

BETWEEN:

SUBSTANCE001 LIMITED

Appellant

-and-

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

Respondents

SKELETON ARGUMENT ON BEHALF OF THE APPELLANT

References are to the Main Document Bundle (of 484 pages) in the form [DB/page/§para], to the Appellant's Documentary Bundle (of 115 pages) in the form [ADB/page/§para], or to the Appellant's Supplementary Authorities Bundle in the form [SAB/page/§para].

Introduction

1. The Appellant (**Substance**) has appealed against an information notice dated 26 July 2024 (**the Notice**) [DB/71], by way of notice of appeal dated 28 February 2025 [DB/5].
2. The Notice was issued pursuant to the Finance Act 2008 (**FA 2008**), Sch. 36, para. 1 [DB/118]. The appeal is made pursuant to para.29 of that Schedule [DB/145].
3. The Notice was issued seeking information in respect of the tax years 2018/19 and 2019/20. The Grounds of Appeal, as set out at [DB/6], are:

- (1) In respect of 2018/19, the information sought is not “reasonably required” since HMRC are now out of time to recover any additional tax for that year (even assuming that any additional tax is due).
- (2) In respect of 2019/20, HMRC have already issued the relevant assessments in respect of that year, and so the information is not “reasonably required”. Any further documentation should be sought by way of disclosure in the event that such is required following an appeal to the Tribunal.

Background

4. HMRC consider that Substance may have underpaid tax and national insurance contributions (**NICs**) pursuant to its PAYE obligations, in particular for the tax year 2019/20: **[DB/26/§8]**. That is disputed by Substance.
5. On 16 February 2024, HMRC issued:
 - (1) A determination, under Regulation 80 of the Income Tax (PAYE) Regulations 2003 (**PAYE Regs**) **[SAB/96]**, in the sum of **[REDACTED]** (**the PAYE Determination**) **[ADB/6]**, and
 - (2) A decision, under s.8 of the Social Security Contributions (Transfer of Functions Act) 1999 **[SAB/87]**, in the sum of **[REDACTED]** (**the NIC Decision**) **[ADB/4]**.
6. Both the PAYE Determination and the NIC Decision (together, **the Assessments**) were made in respect of the tax year 2019/20. The witness evidence of Mr Jim McCourt, for HMRC, explains that the Assessments were made in light of the approaching 4 year “normal time limit”: **[DB/26/§9]**.
7. A PAYE determination is subject to the usual time limits set out in the Taxes Management Act 1970 (**TMA**) (see Reg.80(5) of the PAYE Regs **[SAB/97]**), which provides for a basic time limit of 4 years, or 6 years where (with the burden on HMRC, as HMRC accept; see EM3259 **[SAB/378]**) there is careless behaviour leading to the loss of tax: see ss.34, 36 TMA **[SAB/26, 28]**.

8. There is no specific time limit for a s.8 NIC decision; however recovery of the NICs is subject to a 6 year time limit by virtue of s.9 of the Limitation Act 1980 **[SAB/85]**.
9. HMRC are therefore out of time to make any recoverable assessment (whether in respect of PAYE or NICs) in respect of the 2018/19 tax year, absent a supportable assertion of deliberate underpayment of tax. HMRC have not asserted that there is any deliberate underpayment of tax.
10. On 8 December 2023, HMRC wrote to Substance opening a “Check of employer records” **[DB/31]**, requesting information in the attached schedule **[DB/35]**. The schedule requested a significant amount of information “to the current date”. Substance provided HMRC with a significant amount of information, in so far as relevant to the period from 6 April 2020 to the current date **[DB/69]**.
11. Substance did not agree to provide information for the tax year 2018/19 (on the basis that HMRC were out of time to issue any assessment, absent an assertion of that an extended time was in operation, which was not made), and for the tax year 2019/20 (on the basis that HMRC had already issued assessments for that year). (Even with an assertion of carelessness, HMRC would now be out of time in respect of 2018/19, given that the 6 year period has now passed).
12. On 26 July 2024, HMRC issued the Notice **[DB/71]**. On 30 August 2024, Substance appealed the Notice to HMRC **[DB/85]**, in accordance with a short extension of time agreed by HMRC.
13. On 11 October 2024, HMRC issued their view of the matter letter **[DB/93]**. On 8 November 2024, Substance accepted HMRC’s offer of a review **[DB/99]**. On 31 January 2025, HMRC issued their review conclusion letter **[DB/112]**. HMRC continued to ask for documents for the tax years 2018/19 and 2019/2020, albeit accepted that they were out of time to ask for documents prior to 26 July 2018 (since Sch.36, para.20 **[DB/136]** permits documents which originated more than 6 years prior to an information notice to be requested only if approved by an

authorised officer, and the Notice was not issued with the agreement of an authorised officer) [DB/112].

14. On 28 February 2025, Substance notified its appeal to the Tribunal.

Relevant statutory provisions and case law

15. An information notice can be issued only

“if the information or document is reasonably required by the officer for checking the taxpayer’s tax position or for the purpose of collecting a tax debt of the taxpayer” (Sch. 36, para.1 [118])

16. HMRC’s Sch.36 powers extend to NICs pursuant to s.110ZA of the Social Security Administration Act 1992 [SAB/92].

17. The role of the Tribunal is to consider itself whether the information is (objectively) reasonably required, and not simply to review HMRC’s decision: *Asset House Piccadilly Ltd v HMRC* [2023] UKFTT 385 (TC), [51] [SAB/247]. The burden of proof is on HMRC to show that the documents or information are reasonably required: *ibid*, and as accepted by HMRC in their Statement of Reasons [DB/15/§19].

A document cannot be reasonably required if there is no practical possibility of assessment, HMRC being out of time

18. Where HMRC are out of time to collect the tax, information cannot be reasonably required:

“where the Officer is out of time to raise an assessment, it would be unreasonable for an Officer to issue information notices. The information and documents cannot be reasonably required for the purpose of assessing the right amount of tax if an assessment cannot be issued.”

(Perring v HMRC [2021] UKFTT 110 (TC), [27] [SAB/212])

HMRC must show reasonable grounds if seeking to rely on an extended time limit

19. If HMRC need to rely on some extension of the ordinary time limit, they must show reasonable grounds (based on evidence) that the conditions for such an extension are met:

“In order to request information for tax years more than four years earlier, but not more than six years earlier, there must be reasonable grounds, based on evidence to suspect an insufficiency of tax for those years due to carelessness.”

(Davies v HMRC [2022] UKFTT 369 (TC), [110(2)] [ADB/42].

20. The same principle was also expressed in *Hackmey*, [44] [SAB/226], *Hegarty v HMRC* [2018] UKFTT 774 (TC), [154]-[155], [164]-[166] [ADB/97] and *Joseph v HMRC* [2025] UKFTT 116 (TC), [40] [ADB/109].

21. The position was endorsed by the Court of Appeal in *Hankinson v HMRC* [2011] EWCA Civ 1566, [2012] 1 WLR 2322 (*Hankinson*), [4] [SAB/103]:

“Section 20 of the Taxes Management Act 1970 (and now Schedule 36 to the Finance Act 2008) also gives powers to call for information. These powers may be exercised after the enquiry window has closed ... The giving of a notice under section 20 is a precursor to the making of a discovery assessment; and it can only be done where there is a sensible or practical possibility of a discovery assessment being made under section 29: *R (oao Johnston) v Branigan* [2006] EWHC 885 (Admin) §§ 14, 15; *R (oao Pattullo) v HMRC* [2009] CSOH 137 [2010] STC 107 § 91.”

22. HMRC’s Manual CH21620 [SAB/380] (whilst not itself the law) recognises that:

“Information or an inspection can only be reasonably required where it could affect a person’s tax position. If having the information or carrying out the inspection could not affect a person’s tax position now or in the future it is not reasonable to require it...”

You can only correct a tax position if you can make an assessment, an amendment or a repayment within the time limits set for making them. You should ensure that you use the appropriate time limits for the particular circumstances.”

23. HMRC’s Manual CH21660 [**SAB/383**] recognises that:

“If all the normal and extended time limits have expired so that neither the person nor HMRC can change a particular tax position, see [CH21540](#), it will not be reasonable to carry out a check of that particular tax position.

Where extended time limits may still apply for careless or deliberate behaviour, you must have some reason to suspect that such behaviour has occurred before you can check the tax position. For guidance about behaviour and extended time limits, see [CH50000+](#).”

Where assessments have been made and appealed, the FTT’s power to order disclosure is engaged

24. Where assessments to tax have been made and appealed to the Tribunal, the Tribunal is engaged together with the Tribunal’s ability to order (or refuse) disclosure. The FTT’s power to order disclosure is contained with r.5(3)(d) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**).
25. HMRC may make applications for disclosure in respect of documents, including document which they could have sought by way of Schedule 36 notice at an earlier stage: see *Tower Bridge GP v HMRC* [2016] UKFTT 54 (TC), [64] [**SAB/127**].
26. There have been various cases considering the proper approach to disclosure in the FTT, including at the Court of Appeal level: see *HMRC v Citibank* [2018] 1 WLR 1524, [2017] EWCA Civ 1416, [93]-[95] [**SAB/163**], and *HMRC v Smart Price* [2019] 1 WLR 5070, [2019] EWCA Civ 841, [40]ff [**SAB/186**].

27. In none of those cases did the Court of Appeal suggest that its discretion on disclosure could be side-stepped by HMRC issuing a Sch.36 notice. In *Hankinson*, the Court of Appeal expressly referred to an information notice being “a precursor to the making of a discovery assessment”: see [4].
28. In the Ingenious litigation, HMRC sought to use their Sch.36 powers despite the FTT being seized of proceedings, but failed, as recorded by the Upper Tribunal (Sales J, as he then was) in *Ingenious Games LLP v HMRC* [2014] UKUT 62 (TCC) [DB/231]:

“34. Meanwhile, at a time when the Ingenious Games appeal was on foot (that appeal had been commenced well before the other appeals, in relation to the relevant closure notice which had been issued on 9 February 2012), HMRC had made an application to the FTT for disclosure of documents and information in respect of Ingenious Games and another company, using their powers of investigation under Schedule 36 to the Finance Act 2008. At the hearing of that application on 22 August 2012 and confirmed by written decision dated 25 September 2012, the FTT refused the application. This was on the basis that it was not appropriate for HMRC to seek to exercise its investigatory powers now that an appeal had been launched and the FTT was seized of those proceedings. Instead, the FTT held that the correct course was for HMRC to make an application for disclosure in that appeal, under rule 16 of the Rules.

35. HMRC accepted this ruling. After the other appeals of the appellant partnerships were commenced, HMRC gave an undertaking to similar effect in relation to investigation of their affairs as well, by letter dated 1 March 2013, stating that “any formal requests for information will be made by way of Tribunal directions”.

29. The decision of the FTT dated 25 September 2012 does not appear to have been reported or published. HMRC are invited to provide the Tribunal (and the Appellant) with a copy.

Submissions – 2018/19

29. HMRC are out of time to recover the tax for this year. In respect of the NICs, the six year limit has passed. In respect of PAYE amounts, both the ordinary four year time limit and the extended six year time limit have passed.
30. HMRC have not asserted, or led any evidence to support an assertion, that any further extension of time based on deliberate behaviour is possible.
31. In particular, HMRC's witness does not assert any grounds for considering deliberate behaviour [DB/25-29] (or even careless behaviour, albeit that would not be sufficient in any event).
32. Accordingly, in light of the settled case law referred to above, the information and documentation sought cannot be reasonably required, as there is no practical possibility of an assessment. There are no reasonable grounds, based on evidence, for considering that any relevant extension of time applies.
33. HMRC's Skeleton does not address these points satisfactorily. It is first asserted by HMRC at §45 that:

“[The Appellant] acknowledges that there are circumstances relating to the behaviour of the Appellant (which could be revealed by the provision of the requested documents) under which [HMRC] could issue in time assessments under statutory extensions of time.”
34. That is entirely wrong as a matter of fact. The Appellant does not accept that any extended time limit is met, nor that HMRC have any reasonable grounds, based on evidence, for considering that to be the case. Accordingly, HMRC are invited to withdraw their assertion at §45 which is wrong as a matter of fact and lacks proper evidential basis.
35. The burden of proof is on HMRC to show at least reasonable grounds, based on evidence, for the application of an extended time limit and HMRC have not done so or attempted to do so.

36. It is next said by HMRC, at §46 of their Skeleton, that:

“The fact that determinations or decisions for the relevant period may no longer be made under ordinary time limits does not prevent the Respondents from requesting information that is reasonably required to check the taxpayer’s overall tax position.”

37. That is wrong as a matter of law, for the reasons set out above, and contrary to HMRC’s own guidance. HMRC cannot issue an information notice where it relates to periods in respect of which HMRC have no practical possibility of an assessment. If relying on an extended time limit, HMRC must show reasonable grounds, based on evidence, that the extended time limit might be met. HMRC have not led any such evidence.

Submissions – 2019/20

38. HMRC have already issued the PAYE Determination and the NIC Decision in respect of 2019/20. Accordingly, to the extent that the Assessments are appealed and HMRC seek further information for those years, they should seek disclosure in the ordinary way, rather than side-stepping the Tribunal’s discretion on disclosure by invoking Sch.36.

39. That approach is consistent with the Court of Appeal decision in *Hankinson*, which described Sch.36 powers as a “precursor” to assessment (at [4]), and the decision of the FTT in *Ingenious*, which HMRC accepted at the time, that it was inappropriate for HMRC to use Sch.36 powers when litigation was on track.

40. That approach is also consistent with the overall statutory scheme, which allows HMRC to investigate matters (and to issue assessments and bring claims), but subject to time limits bringing finality for taxpayers. It makes no sense for HMRC to be allowed to continue their enquiry process once assessments have been made. If HMRC are correct, they could continue to seek further information months or years into the litigation process, and could serve a Sch.36 notice during or days before a hearing without regard to the FTT’s controls on disclosure. In

practice, it would mean that HMRC could continue to trouble taxpayers with an enquiry and information gathering process by issuing rough, highly approximate assessments before the statutory deadline, and then continuing the enquiry process thereafter. That is not the intended statutory scheme, or indeed how it has ever operated in practice.

41. HMRC, in their Skeleton argument at §§49-56, refer to the *Distinctive Care* litigation. That case concerned costs, and the question of whether or not HMRC had acted unreasonably (for costs purposes) in issuing an information notice in circumstances where a determination had already been made: see [2016] UKFTT 764 (TC). In that case, HMRC in fact accepted that they could not do so, and withdrew the information notice: see [32]-[36] **[DB/266]**.
42. In those circumstances, and particularly given that HMRC withdrew their information notice in that case, *Distinctive Care* undermines, rather than supports, HMRC's position.
43. HMRC go on, in their Skeleton at §57, to assert that the Assessments “*do not purport to complete [HMRC's] enquiry*”, and that they “*clearly state that they are made ... to protect Income tax and National Insurance Contributions...*”. HMRC are however not permitted to issue assessments on the basis that a relevant time limit is about to expire to protect HMRC's position on time: *Go City Ltd v HMRC* [2024] UKFTT 00745 (TC), [190]-[192] **[SAB/306]**. That will be an issue in the substantive appeal against the Assessments. For present purposes it is important to note that the fact that HMRC claim to have issued for ‘protective’ reasons is no justification to allow HMRC to effectively continue with enquiry processes despite having now issued assessments which are under appeal.
44. It is further suggested by HMRC, at §57.2, that if the Assessments are found to be incorrect they can be varied by HMRC. However, HMRC cannot simply vary the Assessments. As HMRC themselves recognise in their Manuals PAYE54190 **[SAB/386]** and EM3267 **[SAB/388]**, “*once a determination has been made, it can only be varied upon appeal*”; see also *R (Fluid System Technologies*

(Scotland) Ltd v HMRC [2025] STC 1397, [2025] UKUT 278 (TCC), [78] [SAB/352].

45. HMRC are therefore wrong, and acting contrary to their published guidance, when they say at §58 of their Skeleton, that:

“A reasonably prudent taxpayer would understand that to mean that should the information requested in the opening enquiry notice demonstrate that the amounts are incorrect, the amounts would be varied and that consequently the information was still required...”

46. For those reasons, HMRC do not have a power under Sch.36 to seek information and documentation for 2019/20, now that they have issued the Assessments.

Conclusion

47. For those reasons, the Tribunal is respectfully invited to allow the appeal.

Sam Brodsky

12 January 2026

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