



Neutral Citation: [2023] UKFTT 33 (TC)

Case Number: TC08692

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/11253

*Income Tax - enquiry into self-assessment return - application for closure notice –
application refused*

Heard on: 5 January 2023

Judgment date: 12 January 2023

Before

TRIBUNAL JUDGE GUY BRANNAN

Between

**PAUL JOSEPH BRYAN
t/a
BRYAN & CO SOLICITORS**

Applicant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Applicant: The Applicant appeared in person

For the Respondents: Harry Robison, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Applicant, Mr Bryan, applies for a direction pursuant to section 28A Taxes Management Act 1970 (“TMA 1970”) that HMRC close an enquiry into his self-assessment returns for 2016-17 and 2017-18.
2. Mr Bryan had previously applied for such a direction in relation to the tax year 2016-17. The application was refused by Judge Cannan in a decision released on 22 May 2020, and published under reference [2020] UKFTT 239 (TC) (“the Decision”). Judge Cannan, refused permission to appeal and that refusal was upheld by the Upper Tribunal (Judge Herrington) in a decision released on 19 November 2020.
3. I should add that HMRC have also opened an enquiry into Mr Bryan’s self-assessment return for 2018-19, but this application relates only to 2016-17 and 2017-18.
4. At the hearing I announced my decision to refuse the application and this decision contains my reasons.
5. The form of the hearing was a video hearing. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. Therefore, the hearing was held in public.

EVIDENCE

6. Mr Bryan produced a witness statement. Mr Sinclair, an officer of HMRC also produced a witness statement that was originally provided for the hearing before Judge Cannan and a supplementary witness statement. He also gave oral evidence and was cross-examined by Mr Bryan. I was also provided with an electronic bundle of documents of over 600 pages.
7. In addition, HMRC provided a witness statement of Mr Michael Green, the HMRC officer with direct responsibility for handling the enquiry into Mr Bryan’s tax returns. However, a couple of days before the hearing Mr Green was taken ill and was unable to attend the hearing. At the hearing, Mr Robison, appearing for HMRC, suggested that Mr Sinclair (who was Mr Green’s manager and familiar with the enquiry) should simply adopt Mr Green’s witness statement. Mr Bryan objected to this course of action and HMRC accepted that the hearing should proceed on the basis of Mr Sinclair’s evidence. In any event, many of the points dealt with in Mr Green’s witness statement were contained in the correspondence between the parties.
8. It was common ground that the burden of proof to show that there were reasonable grounds for not issuing a closure notice lay upon HMRC.

STATUTORY PROVISIONS

9. The enquiry into Mr Bryan’s tax returns was commenced pursuant to section 9A Taxes Management Act 1970 (“TMA”), which relevantly provides:

“(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.
- (2) ...

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.”

10. An enquiry once started only comes to an end when it is completed in accordance with section 28A TMA 1970. Completion of an enquiry requires HMRC to send a “final closure notice”. An enquiry into a particular aspect of a return may also be completed by the issuing of a “partial closure notice”. Section 28A provides as follows:

“(1) This section applies in relation to an enquiry under section 9A(1) of this Act.

(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a “partial closure notice”) that the officer has completed his enquiries into that matter.

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a “final closure notice”) —

(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or

(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

(2) A partial or final closure notice must state the officer's conclusions and —

(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 partial or final closure notice takes effect when it is issued.”

BACKGROUND

11. The factual background is set out in paragraphs 2-22 of the Decision. I need not repeat the whole of that background in this decision, but incorporate those paragraphs of the Decision.

12. In summary, Mr Bryan is a solicitor in private practice. He has only one associate solicitor and no support staff.

13. The enquiry into Mr Bryan’s self-assessment tax returns for the year 2016-17 was opened under section TMA on 4 December 2018 and the enquiry for the year 2017-18 was opened on 14 January 2020.

14. As already mentioned, Mr Bryan applied for a direction that HMRC issued a closure notice and that application was refused by Judge Cannan for reasons given in the Decision.

15. The enquiry into the 2016-17 return had focused on a number of issues: the high proportion of debtors in relation to turnover, the valuation of work in progress, the non-production of statutory records, the time at which income was recognised, that depreciation had not been added back in computing Mr Bryan’s profits and the size of accountancy fees.

16. At [39]-[44] Judge Cannan considered what the position would be if HMRC issued an information notice for production of the information and documents that they were seeking pursuant to Schedule 36 FA 2008. HMRC had argued that some of the documents and information they required were statutory records. In particular, bank statements and fee notes to support opening and closing debtors. Judge Cannan said:

“40. Paragraph 1 Schedule 36 provides that an officer of HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer’s tax position.

41. Paragraph 29 Schedule 36 provides that a taxpayer can appeal against an information notice or any requirement in an information notice unless the requirement is to provide information or produce documents which form part of the taxpayer’s statutory records.

42. Paragraph 62 Schedule 36 provides that information or documents will form part of a taxpayer’s “statutory records” for present purposes if:

“ ...it is information or a document which the person is required to keep and preserve under or by virtue of -

(a) the Taxes Act, or

(b) any other enactment relating to tax.”

43. The relevant enactment relating to income tax is section 12B TMA 1970 which in so far as relevant provides that any person who may be required by section 8 to make and deliver a self-assessment return shall keep and preserve “all such records as may be requisite for the purpose of enabling him to make and deliver a correct return...”.

44. I considered the position of statutory records in the case of *Holmes & Knight v HM Revenue & Customs* [2018] UKFTT 678 (TC) where I said as follows:

“13. Once it is accepted that a document is a statutory record, Schedule 36 provides no right of appeal against an information notice requiring production of that document. The reason for that is clear. If a taxpayer is legally required by the Taxes Acts to keep and preserve a document, there is no reason for the taxpayer to resist production of the document to HMRC. In those circumstances HMRC are entitled to production of the document as a matter of course. They are not required to justify to a tribunal that the document is reasonably required in order to check the taxpayer’s tax position. The nature of the document, as one that is required to enable the taxpayer to make a correct and complete return, leads to what is in effect an irrebuttable presumption, at least as far as the tribunal is concerned, that it is reasonably required for the purposes of checking the taxpayer’s tax position.”

45. I remain of that view, although my reference to HMRC not being required to justify that a statutory record is reasonably required should not be taken in the present context as meaning that HMRC do not need to satisfy me that there are reasonable grounds for not issuing a closure notice. I must still be satisfied that HMRC have reasonable grounds not to issue a closure notice.”

17. Judge Cannan continued at [46]:

“I am satisfied on the basis of the documentary evidence before me, and on the basis of Mr Sinclair’s evidence, that HMRC have not been provided with the information and documents requested by them in their letter dated 18 April 2019 and repeated in the letter dated 14 June 2019. Those documents, subject to a point I make below in relation to client account statements, are reasonably required to check the Return. In particular, HMRC are entitled to documents that might help to reconcile the turnover figure drawn up by the applicant’s previous accountants to the fees invoiced. That is why they require the applicant’s bank statements. The bank statements are statutory records and the applicant could not object to production of such records under Schedule 36. So too are fee notes which support the opening and closing trade debtors.

HMRC are also reasonably entitled to enquire into the relationship between trade debtors and turnover in order to check the accuracy of the Return.”

18. Finally, Judge Cannan said at [47]:

“47. The applicant also submitted that the enquiry was oppressive and disproportionate. In particular, that it was wrong for HMRC to expand the enquiry to include depreciation and accountancy costs. HMRC have acknowledged that Mr Green ought to have expressly told the applicant that he was widening the enquiry and why that was the case. He did not do so until his letters dated 18 April 2019 and 14 June 2019. In my view Mr Green was reasonably entitled to extend the enquiry because he took a different view to Mr Siddique of certain matters. There may be cases where personnel changes at HMRC take place, and different officers take a different view to their predecessors as to an enquiry or aspects of an enquiry. Such changes are to some extent inevitable, and HMRC should ensure that proper respect is paid by officers to the approach of predecessors. Enquiries can present a significant burden to taxpayers and any disruption to an enquiry caused by personnel changed should be kept to a minimum. Enquiries must not be conducted in a way which is unreasonable, disproportionate or oppressive. In those cases, the Tribunal has power on applications such as this to direct a partial or final closure notice. However, the present case is not such a case. I do not consider it was unreasonable for Mr Green to extend the enquiry to cover depreciation and accountancy costs.”

19. Judge Cannan was, therefore, satisfied that there were reasonable grounds for HMRC not to issue a partial or final closure notice he considered that HMRC are reasonably entitled to see the information and documents they had requested (save that he reserved his position in relation to client bank accounts) was before closing the enquiry. Judge Cannan considered that bank accounts and fee notes issued by Mr Bryan were statutory records which HMRC were entitled to have produced. He, therefore, refused the application.

20. Immediately after the hearing before Judge Cannan, Mr Bryan and Mr Sinclair had a discussion in the hearing room. They were the only persons present. That discussion led Mr Bryan to complain to HMRC about Mr Sinclair’s behaviour, which he described as rude, verbally aggressive and contemptuous. Mr Sinclair denied the allegations made by Mr Bryan. Those allegations were investigated by HMRC’s complaints procedure and Mr Bryan’s complaint was rejected. I mention this episode because part of Mr Bryan’s submissions and evidence consisted of a complaint about Mr Sinclair’s behaviour and the manner in which the enquiry was conducted, a manner which he considered to be oppressive, disproportionate and unreasonable.

21. Mr Robison challenged those parts of Mr Bryan’s notice of appeal and witness statement dealing with this conversation. He submitted that Mr Bryan’s assertions as to what took place between him and Mr Sinclair after the hearing before Judge Cannan simply constituted a complaint or a criticism of HMRC’s conduct which, as Judge Herrington observed at [25] in refusing permission to appeal against the Decision, were not matters which fell within the jurisdiction of this Tribunal or the Upper Tribunal.

22. From the evidence before me, Mr Bryan has, since the hearing before Judge Cannan, produced the following further documents and information:

- (1) Business bank statements for 2016-17
- (2) Cheque counterfoils and paying in books for 2016-17
- (3) Invoices in respect of his accountancy fees for 2016-17 and 2017-18

- (4) Invoices in respect of utilities for 2016-17
 - (5) Invoices in respect of other sundry expenses including advertising, office expenses, telephones and internet for 2016-17
 - (6) A breakdown of his drawings for 2017-18
 - (7) A breakdown of dividends received for 2017-18
 - (8) A number of redacted fee notes relating to 2016-17
 - (9) An extract from Mr Bryan's debtor's control account from 2017-18,
 - (10) A summary of Mr Bryan's monthly "day books" and other figures showing how his 2017-18 turnover was calculated.
23. On 17 August 2021, HMRC issued two information notices under paragraph 1 Schedule 36 Finance Act 2008 covering, respectively, the tax years 2016-17 and 2017-18.
24. In relation to 2016-17, the information notice required the production of
- (1) Fee bills in support of the opening unpaid invoices and disbursements of £98,747 as of 6 April 2016.
 - (2) Fee bills in support of the closing unpaid invoices and disbursements of £88,098 as of 5 April 2017.
25. The accompanying letter from HMRC dated 17 August 2021 explained why HMRC needed this information:
- "I need a list of your debtors for the following reasons:
- Your opening unpaid invoices for 2016 will inform your 2017 return – it would be not be possible to accurately calculate your 2017 turnover without this information
 - Your bank statements show a deposit of £50,307.32 on 22 April 2016. This doesn't correspond to any of the fee bills that you have sent me for 2017. This may relate to a debt from the 2016 tax year, but I cannot confirm this without the fee bills I have requested.
 - As I have previously explained, I am concerned about the debtor figure in comparison to your turnover. It also appears that some payments are not in line with your 30 day payment terms stated on your fee bills.
- Clearly these are vital documents which are needed to submit a complete and correct tax return and are statutory in nature, and I require them to complete my enquiry."
26. As regards the information notice in relation to 2017-18, the following information was required:
- (1) Please state precisely how SA business turnover of £132,401 was arrived at and supply a copy of any supporting sales reconciliation.
 - (2) Please provide a breakdown and analysis of any trade creditors as of 5 April 2018.
 - (3) Please provide a figure for Stock and Work In Progress as of 5 April 2018, and provide the valuation method used to determine this figure.
 - (4) Please provide a breakdown and analysis of any trade debtors at 5 April 2018 with supporting fee bills

(5) Please note that all information and documents relate to Year Ending 5 April 2018 unless otherwise stated.

27. At the hearing, Mr Robison confirmed that Mr Bryan had supplied the information at paragraph 26(1) but noted that the information supplied gave rise to further questions. Mr Robison confirmed that Mr Bryan had supplied the information requested in paragraph 26(3).

28. The accompanying letter from HMRC dated 17 August 2021 also explained why HMRC required this information:

“• I still require to establish precisely how your SA turnover was arrived at. I am sorry, but your explanation is not satisfactory. You have stated that the figure was produced by your accountants without giving any information as to their methodology or even as to what information they were provided with. This does not help me further my enquiry and it does not fulfil the request that I put to you and you have provided no supporting sales reconciliation on this point. A sales reconciliation is vital to produce any accounts and is certainly a record keeping requirement. It is crucial to my enquiry that I can establish how this turnover figure was arrived at, and it is your responsibility to keep the statutory records to support this figure.

• Thank you for providing a breakdown of the trade creditors as of 5 April 2018. You have not provided any supporting documentation for this breakdown, so I am requesting this now.

• I require a figure for Stock and Work In Progress as of 5 April 2018, and I need to understand the valuation method used to determine this figure. – You have not adequately explained why or how this valuation method was used or determined. I would also note that in your 2017 return, your explanation was that this figure was simply a % estimate of your employee’s salary and came to £8,500. This figure has very clearly changed for your 2018 SA return, and I need to know why it has changed, the reasoning for the change and the method behind the change in order to complete my enquiries.

• Please provide a breakdown and analysis of any trade debtors at 5 April 2018 with supporting fee bills. As with the fee bill requests of 2017, these are vital when examining a tax return. They are statutory documents which I need to complete my enquiry.”

29. Mr Bryan said that every penny piece he received went through his firm’s books. He explained that his firm held client monies and, therefore, had to maintain client ledger cards which were subject to an independent audit by appropriately qualified accountants every year. They prepared a written report for the Solicitors Regulation Authority (“SRA”). These audits were, Mr Bryan said, very thorough. The reports had all been unqualified. The client ledger cards had all been audited and reported on to the SRA accordingly.

30. Mr Bryan said that he maintained client ledger cards on a real time basis and updated them according to the state of play of the case. This was, he said, effectively live balance accounting. To produce year end debtors balances plus disbursements required an accounting exercise across all the cards. The accountants came in and did that alongside auditing the cards. The accountants also produced a debtors ledger control account. In order for them to be able to do that, Mr Bryan needed to record all fee notes raised, monies received, disbursements laid out and subsequently recovered in each and every year. The accountants were then able, as Mr Bryan put it, to work their accounting techniques and balance the debtor's ledger control account for accounts purposes. Mr Bryan said that how the accountants did this “...is beyond me. I record accurately the ins and outs, and they do the rest.” There was no debtors ledger

control account in Mr Bryan's records – that was the accountants doing the work and was an overall control account for the global balance.

31. Mr Bryan mentioned that sometimes clients did not pay their bills. He did not have sufficient time always to chase bad debts.

32. Mr Bryan was, he said, very much in the hands of his accountants to produce his year end accounts. He said that he had to think to himself “invoices raised before the year end unpaid actually on the year end date” to understand the figures. On a day-to-day basis his debtors were, he said, simply quite low – about a dozen unpaid invoices at most times.

33. Mr Bryan emphasised that he carried on a small practice with no support staff other than his assistant solicitor. The pressures of work were very considerable.

34. In his evidence Mr Sinclair said that he had approved the issue of the Schedule 36 information notices because HMRC were unable to complete their checks into Mr Bryan's tax returns. Mr Bryan, he said, had failed to comply in full with the Schedule 36 notices and the outstanding information was crucial to enable HMRC to check that the tax returns were accurate. The outstanding information included an analysis and documentation as regards trade debtors and the high ratio of closing debtors to turnover. Without access to an analysis of debtors and fee notes HMRC were not in a position to bring their enquiries into Mr Bryan's tax returns for the year 2016-17 and 2017-18 to a close.

35. Mr Sinclair drew attention to a statement by Mr Bryan in his letter of 9 September 2021 (at paragraphs 52 and 53) which read as follows:

“[52]The calculation of turnover is as follows: [53] minus opening debtors, minus opening wip, plus fee notes in the year, plus closing wip, *plus closing debtors* = turnover.” (Emphasis added)

36. Mr Sinclair noted that Mr Bryan had produced a sales reconciliation for the year ended 31 March 2018 but that reconciliation contain no information as regards debtors.

37. Mr Sinclair noted that HMRC had already identified some inaccuracies in Mr Bryan's returns. For example, in relation to the 2016-17 return it was common ground that depreciation had incorrectly not been added back in calculating Mr Bryan's profits. In addition, in relation to the 2017-18 return there had been a failure to include the Higher Income Child Benefit Charge.

38. Consequently, Mr Sinclair considered that HMRC's information requests were reasonable and that HMRC had reasonable grounds for continuing the enquiry.

DISCUSSION

39. For reasons similar to those given by Judge Cannan in the Decision, I consider that I should dismiss this application.

40. The much of the information and documents (e.g. fee notes) requested by HMRC in order to complete their check into Mr Bryan's tax returns are statutory records, as explained by Judge Cannan at [43]-[44] of the Decision. I am satisfied that HMRC are entitled to see these records and Mr Bryan was not entitled to withhold them. To the extent that the information and documents requested by HMRC are not statutory records, I consider that they are reasonably necessary to enable HMRC to check Mr Bryan's tax returns for 2016-17 and 2017-18. Like Judge Cannan, I consider, for example, that HMRC are entitled to enquire into the relationship between debtors and turnover and the way in which turnover was calculated.

41. At the hearing Mr Bryan accepted that he could produce any outstanding bank statements and fee bills, although he anticipated some difficulty in producing information relating to debtors.

42. In his witness statement, Mr Bryan objected to producing fee bills, which are undoubtedly statutory records, on the basis that they were protected by legal professional privilege (“LPP”). HMRC have, however, made it clear that they not seeking privileged material and are content for Mr Bryan to produce redacted copies of fee bills. It seems to me that it is perfectly possible for Mr Bryan to produce redacted fee bills without infringing his professional obligations in relation to LPP.

43. Mr Bryan argued that HMRC’s enquiry into his tax affairs was unreasonable, disproportionate and oppressive. I sympathise with Mr Bryan who finds himself running a busy practice with no support staff (save for his one assistant solicitor) whilst at the same time having to deal with HMRC’s detailed queries. Nonetheless, HMRC are entitled to enquire into a taxpayer’s self-assessment tax returns and to obtain relevant information in order to check the accuracy of those returns. I do not consider HMRC’s conduct to be oppressive or unreasonable nor do I find the scope of their enquiries to be disproportionate, even bearing in mind the allegations concerning the meeting in the hearing room after the hearing before Judge Cannan.

44. I recognise that the relationship between Mr Bryan and Mr Sinclair is strained and, as Judge Herrington observed, HMRC’s earlier failings have caused a degree of resentment on Mr Bryan’s part. I trust that HMRC will bear this in mind as regards staffing and the scope of their demands as they continue their enquiries and, bearing in mind the relatively small amounts of tax at stake, will seek to bring these enquiries to a swift conclusion once Mr Bryan has produced the required information and documents.

CONCLUSION AND COMMENTS

45. Accordingly, as I stated at the conclusion of the hearing, I am satisfied that there are reasonable grounds for HMRC not to issue a partial or final closure notice and that this application must be refused.

46. Finally, I should add that it would have been more helpful in cases like this if HMRC had clearly identified to the Tribunal the information/documents which had already been supplied (and in respect of which tax years) and which information/documents were outstanding and which they required and for what reasons. As it was, it was necessary to attempt to piece together this picture from the fragmentary nature of the correspondence, witness statements and oral evidence.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

**GUY BRANNAN
TRIBUNAL JUDGE**

Release date: 12th JANUARY 2023