



TC07742

INFORMATION NOTICE – Schedule 36 Finance Act 2008 – whether information ‘reasonably required’ – burden of proof – business records found ‘incomplete’ and ‘unreliable’ – necessity for further information to establish alternative bases for checking tax position – validity of request for ‘personal records’ – whether joint-named accounts ‘third-party’ documents – the restriction criteria paras 18 and 19(3) of Sch 36 – Notice confirmed – appeal dismissed

Appeal number: TC/2019/08825

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

GORDON FERRIS

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at Eagle Building, Glasgow on 21 February 2020

Brian Cairney of BCAS Accountants, for the Appellant

Jennifer Mackay, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Gordon Ferris appeals against the review conclusion decision dated 8 October 2019 in relation to an Information Notice ('the Notice') served by the respondents ('HMRC').
2. The appeal is brought under Schedule 36 to the Finance Act 2008 ('Sch 36'). The issue for determination in this appeal concerns whether the requested items of information are 'reasonably required' as provided under para 1(1) of Sch 36.

RELEVANT LEGISLATION

3. From the Taxes Management Act 1970 ('TMA'), the sections relevant to this appeal are:
 - (1) Section 8 TMA provides that a person may be required by notice to deliver a return of his income specifying each separate source of income and the amount of that source. Subsection 8(2) states that:

'Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.'
 - (2) Pursuant to s 9A TMA, an officer of HMRC may enquire into a return under s 8 by giving a notice of enquiry.
 - (3) Section 12B TMA provides for records to be kept and preserved by a person, for the purpose of enabling the said person to make and deliver a correct and complete return for the year or period.
4. From Schedule 36 FA 2008, the relevant provisions are the following:
 - (1) Paragraph 1(1) provides that an officer of HMRC 'may by notice in writing require a person ("the taxpayer")' to provide information or a document:

'... if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.'
 - (2) Part 4 of Sch 36 concerns the 'Restriction on Powers', of which paras 18 and 19 state, *inter alia*, the following:

'18 An information notice only requires a person to produce a document if it is in the person's possession or power.

19 [...]

(3) An information notice may require a person—

 - (a) to produce documents, or copies of documents, that are personal records, omitting any information whose inclusion (whether alone or with other information) makes the original documents personal records ("personal information"), and
 - (b) to provide any information contained in such records that is not personal information.'
 - (3) Paragraph 29 provides for an appeal against an information notice in terms of:
 - (1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the tribunal 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. ...'

(4) Paragraph 32 provides for the tribunal's jurisdiction in relation to an 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.'

(5) In relation to appeal right, sub-para 32(5) states: '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.'

EVIDENCE

2. Jennifer Owen, who is a Higher Officer working on direct tax enquiries, gave evidence for the respondents in relation to the Sch 36 notice issued. I find Officer Owen to be a credible and reliable witness and accept her evidence as concerns matters of fact without qualification.

FINDINGS OF FACT

5. The chronology of events leading to the issue of the Notice under appeal is as follows.

(1) On 1 November 2018, Officer Kealy issued a notice under s 9A of TMA to open an enquiry into Mr Ferris's Self-Assessment ('SA') return for the year 2016-17. A copy of the s 9A notice was sent to BCAS Accountants Ltd ('BCAS').

(2) On 10 December 2018, Officer Owen who had taken over the enquiry, along with Officer Cupples, visited the business premises of Gordon's Garage, to meet with Mr Ferris, Mr Brian Cairney and Mr Ryan Cairney of BCAS. Business records were collected for review.

(3) On 12 December 2018, HMRC issued the Note of the meeting of 10 December, which is five pages long, and whose content received the confirmation of agreement by Mr Ferris and Mr Brian Cairney by correspondence dated 25 March 2019.

(4) On 25 February 2019, Officer Owen wrote to Brian Cairney to ask how the drawings and wages figures had been calculated because no supporting records had been provided. She also related her findings in relation to a three-month sample period (May 2016 to beginning of August 2016) of the business records, which identified:

- (a) numerous sales were without corresponding purchase invoices for the parts required for the specific job;
- (b) numerous purchases for which there was no apparent sales invoice to match the parts bought.

(5) By letter dated 25 March 2019, Brian Cairney's replies are summarised as follows.

(a) He considered the profit figure declared to be accurate as there is roughly the same number of sales as with purchase invoices, even though the narrative on the sales invoices do not match.

(b) That the records could not be matched probably due to a timing issue, in that customers take time to collect their vehicles, and only a small sample period was reviewed.

(c) Wages were sometimes paid in cash which explained the payments from the bank statements were less than the expenses claimed.

(d) The drawings figure used in the accounts was a balancing figure.

(6) HMRC reviewed a further three months of sales and purchase records (August to early November 2016), extending the sample period to six months. The findings were:

- (a) A similar pattern of non-matching of sales and purchase invoices was identified for the August to November 2016 period to that arising for the previous three months.
 - (b) No missing sales or purchases from the previous sample period could be matched with the records from the ensuing three months.
 - (c) For example: brake pads were purchased on 4 May 2016 to fit a Renault Scenic (registration number KN03YMP). No sales invoice could be identified for the vehicle from May 2016 to the beginning of November 2016.
- (7) On 14 May 2019, Office Owen wrote to advise that Mr Cairney's explanation did not resolve the anomalies identified from the review of records. Information was requested to check the accuracy of the SA return by alternative methods, namely:
- (a) a business economics model to recalculate profits;
 - (b) a personal spending and means position to ascertain the income level.
- (8) On 28 May 2019, Brian Cairney replied that no further information would be provided and that he and Mr Ferris were withdrawing co-operation.
- (9) On 20 June 2019, a Sch 36 Notice was issued to Mr Ferris and a copy to Brian Cairney.
- (10) On 10 July 2019, Brian Cairney replied with:
- (a) information regarding wages with details of three payments made from the business bank account;
 - (b) that the Sch 36 Notice was excessive;
 - (c) that the personal bank statements of a joint account held by Mr Ferris with his wife would be provided on the condition that HMRC withdrew the Sch 36 Notice;
 - (d) that if HMRC could not agree to the condition of withdrawal then the letter was to be treated as an appeal against the Notice on the grounds that: (i) most of the information had already been provided; and (ii) it is not reasonably required; and (iii) does not constitute statutory records.
- (11) On 1 August 2019, Officer Owen wrote to Mr Ferris to acknowledge the appeal and set out her view on the matter:
- (a) That most of the information requested had not already been provided;
 - (b) None of the information or documents were requested on the ground that they were 'statutory records';
 - (c) Nor does the requested information constitute 'personal records' or 'personal information' which are protected under para 19(3) of Sch 36.
 - (d) The information is 'reasonably required' in order to check Mr Ferris's tax position, since the business records are 'incomplete and unreliable' and therefore alternative methods must be used in order to verify his income.
- (12) The 'view of matter' decision of 1 August 2019 contained an offer of review of the decision, and was accepted by Mr Cairney's letter dated 26 August.
6. On 8 October 2019, the review conclusion letter upheld the Sch 36 Notice, save for items 9 and 11 which were withdrawn as the information so requested is covered by item 2.

7. On 26 November 2019, a £300 initial penalty for non-compliance with the Notice, since no information or documents had been received 30 days after the review conclusion letter. The penalty has been stood over pending on the appeal against the Notice as notified to the Tribunal.

8. On 4 December 2019, Mr Cairney wrote to advise that he had notified an appeal to the Tribunal against the review conclusion letter for Mr Ferris, who is also appealing against the £300 penalty.

9. On 18 December 2019, Officer Owen wrote to Mr Cairney and Mr Ferris to advise that the penalty has been stood behind the appeal against the review conclusion decision.

ITEMS OF INFORMATION REQUESTED

10. The Sch 36 Notice as amended by the review conclusion decision of 8 October 2019 requested information for the year from 6 April 2016 to 5 April 2017 under the headings of:

(1) '**Takings Build Up**' consists of 11 items, of which item 9 (pertaining to whether the home address property is owned or rented) and item 11 (pertaining to details of vehicles owned or have access to) were removed on review.

(2) '**Takings Build Up**' – remaining items of information under the heading include:

'Item 1. All bank, building society, and credit card statements for all accounts, held in sole or joint names, covering the full period 6 April 2016 to 5 April 2017.'

Other items of information are summarised: a statement of assets and liabilities; income received other than from the garage business; non-business, personal and household spending; maximum cash held at any one time; any dependents and gifts or loans advanced; exceptional items of spending in the year (e.g. holiday, home refurbishment, capital purchase); any properties owned and rented out.

(3) '**Business Economics Model**': items 12 to 16 are in the format of a questionnaire, with item 12 asking:

'How do you keep track of work to be undertaken? If a diary of the vehicles booked in and jobs to be completed was kept, please provide me with a copy of this to review.'

Other questions include: how many hours on an average day completing billable work? How often did you work on Saturdays during the year (to provide rough estimate if no exact details)? Periods of closure (e.g. holidays); whether specialist services provided.

(4) '**Sales**': items 17 to 25 in relation to invoicing procedure; whether writing up of invoices before or after job completion; any tracking of changes in pricing; details of hourly rate of labour charge if applied; any standard pricing for specific jobs; details regarding diagnostic work, and quotations; whether sales invoices given to customers.

(5) '**Purchases**': items 26 to 27, in relation to details of any mark-up on parts; whether customers buy parts for jobs; and if so, how often, and what records being kept.

(6) '**Employees**': items 28 to 29, in relation to Mr Ferris's role in the business and his weekly employee duties; a detailed description of Mr Ferris's usual working week.

(7) '**Cash**': items 30 to 32, as concerns (i) opening balance of cash, (ii) if opening balance not known, then 'an educated estimate' of cash on hand at the start of the year, and (iii) the maximum amount of cash that would have been on hand during the year.

HMRC'S CASE

11. In evidence, Officer Owen emphasised that the central part of the enquiry is 'to try to quantify the accurate turnover' for 2016-17; that there would appear to be 'missing sales and purchases'; that the figure for drawings per return was a balancing figure; that there are too many gaps in the business records so much so that there is 'no possibility of bringing together a coherent picture' to close the enquiry.

12. It was also highlighted to the Tribunal that Mr Ferris was not registered for VAT, so there were no VAT returns in the system which could have assisted the enquiry by providing an alternative matrix for ascertaining the likely level of turnover, such as by an indication of the sector average in mark-up on purchases by extrapolating from the input VAT claimed.

13. Speaking of the reasons for the information requested, Officer Owen stated that:

(1) The sales duplicate book and purchase invoices do not match: there were purchases not leading to sales; and sales with no corresponding purchases.

(2) She rejected the timing difference as a plausible explanation for the non-matching of sales and purchases. She considers that it is unlikely that any vehicle would have been held in the garage for numerous months after the repair work, and that it is more likely that some sales had not been recorded.

(3) She has concerns that money was taken out of the business in cash without any records. The wages were said to have been paid in cash, but without supporting accounting records of what had been paid. No wage payments can be traced to HMRC's PAYE/ RTI system. Similarly, drawings were taken in cash with no record of the sums drawn to support the figure in the accounts, which was stated to be as a balancing figure.

(4) Further information was therefore requested with a view of preparing a business economics model for profits to be recalculated, possibly by re-creating the mark-up rate to arrive at the likely turnover.

(5) As regards Mr Ferris' personal spending and means position, it is for checking if the income declared is sufficient, in view of the undeclared sales identified.

14. In relation to the request for the bank statements, Officer Owen explained that:

(1) Personal bank statements for all members of the household were requested since it is likely that finances and household spending would be interlinked and this would allow her to take into account any other household income and outgoings that had been met by other people so as to establish the drawings that would have been required from the business; (at paragraph 13 of witness statement).

(2) Mr Ferris' offer to provide 'private' bank statements was not accepted by HMRC because: (a) it was on the condition that the Sch 36 Notice would be withdrawn; and (b) the bank statements were not enough on their own to give the complete picture when a lot of drawings were taken in cash.

THE GROUNDS OF APPEAL

15. The Notice of Appeal was lodged electronically on 8 November 2019 for Mr Ferris against the Sch 36 Notice, the appealable decision being the review conclusion letter of 8 October 2019. The grounds of appeal as stated on the Notice of Appeal are as follows:

'(1) The information does not represent statutory records.

(2) The information is not reasonably required to determine the tax position.'

16. There is no further substantiation to the stated grounds of appeal. For ‘Desired outcome’ of the appeal, it is stated as follows:

‘The notice to be rescinded and the enquiry concluded with the statutory information already provided.’

17. At the hearing, Mr Cairney made similar submissions as those made in his letters of 25 March 2019 and 10 July 2019 (at §5(5) and §5(10)), and emphasised the following points:

- (1) That HMRC had already been provided with all necessary documents to check the tax position of Mr Ferris; and the information notice was a fishing exercise.
- (2) That the bank statements of other people in Mr Ferris’ household are third-party documents and not in Mr Ferris’ power to produce.

DISCUSSION

The issue for determination

18. As ascertained at the outset of the hearing, parties are agreed that the information requested does not represent ‘statutory records’ for the appeal right under para 29(2) of Sch 36 to be engaged. It is therefore unnecessary to consider Ground 1 of the appeal.

19. The only issue for the Tribunal’s consideration pertains to Ground 2. The burden of proof for the ‘reasonably required’ test has been given detailed judicial explication in *Joshy Mathew* [2015] UKFTT 0139 (TC) at [66] to [92]. Notwithstanding the presumption of regularity, I have adopted the same approach as the one stated at [86] in *Joshy Mathew*, whereby:

‘[The tribunal] 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. ...’

20. On the basis that HMRC have the burden to meet the ‘reasonably required’ test, it is important to bear in mind the statutory wording that provides for the test; namely, an item of information is ‘reasonably required by the officer for the purpose of checking the taxpayer’s tax position’: para 1(1) Sch 36.

21. In other words, the ‘reasonably required’ test is essentially a purpose test, and the purpose is that of checking the taxpayer’s tax position. Statutory definitions are given for certain terms under Part 9 of Sch 36, some of which are as follows.

- (1) “‘checking” includes carrying out an investigation or enquiry of any kind’ (para 58);
- (2) ‘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’ (para 62);
- (3) “‘tax position”, in relation to a person, means the person’s position as regards any tax’: (a) ‘past, present and future liability to pay any tax’; (b) penalties paid or payable; (c) claims, elections, applications and notices that have been or may be made (para 64).

The insufficiency of business records

22. In the normal course of event, a taxpayer running a business can be expected to keep adequate business records to support the figures used to make his Self-Assessment returns. The business records are the ‘statutory records’ as defined under para 62 of Sch 36, and the statutory

records should have been sufficient for the purpose of checking the taxpayer's tax position if those records are complete and accurate.

23. It is not disputed that business records have been provided to HMRC to check Mr Ferris' tax position, and these records were the 'statutory records' as defined under Schedule 36. The records provided include business account bank statements, sales invoices, and purchase invoices. These business records have been meticulously collated for a full quarter to establish if the sales and purchases were 'complete and accurate' for the purpose of checking Mr Ferris' tax position. The examination of the records took the form primarily as matching purchases of parts to 'supposed' sales related to the parts. However, there are numerous instances where parts purchased did not lead to a corresponding sale, or recorded sales had no matching purchases on paper.

24. In assessing whether Mr Ferris' business records, being those records that have been provided to HMRC for checking his tax position, are complete and accurate, I have particular regard to the following entries (at paragraphs 15, 21, 23, 24 and 25) in the Note of the Meeting held on 10 December 2018 at the business premises of Mr Ferris.

'[Officer Owen] asked [Mr Ferris] what type of payments he accepts. [Mr Ferris] confirmed he does not have a card machine and only takes cash payments.

[Mr Ferris] explained his wife does the banking and will deposit the cash in the bank at the end of each week. [Mr Cairney] advised that cash is generally only banked to cover the bills ...

... each job is recorded in a duplicate book detailing the date, work carried out and the amount charged ... [Mr Ferris] confirmed ... all jobs were recorded in the duplicate book.'

25. A copy of the Note of Meeting was sent to Mr Ferris and Mr Cairney. In his letter dated 25 March 2019 to Officer Owen, Mr Cairney expressly confirmed that '*there is nothing in those notes that we disagree with*'.

26. Mr Cairney attempted to explain that the failure to match purchases to sales was due to some supposed 'timing differences' between the purchase of the parts and the collection of the relevant vehicles after repair using those parts. This explanation was taken up seriously by HMRC whereby the collation exercise was extended to the next quarter to cover in total a six-month period. Instead of finding the missing sales in the second quarter for the parts purchased in the first quarter, Officer Owen found the same pattern of missing sales repeating for parts which were bought in the second quarter and did not lead to related sales. Plainly, Mr Cairney's explanation has not been borne out by corroborating the evidence from the business records.

27. Based on the findings, HMRC drew the conclusion that the business records provided for checking Mr Ferris' tax position for 2016-17 were 'incomplete and unreliable'. To any objective observer, the conclusion reached is unassailable for the following reasons:

- (1) By the taxpayer's own admission, all his sales were made in cash.
- (2) Not all cash receipts were banked; cash were 'generally' deposited to the extent for covering bills.
- (3) The bank statements therefore afford no assistance as a complete record of the cash receipts from sales.

(4) The duplicate book was supposed to have recorded ‘all jobs’ and was the only record provided to establish ‘sales’, but parts purchased for specific jobs as recorded could not be matched to recorded sales in the duplicate book.

(5) Similarly, there were sales for which specific parts were noted but without corresponding purchases being recorded.

28. To an objective observer, Mr Ferris would appear to operate his business to a significant extent on a cash basis. By Mr Ferris’ own admission, the business ‘takes *only* cash payments’ but only sufficient cash was banked to cover bills; wages were paid (in part) in cash; drawings were taken in cash. The business records are evidently inadequate for providing the audit trail to trace the movement of substantial sums of cash, and for the turnover and profits of the business to be established, which are essential to the checking of Mr Ferris’ tax position.

29. From Officer Owen’s evidence, the necessity of the Notice is occasioned by the conclusion reached that the business records provided to her are neither accurate nor complete. In other words, it is the insufficiency of the business records that has given rise to the information request. Insofar as the business records are concerned, I find as a fact that they are inadequate for the purpose of checking Mr Ferris’ tax position. I therefore dismiss the appellant’s ground of appeal that HMRC have already been provided with the necessary records to conclude the enquiry.

30. It remains to be considered whether the items requested are individually reasonably required. To that end, I have in mind specifically the objection put forward for Mr Ferris that the Notice is ‘excessive’.

Information to build up takings

31. A central aspect of the enquiry is ‘to quantify the accurate turnover’ as stated by Officer Owen. It is a fair focus since the turnover is the starting point for ascertaining the profit level on which the tax liability is to be calculated. I accept the finding that the sales records are incomplete, and there is good reason for inferring that sales could have been under-declared. If not all cash receipts were banked into the business account, then the information requested under ‘Takings Build Up’ is reasonably required in order to gauge the probable level of takings as evidenced by Mr Ferris’ personal and household expenditure.

32. As a taxpayer, Mr Ferris has the statutory duty to keep complete and accurate records to validate the figures in his Self-Assessment returns. Given that the business records provided are neither complete nor reliable, alternative methods have to be found for checking Mr Ferris’ tax position. The objection that the ‘private’ bank statements are personal records is of no avail if the necessity of resorting to personal financial records as an alternative basis for checking the tax position has been principally occasioned by the taxpayer’s failure to maintain adequate and reliable business records in the first place. Furthermore, there is no blanket provision for ‘personal records’ to be specifically excluded from the powers of information request. On the contrary, sub-para 19(3) of Sch 36 provides for ‘personal records’ to be brought within the powers of information request for production, so long as ‘personal information’ contained therein is suitably omitted. Finally, I have regard to the fact that the production of Mr Ferris’ bank account statements jointly held with his wife had been offered to HMRC in exchange for the withdrawal of the Information Notice as a whole. It is not unreasonable to infer from such an offer that there is at least an acceptance on Mr Ferris’ part that the production of ‘personal records’ is reasonable for the purpose of checking a taxpayer’s tax position in the present case.

33. The second objection raised for the appellant is that the information request includes ‘third-party’ documents, specifically in relation to item 1, namely: ‘All bank, building society, and credit card statements for all accounts, held in sole or joint names’ for the year 2016-17. With forcefulness, Mr Cairney challenged this item of information request in the light of Officer Owen’s witness statement (§14), and said that the request amounted to asking for ‘third-party’ documents, which HMRC have no right to do so.

34. Under Part 4 of Sch 36, HMRC’s powers to request information are placed under certain restrictions, one restriction is as stated at para 18: *An information notice only requires a person to produce a document if it is in the person’s possession or power* (emphasis added). As a matter of statutory construction, the limitation to the scope of information or documents that can be requested by HMRC is defined by para 18, and concerns whether the requested item is in the person’s *possession or power* to produce. The restriction criterion is not referential to whether a document has originated with a third party. By reference to the source of a document, a supplier’s invoice rendered to Mr Ferris is a ‘third-party’ document, in that it has originated with a third party, and concerns the sale made by this third party. Despite it being a third-party document, a supplier’s invoice that has been rendered to Mr Ferris is in his possession or power to produce, and complies with the restriction criterion under para 18 of Sch 36.

35. Item 1 of the Notice requests financial statements of accounts in ‘sole or joint names’, which delineate those accounts of which Mr Ferris is either the only holder, or is a holder with another person or other persons. Item 1 does not request financial statements of accounts of other householders to which Mr Ferris is not a named holder. By inference, Mr Ferris is either in possession, or in the power, to produce the financial statements if he is a named holder (solely or jointly) of an account. Item 1 therefore complies with the scope of information request as restricted by para 18 of Sch 36.

36. As to the challenge that HMRC have acted *ultra vires* in requesting the financial statements under item 1, this challenge would seem to be raised on two premises. First, it seems to be premised on interpreting the request as for account statements belonging to other householders. If this is the case, the challenge is factually incorrect, since item 1 is restricted only to those accounts of which Mr Ferris is a holder, either solely or jointly. Item 1 is not a request at large, to include any bank or building society, or credit card accounts of other family members of which Mr Ferris is not also a named holder.

37. The second premise of the challenge seems to base on the distinction between a taxpayer notice and a third-party notice under Sch 36, in that item 1 request is *ultra vires* in the form of a taxpayer notice (under para 1), since such information could only have been requested by way of a third-party information notice (under para 2). While a third-party notice is subject to the additional safeguard under para 3(1), whereby a third-party notice requires ‘the agreement of the taxpayer’, or ‘the approval of the tribunal’, the same ‘reasonably required’ test applies to a third-party notice as to a taxpayer notice. The challenge on this premise is therefore procedural rather than substantive, since the same test is to be applied to a third-party notice as to a taxpayer notice (where the information requested does not form part of statutory records).

38. This procedural challenge is unfounded, since the meaning of ‘person’ in para 18 refers to the person being served an information notice, and is to be taken to mean either a taxpayer who has been served a taxpayer notice, or a third party who has been served a third-party notice. HMRC have not applied for any third-party notice in relation to item 1 because it is unnecessary to do so, given that Mr Ferris can be fairly assumed to have ‘in possession or power’ to produce the financial statements for accounts he is the sole or a joint holder.

39. In the event that Mr Ferris is unable to produce these financial statements as required, HMRC could consider obtaining the statements directly from the relevant banking or financial institutions by issuing third-party notices. Before the issue of such third-party notices, it would then be necessary for HMRC to obtain either Mr Ferris' agreement, or the Tribunal's approval by way of a third-party notice application.

40. For the avoidance of doubt, item 1 is not a request of the kind that would have required a third-party notice in the first instance, since item 1 clearly states that the financial statements being requested concern only those accounts held by Mr Ferris himself, solely or jointly, and these statements can be assumed to be in Mr Ferris' possession or power to produce, such as by printing the relevant statements through online registration.

41. I am satisfied that no items of information under this heading breach the restriction criteria under paras 18 or 19(3) of Sch 36, and that there is no substantive or procedural issue as concerns 'third-party documents' as stated by Mr Cairney for the appellant to render any item invalid. Furthermore, in the absence of accurate and complete business records being available, I conclude that the items of information requested under the heading of 'Takings Build Up' are all reasonably required to enable HMRC to check Mr Ferris' tax position.

Information for Business Economics Model, Sales, Purchases and Employees

42. The items 12 to 29 under the four headings are considered together because they are essentially questions for the common purpose of building up a profile of the business. The detailed information items under each question may have given rise to the objection that the Notice is 'excessive'.

43. As I understand from Officer Owen's evidence, having concluded that the business records cannot be relied upon to check Mr Ferris' tax position, there are two alternative bases being explored by HMRC to check Mr Ferris' tax position. These two bases are 'Takings Build Up' and 'Business Economics Model'. I have concluded that the items of information request under 'Takings Build up' are all reasonably required. In view of the information request for items under 'Takings Build Up', is it therefore 'excessive' that HMRC should also request the information under items 12 to 29 to check Mr Ferris' tax position? If it is 'excessive', then it is not reasonably required, and that is the appellant's argument.

44. In considering whether items 12 to 29 are 'reasonably required' *in addition to* items 1 to 8 and 10, it is foremost to note that no reliable business records exist to enable HMRC to quantify the likely turnover. While 'takings' could have enabled the likely turnover to be ascertained, the tax position is ultimately to be based on a profit figure fairly estimated. A more balanced view can only be taken of the likely profit level if any conclusions reached from information gathered from 'Takings Build Up' can be compared with the projections reached from information gathered under items 12 to 29. In my view, it is in fairness to the taxpayer that HMRC should have corroborative evidence from items 12 to 29 to test the reliability of any conclusions they may reach from the information gathered from 'Takings Build Up'. Given the insufficiency of records, a business economics model represents a viable alternative to ascertain both the likely turnover, and the profit margins.

45. Turning to another facet of the challenge against the Notice as being 'excessive', in the sense of being onerous, I have regard to the fact that the information request under items 12 to 29 is in the form of a questionnaire. The replies to these questions are well within Mr Ferris' knowledge, and the information request can be readily complied with by way of a meeting with

HMRC as proposed. It is not onerous if co-operation is given, and if the information is given verbally to HMRC directly, instead of being set out in writing.

Information as concerns ‘Cash’ position

46. The last three items of information request concern the cash position of the business. I consider the information to be reasonably required, especially in view of the fact that all sales and drawings had been taken in cash. The cash position is another aspect of information gathering that can assist HMRC in testing any conclusions reached under the alternative bases by building up takings and a business economics model. As to whether it can be considered onerous for Mr Ferris to address the cash position where the record keeping of the business had been deficient, I have regard to the fact that Mr Ferris has been given the option to make ‘an educated estimate’ in the event that he cannot readily put a figure to the opening cash balance.

Conclusion

47. To close the enquiry, HMRC need to be in a position to issue a closure notice. A closure notice is not just to inform the taxpayer that the officer has completed the enquiry; a closure notice requires the officer to state the ‘conclusions’ of the enquiry. HMRC have a public duty to assess a taxpayer to the correct amount of tax to the best of their judgment in the light of available information. As Henderson J stated at [115] of the High Court decision in *Tower MCashback* [2008] EWHC 2387 (Ch):

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

48. The items requested on the Sch 36 Notice are necessitated by the fact that statutory business records are incomplete and unreliable. If any amendments to the 2016-17 return are to be made on closure of the enquiry, these amendments need to be fair and reasonable, that is being neither unduly low, nor unduly high and be open to successful challenge. To that end, all items on the Information Notice are ‘reasonably required’ in order to provide HMRC with alternative bases for checking Mr Ferris’ tax position.

DISPOSITION

49. For the reasons stated, the appeal is dismissed. The Information Notice as amended by the review conclusion decision of 8 October 2019 is confirmed in full.

NO RIGHT OF APPEAL

50. Paragraph 32(5) of Sch 36 provides that the decision by this Tribunal on an appeal under para 29 of Sch 36 is *final*, pursuant to which this Decision in relation to the Information Notice cannot be appealed to the Upper Tribunal.

DR HEIDI POON

TRIBUNAL JUDGE

RELEASE DATE: 15 JUNE 2020