



TC03159

Appeal number: TC/2013/03698

Closure notice application – section 28A TMA 1970 – delays attributable to both sides – whether substantial issues outstanding – period allowed for enquiry

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ASSAN KHAN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR SIMON BIRD**

**Sitting in public at Eastgate House, Newport Road, Cardiff on 26 November
2013**

The taxpayer in person

Ms G Millward, presenting officer, for Her Majesty's Revenue & Customs

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DECISION

Introduction

5 1 This is an application by the taxpayer, Mr Assan Khan, for a closure notice to be
issued by the tribunal pursuant to section 28A of the Taxes Management Act 1970 in
respect of an enquiry into Mr Khan's 2009-10 self-assessment return, opened on 15
June 2011. In addition to the documentary evidence prepared by the Revenue (in an
incomplete bundle, not assembled in chronological order), we received sworn
10 evidence from Mr Khan and Mr Steven Lazenby, who was the case officer for much
of the enquiry so far. We find the following facts.

Facts

2 Mr Khan's 2009-10 return was filed online on 26 January 2011 and disclosed that
Mr Khan's business was "accountancy, admin, tax". Mr Khan's turnover in that
15 business was given as £11,300 and net profit £3,598; total rents from properties let
amounted to £335,820. The enquiry was opened on 15 June 2011 by Mr S Davies
with a request, in respect of the accountancy business, for sales computations, a
breakdown of expenses and an analysis of drawings; and in regard to property
lettings, a list of the properties let, dates of acquisition and sources of funding,
20 together with an analysis of expenditure claimed as a deduction against rents. A
deadline of 18 July 2011 was stated, and by agreement was extended to 20 August
2011.

3 On 18 August 2011, Mr Khan says that he delivered the originals of the documents
requested to Cardiff tax enquiry office at Llanishen; he was given no receipt for the
25 documents and Mr Lazenby testified that it was HMRC's policy not to give such
receipts, even if they were requested. Mr Lazenby was unable to give a reason for
this policy and there was no evidence that the tax office even kept a record for
themselves of what had been handed in. The documents did not reach Mr Davies's
office in Swansea and an extensive search for them was undertaken, without success.
30 (Eventually, on 30 August, Mr Davies apologised for the resulting inconvenience to
Mr Khan and said that he hoped that copies had been retained and could be sent to
him.)

4 In failing to give any acknowledgement of their delivery, let alone a full receipt for
the taxpayer's papers, or to produce any record of papers handed in, HMRC have
35 deprived themselves and everyone else of a simple and straightforward means of
verifying the facts. Mr Khan has said on oath that he delivered documents and we
consider it more likely than not that he did in fact do so. It is not probable that Mr
Khan would have pretended to deliver documents when, if he had not done so, the
fact could easily have been established in what he would have expected to be a
40 competently run administration. We find, on the balance of probabilities that a bundle
of documents was delivered to the Cardiff tax enquiry office on 18 August, but we are
not able to determine what it contained.

5 On 22 August Mr Davies issued a formal Notice under paragraph 1 of Schedule 36
to the Finance Act 2008 which (we do not have the schedule to the notice) appears to

require the production of the documents originally requested by 24 September; failure to comply with it would entail a penalty of £300, and possible daily penalties of up to £60.

5 6 On 18 September 2011 Mr Khan wrote to Mr Davies objecting to the scope of the
latter's requests, which suggests that the papers delivered had not covered everything
which had been demanded. Mr Khan's letter of 18 September was taken on board and
the case was reviewed internally, with the information request being re-issued more
narrowly expressed on 3 October 2011. There was no response to this, and a second
10 formal Notice under Schedule 36 was issued on 4 November 2011 with a deadline of
6 December. A warning that penalties were being incurred was issued to Mr Khan on
14 December and he was requested to comply by 31 December 2011. Again, there
was no response and a penalty of £300 was awarded on 17 January 2012. There was
still no response and on 20 February 2012 Mr Davies wrote to Mr Khan informing
15 him that the daily £10 penalties now amounted to £1,050, in addition to the £300
penalty.

7 By April 2012, a reorganisation had taken place and Mr Lazenby had become the
case officer; he wrote on 2 April to say that if he did not receive a response within 30
days he would issue a closure notice in respect of the 2009-10 enquiry and discovery
assessments for the years 2005-06, 2006-07, 2008-09 and 2010-11. Mr Lazenby in
20 that letter indicated the amounts in which he was minded to issue the assessments and
the total tax that would thereby become due. On 23 April, Mr Khan told Mr Lazenby
that his mother was suffering from cancer and that he needed more time to provide the
information sought, and the deadline was therefore extended to 6 June 2012.

8 On 23 April 2012, Mr Khan at last responded to the Revenue's requests for
25 information in a telephone call to Mr Lazenby promising to email bank statements to
him. They did not come, and Mr Lazenby wrote on 2 May 2012 recording that they
had agreed a final deadline of 6 June 2012 to produce the outstanding information; Mr
Lazenby said that in default he would issue the assessments canvassed in his letter of
2 April. In fact, Mr Khan had sent the bank statements by post with a letter dated 1
30 May and on 21 May Mr Lazenby raised queries on them, in what he himself described
as "a long and detailed letter", and asked for replies by 25 June 2012. There was no
response, and on 27 June Mr Lazenby issued his requests for information as a formal
Schedule 36 Notice, with a deadline of 28 July 2012.

9 In July of 2012, Mr Lazenby was promoted and all his cases were passed to his
35 senior manager, following which Mr Khan's file was reallocated to a Mr A Wilson.
Meanwhile, Mr Khan had on 14 July requested a Revenue review of the Schedule 36
Notice issued on 27 June.

10 On 10 August Mr Khan wrote again with detailed replies to the information
requests, but complaining that "the documents that you have requested are
40 unnecessary, old and burdensome" and requesting that the Notice be amended to
"ensure that its scope is no longer excessive and burdensome and relates to statutory
documents"; he added that he was experiencing serious health problems and was
currently awaiting an operation for a disc replacement. Nevertheless, this letter
answered 11 specific questions and enclosed mortgage and bank statements from

Barclays and Coventry banks. Mr Khan's letter of 10 August was in fact received by Mr Wilson, following the reallocation of the case file and they spoke subsequently by telephone.

5 11 Mr Wilson wrote on 19 October 2012 apologising for the delay in taking the case
up again and indicating that Mr Khan's request for a review of the Schedule 36 Notice
issued on 27 June could not be found; in the circumstances, Mr Wilson said he
confirmed that Mr Khan had now "fully complied with the information and document
10 requests made in the information notice issued on 27 June 2012" and that the penalty
of £1,050 for non-compliance with it was accordingly cancelled. Mr Wilson,
however, asked for more information about mortgage interest claimed against Mr
Khan's property income and suggested a meeting to discuss property interest and
other property payments.

12 It is not clear what happened next, because there is a letter from Mr Khan dated 26
15 October 2012 to Mr Wilson complaining that he had not responded to Mr Khan and
that Mr Wilson had "only responded today due to my subsequent telephone calls,
chasing up conclusion of the enquiry"; what that response consisted of we do not
know. Mr Khan explained further details regarding his mortgage interest payments
and asked for a detailed breakdown of the loan interest Mr Wilson had calculated so
20 that he could reconcile it back to his tax return. Mr Khan's letter ended:-

Finally, I would be grateful if you would issue a closure notice given that
this enquiry has no direction and [has] been running for over 18 months. I
am fully aware that your team are under severe pressure to obtain a yield, to
ensure that you meet your ongoing performance targets.

25 13 In May 2013, after another internal reorganisation, Mr Lazenby returned as case
officer and wrote to Mr Khan on 17 May 2013 that he was disappointed that Mr Khan
had not responded to Mr Wilson's letter back on 19 October 2012. We cannot
reconcile this with the existence and contents of Mr Khan's letter of 26 October 2012,
to which there was no reply from the Revenue. At all events, Mr Lazenby's letter of
30 17 May reiterated the concern previously expressed about Mr Khan's mortgage
interest claims and proposed a meeting to sort them out. Bizarrely, in the light of Mr
Wilson's letter of 19 October 2012, Mr Lazenby continued:-

I must also point out that it is still the case that the request for documents
and information issued by me on 21 May 2012, with a formal notice issued
35 on 27 June 2012, has still not been fully complied with.

14 It is difficult to avoid the conclusion that the Revenue's administration was at
fault, since Mr Lazenby's letter showed no knowledge of Mr Khan's response of 26
October 2012 and did not refer to Mr Wilson's acceptance that Mr Khan had
complied with the 27 June 2012 Schedule 36 Notice.

40 15 However that may be, Mr Lazenby was determined to press ahead and made it
clear that he rejected Mr Khan's request for a closure notice, saying:-

You are practising as an accountant and, indeed, my review confirms that you pay subscriptions to the Association of Chartered Public Accountants. This, in my view, means that you are far better and adequately qualified to deal with enquiry issues than a “typical” unrepresented taxpayer.

5

My review of your 2009-10 tax return, and the limited documents you have provided thus far, lead me to the conclusion that there are a number of issues which HMRC is legitimately entitled to query and explore in order to come to a decision regarding the completeness and correctness of the return filed by you.

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16 Mr Lazenby then listed ten specific issues he wished to explore (including transactions and expenditure in Cyprus and Ireland), which he said was “a summary of the many issues that require addressing”; he proposed a meeting with Mr Khan and requested a response by 3 June 2013, in the absence of which he intended to issue protective amendments to self assessments (sic) filed by Mr Khan – the plural suggesting that he was looking at matters outside the year of enquiry as well.

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17 Shortly after the deadline, Mr Lazenby wrote again on 11 June 2013 to say that he had received notification that an application had been made to the tribunal for a closure notice to be issued. Mr Lazenby referred to his letter of 17 May and said: “I do not, in this letter, propose repeating those concerns, but would inform you that the purpose of such enquiries is to satisfy ourselves that the tax returns filed by you are complete and correct in all regards”. This letter of 11 June from Mr Lazenby was not in the bundle provided by the Revenue and it was produced by Mr Khan at the hearing.

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18 Mr Khan alleged that the letter had been omitted deliberately, since it contained an admission that Mr Lazenby was effectively determined to drill down to every last detail – the significance of which will be seen when we come to review the authorities. Mr Lazenby denied that the omission was deliberate. We make no finding on the allegation, but note that the absence of the letter from the bundle appears to be a further instance of poor administration occurring.

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19 On 1 July, a complaints officer, Mr D Thomas, wrote to Mr Khan apologising for the delay between 19 October 2012 and 17 May 2013 and saying that there was no record of Mr Khan’s letter of 26 October 2012 to Mr Wilson. Mr Thomas went on to say Mr Wilson had been incorrect to tell Mr Khan that he had fully complied with the Schedule 36 Notice issued on 27 June 2012, and he indicated that if necessary a further such notice would be issued. Mr Lazenby followed this up with a letter on 4 July saying that since there was evidently to be no meeting as he had requested he was setting out in two schedules the outstanding matters on which he sought information from Mr Khan.

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20 As no response was received, Mr Lazenby issued the two schedules as a Schedule 36 Notice on 2 September, and Mr Khan lodged a request for a review of it on 27 September. Mr Khan reiterated that his health was deteriorating and concluded:-

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Finally, I would be grateful if you could review and amend your notice request to ensure that its scope is reasonable, no longer excessive, costly, burdensome and relates to statutory documents only.

5 21 At the time of the hearing, the internal review was still pending and Ms Millward invited us to consider adjourning the appeal until the outcome of the review. We decided, in view of the fact that Mr Khan had for over a year been urging closure of the enquiry, that it was right to hear and determined the appeal without further delay.

10 22 Mr Lazenby told us that, although he had twice indicated that he would issue protective assessments or amendments – and had even specified the amounts they would contain – he did not do so because he believed that there was much more to be discovered, or at least to be investigated. The figures he had specified on 2 April 2012 were “pre-estimates”, or “informed estimates”, and Mr Lazenby now considered that they would have been insufficient, though he could not say by how much. In
15 support of his continued concern about Mr Khan’s affairs, Mr Lazenby said that he believed that taxpayer had business interest in Ireland and Cyprus which had not been disclosed and that there were at least ten further bank accounts in addition to those so far disclosed.

20 23 For 2009-10, Mr Lazenby believed that bank deposits amounted to £66,644 more than shown on Mr Khan’s return; the property shown as Mr Khan’s principal place of residence in Cardiff now appeared to be let; the mortgage statements produced were not clear as to the individual properties to which they related; it was far from clear how Mr Khan’s large portfolio of properties had been funded; Mr Khan had consistently refused to meet to try and resolve these uncertainties and had disclosed
25 the minimum of information after persistent delays. Mr Lazenby added that if, due to bank statements being unavailable since the mishaps on 18 August 2012, Mr Khan had requested it the Revenue would at their own expense have bespoken replacement documents direct from the banks in question; but Mr Lazenby claimed that no such concern about the expense of obtaining duplicates had been expressed.

30 24 Mr Khan for his part, complained that the Revenue’s enquiry had been seriously inefficient and had put him to unnecessary trouble and stress: five officers in succession had been involved; the deadlines were unrealistically short; the amount of work needed to comply with them was excessive; and it was also unnecessary because the Revenue could have worked out the answers to their questions themselves with
35 the information they had and it was not correct to say that the Revenue had done “extensive work” themselves; moreover, it was not feasible to apportion every cost to a particular property; questions relating to personal income were not relevant to the enquiry; Mr Khan’s bank statements disclosed to the Revenue showed that, far from having a sizeable undeclared income, he was in financial difficulties as demonstrated
40 by having direct debits returned.

25 In relation to Revenue enquiries about his principal place of residence, this was only in Mr Khan’s view relevant if he made a claim for relief for capital gains tax, which was not in point; in the context of income tax, the enquiry amounted to a

breach of his right to privacy under article 8 of the European Convention on Human Rights. The same applied to requests for his credit card statements for business or personal use. In sum, the enquiry had had no direction, was going on too long and sought information which was irrelevant to the determination needed.

5 26 In conclusion of the evidence, although this is not an appeal against the Schedule
36 Notice presently under review, we summarise the information sought in it because
it represents where the enquiry stands at the time of the hearing. It requested:-

- 1 All business records, invoices or receipts for the year under enquiry.
- 2 Bank account paying-in books.
- 10 3 Rent books and tenant contracts for each property let and tenancy.
- 4 Credit card statements (those that are funding business expenditure).
- 5 An analysis of drawings for the year under enquiry.
- 6 Confirmation, in the form of a report, as to all business interest held by you
in the year under enquiry.
- 15 7 A report detailing income from letting and expenditure claimed, split into
each property let during the year, and the full address of each property let.
- 8 All credit card statements, whether for business or personal use.
- 9 Statements for all bank or building society accounts held in your name, or
for which you have control, extant during the year under enquiry.
- 20 10 Documentary evidence to support the transactions with Marfin Popular
bank and Gap Vassilopoulous, with a full explanation of the nature of these
transactions.
- 11 The originals of mortgage statements for the year under enquiry provided
by the relevant financial institutions.
- 25 12 Computerised records to be made available for analysis or site inspection.

This was followed by 24 specific detailed enquiries arising out of the information
already provided.

Legislation

30 27 The legislation relevant to this case is in two sections of the Taxes Management
Act 1970 which, so far as relevant, provide:-

9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or
35 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.

(4) An enquiry extends to—

(a) anything contained in the return, or required to be contained in the
40 return, including any claim or election included in the return,

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.

28 We were referred to a number of first instance examples of the application of these criteria, but the authority of most assistance was the decision of the Supreme Court in *Tower McCashback LLP 1 & anor. v RCC* [2011] STC 143. That case was concerned with an appeal against a closure notice issued by the Revenue but their Lordships made observations material to closure notice cases generally. The case was complex, both in regard to its facts and to the law applicable to them and the taxpayers, who were being advised by leading accountants, had pressed hard for the enquiry to be concluded. They had written:-

The repayments claimed by a number of partners are currently being withheld and in these circumstances the partnerships generally are anxious to ensure that your enquiries are settled without delay. In these circumstances I have to inform you that if we do not receive either confirmation that you can now agree the amounts claimed in the partners' returns or a detailed explanation of your reasons for not doing so by 20 June 2006, we will apply to the [tribunal] for a directive under section 28A(4) TMA 1970.

29 At [13], Lord Walker observed in regard to this:-

In the event [the inspector], after one more letter from [the accountants], did issue a closure notice on 20 June 2006. A great deal of expensive legal argument might have been avoided if [the inspector] had stood his ground and insisted that he needed more time to consider the matter.

30 And at [15], Lord Walker approved the statement of Henderson J below that:-

There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the [tribunal] in exercise of their statutory functions to have regard to that public interest.

31 The aspect of the decision, however, on which the taxpayer in this case relies derives from the finding in *Tower McCashback* that an appeal tribunal was not precluded from entertaining arguments on issues not stated in a closure notice. Thus, Lord Walker concluded, at [18]:-

5 In issuing a closure notice an officer is performing an important public
function in which fairness to the taxpayer must be matched by a proper
regard for the public interest in the recovery of the full amount of tax
payable. In a case in which it is clear that only a single, specific point is in
10 issue, that point should be identified in the closure notice. But if, as in the
present case, the facts are complicated and have not been fully investigated,
and if their analysis is controversial, the public interest may require the
notice to be expressed in more general terms. As both Henderson J and the
Court of Appeal observed, unfairness to the taxpayer can be avoided by
proper case management during the course of the appeal. Similarly Dr Avery
15 Jones observed in *D'Arcy* [2006] STC (SCD) 543, para 13:

It seems to me inherent in the appeal system that the tribunal
must form its own view on the law without being restricted to
what the Revenue state in their conclusion or the taxpayer states
in the notice of appeal. It follows that either party can (and in
20 practice frequently does) change their legal arguments. Clearly
any such change of argument must not ambush the taxpayer and
it is the job of the [tribunal] hearing the appeal to prevent this
by case management.

32 From this passage, comment published in *Taxation* on 27 May 2011 concluded that
25 it would be more difficult for the Revenue to use the argument that they have not
pursued every line of enquiry to the end to prevent a closure notice being issued. Mr
Khan has adopted this comment as his submission in the appeal and we therefore cite
the relevant part of it (from page 23 of the issue we refer to):-

30 Because the Supreme Court has confirmed that the tribunals are not limited
by the precise wording of a closure notice when hearing an appeal, it will be
harder for HMRC to contend that there are reasonable grounds for keeping
the enquiry open, because the officer has not pursued to the end every line of
enquiry or investigation. Accordingly, it should now be easier to obtain
closure notices.

35 33 Thus, Mr Khan's case is that what Mr Lazenby is trying to do is to conduct a
totally exhaustive investigation into every aspect of his affairs to ensure that the tax
shown due on his return is correct to the last penny and, moreover, is now going even
further in pursuing avenues of enquiry that are essentially speculative.

40 34 For the Revenue, it was submitted that there are substantial matters of concern in
relation to Mr Khan's affairs outstanding and requiring explanation; that the
chronology shows that Mr Khan had for the most part failed to cooperate with the
enquiry and that, where he had responded, he had done the minimum possible by way
of disclosure and explanation.

Conclusions

45 35 Section 28A(6) makes it clear, as Ms Millward accepted, that the burden of proof
in this application is effectively on the Revenue to show that it is reasonable for them

to continue the enquiry without restriction. The taxpayer is evidently in a substantial way of business, with a portfolio of 22 properties and gross rental income from them of £335,000, and he is also a practising accountant – albeit that his practice appears to be very limited in its size.

5 36 But Mr Khan has the skills and available resources to produce orderly and accessible records of his business undertakings, so that compliance with the information requests made would not therefore be burdensome. In that context, we are satisfied that Mr Khan’s disclosures or responses to the Revenue’s requests and notices have frequently not been adequate or timely. Moreover, the matters described
10 in the main list at paragraph 26 above are in broad terms ones which it is reasonable for the Revenue to require, though the manner in which the information is requested – for example, in two cases by way of ‘reports’ – may be unnecessarily formal. That such a list of information could still be requested two years after the enquiry began indicates how little real progress has been made.

15 37 It must be said, however, that the fact that the enquiry has now lasted some two and a half years, and has yet reached no conclusion, is in part attributable to poor administration by the Revenue and the probable mishandling of the taxpayer’s documents. An enquiry of this nature ought to be capable of being completed within two years, and the tribunal must guard against it becoming a fishing expedition by the
20 Revenue in the hope of justifying the time already spent. That said, it is also the tribunal’s task to safeguard the public interest in the payment of the correct amount of tax, which involves detailed calculations and enquiries being undertaken.

25 38 On the one hand, the Revenue must not be constrained to close an enquiry when there is genuinely significant information which needs to be provided but, on the other hand, there is unlikely to be any ultimate prejudice to the public interest in placing a reasonable limit on the extent of the enquiry, since in any eventual amendment to his self-assessment return the taxpayer has an unrestricted right of appeal in regard to everything relevant to the year under enquiry, and he bears the burden of displacing the Revenue’s assessment.

30 39 Our conclusion therefore is that nine months from the date of this decision is fully adequate for the enquiry to be concluded properly, and puts a longstop limit on the total time for which the taxpayer is required to continue dealing with it, and we so direct.

Appeal rights

35 40 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no later than 56 days after this decision is sent to that party. The parties are referred to
40 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE
RELEASE DATE: 19 December 2013

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