



TC05037

Appeal number: TC/2015/05965

INCOME TAX – enquiry opened into 13/14 tax return – application for a direction to issue a closure notice – whether reasonable grounds for not issuing such a direction– yes – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLAIRE CARPENTER

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE NIGEL POPPLEWELL
MEMBER NORAH CLARKE**

Sitting in public at Exeter on 12 April 2016

Ms Claire Downs for the Appellant

Mrs Gill Carwardine, Officer of HM Revenue and Customs, for the Respondents

BACKGROUND

1. This is an income tax case. In May 2014 the appellant submitted a personal tax return for the tax year ending 5 April 2014 (the "return").
2. The respondents calculated that she was liable to income tax of £2,074.20 and Class 4 National Insurance Contributions of £1,085.04.
3. The respondents subsequently opened an enquiry ("the enquiry") into the return and asked for information and documents relating to it ("the information").
4. The appellant has declined to give the information and on 24 September 2015 applied to this tribunal for a direction requiring the respondents to issue a closure notice in respect of the enquiry.
5. For the reasons given later in this decision we have decided not to issue such a direction and we therefore refuse the application.

THE LAW

6. The relevant statutory provisions relating to the submission of the return, the opening of the enquiry and the application for the direction requiring the respondents to issue a closure notice are set out in sections 8, 9A and 28A of the Taxes Management Act 1970, and are set out below:

SECTION 8

Personal return

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board-

- (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
- (b) to deliver with the return such accounts, statements and documents relating to information contained in the return as may reasonably be so required.

SECTION 9A

Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")

- (a) to the person whose return it is ("the taxpayer"),
- (b) within the time allowed.

SECTION 28A

Completion of enquiry into personal or trustee return

(1) An enquiry under section 9A(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.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either –

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

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

(5) Any such application is to be subject to the relevant provisions of part 5 of this Act (see in particular section 48(2)(b)).

(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.

7. From now on in this decision, references to sections or sub-sections are to sections or sub-sections in the Taxes Management Act 1970 unless otherwise stated.

THE EVIDENCE AND THE FACTS

8. Neither party provided any witness evidence, and we found the following facts from the documents in the bundles and the parties submissions to us.

(1) The appellant submitted a personal tax return for the tax year ended 5 April 2014 which was received by the respondents on 21 May 2014.

(2) The appellant carries on a hairdressing business as a sole trader, and has a period of account ending on 14 August in each year. The period of account which is relevant to the return was the period of account ending 14 August 2013.

(3) In the return, the appellant reported turnover of £30,567; allowable expenses of £11,003; goods for personal use of £247; and a taxable profit of £19,811.

(4) The respondents calculated that the appellant had a liability to income tax of £2,074.20 and to Class 4 National Insurance Contributions of £1,085.04. A total liability of £3,159.24

(5) On 28 April 2015 the respondents wrote to the appellant opening an enquiry into the return requesting information and documents relating to her business for the period 15 August 2012 to 14 August 2013.

(6) The information and documents required were set out in a schedule to that letter.

(7) The following information and documents were requested:

(1) All business records relating to the period of trading year ended 14 August 2013 including any prime records, such as for example, invoices, payments from clients, takings, booking diaries, Cash book etc.

(2) All bank and/or building society books or statements, cheque book stubs and deposit book counterfoils for any account into which any income from the business or from which any expenditure from the business was paid.

(3) Details of your turnover or employment records supported by invoices, payments from clients, takings records, P60's etc.

(4) Details of receipts or expenditure supported by invoices, receipts or other third-party evidence.

(5) A detailed breakdown showing how the expenses figure of £11,003 was arrived at.

(6) Details of goods or services for your own use for the amount of £248 [Mrs Carwardine subsequently confirmed that this number was wrong and it should have read £247 – i.e. the same amount as had been identified in the return].

(7) A copy of any actual accounts prepared for the year of trading ending 14 August 2013.

9. None of the information was (nor has it ever been) provided to the respondents.

10. Ms Downs, who was authorised by the appellant to act on her behalf in the enquiry, wrote to the respondents on 13 May 2015 and again on 2 June 2015 asking them to let the matter drop under their care and management provisions.

11. Following further correspondence between the parties in June and August 2014 in which:

(1) Ms Downs again asked the respondents to let the matter drop and made a formal complaint about the respondents' handling of the matter; and

(2) The respondents insisted that they still required the information to check that the appellant was paying the right amount of tax;

the appellant applied to this tribunal on 24 September 2015 under section 28A(4) for a direction requiring the respondents to issue a closure notice in respect of the enquiry.

THE RESPONDENTS SUBMISSIONS

12. Mrs Carwardine submitted as follows:

(1) The respondents are entitled to enquire into a return to check its accuracy under section 9A.

(2) An enquiry is only closed when an Officer of the Board issues a closure notice indicating that the enquiry is complete and stating his conclusions.

(3) The respondents are not in a position to complete the enquiry and state their conclusions in the absence of the information.

(4) The information is reasonable and not excessive and the appellant should be able to provide it.

(5) In her 2014/2015 tax return, the appellant has included trading income in an amount which is approximately the same as that which was in the return. This indicates that she is still trading, and there is nothing evidencing an intention to cease her business.

THE APPELLANT'S SUBMISSIONS

13. Ms Downs of behalf of the appellant submitted as follows:

(1) The appellant is seriously ill and HMRC should exercise their power to close the enquiry on humanitarian grounds under their care and management provisions.

(2) The respondents have given no reasons for opening the enquiry.

(3) The appellant's tax position is squeaky clean

(4) If the appellant provides the information to the respondents, it may lead to a more intrusive investigation into the appellant's affairs which would profoundly damage her physical and mental health.

BURDEN AND STANDARD OF PROOF

14. As can be seen, section 28A(6) obliges us to give a direction requiring the respondents to issue a closure notice unless we are satisfied there are reasonable grounds for not doing so. In other words there is a presumption in favour of the taxpayer. The burden, therefore, of proving that there are reasonable grounds for not directing the respondents to issue a closure notice lies, as Mrs Carwardine accepted, with the respondents. The standard of proof is the normal civil standard, namely the balance of probabilities.

DISCUSSION

15. It seems to us that although Ms Downs wants the respondents to close the enquiry, in reality she wants two things. Not only does she want such closure, but she also wants that closure notice to state a conclusion that the appellant's tax position is as per the return.

16. But as Mrs Carwardine has indicated, the respondents are at present in no position to state any conclusion because they have no information on which to verify the figures in the return. In terms of section 28A(1), the respondents simply cannot say that their enquiry is complete. It has never really got off the ground.

17. The self-assessment regime is a file now check later regime. A taxpayer (as the appellant has done) simply signs off the return with some numbers in it, and there is no need for the taxpayer to send with the return any supporting paperwork to justify those figures.

18. So, to enable the respondents to satisfy themselves the figures are correct, they are entitled to enquire into the return and seek the provision of information to carry out a verification exercise.

19. Ms Downs, in insisting that the appellant's position is squeaky clean, means that as far as she is concerned, the figures in the return are an accurate reflection of the underlying paperwork. But the respondents are entitled to check that they too consider that the figures in the return tally with the primary documentation.

20. In order to state a conclusion, therefore, HMRC need to have the primary papers. They need to examine them. They are entitled to be in possession of the full facts before they state their conclusion. Indeed, it would be counter-productive if they were to state a conclusion without such facts. Although in this case it is inconceivable that HMRC would do so in the absence of the information, were HMRC to issue a closure notice stating their conclusion, they would be plucking figures out of the air. If they did this, the appellant would be in the position where she would have to appeal against that conclusion. And that would bring with it precisely the sort of anxiety that Ms Downs, on the appellant's behalf, is very anxious to avoid.

21. The significance of a closure notice, and the balance which section 28A strikes between the respondents and a taxpayer have been neatly set out by Judge Saddler in

the case of *Eclipse Farm Partnerships No. 35 LLP and the Commissioners for HMRC* [2009] STC (SCD) 293 ("Eclipse"), where at paragraphs 16 and 19:

"16. The issuing of a closure notice is a significant event. It closes the enquiry and requires the Commissioners' officer concerned to state his conclusions and, where those conclusions so require, to amend the taxpayer's tax return to give effect to those conclusions. Only then will the taxpayer be able to make any appeal to the tribunal for determination of any matters disputed between the taxpayer and the Commissioners (such matters having been crystallised in the conclusions in the closure notice and the amendments to the return). The scope of any such appeal is shaped and limited by the terms of the closure notice: as Henderson J expressed it in the *Tower MCashback* case (at [128]), "Issue of the notice is an irrevocable step, and once it has been taken the battle ground on any future appeal will be defined by reference to it." It is understandable, therefore if the Commissioners are somewhat cautious as to when their enquiries may be regarded as sufficiently complete to enable them to issue a closure notice – Miss Wakefield expressed this sense of caution when she pointed out that the Commissioners were mindful of the lessons to be learnt from the decision in the *Tower MCashback* case, summed up by Henderson J in these terms (at [128]): "If there is a moral to be drawn, it is that HMRC should ensure that they have considered all the points on which they may wish to rely before a closure notice is issued.""

19. The provisions of section 28B TMA 1970 are (as with the corresponding provisions relating to companies discussed in the case of *HMRC v Vodafone 2* [2006] STC 483 at [44]) "constructed so as to produce a reasonable balance", given these different interests of the Commissioners and the taxpayer. It is implicit in the powers given to the General or Special Commissioners to give a direction requiring the issue of a closure notice, and is part of that "reasonable balance", that a closure notice can be required notwithstanding that the officer has not pursued to the end every line of enquiry or investigation – what is required is that he should have conducted his enquiry to a point where it is reasonable for him to make an informed judgment as to the matter in question, so that, exercising such judgment, he can state his conclusions and make any related amendments to the taxpayer's return. The exercise of that judgment may require the officer to express his conclusions in broad terms, or even express alternative conclusions (see the observations made in the case of *D'Arcy v HMRC* [2006] UKSPC 549 at [12]) – which should at the practical level allow an officer of the Commissioners to avoid the pitfalls identified in the *Tower MCashback* case of a closure notice too restrictively drafted in its conclusions."

22. We wholeheartedly endorse the sentiments expressed in the foregoing passages.

23. The issue of a closure notice is not something to be taken lightly. It is a significant event. The respondents cannot just pluck a figure out of the air. They must have undertaken an enquiry, completed it and so have some basis for stating their conclusions. In the absence of the information, the respondents have no such

basis for stating a conclusion. We are, therefore, miles away from the balancing exercise referred to in paragraph 19 of *Eclipse* set out above.

24. It is our view that there are reasonable grounds for not issuing a closure notice in this case. The respondents are not in a position to genuinely start (let alone complete) their enquiries and state their conclusion which follows from those enquiries since the appellant has not provided the information to which the respondents are, as we say, entitled.

25. The respondents have indicated that they are aware that they have further investigative powers under schedule 36 of the Finance Act 2008 but in light of the appellant's medical condition, they have not sought, to date, to invoke them.

26. We have heard, at some length, from Ms Downs about the seriousness of the appellant's medical condition, and the fact that she has now become her mother's carer, her mother being physically and mentally infirm.

27. And it does Ms Downs considerable credit that she is seeking to protect the appellant from a more intrusive investigation into her affairs by instigating (or advising that the appellant should instigate) today's application.

28. But whilst we are extremely sympathetic of the appellant's position, regrettably we do not think that it justifies a direction that a closure notice should be issued. We say this because:

(1) The documents and information that are being sought are simply the statutory records on which the figures in the return have been based. We suspect that they are readily available and indeed must have been readily available to the appellant (and to Ms Downs who we understand was responsible for assisting the appellant with her return) when completing the return and including in it, the turnover, expense and personal use figures.

(2) The respondents are not seeking to impose on the appellant the burden of taking primary records and producing secondary material from them. They are simply seeking the primary documents. Although a detailed breakdown of the expense figure is being sought, we suspect that the figure of £11,003 was built up from the number of individual expenses. So a detailed breakdown should be relatively simple to provide. Similarly details of the goods and service for personal use of £247 should be simple to provide.

(3) The respondents are entitled to request the information and to have it produced to them.

(4) The information sought is not unreasonable and should be capable of production by the appellant without undue effort.

(5) The appellant has continued to work as a hairdresser during the period in which HMRC have sought this information. We appreciate that as well as working she is looking after her mother, but we would have thought that she would have been able to find time to provide the information sought by the respondents notwithstanding her business and personal commitments.

29. Ms Downs had candidly submitted that whilst it might be possible for the appellant to provide the information, she is concerned that it would lead to a more intrusive investigation which would have a materially detrimental impact on the appellant's physical and mental health. This is an admirable concern. But we are afraid it does not come close to outweighing the reasons submitted by the respondents as to why we should not issue a closure notice.

30. We would observe, however, that if the appellant provides the information, and the respondents, contrary to some of the assurances that were given by Mrs Carwardine, then escalate the enquiry into a more intrusive investigation, that might be the time for the appellant to make a further application for a closure notice. In any such application, the impact of that more intrusive enquiry on the appellant's health might be something which would influence the tribunal adjudicating on that application.

DECISION

31. For the foregoing reasons we have decided not to make a direction under section 28A(4) requiring the respondents to issue a closure notice. And so we refuse the application.

APPLIED RIGHTS

32. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 19 April 2016