



TC04722

Appeal number: TC/2015/03989

INCOME TAX – application for closure notice under section 28A(4) Taxes Management Act 1970 – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREAS MICHAEL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
MS SANDI O'NEILL**

**Sitting in public at the Royal Courts of Justice, Strand, London WC2 on
6 November 2015**

Nicholas Michael, counsel, instructed by Aston Shaw Limited, for the Appellant

Jeremy Taylor, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ('Mr Michael') applies under section 28A(4) of the Taxes Management Act 1970 ('TMA') for a direction that the Respondents ('HMRC') close their enquiry into the Self-Assessment tax return made by Mr Michael for the year ended 5 April 2013. HMRC opened their enquiry on 29 October 2014 and the parties met and corresponded between November 2014 and July 2015. At the same time, HMRC also conducted an investigation to determine whether Mr Michael had under declared sales by his restaurant business for VAT purposes.

2. For the reasons set out below, we have decided to refuse Mr Michaels' application.

Legislation

3. The relevant provision is section 28A TMA and is as follows.

“28A Completion of enquiry into personal or trustee return

(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a 'closure notice') informs the taxpayer that he has completed his enquiries and states his conclusions. In this section 'the taxpayer' means the person to whom notice of enquiry was given.

(2) A closure notice must either—

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

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

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

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

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

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

4. Section 28A(6) TMA provides that the FTT 'shall' direct that HMRC issue a closure notice within a specified period, unless the FTT is satisfied that there are 'reasonable grounds' for not issuing the closure notice. It is therefore clear that the burden is on HMRC to demonstrate, on the balance of probability, that there are reasonable grounds for not issuing the closure notice. If HMRC cannot discharge that burden then the section provides that the FTT must grant the application and direct HMRC to issue the closure notice within a specified period.

Evidence

5. HMRC produced a bundle of documents for the hearing. There were no witness statements from HMRC. The decision maker in this case, Officer Mark Bagley, was unable to be present and had not produced a witness statement although he had produced a short note of his reasons for not closing the enquiry. Mr Michael produced a witness statement and exhibited a bundle of correspondence and other documents (some of which were also in HMRC's bundle). Counsel for Mr Michael (also called Mr Michael) submitted that HMRC, on whom the burden of proof lay in an application such as this, must fail as they had not produced any evidence to establish reasonable grounds for not issuing a closure notice. While agreeing that the note by Mr Bagley was not evidence, we did not accept that there was no evidence that we could consider and that could properly be relied on by Mr Taylor, who represented HMRC. We decided that, taking account of the overriding objective and rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, we could admit and consider the documents, as both parties were aware of them, and the witness statement of Mr Michael. We also allowed Mr Taylor to adopt parts of Mr Bagley's note as his submissions but we did not accept that the note was evidence of the truth of its contents.

Background

6. Mr Michael is a sole trader who carries on a restaurant business trading as The Charcoal Grill in Great Yarmouth. Mr Michael submitted his Self-Assessment tax return for 2012-13 electronically on 7 November 2013.

7. In a letter dated 29 October 2014, HMRC notified Mr Michael that they had opened an enquiry under section 9A TMA into Mr Michael's Self-Assessment Tax Return for 2012-13. As Mr Michael was subsequently informed, HMRC opened the enquiry because his declared income from the Charcoal Grill, which was his only apparent source of income, was sufficiently low to cause HMRC to question how he could fund his private expenditure. In a letter of the same date to Mr Michael's then advisers, Hines Harvey Woods Limited ('HHW'), HMRC requested the following documents and information:

- (1) a copy of the accounts for The Charcoal Grill for the year ended 5 April 2013;
- (2) a copy of any papers linking the entries in the business books and records with the figures which were shown in the accounts and the tax return for 2012-13;
- (3) an analysis of the sales figure of £324,977 for the year ended 5 April 2013;
- (4) an analysis of the cost of sales figure of £252,691 for the year ended 5 April 2013;
- (5) an analysis of drawings taken during the year ended 5 April 2013; and
- (6) details of any estimates, balancing figures or other non-vouched expenditure included within the accounts for the year ended 5 April 2013

8. On 19 November 2014, HHW wrote to HMRC enclosing or providing all the information requested.

9. On 9 December 2014, a meeting took place between HMRC and Mr Michael and HHW. At the meeting, Mr Michael answered questions and provided information about

his income and expenditure. HMRC asked Mr Michael to produce all his private bank statements for the year ended 5 April 2013 and to provide a schedule of assets and liabilities as at 5 April 2013. HMRC also asked Mr Michael to identify and explain the amount of £713 shown in his tax return as non-taxable income.

10. On 14 January 2015, HMRC wrote to HHW enclosing a note of the meeting on 9 December and a schedule setting out the further information required as follows:

- (1) a copy of all statements for any private bank accounts operated by Mr Michael in the year ended 5 April 2013;
- (2) a schedule of his assets and liabilities as at 5 April 2013;
- (3) the source of the £2,500 cash which Mr Michael used to pay for his holiday to Cyprus in January 2013 with documentary evidence if available;
- (4) the name of any person who provided Mr Michael with loans in the year ended 5 April 2013 with the dates and amounts;
- (5) the name of any person who provided Mr Michael with loans which were repaid by Mr Michael in the year ended 5 April 2013 with the dates and amounts; and
- (6) the source of the £713 shown in Mr Michael's tax return for 2012-13 as non-taxable income with an explanation of why the source of the income was considered to be non-taxable.

11. On the 11 February 2015, Aston Shaw Limited, who had succeeded HHW as Mr Michael's tax advisers, responded to HMRC's request for further information as follows:

- “1. Enclosed copies of private bank statements for the year ended 5 April 2013.
2. Enclosed schedule of Assets & Liabilities as at 5 April 2013.
3. The £2,500 cash was the cheque cashed from the business bank (I am awaiting information from previous accountant)
4. Kikis From Savoy £3000 September 2012. Mr Demetriou £4,400 (6th April 2000 to 5th April 2013) Mrs Demetriou £3,600 (6th April 2000 to 5th April 2013).
5. None
6. the source of £713 I am waiting for explanation from the previous accountant, AM confirmed to me that he does not have any other income, therefore it looks like its an error. I will inform you when I know more.”

12. On 17 February 2015, there was a meeting between HMRC and Mr Michael with Aston Shaw. HMRC said that they would still like to know how Mr Michael had financed the £4,600 balance to fund the business vehicle purchased in the year ended 5 April 2013 and whether the business rates of £3,557, which had been paid in cash, had been included in the cash account for the year. HMRC also asked Mr Michael about the source of the bank credits totalling £8,575 in the year ended 5 April 2013. Mr Michael said the source of the credits to his bank account came from a combination of borrowings from personal creditors and rent collected on behalf of his daughter for a property that she was letting. Mr Michael explained that the rent was paid into his bank

account to cover the mortgage with the Bank of Bristol which was £652.15 per month. HMRC requested further details of the rent collected. HMRC also asked if Mr Michael had been able to confirm the source of the non-taxable income of £713 shown in the return. Aston Shaw said this was a premium on the lease for the restaurant which had been incorrectly shown in the return as non-taxable income rather than as a business expense. Aston Shaw said that they would provide evidence of the lease premium to HMRC to confirm the source of the figure.

13. On 6 March 2015, HMRC wrote to Aston Shaw enclosing a note of the meeting on 17 February and a schedule of additional information and documents requested as follows:

- (1) How did Mr Michael finance the £4,600 balance to fund the business vehicle purchased in the year ended 5 April 2013?
- (2) Were the business rates of £3,557, which had been paid by cash, included in the cash account figures for the year ended 5 April 2013? If so, which figure within the cash account included the business rates paid in the year ended 5 April 2013?
- (3) Documentary evidence to confirm the source of the £3,000 loan received from Kiki's From Savoy in the year ended 5 April 2013;
- (4) documentary evidence to confirm the source of the £4,400 loan received from Mr Demetriou in the year ended 5 April 2013;
- (5) documentary evidence to confirm the source of the £3,600 loan received from Mrs Demetriou in the year ended 5 April 2013;
- (6) the rent collected on behalf of Mr Michael's daughter by Mr Michael in the year ended 5 April 2013 and how this rent was paid; and
- (7) a copy of the lease premium showing that Mr Michael incurred costs of £713 in the year ended 5 April 2013.

HMRC asked for the documents and information to be provided by 8 April 2015. HMRC did not receive any of the information or documents requested by 8 April and, on 12 May, HMRC issued an information notice to Mr Michael. The information notice requested the same information as had been contained in the schedule to the letter of 6 March 2015 except that there was no request for documentary evidence to confirm the source of the £3,600 loan received from Mrs Demetriou.

14. On 13 May 2015, Aston Shaw wrote to HMRC and enclosed all the information requested in the information notice. In relation to item 1, the letter stated:

“The £4,600 part payment of the business car addition was paid for by cash from the business, and the remainder was paid for by chq number 101136. Please note that this information was actually provided to you in a letter from [HHW] dated 19 November 2014.”

15. In relation to item 2, the letter stated that “Business rates were paid for by cash as per schedule L1 of the letter dated 19 November 2014 of [HHW]”. The letter also enclosed three letters from the lenders confirming the loans referred to in items 3, 4 and 5 of the information request in the letter dated the 17 February 2015. The letter stated that Mr Michael had collected £22,555 in rent on behalf his daughter and the amount of rent paid into his bank account during the year was £8,500 and approximately £14,055

rent was paid by Mr Michael to his daughter. The letter also enclosed a copy of the lease to which the lease premium of £713 related.

16. On 15 June 2015, HMRC wrote to Aston Shaw in response to their letter of 13 May. HMRC stated that they were satisfied that the £4,600 cash payment in part purchase of a business vehicle had been included in the cash account. HMRC said that they would proceed on the basis that cash of £3,556.88 had been introduced into the business as capital by Mr Michael. In relation to the loans, HMRC said that they would advise Aston Shaw if any further information were needed. HMRC noted in the letter that Mr Michael had paid £2,400 more rent into his account than he paid out as mortgage payments. In relation to the rent collected by Mr Michael on behalf of his daughter and the lease premium of £713, HMRC asked for the following information:

- (1) The full name and address of Mr Michael's daughter.
- (2) The full address of each property Mr Michael collected rent from on behalf of his daughter in the year ended 5 April 2013.
- (3) How rent was paid to Mr Michael in the year ended 5 April 2013 ie cash/cheque.
- (4) What date in the month rent was collected by Mr Michael for each property let by Mr Michael's daughter in the year ended 5 April 2013?
- (5) How much rent was collected per week/per month by Mr Michael for each property let by his daughter in the year ended 5 April 2013?
- (6) How and when Mr Michael passed on rent collected to his daughter in the period ended 5 April 2013?
- (7) Why Mr Michael deposited more rent in his bank account than the total mortgage payments paid to the Bank of Bristol in the year ended 5 April 2013?
- (8) Documentary evidence showing that Mr Michael had incurred costs of £713 relating to the lease premium in the year ended 5 April 2013.

17. On 18 June 2015, Mr Michael made an application to the FTT, under section 28A(4) TMA, for a direction that HMRC immediately close the enquiry into his tax return for the year ended 5 April 2013. The application form stated:

“It is our view that all information pertinent to the enquiry has been submitted to HM Revenue and Customs.

The Inspector is now attempting to widen his questioning to include information relating to our client's daughter.

The basis of the HMRC original enquiry appears to be made on incorrect mark up details and incorrect assumptions giving rise to unnecessary anxiety to our client.”

18. Aston Shaw responded to HMRC's letter of 15 June 2015 by letter dated 14 July. The letter included the following:

“We are concerned that the information requested at points 1 to 7 do not directly relate to our clients return of income nor to any income that is his but is his daughter's (please note that your letter refers to daughter but in fact Mr Michael has two daughters) and I feel it inappropriate for you to seek to extend the enquiry into his daughter's affairs. On that basis I feel

that the information requested in relation to those points is outside the scope of this enquiry. Please reconsider the request for this information and agree that it is out of your scope. We have provided you with previous information in good faith, as I felt you needed that to understand the entries in the client's personal bank statements. You now have all the information that you require, and I feel you are over stepping the mark by this request.

Lease premium. I suggest you ask one of your experts to explain the procedures in claiming premium on the granting of a lease. HMRC has a formula that is used for claiming tax relief on this, and therefore your expectation of some reference to £713 is invalid. As you know Aston Shaw were not the accountants at that point. I feel it is inappropriate to charge my client for time to explain a basic tax allowance on premiums. If you look it up under the HMRC guidance you will find the formula and be able to check if it's correct. If you still cannot work it out and you need my assistance please let me know.

For your information, I have applied to have the case closed, as this investigation has over stepped the mark for information requested, it's actually factual that the financial statements are true and fair. This case is now costing my client unreasonable costs and your further requests for information are outside your scope. If you want to discuss this further I am happy to do so, if you feel differently please refer me to the legislation that allows you to seek information for two other taxpayers. However, if you provide me with a reasonable reason why you require the information 1 - 7 I would be happy to try to obtain it for you."

Issues

19. The following issues are the only ones for us to decide in relation to this application:

- (1) Are we satisfied that HMRC have reasonable grounds for not issuing the closure notice?
- (2) If not, what period should we specify within which HMRC must issue a closure notice?

Submissions

20. Mr Taylor acknowledged that Mr Michael had co-operated in providing some information. Mr Taylor adopted, as his submission, the explanation for not closing the enquiry given by Mr Bagley in his note. Mr Taylor submitted that Mr Bagley had not been provided with sufficient documentary evidence or information to close the enquiry. He stated that HMRC are entitled to ask for the information that was requested and it is required in order to substantiate explanations provided by Mr Michael.

21. Mr Michael had received credits into his private bank account and appeared to be paying a mortgage from that bank account. Mr Michael said that the rents related to a properties let by his daughter. However, no evidence had been provided to confirm that the properties are not owned by Mr Michael. Mr Taylor submitted that, without any evidence confirming the ownership of the properties, it could not be assumed that the income from the properties belonged to Mr Michael's daughter. He said that HMRC needed the addresses of the properties in order to conduct Land Registry searches to

confirm that the rental amounts received by Mr Michael did not relate to properties owned by him and so should not be regarded as his income. He also contended that no information had been provided to show that a lease premium had been incurred by Mr Michael from which the allowance of £713 had been calculated for the 2012-13 tax return.

22. In relation to the parallel VAT enquiry into the level of takings declared by Mr Michael in relation to his restaurant business for VAT purposes, Mr Taylor stated that a VAT assessment was issued by HMRC on 29 October 2015. Mr Taylor submitted that if the level of takings at the restaurant is found to have been understated then that will have an impact on Mr Michael's 2012-13 tax return. Mr Michael has until 28 November to appeal the decision to assess him for underdeclared VAT.

23. Mr Taylor submitted that it will not be possible for HMRC to close the enquiry into Mr Michael's 2012-13 tax return based on accurate figures until the requested information and documents have been obtained. He contended that, given the number and nature of questions that remain unanswered in this case, it cannot be said, with any degree of certainty, how long enquiries may take to enable the officer to reach a conclusion.

24. Mr Michael, counsel, referred us to the decision of this Tribunal in *Bloomfield v HMRC* [2013] UK FTT 593 (TC). *Bloomfield* concerned an enquiry that lasted over three years. At [15] of the decision, the tribunal stated:

“In reaching my decision I have balanced a number of factors, including the fact that enquiry has been ongoing for a significant period of time, the co-operation of the Appellant and the queries which remain outstanding.”

25. The tribunal in *Bloomfield* directed HMRC to issue a closure notice within 30 days. Mr Michael submitted that we should adopt the same balancing exercise approach as the tribunal in *Bloomfield* and should come to the same conclusion. He submitted that the Charcoal Grill was a small business. HMRC had asked a number of questions at the beginning of the enquiry in October 2013 and Mr Michael had answered all of them frankly. The correspondence between Mr Michael's advisers and HMRC showed that the advisers were proactive and made frank disclosure of information in response to the earlier requests. The more recent requests for information by HMRC were not related to the business but at the periphery of Mr Michael's tax affairs. For example, Mr Michael had told HMRC that he had no title in any buy to let properties but HMRC requested further information about the rents and the properties. Those questions were not relevant to Mr Michael's tax position but could only be relevant to his daughter's tax liabilities.

Discussion

26. Section 28A(6) TMA requires the tribunal to direct that HMRC give a closure notice within a specified period unless HMRC can satisfy the tribunal that there are reasonable grounds for not giving such a notice within a specified period. The burden of satisfying the tribunal that a direction should not be given is on HMRC.

27. As the tribunal in *Estate 4 Ltd v HMRC* [2011] UKFTT 269 (TC), which was not cited by the parties in this case, observed

“... the test to be applied by the tribunal is whether on an objective view it is appropriate for a closure notice to be issued. This involves close scrutiny of the questions put to the taxpayer and its advisers, the information provided in response and its adequacy, and the extent to which it appears to the tribunal that further enquiry would produce information enabling the company’s corporation tax liability to be adjusted to a level differing from that shown in the return.”

All enquiries must come to an end at some point and so the focus of the issue before the Tribunal is whether, on an objective view, HMRC have reasonable grounds for not giving the closure notice immediately or within a specified period.

28. In this case, the enquiry had been started at the end of October 2014 and Mr Michael applied for a closure notice in mid-June 2015. That was a period of some eight months during which, as Mr Taylor acknowledged, Mr Michael and his advisers had co-operated until the end of the period. The later correspondence reveals that Mr Michael’s advisers felt frustrated by HMRC’s continuing requests for information. His advisers appear to have formed the view that Mr Michael had provided all the information that was necessary for HMRC to decide whether to amend Mr Michael’s tax return and close the enquiry. HMRC, on the other hand, considered that, without further information and documents, it would not be possible to close the enquiry based on accurate figures.

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. In addition, we consider that it is reasonable that HMRC should have further information about payments of rent received by Mr Michael including the addresses of the properties to which the rents relate. Providing such information would clearly not be onerous for Mr Michael and would allow HMRC to determine whether or not the rents should be regarded as his income. Requiring HMRC

to close the enquiry now would mean that they would be bound, on the evidence available to them, to amend the return to treat the rent payments as Mr Michael's income. In that situation, Mr Michael would have to appeal. If it can easily be established that the payments of rent are not his income but his daughter's then the issue of the closure notice at this stage and the making of an appeal would be a waste of everyone's time. Accordingly, we are satisfied that HMRC have reasonable grounds for not giving a closure notice now.

31. We have also considered whether we should direct that a closure notice be given within a specified period. In our view, it is not possible in this case to determine what period should be specified for closure without knowing what further information will be produced in relation to the rented property or as a result of the VAT investigation and how long will be required for that information to be considered. The inability to determine, on any objective basis, what would be an appropriate period is itself a reason for not directing that a closure notice be given within a specified period. In conclusion, we are satisfied that HMRC have reasonable grounds for not giving a closure notice within a specified period in relation to the enquiry into Mr Michael's tax return for the year ended 5 April 2013.

Decision

32. For the reasons given above, Mr Michael's application is refused.

Right to apply for permission to appeal

33. 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.

**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 19 NOVEMBER 2015