[2018] UKFTT 469 (TC)

TC06647

Appeal number: TC/2016/06517, TC/2017/00796, TC/2017/00804

INFORMATION NOTICES – notices to provide information and documents – whether items requested were reasonably required for the purposes of checking the Appellant's tax position – yes - consideration of the jurisdiction of the First-tier Tribunal in relation to information notices – appeal dismissed – appeals against penalties dismissed – applications for closure notices dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AMARJIT SINGH HUNDAL **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 18 May 2017 and 26 June 2017 and at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 17 January 2018 and 26 to 28 June 2018

Mr S Reevell for the Appellant

Ms H Jones, Officer of HM Revenue Customs, and Mr M Beattie, Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to a number of applications and appeals by Mr. Amarjit Singh Hundal (the "Appellant"). They are as follows:-

(a) an appeal against certain requests which were made in an information notice issued under paragraph 1 Schedule 36 Finance Act 2008 (the "FA 2008") on 17 October 2014 in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013 (the "First Information Notice");

(b) an appeal against a penalty notice of 12 July 2016 in the amount of £300 (the "First Penalty Notice) in relation to the First Information Notice;

(c) an application for a closure notice in respect of the tax years of assessment referred to in sub-paragraph 1(a) above;

(d) an appeal against a penalty notice of 21 December 2016 in the amount of £300 (the "Second Penalty Notice") in relation to an information notice issued under paragraph 1 Schedule 36 FA 2008 on 17 June 2015 in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013 (the "Second Information Notice");

(e) an appeal against certain requests which were made in an information notice issued under paragraph 1 Schedule 36 FA 2008 on 2 October 2015 (and subsequently re-issued on 8 January 2016) in respect of the tax year of assessment ending 5 April 2014 (the "Third Information Notice); and

(f) an application for a closure notice in respect of the tax year of assessment referred to in sub-paragraph 1(e) above.

Background

2. The relevant events that form the background to these proceedings may be summarised as follows:

(a) the Appellant is a director and a direct or indirect shareholder in various companies that either form part of the group of companies that is headed by a company called Gold Nuts Limited or are connected with one or more members of that group of companies. The group of companies is controlled by a Mr Shamir Budhdeo ("SB") and members of SB's family. The Appellant is also a member in a limited partnership called Symbio Energy Solutions LLP ("Symbio") the members of which include SB. For convenience, I will refer in the rest of this decision to the members of the group of companies which is headed by Gold Nuts Limited, the

companies connected with any of those companies and any other entities associated with SB, such as Symbio, as the "GN Group";

(b) SB has formally waived his right to require the Respondents to maintain the confidentiality of his tax affairs to the extent that those tax affairs are relevant to these proceedings;

(c) prior to October 2012, the Respondents, through a team in their office in Portsmouth, were conducting a number of enquiries in relation to certain of the entities falling within the GN Group and various individuals associated with the GN Group, including SB and the Appellant. The lead investigator of that team was Mr Antony Douglass, a corporation tax specialist, but the team also included VAT and PAYE/NI specialists;

(d) in October 2012, Mr Douglass referred those enquiries, via the Respondents' standard evasion referral procedure, to the Respondents' Specialist Investigations Department ("SID") based in the Respondents' office in Newcastle;

(e) the referral was allocated to Mrs Karen Murphy, a senior member of SID. Mrs Murphy conducted an extensive review of the position in relation to the relevant entities and individuals and concluded, in consultation with her manager, Mrs Helen Haghighat, that the enquiries into certain of the entities falling within the GN Group should continue, that the Respondents should open an investigation into SB under Code of Practice 9 ("COP9") and that, in relation to the Appellant, although an investigation under COP9 was not appropriate, there were certain risks to the UK exchequer arising out of his tax affairs which warranted further investigation, primarily those arising out of a shortfall between the income and capital gains declared by the Appellant in his tax returns and his apparent means;

(f) as part of that decision, Mrs Murphy and Mrs Haghighat determined that primary responsibility for the enquiries into the relevant entities falling within the GN Group should be transferred back to the Respondents' office in Portsmouth, that Mrs Murphy herself would take primary responsibility for the COP9 investigation and any other enquiries into SB and that, in relation to the Appellant, Mrs Murphy would enlist the services of a trainee to carry out the risk assessment, which trainee would be mentored by Mrs Murphy;

(g) the trainee nominated for this purpose by the training team manager, Mrs Isobel Young, was Mr Darren Kilmartin. As a result of his initial investigation into the affairs of the Appellant, Mr Kilmartin, in consultation with his mentor, Mrs Murphy, determined that it was appropriate to open formal enquiries into the tax affairs of the Appellant in respect of the tax years of assessment ending 5 April 2012 and 5 April 2103 and it was in connection with those enquiries that Mr Kilmartin issued the First Information Notice on 17 October 2014;

(h) Mr Kilmartin's involvement with the enquiries into the Appellant's tax affairs ceased on 16 December 2014 as a result of his having to take an extended leave of absence for health reasons and he was replaced from January 2015 by another trainee, Miss Liza Oliver. Like Mr Kilmartin, Miss Oliver was mentored by Mrs Murphy and so her decisions in relation to the conduct of the ongoing enquiries into the Appellant's tax affairs were taken by her in consultation with Mrs Murphy. It was in connection with those ongoing enquiries that the Second Information Notice of 17 June 2015 (which is not itself a subject of these proceedings) was issued. Miss Oliver also determined that an enquiry into the Appellant's tax affairs in the tax year of assessment ending 5 April 2014 should be opened and, in the course of conducting that enquiry, issued the Third Information Notice on 2 October 2015 (and re-issued that notice on 8 January 2016); and

(i) in March 2016, the primary responsibility for the enquiries into the tax affairs of the Appellant was moved from the Respondents' office in Newcastle to the team within the Respondents' office in Portsmouth which was dealing with the enquiries into certain of the entities falling within the GN Group. By that time, Mr Douglass had changed roles within the Respondents and leadership of that team had passed to Mr James Moss, an existing member of that team. Mrs Helen Hollis, an income tax specialist in the Respondents' office in Portsmouth, was the member of the team to whom the enquiries in relation to the Appellant were allocated and it was Mrs Hollis who went on to issue the First Penalty Notice and the Second Penalty Notice.

3. From the procedural perspective, the detailed chronology of events in relation to each of the appeals referred to in paragraph 1 above is as follows:

(a) the Appellant submitted his notice of appeal against the First Information Notice on 17 November 2014. That appeal was dismissed by the Respondents on 16 December 2014 and then, following a review, on 18 June 2015. The Appellant notified the First-tier Tribunal of his appeal against the First Information Notice on 18 July 2015 but did not do so in proper form and the appeal was not properly notified to the First-tier Tribunal until 10 January 2017. Both the appeal against the First Information Notice and the notice of appeal against that notice to the First-tier Tribunal are therefore late;

(b) the Appellant submitted his notice of appeal against the First Penalty Notice on 10 August 2016. The appeal is therefore in time. The appeal was dismissed by the Respondents on 6 September 2016 and then, following a review, on 25 November 2016. The Appellant notified the First-tier Tribunal of his appeal on 21 December 2016. The notice of appeal against the First Penalty Notice to the First-tier Tribunal is therefore in time;

(c) the Second Penalty Notice relates to a failure on the part of the Appellant to comply with the Second Information Notice. The Second

Information Notice was issued under paragraph 1 Schedule 36 FA 2008 on 17 June 2015. In relation to the Second Information Notice, the Appellant submitted his notice of appeal on 24 June 2015. The appeal was therefore in time. The appeal was dismissed by the Respondents on 2 October 2015 (and again on 8 January 2016 because the original letter was returned to the Respondents by Royal Mail). The letter from the Respondents offered the Appellant a right to request a review of their decision on or before 6 February 2016. That letter also notified the Appellant that the Respondents were dismissing the Appellant's appeal against the First Information Notice and enclosed the Third Information Notice. The Appellant failed to request a review of the Respondents' decision to reject his appeal against the Second Information Notice by 6 February 2016, despite writing to the Respondents on 5 February 2016 to say that he would reply to the Respondents' letters by that date. However, he did write to the Respondents on 18 February 2016 to "request an appeal of the decision". (I will say more below about my interpretation of the language used by the Appellant in that letter);

(d) the Respondents wrote to the Appellant on 12 July 2016 to the effect that they were interpreting his letter of 18 February 2016 as an appeal against the Third Information Notice and that therefore the Appellant's appeal against the Second Information Notice was now closed, with the result that the relevant information and documents were required to be provided and produced by 12 August 2016. No appeal was notified by the Appellant in respect of the Second Information Notice following receipt of that letter and, although the Appellant has now either provided to the Respondents the information and documents required by the Second Information Notice or indicated his intention to do so, he did not provide any of the information and documents requested by that information notice by the stipulated backstop date of 12 August 2016;

(e) the Respondents therefore issued the Second Penalty Notice on 21 December 2016. The Appellant wrote to the Respondents on 19 January 2017. In that letter, he did not formally appeal against the Second Penalty Notice but he did ask for it to be "immediately withdrawn". The Respondents wrote to the Appellant on 21 February 2017 and explained that, if the Appellant wished to appeal against the Second Penalty Notice, he needed to do so formally. The Appellant formally submitted his notice of appeal against the Second Penalty Notice on 10 May 2017, eight days before the start of the hearing in these proceedings. It was therefore a late appeal. In addition, the Appellant did not notify the First-tier Tribunal of his appeal against the Second Penalty Notice prior to the start of the hearing in these proceedings. Instead, through his counsel, Mr Reevell, he made an oral request at the hearing for his appeal against the Second Penalty Notice to be heard by the First-Tier Tribunal. Accordingly, if and to the extent that that request can be construed as "notice" of the appeal against the Second Penalty Notice to the First-Tier Tribunal (as to which, see further below), that notice of appeal to the First-tier Tribunal was late; and

(f) the Appellant submitted his notice of appeal against the Third Information Notice on 18 February 2016. It is therefore a late appeal. The appeal was dismissed by the Respondents on 29 July 2016 and then, following a review, on 21 October 2016. The Appellant notified the First-tier Tribunal of his appeal against the Third Information Notice on 17 November 2016. The notice of appeal against the Third Information Notice to the First-tier Tribunal is therefore in time.

4. The First Information Notice required the provision or production of various information and documents. The required information had already been provided by the time that the hearing in these proceedings commenced. In addition, by the time that the hearing in these proceedings recommenced on 26 June 2017 after an adjournment of a few weeks following the start of the hearing, all but one of the categories of required documents had been provided by the Appellant to the Respondents. The sole outstanding request was in the following terms:-

> "A full breakdown of all directors' loans both made and received by you in the period from 6 April 2011 to 5 April 2013, to cover both years for which I have an open enquiry – to include opening and closing balances, and all movements throughout the period, with a narrative description for each one, and evidence of all credits/repayments made to these loans."

5. As for the Third Information Notice, considerably more of the information and documents which are required by the notice to be provided or produced has not been supplied by the Appellant. The outstanding requirements in the relevant information notice are set out below:-

"Capital Gains and loss relief

1) In relation to the Capital Gain on the sale of Symbio Energy Solutions LLP on 25 March 2014:

   a) A copy of the valuation of the goodwill.

   b) An explanation, together with any supporting documentation, of how your share valued at £1,500,000 was arrived,

   c) Evidence of any payment received, showing the amounts and dates payment was received. This should be in the form of bank statements showing all amounts received in connection with this sale.

   d) Your request for 'Time to Pay' your Income tax for year ending 5 April 2014 that was due and payable on 31 January 2015 suggests you may not have received full payment. If you have not received full payment, provide:

      (i) An explanation of how £1,500,000 has been treated, and

      (ii) Supporting documentary evidence such as any loan agreements and loan statements…

Property purchase

3) In relation to the property purchase at 62 Penn Road, Beaconsfield, for £1,140,000 on 18 December 2013 provide the following:

a) The level of deposit provided to purchase this property, including documentary evidence of how you were able to fund this payment and bank statements showing the payment of your deposit from your personal account.

b) If another person made the deposit payment on your behalf, provide an explanation with supporting documentary evidence of who has made that payment and why they made that payment.

c) Land Registry shows that there is a charge set against this property with Clydesdale Bank PLC. In relation to this charge provide:

(i) Application for the loan/mortgage

(ii) Loan/Mortgage agreement

(iii) Evidence to show the monthly payments that have been paid from your personal bank accounts.

(iv) If another person has made monthly payments on your behalf, please provide details of that person with supporting evidence of any agreements in place.

d) Details of the Legal and professional costs which you incurred when acquiring this property. These will include but not be limited to:

(i) Stamp duty land tax of £57,000

(ii) Land search fees

(iii) Legal costs

(iv) For the above items point 3.d.i – iii, provide statements from solicitors and estate agents showing all the costs of purchase and evidence that payment has been made from your personal bank accounts.

(v) If another person has made these payments on your behalf, please provide an explanation as to who and why they made the payment with supporting documentary evidence.

Interest received

4) Interest certificates and bank statements for all accounts in which you had an interest in the period to evidence the taxed UK interest of £802.65.

5) In 2013 £375.47 and in 2012 £55.21 had been returned, please provide explanations of the source of savings that now return the increased amount of interest."

6. In the course of their submissions at the hearing, the Respondents applied for the wording in paragraphs 4) and 5) of the Third Information Notice as set out above to be amended so as instead to read as follows:-

> "4) Interest Certificates/bank statements to evidence the declared interest figure of £802.65 net of tax.
>
> 5) All bank and/or building society books or statements for all personal bank accounts held in your own name or jointly, together with explanations and supporting evidence for all deposits not derived from your employment with Venture Pharmacies Ltd for the period 6 April 2013 to 5 April 2014."

7. As for the penalty notices, each of them imposes a fixed penalty of £300 for failing to comply with the information notice to which it referred.

Preliminary procedural issues

8. Before turning to consider the substantive issues in relation to these appeals and applications, it is necessary to consider whether I am precluded from considering any of the appeals because of the Appellant's failure to observe stipulated time limits. As noted in paragraph 3 above, there are no failures to observe stipulated time limits in relation to the First Penalty Notice. However, each of the appeal in relation to the First Information Notice, the appeal in relation to the Third Information Notice and the appeal in relation to the Second Penalty Notice were made late. In addition, notice of the appeal to the First-tier Tribunal in relation to the First Information Notice was made late and, if the oral notification made by Mr Reevell on behalf of the Appellant at the hearing constitutes notice of the appeal to the First-tier Tribunal, the notice of the appeal to the First-tier Tribunal in relation to the Second Penalty Notice was made late.

9. The Respondents have not objected to the late appeals in relation to the First Information Notice or the Third Information Notice and therefore, pursuant to sub-section 49(2)(a) Taxes Management Act 1970 (the "TMA 1970"), the fact that the appeals to the Respondents in relation to those information notices were made late is not a bar to my hearing those appeals. In addition, the Respondents have not objected to the late notice of the appeal in relation to the First Information Notice to the First-tier Tribunal. As the Respondents have not objected to that late notice and I am entitled to permit the late notice under sub-section 49G(3) TMA 1970, I propose to exercise my discretion under that provision and Rule 7 of The Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") to admit that appeal.

10. The position in relation to the Appellant's appeal against the Second Penalty Notice is more difficult because, in addition to the fact that the appeal to the Respondents was made late, no notice of that appeal was given to the First-Tier Tribunal until it was mentioned orally at the hearing by Mr Reevell. The Respondents indicated on the first day of the hearing that they were content to agree to the late notice of the appeal to them and that they also did not object to the appeal's being

heard notwithstanding the timing and form of the notice given to the First-Tier Tribunal of the appeal.

11. However, the fact that the Respondents agreed to accept late notice of the appeal to themselves and late notice of the appeal to the First-tier Tribunal did not relieve me of the obligation to consider whether the timing and form of the notice which was given to the First-Tier Tribunal in relation to the appeal against the Second Penalty Notice precluded me from considering the appeal.

12. The issue which arose in this context is that, because notice of the appeal was given to the Respondents only eight days before commencement of the hearing, the Respondents did not formally dismiss the appeal and therefore no request was made by the Appellant requiring the Respondents to review the matter in question and no offer was made by the Respondents to conduct any such review. This meant that neither Section 49B TMA 1970 nor Section 49C TMA 1970 was engaged in relation to the appeal. As a result, sub-section 49D(3) TMA 1970 was not disapplied by sub-section 49D(4) TMA 1970, which meant that, as long as the Appellant had properly notified the appeal to the First-Tier Tribunal, I was bound by sub-section 49D(3) TMA 1970 to decide the matter in question and had no discretion as to whether or not to hear the appeal despite the late notice. On the other hand, if the form of the notification provided by the Appellant to the First-tier Tribunal did not amount to the notification of the appeal to the First-Tier Tribunal, then sub-section 49D(3) TMA 1970 was not engaged and I had no power to consider the appeal in question.

13. It is clear from sub-section 49I(b) TMA 1970 that any reference in Sections 49A to 49H TMA 1970 to a "notification" is to a notification in writing. Thus, I concluded during the course of the hearing that the oral notice of appeal provided to the First-tier Tribunal on the first day of the hearing did not amount to notice of the appeal to the First-tier Tribunal and therefore did not lead to the engagement of Section 49D TMA 1970. Accordingly, I suggested to the Appellant's counsel, Mr Reevell, during the course of the hearing that written notice of the Appellant's appeal against the Second Penalty Notice be submitted to the First-tier Tribunal as soon as practicable. As that written notice was subsequently received by the First-tier Tribunal, I now consider that Section 49D TMA 1970 has been engaged and therefore that, notwithstanding the late notice of the appeal to the First-tier Tribunal, I am bound to determine the appeal.

The relevant law

14. The statutory provisions which are relevant in this case are as follows:-

> (a) paragraph 1 Schedule 36 FA 2008, which entitles an officer of the Respondents by notice in writing to require a taxpayer to provide information or to produce a document "if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's position" (any such notice's being referred to hereafter in this decision as a "taxpayer notice");
>
> (b) paragraph 2 Schedule 36 FA 2008, which entitles an officer of the Respondents by notice in writing to require a person to provide

information or to produce a document "if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer" (any such notice's being referred to hereafter in this decision as a "third party notice" and, together with a taxpayer notice, as an "information notice") and requires the relevant other person to be named in the third party notice;

(c) paragraph 3 Schedule 36 FA 2008, which provides, inter alia, that an officer of the Respondents may not give a third party notice without the agreement of the person in relation to whom the information or document is sought or the approval of the tribunal and that, in seeking such approval, the officer must first give the relevant person a summary of the reasons why the information or document has been requested and an opportunity to make representations in relation to the proposed request, which representations are to be given to the tribunal;

(d) paragraph 7 Schedule 36 FA 2008, which stipulates that, where a person is required by an information notice to provide information or produce a document, that person must do so within such period and at such time, by such means and in such form as is reasonably specified or described in the notice;

(e) paragraph 18 Schedule 36 FA 2008, which specifies that an information notice "only requires a person to produce a document if it is in the person's possession or power";

(f) paragraph 29 Schedule 36 FA 2008, which provides that a taxpayer who is in receipt of a taxpayer notice may appeal against the notice or any requirement in the notice, except in a case where the tribunal has approved the relevant notice in advance, but may not appeal against a requirement in the notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records;

(g) paragraph 32 Schedule 36 FA 2008, which provides that, on an appeal against an information notice or any requirement in an information notice that is notified to the tribunal, the tribunal may confirm that information notice or such requirement, vary the information notice or such requirement or set aside the information notice or such requirement and that, where the tribunal confirms or varies the information notice or any such requirement, the person to whom the information notice was given must comply with the notice or requirement within such period as is specified by the tribunal or, if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of the Respondents following the decision;

(h) paragraph 39 Schedule 36 FA 2008, which provides that a person is liable to a penalty of £300 if that person fails to comply with an information notice;

(i) paragraph 45 Schedule 36 FA 2008, which provides that liability to a penalty under paragraph 39 Schedule 36 FA 2008 does not arise if the relevant person satisfies the Respondents or (on an appeal notified to the

tribunal) the tribunal that there is a reasonable excuse for the failure that has given rise to the penalty;

(j) paragraph 47 Schedule 36 FA 2008, which provides that a person may appeal against a decision that a penalty is payable under paragraph 39 Schedule 36 FA 2008;

(k) paragraph 48 Schedule 36 FA 2008, which provides that, on any appeal against a decision that a penalty is payable, the tribunal may confirm or cancel the decision and that, on any appeal against a decision as to the amount of that penalty, the tribunal may confirm the decision or substitute for the decision another decision that the relevant officer of the Respondents had the power to make;

(l) paragraph 62 Schedule 36 FA 2008, which provides as follows:-

> "(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of:-
>
> (a) the Taxes Acts, or
>
> (b) any other enactment relating to a tax,
>
> subject to the following provisions of this paragraph.
>
> (2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts -
>
> (a) does not relate to the carrying on of a business; and
>
> (b) is not also required to be kept or preserved under or by virtue of any other enactment relating to a tax;
>
> it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.
>
> (3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired."

References hereafter in this decision to information or a document which comprises part of a person's "statutory records" should be construed as references to information or a document which meets the above conditions;

(j) Section 12B TMA 1970, which stipulates that a person who is required to deliver a tax return for a year of assessment must "keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year" and to preserve those records for a specified period of time, in this case the first anniversary of the 31 January next following the relevant year

of assessment or such earlier day as may be specified in writing by the Respondents; and

(k) sub-section 28A(4) TMA 1970, which stipulates that a taxpayer may apply to the tribunal for a direction requiring an officer of the Respondents to issue a closure notice ending an enquiry under sub-section 9A(1) TMA 1970 within a specified period.

15. The provisions set out in the above summary which are of most significance in the context of these proceedings are as follows:

(a) the legislation in question draws a distinction between a taxpayer notice – which requires the recipient to provide information or produce a document which the Respondents require for the purpose of checking the recipient's own tax position – and a third party notice – which requires the recipient to provide information or produce a document which the Respondents require for the purpose of checking the tax position of another person. The latter is subject to the additional safeguards that are set out in the schedule and, in particular, in sub-paragraph 2(2) Schedule 36 FA 2008 and paragraph 3 Schedule 36 FA 2008;

(b) the legislation provides that a person receiving a taxpayer notice may appeal against the relevant notice or any requirement in the relevant notice, except in a case where the tribunal has approved the giving of the relevant notice in advance of its being given, but that the recipient of a taxpayer notice may not make an appeal in relation to a requirement in any such notice to provide any information or produce any document that, in either case, forms part of the "statutory records" of the recipient;

(c) there is some circularity in the way in which paragraph 1 Schedule 36 FA 2008 and paragraph 29 Schedule 36 FA 2008 interact.

Paragraph 1 Schedule 36 FA 2008 defines a "taxpayer notice" as a notice which is given under that paragraph. In other words, a "taxpayer notice" is a notice requiring the recipient to provide or produce information or a document that is reasonably required by the relevant officer of the Respondents for the purpose of checking the recipient's tax position. One might infer from that definition that a notice that does not meet that description – ie a notice requesting information or a document that is not reasonably required by the relevant officer for the purpose of checking the recipient's tax position - is therefore not a "taxpayer notice", as defined.

Paragraph 29 Schedule 36 FA 2008 then simply provides for a right of appeal against a "taxpayer notice" (or a requirement in a "taxpayer notice") without specifying the potential grounds for any such appeal.

The language used in paragraph 29 Schedule 36 FA 2008 is unfortunate in two respects. First, given the way that a "taxpayer notice" is defined in paragraph 1 Schedule 36 FA 2008, it is unclear how the right of appeal in paragraph 29 Schedule 36 FA 2008 can apply to a notice that fails to meet the conditions in paragraph 1 Schedule 36 FA 2008 because that notice is not a "taxpayer notice" and therefore, on a literal reading of paragraph 29

Schedule 36 FA 2008, the right of appeal set out in that provision does not apply to the notice. Secondly, paragraph 29 Schedule 36 FA 2008 does not stipulate the grounds on which any appeal against a taxpayer notice under that provision may be made.

Taking these two points together, one might have thought that paragraph 29 Schedule 36 FA 2008 should be expressed to apply to a notice which purports to be a taxpayer notice (as opposed to a notice that is a taxpayer notice) and then to specify that an appeal might be made against that notice on the basis that the relevant notice does not in fact meet the conditions necessary to be a taxpayer notice, as defined. The fact that the provision is not drafted in this way does create unnecessary circularity and obscurity.

(I would observe in passing that the same circularity does not arise in relation to third party notices because paragraph 30 Schedule 36 FA 2008 – the provision dealing with appeals against third party notices - clearly sets out the basis on which the recipient of the third party notice may appeal against the notice or any requirement in the notice – namely, the fact that it would be unduly onerous for the recipient to comply with the relevant notice or requirement – and that basis of appeal is quite distinct from a failure by the notice to satisfy the conditions set out in paragraph 2 Schedule 36 FA 2008 which need to be met in order for the notice to be a third party notice.)

I will return to this point when I address, in my decision, the arguments which have been made by Mr Reevell on behalf of the Appellant in these proceedings.

16. Finally, in this section of this decision, I should mention the burden of proof.

17. In relation to the appeals against the First Information Notice and the Third Information Notice, neither party made any submissions during the course of the hearing as to whether the burden of proof in relation to the satisfaction of the language in paragraph 1 Schedule 36 FA 2008 rested with the Appellant or with the Respondents. Like the First-tier Tribunal in each of *Joshy Matthew v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 139 (at paragraphs [68] to [87]), *Gold Nuts and Others v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 354 (at paragraphs [60] to [63]) and *Codexe Limited v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 569 (at paragraph [45]), I am inclined to think that it should be for the Appellant to prove that a relevant notice does not satisfy the language in paragraph 1 Schedule 36 FA 2008 (rather than for the Respondents to prove that it does) but, as no submissions were made to me on the subject, I have adopted the working assumption in this decision that the onus should be on the Respondents to establish that they have satisfied the language in that provision.

18. In relation to the appeals against the First Penalty Notice and the Second Penalty notice, it is well-established that it is for the Respondents to prove that there has been a failure to satisfy the relevant underlying information notice so that the

language in sub-paragraph 39(1) Schedule 36 FA 2008 is satisfied and then, if they do, for the taxpayer to prove that he has a reasonable excuse for that failure so that the language in sub-paragraph 45(1) Schedule 36 FA 2008 is satisfied.

19. In relation to the applications for the two closure notices, the language used in sub-section 28A(5) TMA 1970 makes it clear that it is for the Respondents to establish that there are reasonable grounds for not issuing the relevant closure notice.

20. Thus, I have proceeded on the basis that, with the exception of the question of reasonable excuse, the onus is on the Respondents in relation to each of the constituent elements of this decision.

The Appellant's arguments

21. In relation to the Appellant's appeals against the outstanding requirements for information and documents in the two information notices which are the subject of these proceedings, Mr Reevell, on behalf of the Appellant, argues as follows:-

(a) the purpose of the Respondents in stipulating some or all of the requirements which are set out in the information notices was predominantly (or, putting the argument at its weakest, at least in part) to obtain information which would assist them in pursuing their COP9 investigation and other enquiries into SB and/or in pursuing their enquiries into certain of the entities falling within the GN Group and/or to harass the Appellant because of the Appellant's association with SB and the entities comprising the GN Group;

(b) in any event, the purpose of the Respondents in stipulating some or all of the requirements which are set out in the information notices was not solely to obtain information for the purpose of checking the Appellant's own tax position;

(c) since a "taxpayer notice", as defined in paragraph 1 Schedule 36 FA 2008, is a notice seeking information or a document that is reasonably required for the purpose of checking the recipient's tax position, a notice which is issued, either wholly or in part, for any purpose other than that cannot be a "taxpayer notice", as so defined. This means that the relevant notices were not truly "taxpayer notices", as so defined, at all. Instead, at least to the extent that the purpose of the relevant notices included the purpose of obtaining information in order to check the tax position of SB or any person other than the Appellant, the relevant notices were disguised third party notices, in relation to which the additional safeguards set out in Schedule 36 FA 2008, and, in particular, sub-paragraph 2(2) Schedule 36 FA 2008 and paragraph 3 Schedule 36 FA 2008, should have applied;

(d) the First-tier Tribunal is a creature of statute and has the jurisdiction to protect its own process from abuse. This is an inherent power but is, in any event, supplemented by the provisions in the Tribunal Rules which set out the rights and obligations of the First-tier Tribunal – most notably,

Rule 2, which stipulates that the overriding objective of the Tribunal Rules is to deal with cases fairly and justly, and Rule 5, which allows the First-tier Tribunal to regulate its own procedure and entitles the First-tier Tribunal to give a direction in relation to the conduct or disposal of proceedings;

(e) this means that, before considering any of the substantive issues which are raised by a particular appeal, the First-tier Tribunal is entitled and obliged to satisfy itself of the legitimacy of the proceedings before it and to make such orders as it believes are necessary to ensure the fair and just disposition of those proceedings;

(f) in this case, as the two information notices which are the subject of these proceedings were not "taxpayer notices", as defined in sub-paragraph 1(1) Schedule 36 FA 2008, for the reasons set out in paragraphs 21(a) to (c) above, it was beyond the powers of the Respondents to issue them and therefore the notices, and all of the requirements stipulated in the notices – including, if I find against the Appellant in relation to the argument set out in paragraph 21(g) below, those requirements to provide or produce information or a document which comprises part of the Appellant's statutory records - were invalid, with the result that the Appellant's appeal against the notices should be upheld in full, even to the extent that the notices contain a requirement to provide or produce information or a document which comprises part of the Appellant's statutory records;

(g) in any event, none of the information or documents which are required to be provided or produced by the relevant notices does comprise part of the Appellant's statutory records and therefore, even if the prohibition in sub-paragraph 29(2) Schedule 36 FA 2008 were to apply to the appeals against the two information notices, the Appellant would not be precluded by the terms of that provision from appealing against each of the requirements in the relevant notices;

(h) the amendments to paragraphs 4) and 5) of the Third Information Notice that were proposed by the Respondents at the hearing amount to an expansion of the requirements in question and, even if I find against the Appellant in relation to the arguments set out in paragraphs 21(a) to (f) above, the requirements as so widened are so broad that they cannot properly be construed as requiring the provision or production of information or documents that are reasonably required for the purpose of checking the Appellant's tax position because the scope of the requirements is unreasonable and disproportionate;

(i) even if I find against the Appellant in relation to the arguments set out in paragraphs 21(a) to (f) above, the requirements stipulated in the two notices were purely speculative and were not reasonably required for the purpose of checking the Appellant's tax return in respect of the relevant tax years of assessment; and

(j) even if I find against the Appellant in relation to the arguments set out in paragraphs 21(a) to (f) above, the terms of the requirement stipulated at paragraph 3)b) of the Third Information Notice were inappropriate in that the Respondents should have waited for an answer to the first part of the requirement before requiring the answer to the second part of the requirement (ie asking why another person made the relevant deposit payment).

22. There are two further points which I should mention in connection with the Appellant's position in relation to the two information notices. First, at an early stage in his correspondence with the Respondents and his notices of appeal, the Appellant alleged that the requirements in the notices violated his rights under Article 8 of the European Convention on Human Rights. However, at the hearing, Mr Reevell made it clear that the Appellant did not wish to pursue that argument. Secondly, the Appellant does not argue that any of the documents in relation to which there is an outstanding requirement are not in his power or possession.

23. In relation to the Appellant's appeals against the two fixed penalty notices which are the subject of these proceedings, Mr Reevell, on behalf of the Appellant, argues that these have not been validly issued because they relate to a failure to provide information and documents which have not properly been required, as outlined in paragraph 21 above.

24. In relation to the Appellant's applications for closure notices, Mr Reevell, on behalf of the Appellant, argues that the Respondents have repeatedly failed to provide the Appellant with any determination in relation to the information supplied to them but have simply required the provision and production of further information and documents without drawing their enquiries to any conclusion. He relies on the decisions of the First-tier Tribunal in *Bloomfield v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 593 (TC) and *Assan Khan v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 018 (TC) as authorities for the proposition that I should issue closure notices in this case based on the Respondents' failure to do anything with the information and documents which the Appellant has already supplied.

The Respondents' arguments

25. In response, Ms Jones and Mr Beattie on behalf of the Respondents contend as follows:

(a) the sole purpose of the Respondents in stipulating the requirements set out in the information notices was to check the tax position of the Appellant. They deny that the Respondents had any other purpose in making the relevant requests. In particular, Ms Jones and Mr Beattie contend that it was not any part of the Respondents' purpose in stipulating the relevant requirements to obtain information which would assist the Respondents in pursuing their COP9 investigation and other enquiries into SB and/or in pursuing their enquiries into certain of the entities falling

within the GN Group and/or to harass the Appellant because of the Appellant's connection to SB and the entities comprising the GN Group;

(b) in addition, the information and documents which are required to be provided or produced by the information notices are reasonably required for that sole purpose and the scope of the requirements is neither unreasonable nor disproportionate;

(c) thus, the information notices fall squarely within the language set out in paragraph 1 Schedule 36 FA 2008 and the appeals against the two information notices should fail;

(d) without prejudice to the arguments set out in paragraphs 25(a) to (c) above, even if the Respondents had had a mixed purpose in stipulating those requirements – ie the purpose of checking the tax position of the Appellant and some other purpose, whether it be the purpose of obtaining information which would assist them in pursuing their COP9 investigation and other enquiries into SB and/or in pursuing their enquiries into certain of the entities falling within the GN Group and/or the purpose of harassing the Appellant - the language in paragraph 1 Schedule 36 FA 2008 would still have been met because the requirements would still have been stipulated (even if only in part) for the purpose of checking the Appellant's tax position and the information and documents required to be provided or produced would be reasonably required for that (partial) purpose. As such, the appeals against the information notices should still fail in that event. Only if the purposes of the Respondents in stipulating a requirement set out in a notice did not include checking the tax position of the Appellant at all would the Appellant be entitled to succeed in his appeal in relation to that requirement;

(e) even then, the Appellant would not be entitled to succeed in his appeal in respect of a requirement stipulated in the relevant notice to provide or produce information or a document which comprises part of the Appellant's statutory records because paragraph 29 Schedule 36 FA 2008 precludes any such appeal and the bar on appeals under that provision is absolute;

(f) in other words, Ms Jones and Mr Beattie explained that, in the view of the Respondents, there is no such logically anterior jurisdictional question as is alleged by Mr Reevell on behalf of the Appellant. There is simply a right of appeal under paragraph 29 Schedule 36 FA 2008 against a notice or requirement stipulated in a notice on the grounds that the notice or requirement fails to satisfy one or both of the conditions set out in sub-paragraph 1(1) Schedule 36 FA 2008. Therefore, the extent of any such right of appeal is circumscribed by the prohibition in sub-paragraph 29(2) Schedule 36 FA 2008;

(g) so the Respondents do not accept that there is any authority for the proposition that a requirement in a notice to provide or produce information or a document which comprises part of the recipient's statutory records can be challenged before the First-tier Tribunal on the

ground that the purpose of the Respondents in stipulating the requirement does not satisfy the terms of sub-paragraph 1(1) Schedule 36 FA 2008 or on any other ground for that matter;

(h) as the only basis on which the recipient of a notice which requires the provision or production of information or a document can challenge the notice or the relevant requirement in the notice before the First-tier Tribunal is by way of an appeal under paragraph 29 Schedule 36 FA 2008, it follows that, if the recipient wishes to challenge a requirement to provide or produce information or a document which comprises part of the recipient's statutory records on any ground, including the ground that the Respondents did not have the requisite purpose in issuing the notice or stipulating the relevant requirement, then the only basis for doing so would be by way of an application for judicial review to the High Court. The First-tier Tribunal does not have the jurisdiction to consider a public law issue of the nature asserted by Mr Reevell on behalf of the Appellant;

(i) the Respondents consider that certain of the information and documents which the Respondents have required to be provided or produced in the information notices do satisfy the definition of "statutory records" in paragraph 62 Schedule 36 FA 2008. Accordingly, Ms Jones and Mr Beattie say that, regardless of my conclusion in relation to the purpose of the Respondents in stipulating any of those requirements, the Appellant's appeal against such requirement, to the extent that it relates to that information or those documents, must fail; and

(j) the Respondents deny that the amendments to paragraphs 4) and 5) of the Third Information Notice that were proposed by the Respondents at the hearing amount to an expansion of the requirements in question but add that, even if I decide that the amendments do amount to such an expansion, that expansion is justified because the information and documents which the amended paragraphs require to be provided or produced are reasonably required for the purpose of checking the Appellant's tax position and the scope of the amended paragraphs is neither unreasonable nor disproportionate.

26. In relation to the Appellant's appeals against the two fixed penalty notices that are the subject of these proceedings, Ms Jones and Mr Beattie say that the appeals should fail on the basis that each of the penalties in question relates to a valid information notice with which the Appellant has failed to comply in full on or before the date stipulated in the relevant information notice.

27. In relation to the Appellant's applications for closure notices, Ms Jones and Mr Beattie say that, given the lack of co-operation shown by the Appellant in relation to the relevant enquiries hitherto, and, in particular, the extent of the failure by the Appellant to comply with the requirements which are stipulated in the First Information Notice and the Third Information Notice, the applications for closure notices are premature and should therefore fail.

Questions to be determined

28. So far as concerns each of the First Information Notice and the Third Information Notice, I believe that I need to determine the answers to the following questions in the course of this decision:

(a) the first question is whether the Respondents' sole purpose was to check the tax position of the Appellant, in stipulating each of the requirements that are set out in those information notices, or whether the Respondents had some other purpose, such as obtaining information which would assist them in pursuing their COP9 investigation and other enquiries into SB and/or in pursuing their enquiries into certain of the entities falling within the GN Group and/or to harass the Appellant, in stipulating any such requirement as their only purpose or as part of their purposes and, if the Respondents had, in stipulating any such requirement, both the purpose of checking the tax position of the Appellant and some other purpose, the extent of each such purpose (together, the "First Issue");

(b) the second question is whether, to the extent that I conclude, following my consideration of the First Issue, that the purpose of checking the tax position of the Appellant was either the sole purpose or part of the purposes of the Respondents in stipulating any requirement that is set out in those information notices, the information or document that is the subject of the relevant requirement is reasonably required by the Respondents for that purpose (the "Second Issue");

(c) unless I conclude, following my consideration of the First Issue, that the sole purpose of the Respondents in stipulating each requirement that is set out in those information notices was to check the Appellant's tax position, and, following my consideration of the Second Issue, that the information and documents to which each such requirement relates is reasonably required for that purpose, the third question is to identify which of the information and documents that are required to be provided or produced by the information notices comprise part of the statutory records of the Appellant (the "Third Issue"); and

(d) finally, unless I conclude, following my consideration of the First Issue, that the sole purpose of the Respondents in stipulating each requirement that is set out in those information notices was to check the Appellant's tax position, and, following my consideration of the Second Issue, that the information and documents to which each such requirement relates is reasonably required for that purpose, the fourth question is to determine the impact of my conclusions in relation to the First Issue and the Second Issue on the appeals against the information notices, both as regards any requirement to provide or produce information or a document which does not comprise part of the Appellant's statutory records and, separately, as regards any requirement to provide or produce information or a document which does comprise part of the Appellant's statutory records (the "Fourth Issue").

29. So far as concerns each penalty notice that is the subject of this decision, I believe that I need to determine whether the relevant penalty notice is justified because the information notice to which the relevant penalty notice relates is valid and the Appellant has failed to comply with that information notice and, if so, whether the Appellant has a reasonable excuse for its non-compliance.

30. So far as concerns each application for a closure notice, I believe that I need to determine whether, in the light of the information which the Appellant has yet to provide to the Respondents in the course of the Respondents' enquiries into his tax affairs, it is appropriate at this stage to direct the Respondents to bring those enquiries to a close.

The evidence

31. The main question of fact that I need to determine in connection with these proceedings is whether, in stipulating any of the requirements set out in the First Information Notice and the Third Information Notice, the Respondents had any purpose other than checking the tax position of the Appellant and, if so, the extent to which that was the case.

32. In answering that question, I have considered the terms of the two information notices and the correspondence leading up to the issue of those information notices and I have also heard extensive oral evidence from those officers of the Respondents who were involved in the decision to issue each information notice.

33. Before summarising the relevant parts of that oral evidence, I would make the following preliminary observations:

(a) there is nothing on the face of either information notice or the correspondence preceding either information notice to suggest that the purpose of the Respondents in issuing the relevant information notice was anything other than obtaining information for the sole purpose of checking the Appellant's tax affairs;

(b) however, at an early stage in the hearing, Mr Reevell pointed out that the mere fact that each information notice had that apparent purpose did not necessarily mean, in and of itself, that that was the purpose of the Respondents in issuing the relevant information notice. Mr Reevell elaborated on this during the course of the hearing by explaining that, since the Appellant was a director, shareholder and member of various entities falling within the GN Group, information pertaining to the Appellant's tax affairs would necessarily be of assistance to the Respondents in the pursuit of their COP9 investigation and their other enquiries into SB and their enquiries into certain of the entities falling within the GN Group and that the purpose of the Respondents in issuing the information notices was, either solely or in part, to obtain information that would enable them better to pursue that investigation and those enquiries;

(c) the Respondents' intention at the start of these proceedings was to provide only one witness – namely Mrs Hollis, as the income tax specialist in the Respondents' office in Portsmouth who assumed responsibility for the enquiries into the Appellant when those enquiries were moved to the Respondents' office in Portsmouth in March 2016. However, it quickly became apparent during the course of Mrs Hollis's evidence that, as Mrs Hollis's involvement in the enquiries in relation to the Appellant had commenced only after all three information notices had already been issued, she was unable to shed any material light on the question of the purposes of the Respondents in issuing the information notices. Mrs Hollis was able to outline the chronology of the events that had led up to the issue of the information notices and also the events that had occurred between the issue of the information notices and the start of these proceedings but she could not personally attest to the process and thinking within the Respondents that had led to the issue of the information notices. For that reason, the Respondents agreed to provide further witnesses who might shed some light on those issues;

(d) as a result, over the course of two days at the end of June 2018, nine further officers of the Respondents gave evidence, and were cross-examined by Mr Reevell, in relation to the circumstances leading up to the issue of the two information notices. I have summarised below the features of that evidence that are relevant to the question of fact that I have to decide but I would preface that summary by observing that the evidence which I heard necessarily related to the whole period over which the COP9 investigation and enquiries into SB, the enquiries into certain of the entities falling within the GN Group and the enquiries into the Appellant have been ongoing and that, in terms of ascertaining the purpose of the Respondents in issuing the two information notices, events which have occurred in the course of the COP9 investigation and those enquiries following the date when the Third Information Notice was re-issued – ie 8 January 2016 – are of limited relevance to the question that I have to decide;

(e) it means, for example, that the evidence of Mr Paul Rooney, who took over as the case director in relation to the COP9 investigation and certain enquiries into SB in 2016, some months after the Third Information Notice was re-issued, who had no involvement in that investigation and those enquiries before the date that he took over as case director in relation to that investigation and those enquiries and who has had no involvement in the enquiries in relation to the Appellant at any time, whether before or after the re-issue of the Third Information Notice, is of limited relevance to the question that I need to determine. Instead, the most significant evidence in this context is that of Mrs Murphy – as the officer of the Respondents who, at the time when the relevant information notices were issued, had primary responsibility for the COP9 investigation into SB and was also the mentor to Mr Kilmartin and, subsequently, Miss Oliver – Mr Kilmartin and Miss Oliver – as the officers of the Respondents who were responsible for issuing the relevant

information notices – and Mr Moss – who, in his capacity as the leader of the team in the Respondents' office in Portsmouth that had primary responsibility for the enquiries in relation to certain of the entities falling within the GN Group (including Symbio) at the time when the Third Information Notice was issued and then re-issued, was responsible for the drafting of certain questions in the Third Information Notice; and

(f) finally, I would note that, during the course of the witness evidence, Mr Reevell pointed out that the witness statement of Mr Andrew Watson had made no disclosure of Mr Watson's involvement in the investigation into SB and that Mr Reevell would not have acceded to the non-attendance of Mr Watson at the hearing (and thereby given up his right to cross-examine Mr Watson) if he had been made aware of that at the time when Mr Watson's witness statement was given to him. For their part, Ms Jones and Mr Beattie pointed out that, at the time when the witness statements had been prepared, SB had not yet agreed to waive his right to require the Respondents to keep his tax affairs confidential and therefore that, in remaining silent about his involvement in connection with the COP9 investigation and other enquiries in relation to SB, Mr Watson had not been deliberately misleading in his witness statement.

Be that as it may, Mr Reevell invited me at that stage to require Mr Watson to attend the hearing to give evidence but I determined that that would be unduly onerous on both Mr Watson and the Respondents and was unnecessary given that, based on the evidence of the other witnesses, Mr Watson's involvement in the COP9 investigation into SB had not started until April 2016, when Mrs Murphy left her role in SID, and that date fell some three months after the Third Information Notice had been re-issued. In addition, I considered that I had already had the benefit of hearing evidence from ten officers of the Respondents to attest to the relationship within the Respondents of, on the one hand, the COP9 investigation and other enquiries into SB and, on the other hand, the enquiries in relation to the Appellant in connection with which the relevant information notices have been issued, and therefore the evidence of Mr Watson would be unlikely materially to advance my determination of the question at issue.

34. The following paragraphs summarise those parts of the witness evidence which are material to the question that I am required to answer in determining the purpose of the Respondents – and, more specifically, Mr Kilmartin and Miss Oliver as the officers of the Respondents who issued the relevant information notices – in issuing the relevant information notices.

35. Mrs Karen Murphy was the officer of the Respondents who had primary responsibility for the COP9 investigation and other enquiries into SB and who also acted as mentor to Mr Kilmartin and Miss Oliver. Her involvement in those matters commenced in October 2012, when she received the evasion referral that had been made by the Respondents' office in Portsmouth in relation to certain of the entities falling within the GN Group and various individuals who were associated with those

entities, including SB, and ceased when, following a period of secondment to the Risking and Intelligence Service of the Respondents ("RIS") from February 2015, she moved permanently to RIS on 31 March 2016.

36. Mrs Murphy gave the following evidence:

(a) she was part of the Respondents' SID team based in Newcastle and reported to Mrs Haghighat. Her role was to investigate large cases and cases where fraud was suspected and the enquiries in relation to certain of the entities falling within the GN Group and various individuals who were associated with those entities were allocated to her by Mrs Haghighat when the evasion referral to the Newcastle office was made;

(b) it was her decision to open the COP9 investigation into SB, to decline to open a similar investigation into the Appellant and to pursue further enquiries into the risks posed by Appellant although she did all of that with the knowledge and agreement of her manager, Mrs Haghighat;

(c) her concerns in relation to the tax affairs of the Appellant stemmed from the discrepancy between his declared income and capital gains and his apparent means but, as the Appellant, unlike SB, was not the controlling mind of the entities comprising the GN Group, she did not think that a COP9 investigation into the Appellant was justified;

(d) she had approached Mrs Young to ask for the allocation of a trainee to pursue the further enquiries into the Appellant and had been allocated, first, Mr Kilmartin and, after Mr Kilmartin's departure, Miss Oliver;

(e) Mr Kilmartin and Miss Oliver were primarily responsible for pursuing the enquiries into the Appellant and, although she discussed the progress of those enquiries with them from time to time, they required very little in the way of strategic input from her. Instead, her role was confined in practice to making more minor suggestions, such as stylistic changes to letters;

(f) in the course of her work on all of the enquiries, she had had frequent interaction with the team in the Respondents' office in Portsmouth, initially primarily with Mr Douglass and subsequently primarily with Mr Moss. She also visited Portsmouth to look at files and for meetings. In that regard, whereas the Respondents' office in Portsmouth took the lead on the enquiries into certain of the entities falling within the GN Group, she and her colleagues in the Respondents' office in Newcastle had primary responsibility for the enquiries into the individuals who were associated with those entities, including SB and the Appellant. However, the two offices were effectively working together and sharing information in relation to all of the enquiries;

(g) in that regard, she saw nothing untoward or unusual in the fact that Mr Moss had played a significant role in framing the questions relating to Symbio in the Third Information Notice. The Respondents' office in Portsmouth had primary responsibility for the enquiry in relation to

Symbio, as one of the entities comprising the GN Group and, as Symbio was a transparent limited liability partnership, any enquiry in relation to Symbio had a direct impact on the tax position of the Appellant. Mr Moss's involvement in framing the questions did not mean that the Respondents must have been seeking the relevant information for the purpose of assisting them in pursuing their COP9 investigation and other enquiries into SB and/or in pursuing their enquiries into certain of the entities falling within the GN Group. Miss Oliver's sole purpose in including the questions within the Third Information Notice was to ascertain information about the Appellant's tax position. Miss Oliver knew that SB's tax position was being addressed by Mrs Murphy and that the enquiries in relation to certain of the entities falling within the GN Group were being handled by the Respondents' office in Portsmouth and she had no meaningful knowledge of the details of the investigation and enquiries into SB or the enquiries into certain of the entities falling within the GN Group or of how that investigation and those enquiries were progressing. She therefore had no need to consider SB's tax position or the position of the entities falling within the GN Group that were not transparent for UK tax purposes in asking the questions. And she also knew that there were clear risks in relation to the Appellant's own tax position that needed to be further explored;

(h) more generally, Mrs Murphy did not consider that the information obtained from the Appellant about the Appellant's tax position was of any material assistance in relation to the COP9 investigation and other enquiries into SB because that investigation and those enquiries related to the personal tax position of SB and she didn't see how information about the tax position of the Appellant, who was not the controlling mind of the entities comprising the GN Group, would be of any great assistance in connection with the COP9 investigation and other enquiries into SB, who was the controlling mind of those entities.

(i) moreover, she had never asked any of her colleagues to obtain information about the Appellant in order to progress the COP9 investigation or other enquiries into SB; and

(j) she had continued to carry on her roles as the officer with primary responsibility for the COP9 investigation and other enquiries into SB and as mentor to Miss Martin during the period of her secondment to RIS. However, when her move to RIS became permanent, primary responsibility for the COP9 investigation into SB was passed to her colleague, Mr Andrew Watson, in the Respondents' office in Newcastle and primary responsibility for the enquiries into the Appellant was passed to the Respondents' office in Portsmouth.

37. Darren Kilmartin was the officer of the Respondents who had primary responsibility for the enquiries into the Appellant over the period between the time that Mrs Murphy determined that it was not appropriate to pursue a COP9 investigation into the Appellant but that further enquiries needed to be made into the Appellant's tax position – which was in late 2013 - until 16 December 2014 (when he

was required to take an extended leave of absence on health grounds). In that capacity, Mr Kilmartin was the officer of the Respondents who made the decision to issue the First Information Notice on 17 October 2014.

38. Mr Kilmartin gave the following evidence:

(a) at the time of his involvement with the enquiries into the Appellant, he was a trainee on the Tax Specialist Programme working in the Large Business division of the Respondents;

(b) he had been asked by his manager, Mrs Isobel Young, to carry out a risk assessment in relation to the Appellant - ie to look into the risks to the UK exchequer posed by the Appellant - under the mentorship of Mrs Murphy, a senior officer of the Respondents in SID;

(c) he had accordingly made various enquiries into the Appellant, using information already known to the Respondents and external databases and had reached the conclusion that there were sufficient risks arising out of the Appellant's tax position to merit further enquiries. Those risks arose primarily from a significant discrepancy between the Appellant's declared income and capital gains and the Appellant's apparent means;

(d) he passed the results of his findings on to Mrs Murphy and, in consultation with her, decided to open, and subsequently pursued, the formal enquiries into the Appellant in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013;

(e) during the course of his work in relation to the Appellant, he had enjoyed considerable autonomy in that it was he who made the decisions in relation to the relevant enquiries. Although Mrs Murphy, as his mentor, was at all times fully aware of how the case was progressing and discussed the case with him from time to time, and although Mrs Murphy, as his mentor, could have suggested that he change his approach in conducting the enquiry if she had thought that he was going wrong, in practice her input tended to be of a minor and inconsequential nature, such as making stylistic changes to letters, and not of any material strategic significance;

(f) thus, the decision to issue the First Information Notice was his decision, albeit that he would have checked with Mrs Murphy to confirm that she did not have any objection to the route that he was taking; and

(g) he was aware that the enquiries into the Appellant were part of a larger investigation by the Respondents into SB and certain of the entities falling within the GN Group but he had very little knowledge as to the details of that larger investigation or how that larger investigation was progressing. Instead, his sole focus was on the enquiries into the Appellant.

39. Miss Liza Oliver was the officer of the Respondents who had primary responsibility for the enquiries into the Appellant over the period from January 2015 (immediately following Mr Kilmartin's departure for health reasons) to March 2016,

when she provided the Respondents' office in Portsmouth with a summary of the enquiries' then current standing in connection with the transfer to that office of primary responsibility for the enquiries. In that capacity, Miss Oliver was the officer of the Respondents who made the decision to issue the Second Information Notice on 17 June 2015 and the Third Information Notice on 2 October 2015 and the decision to re-issue the Third Information Notice on 8 January 2016.

40. Miss Oliver gave the following evidence:

(a) on taking up her role as the officer with primary responsibility for the enquiries into the Appellant, she had conducted a thorough review of the file and decided how to progress the outstanding enquiries. In that regard, she had identified what further information and documents were required to be obtained from the Appellant in order to check the relevant risks;

(b) she had also made the decision in August 2015 to open a further enquiry into the Appellant, in connection with the tax year of assessment ending 5 April 2014;

(c) her particular concern in relation to all three enquiries was the discrepancy between the Appellant's declared income and capital gains and the Appellant's apparent means;

(d) her purpose in requesting the information and documents that she had was to check that the entries made by the Appellant in his tax returns in respect of the relevant tax years of assessment were correct. The Appellant's financial statements showed numerous transactions that were not in line with those tax returns;

(e) as had been the case with Mr Kilmartin, Miss Oliver was a trainee under the mentorship of Mrs Murphy. Accordingly, she ensured that Mrs Murphy was at all times up to speed on the state of the enquiries and she consulted with Mrs Murphy from time to time. However, in practice, she enjoyed considerable autonomy in relation to the decisions made to progress the enquiries;

(f) she was aware that the enquiries into the Appellant were part of a larger investigation by the Respondents into SB and certain of the entities falling within the GN Group but she had very little knowledge as to the details of that larger investigation or how that larger investigation was progressing. Instead, her sole focus was on the enquiries into the Appellant; and

(g) she did not know why the decision had been taken to move primary responsibility for the enquiries into the Appellant to the Respondents' office in Portsmouth in March 2016. This was unusual in that she could not recall another occasion in which the primary responsibility for one of her cases had been moved to another office before the case was concluded.

41. Mr James Moss was a member of the team in the Respondents' office in Portsmouth that, before the evasion referral to the Respondents' office in Newcastle, had responsibility for the enquiries into certain of the entities falling within the GN Group and the enquiries in relation to certain of the individuals who were associated with those entities and then, following Mrs Murphy's review, retained primary responsibility for the former group of enquiries. He was part of that team under the leadership of Mr Douglass from 11 June 2012 and assumed leadership of the team on 22 August 2014, when Mr Douglass moved on to another role within the Respondents. Thus, each of the First Information Notice, the Second Information Notice and the Third Information Notice was issued at a time when Mr Moss was leading the team in the Respondents' office in Portsmouth.

42. Mr Moss gave the following evidence:

(a) he had had no involvement in the decisions to issue either the First Information Notice or the Second Information Notice and had had no knowledge of either of those notices until he looked at the file in preparation for attending the hearing in these proceedings;

(b) however, he had been intimately involved in the formulation of some of the questions which had been included in the Third Information Notice - namely those relating to the Appellant's membership in Symbio, a limited liability partnership which was the subject of one of the enquiries by his team in Portsmouth;

(c) the questions related to a transaction which Mr Moss had identified in the 2014 accounts of Symbio involving the sale of Symbio's business to a connected entity. That sale had been made for a consideration of £6m, which raised questions because the business being sold had hitherto made losses or minimal profits;

(d) he first made Miss Oliver, as the officer with primary responsibility for the enquiries in relation to the Appellant, aware of this in May 2015 and he subsequently suggested the form of the questions which Miss Oliver should raise of the Appellant, initially informally in her letter to the Appellant of 14 August 2015 and then in the Third Information Notice. He confirmed that, shortly before the letter of 14 August 2015 making the informal request for the relevant information had been sent, Mrs Murphy had e-mailed him a draft of the letter, for information and welcoming any comments that he might have;

(e) he considered that his extensive involvement in the drafting of the relevant questions was natural given that Miss Oliver was still only a trainee and that the questions related to the affairs of a limited liability partnership, which fell within his area of expertise;

(f) he thought it likely that Miss Oliver would have been intending to make the other information requests set out in the Third Information Notice before he suggested the questions relating to Symbio because of the extent of the Appellant's failure to co-operate with the Respondents in

relation to his tax affairs in the tax years of assessment ending 5 April 2012 and 5 April 2013;

(g) on 20 November 2015, he had written to the Appellant (and to Symbio's nominated member, Mr Matthew) to inform them that he was opening an enquiry into Symbio's tax return for the tax year of assessment ending 5 April 2014 and, as an enclosure with his letter to the nominated member, he had also issued an information notice to Symbio which contained similar questions to the ones that he had suggested that Miss Oliver ask of the Appellant;

(h) the fact that he had issued an information notice asking Symbio to provide the same information as that requested by Miss Oliver of the Appellant demonstrated that he had no need to get Miss Oliver to obtain that information on his behalf and he had never asked anyone, including Miss Oliver, to obtain information from the Appellant on his behalf;

(i) he accepted that any answer by the Appellant to the Symbio-related questions could conceivably be helpful in connection with the COP9 investigation and other enquiries into SB but that was not his purpose in suggesting that Miss Oliver should ask the relevant questions;

(j) he was familiar with the statutory powers of the Respondents in relation to information gathering and sharing and therefore well aware of the differences between a taxpayer notice and a third party notice and the fact that there was a different procedure, with in-built safeguards for the taxpayer, for obtaining information from one person for the purpose of checking the tax affairs of another person;

(k) he was also familiar with the provisions of Section 17 of the Commissioners for Revenue and Customs Act 2005 (the "CRCA 2005") which provided that, subject to certain specified exceptions, information obtained by or on behalf of the Respondents in connection with one function may be used by the Respondents in connection with another function. Thus, it was perfectly normal for information that was obtained in the course of one of the enquiries in relation to any entity falling within the GN Group or in relation to any individual associated with any such entity to be shared, where relevant, with officers of the Respondents involved in one or more of the other enquiries; and

(l) although a limited amount of information had been provided by the entities comprising the GN Group and the individuals associated with those entities to the Respondents prior to the commencement of the COP9 investigation into SB, the general pattern since then had been one of concerted non-co-operation, including a refusal to provide information and the raising of complaints with the Respondents as to the Respondents' manner of proceeding. By way of example, none of the information requested by the information notice sent to Symbio on 20 November 2015 had yet been provided to him.

43. Mrs Helen Haghighat was, at the time when the relevant information notices were issued, inter alia, the operational leader of the Fraud and Bespoke Avoidance unit in the Respondents' office in Newcastle and, as such, the manager of Mrs Murphy over the relevant period.

44. Mrs Haghighat confirmed that, given her other roles within the Respondents and the seniority of Mrs Murphy, she had had very limited involvement in either the COP9 investigation and the other enquiries into SB or the enquiries into the Appellant. She could not recall having any involvement in the decisions to issue the relevant information notices but confirmed that it was highly likely that the officers within the Respondents who were conducting the enquiries into the Appellant would have shared information with the officers within the Respondents who were conducting the COP9 investigation and the other enquiries into SB and the officers within the Respondents who were conducting the enquiries into certain of the entities falling within the GN Group (and vice versa) because this was standard practice within the Respondents in the case of such investigations and enquiries.

45. Mr Paul Goater was, at the time when the relevant information notices were issued, a PAYE and NI specialist working as part of the team in the Respondents' office in Portsmouth that was looking into the affairs of certain of the entities falling within the GN Group. Mr Goater had had no involvement with the enquiries into the three tax years of assessment which were the focus of the First Information Notice and the Third Information Notice – namely, the tax years of assessment ending 5 April 2012, 5 April 2013 and 5 April 2014. Instead, his involvement with the tax affairs of the Appellant concerned the remuneration which the Appellant had received from one of the entities comprising the GN Group (Intecare Homecare Limited ("IHL")) in the tax year of assessment ending 5 April 2009. His enquiries into that matter ultimately led to the making of a direction under Regulation 72(5) of the Income Tax (Pay As You Earn) Regulations 2003 in respect of that remuneration on 28 February 2017 in order to recover from the Appellant the income tax that should have been withheld from the remuneration by IHL.

46. The only points arising out of Mr Goater's evidence that are relevant to these proceedings are that:

(a) Mr Goater outlined the extent of the non-compliance by the Appellant with the queries that he had raised in the course of his enquiries. This included accusations by the Appellant of harassment and misfeasance on the part of the Respondents; and

(b) in the course of his enquiries, Mr Goater obtained certain information about the Appellant informally from the liquidators of IHL. Mr Goater made the point that, if the liquidators of IHL had not provided him with that information pursuant to his informal request, he would have consulted with his colleagues within the team as to the appropriate steps to be taken to compel the production of that information.

47. Mr Antony Douglass was, between 11 June 2012 and 21 August 2014, the leader of the team in the Respondents' office in Portsmouth which was conducting the

enquiries into certain of the entities falling within the GN Group and the enquiries into certain individuals associated with those entities and which made the evasion referral to SID in the Respondents' office in Newcastle in October 2012. After that referral, Mr Douglass and his team continued to liaise with Mrs Murphy as she continued to pursue those enquiries. Mr Douglass's involvement in the various enquiries ceased three months before the First Information Notice was issued, at which time Mr Moss took over Mr Douglass's role as team leader. On that basis, there was nothing in Mr Douglass's evidence that shed any material light on the question which I need to determine.

48. Mr Paul Rooney was appointed as case director in relation to the COP9 investigation and other enquiries into SB in September 2016. He therefore had no involvement at any time in the enquiries into the Appellant and his involvement with the COP9 investigation and other enquiries into SB post-dated by almost a year the issue of the Third Information Notice. On that basis, there was nothing in Mr Rooney's evidence that shed any material light on the question which I need to determine.

49. Miss Lesley Fairweather is a case director and corporation tax specialist based in the Respondents' office in Portsmouth who had no involvement in, or knowledge at the time of, the issue of any of the First Information Notice, the Second Information Notice or the Third Information Notice or the re-issue of the Third Information Notice and whose involvement in the enquiries in relation to the Appellant did not commence until May 2016, when responsibility for those enquiries was transferred from SID in the Respondents' office in Newcastle to Mrs Helen Hollis in the Respondents' office in Portsmouth. On that basis, there was nothing in Miss Fairweather's evidence that shed any material light on the question which I need to determine.

50. Mrs Helen Hollis is an officer of the Respondents and income tax specialist based in the Respondents' office in Portsmouth who had no involvement in the issue of any of the First Information Notice, the Second Information Notice or the Third Information Notice or the re-issue of the Third Information Notice and whose involvement in the enquiries in relation to the Appellant did not commence until May 2016, when responsibility for those enquiries was transferred to her from SID in the Respondents' office in Newcastle. As such, so far as concerns the period which is of relevance to the question which I need to determine, her evidence was necessarily limited to outlining the chronology of the events that had occurred in the course of the enquiries in relation to the Appellant over that period and her understanding, based on discussions with her colleagues and her reading of the file, of the reasons why the Respondents had asked for the information and documents requested in the relevant information notices.

51. Mr Andrew Watson is an investigator attached to the Fraud Investigation Service within the Respondents. He provided a witness statement attesting to the fact that he had had no involvement in, and had had no knowledge of, the enquiries in relation to the Appellant at the time when the First Information Notice, the Second Information Notice and the Third Information Notice were issued, or at the time when the Third Information Notice was re-issued. On that basis, the Appellant did not

require Mr Watson to attend the hearing to be cross-examined although, as noted in paragraph 33(f) above, Mr Reevell did subsequently during the course of the hearing make an application to me to require Mr Watson's attendance, an application which I refused for the reasons set out in paragraph 33(f).

Decision

Information notices

The First Issue

52. After listening in the course of an extensive hearing to the arguments of both parties and the evidence of those officers of the Respondents who were involved in the decisions to issue the relevant information notices, and after examining the correspondence that has passed between the parties over the course of some three years, my conclusion is that:-

(a) the sole purpose of the Respondents in making the requests set out in the relevant information notices was to obtain information about the Appellant in order to check the Appellant's own tax position; and

(b) it was neither a dominant purpose, nor even any part of the purpose, of the Respondents in making those requests to obtain information which would assist them in pursuing their COP9 investigation and other enquiries into SB and/or in pursuing their enquiries into certain of the entities falling within the GN Group and/or to harass the Appellant.

53. I would add that, notwithstanding the eloquence and considerable forensic skills of Mr Reevell in his cross-examination, I have reached that conclusion without the slightest shred of doubt.

54. In my view, the officers of the Respondents who gave evidence were reliable and credible and the conduct to which they attested was at all times thoroughly professional and beyond reproach. More specifically:

(a) it is abundantly clear to me from the witness evidence and the written evidence that I have seen that there were very sound reasons for the Respondents' conclusion that the tax affairs of the Appellant required further investigation. For instance, several of the officers, and in particular, Mrs Murphy, Mr Kilmartin and Miss Oliver, referred to the fact that there was a significant discrepancy between the Appellant's declared income and capital gains and the Appellant's means;

(b) both Mrs Murphy and Mr Moss made it clear in their evidence that they were well aware of the scope of the Respondents' powers to obtain information in relation to a taxpayer and, in particular, the differences between, on the one hand, a taxpayer notice, and, on the other hand, a third party notice, such that, they knew that, if they wished to obtain information from the Appellant for any purpose other than checking the Appellant's tax position, such as assisting them with their COP9

investigation and other enquiries into SB or their enquiries into certain of the entities falling within the GN Group, they would need to proceed by way of a third party notice;

(c) although there was inevitably considerable co-operation between those officers of the Respondents who were handling the enquiries into the Appellant – Mr Kilmartin and Miss Oliver, under the supervision of their mentor, Mrs Murphy - and those officers of the Respondents who were handling the COP9 investigation and the enquiries into SB and the enquiries into certain of the entities falling within the GN Group, that co-operation did not mean that any of the questions that were asked of the Appellant had the purpose of assisting the Respondents with their COP9 investigation and other enquiries into SB or their enquiries into certain of the entities falling within the GN Group;

(d) in this regard, I can see nothing improper in the fact that the officers in question shared information which they obtained in the course of their respective investigations. Indeed, they would have been failing in their duty to the general body of taxpayers if they did not do that. Mr Moss referred in his evidence to Section 17 CRCA 2005, which makes provision for information sharing within the Respondents;

(e) I would add that there is a significant difference between, on the one hand, deciding that an individual's tax position merits further investigation, and therefore asking for information from that individual for the purposes of furthering that investigation, whilst recognising that the information about the individual which is thereby obtained may prove to be of value in the conduct of investigations or enquiries into other persons and, on the other hand, making a request for information or documents which, whilst purporting to have the purpose of obtaining further information in order to check the tax position of the recipient, is in fact wholly or partly for the purpose of obtaining information in order to assist in the conduct of investigations and enquiries into other persons. In my view, the requirements stipulated in the First Information Notice and the Third Information Notice fell firmly into the former category;

(f) in addition, I can see nothing improper in the fact that Mr Moss provided drafting to Miss Oliver for the Third Information Notice in connection with the Appellant's membership of Symbio. It was inevitable that there would be a considerable overlap between the investigation of Mr Moss into the affairs of Symbio and the investigation of Miss Oliver into the affairs of the Appellant because, as a limited liability partnership, Symbio was transparent for UK income tax and capital gains tax purposes. Thus, any investigation into the activities of Symbio would inevitably have a direct impact on the tax affairs of the Appellant. That, together with the fact that Miss Oliver, as a trainee, was less experienced than Mr Moss and that Mr Moss had the requisite expertise in relation to the tax affairs of a limited liability partnership, made it entirely natural and appropriate in my view for Mr Moss to have been involved in the framing of the relevant questions;

(g) I can certainly see no basis in the evidence for concluding that the fact that Mr Moss was the person who drafted the relevant questions and was asked by Mrs Murphy to comment on the relevant questions before the letter which led to the notice was despatched should lead to the conclusion that the purpose of the questions was something other than obtaining information for the purpose of checking the Appellant's tax position. The Appellant was a member of Symbio and there were clearly some questions for him to answer in connection with his own tax affairs as regards a significant transaction which had been implemented by Symbio;

(h) in that context, I see no basis for concluding that, just because, in addition to the Appellant, Symbio had members apart from the Appellant whose tax affairs were of interest to the Respondents, the purpose of Mr Moss, in framing the relevant questions, must have been to obtain information which would assist the Respondents in their enquiries into any of those other members. No doubt the information obtained from the Appellant in response to the relevant questions would also have been helpful to those officers of the Respondents who were conducting the enquiries into the other members of Symbio, but that did not mean that the purpose of the relevant questions was anything other than checking the tax position of the Appellant;

(i) finally, I see no reason to draw any adverse inference from the fact that Mrs Murphy, who was the SID officer heading the investigation into SB, was also acting as mentor to Mr Kilmartin and Miss Oliver as they pursued their enquiries into the Appellant. As was made clear throughout the hearing, the enquiries in relation to both individuals, together with the enquiries in relation to certain of the entities falling within the GN Group and certain other individuals who were associated with those entities, naturally formed a single package because of the inter-connected nature of the individuals and entities concerned. So it would have been inefficient for the Respondents, and would have hampered the Respondents' efforts in relation to the various enquiries, if each of the enquiries had been put into a separate silo; and

(j) indeed, even if Mrs Murphy alone had been primarily responsible for the investigation into the Appellant, as well as being primarily responsible for the investigation into SB, that would not have led me to consider that her involvement in the investigation into SB necessarily compromised the purpose underlying the requirements stipulated by the Respondents in the relevant information notices. As it happens, although Mrs Murphy was the controlling officer in relation to the investigation into the Appellant because of her mentorship of Mr Kilmartin and Miss Oliver, I determined from the evidence of all three individuals that the decisions in relation to the appropriate means of pursuing the enquiries into the Appellant were essentially taken by the two trainees themselves and that Mrs Murphy merely acted as supervisor and eminence grise,

giving them gentle guidance as required in relation to matters of style and presentation.

55. Thus, Mr Reevell has failed to persuade me that the Respondents had any improper motive in asking these questions. On the contrary, I find that the Respondents' motive was unimpeachable.

56. As noted in paragraph 6 above, in the course of these proceedings, the Respondents have applied for the wording in paragraphs 4) and 5) of the Third Information Notice to be amended. The Respondents say that the amendments that they have made to the paragraphs are merely clarificatory in nature but Mr Reevell made the point (quite correctly in my view) that the scope of the amended paragraphs is slightly wider than the scope of the original paragraphs which they are intended to replace. The revised paragraph 4) essentially covers the same ground as did the original paragraph 4) but the revised paragraph 5) is much wider in scope than the original paragraph 5) because it requires, in respect of the tax year of assessment ending 5 April 2014, all books and statements for all of the Appellant's personal bank accounts, whether in the Appellant's sole name or jointly, together with information and supporting evidence for all deposits into those accounts which were not derived from the Appellant's employment with Venture Pharmacies Limited, whereas the original paragraph 5) merely required an explanation for the source of the savings which had given rise to specified amounts of interest.

57. Nevertheless, I have reached the same conclusions in relation to the purpose underlying the amended paragraphs as I did in relation to the purpose underlying the original paragraphs which the Respondents are asking to be replaced. That is to say, I consider that, despite the fact that the scope of the paragraphs has been widened, the sole purpose of the Respondents in stipulating the requirements in the amended paragraphs is to check the tax position of the Appellant and that the Respondents have no other purpose in stipulating those requirements.

58. I therefore find that the information and documents required to be provided or produced by the outstanding requirements in the First Information Notice and the Third Information Notice (amended as described in paragraph 6 above) are required to be provided or produced with the sole purpose of checking the Appellant's tax position.

The Second Issue

59. I also find that the information and documents required to be provided or produced by the outstanding requirements in the First Information Notice and the Third Information Notice are reasonably required by the Respondents for that purpose because each of the requirements relates to material which clearly pertains to the Appellant's tax position and would be of assistance to the Respondents in determining the tax liabilities of the Appellant and, in my view, the scope of the requirements is, in each case, reasonable and not disproportionate.

60. I reach the same conclusion in relation to the outstanding requirements in the amended paragraphs 4) and 5) of the Third Information Notice. Although I have

concluded, as set out above, that the scope of the amended paragraphs is slightly wider than the scope of the original paragraphs which they are intended to replace, I consider that the information and documents required to be provided or produced by the amended paragraphs are reasonably required to be provided or produced for the purpose of checking the Appellant's tax position, and that the scope of the amended paragraphs is reasonable and not disproportionate.

Summary in relation to the First Issue and the Second Issue

61. The consequence of my conclusions in relation to the First Issue and the Second Issue is that, in my view, each of the outstanding requirements in the First Information Notice and the Third Information Notice falls squarely within the terms of paragraph 1 Schedule 36 FA 2008 and therefore that the First Information Notice and the Third Information Notice are both valid information notices with which the Appellant should have complied by the specified date.

62. I am permitted by sub-paragraph 32(3)(b) Schedule 36 FA 2008 to vary the information notices on appeal and I hereby do so to the extent of the amendments requested by the Respondents in relation to paragraphs 4) and 5) of the Third Information Notice.

63. The conclusions set out above in relation to the First Issue and the Second Issue mean that the appeals against the two information notices fail. It also means that, strictly, I do not need to address either of the other two issues that are set out above in relation to the information notices. However, for completeness, and in deference to the fact that both parties submitted arguments in relation to those issues during the course of the hearing, I have set out below my thoughts on the two issues in question.

The Third Issue

64. As regards whether – and, if so, to what extent – any of the information or documents required to be provided or produced by the two information notices (or by the revised paragraphs 4) and 5) of the Third Information Notice) comprise part of the Appellant's statutory records, paragraph 62 Schedule 36 FA 2008 provides that "information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of:-

(a) the Taxes Acts; or

(b) any other enactment relating to tax…"

and Section 12B Taxes Management Act 1970 requires a taxpayer to "keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year". So the question to be asked in relation to each requirement is whether – and, if so, to what extent – that requirement relates to records that are "requisite" for the purpose of enabling the Appellant to make and deliver correct and complete returns for the tax year or tax years in question.

65. In that regard, it appears to me that the requirement stipulated in the First Information Notice for a breakdown of all directors' loans which were made and

received in the tax years ending 5 April 2012 and 5 April 2013 was so "requisite" because, without that record, the Appellant would be unable to determine the amounts to be included in his tax returns in respect of the relevant loans.

66. I reach the same conclusion, for the same reasons, in relation to the outstanding requirements to produce documents stipulated in each of paragraphs 1), 3) and 4) of the Third Information Notice.

67. The Third Information Notice also included outstanding requirements for certain information. I have noted the analysis set out in the decision of Judge Redston in *Gold Nuts Limited and Others v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 84 (TC) (at paragraph [132] and following) as to whether or not information that is not written down can nevertheless comprise part of a person's "statutory records" and I agree both with her conclusion that it can and the reasons that she sets out for reaching that conclusion.

68. On that basis, I consider that each of:

(a) the requirements for an explanation as to how the Appellant's share of the goodwill sold by Symbio was valued and how the receipt of the consideration for the sale of the goodwill was treated (which appear at sub-paragraphs 1)b) and 1)(d)(i) of the Third Information Notice);

(b) the requirements for information as to the level of the deposit provided to purchase 62 Penn Road and how that deposit was funded (which appear at sub-paragraph 3)a) of the Third Information Notice);

(c) the requirements for the details of any third party that may have paid the deposit or made the monthly mortgage payments in respect of that property on behalf of the Appellant (which appear at sub-paragraphs 3)b) and 3)c)(iv) of the Third Information Notice);

(d) the requirements for the details of certain costs incurred in acquiring that property and the details of any third party that may have discharged those costs (which appear at sub-paragraphs 3)d)(i) to (iii) and (v) of the Third Information Notice); and

(e) the requirement for an explanation as to the source of savings giving rise to certain interest (which appears in the original sub-paragraph 5) of the Third Information Request) and the requirement for an explanation of all deposits made by the Appellant into his bank accounts that were not derived from his employment with Venture Pharmacies Limited (which appears in the amended sub-paragraph 5) of the Third Information Notice),

are all requirements to provide information which comprises part of the Appellant's statutory records because all of that information is information which is requisite for the purpose of enabling the Appellant to make and deliver complete and correct tax returns in respect of the relevant tax years of assessment.

On the other hand, the Third Information Notice also required the Appellant to provide certain explanations as to the motives of any third party who may have discharged the obligations of the Appellant from time to time – see, for example, sub-paragraphs 3)b), 3)c)(iv) and 3)d)(v) of the Third Information Notice. In my view, the explanations so required to be provided do not form part of the Appellant's statutory records because that information, whilst being relevant to the Respondents' enquiry in relation to the Appellant in respect of the tax year of assessment ending 5 April 2014, is not requisite for the purpose of enabling the Appellant to make and deliver complete and correct tax returns in respect of the relevant tax years of assessment.

The Fourth Issue

69. As regards the question of whether the notices could be challenged, even to the extent that they contained requirements for the provision or production of information or documents which comprise part of the Appellant's statutory records, on the basis that they were ultra vires, Mr Reevell based his argument on the fact that all courts and tribunals are creatures of statute – in the case of the First-tier Tribunal, the Tribunals, Courts and Enforcement Act 2007 (the "TCEA 2007") – and that, as such, they have an inherent jurisdiction to protect their own process from abuse.

70. He went on to observe that, in the case of the First-tier Tribunal, this is supplemented by the terms of the Tribunal Rules, which have been enacted pursuant to the enabling power in Section 22 TCEA 2007, and that Rules 2 and 5 of the Tribunal Rules require the First-tier Tribunal to deal with cases fairly and justly and allow the First-tier Tribunal to regulate its own procedure. He pointed out that the power to stay proceedings, which is conferred on the First-tier Tribunal by Rule 5(3)(j) of the Tribunal Rules, is illustrative of the extent to which the First-tier Tribunal can investigate, regulate and determine matters that are before it.

71. So, in the view of Mr Reevell, before addressing any appeal that comes before it, the First-tier Tribunal has an over-arching power to determine the legitimacy of the matter before it as a logically anterior jurisdictional question in advance of addressing that appeal and then to make such orders as it believes are necessary in order to ensure that the process of determining any such matter is both fair and just.

72. In that context, Mr Reevell contended that a notice containing requirements which purport to have the sole purpose of seeking information or documents in order to check the tax position of the recipient but which, in reality, have, as their sole purpose or one their purposes, some purpose other than that purpose, is not a "taxpayer notice" (as defined in paragraph 1 Schedule 36 FA 2008) because it fails to meet the terms of sub-paragraph 1(1) Schedule 36 FA 2008. Mr Reevell added that, if the purpose or some part of the purpose in stipulating the requirements is in reality to obtain information and/or documents that would assist the Respondents in pursuing their investigations and enquiries into a person other than the recipient, such a notice is in fact a disguised "third party notice" (as defined in paragraph 2 Schedule 36 FA 2008) in relation to which the proper procedures set out in Schedule 36 FA 2008 -

and, in particular, sub-paragraph 2(2) Schedule 36 FA 2008 and paragraph 3 Schedule 36 FA 2008 - have not been followed.

73. I must confess that I find Mr Reevell's argument to be somewhat confusing.

74. On the one hand, he is arguing that, before considering whether the requirements in a notice satisfy the conditions in sub-paragraph 1(1) Schedule 36 FA 2008 for the purposes of determining an appeal under sub-paragraph 29(1) Schedule 36 FA 2008, there is a logically anterior jurisdictional question to be addressed by the First-tier Tribunal and yet, on the other hand, he is relying on part of the language used in sub-paragraph 1(1) Schedule 36 FA 2008 to frame the terms of that logically anterior jurisdictional question.

75. Of course, he has to argue in favour of the logically anterior jurisdictional question if he is to justify the proposition that the exclusion, in sub-paragraph 29(2) Schedule 36 FA 2008, of the right of appeal against a requirement to provide or produce information or a document which comprises part of the recipient's statutory records is not to apply in this case. But, by relying on part of the language used in sub-paragraph 1(1) Schedule 36 FA 2008 to frame the terms of that logically anterior jurisdictional question, he necessarily creates an overlap between the terms of that question and the terms of the question which is required to be addressed in determining the substantive appeal pursuant to sub-paragraph 29(1) Schedule 36 FA 2008 – ie in determining whether the requirements in the notice satisfy both of the conditions set out in paragraph 1(1) Schedule 36 FA 2008.

76. This makes no sense to me whatsoever. Moreover, it necessarily leads to a significant inconsistency in Mr Reevell's position insofar as the "reasonably required" condition in sub-paragraph 1(1) Schedule 36 FA 2008 is concerned. This is because Mr Reevell relies solely on the "purpose" part of the language used in sub-paragraph 1(1) Schedule 36 FA 2008 to frame his logically anterior jurisdictional question. He does not regard the "reasonably required" part of that language as forming any part of that question. But there are effectively two conditions that are required by the terms of sub-paragraph 1(1) Schedule 36 FA 2008 to be satisfied by the information or document that is being sought. The first is that that information or document must be being sought for the purpose of checking the recipient's tax position and the second is that that information and document must be reasonably required for that purpose.

77. Mr Reevell's argument in relation to jurisdiction is confined solely to the first of those requirements in that he readily conceded at the hearing that there could be no successful appeal by the recipient of a notice against requirements in that notice for the provision or production of information or a document which comprises part of the recipient's statutory records as long as the relevant requirements were stipulated solely for the purpose of checking the recipient's tax position, even if the information or document required to be provided or produced was not reasonably required for that purpose. I can see no basis whatsoever for a distinction of that kind because the definition of a "taxpayer notice" in paragraph 1 Schedule 36 FA 2008 includes both of the above conditions. Thus, it is surely axiomatic that, if there is any logically anterior jurisdictional question to be addressed in relation to a notice and that question

depends on whether or not the notice is a "taxpayer notice", any failure by the requirements in that notice to satisfy the "reasonably required" condition in sub-paragraph 1(1) Schedule 36 FA 2008 must be just as relevant as any failure to satisfy the "purpose" condition in sub-paragraph 1(1) Schedule 36 FA 2008.

78. Be that as it may, Mr Reevell's challenge raises the issue of the extent to which the First-tier Tribunal is entitled to take into account matters of public law in exercising its jurisdiction. There is a considerable body of authority in this regard; principally, *Wandsworth LBC v Winder* [1985] AC 461, *Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864, *Oxfam v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 3078, *Hok Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 363 (TCC), *The Commissioners for Her Majesty's Revenue and Customs v Noor* [2013] UKUT 71 (TCC) and *The Trustees of the BT Pension Scheme v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 713. There is an excellent and thorough summary of the effect on this question of all of the above decisions in the Upper Tribunal decision in *R & J Birkett v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 0089 (TCC) ("*Birkett*") at paragraphs [24] and following.

79. Given that this part of my decision is effectively obiter as a result of my conclusions in relation to the First Issue and the Second Issue, I will not rehearse in this decision all that is said about this question in the above decisions but I will confine myself to stating the conclusions that should be drawn from them, as stated by the Upper Tribunal in *Birkett*, which are that:

(a) the First-tier Tribunal has no general judicial review jurisdiction;

(b) however, it may in certain cases have to decide questions of public law either in the course of exercising the jurisdiction that it does have or to determine whether it has jurisdiction in the first place;

(c) in each case, therefore, in assessing whether a particular public law point is one that the First-tier Tribunal can consider, it is necessary to consider the specific jurisdiction that the First-tier Tribunal is exercising and then to determine whether the particular public law point that is sought to be raised is one that falls to the First-tier Tribunal either in exercising that jurisdiction or in determining whether it has jurisdiction; and

(d) since the First-tier Tribunal is a creature of statute, this is ultimately a matter of statutory construction.

80. Applying the above principles in the present case:

(a) I can see no basis whatsoever in the legislation as a whole – whether it be the TCEA, the Tribunal Rules, Schedule 36 FA 2008 or anywhere else - for Mr Reevell's proposition that, before considering whether the requirements in a notice satisfy the conditions set out in sub-paragraph 1(1) Schedule 36 FA 2008, the First-tier Tribunal is either empowered or

required to consider a logically anterior jurisdictional question, which is whether the process before the First-tier Tribunal is being abused;

(b) the rights and obligations of the First-tier Tribunal which are set out in the Tribunal Rules – and, in particular, the rights and obligations set out in Rules 2 and 5 of the Tribunal Rules to which Mr Reevell alludes in his argument - are merely setting out the basis on which the First-tier Tribunal is entitled and required to act in determining an appeal that has been made to it under the statutory provision that has given rise to the relevant appeal – in this case, paragraph 29 Schedule 36 FA 2008. The Tribunal Rules do not give rise to some separate and self-standing right or obligation for the First-tier Tribunal to apply public law principles in order to reach whatever decision it considers to be fair and just without regard to the terms of that specific statutory provision;

(c) I can discern nothing in the terms of Schedule 36 FA 2008 or any other legislation to indicate that the First-tier Tribunal has the jurisdiction to uphold, whether on the principles of public law or on any other basis, an appeal against a requirement in a notice to provide or produce information or a document which comprises part of the recipient's statutory records;

(d) instead, the First-tier Tribunal's jurisdiction in relation to a notice which purports to be a taxpayer notice falling within paragraph 1 Schedule 36 FA 2008 is confined by the legislation to the consideration of an appeal under paragraph 29 Schedule 36 FA 2008 against that notice or a requirement in that notice, which means that it does not have the jurisdiction to entertain an appeal against a requirement in a notice to provide or produce information or a document which comprises part of the recipient's statutory records; and

(e) as for an appeal against a notice or requirement in a notice to provide or produce information or a document which does not comprise part of the recipient's statutory records, the First-tier Tribunal does not have a general power to apply public law principles, as a separate and distinct logically anterior question of a kind alleged by Mr Reevell, in determining the relevant appeal. Instead, the First-tier Tribunal is simply required to consider whether the relevant notice or requirement meets both of the conditions set out in sub-paragraph 1(1) Schedule 29 FA 2008. That includes both the "purpose" test and the "reasonably required" test which are set out in that provision.

81. It follows from the above that, in my view, even if the Respondents did not have the purpose specified in sub-paragraph 1(1) Schedule 36 FA 2008 in requiring the provision or production of any information or document, the Appellant would not be able to succeed in his appeal against the relevant requirement on that ground (or on any other ground for that matter) to the extent that the information or document in question comprises part of his statutory records.

82. Instead, the absence of the purpose specified in sub-paragraph 1(1) Schedule 36 FA 2008 can lead to a successful appeal by the Appellant only against a requirement in a notice to provide or produce information or a document which does not comprise part of his statutory records.

83. There are a few subsidiary points that I should make in this context.

84. The first relates to my observation in paragraph 15(c) above of the peculiar circularity which exists between the terms of paragraph 1 Schedule 36 FA 2008 and the terms of paragraph 29 Schedule 36 FA 2008 in that a notice that fails to meet either or both of the conditions in sub-paragraph 1(1) Schedule 36 is arguably not a "taxpayer notice" as defined in sub-paragraph 1(2) Schedule 36 FA 2008, with the result that there appears to be nothing to which the right of appeal in paragraph 29 Schedule 36 FA 2008 can apply.

85. I have considered whether this might support Mr Reevell's contention that the First-tier Tribunal has the power to set aside a requirement in a notice which fails to meet the "purpose" requirement in sub-paragraph 1(1) Schedule 36 FA 2008, regardless of whether or not the requirement relates to information or a document which comprises part of the recipient's statutory records, on the basis that there is a logically anterior jurisdictional question to be addressed the answer to which depends on whether the requirement was stipulated with the appropriate purpose.

86. However, I have concluded that it does not because the drafting infelicity to which I have referred in paragraph 15(c) above would not in any way be "cured" by applying Mr Reevell's contention. In other words, regardless of whether or not I adopted Mr Reevell's contention, a literal construction of the two paragraphs in Schedule 36 FA 2008 would emasculate in its entirety the right of appeal in paragraph 29 Schedule 36 FA 2008 because any such failure by a requirement to satisfy the conditions in sub-paragraph 1(1) Schedule 36 FA 2008 as might justify an appeal against the requirement would, in and of itself, prevent paragraph 29 Schedule 36 FA 2008 from applying to the requirement.

87. In my view, the only logical conclusion to draw is that the circularity in the drafting to which I have alluded is simply an error and that, when sub-paragraph 29(1) Schedule 36 FA 2008 refers to a taxpayer's being given a "taxpayer notice", it is actually referring to the receipt by the taxpayer of a notice containing requirements which purport to satisfy the conditions in sub-paragraph 1(1) Schedule 36 FA 2008 but which may or may not do so.

88. As I have noted above, if that interpretation were not to be correct, then it is difficult to see the basis on which any appeal could be made under paragraph 29 Schedule 36 FA 2008 and we would be left with a schedule that made no provision at all for challenging a notice that purported to be a taxpayer notice. Moreover, in that case, there would be nothing elsewhere in the legislation that would enable the First-tier Tribunal to entertain an appeal against such a notice at all. This is because there is no provision either in Schedule 36 FA 2008 or elsewhere in the legislation which empowers the First-tier Tribunal to entertain an appeal against a notice which purports

to be a notice falling within paragraph 1 Schedule 36 FA 2008 other than paragraph 29 Schedule 36 FA 2008. If a recipient wishes to challenge a notice other than pursuant to paragraph 29 Schedule 36 FA 2008, he or she must necessarily make an application for judicial review to the High Court.

89. I therefore consider it to be implicit in the terms of Schedule 36 FA 2008 that the only basis for appealing to the First-tier Tribunal against any requirement in a notice that has purportedly been issued under paragraph 1 Schedule 36 FA 2008 is that the relevant requirement fails to meet one or both of the conditions in sub-paragraph 1(1) Schedule 36 FA 2008 and therefore that the term "taxpayer notice", when it is used in sub-paragraph 29(1) Schedule 36 FA 2008, must necessarily be construed as referring to a notice that, whilst purporting to satisfy both of the conditions in sub-paragraph 1(1) Schedule 36 FA 2008, fails to satisfy one or both of those conditions, whether it be because of an inappropriate purpose or because the information or document required by the notice to be provided or produced is not reasonably required for the appropriate purpose.

90. The second point relates to what constitutes an appropriate purpose for the purposes of sub-paragraph 1(1) Schedule 36 FA 2008. It is quite clear that, if the relevant officer does not have, as at least one of his or her purposes in stipulating the relevant requirement, the purpose of checking the recipient's tax position, then the purpose test is failed and the appeal, to the extent that it relates to a requirement to provide or produce information or a document which does not comprise part of the recipient's statutory records, must succeed. But what is the position if the relevant officer has a mixed purpose in stipulating the relevant requirement – ie both the purpose of checking the recipient's tax position and some other purpose?

91. In this regard, subject to one caveat which I outline below, I agree with the contention made by Ms Jones and Mr Beattie on behalf of the Respondents that, as long as the relevant officer has, as at least one of his or her purposes in stipulating the requirement, the purpose of checking the recipient's tax position, then that requirement satisfies the purpose condition in sub-paragraph 1(1) Schedule 36 FA 2008 regardless of whether or not the relevant officer also has one or more other purposes in stipulating the requirement. I say this even if the purpose of checking the recipient's tax position is relatively insignificant in comparison to the other purpose or purposes because, as a matter of statutory construction, the purpose test will still have been satisfied.

92. I have noted that, in earlier decisions of the First-tier Tribunal relating to SB and certain of the entities falling within the GN Group, the Respondents conceded that, if the dominant purpose of the Respondents in stipulating a requirement was something other than checking the recipient's tax position, then the appeal against the requirement should succeed – see *Gold Nuts Limited and Others v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 82 (TC) (at paragraphs [14](2) and [85]) and *Gold Nuts Limited and Others v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 84 (TC) (at paragraph [158]). However, at the hearing in these proceedings, the Respondents changed their position and contended that, even if the dominant purpose of the Respondents in stipulating a

requirement was not to check the recipient's tax position, the requirement would still remain valid as long as checking the recipient's tax position was one of the purposes of the Respondents in stipulating the requirement, albeit a minor purpose. I believe that, subject to the caveat that I mention below, this amended position is the correct one because, in that event, the requirement would have satisfied the statutory language.

93. In my view, if the recipient feels aggrieved at any comparative lack of significance that the "good" purpose bears to the "bad" purpose in those circumstances, then the only appropriate way for the recipient to challenge the requirement would be by way of an application to the High Court for judicial review based on misconduct by the Respondents and not by way of an appeal under paragraph 29 Schedule 36 FA 2008.

94. The one caveat to the above is that, if the other purpose for stipulating the relevant requirement is in fact to check the tax position of some person other than the recipient, then the requirement has the effect of turning the notice within which it is contained into a third party notice, as well as a taxpayer notice, because the requirement satisfies both the conditions in sub-paragraph 1(1) Schedule 36 FA 2008 and the conditions in sub-paragraph 2(1) Schedule 36 FA 2008. As such, in that case, the Respondents would be required by the terms of Schedule 36 FA 2008 to follow the procedures set out in that schedule that are applicable to third party notices, in order that the rights of the relevant third party under the legislation are protected, and any failure to do so would be a breach of the requirements in the schedule and thereby expose the relevant requirement to a successful challenge.

95. So, in this case, if the Appellant had succeeded in showing not merely that the purpose of checking the Appellant's own tax position was not the sole purpose of the Respondents in stipulating the relevant requirement but also that the other purpose or purposes for stipulating the relevant requirement included the purpose of checking the tax position of some other person - such as SB or any of the entities falling within the GN Group - then the failure of the Respondents, in connection with that requirement, to comply with the safeguards set out in Schedule 36 FA 2008 in relation to third party notices – for example, in sub-paragraph 2(2) Schedule 36 FA 2008 and paragraph 3 Schedule 36 FA 2008 - would mean that the relevant requirement, to the extent that it did not relate to information or a document which comprises part of the Appellant's statutory records, would be open to a successful challenge.

96. The third point is that I have considered whether there is anything in the recent decision by the First-tier Tribunal in *The Barty Party Company Limited v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 697(TC) ("*The Barty Party*") to make me re-consider the conclusion that I have reached above. In that case, the First-tier Tribunal held that an information notice which included a requirement to provide information relating to tax years of assessment falling more than four years before the information notice was given was held to be invalid because information from that period could be reasonably required to check the taxpayer's tax position only if there was good reason for that request (such as a

suggestion of deliberate error on the part of the taxpayer) and no such suggestion had been made in that case.

97. In reaching that decision, the First-tier Tribunal recognised that, by invalidating the notice as a whole on those grounds, it was effectively giving the taxpayer in that case a right of appeal against a requirement to provide or produce information or a document falling within the definition of statutory records, notwithstanding the terms of sub-paragraph 29(2) Schedule 36 FA 2008. However, the First-tier Tribunal observed that the terms of paragraph 29 Schedule 36 FA 2008 distinguished between, on the one hand, appealing against a notice in its entirety and, on the other hand, appealing against a requirement in a notice and noted that the prohibition in sub-paragraph 29(2) Schedule 36 FA 2008 applied only to an appeal against a requirement to provide or produce information or a document and not to an appeal against a notice as a whole.

98. With all due respect to the reasoning adopted by the First Tier Tribunal in *The Barty Party*, I do not agree that the prohibition on appealing against a requirement to provide or produce information or a document which comprises part of the taxpayer's statutory records applies only to an appeal against a requirement to provide or produce information or a document and not to an appeal against a notice as a whole. I say this for the reasons which follow.

99. Whilst I can see that paragraph 29 Schedule 36 FA 2008 does expressly distinguish between an appeal against a notice as a whole and an appeal against a requirement in a notice, I believe that this distinction merely recognises the fact that, in some cases, a taxpayer will wish to appeal against all of the requirements which are stipulated in a particular notice and, in other cases, the taxpayer in question will merely wish to appeal against certain of the requirements which are stipulated in a particular notice.

100. Following on from that, in my view, paragraph 29 Schedule 36 FA 2008 precludes the making of an appeal against any requirement to provide or produce information or a document which comprises part of the recipient's statutory records regardless of whether the information and documents which are required to be provided or produced by the notice as a whole are confined to those which comprise part of the recipient's statutory records or also include information or documents which do not comprise part of the recipient's statutory records and regardless of whether the relevant appeal is against the notice as a whole or against only particular requirements which are stipulated in the notice. Instead, the recipient's right to appeal is limited to those requirements stipulated in a notice that require the provision or production of information or a document which does not comprise part of the taxpayer's statutory records.

101. Any other construction of paragraph 29 Schedule 36 FA 2008 would lead to the position that the ability of a recipient to challenge a requirement to provide or produce information or a document which comprises part of the recipient's statutory records would depend, arbitrarily, on:

(a) whether or not the recipient wished to challenge all of the requirements stipulated in the relevant notice containing that requirement (so that the relevant appeal was in respect of the notice as a whole and not in respect of only certain specified requirements in that notice); and

(b) whether or not the notice containing that requirement contained only requirements to provide or produce information or documents which comprised part of the recipient's statutory records or also included requirements to provide or produce information or documents which did not comprise part of the recipient's statutory records.

102. Neither of those outcomes can possibly have been intended in drafting the relevant provision and, for the reasons set out in paragraph 100 above, I do not believe that it is necessary to construe the provision in that way. So my reading of paragraph 29 Schedule 36 FA 2008 is that there should be no appeal against a requirement to provide or produce information or a document which comprises part of the recipient's statutory records regardless of whether or not that requirement is contained in a notice all of the requirements stipulated in which are the subject of challenge by the recipient and regardless of whether or not the only requirements stipulated in the notice are requirements to provide or produce information or documents which comprise part of the recipient's statutory records.

103. In conclusion on the Fourth Issue, there is, in my view, no separate and logically anterior jurisdictional question to be addressed by the First-tier Tribunal in determining an appeal against a notice which purports to be a taxpayer notice. Instead:

(a) regardless of whether or not the relevant requirement satisfies the terms of sub-paragraph 1(1) Schedule 36 FA 2008, and regardless of whether or not the appeal is against the notice containing the relevant requirement as a whole or whether or not the notice containing the relevant requirement also contains a requirement to provide or produce information or a document which does not comprise part of the recipient's statutory records, a requirement to provide or produce information or a document which comprises part of the recipient's statutory records cannot be the subject of an appeal to the First-tier Tribunal; and

(b) a requirement to provide or produce information or a document which does not comprise part of the recipient's statutory records can be the subject of a successful appeal to the First-tier Tribunal if it fails to meet either of the conditions in sub-paragraph 1(1) Schedule 36 FA 2008 – that is to say, if it was not made with the checking of the tax position of the recipient as at least one of its purposes or if the information or document which is required to be provided or produced is not reasonably required for that purpose – or if, despite meeting both of those conditions, one of the purposes of the Respondents in stipulating the requirement was to check the tax position of a person other than the recipient of the notice in which the requirement is stipulated and the appropriate procedure in relation to third party notices has not been followed.

Summary in relation to the Third Issue and the Fourth Issue

104. Given the views set out above in relation to the Third Issue and the Fourth Issue:

(a) even if I were to have concluded that no part of the purpose of the Respondents in stipulating any of the requirements set out in the First Information Notice and the Third Information Notice was to check the tax position of the Appellant, the appeals against those notices would succeed only to the extent that the requirements in question were to provide or produce information or a document which did not comprise part of the Appellant's statutory records;

(b) certain of the information and documents so required do comprise part of the Appellant's statutory records; and

(c) in relation to a requirement to provide or produce information or a document which does not comprise part of the Appellant's statutory records, the appeal would succeed only where the Respondents did not have, as any part of their purposes in stipulating the relevant requirement, the purpose of checking the tax position of the Appellant or where the Respondents had both the purpose of checking the Appellant's tax position and checking the tax position of some person other than the Appellant in stipulating the relevant requirement and the appropriate procedure in relation to third party notices had not been followed or where, despite the fact that the Respondents have, as one of their purposes in stipulating the relevant requirement, checking the tax position of the Appellant, the information or document required by the Respondents is not reasonably required for that purpose.

Final comments in relation to the First Information Notice and the Third Information Notice

105. Finally in relation to the information notices, I would add that, whilst the Respondents have acted with considerable restraint in pursuing their requests for information and documents, the Appellant has at all stages sought to obstruct and delay the process. Some examples of this are as follows:-

(a) he failed to attach various documents to his e-mail of 22 August 2014 and failed to respond to a request from the Respondents on 8 September 2014 to provide the relevant attachments;

(b) he refused to accept delivery of the letter from the Respondents of 2 October 2015, which included the issue of the Third Information Notice, with the result that that letter and notice had to be re-issued on 8 January 2016;

(c) he wrote to the Respondents on 5 February 2016 promising a reply to the Respondent's letter of 8 January 2016 by 6 February 2016 but then failed to respond until 18 February 2016;

(d) he successfully requested postponement of the hearing listed for 28 March 2017 and then sought (unsuccessfully) to do the same for the re-listed hearing on 18 May 2017; and

(e) he chose to instruct Mr Reevell only a few days before the commencement of the hearing on 18 May 2017 even though the dispute had been ongoing for a considerable period of time. This meant that most of the first morning of the hearing was spent with the parties locked in discussion as to the requests by the Respondents with which the Appellant was prepared to comply. The appointment of Mr Reevell and those discussions could (and should) have taken place before the hearing commenced.

106. During the period of this dispute, the Appellant has made various allegations, some of which are set out in paragraph 21 above but others of which have subsequently been dropped, in support of his non-compliance. Moreover, those allegations were made not only in respect of the requirements which currently remain outstanding and are the subject of these proceedings but also in respect of a considerable number of other requirements with which the Appellant has belatedly complied, in some cases only after the commencement of these proceedings. I have already referred above to the fact that the Appellant repeatedly alleged prior to the hearing that the Respondents' actions amounted to a breach of his rights under Article 8 of the European Convention on Human Rights and that he now accepts that this is not the case. Other arguments which he has raised at various times include the fact that the Respondents were not entitled to open an enquiry into the tax year of assessment ending 5 April 2014 because it was just a tactic to keep the enquiries in relation to the earlier tax years of assessment active and harass the Appellant and that the Respondents were not making it clear whether the enquiry into the return in respect of the tax year of assessment ending 5 April 2014 was a "routine check" or related to the checks in relation to the earlier tax years of assessment.

107. In relation to the above, I find that:-

(a) the Respondents have acted perfectly appropriately in stipulating the requirements which they have of the Appellant because the information and documents to which those requirements related were reasonably required by the Respondents for the purpose of checking the Appellant's tax position in relation to the tax years of assessment in question;

(b) there is no evidence that, in stipulating their requirements, the Respondents were motivated, either in whole or in part, by anything other than a desire to obtain more information about the tax affairs of the Appellant and, in particular, there is no evidence that the Respondents' requirements were motivated by a desire to obtain information in relation to SB or any other taxpayer; and

(c) there is no evidence that the Respondents have been seeking to harass the Appellant – instead, the Respondents have been acting perfectly appropriately (and with considerable restraint) in seeking from the

Appellant the provision or production of information and documents to which they are entitled.

108. In conclusion, I hereby confirm the First Information Notice and the Third Information Notice, in the case of the latter notice, varied in relation to paragraphs 4) and 5) as described above.

109. I am content for the Respondents, following this decision, to specify the period within which the Appellant must comply with the outstanding requirements set out in the First Information Notice and the Third Information Notice as so varied, pursuant to sub-paragraph 32(4)(b) Schedule 36 FA 2008.

Penalty notices

110. As regards the appeal against the Second Penalty Notice, I outlined in paragraphs 10 to 13 above that the Second Penalty Notice relates to the Second Information Notice:

> (a) in relation to which notice the Appellant failed to ask the Respondents to conduct a review of their dismissal of his appeal within the necessary time limit; and
>
> (b) in relation to the requirements in which notice the Appellant has belatedly either complied (or said that he intends to comply) and which is not the subject of these proceedings.

111. In relation to sub-paragraph 110(a) above, even if the ambiguous response by the Appellant in his letter of 18 February 2016 to the letter from the Respondents of 2 October 2015 (which was re-issued on 8 January 2016) were to be construed as a request for a review of the Respondents' dismissal of his appeal against the Second Information Notice of 17 June 2015 – and there is some doubt in my mind that this is the correct construction of that response, given that the phrase "request an appeal of the decision" as a response to a letter containing three decisions two of which involved the rejection of prior appeals and one of which involved the issue of a new information notice is more likely to be intended as a notice of an appeal against the decision to issue the new information notice than intended as a request to review either or both of the two appeals which had already been dismissed – 18 February 2016 fell after the date when the Appellant was entitled to request a review of the decision.

112. In relation to sub-paragraph 110(b) above, the fact that the Appellant has now belatedly either complied or said that he will comply with the requirements set out in the Second Information Notice does not change the fact that he did not comply with the requirements set out in the Second Information Notice within the time limit set out in the notice. Since the Appellant is not appealing in relation to those requirements, he has, by definition, failed to comply, within the necessary time limit, with certain requirements to provide and produce information and documents which were validly stipulated.

113. It follows that, as regards the Second Penalty Notice, the Appellant both failed to request a review of the Respondents' decision to reject his appeal against the underlying information notice within the requisite timeframe and also failed to produce the required information and documents within the requisite timeframe. So, his appeal lapsed and he failed to comply with the underlying information notice.

114. Consequently, unless the Appellant can establish that there is a reasonable excuse for his failure, the fixed penalty under paragraph 39 Schedule 36 FA 2008 in respect of that failure is justified and the Appellant's appeal against the relevant penalty must necessarily fail. Since the Appellant did not advance at the hearing any arguments in favour of the proposition that he had a reasonable excuse for his failure to comply with the Second Information Notice within the requisite timeframe, his appeal against the Second Penalty Notice fails.

115. As regards the appeal against the First Penalty Notice, the position is slightly different because the underlying information notice in that case – the First Information Notice – has been the subject of a valid appeal. However, as noted above, I have reached the view that the requirements stipulated in the First Information Notice were valid. Thus, there has clearly been a failure to comply with valid requirements to provide or produce the specified information and documents within the requisite timeframe. In addition, the Appellant has not put forward a reasonable excuse for his failure, other than the arguments which he has raised in relation to the validity of the First Information Notice and which I have held to be unfounded. It follows that the appeal against the First Penalty Notice also necessarily fails.

116. For completeness, I would add that, even if the Appellant had complied with some of the requirements which were stipulated in an underlying information notice within the time limit set out in the relevant information notice, that would not be sufficient to prevent the fixed penalty in relation to the relevant information notice from being properly imposed because, as the First-tier Tribunal noted at paragraph [13] of its decision in *The Commissioners for Her Majesty's Revenue and Customs v Spring Capital Limited* [2015] UKFTT 8 (TC), "partial non-compliance is non-compliance for the purpose of paragraph 39(1)(a) of Sch 36".

117. For the above reasons, I uphold both of the fixed penalty notices. I would add that, in my view, the Appellant should consider himself fortunate that the Respondents have confined themselves to the fixed penalty regime described in paragraph 39 Schedule 36 FA 2008. I believe that, in both cases, the Respondents allowed the Appellant considerable leeway before issuing the relevant penalty notice and demonstrated the utmost restraint in declining to impose the more stringent penalties under paragraph 40 Schedule 36 FA 2008 which they were entitled to impose.

Closure notices

118. In terms of the application for closure notices in relation to the tax years of assessment ending 5 April 2012, 5 April 2013 and 5 April 2014, I can see no reason to

uphold these applications given the extent to which the Appellant has failed to co-operate with the Respondents in relation to the process of information-gathering. I consider that the Respondents are perfectly entitled to await receipt of the information which they have validly requested before taking steps to issue a closure notice. In that regard, I agree with the principle set out by the First-tier Tribunal in *Steven Price v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 624 (TC), when it said that:

"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…"

119. Thus, I believe that it would be premature for me to uphold the applications for closure notices at this point, given the lack of co-operation which has been shown by the Appellant so far and the extent of the Appellant's refusal to provide information that the Respondents reasonably require in order to make their assessments in respect of the relevant tax years of assessment. I would add that there is no little irony in the Appellant's maintaining, on the one hand, that the requirement stipulated at paragraph 3)b) of the Third Information Notice is premature and therefore inappropriate (on the basis that the Respondents should have waited for a response to the first part of the requirement before stipulating the second part of the requirement) and, on the other hand, that the Respondents should have issued a closure notice.

120. I have taken into account the fact that, as outlined in the two cases cited by the Appellant and mentioned in paragraph 24 above, it is unnecessary for the Respondents to have completed a totally exhaustive investigation into every aspect of a taxpayer's affairs before issuing a closure notice but, in my view, the nature and extent of the outstanding requirements, and the level of the Appellant's non-co-operation to date, mean that it would be wholly inappropriate to uphold the Appellant's application for closure notices. The reason why these enquiries have lasted for such a long time is in large part down to the steps which have been taken by the Appellant in refusing to provide or produce, or delaying the provision or production of, the required information and documents. I therefore decline to direct the Respondents to issue the closure notices for which the Appellant has applied.

121. In conclusion, I hold that each of the appeals and applications described in paragraph 1 above fails.

122. This document contains full findings of fact and reasons for the decision. There is no right of appeal against this decision to the extent that it pertains to the appeals against the First Information Notice or the Third Information Notice – see sub-paragraph 32(5) Schedule 36 FA 2008. To the extent that it pertains to the appeals against the First Penalty Notice or the Second Penalty Notice or to the extent that it pertains to the applications for the two closure notices, any party dissatisfied with this decision has a right to apply for permission to appeal against this decision pursuant to

Rule 39 of the Tribunal Rules. 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.

TONY BEARE

TRIBUNAL JUDGE