



**TC06915**

**Appeal number: TC/2018/02174  
TC/2018/02176**

*Income Tax – appeal against schedule 36 Notice – what are statutory records – appeal precluded by legislation - closure notice application – HMRC has reasonable grounds for not issuing closure notice.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TASNEEM ARIF**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ALASTAIR J RANKIN  
MRS ELIZABETH POLLARD**

**Sitting in public at Bradford IAC, Phoenix House, Rushton Avenue, Bradford,  
BD3 7BH on Monday 3 December 2018 at 10:00 AM**

**Mr T Nawaz for the Appellant**

**Ms Joanna Bartup, Presenting Officer, HM Revenue and Customs, for the  
Respondents**

## DECISION

1. This is an application for closure of enquiries and an appeal against an information notice in relation to the 2014/15 tax year. By Direction released on 17 April 2018 the two matters were directed to be heard by the same Tribunal.

### Background

2. The Appellant owns and operates a takeaway business near Huddersfield town centre. During the year ended 31 March 2015 these included two separate premises, one a fried chicken takeaway operating as Trinity HFC and another, a pizza takeaway operating as Trinity Pizzas. The Appellant also had rental income from seven properties which were owned jointly with her husband.

3. HMRC's Leeds office opened an enquiry under section 9A of the Taxes Management Act 1970 on 8 December 2016 into the Appellant's self-assessment tax return for 2014/15.

4. On 2 March 2017 the appellant's agent, Mr Nawaz, delivered one box of records to HMRC's Bradford office which was subsequently forwarded to the Leeds office on 3 March 2017. Mr James O'Brien, an HMRC officer, acknowledged receipt of the box by email dated 3 March 2017 and stated that he would review the records and would provide an update by 31 March 2017. Subsequently Mr O'Brien opened the sealed box and sent Mr Nawaz a schedule entitled 'Records Inventory List'. It is not clear when this schedule was sent by Mr O'Brien to Mr Nawaz. Mr Nawaz did not keep copies of the records which he sent to HMRC nor did he list them in detail in his email dated 2 March 2017.

5. Mr O'Brien, having reviewed the records submitted by Mr Nawaz felt it was not clear how the wages, capital introduced and other matters had been arrived at. Following an informal request for further information he issued a Notice under paragraph 1 of Schedule 36 of the Finance Act 2008 on 27 October 2017. It is this Notice which is the subject of this appeal and was as follows:

- "1. A detailed aged analysis or record with dates and amounts for the following for the year ending 31 March 2017:
- a) Wages paid amounting to £54,855
  - b) Individual record of capital introduced amounting to £30,205
  - c) Individual record of cash drawings amounting to £19,128
2. Mileage logs for each vehicle used in the business
3. A list of suppliers where purchases are collected
4. Details of which, if any, vehicles are used for deliveries with their mileage records.
5. Bank statements for HSBC accounts 70002194 & 9000224 covering the period 1 April 2014 to 5 April 2015

5 6. In addition to the accounts in point 5. All of your clients' bank accounts, building society and credit card accounts both in the UK and abroad, including any joint accounts or accounts where your client has a connection or is a named trustee where the account is in the name of a minor. These statements should cover the period 1 April 2014 to 5 April 2015."

6. Mr Nawaz sent an email to HMRC on 3 November 2017 which stated inter alia:

10 "A detailed and aged record of wages does not exist other than what you already have whether in the form of deduction cards or RTI information. Why do you seek such additional information? The like comments apply to capital introduced or INDIVIDUAL (sic) cash drawings."

And

"All bank statements for the enquiry year have been provided to you."

15 7. A Review Officer from HMRC explained to the Appellant in a letter dated 15 February 2018 that as the Schedule 36 Notice related to statutory records and as the information requested by HMRC was all in relation to statutory records there was no right of appeal under the legislation. However the Review Officer cancelled items 2, 3 and 4 in the Notice but maintained that he still needed the information in paragraphs 1 and 5 of the Notice.

20 8. On 15 March 2018 the Appellant appealed to this Tribunal the Review Officer's decision dated 15 February 2018.

25 9. As time was running out for HMRC to issue an assessment for the 2011/12 tax year Mr O'Brien wrote to the appellant on 28 March 2018 to advise that he had conducted a number of tests from reviewing the business records provided and issued a protective assessment for the 2011/12 tax year based on suppression of sales for the 2014/15 tax year which he then extrapolated back to 2011/12. The additional assessment amounted to £23,580.79. This assessment was subsequently cancelled by a different HMRC Review Officer on 29 June 2018.

### **Evidence at the Tribunal**

30 10. Mr O'Brien signed a statement on 16 May 2018. He was not called as a witness by HMRC. It appears he may have been transferred to another department within HMRC. Mr Alexander Sainsbury, another officer within HMRC who had taken over the Appellant's case gave oral evidence having signed a statement dated 15 November 2018. He confirmed that he adopted the statement made by Mr O'Brien dated 16 May 2018 and referred the Tribunal to several supporting documents.

35 11. In his statement Mr Sainsbury explained why HMRC still required some of the information requested in the Schedule 36 Notice. Concerning the wages, Mr Sainsbury wishes to use the wages records to ensure the Appellant is paying the minimum wage to her staff and that PAYE is being properly operated on all the wages paid by the Appellant.

12. Mr Sainsbury referred to a statement which he had prepared from the information available to him which showed that in the 2014/15 tax year the Appellant's outgoings exceeded her income by £19,881.78. He therefore needed a dated analysis or record of the figure of drawings which appeared in her accounts.

5 13. Mr Sainsbury also wished to check the makeup of the capital introduced which appeared on the Appellant's balance sheet in order to ensure the Appellant had sufficient income to meet her private outgoings which would include capital introduced into her business.

10 14. Finally Mr Sainsbury required the two HSBC bank accounts to ensure that the correct rental income had been declared.

15 15. As the Appellant had not supplied all the statutory documents requested, HMRC could not conclude their enquiry as they were not certain that the Appellant's declared income for 2014/15 was correct.

15 16. Mr Nawaz, in cross-examining Mr Sainsbury, stated that he had supplied all the necessary documents in the box which had been delivered on 2 March 2017. He stated that the bank statements had been included as had further information about the wages. As he had not kept copies of any of the items included in the box he was no longer able to provide the documents requested. Mr Nawaz had previous experience of documents going missing within HMRC.

20 17. Mr Nawaz maintained that HMRC must have come to a conclusion concerning the Appellant's income for 2014/15 before it could issue the protective assessment for 2011/12. HMRC therefore no longer required the information sought in the Notice

### **The legislation**

18. Section 9A of the Taxes Management Act 1970 (TMA 1970) states:

25 "9A(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry") –  
(a) to the person whose return it is ("the taxpayer"),  
(b) within the time allowed.

30 9A(2) The time allowed is –  
(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;".

35 19. The Appellant submitted her self-assessment tax return for 2014/15 to HMRC on 31 December 2015. HMRC wrote to her on 8 December 2016 to advise her that they were opening an enquiry under section 9A. This was clearly within the time allowed by the legislation.

20. Paragraph 1 of Schedule 36 of the Finance Act 2008 (FA 2008) is as follows:

“1(1) An officer of Revenue and Customs may by notice in writing require a person (“the taxpayer”)—

- (a) to provide information, or
- (b) to produce a document,

5 if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

1(2) In this Schedule, “taxpayer notice” means a notice under this paragraph.”

21. HMRC issued the taxpayer notice on 27 October 2017.

10 22. Paragraph 18 of Schedule 36 of FA 2008 is as follows:

“18 An information notice only requires a person to produce a document if it is in the person’s possession or power.”

23. The information requested by HMRC in paragraphs 1 and 5 of the notice dated 27 October 2017 is clearly within the appellant’s possession or power.

15 24. Paragraph 21 of Schedule 36 of FA 2008 is as follows:

“(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

(2) Refers to corporation tax and is not relevant to current appeal

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of—

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates (“relevant tax”), and the enquiry has not been completed.

(5) In sub-paragraph (4), “notice of enquiry” means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that an officer of Revenue and Customs has reason to suspect that—

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

(7) Not relevant as it relates to VAT.

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments referred to in paragraph 64(2) (PAYE etc)."

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25. Paragraph 28A(6) of TMA 1970 states:

"28A(6) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period."

10 26. Paragraph 29 of Schedule 36 of FA 2008 states:

"29(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

15 29(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document that forms part of the taxpayer's statutory records."

27. Finally paragraph 62(1) of Schedule 36 of FA 2008 states:

"62(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 –

- 20 (a) Taxes Acts, or  
(b) any other enactment relating to a tax,".

### Case law

25 28. The Tribunal was referred to three cases all dealing with appeals against schedule 36 notices. In *D. Midgley & Sons Ltd and Stuart Midgley v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 187 at paragraph 32 Judge Blewitt stated:

30 "The Tribunal is bound by the legislation and therefore finds as a fact that it has no power to allow an appeal in respect of those items requested by HMRC, as set out at paragraph 4 (d) (as revised) and (g) of this Decision, which form part of the Appellant's statutory records."

29. Paragraph 4(g) of the Schedule 36 Notice was as follows:

"(g) Business bank statements and accompanying paying-in books and cheque book stubs for the 12 month period ending 31 March 2008."

35 30. In *Wai Yan Chan v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 462 Judge Blewitt at paragraph 43 stated that

“a trader may not be obliged to create a balance sheet, but if one had been created it clearly forms part of the statutory records.”

31. In *Joshy Mathew v The Commissioners for Her Majesty’s Revenue & Customs* [2015] UKFTT 139 at paragraph 191 Judge Anne Redston stated:

5 “In issuing a closure notice an officer is performing an important function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable, see *Tower MCashback v HMRC* [2011] STC 1143 (“*Tower*”), per Lord Walker at [18]. Lord Hope, in the same case, said at [83] that the closure notice should be “as informative as possible” because it will serve the function of identifying the subject matter of any appeal.”

32. Judge Anne Redston continued at paragraph 197:

15 “It is clear from the volume of information and documents which have not yet been supplied by Mr Mathew that it would be premature to issue a closure notice with immediate effect, which is what Mr Mathew has asked us to do. This is not a situation where HMRC is seeking to “pursue to the end” every line of enquiry, as in *Eclipse*. Neither is it one where HMRC can simply exercise judgment as to the correct figure, as in *Jade Palace*, or issue alternative assessments, as in *D’Arcy*. If we directed that HMRC close the enquiry now, it would put them in the position of being “forced to make assessments without knowledge of the full facts” as the tribunal put it in *Stephen Price*.”

### Decision

33. The Tribunal is satisfied that the information requested in paragraph 1 and 5 of the Schedule 36 Notice dated 27 October 2017 relates to statutory records and in accordance with paragraph 29 is not capable of forming part of an appeal to this Tribunal.

34. Mr Nawaz maintained at the hearing that all the necessary documents were included in the sealed box which he delivered to HMRC Bradford on 2 March 2017. While Mr Nawaz was able to show that the schedule prepared by HMRC of the items included in the box was incomplete he was not able to provide evidence of all the items actually in the box. It is unfortunate Mr Nawaz did not detail in a covering letter or email what he was in fact sending and that he did not keep copies of everything.

35. Mr O’Brien in his statement dated 18 May 2018 at paragraph 7 confirms that the box was sealed when he opened it. The Tribunal finds as a fact that the bank statements referred to in paragraph 5 of the Schedule 36 Notice were not included in the box. In any event it is possible for the Appellant to obtain copies of these bank statements which are clearly within the statutory definition. Mr Nawaz did not argue that the two bank accounts referred to in the Notice were not documents within the statutory definition. He argued that they had been included in the sealed box and that HMRC must have lost them. The Tribunal rejects this argument.

36. Mr Nawaz argued that HMRC already had all the necessary information concerning wages paid to staff through the requirement of the Appellant to inform HMRC through the Real Time Information online Pay As You Earn (RTI) of all salaries paid and tax and NIC deducted. RTI information does not include the actual hours worked by each member of staff. There appear to be around 20 staff employed by the Appellant. Mr Nawaz maintained that no time sheets or similar records were kept. Mr O'Brien and latterly Mr Sainsbury think that the Appellant may be paying staff at less than the minimum wage. Mr Nawaz advised the Tribunal that the Appellant's children worked in the business and this may account for the salaries paid being for fewer hours than the number of hours required for the two businesses to be manned during opening hours.

37. It is a criminal offence for an employer to pay less than the National Minimum Wage. HMRC has the right to carry out checks at any time and ask to see payment records. The Tribunal is unable to accept that the Appellant does not have a record of the number of hours worked by each employee unless each employee only works the same number of hours each week and their gross salary does not change from week to week, in which case the necessary information will be included in their contracts of employment. The Tribunal is satisfied that the Appellant has the necessary information concerning salaries within her knowledge and control.

38. Concerning the record of capital introduced and the record of cash drawings there does not appear to the Tribunal to be any reason why the Appellant cannot produce the supporting documentation even if this means sending copies of the documentation which Mr Nawaz claims were included in the locked box. Mr Nawaz must be able to reproduce the documents that enabled him to produce figures for the record of cash drawings and capital introduced.

39. Following the decision of Judge Anne Redston in *Joshy Mathew* quoted at paragraph 32 above it is clear to the Tribunal that HMRC requires further information before it can come to a conclusion as to whether the Appellant's tax return for 2014/15 was correct. The fact that HMRC issued an assessment for 2011/12 based on their initial estimate of the Appellant's income for 2014/15 does not mean that HMRC had formed a view as to all the Appellant's income. Without the information requested in paragraphs 1 and 5 of the Schedule 36 Notice HMRC could not be certain that the correct information had been supplied concerning the Appellant's income for 2014/15.

40. The Tribunal dismisses the appeal against the Schedule 36 Notice as the legislation precludes an appeal to this Tribunal and refuses the application by the Appellant to issue a closure notice. The application by HMRC to amend the date in paragraph 1 from 2017 to 2015 and to delete the word "cash" from paragraph 1. c) is granted

41. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to



accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**ALASTAIR J RANKIN  
TRIBUNAL JUDGE**

**RELEASE DATE: 03 JANUARY 2019**

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