



**TC01466**

**Appeal number:TC/2011/1918**

*DIRECT TAX – enquiry opened into 05/06 tax return in 2007 – application for closure notice in March 2011 – whether HMRC had reasonable grounds for not issuing a closure notice – yes as relevant information supplied only 2 days before hearing – application refused*

**FIRST-TIER TRIBUNAL**

**TAX**

**STEVEN PRICE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Mrs B Mosedale (TRIBUNAL JUDGE)  
Mr A Hughes (TRIBUNAL MEMBER)**

**Sitting in public at 45 Bedford Square, London WC1 on on 23 May 2011**

**Miss H Brown, Counsel, for the Applicant**

**Miss C Martin, Officer of HMRC, for the Respondents**

## DECISION

1. Mr Price submitted his personal tax return for the tax year ended 5 April 2006 on 20 January 2007. On 26 October 2007, HMRC opened an enquiry into that return by Mr Price. The enquiry was stated to be in respect of 3 matters: Mr Price's employment income, his bank interest and the claim for losses of £1,500,162 arising under section 574 Income and Corporation Taxes Act 1988 (ICTA).
2. On 7 March 2011 Mr Price applied for a Direction under s 28A Taxes Management Act 1970 (TMA) that HMRC issue a closure notice in relation to this enquiry within 30 days of the date of the hearing in front of us. The enquiry into Mr Price's employment income and bank interest had already been concluded and formed no part of his application which related solely to the loss relief claim.
3. We announced our decision at the hearing and later provided a summary of reasons. We are now asked to provide full written reasons.

### 15 **The Law**

4. Section 28A TMA provides as follows:

“(1) An enquiry under section 9(1) of this Act is completed when an officer of the board by notice (a ‘closure notice’) informs the taxpayer that he has completed his enquiries and states his conclusions.

(2) .....

(3) .....

(4) The taxpayer may apply to the Commissioners for a direction requiring an officer of the Board to issue a closure notice within a specified period.

(5)....

(6) The Tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.

5. Miss Brown cited *Eclipse Film Partners No 35 LLP* [2009] STC (SCD) 293 for the proposition that it is for HMRC to show reasonable grounds not to issue closure notice. This must be correct as s 28A TMA says that the Tribunal must be satisfied that there are reasonable grounds for *not* issuing such a notice. There is therefore a presumption that the application should be granted unless HMRC show that there are reasonable grounds to refuse it.
6. Miss Brown also cited *D’Arcy* [2006] STC (SCD) 543 and *Vodafone 2* [2005] EWHC. At the end of paragraph 43 in *Vodafone Park J* refers (in relation to the similar provisions to the TMA for companies) to the ability for the taxpayer to apply for a closure notice as “a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal” and in paragraph 44 that it was “a protection for companies that wish to question whether in their particular circumstances the use by the Revenue of some of their Sch 18 powers is, or continues to be, justified.”

7. We did not understand Miss Martin to disagree with the Applicant’s statement of the law: it was for HMRC to show to this Tribunal that the enquiry was not being inappropriately protracted but, on the contrary, that they had reasonable grounds for not issuing a closure notice. If they could not, the Tribunal would grant the application.

8. The parties did not agree on how much information a taxpayer must provide to HMRC before a closure notice had to be issued. It was Miss Brown’s case that, where the enquiry as into the implementation of a planning scheme as in this case, as long as HMRC had a broad understanding of the scheme, they could form a view on whether the claimed tax loss claim was lawful and issue a closure notice accordingly. The detailed scheme documents could be provided to HMRC under disclosure once an appeal was lodged.

9. We were referred to the Supreme Court decision in *Tower MCashback* [2011] UKSC 19 and the ability of HMRC to issue closure notices in broad terms. Lord Walker said:

“[18] This should not be taken as an encouragement to officers of HMRC to draft every closure notice that they issue in wide and uninformative terms. In issuing a closure notice an officer is performing an important public function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable. In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms.”

10. We did not agree with Miss Brown. Although the cases show that where the full facts are not known, HMRC are *entitled* to issue estimated assessments (eg see the case *T Haythornthwaite & Sons Ltd* CA 1927 11 TC 657) and are, as stated by the Supreme Court above, entitled to issue closure notices in broad terms, HMRC are not bound to do so. On the contrary HMRC is entitled to know the full facts related to a person’s tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody’s time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008)

11. If Miss Brown were correct that HMRC have no reasonable grounds to refuse to issue a closure notice where they have not yet been provided with all the relevant information about the scheme (putting aside the issue whether the request for information was belated) because they can make an assessment in any event, this would mean HMRC do not reasonably require the information for the purpose of checking the tax return. This would in effect compel HMRC to issue assessments based on far less than the full facts and be unable to obtain those unless and until HMRC obtained a disclosure order in proceedings.

12. This is clearly not the proper interpretation of the legislation. The taxpayer is not given a right to keep back facts or documents material to the correctness of his tax return. HMRC are entitled to them if they are reasonably required for checking a tax return. And if such relevant documents are not forthcoming (subject potentially to whether they were requested timeously), HMRC have reasonable grounds for not issuing a closure notice.

### **The Facts**

13. There was a statement of agreed facts before the Tribunal and we found as follows. The Appellant entered into transactions which were the subject of tax planning notifiable under Regulation 7 of the Tax Avoidance (Prescribed Description of Arrangements) Regulations 2004. The planning was notified by its promoter (NT Advisors LLP) on 22 March 2006 and the disclosed arrangements were given a DOTAS number. The Appellant disclosed the DOTAS number in his tax return.

14. It was agreed by both parties that the details of the proposed planning scheme were not relevant to the decision we had to make.

15. The notice of enquiry from HMRC (referred to above) asked the Applicant and its agent for a number of documents and in particular requested all documents in the Applicant's possession relating to the tax planning; all agreements entered into by the Applicant or his agents during the course of or in contemplation of the tax planning; all advice and marketing material received by the Applicant in relation to the tax planning; bank statements; and a few other matters.

16. On 20 December 2007 NT Advisors LLP wrote to HMRC enclosing the requested documents and information. HMRC acknowledged receipt but since that date and up until the application for a closure notice made no further requests for information or documents from the Applicant nor communicated with the Applicant about the information provided on 20 December 2007.

17. On receipt of the closure notice on 7 March 2011, HMRC replied on 8 March 2011 with a request for further information and documents.

18. It was also an agreed fact that between five and ten taxpayers who had participated in the tax planning notified under the DOTAS were selected by HMRC to be informal lead cases. This did not amount to a formal representative agreement but was a working arrangement agreed to by NT Advisors LLP under which the tax planning scheme could be investigated by HMRC with reference to a small number of sample cases. The Applicant was not one of those selected as a sample case.

19. Further evidence was given in witness statements and at the hearing by Miss Martin, the HMRC officer in charge of the enquiry and Mr A Mehigan, a representative of NT Advisors LLP. From this we find that HMRC and Mr Mehigan were in talks about the scheme (called the "Stony Heating scheme") from July 2007. HMRC proposed a formal representative sample agreement and this was discussed in detail between the two sides on 10 August 2007. The proposal did not progress as the parties were unable to agree on the formal terms of it.

20. Mr Higgins for HMRC proposed instead a more informal working arrangement. This was an arrangement that HMRC would only seek full facts and documents in relation to six scheme users, none of which were Mr Price. It was Mrs Martin's understanding, and we find as a fact, that Mr Mehigan knew that once the initial  
5 scheme documentation as requested in the letter opening the enquiry was provided to HMRC, HMRC would in future correspond with him only in respect of the six sample cases. Mr Mehigan says that although he agreed to the informal arrangement he did not have power to prevent any of the non-sample case taxpayers applying for a closure notice.

10 21. HMRC identified some 420 taxpayers who had implemented the scheme and opened enquiries into their returns, one of which was the enquiry opened into Mr Price's tax return.

15 22. Thereafter, Mr Mehigan (and later Mr M Jenner) of NT Advisors LLP and on behalf of the taxpayers in the sample cases, and Miss Martin or other officers of HMRC entered into a correspondence about the sample cases. In late 2007 and early 2008 some further documentation was provided but there was a dispute about whether HMRC was entitled to all that it requested. Ultimately, further information and documents were provided to HMRC by Mr Jenner in September 2008. From mid-2008 to mid-2009 HMRC requested and ultimately obtained under Notices approved  
20 by the General Commissioners documents in relation to the sample schemes from a third party.

23. The accounts of Stony Heating Ltd were requested by HMRC in late 2008. They were supplied by Mr Jenner (after some correspondence) in September 2009. After a review of these accounts and the other information provided, Miss Martin asked NT  
25 Advisors Ltd for further explanations and documents. There was some further correspondence, for example, about what information was actually relevant to the enquiry.

24. As not all requested information and documents had been supplied HMRC, after a precursor letter, HMRC issued one of the sample case taxpayers with an Information  
30 Notice under Paragraph 1 of Schedule 36 to Finance Act 2008.

25. There was a meeting between Mr Jenner and Miss Martin in mid-2010 and by mid – July 2010 virtually all of the outstanding requested information and documents were provided by Mr Jenner to HMRC in relation to the sample cases.

26. Since then HMRC have been involved in reviewing the documents and seeking  
35 technical advice prior to making a decision (which they have not yet made) whether HMRC considered the sample taxpayers were entitled to the claimed losses.

27. The further documentation requested by Miss Martin on 8 March 2011 in response to the Mr Price's closure notice application was a mirror of the information requested and provided on the sample cases. Much of the requested documentation  
40 has now been provided by Mr Jenner but was provided two working days before this hearing. In summary some 90 documents in relation to Mr Price's implementation of the planning scheme have been provided to HMRC, but some 60 of these were only provided two working days before the hearing in front of us.

28. Miss Martin and her colleagues said, and this evidence was not disputed, that they have not yet had time to thoroughly review the new documents and information. Miss Martin has noticed that some of the documents are not complete nor, at this point, can she be certain all documents requested have been provided. And it is possible that on reading them, she may find that she needs to make further enquiries or ask for further documents. Further, she was told on the day before the hearing that unlike virtually every other implementation of this scheme, the loan to Mr Price has not been waived.

### **Submissions by Applicant**

29. Miss Brown's case was that HMRC have more than enough information to give a broad conclusion and are in a position to issue a closure notice and amend the return. Mr Price is entitled to finality in his tax affairs.

30. In Miss Brown's view the only ground given by HMRC for refusing to issue the closure notice is that the Applicant has not provided all the requested documents. The Applicant has now provided virtually all of the documents and the outstanding ones are not necessary for HMRC to come to an informed judgement. We note Miss Brown did accept that HMRC had not had a chance to review the recently provided documents (about two thirds of the total documents). Nevertheless, it was her view that giving an order that HMRC should issue a closure notice in 30 days would allow them the time to review and form a view on the remaining 60 odd documents.

### **Conclusions**

31. Miss Brown's primary case seemed to us to be that HMRC had had over 3 years since the enquiry opened to ask for the documents in relation to Mr Price's implementation of the scheme but had not done so until a few months before the hearing. We find this disingenuous. The Tribunal found that, as was well known to the Applicant's representatives, during those three years both parties had been proceeding (even though there was no formal agreement) on the basis that HMRC would enquire in detail into the tax return of the sample taxpayers who had implemented similar tax planning to the Applicant. In particular, the Applicant's representatives had made detailed disclosure on those three other enquiries and were well aware when applying for the closure notice that they had not made a similar disclosure in relation to Mr Price's affairs.

32. Nevertheless, the question for the Tribunal was whether it is reasonable for HMRC to ask for time to consider the extra documents disclosed two days before the hearing before ordering them to issue a closure notice, and if they needed extra time, whether 30 days would be enough time?

33. HMRC have to form a view on whether Mr Price's tax return was correct. To do this they are entitled to know the facts. Despite in fact providing virtually all of the requested documents and information in relation to the sample cases and now Mr Price's case, it was Miss Brown's submission that HMRC do not in fact need this information but have enough to form a view on whether or not they will refuse the claimed loss relief and why. She pointed out that Miss Martin had stated that HMRC already had a provisional view that the scheme could be challenged.

34. We have already stated in our consideration of the law that HMRC are entitled to all relevant information and documents. The Applicant does not dispute that the documents with which they have just provided HMRC are relevant. It is reasonable for HMRC to wish to see *all* relevant documents before forming a view on the correctness of the taxpayer's tax return.

35. Miss Brown argued that HMRC did not need to consider these new documents before issuing a closure notice. We do not accept that. Although HMRC had been in possession of what may have been virtually identical documents for other taxpayers, the closure notice had to be in respect of Mr Price's affairs and in order to do that HMRC needed to inspect the documents relating to Mr Price's implementation of the scheme. It turns out in the event that it is not identical to the scheme as implemented by the other taxpayers, which merely affirms that HMRC need to see the information on Mr Price's scheme before issuing a closure notice in relation to Mr Price.

36. Nor did we accept Miss Brown's argument that HMRC could issue a closure notice simply refusing the claimed relief and without giving reasons. HMRC had to form a view whether Mr Price was entitled to the claimed relief and to do that it was reasonable to ask to see all the documents which related to Mr Price's implementation of the scheme. As we have said, HMRC are entitled to information reasonably required for checking a tax return. If they do not have this (or as in this case, have had for such a short time they have not had time to read it) that is reasonable grounds to refuse a closure notice.

37. HMRC accepted that it was likely they would be in a position to give a closure notice shortly. But the Tribunal agreed with HMRC that it was premature to order one now. We could put no date on when a closure notice should be issued because at the date of the hearing before us it was uncertain whether HMRC, having had time to read what had only just been disclosed to them, would make further enquiries and, if so, how long it would take the Applicant to respond to such further enquiries.

38. That this is one of many similar schemes does not alter the position. The documents may be substantially similar or largely identical to those used in the sample schemes in respect of which HMRC have had the documents for some time. But HMRC are entitled to the full facts in relation to Mr Price. They have the right to satisfy themselves if Mr Price's scheme is in truth identical to the sample cases (and indeed they have been told that it is not identical in at least one respect).

39. Nor is it appropriate to give a fixed time to HMRC to read the documents such as the 30 days suggested by the Applicant. HMRC have yet to read the 60-odd new documents provided and to ascertain whether they have further requests to make. They have just been told that this scheme differs from the other schemes in at least one respect (the loan waiver). They needed time to consider whether to ask for more information or documents in relation to this.

40. We recognise that it may be appropriate to order a closure notice without full facts being available to HMRC where, for instance, HMRC have unreasonably protracted the enquiry. HMRC should not open an enquiry and then first ask for documents 3 years down the line without a reasonable explanation. In this case, as already mentioned, we find they have not acted unreasonably in proceeding with a

sample of cases and this was with the agreement of Mr Price's advisers. Mr Price must therefore be taken to know that this was how HMRC was proceeding and cannot claim HMRC have been dilatory in not asking for his documents up until the point that he notified them (by asking for a closure notice) that he was no longer content to wait for HMRC to make a decision on the sample cases.

41. It was Mr Price's right to decide that he no longer wished to sit behind a sample case and he wanted his enquiry brought to an end: but at that point (March 2011) he and his advisers should have provided to HMRC all the outstanding factual information about his implementation of the scheme. Having done so only two days before the hearing, we were satisfied there were reasonable grounds not to order a closure notice to be issued at the hearing or at some fixed time after the hearing. Mr Price should give HMRC time to consider the latest batch of documents and then, if no closure notice is issued, apply for one again.

42. We refused the application.

43. 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.

**TRIBUNAL JUDGE**

**RELEASE DATE: 21 September 2011**