notice.

HMRC added that it did not consider it was required to give any further undertakings over and above what had been directed by the Tribunal.

34. On 19 January 2016 HMRC returned all the material provided pursuant to the information notice along with the copies which had been made. HMRC still hold analysis and other work product derived from the information and documentation which the claimant had provided under the notice. There was an explanation before me of what that entailed. The material itself includes spreadsheets, an example of which was in evidence at the hearing.

HMRC'S criminal investigation

35. HMRC'S criminal investigation is concerned with whether there was a suspected fraud in the difference between the amount of corporation tax the claimant declared for its managed service company ("MSC") clients and what it declared to HMRC. The possible fraud was against both HMRC and the claimant's clients. HMRC has estimated the suspected fraud amounts to at least £8 million.

36. In April 2015 HMRC applied ex parte to the Southampton Crown Court for search warrants at five premises, being the business premises of the claimant and the home addresses of Richard Hazell and his sons. A Crown Court judge granted the warrants, which were executed on the morning of 29 April 2015. Following the execution of the search warrants, Richard Hazell and his sons were arrested in connection with allegations of suspected fraud, cheating the public revenue and money laundering. They were interviewed under caution but exercised their right of silence. They were released without charge.

37. Richard Hazell and his sons brought a claim for judicial review against the lawfulness of the search warrants. Permission was refused by Collins J on the papers and then by the Divisional Court: *R (on the application of Hazell)* v. *Southampton Crown Court*, CO/3637/2015, 4 December, 2015. Irwin J (with whom Burnett LJ agreed) rejected the arguments that HMRC should have disclosed to the Crown Court judge the Tribunal's draft (and at that point embargoed) judgment; that HMRC should have pursued other avenues for its investigation; and that the warrants failed sufficiently to specify the material to be seized.

38. At the time of the hearing before me the criminal investigation was continuing. HMRC state that there are several thousand potential victims of the alleged fraud. Recently Richard Hazell and his sons have had their police bail removed.

LEGAL FRAMEWORK

Information notices and appeals against them

39. Part 1 of Schedule 36 to the 2008 Act deals with the power to obtain information and documents from the taxpayer by issue of an information notice. Persons must comply with a notice: para. 7. Under paragraph 1 HMRC has power to issue a notice requiring the person to whom it is addressed to provide information or to produce documents where these are reasonably required for the purposes of checking the person's "tax position". This is called a taxpayer notice in the 2008 Act but for convenience is referred to in this judgment as a first party notice. Under paragraph 2 an information

notice may be issued to a person for the purpose of checking another person's tax position ("a third party notice"). Under paragraph 3 HMRC must apply to the Tribunal for approval before issuing a third party notice or seek the taxpayer's consent.

40. Appeals against information notices are dealt with in Part 5 of Schedule 36. Paragraph 29 provides that the taxpayer may appeal to the Tribunal against the information notice or any requirement in the notice, but this does not apply if the Tribunal approved the issue of the notice in accordance with paragraph 3: para. 29(3).

41. Paragraph 32 addresses the procedure for an appeal. Notice of an appeal must be given in writing (para. 32(1)(a)), before the end of the period of 30 days beginning with the date on which the information notice is given (para. 32(1)(b)), and

> "(c) to the officer of Revenue and Customs by whom the information notice was given."

On an appeal the tribunal may set aside the information notice itself or the requirement contained in it: para. 32(3)(c). Paragraph 32 adds:

> "(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.
>
> (6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

42. Part 5 of the Taxes Management Act 1970 ("TMA 1970"), which is referred to in paragraph 32(6), regulates late appeals, where no in-time appeal has been made: s.49(1). HMRC must agree to the notice being given after the relevant time limit if three conditions are met: Condition A is that the appellant has made a request in writing to HMRC to agree to the notice of appeal being given; Condition B is that HMRC is satisfied that there was reasonable excuse for not giving the notice before the relevant time limit; and Condition C is that HMRC is satisfied that request was made without unreasonable delay after the reasonable excuse ceased: s. 49 (4)-(6).

43. Also contained in Part 5 of TMA 1970 is a provision for settling appeals by agreement. Section 54(1) reads:

> "(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal , the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the

> [tribunal] had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be."

Penalties regarding information notices

44. Penalties are dealt with in Part 7 of Schedule 36 to the 2008 Act. If a person fails to comply with an information notice, paragraph 39 (1)(c) and (2) provides for a £300 penalty. If the failure continues after the imposition of a paragraph 39 penalty, the person is liable under paragraph 40 to further penalties, not exceeding £60 for each day on which the failure continues. Paragraph 40A provides for penalties for inaccurate information and documents. Paragraph 45 provides that a penalty shall not arise under paragraphs 39 or 40 in the event that the person has a reasonable excuse for the failure. Paragraph 46 then provides that where a person becomes liable for a penalty under paragraph 39, 40 or 40A: "(a) HMRC may assess the penalty…".

45. Appeals to the Tribunal against the imposition of a penalty or its amount are provided for in paragraph 47.

> "47 Right to appeal against penalty
>
> A person may appeal against any of the following decisions of an officer of Revenue and Customs–
>
> (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or
>
> (b) a decision as to the amount of such a penalty".

46. The procedure on an appeal against a penalty is provided in paragraph 48. Under paragraph 48(1) the notice of appeal must be given (a) in writing, (b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and (c) to HMRC. Appeal notices under paragraph 47 must state the grounds of appeal: para. 48(2). With appeals against the imposition of a penalty paragraph 48 states that:

> "(3) …the First Tier Tribunal may confirm or cancel the decision."

47. Paragraph 48(5) then states that the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals against penalties.

48. Of relevance in this context is section 49A, which applies if a notice of appeal has been given to HMRC: s.49A(1). In such a case the appellant may notify the appeal to the Tribunal: s.49A(2)(c). Section 49D applies to tribunal appeals. It applies if notice of appeal has been given to HMRC: s.49D(1). Section 49D(3) then states:

> "(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question."

49. *Birkett* v. *Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 89 (TCC) was an appeal to the Upper Tribunal (Tax and Chancery Chamber) (Nugee J

and Judge Ashley Greenbank) against a decision of the First-tier Tribunal ("FTT") upholding the daily penalties imposed by HMRC for failure to comply with information notices. The right of appeal was taken to be a paragraph 47(a) appeal, against the imposition of daily penalties rather than their amount. The argument of the appellants in that case was that the decision to impose the penalties was unfair because the appellants had a legitimate expectation that any further penalties would be deferred.

50. The Upper Tribunal held that, given the statutory provisions, this argument was not open to the appellants and the only issue was whether they were liable to the penalties under paragraph 40(2). It held:

> "38… Under s.49D(3) TMA, the FTT's jurisdiction is to decide "the matter in question", and under para 48(3) of sch 36, the FTT is limited to confirming or cancelling the decision. The matter in question on an appeal under para 47(a) is whether "a penalty is payable by that person [that is, the appellant] under paragraph 40". That seems to us to be the same question as whether "the person is liable to a further penalty" under para 40(2), which in turn depends on whether the requirements of para 40(1) are met. In other words, the FTT's jurisdiction on an appeal under para 47(a) is in our view confined to asking whether the statutory requirements under para 40(1) are met.
>
> 39 That means that the FTT cannot on an appeal under para 47(a) review the decision of the HMRC officer on any other grounds. In the present case the appellant partnerships wished the FTT to review the decision on the grounds that it was unfair to issue the penalties because they had a legitimate expectation of deferring any further penalties. That does not seem to us to be an issue which goes to the matter in question on an appeal under para 47(a).
>
> 40 We have reached this conclusion simply as a matter of construction of the relevant statutory provisions…"

51. The Upper Tribunal also rejected an argument that paragraph 46(1)(a) of Schedule 36, in providing that HMRC may assess the penalty, conferred a discretion on HMRC, so that the power of the Tribunal to confirm or cancel the decision under paragraph 48(3) was to be construed as wide enough to enable it to reconsider the exercise of discretion and hence to take into account such matters as fairness and the appellants' legitimate expectations. The Upper Tribunal held:

> "42…[A]s we read the legislation, para 47(a) does not confer a right of appeal against the discretionary decision of an HMRC officer under para 46(1)(a) to assess the penalty. Instead para 47(a) only confers a right of appeal against the decision that a penalty is payable under paras 39, 40 or 40A. Under para 46(1) HMRC can only assess the penalty when a person becomes liable for a penalty under paras 39, 40 or 40A , so the question whether the person has become so liable is a pre-condition to

> the exercise of the para 46(1) powers. Para 47(a) confers a right of appeal against the officer's decision that that pre-condition has been met, but that is simply a question of whether the requirements in para 40 have been satisfied."

Managed service companies

52. Part 2, Chapter 9 of the 2003 Act covers what are called managed service companies. The legislation was enacted to address the tax position of individuals who provide their services through individual service companies rather than as employees. In brief summary the effect of the legislation is to treat certain payments made for the provision of services by a managed service company ("MSC") to a "worker" as earnings liable to income tax and national insurance contributions as if the worker were employed by the MSC.

53. Further, the legislation identifies what it calls an "MSC provider", those carrying on a business of promoting or facilitating the use of companies to provide the services of individuals: s.61B(2)-(3). This excludes accountancy and tax advisers who simply advise clients who are MSCs merely by virtue of their client base. In some circumstances the tax liabilities of an MSC may be shifted home to an MSC provider: see s.688A; Income Tax (Pay As You Earn) Regulations 2003, reg.97C. Thus if MSCs are unable to pay the tax or national insurance contributions due, these debt transfer provisions can be invoked to transfer liabilities to an MSC provider to the extent that they are not met by the MSCs.

TRIBUNAL'S FINDING RE INFORMATION NOTICE

54. The claimant's judicial review is a challenge to the decision of HMRC regarding the work product derived from what was obtained from the information notice HMRC issued in November 2012. It is not, and it could not be, a challenge to the decision of the Tribunal in September 2015 in the penalties appeal.

55. Given HMRC's defence, however, the judicial review involves a critical consideration of the Tribunal's conclusion that the information notice was invalid. HMRC argued that the Tribunal lacked jurisdiction to determine the validity of the information notice, and that its decision on this point was wrong. By contrast, in the claimant's submission not only was the Tribunal correct but HMRC was barred from challenging the decision in the present proceeding. A major focus of the parties' submissions concerned the jurisdiction of the Tribunal to consider the validity of the information notice in the penalties appeal. There were various aspects to this.

Section 54 TMA 1970

56. HMRC submitted that section 54 TMA 1970 provided a complete answer regarding the status of the Tribunal's conclusion regarding the validity of the information notice. Its case was that there was an appeal against the information notice and as a result of section 54 TMA 1970 the settlement of that appeal meant that the issue of its validity was res judicata and/or the Tribunal was estopped from determining the same issue again as it purported to do in the penalties appeal.

57. The appeal against the information notice occurred when, in December 2013, the claimant appealed against the time HMRC had given it to comply with it. That appeal was compromised because HMRC agreed to extend the time. HMRC contended that section 54 applied and for all purposes its consequences were the same as if, at the time when the agreement was reached, the claimant had come to the Tribunal itself and it had determined the appeal. In HMRC's submission, although the Tribunal recognised that section 54 applied to that compromise agreement it did not appreciate that it precluded it from determining the validity of the information notice.

58. In response to HMRC's case, the claimant accepted that a section 54 agreement would be treated as if the Tribunal had decided the issues raised and would give rise to issue estoppel/res judicata in the same way as a decision of the Tribunal. But, it contended, that only applied where there was an identity between the issue determined in the earlier appeal and the issue raised in any subsequent appeal. In its submission, there are two separate categories of appeal which can be made in respect of an information notice under paragraph 29 of Schedule 36 of the 2008 Act, an appeal against the notice and an appeal against any requirement in the notice. In its submission the December 2013 appeal was not against the notice or its validity but against a requirement in the notice, namely, the requirement to provide the requested material by 11 January 2013.

59. The claimant added that even if the appeal had been an appeal against the information notice, issue estoppel applied only in respect of issues which the unsuccessful party raised and had determined against them in the earlier litigation. It cited *Caffoor and Others, the Trustees of the Abdul Gaffoor Trust* v. *Commissioner of Income Tax, Colombo* [1961] A.C. 584, where the Privy Council held that the Commissioners were not estopped by the decision of the Board of Review for the year 1949-50 from challenging the trustees' claim to an exemption as a charity for the subsequent years. In the present judicial review, the claimant added, HMRC could have raised the section 54 argument it advanced before me in the penalties appeal in the Tribunal or by appealing to the Upper Tribunal. It did not do so and cannot do so now.

60. In my view the statutory regime which applies to information notices precludes the claimant from arguing that the 2013 appeal left unresolved the validity of the information notice. There was never any appeal on that issue. As a result paragraph 32(5) of Schedule 36 of the 2008 Act, and section 54 TMA 1970, meant that the compromise agreement was final as regards any issue concerning the information notice. When it came to the penalties appeal, what the Tribunal did in addressing on its own initiative the validity of the information notice was to reopen a final decision.

61. The only possible basis for the Tribunal to do this was by granting the claimant an out of time appeal, albeit that the claimant had never challenged the validity of the information notice in the penalties appeal or otherwise. Late appeals are possible where no in-time appeal has been made, but under section 49 TMA 1970 they turn on HMRC being notified and satisfied as to reasonable excuse and that there has been no unreasonable delay. No attempt was ever made to address these preconditions for a late appeal as regards the notice's validity. In the penalties appeal HMRC's representative was wrong to concede before the Tribunal that a late appeal was possible. He should never have done so because the statutory preconditions did not exist.

62. In my respectful judgment therefore, the Tribunal was wrong in assuming that it had jurisdiction to consider the validity of the information notice.

Issues in a penalties appeal

63. There is another reason that in my judgment the Tribunal had no jurisdiction to consider the validity of the information notice in the penalties appeal. That is the narrow scope of the issues in a penalties appeal as a result of the relevant statutory provisions. That narrow scope was correctly identified, in my view, in *Birkett* v. *Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 89 (TCC).

64. The claimant contended that in this case the issue was whether the claimant was liable for a penalty under paragraphs 39 or 40 of Schedule 36 of the 2008 Act. That included whether Mr Dootson's decision was correct that the pre-conditions for imposing them had been met. The pre-conditions in this case included whether there was a valid information notice which had not been complied with. In the claimant's submission the Tribunal was correct to conclude that the validity of the information notice was "fundamental to the question of the lawfulness of the penalties under appeal".

65. The claimant sought to distinguish *Birkett* on the basis that the specific issue being considered there was whether the taxpayer could raise the public law ground of legitimate expectation in support of its appeal against penalties, in that case against those imposed under paragraph 40. Under the statutory provisions an argument of legitimate expectation was not an issue which went to the "matter in question", whether a penalty was payable, so clearly in that case the Tribunal had no jurisdiction to consider that issue.

66. In my view these submissions and the Tribunal's decision misunderstand the statutory framework and are inconsistent with *Birkett*. The Tribunal's jurisdiction is statutory. Section 49D TMA 1970 provides that the Tribunal's overall jurisdiction is to decide "the matter in question". The right to appeal a penalty set out in paragraph 47 of Schedule 36 of the 2008 Act is against "(a) a decision that a penalty is payable by that person under paragraph 39, 40.." or against the amount (not relevant in this case). Under paragraph 48(3) the Tribunal is limited to confirming or cancelling the decision. In a penalties appeal paragraph 39(1) of Schedule 36 applies "to a person who (a) fails to comply with an information notice" where there is liability to a penalty of £300. Paragraph 40(1) for daily default applies "if the failure or obstruction" continues.

67. Thus the issue on appeal whether a penalty is payable under both paragraph 39(1) and 40(1) is the narrow one of whether, in the former case, the person has failed to comply with the notice, and with the latter, whether the failure or obstruction has continued. The validity of the information notice which gives rise to the imposition of a penalty simply does not arise. As the Upper Tribunal in *Birkett* held at paragraph [42], the right of appeal against the officer's decision to impose a penalty "is simply a question of whether the requirements in para 40" – and by extension paragraph 39 – "have been satisfied".

68. In my view all this makes sense within the statutory scheme since any appeal against the validity of an information notice is decided at an earlier stage than the penalty

appeal, and under separate statutory provisions. In this case if on the penalty appeal the Tribunal was to consider the validity of the information notice it would have had to be by way of a late appeal. The Tribunal rejected that course and, as explained earlier, a late appeal against the information notice was not possible in the circumstances of this case.

69. If, as I have held, the Tribunal lacked jurisdiction in deciding that the information notice was invalid, there are still the consequences of this for the grounds advanced by the claimant on this judicial review.

GROUNDS OF JUDICIAL REVIEW

70. The claimant advanced two broad arguments of challenge, illegality and Article 8 ECHR.

Illegality

71. The claimant pointed to the decision of the Tribunal in the penalties appeal, that the information notice was invalid. That had led to the return of documents and information it had given to HMRC under the notice. In the claimant's submission, however, HMRC unlawfully retained substantial information and work product derived from that material, and refused to confirm that it would not make use of this material in the future.

72. The claimant submitted that even if it was wrong, and there were errors in the Tribunal's determination, the validity of the notice was conclusively determined by the Tribunal. Absent any appeal by HMRC to the Upper Tribunal its decision is final. In its submission HMRC are barred from raising the issue of the validity of the notice by virtue of the doctrine of issue estoppel or res judicata. In any event, the claimant submitted, HMRC is now estopped from challenging the validity of the Tribunal's decision because it previously represented that it accepted the decision.

73. As regards the first part of this submission, the claimant cited Lord Woolf in giving the court's judgment in *Taylor* v. *Lawrence* [2002] EWCA Civ 90; [2003] QB 528: "Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation": at p.535D. Amongst other authorities the claimant referred to *Henderson* v. *Henderson*, as explained by Lord Bingham in *Johnson* v. *Gore Wood* [2002] 2 AC 1, 31A, and *Thrasyvoulou* v. *Secretary of State for the Environment* [1990] 2 AC 273, 289D, per Lord Bridge. That the error of the Tribunal might be one of jurisdiction did not place it in a different category to any other error that the Tribunal might make. It was for the Tribunal to determine its own jurisdiction, and although a decision could be challenged on appeal to the Upper Tribunal and beyond, it was too late now for that to be done.

74. I fail to see any public law illegality on HMRC's part. First, the decision which the claimant challenges is HMRC's response to its requests to destroy work product and to provide the undertakings requested. The Tribunal's decision said nothing about work product. Its decision at paragraphs [183]-[185] was that HMRC must return the documents and any copies made and could not rely upon them. It conceded that it could not order this. Apart from referring to the Tribunal's decision on the invalidity

of the information notice and Article 8 ECHR (considered shortly), the claimant has not identified on what basis HMRC is legally obliged to destroy work product derived, even if only in part, from what the claimant provided as a result of the information notice, or to provide the undertakings requested.

75. Secondly, in the present case I have held that the Tribunal did not have jurisdiction to determine the validity of the information notice. That is because of the section 54 TMA 1970 settlement of the claimant's statutory appeal against it, or in any event because of the limited ambit for the Tribunal under the statutory scheme applying to penalty appeals. As a matter of principle a judgment or determination of an inferior court or tribunal can be impeached on the basis that there was no jurisdiction to give it, or because it is not conclusive as regards collateral or incidental questions to the issue to be decided: for example, *Phipson on Evidence*, 18th ed, para. 43-07; Spencer Bower and Handley, *Res Judicata*, 4th ed, (Handley & Grubb eds .), paras. 4.07, 4.10. As far as the Tribunal's decision regarding the validity of the information notice is concerned, therefore, there is no room for res judicata or issue estoppel as regards this court.

76. The principle stated in *Taylor* v. *Lawrence* does not apply where a court or tribunal lacks jurisdiction to give judgment or to make a determination. The passage regarding res judicata in Lord Bridge's speech in *Thrasyvoulou* v. *Secretary of State for the Environment* recognises this, since it is expressly premised on the decision-making body there having jurisdiction under the statutory code. In any event, because of the public interest the doctrines of issue estoppel and res judicata do not apply in the ordinary way in tax cases: *Caffoor and Others, the Trustees of the Abdul Gaffoor Trust* v. *Commissioner of Income Tax, Colombo* [1961] AC 584, 599H-600A. Nor do they apply with full force in the case of judicial review as they do in ordinary civil proceedings: see *R* v. *Customs and Excise Commissioners, ex p Kay & Co Ltd* [1996] STC 1500 at 1516-1518; *R* v. *The Commissioners for Customs and Excise, ex p Building Societies Ombudsman Company Limited* [2000] STC 892, [90].

77. The second aspect to the claimant's submission on conclusive determination was its contention that since HMRC has not challenged the decision of the Tribunal, it was a breach of its legitimate expectation or otherwise in breach of public law principles for HMRC directly to contravene the decision. In my view this is simply not arguable. As I have said the Tribunal at paragraphs [183]-[184] did not order HMRC to return the documents and information, since it rightly recognised that it had no jurisdiction to do so. Further, HMRC did return the documents it was provided and confirmed that it would not rely on them. There is no basis for any expectation, legitimate or otherwise, that it would do anything along the lines the claimant claims it ought to do as regards work product.

Article 8 ECHR

78. Although developed at some length in writing, this aspect of the claim became secondary at the hearing. In short, the claimant submitted that HMRC's retention of work product from what was seized under the information notice breached its rights under Article 8 ECHR. The argument was that HMRC is unlawfully in possession of commercial information that is the property of the claimant, and this constitutes an unlawful, unjustified and disproportionate infringement of its right to private life. In the claimant's submission the Tribunal's finding on its Article 8 rights, quoted earlier

in this judgment, could only be understood in the context that the Tribunal made them on the hypothetical basis that the information notice did relate to its tax position. Had it considered the Article 8 issue in conjunction with its earlier finding that the information notice was unlawful, it could not find that the notice was proportionate or in accordance with the law. The claimant also referred to *R (GC)* v. *Commissioner of Police of the Metropolis* [2011] UKSC 21; [2011] 1 WLR 1230 to support its case.

79. Turning to Article 8(2), the claimant began with the Tribunal's holding that the information notice was not in accordance with law because it did not comply with the requirements of paragraph 1, Schedule 36. It submitted that there was no alternative lawful basis upon which HMRC could justify retention of the information and work product. As well, HMRC's retention was not necessary for any of the specified purposes in Article 8(2), not least because it had the alternative route suggested by the Tribunal, namely an application under paragraph 2 of Schedule 36.

80. As regards the Article 8 rights of the claimant's clients, the claimant submitted that it had sufficient interest to rely on the breaches of its clients' rights since if a person already has sufficient interest to bring a claim for judicial review there is no requirement that the claim is confined to its personal right. The claimant relied on a passage in *R (on the Application of Am)* v. *Secretary of State for the Home Department, Kalyx Ltd* [2009] EWCA Civ 219, [34]-[35], that since judicial review is concerned with public law wrongs, there is no requirement that claimants must be confined to their private law or personal interests. Further, the claimant asserts, as the tax agent of its clients it has an interest in seeking the retrieval of the clients' commercial information.

81. In my view these submissions are not arguable. The first difficulty which the claimant faces is that the documents and information provided pursuant to the information notice have been returned to it and HMRC has said it will not rely on them. Secondly, the Tribunal found that the information notice did not breach the claimant's Article 8 rights. The claimant seeks to overcome this finding by a convoluted reading of what in my view are the clear words of paragraphs [160]-[161] of the Tribunal's reasons. Thirdly, I accept HMRC's submission that the claimant has not explained how the decision challenged, namely, the refusal to provide the work product, constitutes a breach of the claimant's Article 8 rights when that derivative material is the result of work carried out after the claimant decided not to pursue any appeal against the information notice and was completed in advance of the July 2014 hearing. Fourthly, any interference with the claimant's Article 8 rights is justified under Article 8(2) in the circumstances of HMRC's ongoing civil and criminal investigations. *R (GC)* v. *Commissioner of Police of the Metropolis* [2011] UKSC 21; [2011] 1 WLR 1230 has no application to the present claim since it did not concern derivative material.

82. The short answer to the claimant's point about the interference with the Article 8 rights of the claimant's clients is that the claimant does not have standing to raise their rights as a person aggrieved. In the passage the claimant referred to in *R (on the Application of Am),* Sedley LJ insisted that a person seeking judicial review should have standing: see [34]. I note in passing that the interests of the claimant and its clients, or at least some of them, may now be in conflict given aspects of the criminal investigation where it is alleged that the claimant could have defrauded its clients. The claimant in its submissions did not address this point.

REMEDY

83. Given the Tribunal's finding, the claimant submitted that what should follow was firstly the return, destruction or deletion of information and work product derived from the documentation and information provided in response to the information notice, and secondly an undertaking that HMRC should not use any of the information or work product for the future.

84. In advancing its case, the claimant referred to a passage in *R (on the application of Chatwani)* v. *National Crime Agency* [2015] EWHC 1283 (Admin), a case concerning information and documentation unlawfully obtained pursuant to a search warrant:

> "[131] Any breach of section 15 or 16 [Police and Criminal Evidence Act 1984] renders the issue and/or execution of the relevant warrant unlawful (see paragraph 40 above); and, on the principle that a person should not profit from his own wrong, that imposes an obligation on the agency of the State that has obtained documents to return all of the material seized and not use any work product derived from that material, such as copies. That would apply even if the error in the application (as reproduced in the warrant) was small, and immaterial in the sense that, had the application contained the correct information, the court would in any event have issued a warrant."

85. That was a case where the National Crime Agency had acted with egregious disregard of the statutory safeguards for the issue of warrants. In ordering return of the material seized – it was not a case of work product – Hickinbottom J stated that such circumstances would be rare: para. [139(iv)]. Davis LJ agreed. In my judgment *Chatwani* has no application to the present case where the statutory and factual contexts are so different.

86. In making its submission that the court should exercise its discretion and grant the relief sought, the claimant also referred to passages in other authorities, not directly on point, that HMRC's information powers are "intrusive and potentially oppressive" (*R* v. *Inland Revenue Commissioners, ex parte T C Coombs & Co* [1991] 2 A.C. 283) and that it has "a heavy responsibility when seeking to exercise their powers" (*R* v. *Inland Revenue Commissioners, ex parte Continental Shipping Ltd SA and Atsiganos SA* [1996] STC 813).

87. The claimant submitted that a proper course of restraint for HMRC was for it to use the third party notice procedure which would have provided a safeguard. While not going as far as alleging bad faith, the claimant contended that HMRC was reckless in adopting the course it did, and in that regard referred to the doubts that were expressed internally by Mr Dootson about whether the first party procedure was the appropriate one to adopt.

88. The claimant rejected HMRC's objection that there were practical issues if the court granted the orders it sought. Applying any such order to particular documents should not be a difficult task, the claimant contended, if common sense applied. The claimant was confident that HMRC would act in good faith in complying with both

the letter and spirit of any order made by the court. It is also noted that the court has no concerns about practicality when making the same type of order in *Chatwani*.

89. In my clear view there is no basis for granting the relief the claimant seeks. Even if I had decided that it had established the grounds advanced, which I have not, I would have refused the orders sought as a matter of discretion.

90. First, HMRC issued the information notice after the failure of the claimant and its tax advisers, Hazell Minshall, to engage with its enquiry. There was nothing intrusive about the decision to issue an information notice in these circumstances. After the information notice had been issued there was substantial non-compliance, for which after considering the evidence the Tribunal held there was no lawful excuse.

91. Secondly, there was no recklessness as alleged by the claimant in HMRC's decision to issue the information notice. This was unchartered territory and there were naturally doubts in HMRC as to whether the first or third party notice route should be followed. Mr Dootson consulted internally and the first party route was adopted. That did not mean that Mr Dootson and HMRC did not continue to wonder what others like the Tribunal would make of the decision. But there is nothing reckless about that.

92. As to the claimant's point that the third party route offered safeguards of Tribunal scrutiny before an information notice was issued, that course was not something the claimant itself wanted at the time. As expressed in its letter in July 2013, quoted earlier in the judgment, the claimant wanted to keep from its clients the investigation and the reputational damage it might suffer if word got out. There is also something in HMRC's submission that had the third party route been adopted there was no possibility of the claimant appealing, so that it lacked a safeguard which obtained with a first party notice: see paras 3(2) and 29(2) of Schedule 36 of the 2008 Act.

93. Thirdly, the claimant never challenged the information notice through exercise of its statutory right to appeal. Indeed it did not raise the validity of the information notice in the penalties appeal, the matter arising at the initiative of the Tribunal. Quite apart from any other reason, I accept HMRC's submission that, in circumstances where the claimant did not exercise its right of appeal and acquiesced in the processing of the material obtained as a result of the information notice, it would not be appropriate for the court to exercise its discretion and order the relief sought. There was an alternative remedy available and on that basis judicial review will normally be refused.

94. Fourthly, for HMRC to give the undertakings required would encourage the type of satellite litigation as to the origin of evidence deprecated by Leveson LJ in *R (Cook)* v. *Serious Organised Crime Agency* [2010] EWHC 2119 (Admin); [2011] 1 WLR 144 and *R (on the application of Cummins)* v. *Manchester Crown Court* [2010] EWHC 2111 (Admin), cases where material had been unlawfully seized under search warrants. In this case one can well imagine disputes about the origin of material and information seized under the search warrants issued in the criminal investigation in this case, which was upheld by the Divisional Court in *R (on the application of Hazell)* v. *Southampton Crown Court*, CO/3637/2015, 4 December 2015.

95. Finally, the practical difficulties to the relief sought cannot be ignored. Mr Dootson's evidence is that the work product was derived from a combination of different sources including the information notice material, and that as regards the requests to destroy work product this would require HMRC to review thousands of its files, both electronic and paper, to determine if there has been any information drawn from the documents supplied as a result of the information notice. The claimant has relied on assertions on this issue and produced no evidence as to the ease with which its suggested relief could be ordered.

CONCLUSION

96. Since this is a rolled up hearing, there is a need to consider permission. I grant permission in relation to the illegality ground only. For the reasons given in the judgment I dismiss the claim.