



**TC05586**

**Appeal number: TC/2016/03862**

*INFORMATION NOTICES – appeal against information notices issued under Schedule 36 of The Finance Act 2008 – information reasonably required? - yes – information notices varied and appeal otherwise dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MARYLIN MAY PHILLIPOU**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL  
MR SIMON BIRD**

**Sitting in public at Cardiff on 29 November 2016**

**Mr Tony Monger, Tax Adviser, for the Appellant**

**Mrs Christine Cowan, Officer HM Revenue and Customs, for the Respondents**

## DECISION

### **Background and Issues**

1. This case concerns the issue of two taxpayer information notices (the "notices", each a "notice") issued by the respondents (or "HMRC") on 16 March 2016 during the course of an enquiry into the appellant's 2013/2014 tax return.
2. The notices were issued pursuant to Schedule 36 of the Finance Act 2008 ("Schedule 36") which enables the respondents to request information or documents if the information or documents are reasonably required by the respondents for the purpose of checking the taxpayer's tax position.
3. The sole issue between the parties is whether the information sought by the notices is reasonably required to check the appellant's tax position. The appellant says HMRC already has sufficient information with which to check her position, and the request for further information is unreasonable. HMRC say that they do not have sufficient information to undertake that check, the information sought by the notices is reasonably required, and they are entitled to it.
4. For the reasons given in this decision, and pursuant to our powers to vary information notices given under paragraph 32 of Schedule 36, we have decided to vary the notices in accordance with the revised notices set out in the appendix to this decision. And save to the extent so varied, we dismiss the appeal.

### **The relevant legislation**

5. The relevant legislation, or a summary of it, is set out below. References in this decision to paragraphs, without anything further, are to paragraphs in Schedule 36.

(1) The respondents may enquire into an individual's self-assessment tax return by giving notice of their intention to do so within the relevant period. This is usually 12 months from the end of the relevant filing date (Section 9A Taxes Management Act 1970 ("TMA")).

(2) An enquiry under Section 9A TMA is completed when HMRC issues a closure notice informing the taxpayer that the enquiry is complete, and states a conclusion as to the tax liability of the taxpayer (Section 28A TMA).

(3) Where the conclusion is that there is more or less tax to pay than was originally identified in the tax return, that conclusion is given effect by an amendment to the tax return (Section 28A TMA).

(4) Under paragraph 1

(1) An officer of Revenue and Customs made by notice in writing require a person ("the taxpayer"):

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

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

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

(5) Where a taxpayer has filed a tax return, a taxpayer notice may only be given if one of four conditions is met. One of these conditions (Condition A) is that an enquiry notice has been given in respect of the return (paragraph 21).

(6) An information notice (which term includes a taxpayer notice) must specify or describe the information or documents to be provided or produced by the taxpayer (paragraph 6). The taxpayer must provide or produce the information or documents so requested within a reasonable time, and at a place specified, in default of agreement, by HMRC (paragraph 7).

(7) A taxpayer is only obliged to produce a document, pursuant to an information notice, if that document is in the person's possession or power (paragraph 18).

(8) A taxpayer has a right of appeal against an information notice or any requirement in the notice (paragraph 29(1)). But the taxpayer has no appeal right against an information notice if it requires the provision of information (or production of any document) that forms part of the taxpayer's statutory records (paragraph 29(2)).

(9) Under paragraph 32:

(3) On an appeal that is notified to the tribunal, the tribunal may-

- (a) confirm the information notice or a requirement in the information notice,
- (b) vary the information notice or such a requirement, or
- (c) set aside the information notice or such a requirement.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement-

- (a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

(10) The definition of "tax position" is very wide and includes the taxpayer's position as regards past, present and future liability to pay any tax (paragraph 64(1)). The concept of "checking", too, is wide and includes carrying out an investigation or enquiry of any kind (paragraph 58).

### **Relevant case law**

6. Mrs Cowan took us to the case of *Stephen Price* [2011] UKFTT 624 (TC) ("Price"). In particular she took us to [10] of that decision. This paragraph has been cited with approval in other tribunal cases, most notably in the case of *Andreas Michael* [2015] UKFTT 0577 (TC) ("Michael") by Judge Sinfield. At [29] of that decision, he states as follows:

29. We take the same view as the tribunal in *Stephen Price v HMRC* [2011] UKFTT 624 (TC), another case which was not cited to us by the parties. In *Price*, the appellant had submitted that the enquiry could be closed and an estimated assessment made. The tribunal said that while HMRC has the power to issue such assessments:

“HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008 ).

30. If we directed HMRC to close the enquiry into Mr Michael's tax return for 2012–13 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*. In our view, it is not necessary for HMRC to be certain that the figures are wholly accurate before they can issue a closure notice. We consider, however, that it would not be appropriate in this case to direct that HMRC must issue a closure notice when it is clear that further information is or may be available that will affect Mr Michael's liability to tax. We say this because it appears to us that there is real uncertainty about the level of takings from the Charcoal Grill for the year ended 5 April 2013, as revealed by the decision of

HMRC in the VAT investigation to issue an assessment for under recorded takings covering part of the period..."

7. Both Price and Michael were cases about the issuing of closure notices rather than cases about information notices. But of course the two are intimately related.

8. In the case of the appellant, HMRC has opened an enquiry into her 2013/2014 tax return.

9. The enquiry will end with the giving of a closure notice under section 28A TMA.

10. All that section 28A TMA requires HMRC to do when closing an enquiry is to state its conclusions. There is no need for those conclusions to be made to "best judgment" (as would be the case for a VAT assessment or a PAYE regulation 80 Determination). There is, furthermore, no need for HMRC to give reasons for its conclusion.

11. In *Fidex Ltd v Revenue and Customs Commissioners* [2014] UKUT 454 (TCC), [2015] STC 702 ("Fidex"), the Upper Tribunal considered the decision in *Tower MCashback*, and summarised the applicable principles at [62] as follows:

(1) An appeal to the FTT in such a case as this is brought against "an amendment of a company's return" which is required to give effect to conclusions stated in a closure notice.

(2) The scope of the appeal is defined by and confined to the subject matter of the enquiry, the conclusions and amendments (if any) in the closure notice. An appeal does not permit HMRC to launch a new roving enquiry into a tax return.

(3) It is the HMRC officer's conclusions/amendments in the closure notice which matter, and not the process of reasoning which has led to them.

(4) The officer does not need to give reasons for his conclusions.

(5) The officer has a duty to make the closure notice as helpful to the taxpayer as is possible or appropriate in the circumstances.

(6) The FTT has jurisdiction to entertain legal arguments which have played no part in the officer's reasoning for the conclusions in the closure notice; any element of ambush or unfairness must be avoided by proper case management.

(7) It is a matter for the fact finding tribunal (the FTT) to identify the subject matter of the enquiry, the conclusions and, therefore, the appeal.

(8) In determining these matters the context is relevant and may include, in addition to the subject matter of the enquiry and the contents of the closure notice themselves, any other relevant correspondence.

(9) In making its determination the FTT should also balance protection of the taxpayer with the public interest in the collection of the correct amount of tax.

12. It is clear that HMRC cannot simply stick a finger in the air and state its conclusions. There must be some basis on which those conclusions have been made. They must have undertaken an enquiry, completed it, and so have some basis for stating their conclusions. In the absence of relevant information, HMRC have no such basis.

13. The significance of a closure notice, and the balance which section 28A TMA strikes between HMRC and a taxpayer has been neatly set out by Judge Saddler in the case of *Eclipse Farm Partnerships No. 35 LLP* [2009] STC (SCD) 293 ("Eclipse"), where at [16] and [19]:

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

19. The provisions of section 28B TMA 1970 are (as with the corresponding provisions relating to companies discussed in the case of *HMRC v Vodafone 2* [2006] STC 483 at [44]) "constructed so as to produce a reasonable balance", given these different interests of the Commissioners and the taxpayer. It is implicit in the powers given to the General or Special Commissioners to give a direction requiring the issue of a closure notice, and is part of that "reasonable balance", that a closure notice can be required notwithstanding that the officer has not pursued to the end every line of enquiry or investigation – what is required is that he should have conducted his enquiry to a point where it is reasonable for him to make an informed judgment as to the matter in question, so that, exercising such judgment, he can state his conclusions and

make any related amendments to the taxpayer's return. The exercise of that judgment may require the officer to express his conclusions in broad terms, or even express alternative conclusions (see the observations made in the case of *D'Arcy v HMRC* [2006] UKSPC 549 at [12]) – which should at the practical level allow an officer of the Commissioners to avoid the pitfalls identified in the *Tower MCashback* case of a closure notice too restrictively drafted in its conclusions."

14. So, the reason that the provision of information is so important to HMRC is that it enables it to close its enquiry. In the absence of such information, it is unable to do so or at least unable to do so in accordance with the principles set out in the case law extracts cited above.

### **Evidence and findings of fact**

15. We were provided with a comprehensive bundle of documents which, in the main, comprised correspondence between the parties. Although the appellant was not formally called to give evidence, during the course of Mr Monger's submissions, she chipped in with a number of comments which we found to be helpful. We have taken her comments into account when coming to our decision.

16. Based on the foregoing, we make the following findings of fact:

(1) The appellant's business is that of a fish and chip shop in a residential area of Cardiff. The appellant trades as "The Friary Fish & Chip Shop". The appellant inherited the shop from her husband on his death in 2008.

(2) The appellant submitted her 2013/2014 tax return on 23 April 2014. An enquiry into this return was opened on 30 March 2015.

(3) On that date, HMRC requested information and documents some, if not all of which, were sent to HMRC on 13 April 2015. A list of those documents is set out below.

(a) Collins Cathedral Analysis Book 150/4/16.1 Front of Book Cash recording (1.4.2012-31.12.2013, Back of Book Bank recording (1.10.2012-31.12.12).

(b) 4 VAT quarters of invoices.

(c) HSBC – Commercial Cards.

(d) HSBC Current Account Statements A/C No 60025216.

(e) Barclays Current Account Statements A/C No 33940284.

(f) Copy of Principality Building Society re PAYE.

- (g) Copy of Principality Building Society re RENT.
- (h) NATWEST current account statements A/C No 29800919.
  
- (i) Copy Wageslips
  
- (j) Barclays Bank Pay-in books x 3.
  
- (k) HSBC Pay-in books x 2.
  
- (l) Daily Takings Sheets x 4.

(4) There then followed an exchange of correspondence between the appellants agent and HMRC in which the respondent requested further information and documents relating to the enquiry. The appellants agent provided some of the information and the documents requested; but also went on to explain why, in its view, much of the information sought was not relevant, and that some of it would be impossible for the appellant to produce.

(5) During the correspondence, HMRC suggested that it might be sensible to have a meeting with the appellant in which the information sought could be given. The appellant, through her agent, declined to accept such a meeting.

(6) In a letter dated 26 November 2015, HMRC asked the appellant to provide a raft of information, much of which is now reflected in the notices.

(7) One of the areas of dispute concerned the appellant's cash flow position. In a letter dated 12 January 2016, HMRC sent a cash flow analysis (the "Cash Flow Test") to the appellant's agent for the 2013/2014 tax year. The Cash Flow Test was based on a number of assumptions (the "Cash Flow Assumptions").

(8) On 12 January 2016, HMRC also served an information notice on the appellant seeking a copy of the appellant's price list for the tax year 2013/2014 or, if none, a copy of the then current price list together with any changes that had been made since 2013/2014.

(9) The appellant's agent appealed against this notice which was subsequently withdrawn by HMRC on 16 March 2016. On that date, HMRC issued the notices which are the subject matter of this appeal.

(10) On 29 March 2016, the appellant's agent sent a copy of the appellant's then current price list to the respondents. On that date too, the appellant appealed against the notices on 29 March 2016 and sought a statutory review. The review officer upheld the decision to issue the notices and confirmed that decision in a letter to the appellant dated 24 June 2016.

(11) The appellant notified the tribunal of her appeal on 15 July 2016.



## **Burden and standard of proof**

17. The respondents were content to accept that the burden of establishing that the information sought by the notices was reasonably required, was on them; and the standard was the balance of probabilities. The appellant agreed with this approach.

18. The issue of burden of proof in information notice cases was eloquently discussed by Judge Redston at [66] – [87] in her decision in *Joshy Mathew* [2015] UKFTT 0139. In that case Judge Redston explained that there were cogent reasons as to why the burden of proof of establishing that documents and information are reasonably required may not lie with HMRC. Instead, the burden might be on the appellant to show that such documents or information were not reasonably required.

19. However, like Judge Redston, we find that HMRC has met the burden of establishing that the information sought by the notices is reasonably required, and therefore we do not need to decide this point.

20. We are therefore content to adopt the respondent's position on the burden and standard of proof.

## **Appellant's submissions**

21. On behalf of the appellant, Mr Monger made a number of detailed submissions, the overall tenor of which was that HMRC already has sufficient information to check the taxpayer's tax position; it has no need for any further information; and production of the information sought by the notices would be unduly onerous for the appellant. To quote Mr Monger:

"If gross profits are satisfactory and the statutory records are satisfactory that should be an end of the check. The information in those is sufficient to conclude that the takings are adequately recorded with the gross profit rate. This should be enough for HMRC to conclude the check."

22. In support of his overall submission that the information is not reasonably required for the purpose of checking the appellant's tax position, Mr Monger made the following specific points.

(1) HMRC has already been provided with the statutory business records (see [16(3)]) and HMRC has admitted that they are not flawed.

(2) The Cash Flow Test is flawed. The Cash Flow Assumptions are flawed. When these assumptions are corrected, the Cash Flow Test does not show negative cash flow.

(3) A comparison of the Z readings with the recorded cash takings demonstrates the reliability of the cash recorded.

(4) HMRC requires the information to conduct a business economic exercise. Case law and HMRC's own manuals suggest that this technique is an unreliable basis for assessing a taxpayer's gross profit.

- (5) The gross profit percentage has been agreed by HMRC as being in line with industry standard.
- (6) HMRC contends that own goods consumption is overstated (the implication being that, as a consequence, the appellant's declared profit has been overstated).
- (7) HMRC's view that the net profit rate of 0.34% is too low, is flawed, in that it fails to take into account overheads which are specific to the appellant.
- (8) The range and extent of the information sought would be unduly onerous for the appellant to provide.
- (9) There is no obligation on a taxpayer to keep records of, for example, the weight of potato peelings. So, unsurprisingly, the appellant has kept no records and is unable therefore to supply information sought in this regard (and in respect of other similar items) by the notices.

### **Respondent's submissions**

23. The respondent's position, as outlined by Mrs Cowan is (in essence) that HMRC are only seeking information which is necessary to give it a better understanding of how the appellant's business operates in order to put the business records provided by the appellant into proper context, and to check the veracity of the figures returned by the appellant in her tax return.

24. At present, the respondents have highlighted some concerns over the records which have been provided and the figures returned. HMRC is not yet in a position to reach an informed conclusion as regards the accuracy of the declared profit. Without the information sought by the notices, HMRC has insufficient information to reach such a conclusion.

25. In particular:

- (1) HMRC has concerns over the accuracy of the sources of capital introduced; what is included in the own goods adjustment; missing Z readings; negative cash from the Cash Flow Test; low net profitability; casual workers paid in cash; and an increase in trader creditors.
- (2) The information sought by the notices would often be given by a taxpayer at a meeting with HMRC. The appellant (perfectly properly) has declined the offer of a meeting, so the only way of obtaining information is via the notices.
- (3) The information can be provided by the appellant from her knowledge about how the business is run.
- (4) In the absence of the offer of a meeting, Mrs Cowan concedes that production of the information sought might have been seen as onerous; but if the only way that HMRC can obtain the information is via the notices, then it is entitled to adopt this route.

(5) HMRC is attempting to gather sufficient, reliable and relevant information in order to test the veracity of the business records provided. This may be in the form of a business economic exercise or the Cash Flow Test or some other proven method of checking the return figures.

(6) Whilst the schedule of questions may look daunting, HMRC contends that they are both relevant and reasonable in order to provide information to determine whether the appellant's tax position is correct and the return sales and profit figures are credible.

(7) It may be the case that there will be no issue once the information requested is provided by the appellant. But in the absence of the information, HMRC is simply not in a position to make that call at present.

### **Discussion**

26. The information sought by the notices must be seen in the context of the enquiry into the appellant's 2013/2014 tax return.

27. As the cases relating to closure notices clearly show, the issuing of a closure notice is a significant and important event and governs the ambit of any subsequent appeal against the closure notice. HMRC must have concluded their enquiry to a stage where it is reasonable for the relevant HMRC officer to make an informed judgment as to the matter in question.

28. And to do this, HMRC are entitled to know the full facts relating to a taxpayer's tax position so that it can make an informed decision whether and what to assess. Without these, HMRC cannot frame the closure notice to comply with its duty to make it as helpful to the taxpayer as is possible or appropriate in the circumstances.

29. It is clearly, too, in the interests of justice for the closure notice to refine the issues in question.

30. In the context of this enquiry, and in the absence of the information sought by the notices, we believe HMRC's position to be that even if it were possible to issue a closure notice at this stage, it would have to be couched in very wide terms, leaving the taxpayer in the invidious position of having to bring an appeal in which there would be any number of live issues.

31. It is in everyone's interest for the issues to be narrowed. And indeed, if the appellant provides the information sought by the notices, it might very well be, as Mrs Cowan has accepted, that HMRC will be satisfied with the position, and the closure notice will endorse the figures which have been submitted by the taxpayer in her return.

32. Schedule 36 gives HMRC very wide powers. The definition of tax position is very wide as, too, is the concept of checking which includes carrying out an investigation or enquiry of any kind.

33. The appellant's view is that HMRC already has sufficient information on which it can judge the taxpayer's position and, if it disagrees with the taxpayer's recorded position as set out in her tax return, could issue a closure notice without any further check. HMRC dispute this. It believes that it needs to check the taxpayer's position. And to do this, it needs to build up an alternative model of the activities of her business, against which they can test the information which has been provided by the appellant (basically the business records referred to at [16(3)]).

34. Mr Monger said that checking does not mean testing to destruction. But it is our view that HMRC have got nowhere near being able, yet, to test the information at all, let alone to destruction. This is Mrs Cowan's position. At the moment HMRC has little knowledge of the business activities of the appellant, otherwise than those which are apparent from the business records. HMRC would like a fuller understanding of the way in which the business is operated, in order to build up a model (the business economic exercise) in order to test the information submitted by the taxpayer.

35. Mr Monger handed up an extract from HMRC's Enquiry manual and directed us to statements therein regarding business models. For example:

"In isolation, the results of a business model may not mean very much and will not provide you with a conclusive figure of profits to overturn the returned figure..."

36. But Mrs Cowan responded that in the same extract, HMRC officers are directed that

"Whatever model you use, make every attempt to understand the business and how it works"; and

"Use facts from the actual business and wherever possible these should come from contemporary documentation, such as price lists, purchase invoices etc. Alternatively, you can ask the taxpayer to provide the necessary information from his or her knowledge of the business and verify this if you can – perhaps by looking at documentation for the current period...."

37. It is our view that HMRC are entitled, when checking a taxpayer's tax position, to seek, and obtain, information about the business of the taxpayer in order to put it in a position, which is broadly equivalent to that of the taxpayer's professional advisers.

38. Obviously, some information may be privileged, but the scheme of Schedule 36, in essence, levels up the information playing field between taxpayer and HMRC.

39. There has been no suggestion in this case that the taxpayer has suppressed her takings. But HMRC are, we believe, entitled to build an alternative model, a "bottom-up" model, against which to test the information provided by the taxpayer, and the figures provided in her tax return.

40. Many of Mr Monger's submissions were aimed at pointing out flaws in the business economic exercise. But the battleground for those is if a business economic exercise is compiled and then used to support an HMRC challenge to the appellant's turnover and profit. It would no doubt be used as the basis for a closure notice which it is then open for the appellant to challenge by way of an appeal to this Tribunal.

41. Similarly, he championed the veracity of the business records and the adequacy thereof for testing the taxpayer's tax position, explaining away some of HMRC's concerns by flaws in their methodology (for example the Cash Flow Assumptions which form the basis of the Cash Flow Test). We accept that he may have cogent grounds for suggesting these flaws. But again, the time for asserting them is not now but if and when HMRC, having used them to test the appellant's turnover and profit set out in her tax return, issues a closure notice based (in the appellant's eyes) on these flawed assumptions.

42. We can see that this is extremely frustrating for the appellant and her advisers. In their eyes she has recorded (wholly properly and accurately) her cash takings; deducted from them expenses which were wholly and exclusively incurred by her business; and has reported a profit which she has signed off as being true and accurate. She should not, therefore, be put to any further trouble over and above providing the business records, as she has done.

43. But HMRC see it differently (and is entitled to do so). In its eyes the appellant's assertions that she has properly recorded her takings; the business records are accurate; and that the expenses are properly deductible is something which HMRC are not obliged to take at face value. It is entitled to test them. Perhaps not to destruction, as suggested by Mr Monger in this case, but certainly to check them (which is the statutory test and, as set out above, is widely defined).

44. As we say, the information which is sought by the notices will simply put HMRC in the same position as the appellant's professional advisers. It is no doubt information that has been provided (or can readily be provided) by the appellant to such advisers. It is not right for the appellant and her advisers to say that HMRC has no right to know about the way in which the appellant's business is undertaken. The information is reasonably required since it explains the specific way in which the appellant runs her business which, in turn, will have a significant impact (as the appellant accepts as being the case as regarding, for example, business expenses) on her tax position.

45. As we have said above, if we were to decide that the information should not be provided, then HMRC may well have to issue a closure notice by "waving a finger in the wind". This would be wholly contrary to the principles governing the issue of closure notices set out in the cases of Price, Michael, Fidex and Eclipse mentioned at [6], [11] and [13] above.

46. And whilst the appellant will have a right of challenge by way of an appeal to this Tribunal, we would point out to her that in these circumstances, the onus of showing that HMRC's assessment, evidenced by the conclusion in the closure notice is incorrect, lies with her. So she would have to lead

evidence that HMRC's conclusion is incorrect. To do this she would have to provide, we suspect, much of the information that is being sought by the notices.

47. Leaving aside, therefore, her legal obligations, it might be better for the appellant in any event to provide this information. Firstly, it might enable HMRC to come to the same conclusion as the appellant regarding the reported profit and turnover (namely that it is correct); and secondly, if it comes to a different conclusion and issues a closure notice accordingly, she will already have the evidence which can be used to challenge that conclusion.

48. Mr Monger referred us to two cases in which the use of a business economics exercise had, apparently, been discredited by the First-tier Tribunal. The cases were *Newell* [2013] UKFTT 742 (TC) and *Scott (t/a Farthings Steakhouse)* [1996 SpC 91].

49. But in both of those cases, the issues were whether the taxable profits reported by a taxpayer were correctly reported. The cases did not deal with information notices. Were HMRC, in the appellant's case, to issue a closure notice stating a conclusion which is that her turnover and profit is understated, and do so on the basis of a business economic exercise, then it is open for the appellant to challenge that, and any flaws in the business economic exercise, in an appeal against the conclusion in the closure notice. And if the criticisms made of HMRC's methodology to date are correct, then no doubt they will be run by the appellant or her representatives in that appeal. But neither of those cases causes us to take the view that HMRC's desire to build up a business economics exercise to test the information provided by the taxpayer and her representatives, and so check her tax position, is unreasonable.

50. Nor do we think that much of the information sought by the notices, and the production of it, is unduly onerous. As we have mentioned above, we strongly suspect that it is information which has already been supplied by the appellant to her professional advisers. We would observe, too, that although initially holding out against production of a price list, on the 29 March 2016 (as a gesture of good faith) the appellant's agent sent a copy of the appellant's then current price list to the respondents.

51. Mr Monger referred, briefly, to the fact that HMRC have produced an economic note relating to fish and chip shops, and although he was not absolutely clear on his submission, we took from it that it was his view that HMRC had not followed either the process, or the misgivings concerning business economic exercises, set out in the economic note. We obtained the business economic note 13 (dated October 1990) from the HMRC website. It made interesting reading, but did not, in our view, support Mr Monger's submission. Indeed to the contrary, it strongly affirms HMRC's position in this appeal; namely that in order to test a traders profitability, building a business economic model is an appropriate thing to do.

52. We are sympathetic towards the appellant when it comes to recording wastage, portion sizes etc, something which there is no statutory obligation to do.

53. But much of the information (for example the weight of fish, and separately chips in each portion size), is something which we think the appellant could provide comparatively simply. If she did not record it at the time (remember the period in question is 1 April 2013 to 31 March 2014) then it would be comparatively straightforward to undertake such a review of her current trading. If there have been significant changes between the current and past periods, the appellant can explain those to HMRC. Should HMRC fail to take into account such explanation then such failure could be challenged on any subsequent appeal when the appellant would be giving sworn evidence. If HMRC could be shown to have acted unreasonably in those circumstances, it may risk a costs order being made against it.

54. It is notable, too, that the appellant was able to tell the Tribunal of her regime for buying potatoes (in bags every few days); the extraction therefrom of large stones (which ruin the peeler); and the way in which the potatoes are then skinned and sliced to order. It is this sort of information that HMRC are seeking, and, as we say, the appellant had no difficulty in providing it to us. It is clearly information that is, and has been made, available to her professional advisers. We do not think monitoring how the trade currently operates as regards portion size, wastage etc, is something, therefore, which will cause the appellant any, or any significant, burden or difficulty.

55. Mr Monger was also able to explain (undoubtedly on the appellant's instructions) in clear and straightforward terms, how the appellant cashed up the weekly takings; how she reconciled her cash position on a weekly basis; how she set money aside for wages; how she took into account liabilities such as VAT and creditors; how much of a cash float she needed, and how she banked the excess cash on the Tuesday following the relevant week. This is information which is sought by HMRC under the notices. We have little doubt that were the appellant to have attended a meeting with HMRC, she would have given as cogent and comprehensive an explanation to HMRC as Mr Monger has given to us. Mrs Cowan has, quite rightly and properly, accepted that there is no obligation on the appellant to attend a meeting with HMRC. But the provision of this information to the Tribunal does illustrate to us how little difficulty the appellant would have in providing this information to HMRC via the notices, and militates against Mr Monger's submission that the provision of much of this information would be unduly onerous on the appellant.

56. So, it is our view that, as regards wastage etc for the period in question the appellant should make her best guess of the position at the moment and explain what factors might have changed the position between now and the period in question.

57. It is for that reason that we have slightly altered the notices as we have power to do under paragraph 32 of Schedule 36, and such amended notices are set out in the appendix attached to this decision.

**Decision**

58. Our decision is that the appellant must comply with the slightly altered information notices set out in the appendix to this decision within six weeks from the date on which this decision is released to the parties.

59. The foregoing paragraphs contain full findings of fact and reasons for our decision. Pursuant to paragraph 32(5) of Schedule 36, that decision is final.

**JUDGE NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 5 DECEMBER 2017**



## APPENDIX



### Schedule of information needed to carry out our check

**Customer name** Mrs Philipou

**Case reference** CFSS-1283595

To help us with our check we need the following information:

#### Information

For the period 1 April 2013 to 31 March 2014 (the "assessment period information"):

- 1 A list of the lines of products sold
- 2 The mark up for each line

Where no records were kept of the position during the period mentioned above, please provide the information for the business for the period 1 April 2016 to 31 March 2017 ("current information"). If you believe that the current information differs from the assessment period information, then please provide brief reasons for those differences and make a best guess, in light of those reasons, of the assessment period information.

**Customer name** Mrs Philipou

**Case reference** CFSS-1283595

To help us with our check we need the following information:

#### Information

Please answer the below questions for the period 1 April 2013 to 31 March 2014 (the "assessment period information"). Where no records were kept of the position during the period mentioned above, please provide the information for the business for the period 1 April 2016 to 31 March 2017 ("current information"). If you believe that the current information differs from the assessment period information, then please provide brief reasons for those differences and make a best guess, in light of those reasons, of the assessment period information.

1. What weight of chips does the business provide for each portion size?
2. What weight of fish is provided for each portion size?
3. What are the weight of the portion sizes for the following:
  - i. Mushy Peas
  - ii. Baked Beans
  - iii. Gravy
  - iv. Curry Sauce — both types
  - v. Cheese
4. How is wastage recorded?
5. Please give a percentage loss of potatoes to each of the following factors:
  - i. Substandard potatoes
  - ii. Peeling
  - iii. Chipping
  - iv. Frying
  - v. Unsold cooked goods
6. Please give a percentage loss of fish on each of the following factors:
  - i. Substandard fish
  - ii. Skinning
  - iii. Trimming
  - iv. Unsold cooked goods

7. What is percentage wastage due to all factors for the following lines:
  - i. Fishcakes
  - ii. Sausage 4s
  - iii. Sausage 8s
  - iv. Pies — each supplier
  - v. Drinks Cans
  - vi. Mushy Peas
  - vii. Baked Beans
  - viii. Gravy
  - ix. Curry Sauce — both types
  - x. Cheese
8. Does Mrs Philipou ever take cooked food from the shop?
9. How are meals taken by Mrs Philipou recorded?
10. How many meals does Mrs Philipou take for her own consumption in a week?
11. What does an average one of those meals consist of?
12. Does Mrs Philipou ever purchase things through the business for her own use?
13. In the year of enquiry did Mrs Philipou ever taken uncooked goods from the business?
14. How was this recorded?
15. Do staff ever get free meals?
16. How are free meals for staff recorded?
17. On average how many of these meals are given out in a week?
18. Does the business ever provide free meals for any other purpose?
19. How are those free meals recorded?
20. Does the business ever do mobile catering?
21. Does the business ever cater for events?
22. Does the business have a restaurant on site?
23. Does the business do online trade via Just Eat etc?

24. Does the business have any gaming machines on site?
25. If the answer to any of 20-24 is yes, how are these sales recorded?
26. Does the business offer any meal deals or similar discounts?
27. Does the business deliver and if so are there any delivery charges?
28. Does the business have a flat above the premises? If so, is this owned by the business?
29. Is there any rental income from this property?
30. Does the business ever take debit or credit card payments?
31. Does the business ever take cheque payments?
32. How many tills were used by the business?
33. Were any of these tills broken or changed in the year of enquiry?
34. Do all sales go through the till?
35. Does Mrs Philipou ever put cash into the till from her own funds?
36. Does Mrs Philipou ever take cash out of the till for her own use for any reason, including for example refunding expenses paid by herself on behalf of the business?
37. Are expenses of the business ever paid out of the till?
38. How are 35-37 recorded?
39. How often does the business take out change from the banks?
40. What is the businesses standard float?
41. What is the most amount of cash kept on hand by the business?
42. Are all takings banked into one of the business accounts for which I have bank statements?
43. Are takings ever banked into a personal bank account?

44. Can you confirm that the cash on hand at the beginning of the year is in line with the petty cash book at £642.82?
45. Who writes the entries in the cash book?
46. When are these entries recorded?
47. Are wages paid in cash?
48. What day are wages paid?
49. On what basis is Stock and WIP calculated?
50. Can you provide a breakdown of the trade creditor figure of £3462?
51. Can you provide a breakdown of the source, reason and type of the loans figure of £2374?
52. Can you provide a breakdown of the liabilities and accruals of £7444?
53. The business records show casual wages paid to Kate, was PAYE operated on these?
54. Where in the return is this recorded?
55. Does the business hire other casual workers?
56. How many staff does the business have on each day?
57. Where are Mrs Philipou's drawings recorded?
58. Where are the drawings taken from? E.g. from the till after cashing up, from the bank etc.