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Schedule 36 Finance Act 2008: Information Notices

Introduction

HMRC's civil information powers are set out in Schedule 36 to Finance Act 2008. Part 1 of that schedule sets out HMRC's powers to obtain information and documentation by way of written notices (often referred to as 'information notices'). Given HMRC has in recent years made increasing use of the information notice powers, and given HMRC is currently consulting on extending the information notice powers (see *Amending HMRC's Civil Information Powers,* 10 July 2018), now seems an opportune time to recap on the extent of those powers and the scope for challenging information notices.

Brief overview of the information notice powers

Paragraph 1 of Schedule 36 allows HMRC to require, by notice, a taxpayer to provide information or documents if those documents are reasonably required to check that taxpayer's tax position (these notices are referred to as 'taxpayer notices').

Paragraph 2 of Schedule 36 allows HMRC to require, by notice, any person provide information or documents if those documents are reasonably required to check any other person's tax position (these notices are referred to as 'third party notices').

HMRC cannot give a third party notice without either (1) the consent of the taxpayer concerned or (2) approval of the FTT.

A copy of the third party notice must be given to the taxpayer to whom it relates unless the FTT has disapplied that requirement. The FTT may only disapply the requirement if satisfied that there are reasonable grounds for believing that giving such notice might prejudice the assessment or collection of tax (see paragraph 4 of Schedule 36).

There is no requirement on HMRC to seek the FTT's approval before issuing a taxpayer notice. However, HMRC can, if it so chooses, seek such prior approval.

Part 4 of Schedule 36 sets out various restrictions on the information notice powers. These include that an information notice –

- can only require a person to produce information/documentation that is in that person's possession or power (see paragraph 18 of Schedule 36);

- cannot require a person to provide–
  - information/documentation relating to a pending tax appeal[1];
  - 'personal information' (see paragraph 19 of Schedule 36);
  - any document '*the whole* [of which] *originates more than 6 years before the date of the notice unless the notice if given by or with the agreement of an authorised officer*' (see paragraph 20 of Schedule 36);
  - any privileged information/document (see paragraph 23 of Schedule 36, and paragraphs 25 and 26 in relation to tax advisers);
- cannot be given for the purpose of checking the tax position of a person that has died if more than 4 years has passed since the person's death (see paragraph 22 of Schedule 36).

There are various other restrictions in part 4. Some of these apply to all taxes. Others, such as paragraph 21, only to direct taxes. :

The FTT's role and powers

Prior approval

As set out above, third party notices can (currently[2]) only be issued with the consent of the taxpayer or approval of the FTT. Before giving its approval, the FTT must be satisfied that '*in the circumstances, the officer giving the notice is justified in so doing'* and that the third party has been told that the relevant information/documentation is required by HMRC and has been given a reasonable opportunity to make representations to HMRC in relation to the same (see paragraph 3 of Schedule 36). The burden of satisfying the FTT clearly rests with HMRC.

If HMRC seeks prior approval in relation to a taxpayer notice, the FTT will adopt the same approach as when an application is made to approve a third party notice (see paragraph 3(3) of Schedule 36).

[1] HMRC's view (as confirmed Compliance Manual CH22160, and supported by *Monarch Assurance Co Ltd* [1986] STC 311) is that paragraph 19(1)(a) is limited to documents which are brought into existence as part of the preparation for the presentation of an appeal.

[2] One of the amendments currently being consulted on is to allow HMRC to issue third party notices without the FTT's prior approval (and without taxpayer consent) so that these notices are '*aligned with taxpayer notices'*. However, the recipients statutory right of appeal would, it seems, be limited to arguing that compliance would be unduly onerous (see paragraph 4.2-4,3 of the consultation document).

If the FTT grants prior approval (whether for a third party notice or a taxpayer notice) the recipient of the notice will have no right of appeal to the FTT (see paragraphs 29 and 30 of Schedule 36). Any challenge will need to be by way of judicial review.

FTT appeals

Overview

Paragraph 29 of Schedule 36 gives the recipient of a taxpayer notice a right of appeal (save where the notice has prior approval from the FTT).

Paragraph 30 gives the recipient of a third party notice a right of appeal (save where the notice has prior approval from the FTT i.e. there is a right of appeal where the information notice was issued with the consent of the taxpayer). This appeal is on the limited basis that compliance would be 'unduly onerous'.

Both paragraphs 29 and 30 exclude from the right of appeal information notices to the extent they relate to information/documentation that forms part of the taxpayer's statutory records.

Paragraph 32 (3) of Schedule 36 provides that on appeal, the FTT 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.

Schedule 36 is curiously silent as to nature of the Tribunal's jurisdiction (i.e. full appellate or supervisory) and as to the where the burden of proof rests.

Paragraph 32(5) provides that 'a decision of the tribunal on an appeal under this Part of this Schedule is final.' (i.e. there is no right of further appeal). Any subsequent challenge would, then, need to be by way of judicial review.

Nature of the Tribunal's jurisdiction and the burden of proof.

After some inconsistency of approach in the FTT, the FTT in *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 0231 (TC) determined after argument that the jurisdiction was appellate and the burden was on HMRC to show that the information/documentation requested is 'reasonably required' (see paragraph 39 of the decision). It is respectfully submitted that that is the correct approach. The FTT went on to say that in relation to whether or not an item is a statutory record

or whether a restriction in Part 4 applies, the burden of proof is on the Appellant. It is submitted here that a better view is that, at least far as the Part 4 restrictions are concerned, the burden is a shifting one – it being for the taxpayer to show that the restriction is *prima face* applicable and for the burden then to shift to HMRC if they say that the given restriction should be disapplied. So, for example, if a taxpayer has made a relevant tax return for the purposes of paragraph 21 (1) or (2) of Schedule 36 (something which HMRC ought to be in a position to confirm or deny), the burden then shifts to HMRC to satisfy the FTT that the restriction ought not to apply because one of the conditions referred to at paragraph 21(3) is satisfied. Such a shifting burden would provide greater consistency between the approach of the FTT in appeals and the approach of the FTT in prior approval applications where, given HMRC needs to satisfy the FTT that '*in the circumstances, the officer giving the notice is justified in so doing'*, HMRC must surely need to (1) confirm whether a relevant tax return has been filed and (2) establish that paragraph 21 does not prohibit the notice being given by establishing that one of the conditions referred to at paragraph 21(3) is satisfied.

To discharge the burden on it, HMRC will need to explain to the FTT why, for example, information/documentation is 'reasonably required' and support this explanation with relevant evidence/documentation. Mere assertion by HMRC that the information/documentation is, for example, 'reasonably required' will not be enough (see *Maurice Newton v HMRC* [FTT] as yet unrep.).

Statutory Records

Whether or not information/documentation compromises a 'statutory record' is important, given that no appeal lies against an information notice to the extent it contains a request for statutory records.

Paragraph 62 defines statutory records as those records:

> *"which the person is required to keep and preserve under or by virtue of-*
> *(a) the Taxes Act, or*
> *(b) any other enactment relating to a tax"*

At the outset, then, it is crucial to establish whether any enactment relating to tax requires the information/documentation to be kept and preserved. The enactments most often relied on are s12B TMA 1970 and Regulations 31 of the Value Added Tax Regulations 1995. If there is no statutory requirement, the information/documentation cannot be a 'statutory record'. However, it should be noted that the FTT has adopted a broad approach to what constitutes a statutory record

(see *Beckwith* v HMRC [2012] UKFTT 181 (TC); *Midgley v HMRC* [2011] UKFTT 187*; Couldwell Concrete Flooring Ltd v HMRC* [2015] UKFTT 0136 (TC)). The FTT has also consistently held that there need be no link between the tax under enquiry and the source of the obligation to keep the statutory records. This means that a record which is required to be retained for VAT purposes may be required to be produced for the purposes of a corporation tax enquiry (*Gold Nuts Limited v HMRC* [2017] UKFTT 354 (TC)).

If an enactment does require the information/documentation sought to be kept/preserved, it is unlikely to impose that requirement on an indefinite basis (see for example s12B(2) TMA 1970). If the obligation to keep/preserve has been extinguished by passage of time, then the records will no longer be 'statutory records' (see paragraph 62(3) of Schedule 36). Given the FTT's jurisdiction is a full appellate one, it is considered that the relevant date is the date of the appeal hearing (not the date of the information notice) (see *Sarah Duncan v. HMRC* [2018] UKFTT 296 (TC)).

Further, if the FTT determines that the notice was not validly issued (for example because it falls foul of Paragraph 21 of Schedule 36), the entire notice should be set aside. This is so even if some of the items listed are statutory records (*Barty Party Co Ltd v HMRC* [2017] UKFTT 697 (TC)).

Reasonably Required

Assuming that the relevant notice is not set aside *in toto* and the records are not statutory records, the Tribunal will need to consider whether HMRC has established that the information/documentation is 'reasonably required'.

The FTT will apply the test on an item by item basis. It is clear that a disproportionate request will rejected as unreasonable (*Gold Nuts Limited v HMRC).* Similarly, if the information notice is in vague or ambiguous terms the Tribunal is unlikely to be satisfied that the documents or information are needed for the purposes of checking the taxpayer's tax position (*Concrete Flooring Limited v HMRC)*. More generally, however, the FTT has adopted a generous (so far as HMRC is concerned) approach to the 'reasonably required' test (see paragraph 143 of *Carlyle v HMRC* [2017 UKFTT 0525 (TC), although note that this was decided before (and some of the reasoning is inconsistent with) *Cliftonville Consultancy*)

Conclusion

Information notices are a powerful and increasingly used weapon in HMRC's armoury. However, with careful consideration, it may be possible to mount a successful challenge such that the notice is set aside or varied.

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