[2015] UKFTT 139 (TC)

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TC04342

Appeal numbers: TC/2014/05257 & TC/2014/06553

INCOME TAX –appeals against Schedule 36 Notices – whether to stay the case – whether appeals made to HMRC – what are statutory records – whether burden of proof is on HMRC – Schedule 36 Notices varied – closure notice applications – whether HMRC has reasonable grounds for not issuing closure notices – held, yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOSHY MATHEW **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MS HELEN MYERSCOUGH

Sitting in public at the Royal Courts of Justice, Strand, London on 5 February 2015

Mr James Onalaja of Counsel, instructed by and acting for Mr Mathew.

Mrs Yeeni Naylor and Ms Harry Jones of HM Revenue & Customs Appeals and Reviews Unit for the Respondents.

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DECISION

Introduction

1. HM Revenue & Customs ("HMRC") opened enquiries into Mr Mathew's self-assessment ("SA") returns for the five years 2008-09 through to 2012-13 ("the relevant years"). They also issued two Notices under Finance Act 2008, Schedule 36 ("Sch 36").

2. Mr Mathew applied to the Tribunal, asking it to issue a direction that HMRC close all enquiries forthwith. He also notified appeals to the Tribunal against the Sch 36 Notices.

3. The issues in the case were:

   (1) whether the case should be stayed pending the preliminary hearing which is to be listed for *Gold Nuts Limited and others v HMRC*; and if not

   (2) whether Mr Mathew had appealed the Sch 36 Notices to HMRC as required by Sch 36, para 32;

   (3) if so, whether the Tribunal should confirm, vary or set aside the Sch 36 Notices; and

   (4) whether the Tribunal should issue a direction that HMRC close one or more of the SA enquiries.

4. Although Mr Mathew had been issued with a £300 penalty for non-compliance with one of the Sch 36 Notices, Mr Onalaja confirmed that this had not been appealed and was not before the Tribunal.

Summary of decision

5. The Tribunal decided that the case should not be stayed, for the reasons given at §35ff.

6. As explained at §43ff, the Sch 36 Notices had not been appealed to HMRC; however, HMRC exercised their discretion to accept a late appeal and the Tribunal dispensed with the strict notification requirements.

7. The Tribunal decided to vary the Sch 36 Notices and for ease of reference have set out the Notices (as varied) at Appendix 1. We direct that Mr Mathew comply with Notices, as varied, by 30 days from the date of issue of this decision.

8. We also decided that there were reasonable grounds for not directing HMRC to close the SA enquiries within a specified period. .

The legislation and the evidence

9. The relevant legislation is set out as Appendix 2 to this decision.

10. The Tribunal was provided with a Bundle of documents prepared by HMRC, which included:

(1) the correspondence between the parties, including various documents provided by Mr Mathew in response to the first Sch 36 Notice;

(2) the correspondence between the parties and the Tribunal;

(3) the SA return summaries for Mr Mathew, showing the dates on which his returns were filed for the relevant years; and

(4) tax calculations for each of the relevant years, prepared by HMRC.

11. Mr Kevin Straughair was the officer in HMRC's Specialist Investigations Unit who opened the enquiries into Mr Mathew's SA returns for the relevant years, and he also issued the Sch 36 Notices. Mr Straughair gave oral evidence-in-chief, led by Ms Jones, and was cross-examined by Mr Onalaja. We found him to be an honest and straightforward witness.

12. Mr Mathew provided a witness statement and attended the hearing. However, he declined to give evidence. As this case was classified as "Basic" under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") the Tribunal had not issued the direction often given in "Standard" cases that a party seeking to rely on a witness statement "must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

13. Mr Onalaja said he was aware that Mr Mathew's decision not to take the stand (a) prevented any contentious points included his witness statement from being tested in cross-examination and (b) might mean that the weight which the Tribunal placed on his evidence would be reduced. Mr Onalaja said that as Mr Mathew's witness statement was largely a recitation of the parties' correspondence, it contained few contentious points. Mrs Naylor did not ask that the Tribunal direct, under Rule 15(1)(e) of the Tribunal Rules, that Mr Mathew give his evidence orally, so as to allow HMRC the opportunity for cross-examination.

14. On the basis of the evidence in the Bundle, Mr Straughair's oral evidence, and Mr Mathew's witness statement, we make the following findings of fact, which were not in dispute.

Findings of fact

15. Mr Mathew is a director of Gold Nuts Limited ("Gold Nuts"), a company with a number of subsidiaries, including Blackbay Ventures Limited ("BBL"). Mr Mathew is also a director of Noviscom Limited ("Noviscom"), which is not a subsidiary of Gold Nuts. However, Gold Nuts and Noviscom have some directors and/or shareholders in common.

16. On 31 May 2012, HMRC served Mr Mathew with a Notice to file his 2008-09 SA return. The Notices to file the SA returns for the other relevant years were all issued on 4 June 2013.

17. Table 1 below shows when Mr Mathew filed his returns for the relevant years, and when HMRC opened enquiries under Taxes Management Act 1970 ("TMA"), s

9A. It also sets out Mr Mathew's total income as shown on his SA returns, before and after deduction of the personal allowance ("PA") for each year, and the tax calculated as due based on the figures on his SA returns.

TABLE 1						
Tax Year	**Total income before PA**	**Total income after PA**	**Tax**	**Date of Notice**	**Date Filed**	**Date enquiry opened**
2008-09	£129,524	£123,489	£42,709	31/5/12	30/3/13	18/3/14
2009-10	£45,217	£38,742	£8,160	4/6/13	7/1/14	18/3/14
2010-11	£46,030	£39,555	£8,342	4/6/13	7/1/14	18/3/14
2011-12	£13,626	£6,151	£1,230	4/6/13	7/1/14	13/3/14
2012-13	£8,105	£466	£93	4/6/13	26/1/14	18/3/14

18. All the enquiries were opened within the statutory time limits.

19. As can be seen from Table 1, on 13 March 2014 HMRC opened the enquiry into Mr Mathew's 2011-12 SA return. That return disclosed total income of £13,626, made up of £12,624 of employment income and £1,002 of profits from UK land and property. Mr Straughair's opening letter asked about Mr Mathew's property business income, his employments, and other matters. The detail of that letter is replicated in the first Sch 36 Notice ("the First Notice"), and so is dealt with at §101 below. The letter asked Mr Mathew to respond by 12 April 2014.

20. The enquiries into the other relevant years were all opened on 18 March 2014. Mr Straughair said in his covering letter that "at the moment I do not require any information about these particular years. I am protecting HMRC's position to make enquiries should the need arise."

21. On 14 April 2014, having received no response to his letter of 13 March 2014, Mr Straughair issued the First Notice. It asked for the information and documents summarised in Table 2 below. The parties agree that some of these Items had been supplied in the course of correspondence between April and June 2014, and this is shown as "agreed" in the third column of Table 2. Where the parties agree that some of the documents/information have been provided, this is shown as "in part."

22. Where the parties do not agree as to whether or not the Notice has been complied with, this is shown as "No" in the third column of Table 2. In other words, at this stage we are only recording the parties' agreement or otherwise as to the extent of Mr Mathew's compliance with the Notice; we are not making a decision as to the extent to which the documents/information have been provided. We come to this later in our decision.

TABLE 2		
No.	**Item**	**Agreed provided?**
1	Addresses of rental properties and certain details	Yes
2	Schedule of [rental] income and expenditure	Yes
3	Schedule of any shares held in any entities, including as a nominee or in another name, showing name and address of entity, date and cost of acquisition, date and value of sale. This list should include interests in partnerships and joint ventures	In part
4	Schedule of any benefits or loans received because of Mr Mathew's position in an entity, such as a director, shareholder, partner, employee or nominee	No
5	For each director's loan account, a chronological breakdown with narrative description for amounts received	In part
	Details and evidence to support any repayments made on these loans, including bank statements showing the payments made	In part
6	All bank and/or building society books or statements, cheque book stubs, and deposit book counterfoils ("bank statements etc") from any account into which Mr Mathew received his employment income and into which he received income from or made payments to a director's loan account	In part
7	For any personal assets on which there is a charge such as a mortgage or loan, the loan agreements and/or mortgage statements which cover the whole period, and the bank and/or building society books or statements from which these payments were made for the period	In part
8	Bank statements etc for any account into which any income from, or expenditure of, the property business is paid	Yes
9-10	Rent books and tenancy agreements	Yes
11	Housing benefit slips	Yes
12	Expense invoices [related to the property business]	Yes

23. Included in Mr Straughair's covering letter attached to the First Notice are clear instructions on how to appeal against the Notice including information on the time limit.

24. On 11 July 2014, as part of his SA enquiries into Mr Mathew's 2011-12 and 2012-13 returns, Mr Straughair asked for further information. On 13 August 2014, having not received a response to that letter, Mr Straughair issued another Sch 36

Notice ("the Second Notice") with two Schedules, one for each year, as summarised at Table 3.

25. There was no agreement as to the extent to which this Notice had been complied with, and we return to this at §151 below. As with the First Notice, the covering letter gave clear instructions on how to appeal and the time limits.

TABLE 3	
2011-12	
No.	**Item**
1	Employment/director contracts between Mr Mathew and any/all of seven named companies
2	Loan agreements between Mr Mathew and (a) BBL and (b) Noviscom
3	Supporting documents for the credit balance with BBL
4	Specified information about the disposal of a property at Stanmore Hill, Middlesex
5	All bank accounts etc held in own name or jointly
6	A schedule of any rental income from the property at Stanmore Hill, including the name and address of any tenant
7	State whether the Stanmore Hill property was disposed of to a connected party
8	Explanation of some thirty deposits in Mr Mathew's bank account, which had been extracted from the bank statements provided in response to the First Notice.
9	Explanation of the opening credit balance which Mr Mathew said was owed by BBL to him of £31, 458.
2012-13	
1	Any employment/director contracts between Mr Mathew and 13 named companies
2	All bank accounts etc held in own name or jointly
3	For each loan account held with a company, a detailed and chronological breakdown with narrative description for amounts received, opening and closing balances, and movements during the period including any repayments, evidenced by bank statements

26. Meanwhile, on 11 August 2014, Mr Mathew had made a complaint about the conduct of the enquiries and the issuance of the Notices. He asked why HMRC's Special Investigations Unit was conducting the enquiries and said that this was "not usual and is an unlawful use of power." Mr Mathew informed Mr Straughair that he would be applying to the Tribunal to issue closure notices. He also said that he:

> "would like to formally lodge a complaint on the basis that this investigation is retaliatory in nature and based upon the numerous complaints made against the HMRC by the group company Gold Nuts Limited, of which I am a director…Any further information will need to be requested by HMRC under direction from the First-tier Tribunal…I will request a formal reference of complaint against your conduct and that of your department in starting this investigation as you are abusing the legislative powers."

27. On 3 September 2014, Mr Straughair responded. He opened by saying "Thank you for your letter of 11 August 2014. I have treated this as a letter of complaint."

28. On 23 September 2014 Mr Mathew applied to the Tribunal to close all the enquiries. On 20 October 2014 the Tribunal asked if he was also "wishing to appeal against the HMRC Information Notice and if so please provide a separate, completed, Notice of Appeal form." On 3 November 2014 Mr Mathew sent a Notice of Appeal to the Tribunal, seeking to appeal against the two Sch 36 Notices.

PRELIMINARY MATTERS

29. There were two preliminary matters: whether the case should be stayed, and whether Mr Mathew had properly appealed the Sch 36 Notices.

Whether to stay the appeal

30. We have already found as a fact that Mr Mathew is a director of a company called Gold Nuts Limited. Two days before this hearing, the same Tribunal heard the case listed as *Gold Nuts Limited and others v HMRC* ("*Gold Nuts*"). The "others" are (a) companies in the Gold Nuts group (b) Mr Budhdeo, a director of Gold Nuts, and (c) one or more other companies which may be connected to Mr Budhdeo.

31. The *Gold Nuts* case was adjourned because it raised important preliminary issues which require a separate hearing, namely whether HMRC can use their civil powers to obtain information with a view to pursuing a possible criminal prosecution of Mr Budhdeo. There was no suggestion from either party that there was any similar risk to Mr Mathew.

Submissions of the parties

32. Mr Onalaja submitted that it was appropriate to stay Mr Mathew's case until the preliminary hearing of *Gold Nuts* because, if the Tribunal upheld Mr Mathew's Sch 36 Notices, the information or documents he provided could be used by HMRC in the context of the *Gold Nuts* litigation. In particular Mr Onalaja drew attention to the fact that HMRC were trying to reconcile (a) a loan Mr Mathew said he had received, with (b) the statutory accounts of companies which were parties to the *Gold Nuts* litigation. He said that the SA enquiries into Mr Mathew's return represented a "gradual creep" into documents which really related to the Gold Nuts companies.

33. Mrs Naylor responded by saying that Mr Mathew's case was separate from that of the appellants in *Gold Nuts*. These enquiries are into Mr Mathew's SA tax returns. Key issues are Mr Mathew's employment income and the source of deposits into his

bank accounts. In relation to Mr Onalaja's submission about the loans, she said that HMRC have not approached the Gold Nuts companies for information about the loans, but had only considered the material supplied by Mr Mathew together with the statutory accounts submitted by the companies to HMRC. In summary, she submitted that the enquiry into Mr Mathew's affairs is proceeding along normal lines and there is no reason to stay it.

34. She also reminded the Tribunal that Mr Mathew had resisted being joined to the *Gold Nuts* litigation on the basis that his affairs were separate, and that HMRC had agreed with this.

Discussion and decision

35. The key issue to be determined at the preliminary hearing of the *Gold Nuts* litigation is the relationship between HMRC's civil powers and a possible criminal prosecution of Mr Budhdeo.

36. The enquiries into Mr Mathew's SA return and the Sch 36 Notices do not relate to Mr Budhdeo's personal tax position, but only to Mr Mathew's. Mr Onalaja did not explain how the provision of information about loans made to Mr Mathew by companies involved in the *Gold Nuts* litigation could impact upon any possible criminal proceedings against Mr Budhdeo, and we were also unable to think of any interaction.

37. Mr Mathew had previously submitted that the enquiries into his case were separate from those in *Gold Nuts.* In his letter of 3 November 2014 to the Tribunal, under the heading "Merger of the matter" he said "I wish to proceed independently…as these are my personal matters and not to be considered with the company I am associated with."

38. We agree with Mr Mathew's position as articulated in that letter, and we agree with Mrs Naylor that there is no reason to stay this case until after the issuance of a final decision consequent upon the preliminary hearing of *Gold Nuts*.

39. One of the issues we considered when making our directions for the preliminary hearing in *Gold Nuts* was whether or not to grant a privacy direction. We decided not to do so, for the reasons given in that decision. However, that was not clear at the time of Mr Mathew's hearing and so the first part of these proceedings, which considered whether or not to stay Mr Mathew's case behind *Gold Nuts,* was heard in private. However, because we have subsequently decided that the *Gold Nuts* litigation will be in public, there is no need to anonymise this part of our decision.

Appealing the Sch 36 Notices

The law

40. Sch 36, para 32(1) provides that appeals against Sch 36 Notices must be made in writing, within 30 days, to the HMRC Officer who issued the Notice. Once a person has appealed, the Chapter 5 TMA provisions come into play, see Sch 36, para 32(6).

41. TMA s 49 says that a late appeal can only be accepted by HMRC if it has been made "in writing" and that HMRC must also be "satisfied that there was a reasonable excuse for not giving the notice before the relevant time limit." If HMRC refuse to allow a late notice of appeal to be given, the Tribunal may give permission (TMA s 49(2)(b)). It is only if notice of appeal has been given to HMRC that the appellant may notify the appeal to the Tribunal (TMA s 49D).

42. Rule 20(1) of the Tribunal Rules says that "a person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal." Rule 7(2) says that:

> "If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include:
>
> (a) waiving the requirement…"

The position in this case

43. It is clear from the facts already set out that Mr Mathew did not appeal the Sch 36 Notices by writing to Mr Straughair. We considered whether his letter of complaint could be read as an appeal. However, we decided that it could not, because:

(1) it explicitly stated that it was a complaint;

(2) it made no reference to the First Notice at all, still less to appealing against that Notice;

(3) it crossed with the Second Notice, so could not be an appeal against that Notice; and

(4) when Mr Straughair replied to the letter, he said "I am treated this as a letter of complaint." Had Mr Mathew wanted it to be treated as an appeal, he could have responded by saying that the purpose of his letter had been misunderstood. But he did not do so.

44. Instead of appealing to Mr Straughair, as the statute requires and as was explained in the covering letters sent with both Sch 36 Notices, Mr Mathew completed a Notice of Appeal to the Tribunal, seeking to appeal against both Sch 36 Notices. We accept that he may have read the letter from the Tribunal, dated 20 October 2014, as indicating that this was the correct process.

45. The second difficulty is that the Notice of Appeal was submitted on 3 November 2014, over six months after Mr Mathew had been issued with the First Notice, and over two months after he had been issued with the Second Notice. The statutory deadline is 30 days.

46. We explained to the parties that the Tribunal had no jurisdiction to hear an appeal made by way of a direct application to the Tribunal. We could only hear an appeal which had been first made to HMRC. The parties asked for a short adjournment which we granted.

47. After the adjournment, the parties informed us that Mr Mathew had made an oral appeal to Mr Straughair. Although the statute provided that the appeal be in writing, HMRC had used their care and management powers to accept the oral appeal. They had also accepted that Mr Mathew had a reasonable excuse for making the appeals late. Mr Mathew then made an oral application for the Tribunal to hear his appeals on the same basis as his earlier written Notice of Appeal.

48. We decided under Rule 7(2) that it was in the interests of justice to admit an oral notification of Mr Mathew's appeal, and we also accepted that his oral application should be treated as containing the same material as in his written Notice of Appeal.

RECORDS, PROOF AND SUBMISSIONS

49. This part of our decision first considers the law on "statutory records" and the burden of proof in Sch 36 appeals, before setting out the parties' main submissions.

Statutory records

The legislation

50. Sch 36, para 29(2) says that there is no right of appeal in relation to "a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records."

51. Sch 36, para 62 says that information or documents are "statutory records" if "it is information or a document which the person is required to keep and preserve under or by virtue of (a) the Taxes Acts, or (b) any other enactment relating to a tax."

52. The definition in Sch 36, para 62 is therefore not free-standing, but cross-refers to other provisions. In the case of an employee such as Mr Mathew, the only relevant section appears to be TMA s 12B. This requires that a person who is issued with a Notice to file an SA return, must keep "all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period."

Can "information" be a statutory record?

53. The first question is whether TMA s 12B extends to "information" which has not been written down, as well as to "documents." The purpose of the section is to require taxpayers to retain the material they need to file their SA returns. It uses the word "records" rather than "documents."

54. The Oxford English Dictionary's first two meanings of "record" refer to phrases, such as "on record" and "to take record of." The third meaning is "the fact or condition of being preserved as knowledge or information, esp. by being set down in writing."

55. We therefore find that information does not necessarily have to be set down in writing before it can be a "record" and that therefore "information" as well as "documents" comes within TMA s 12B.

For how long must statutory records be preserved?

56. TMA s 12B goes on to specify for how long the records should be kept. This is important because Sch 36, para 62(3) says that "information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired." In other words, once the period of retention specified in TMA s 12B has ended, the information and documents are no longer "statutory records" and the person has a right of appeal.

57. The TMA s 12B provisions on retention are somewhat complicated in a case such as this, because Mr Mathew was issued with Notices to File some of his SA returns long after the end of the tax year in question.

58. TMA s 12B(1)(b) says that where the Notice to file an SA return was issued before 31 January of the second year after the end of the tax year in question ("the second 31 January") then the records must be kept until "the end of the relevant day." The relevant day is the later of (a) the second 31 January and (b) the closure of any enquiry into the return, or, if no enquiry is opened, the day on which an officer no longer has power to make those enquiries.

59. For example, the second 31 January after the end of the 2011-12 tax year was 31 January 2014. On 4 June 2013, HMRC issued Mr Mathew a Notice to file his 2011-12 return. The Notice was therefore given before 31 January 2014. As a result, TMA s 12B(1)(b) applies, so the relevant day is the later of:

(1) 31 January 2014; and

(2) the date on which any enquiries into the 2011-12 SA return are closed.

60. Until the 2011-12 enquiry is closed, Mr Mathew has to retain any statutory records "requisite for the purpose of enabling him to make and deliver a correct and complete return" for that tax year. He also has no right of appeal against a Sch 36 Notice requiring that information or documents.

61. The same rule applies to the 2012-13 tax year: the Notice to file was issued on 4 June 2013, well before 31 January 2015, being the second 31 January after the end of the 2013-14 tax year. As a result, any statutory records have to be preserved until the enquiry has been closed, and if any Item in the Notices constitute statutory records, Mr Mathew has no right of appeal in relation to that or those Items.

62. When the Notice to file a return is given *after* the second 31 January, then TMA s 12B(2A) says that, where a person "has in his possession at that time records which may be requisite for the purpose of enabling him to make and deliver" his SA return, then he:

> "shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before [the second 31 January], would have been the relevant day for the purposes of subsection (1) above"

63. In other words, the deadline for preservation of the records is tied to the later of (a) if an enquiry is opened, the closure of those enquiries and (b) if no enquiry has been opened by the deadline for enquiries into that return, that deadline.

64. This provision applies to all the other relevant years: the Notices were issued after the second 31 January, but enquiries have been opened into each of these years. The records must therefore be preserved until the enquiries are closed, and there would be no right of appeal against a Sch 36 Notice issued which required Mr Mathew to produce any statutory records for those years.

Are any of the documents/information statutory records?

65. Given the number of information requests, we have considered this question in relation to each Item in the Sch 36 Notices from §101 below.

The burden of proof

The "reasonably required" test

66. Mr Onalaja submitted that HMRC had the burden of showing that the information and documents contained in the Sch 36 Notices were "reasonably required." He relied on *Kevin Betts v HMRC* [2013] UKFTT 430 (TC) (Judge Perez and Ms Stalker) ("*Kevin Betts*") where the tribunal recorded at [14] that it was "common ground" that the burden of proof was on HMRC.

67. As we have already noted, Mr Mathew's case was classified as a "Basic" case by the Tribunal, and so the parties were not directed to provide skeleton arguments in advance of the hearing, as would have happened in a "Standard" case. None of the earlier correspondence referred to the burden of proof. HMRC made no response to Mr Onalaja's submission during the hearing.

Case law on Sch 36 and precursor provision

68. We reviewed the case law. The tribunal in *Eudora Thompson v HMRC* [2013] UKFTT 103(TC) (Judge Brannan and Mr Williams) said at [62] that "the onus of proof in relation to an appeal against an information notice lies on HMRC." But, as in *Kevin Betts,* there appeared to be no argument to the contrary.

69. We could find no decisions of the Upper Tribunal or the courts which have considered this issue in the context of Sch 36 Notices provided to the taxpayer. There is, however, case law on "without notice" or *ex parte* notices. These are notices given to third parties, such as banks, with the approval of the tribunal, without the taxpayer attending the hearing and sometimes without the taxpayer knowing that the application is being made, see Sch 36 para 3(3). One of the statutory requirements for such a notice is that the tribunal must be "satisfied that, in the circumstances, the officer giving the notice is justified in doing so," see Sch 36 para 3(3)(b). If the third party wishes to challenge the Notice, the only route is via judicial review, because no appeal is possible, see Sch 36, para 29(3).

70. In *R (oao) Derrin Brother Properties Ltd v HMRC* [2014] EWHC 1152 (Admin) ("*Derrin*") the High Court dismissed a judicial review application against *ex parte* notices issued to a number of banks and others about their clients' affairs.

Simler J said at [14] that the question of whether documents or information were reasonably required for the purpose of checking a taxpayer's position "depends on the conclusion of the officer, which must be justified in the circumstances" and that the Tribunal must also be satisfied "that the officer holds the relevant opinion." She goes on to say at [15] that:

> "[15] A number of further matters in relation to third party notices of this kind are well established by reference to the predecessor s. 20 TMA 1970 scheme and apply with equal force to Sch.36 notices, as the parties agreed. First, and significantly, as held in *R v Commissioners of Inland Revenue ex parte T C Coombs & Company* [1991] 2 AC 283 [*Coombs*], 300C-F, 302E-F (Lord Lowry) the Tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC's intrusive powers. Parliament designated the officer as the decision-maker and the Tribunal as the monitor of the decision. A presumption of regularity applies to both, and is strong in relation to the Tribunal in particular.
>
> [16] Accordingly, in challenging a third party notice, what must be proved are facts which are inconsistent or irreconcilable with the authorised officer's conclusion that documents are reasonably required for checking the taxpayer's tax position and the Tribunal being satisfied that the officer is justified in the circumstances in giving that notice. The resolution of this question will usually depend on confidential information or evidence which is not before the court on judicial review. The Tribunal, able to receive such confidential information or evidence in an *ex parte* hearing, is therefore in a much better position to make a proper appraisal of it than this court on judicial review. The fact that the Tribunal, having heard an application, approved the giving of the notice is therefore evidence which the court should take account of in this respect, not least since the Tribunal's approval is the real and intended safeguard in the statutory scheme."

71. Simler J thus confirms that the House of Lords' judgment in *Coombs*, which concerned the precursor provisions in TMA s 20, can be relied on in relation to Sch 36 Notices. One of the principles established in *Coombs* is that a "presumption of regularity" applies both in relation to HMRC officers and to the tribunal. This is a presumption that that the statutory authority has acted lawfully and in accordance with its duty, and if it applies, the burden is on the other party to rebut the presumption.

72. If the same principle applies in this case, the burden of proof would be on Mr Mathew to show that it was not reasonable of Mr Straughair to require the information or documents. At page 109(6) of *Coombs* Lord Lowry said (emphasis in original):

> "What they [the appellants] need to do is prove facts which are inconsistent (or irreconcilable) with the inspector's having had a reasonable (not necessarily a correct) opinion when he gave the second notice that the applicants had documents relating to the six companies which contained or *might contain* information relevant to any tax liability to which the taxpayer was or *might be* or *might have been* subject."

73. There are, however, two differences between *Derrin* and *Coombs* on the one hand, and Mr Mathew's case on the other, and we now consider whether they change the position. The first is that in *Derrin* and *Coombs* the courts were considering applications for judicial review whereas our task is whether or not to allow an appeal against the notices. The second is that the notices in both *Derrin* and *Coombs* were approved by the tribunal before being issued.

Judicial review

74. A decision can only be overturned on judicial review if it is found to be illegal, unreasonable, or procedurally flawed. Judicial review is not the same as an appeal. In an application for judicial review, the burden is always on the applicant.

75. On our analysis of both *Derrin* and *Coombs,* the courts found that the burden was on the appellants because of the presumption of regularity which applied to the making of the decision in the first place, and not because the appellant always has the burden in judicial review proceedings.

Notices issued without the tribunal's prior approval

76. Where the tribunal has approved the issuance of the notice, the taxpayer cannot appeal, but where (as in Mr Mathew's case) there was no prior approval, the taxpayer can appeal, see Sch 36, para 29,

77. Does this mean that our hearing of Mr Mathew's appeal is similar in some ways to the *ex parte* proceedings? In particular, does Mr Straughair have to justify to the tribunal in the course of the appeal his reasoning for considering that the notice was "reasonably required," in the same way as he would have to satisfy the tribunal in an *ex parte* hearing that the officer is justified in giving that notice? If so, does that mean that the burden is on HMRC?

78. The answer to that question can be established, we think, from the House of Lords decision in *Coombs.* At page 110, Lord Lowry said:

> "Parliament designated the inspector as the decision-maker and also designated the commissioner as the monitor of the decision. A presumption of regularity applied to both…the presumption that the inspector acted *intra vires* when giving the notice can only be displaced by evidence which cannot be reconciled with the inspector's having had the required reasonable opinion."

79. Later on the same page he makes it clear that the burden is on the applicant to provide that evidence, asking (emphasis added) :

> "Have the applicants proved that when giving the second notice the inspector's opinion that there remained in the applicants' power or possession relevant documents which they had not disclosed was not reasonable?"

80. Moreover, in *Coombs* the taxpayer did not seek to challenge the decision of the Special Commissioner, but that of the HMRC officer, see page 111 at (3). Although the Special Commissioner's approval of the notice was a factor which the court

considered when assessing whether or not the officer had acted reasonably, it was the latter's decision to issue the notice which was in issue.

81. Nevertheless, in both *Derrin* and *Coombs* the courts relied significantly on the fact that the tribunal/special commissioner had seen the evidence on which HMRC relied. In *Derrin* Simler J says that the presumption of regularity is "strong in relation to the Tribunal in particular," that the tribunal will "usually" have received "confidential information or evidence" during the *ex parte* hearing, and that "the Tribunal's approval is the real and intended safeguard in the statutory scheme." In *Coombs* at page 109(3) Lord Lowry said that "the fact that the commissioner in these circumstances gave his consent is of paramount importance."

Concluding remarks on burden of proof in relation to "reasonably required"

82. We find that the weight of authority is that the burden of proof in relation to the "reasonably required" test in Sch 36 Notices rests on the appellant, and not on HMRC.

83. We note that this is consistent with the position in substantive tax appeals. In *Nicholson v Morris* [1977] STC 162, Goff LJ approved the words of Walton J, when he said that the reason for this was that:

> "it is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position), to provide the right answer, and chapter and verse for the right answer."

84. If the burden of proof in relation to the "reasonably required" test rests on the appellant, then a similar rationale could be put forward: it is the taxpayer who knows the relevance of information or documents to his tax position, because he knows the full facts. This analysis is also consistent with the objective of Sch 36 taken as a whole, which is "to ensure that the information which will ensure that the correct amount of tax can be determined," see *HMRC v Tager* [2015] UKUT 0040 (TCC) at [16], per Judge Bishopp.

85. However, we acknowledge that the differences between *Derrin* and *Coombs* on the one hand, and Mr Mathew's position on the other, mean that it remains arguable that the burden is on HMRC. We were also conscious that we had very limited submissions.

86. We therefore decided to approach each Item of the Notices on the working assumption that HMRC had the burden of showing that it was reasonable to require the information or documents. Had we found that HMRC had not met that burden, we would have adjourned the case for further submissions in relation to the burden of proof.

87. As will be seen from the later parts of our decision, we found that HMRC had met the burden in relation to each of the Items which remain in dispute, so we have not needed to decide this point. That may be the task of another tribunal, on another day.

Burden of proof in relation to "statutory records"

88. There is a further point, raised by neither party: who has the burden of proof in the context of statutory records? In other words, if HMRC assert that a document is a statutory record, is the burden on the appellant to prove the contrary? This is important, because, as we have already noted, if the documents/information are "statutory records," the appellant has no right of appeal.

89. In the context of a company, or even a self-employed business, it is usually relatively straightforward to identify statutory records. These will include a business bank accounts, invoices, purchase orders, till rolls etc. But it is more problematic for individuals. What documents/information does a person require in order "to make and deliver a correct and complete return for the year or period?"

90. Consider some of the Items required under the Notices issued to Mr Matthew. He sold a property in Stanmore. HMRC asked for documents/information to establish whether he had received rental income, and whether or not the disposal gave rise to a capital gain. If Mr Mathew did receive rental income, and/or there was a capital gain, many or all of the documents/information requested by HMRC via the Sch 36 Notice will be statutory records, because they will be required for the correct completion of Mr Mathew's SA return. But HMRC do not know if there was rental income, and they do not know if there is a capital gain: only Mr Mathew knows these facts. The citation from *Nicholson v Morris,* set out at §83 above, is apposite.

91. If the burden is on the appellant in relation to statutory records, he can of course appeal to the Tribunal if he considers that an item which HMRC assert is a statutory record is not such a record, and provide the relevant evidence.

92. However, as we had no submissions on this point, we have taken the same approach in relation to statutory records as we have as in relation to the "reasonably required" test, namely that HMRC have the burden of showing that the documents/information constitute a statutory record. If our approach would have meant that or more documents/information would be removed from the Notices, we would have adjourned the case for further submissions. But as the rest of our decision makes clear, this was not the position.

The parties' main submissions

Reasonably required?

93. Mr Straughair said that there were discrepancies between Mr Mathew's lifestyle and his declared earnings. HMRC had "access to databases" which indicated that Mr Mathew's income was "possibly understated" and that his SA returns disclose an income after personal allowances which has fallen from £123,489 in 2008-09 to £6,151 in 2011-12. Mr Straughair said he was seeking to establish in particular whether Mr Mathew received employment income dressed up as loans, and whether he was receiving other taxable income or gains which had been omitted from his tax returns.

94. Mr Onalaja did not dispute that there was a difference between Mr Mathew's taxable income and his expenditure. He invited Mr Straughair simply to find that the

money received by Mr Mathew as loans was in fact earnings. He submitted that HMRC had enough information to (a) withdraw the Sch 36 Notices and (b) close the enquiries on that basis and make assessments.

95. Mr Straughair responded by saying that HMRC had a duty to make assessments to the best of its judgement, and that he currently had insufficient information to make the assessments. The information and documents in the Notices were, in his submission, reasonably required for the purposes of establishing Mr Mathew's tax position.

Fishing expedition?

96. Mr Onalaja said that it was not reasonable of Mr Straughair to continue to ask for so much detail; that some of the Items in the Notices were in the nature of a "fishing expedition" and that HMRC were "just prolonging enquiry by requesting more and more documents." Mr Straughair sought to resist this by reference to the particular Items set out below.

Retaliatory action?

97. In his witness statement Mr Mathew said that HMRC's enquiries were "a retaliatory action to the complaints made by the [Gold Nuts] group" and he made similar statements in his letter of complaint, set out earlier in this decision. Mr Onalaja made related submissions. In particular, he said that the enquiries into Mr Mathew were being conducted by the same individuals who were investigating the parties to the *Gold Nuts* litigation.

98. In response, Mr Straughair repeated his submissions that the enquiries had been triggered by the gap between Mr Mathew's income and his lifestyle. He gave evidence, which we accepted, that he dealt only with SA enquiries and had nothing to do with corporation tax. He acknowledged that he was part of HMRC's Special Investigations Unit and that same Unit was also working the enquiries into the Gold Nuts group and Mr Budhdeo.

Our approach

99. We considered these submissions in the context of each Item in the Notices, when answering the following questions:

(1) whether they were "statutory records" against which no appeal is possible;

(2) whether Mr Mathew had complied with the requirements; and if not

(3) whether information or documents which were not statutory records were "reasonably required" for the purposes of checking Mr Mathew's tax position.

100. Our overall conclusions on the "fishing expedition" and "retaliatory action" submissions are at §184 and §186 respectively.

THE FIRST NOTICE

Item 3: Schedule of interests

The Notice, correspondence and submissions

101. Item 3 of the First Notice is that Mr Mathew provide:

> "A Schedule of any shares held in any entities, both within the UK and overseas at any time during the period, even if you hold them as nominee or in another name. The name and address of the entity should be provided, along with the date and cost(if any) of acquisition. If any disposals have been made during the year, please provide the date and value of sale. As an example this list should include (but not be limited to) interests in companies, partnerships and joint ventures)."

102. On 9 May 2014, Mr Mathew's then agent, Mr Gupta of ARN Gupta & Co provided information about four companies in which Mr Mathew owned shares. The information was provided under the heading "Business Interests."

103. On 14 May 2014 Mr Straughair called Mr Gupta and asked him to confirm whether the information was a complete list of all Mr Mathew's shareholdings. He also pointed out that neither the date nor the cost of acquisition had been provided. Mr Gupta said he would check with his client.

104. On 30 May 2014, Mr Gupta sent Mr Straughair the address of each of the four companies listed in the letter of 9 May 2014. He also said that "the amounts paid for the shares in the above companies was the nominal value of each share" which had been given in the letter of 9 May 2014. The paragraph in Mr Gupta's letter is again headed "business interests." Mr Mathew's witness statement confirms that he has provided information about his "business interests."

105. Mr Straughair said at the hearing that the information was incomplete, because it does not confirm that it is a complete list of all shares held. Mr Onalaja asked if HMRC could obtain some of this information from other sources, and Mr Straughair agreed that this may be possible. Mr Onalaja submitted that HMRC should use these other sources rather than a Sch 36 Notice.

Schedule of interests: statutory records?

106. As we have already seen, TMA s 12B(1)(a) requires that a person such as Mr Mathew who is not in business "keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return."

107. Is a schedule of interests in entities a "statutory record"? This is another example of the "burden of proof" issue we identified earlier. It is very difficult for anyone other than Mr Mathew to know the answer to this question. If he has bought and sold shares during the year, then clearly that information and the related documents need to be retained for the purposes of his SA return. But if there are no disposals and no distributions, his shareholdings will be irrelevant to his tax return.

108. On the basis of the information available, we decided that a schedule of interests is not a statutory record in Mr Mathew's case. He therefore has a right of appeal against Item 3.

Schedule of interests: compliance by Mr Mathew?

109. Mr Mathew has not confirmed whether or not the four companies named in the letter of 9 May 2014 constitute a complete list of all entities in which he has an interest (including any which he may hold as a nominee or in another name), despite Mr Gupta saying he would confirm this one way or the other with his client. Mr Mathew has also failed to tell HMRC whether there has been any change to his interests, whether by acquisition or disposal, during the year. We find that this Item has been complied with only in part.

Schedule of interests: reasonably required?

110. Is the requirement reasonable? Mr Mathew has accepted that there is a gap between taxable income and expenditure. Although it is Mr Mathew's case that he is living on loans, it is clearly reasonable for Mr Straughair to check whether there are other sources of income and/or gains which have contributed to filling the gap between Mr Mathew's incomings and outgoings.

111. We also find that it is reasonable for the requirement to extend to all entities in which Mr Mathew has an interest, not just those which relate to business: if there are dividends or gains from portfolio holdings this is relevant to the acknowledged gap between income and expenditure.

112. We do not accept Mr Onalaja's submission that, because HMRC may be able to find some of this information from other sources, it is unreasonable for Mr Straughair to require Mr Mathew to provide it. The law requires only that the "the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position." HMRC do not have to exhaust other information sources before turning to the taxpayer.

Schedule of interests: decision

113. We have varied the Notice to reflect the fact that some information has already been provided and to include confirmation of completeness, and have made some other minor amendments.

114. The Notice ends by saying the list "should include (but not be limited to) interests in companies, partnerships and joint ventures." We have separated the requirements relating to companies from the others, and therefore divided the Item into 3(a) and 3(b). The second of these relates to "any interests in any partnership, limited partnership, limited liability partnership or joint venture." We think this is clearer and more specific than the very open wording of the original notice.

Item 4: Benefits in kind other than loans

The Notice, correspondence and submissions

115. Item 4 of the Notice requires Mr Mathew to provide a Schedule of any benefits arising because of his position in an entity, whether as director, shareholder, member of the Board, partner, employee or nominee.

116. Mr Gupta's letter of 9 May 2014 simply said that "the employment income of Mr J Mathew is as per the submitted 2011/12 return." When Mr Straughair spoke to Mr Gupta on 14 May 2014, he asked whether Mr Mathew received any company benefits, and Mr Gupta said he would check again with his client. In the letter dated 30 May 2014, Mr Gupta said "there were no taxable benefits that were received from his employments."

117. Mr Straughair said in cross-examination that he was concerned whether this was complete and correct. Mr Onalaja said that he should take up any issues about benefits with the relevant employing company or companies.

Benefits other than loans: decision

118. Mr Mathew was asked to provide information about any benefits in kind. He has clearly answered that there were none. However, we note that there remains an issue about whether the loans (if they are in fact loans) are interest-bearing or not. We deal with that in relation to the Second Notice (2011-12) below.

119. We vary the Notice to remove Item 4, because Mr Mathew has complied with it, subject to the interest-bearing loans point.

120. If Mr Straughair has concerns about the accuracy of the statement that Mr Mathew has no benefits in kind, that is a separate matter, which goes beyond this appeal. HMRC cannot simply repeat information requests because they do not trust the answers.

Items 4 and 5: Loans

The Notice and correspondence

121. Items 4 and 5 of the Notice require:

(1) a Schedule of any benefits or loans received because of Mr Mathew's position in an entity, such as a director, shareholder, partner, employee or nominee (Item 4);

(2) for each director's loan account, a chronological breakdown with narrative description for amounts received (Item 5);

(3) details and evidence to support any repayments made on these loans, including bank statements showing the payments made (Item 5).

122. Attached to Mr Gupta's letter of 9 May 2014 was a Schedule setting out two loans. The first was stated to be from Gold Nuts Ltd. It shows receipts of £93,261, paid in 23 separate amounts during the year. In most months there were two sums of either £2,500 or £3,000. The last item on the list is £6,558 relating to car hire purchase charges paid by the company.

123. The second loan was for £50,000. It was received from Noviscom on 23 December 2011. On 29 December 2011, the Schedule shows that Mr Mathew paid this money to Gold Nuts Ltd, to reduce the loan from that company to £43,261.

124. When Mr Straughair spoke to Mr Gupta on 14 May 2014, he asked if this list was complete. Mr Gupta said that it was. Mr Straughair said that Mr Mathew had not provided the detailed proof of payment and evidence, given that the bank statements provided did not show any receipts from Gold Nuts Ltd.

125. In Mr Gupta's second letter of 30 May 2014, he said that:

> "the loans were received directly by bank transfer from Blackbay Ventures Ltd ("BBL"). The loans were from BBL and not Gold Nuts Ltd as referred to in our previous letter. The other loan was received directly by bank transfer from Noviscom. These loans were merely cash loans for Mr J Mathew's personal use."

126. On 12 June 2014 Mr Straughair wrote to Mr Gupta, saying:

> "I will need sight of each Director's Loan Account ("DLA") with each company held by your client. I would expect each DLA to have an opening and closing balance and show all movements within the period. I have also asked for a narrative breakdown but that has not been provided. I would expect this to describe the nature of the payment and how it was paid, for example were the debits made by cash or by bank payments and what was the purpose of each payment. A DLA is a statutory document and I still consider Item 5 of the schedule of information and documents is outstanding."

127. On 22 June 2014 Mr Gupta provided a detailed analysis of what was now said to be the loan from BBL. The opening balance is shown as a credit of £31,458 – in other words, an amount owed by BBL to Mr Mathew. There follows the same list of payments as in the Schedule attached to Mr Gupta's 9 May letter, other than that the car hire payment is now £6,001 and not £6,558 and one payment for £10,000 is shown as having been received on 19 December 2011 rather than 31 December 2011.

128. Next to each of the payments Mr Gupta has either put a cross-reference to Mr Mathew's HSBC bank statement, or written "cash received."

129. Below the list are the following items, headed "Repayment":

Month/Yr		**Date paid**		**Explanation**
Dec 11	£50,000	29/12/11	CHAPS	Loan repayment
June 11	£610	30/6/11		Undrawn salary credited
Jan 12	114	30/1/12	CHAPS	Expenses paid on behalf of company
Total	**50,724**			

130. The balance on the account at the end of the year is shown as £10,522 owed by Mr Mathew to BBL. The Schedule also shows interest of £2,221.97 owing on the loan, which has been added to the amount outstanding.

131. Mr Gupta's covering letter said:

> "you will now note from the further information provided in this letter that our client borrowed c £91k during the period for his living expenses. This should now explain how our client funded his living."

132. Mr Gupta also said that while a director's loan account may be a statutory record in the context of the company, it was not a statutory record in the context of the individual director.

133. On 7 July 2014, Mr Straughair called Mr Gupta. He said he was struggling to reconcile the loan arrangements, and his concerns "were compounded by the fact that Mr Mathew was not made a director of Blackbay until 23/5/12" – a date after the end of the tax year. Mr Gupta responded by saying that "Mr Mathew was a director of the overall group connected to Blackbay..."'

134. On 11 July 2014 Mr Straughair wrote setting out his concerns in more detail. These were that:

(1) the source of the credit balance owed to Mr Mathew from BBL i.e., why BBL owed money to Mr Mathew;

(2) BBL's accounts as filed with HMRC show the loan as non-interest bearing;

(3) given that the loans were to fund living expenses, they have the hallmark of remuneration, so what assurances did Mr Mathew provide to the companies that the loans would be repaid;

(4) how all the loans with the companies have been treated, given that Mr Mathew received this money from a company of which he was neither an employee nor a director.

Loans: statutory records?

135. If the loans are in fact salary, then a schedule of amounts paid to him is likely to be "requisite for the purpose of enabling [Mr Mathew] to make and deliver a correct and complete return." If, instead, the payments were in fact loans and not salary, they will only be "requisite" for Mr Mathew's tax return if the interest paid is insufficient to eliminate a benefit in kind charge.

136. As we have decided to proceed on the basis that HMRC have the burden of proof, we have therefore gone on to consider the position on the basis that the schedule of loans is not a statutory record and that Mr Mathew has a right of appeal.

137. In coming to this conclusion, we did not ignore Mr Onalaja's invitation to HMRC that they find the loans to be salary. It appeared to us that Mr Onalaja was putting this forward as a way of closing the enquiries, and was not to be taken as an

offer of settlement. In other words, he was inviting HMRC to assess Mr Mathew on that basis but leaving open the possibility of appealing the resulting assessment.

Loans: decision

138. Mr Onalaja has not argued that these amounts are not "reasonably required" but rather that enough information is already in Mr Straughair's hands. Mr Straughair's position is that he still requires further information about the loan position.

139. Although there is no dispute on this point, we agree that Items 4 and 5 are reasonably required for the purposes of checking Mr Mathew's tax position.

140. Has Mr Mathew provided the required information? He has said that he has two loans, one from BBL and one from Noviscom. We find that he has thus met Item 4 and the first part of 5 in that he has provided a Schedule, subject to confirmation that (a) there are no other loans and (b) an explanation of the basis on which the loan has been provided by BBL given that he was neither a director nor an employee of that company in 2011-12. To the extent that there are other unresolved loan-related issues, they are picked up in the Second Notice (2011-12) and we deal with them there.

141. We have therefore varied the Notice to remove most of the requirements of Items 4 and 5, subject to the two points in the previous paragraph.

Item 6: Bank accounts

142. Item 6 required that Mr Mathew provide:

> "All bank and/or BS books or statements, cheque book stubs, and deposit book counterfoils ["bank statements etc"] from any account into which he received his employment income and into which he had received income from or made payments to a director's loan account."

143. Attached to Mr Gupta's letter of 9 May 2014 are copies of Mr Mathew's HSBC bank account xxx16. Mr Gupta said that "this contains the employment income and directors loans."

144. On 11 July 2014 Mr Straughair wrote to Mr Gupta, saying he was unable to trace the salary payments shown on Mr Mathew's SA return (which were from a company called Venture Pharmacies Ltd) to the HSBC account. Further, the bank statements show some payments from BBL as being "salary" although Mr Mathew was neither an employee or director of that company in 2011-12. In the same letter, Mr Straughair said that he had identified £50,031 of miscellaneous receipts paid into the HSBC account. As a result he included a wider information requirement relating to bank statements etc in the Second Notice (2011-12), see §173.

Bank accounts: decision

145. This Item has been subsumed into Item 5 of the Second Notice (2011-12) and we have removed it from the First Notice.

Item 7: charges on personal assets

146. Item 7 of the First Notice asked for "loan or mortgage agreements in relation to any personal asset and the bank statements etc of the account(s) from which related payments are made." We had no difficulty in finding that this information did not constitute "statutory records" as loans for purchasing personal assets are not "requisite" for the purposes of delivering a complete and correct SA return.

147. Mr Gupta responded to this Item of the First Notice on 30 May 2014 by saying that Mr Mathew had two unsecured five year loans of £10,000, one from HSBC (from 2008) and one from Halifax (from 2007) and that he had no other loans. At the hearing, Mr Straughair said that this Item was still outstanding. Mr Onalaja made no submissions.

148. In a case such as this, where the issue is whether there is a discrepancy between a person's lifestyle and his means, it is reasonable for HMRC to ask for details of other financial commitments. As we have already noted, Mr Onalaja did not argue otherwise.

149. Mr Gupta provided details of two unsecured loans but has not confirmed whether this is a complete list. He has not provided details of the bank account from which these loans are repaid (if, indeed, regular repayments are required). We have varied the Notice to take these points into account.

Decision on the First Notice

150. We therefore vary the First Notice as follows:

(1) Items 1, 2, 8, 9, 10, 11 and 12 have been removed entirely on the basis that they have been complied with;

(2) Item 6 has been removed entirely as it is subsumed into Item 5 of the Second Notice (2011-12);

(3) Items 3, 4, 5 and 7 have been varied on the bases explained above.

151. The Notice, as varied, is set out in Appendix 1.

THE SECOND NOTICE

152. The Second Notice has two Schedules, one relating to 2011-12 and the other to 2012-13. We consider each in turn.

The Second Notice (2011-12)

Item 1: Employment/director contracts

153. Item 1 requires the provision of employment/director contracts between Mr Mathew and seven named companies. These are:

(1) the four companies in which Mr Mathew has said he has a business interest;

(2) Venture Pharmacy Limited, the company identified as Mr Mathew's employer in his SA return;

(3) two other companies which we understand to be part of the Gold Nuts group, Dispensary Holdings Ltd and Leyton Orient Dispensary Ltd.

154. A person does not normally have to refer to his employment contracts in order to complete his SA returns. We find that none of these documents are "statutory records."

155. Mr Onalaja submitted that information about directorships could be obtained from Companies House and thus that it was not reasonable of HMRC to ask Mr Mathew to "dig out" his employment contracts. For the reason already set out at §112, we reject this submission.

156. As already noted at §143, Mr Straughair said in correspondence that he had been unable to reconcile the salary payments included in Mr Mathew's SA return with the receipts shown on his HSBC bank statements, despite that being the account into which Mr Gupta had stated that Mr Mathew's salary was paid. At the hearing, Mr Straughair said he needed to understand "which companies [Mr Mathew] is actually employed by and which are actually paying him."

157. In this Item, Mr Straughair has asked for information about companies already referred to by Mr Mathew, plus those companies where other third party information indicates that he is either an employee and/or a director. Mr Onalaja did not seek to argue that any one or more of these companies should not be on the list.

158. On the bases that (a) there is a disconnect between the employment income on Mr Mathew's SA return and the bank statements into which that salary was said to be paid, and (b) the links between Mr Mathew and the companies listed, we find that Item 1 is reasonably required.

159. The confusion between payments from Gold Nuts Ltd and BBL indicates that there is at least some informality in the relationship between Mr Mathew and one or more of the companies for which he provides services. It is therefore possible that there are no formal contracts between Mr Mathew and any of the companies. We have therefore varied the Notice to add an information requirement in the same terms.

Item 2: Loan agreements

160. Item 2 requires the provision of loan agreements between Mr Mathew and (a) BBL and (b) Noviscom. The background to this Item is set out at §120ff. For the same reasons as there set out, we have proceeded on the basis that the loan agreements are not statutory records.

(1) Mr Straughair said that he wants to establish in particular whether the loans are interest bearing, and

(2) their repayment terms.

161. We note the following:

(1) the conflict between the BBL's statutory accounts (which show that the loans are non-interest bearing), and the Schedule attached to Mr Gupta's letter of 30 May, which show interest added to the loan balance;

(2) the original information provided by Mr Gupta that the loans totalling £93,261 made by way of regular monthly payments were from Gold Nuts, and the subsequent letter correcting that;

(3) the use of a loan from Noviscom to repay a loan from BBL; and

(4) Mr Gupta's statement that the loans are used for Mr Mathew's living expenses.

162. Of these points, (1) and (2) demonstrate that the information so far provided has contained inconsistencies, point (3) is unusual and (4) throws into sharp relief the question of repayment terms. Against that background, we find that it is entirely reasonable for Mr Straughair to require the information at Item 2, that the burden of proof is satisfied and we uphold this Item in the Notice.

163. For the same reason as in relation to Item 1, it is possible that there are no formal loan agreements. We have thus varied the Notice to require Mr Mathew to provide the answer to these two questions as "information" if the answer to Item 2 is that there are no formal loan agreements.

Items 3 and 9: Credit balance with BBL

164. At Item 5 of the First Notice Mr Straughair asked for details of loan repayments. Mr Gupta provided the repayment schedule set out at §128. An explanation of the opening credit balance was not within Item 5, as it is not a "repayment." Mr Straughair has therefore included requests for related documents and information as Items 3 and 9 of the Second Notice 2011-12. We have taken the position that these are not "statutory records" for the same reasons as in relation to the loan information.

165. Mr Onalaja suggested that proof of the existence of the credit balance should be sought from BBL, not from Mr Mathew. Again, for the reasons set out at §112, we reject that submission.

166. We first considered whether the credit balance is relevant to Mr Mathew's tax position, and find that it is. If BBL owed Mr Mathew £31,458 at the beginning of the tax year, the figure which Mr Mathew needs to repay has reduced by that amount. If the loan should, as Mr Onalaja suggests, be treated as earnings, then the credit balance reduces those earrings. If the loan is in fact a loan, but is non-interest bearing, the credit balance reduces the benefit in kind charge.

167. We next asked whether it was reasonable of HMRC to seek to validate the statement that there was an opening credit balance, rather than simply accepting what Mr Gupta said. The effect of the credit balance is that the payments made to Mr Mathew by BBL between April and September 2011 are not loans *to him* but repayments of amounts borrowed *from him*. However, the Schedule provided in May 2014 describes these first ten payments as "loans" to Mr Mathew. There is a conflict between this presentation and the credit balance. We find that HMRC have met the

burden of proof, and that the information/documents explaining the credit balance are reasonably required for the purpose of checking Mr Mathew's tax position, and we uphold Items 3 and 9.

Items 4, 6 and 7 Disposal of property at Stanmore Hill

168. In his letter of 11 July 2014, Mr Straughair informed Mr Gupta that he had identified from the Land Registry that Mr Mathew had disposed of a property at Stanmore Hill on 12 December 2011, but that there was no record of any capital gain in his 2011-12 tax return.

169. Item 4 lists certain specified documents relating to the disposal of this property, including those which would be relevant to the calculation of a capital gain, and also those which relate to rental income. Item 6 requires a schedule of any rental income from the property at Stanmore Hill, including the name and address of any tenant and item 7 requires Mr Mathew to say whether or not the property was disposed of to a connected party.

170. At the hearing, Mr Onalaja submitted that there was no evidence that the property was being rented out. He made no submissions on the capital gain. Mr Mathew's witness statement provided no information about this property.

171. Are these documents/information "statutory records"? As we have already identified at §90, this is a difficult question for anyone other than Mr Mathew to answer. If the property was let out, and if its sale gave rise to a capital gain, the answer is yes. But if the property was lived in by relatives who paid no rent, and if (for some reason) it did not give rise to a capital gain on sale, then the documents/information would not be statutory records. For the reasons set out at §90 we have assumed that they are not statutory records, so that Mr Mathew has a right of appeal.

172. An SA return covers both income and gains. Mr Straughair has identified a property which did not feature in Mr Mathew's SA return, either as a rental property or as an investment. If the property was rented out, that rental income will help to explain the acknowledged gap between Mr Mathew's income and his expenditure. If it was sold so as to give rise to a gain, the same is true.

173. We find that HMRC have met the burden of showing that the documents/information requested in Items 4, 6 and 7 are reasonably required for the purpose of checking Mr Mathew's tax position and we uphold these Items of the Notice.

Item 5: Bank Accounts

174. Item 5 is that Mr Mathew provide all bank accounts etc held in his own name or jointly. Item 8 asks Mr Mathew to explain some thirty receipts totalling £50,031 into his HSBC bank account: Mr Straughair identified these from bank statements provided in response to the First Notice. Mr Straughair accepted during cross-examination that £10,000 of these receipts formed part of the sum disclosed as a loan from BBL.

175. Again, only Mr Mathew knows whether his bank statements are "statutory records." We have proceeded on the basis that they are not, and that Mr Mathew therefore has a right of appeal.

176. Mr Straughair also said that the Schedule provided by Mr Gupta showed Mr Mathew as receiving seven cash payments each of £2,500, and he would have expected to see at least some of this deposited in his bank accounts, but he had not been able to trace any of this money to the HSBC bank account provided.

177. Apart from the £10,000 mentioned above, HMRC have not been provided with an explanation for any of the deposits into this account. It appears from the HSBC bank statement that Mr Mathew may have other bank accounts. The enquiry was originally opened because HMRC had concerns that there was a gap between Mr Mathew's declared income and his lifestyle.

178. We again find that HMRC have met the burden of proof in showing that the documents and information required by Items 5 and 8 are reasonably required for the purpose of checking Mr Mathew's tax position and we uphold these Items of the Notice.

Conclusion on the Second Notice (2011-12)

179. For the reasons given above, we uphold the Second Notice (2011-12) in its entirety and confirm Items 1-9 as set out in that Notice under Sch 36, para 32(3)(a). We vary the Notice under Sch 36, para 3(2)(b) to add the following two Items:

(1) If there are no formal contracts between Mr Mathew and any one or more of the companies in Item 1, then he is to provide a list of all companies of which he was either an employee or a director, or both, during the year (Item 10); and

(2) If there are no formal loan agreements between Mr Mathew and either or both of Noviscom and BBL, he is to provide a formal statement as to whether the loans are (a) interest bearing and (b) whether there are any arrangements in place for repayment, together with supporting evidence for both (a) and (b)

The Second Notice (2012-13)

180. This part of the Notice required the production of three Items:

(1) copies of employment contracts with thirteen named companies;

(2) bank statements etc for all personal and business bank accounts in Mr Mathew's own name or jointly;

(3) specified information about all loan accounts.

181. We have already explored in some detail the similar Items in relation to 2011-12 and decided that they do not constitute statutory records, and that HMRC have met the burden of showing that they are reasonably required for the purpose of checking Mr Mathew's tax position in 2011-12.

182. No particular submissions were made by Mr Onalaja, and no information was put forward in Mr Mathew's witness statement, which would form any basis for distinguishing 2012-13 from 2011-12. On the evidence the gap between his disclosed earnings and his lifestyle is likely to have increased: in 2011-12 his SA return shows earnings of only £6,999, around 50% of the figure for 2011-12 and only 5.4% of the earnings in his 2008-09 return.

183. We therefore confirm the Second Notice (2012-13) in its entirety under Sch 36, para 32(3)(a). For the same reasons as given in relation to the Second Notice (2011-12), we vary the Notice under Sch 36, para 32(3)(b).

CONCLUSIONS ON THE SCH 36 NOTICES AND DIRECTION

184. Having considered each of the Items, we end this part of our decision by setting out our conclusions on whether or not some or all of the Items in the Notices were in the nature of a "fishing expedition" and/or an abuse of power by HMRC, as Mr Onalaja submitted.

185. We agree that HMRC are not permitted to use the Sch 36 powers to "fish" for possible issues. In *Derrin* at [20], Simler J said:

> "HMRC may not use their Sch.36 powers for a fishing expedition – whether for their own or the purposes of another revenue authority. A broadly-drafted request will not be valid if in reality HMRC are saying "can we have all available documents because they form so large a class of documents that we are bound to find something useful". What is required is that the request is genuinely directed to the purpose for which the notice may be given, namely to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position. It is no objection however, to the issue of a third party notice that it seeks disclosure of 'conjectural' documents; in other words documents that might not exist: *R v Commissioners of Inland Revenue ex parte Ulster Bank Ltd* [1997] STC 832, 841f-h (Morritt LJ)."

186. However, for the reasons given above, we find that the Items in the Notices as varied are "genuinely directed to the purpose for which the notice may be given" and that Mr Straughair is not on a "fishing expedition."

187. Mr Onalaja also submitted that HMRC were abusing their powers. This tribunal does not have a judicial review jurisdiction, so this is not a matter we can take decide, or take into account as part of the appeal. However, for completeness we record that there was no evidence before us to support a submission that that Mr Mathew is being improperly investigated in retaliation for challenges made to HMRC by the parties to the *Gold Nuts* litigation. Although Mr Straughair is part of Special Investigations, that fact, of itself, takes us nowhere. He told us, and we accepted, that his enquiry came about because he identified a gap between Mr Mathew's income and his lifestyle. That this is true has been accepted by Mr Gupta and Mr Onalaja and is reflected in his disclosed earnings and his bank statements. We have found that the Items contained within the Sch 36 Notices were "reasonably required" in the context of Mr Straughair's concerns about his means and the information so far provided to

HMRC. In short, we found no foundation for the submission that HMRC were abusing their powers by enquiring into Mr Mathew's SA returns.

188. The First and Second Notices as varied are set out at Appendix 1 to this decision. Under Sch 36, para 32(4)(a) we direct that Mr Mathew comply with the Notices, as varied, by 30 days from the date of issue of this decision.

THE CLOSURE NOTICE APPLICATIONS

The law on closure notices

189. The burden of showing that there are "reasonable grounds" for not issuing a closure notice rests on HMRC (TMA s 28A(6)). The case law on closure notices provides extensive guidance, which we briefly summarise here.

190. First, the statutory provisions are "constructed so as to produce a reasonable balance" between HMRC's enquiry and investigation powers on the one hand, and protection for those who wish to question whether the use of those enquiry powers continues to be justified, see *HMRC v Vodafone 2* [2006] STC 483 at [44] *per* Park J in the context of the similar legislation relating to companies**.**

191. 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, see *Tower MCashback v HMRC* [2011] STC 1143 ("*Tower*"), *per* Lord Walker at [18]. Lord Hope, in the same case, said at [83] that the closure notice should be "as informative as possible" because it will serve the function of identifying the subject matter of any appeal.

192. However, that does not mean that a closure notice cannot be ordered until the HMRC officer has "pursued to the end every line of enquiry or investigation," see *Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 29 ("*Eclipse*") at [19] per Special Commissioner Sadler. As Lord Walker said in *Tower* at [18], if 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. In *D'Arcy v HMRC* [2006] UKSPC 549 ("*D'Arcy*") at [12], Special Commissioner Avery Jones said that alternative conclusions can be stated in a closure notice.

193. We also considered *Stephen Price v HMRC* [2011] UKFTT 624(TC) (Judge Mosedale and Mr Hughes), where 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)."

Submissions on the closure notices for 2011-12 and 2012-13

194. Mr Onalaja relied on *Jade Palace v HMRC* [2006] STC (SCD) 419, where Special Commissioner Wallace said at [46]:

> "I accept the submission by Mr Maas that the Revenue do not have to be satisfied in order to state their conclusions. If they are not satisfied, this will be part of the conclusion; in such a case the closure notice will go on to make a judgment as to what the correct figure should be. Such judgment will be on the same basis as on a discovery assessment under s 29. Although it may be possible in some cases to state a figure with confidence, for example if an identified income receipt has been omitted or if specific expenditure is disallowed, in many cases no precision will be possible. The measure of profits is often a matter of judgment."

195. Mr Onalaja said that the main issue was the loans, and as we have already recorded, submitted that HMRC could simply close the enquiries and assess the loans as income.

196. Mrs Naylor submitted that there was simply too much uncertainty for HMRC to assess Mr Mathew at the moment. Mr Straughair was not able to reconcile (a) the loans which are currently stated to have been provided, with (b) the relevant statutory accounts. There were also numerous unanswered questions in other areas, such as possible capital gains and other amounts paid into Mr Mathew's disclosed bank account.

Decision on the closure notices for 2011-12 and 2012-13

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

198. We find that the volume of information and the degree of uncertainty mean that there are reasonable grounds for not issuing a closure notice now.

199. TMA s 28A(6) allows the Tribunal to direct that a closure notice be issued within "a specified period." Mrs Naylor said that if Mr Mathew fully co-operated with the enquiry and provided all relevant information on a timely basis, that HMRC hoped to be able to close the 2011-12 and 2012-13 enquiries in six months.

200. Mr Mathew ended his witness statement by saying that:

> "…if the Tribunal come to the conclusion that such information is required as per the reasons given by the HMRC then I would have no objection to provide the same as long as the HMRC provides me with a timeframe within which such checks will be completed."

201. Mr Mathew has now been directed by the Tribunal to comply with the Sch 36 Notices, as varied, within 30 days from the date of issue of this decision. However, given the volume of information and its uncertain extent, together with the possibility that Mr Mathew's full compliance may open up new issues, we think that HMRC are likely to need more than six months.

202. We are conscious of the fact that a direction to close the enquiry is not like a direction given under the Tribunal Rules, which can be varied on application by the parties. A direction under TMA s 28A can only be appealed. If HMRC find that they need more time at the end of the six month period, they would be out of time to appeal. They would then either have to issue an assessment which did not reflect the "proper regard for the public interest in the recovery of the full amount of tax payable" as Lord Walker put it in *Tower,* or they have to apply for permission to make a late appeal to the Upper Tribunal. If permission were granted, the appeal process could take over a year. That would be inefficient for both parties.

203. We considered whether to set a longer period, but the level of uncertainty is simply too great. As a result, we decided not to set a date by which the enquiries must be closed. Of course, this does not give HMRC permission to procrastinate. Mr Mathew can make another application for closure notices, and any such applications will be considered by the tribunal in the light of any further developments.

The closure notice applications for the earlier years

204. Mr Straughair has opened enquiries into the earlier years but not asked any questions. Mr Onalaja submitted that these years were being held "in limbo" and HMRC should either progress them or close the enquiries.

205. We disagree. It is entirely reasonable for HMRC to decide to progress one or two of the open enquiries and then if appropriate turn to the other years. This makes the volume of questions proportionate and manageable for both sides. Mr Mathew is on notice that these earlier years are under enquiry so will not be taken by surprise if questions are asked in due course.

206. At the moment, nothing is known about the position for these years and it would be inappropriate to direct that they be closed forthwith. We therefore find that there are reasonable grounds for not issuing a closure notice with immediate effect for the years 2008-09 through to 2010-11.

207. Because of the level of uncertainty, we also do not direct a specified period within which the enquiries must be closed. But again, this is not an invitation to HMRC to delay: Mr Mathew can apply again for a closure notice and may well do so if he considers that appropriate and timely progress has not been made in moving forward the later years so that HMRC can transfer their focus to these earlier returns.

Full decision and appeal rights

208. This document contains full findings of fact and reasons for the decision.

209. There is no right of appeal against the decision in relation to the Sch 36 Notices, see Sch 36, para 32(5).

210. Any party dissatisfied with the closure notice decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. T he 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 31 March 2015

APPENDIX 1: THE SCHEDULE 36 NOTICES

THE FIRST NOTICE AS VARIED	
No.	**Item**
3a	Schedule of any shares held by you in any entities, both within the UK and overseas at any time during the period, other than those provided in the letter of 9 May 2014, including (a) held by you as nominee for someone else and (b) those held in another name where you are the beneficial owner. The name and address of each entity must be provided, along with the date and cost (if any) of acquisition. If any disposals have been made, provide the date and value of sale. Also provide a statement that Schedule is a complete and accurate list of all shareholdings beneficially owned by you at any time during the tax year.
3b	Schedule of any interests in any partnership, limited partnership, limited liability partnership or joint venture, whether in the UK or overseas at any time during the tax year, showing the name and address of the entity, date and cost of acquisition, date and value of sale and any other changes in your interest during the year. This Schedule must include any such interests (a) held by you as nominee for someone else and (b) those held in another name where you are the beneficial owner. The Schedule must be accompanied by a statement that it contains a complete and accurate list of all such interests beneficially owned by you at any time during the tax year.
4a	Confirmation whether the loans from BBL and Noviscom disclosed to HMRC is a complete and correct list of all loans from any entity with which you are connected, and if not, a further Schedule of loans received because of your position in an entity, such as a director, shareholder, partner, employee or nominee
4b	An explanation of the basis on which you were loaned money by BBL
5a	If any further loan account is disclosed in response to Item 4a, a chronological breakdown with narrative description for amounts received and details and evidence to support any repayments made on these loans, including bank statements evidencing the payments and any repayments.
7	For any personal assets on which there is a charge such as a mortgage or loan, provide the loan agreements and/or mortgage statements which cover the whole period. Provide the bank and/or building society books or statements from which you make these payments for the period.

THE SECOND NOTICE AS VARIED	
2011-12	
No.	**Item**
1	Employment and/or director contracts between you and the companies

	named in Item 1 of the Second Notice issued on 13 August 2014
2	Loan agreements between you and (a) BBL and (b) Noviscom
3	Supporting documentation for the credit balance with BBL
4	Specified documentation about the disposal of the property at Stanmore Hill, Middlesex as set out at in the Second Notice issued on 13 August 2014
5	All bank and/or building society books or statements, cheque book stubs, and deposit book counterfoils for all personal and/or business bank accounts held in your own name or jointly
6	A schedule of any rental income from the property at Stanmore Hill, including the name and address of any entity/individual renting the property
7	State whether the Stanmore property was disposed of to a connected party
8	Evidence for, and an explanation of, the bank receipts in the bank account, as set out at Annex 1 to the Second Notice issued on 13 August 2014
9	Explanation of the opening credit balance with BBL
10	If there are no formal contracts between you and the companies in Item 1, provide a list of all companies of which you were either an employee or a director, of both, during the year.
11	If there are no formal loan agreements between you and either or both of Noviscom and BBL, provide a formal statement as to whether the loans are (a) interest bearing and (b) whether there are any arrangements in place for repayment, together with supporting evidence for both (a) and (b).
2012-12	
1	Any employment/director contracts between you and the companies listed at Item 1 of the Second Notice issued on 13 August 2014
2	All bank and/or building society books or statements, cheque book stubs, and deposit book counterfoils for all personal and business bank and/or building society accounts held in your own name or jointly
3	For each loan account held with a company, provide a detailed and chronological breakdown with narrative description for (a) amounts received and (b) all amounts repaid. The schedule must provide opening and closing balances, and itemise all movements during the period. Provide details and evidence to support any repayments made to these loans including bank statements showing the payments made.
4	If there are no formal contracts between you and any one or more of the companies in Item 1, provide a list of all companies of which you were either an employee or a director, or both, during the year.
5	If there are no formal loan agreements between you and either or both of Noviscom and BBL, provide a formal statement as to whether the loans are (a) interest bearing and (b) whether there are any arrangements in place for repayment, together with supporting evidence for both (a) and (b).

APPENDIX 2: LEGISLATION

TAXES MANAGEMENT ACT 1970

1 Responsibility for certain taxes

The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—

(a) income tax,

(b) corporation tax, and

(c) capital gains tax.

12B Records to be kept for purposes of returns

(1) Any person who may be required by a notice under section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment or other period shall—

(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—

(i) where enquiries into the return are made by an officer of the Board, the day on which, by virtue of section 28A(1) or 28B(1) of this Act, those enquiries are completed; and

(ii) where no enquiries into the return are so made, the day on which such an officer no longer has power to make such enquiries.

(2) The day referred to in subsection (1) above is—

(a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company…;

(b) otherwise, the first anniversary of the 31st January next following the year of assessment

or (in either case) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases).

(2A) Any person who—

(a) is required, by such a notice as is mentioned in subsection (1) above given at any time after the end of the day mentioned in subsection (2) above, to make and deliver a return for a year of assessment or other period; and

(b) has in his possession at that time any records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period,

shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before the day mentioned in subsection (2) above, would have been the relevant day for the purposes of subsection (1) above.

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.

…

48 Application to appeals and other proceedings

(1) In the following provisions of this Part of this Act, unless the context otherwise requires—

(a) "appeal" means any appeal under the Taxes Acts;

(b) a reference to notice of appeal given, or to be given, to HMRC is a reference to notice of appeal given, or to be given, under any provision of the Taxes Acts.

(2) In the case of—

(a) an appeal other than an appeal against an assessment, the following provisions of this Part of this Act shall, in their application to the appeal, have effect subject to any necessary modifications, including the omission of sections 54A to 54C and 56 below;

(b) any proceedings other than an appeal which, under the Taxes Acts, are to be subject to the relevant provisions of this Part of this Act, the relevant provisions—

(i) shall apply to the proceedings as they apply to appeals;

(ii) but shall, in that application, have effect subject to any necessary modifications, including (except in the case of applications under section 55 below) the omission of section 56 below.

(3) In subsection (2), a reference to the relevant provisions of this Part of this Act is a reference to the following provisions of this Part, except sections 49A to 49I and 54A to 54C.

49 Late notice of appeal

(1) This section applies in a case where—

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

49A Appeal: HMRC review or determination by tribunal

(1) This section applies if notice of appeal has been given to HMRC.
(2) In such a case—
(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
(c) the appellant may notify the appeal to the tribunal (see section 49D)…

49B-49C …

49D Notifying appeal to the tribunal

(1) This section applies if notice of appeal has been given to HMRC.
(2) The appellant may notify the appeal to the tribunal.
(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

50 Procedure

(1)–(5) …
(6) If, on an appeal notified to the tribunal, the tribunal decides—
(a) that the appellant is overcharged by a self-assessment;
(b) that any amounts contained in a partnership statement are excessive; or
(c) that the appellant is overcharged by an assessment other than a self-assessment,
the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

FINANCE ACT 2008, SCHEDULE 36

1 Power to obtain information and documents from taxpayer

(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
(a) to provide information, or
(b) to produce a document,
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....

....

3. Approval etc of taxpayer notices and third party notices

(1) An officer of Revenue and Customs may not give a third party notice without—

(a) the agreement of the taxpayer, or

(b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless—

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

(4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

(5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax.

….

6 Notices

(1) In this Schedule, "information notice" means a notice under paragraph 1, 2 or 5.

(2) An information notice may specify or describe the information or documents to be provided or produced

7. Complying with notices

(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

…

21. Taxpayer notices following tax return

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

(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

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

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

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed.

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

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

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

(6) Condition B is that an officer of Revenue and Customs has reason to suspect that, as regards the person,—

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

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

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

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking the person's position as regards any tax other than income tax, capital gains tax or corporation tax.

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

(9) In this paragraph, references to the person who made the return are only to that person in the capacity in which the return was made.

….

29 Right to appeal against taxpayer notice

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

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

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3.

….

32 Procedure

(1) Notice of an appeal under this Part of this Schedule must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(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.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

….

62 Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

(2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—

(a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (TAX CHAMBER) RULES 2009

7 Failure to comply with rules etc

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include--

(a) waiving the requirement…

20 Starting appeal proceedings

(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

(2) The notice of appeal must include--

(a) the name and address of the appellant;

(b) the name and address of the appellant's representative (if any);

(c) an address where documents for the appellant may be sent or delivered;

(d) details of the decision appealed against;

(e) the result the appellant is seeking; and

(f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal--

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

(5) When the Tribunal receives the notice of appeal it must give notice of the proceedings to the respondent.