



Taxing Matters

Schedule 36 Notices with Alexis Armitage

Alice

Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC.

My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes.

Taxing matters brings you a fortnightly roadmap to guide you and your business through this labyrinth.

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Today we're talking about HMRC's power to compel an individual or a business to provide them with information. Here to explain HMRC's powers is Alexis Armitage.

Alexis is an Associate at RPC's Tax Disputes team where she advises on a broad range of litigious matters, some with household names, some with group litigants. Alexis also writes "How to's" and indeed "How not to's" for a wide range of publications and in her spare time she also raises a one year old baby. Alexis, welcome to Taxing Matters.

Alexis

Thank you very much. I'm very happy to be here.

Alice

Great. So, HMRC's information powers. What are they and where are they found?

Alexis

Yes, so HMRC; they have a lot of powers, as we know, one of which is to request information and/or documents from the tax payer or a third party.

They can ask for these documents if these documents are reasonably required for the purposes of checking a taxpayer's tax position. This power is contained within Schedule 36 of the Finance Act 2008.

So, in terms of what can HMRC ask for, as I have just said, they can ask for information or documents that are reasonably required for the purpose of checking a taxpayer's tax position.

The HMRC officer does not have to have evidence that a document will definitely effect a taxpayer's tax position, only that it is reasonably required to carry out a check of their tax position and the information they can ask for, or the documents they can ask for; they include past, present and future liabilities to pay tax, so it is quite wide ranging.

There is no condition that HMRC have to ask the taxpayer to provide the information or documents voluntarily before they serve the individual or business with a notice, so they can just issue it straight away. They usually do request it informally first, and then it is

only if the taxpayer or third party doesn't provide it for whatever reason that they then issue a formal notice.

There isn't any obligation for HMRC to obtain prior judicial approval from the tax tribunal to issue such a notice, although they can do and if they do actually it is important to say that if they do seek permission from the tribunal to issue a notice, there is actually no right of appeal against that notice because the tribunal will have considered whether or not the information is reasonably required by HMRC in order to look into a taxpayer's tax position before they gave permission. The only recourse for a taxpayer or third party who disagrees is to bring a claim for judicial review.

Alice	So, who are these likely to be issued to? What kind of thing might they receive?
Alexis	<p>So, it's quite wide ranging. HMRC can issue them to an individual, or a business, or even a third party, if they deem that the information is reasonably required for the purpose of checking somebody's tax position. So somebody might receive a letter from HMRC on their doorstep which states 'we require this information' and the information has to be quite clear - it should set out exactly what HMRC are asking for. It usually sets out a time period in which you have to respond. It usually says how they want the material provided. So, for example, HMRC are, in recent years, now wanting everything electronically, because obviously it helps them when they receive it, because some of the information they are asking for is so voluminous that it is easier for them to analyse when they receive it, if they receive it electronically, whereas previously everything was provided in hard copy.</p> <p>There is no set time limit to respond to an information notice, so there is no minimum time, it's really just what's reasonable. So, it depends on what they are asking for, how much they are asking for and it will depend on a case by case basis of when you need to provide it by. HMRC will stipulate a time for compliance.</p>
Alice	So, if you got one of these letters and it has a timeframe that you look at and think "Ah! I'm never going to be able to comply with that", either because you don't have the information on site, or you might need to access it, or because it requires it in electronic format and you only have it in paper copy so someone is going to have to sit there and scan it all through, what can you do in that situation?
Alexis	<p>So, I think the best thing to do is, whenever you receive a notice like this is to take very early action; look at exactly what they are asking you to do, when they are asking you to do it by.</p> <p>Communication is key when you receive a document like this; immediately you probably want to pick up the phone to the HMRC officer that's issued you with the notice, explain why you think you may not be able to comply within the timeframe and just see what they say. They might allow that extra time, they might allow you to provide it in a different way that circumvents the need for you to go off and spend hours providing it. Communication really is key here.</p>
Alice	So, if you look at the information notice itself and it's got a list of things that you've got to do, what is it that you have to do exactly?
Alexis	So, for example, it depends what they're asking you for but it could say accounts for certain years, so you'd have to go off and obviously liaise with your accountants and get

all of that information together, you'd have to review it all and possibly get your lawyers to check it if you wanted to make sure that what HMRC are asking for is reasonably required in order to check your tax position and there would have to be quite a lot of checks going on before you send it over.

Alice Obviously businesses might be a bit concerned about sending over sensitive or privileged information - is there any ability to restrict what you give HMRC on that basis, or any restrictions on what HMRC can do with the information once they've got it?

Alexis Yes, there's quite a long list of what HMRC are not allowed to ask for in information notices.

One of the key things, as you've identified, is any documents that are protected by legal professional privilege and this would be legal advice privilege, so for example communications between lawyer and client; also, litigation privilege, so any communications that came into existence for the dominant purpose of being used in connection with or in contemplation of litigation.

Another thing that is important to point out, is that communications between clients and accountants or tax advisers; a lot of people often think that they will attract legal professional privilege, but unfortunately, they don't. So, if information you have been discussing with your accountant or tax adviser is deemed to be reasonably required by HMRC for the purposes of checking your tax position, or someone else's if you have received a third party notice, it is possible that you may have to hand over certain documents or information in that regard, which can worry a lot of clients. So, that is just something to bear in mind.

The notice can obviously only ask for what is reasonably required for checking a person's tax position. So, when you get the notice it is important to check the scope of the notice, because if the information in there is not reasonably required for checking yours or someone else's tax position, then there is an opportunity there, if you think appropriate, to challenge the notice, challenge the scope of it, and if necessary to lodge an appeal with the Tribunal and, if the Tribunal agrees with you, the Tribunal will vary or set aside the information notice that you have been given.

There are also several other situations where HMRC are not really supposed to include this information in the notice, so, for example, personal records – HMRC are not supposed to ask for, medical records.

One of the things that quite often crops up is bank accounts. So, you'll have bank accounts for a small business that sometimes they don't have separate bank accounts, so, they don't have separate accounts between business and personal, they're mixed. Now, one of the things that quite a lot of clients come up against is when they get an information notice for access to their personal bank accounts, they obviously want to object, but unfortunately because the funds are all mixed in together, quite often HMRC are entitled to those documents for information, which, obviously, can lead to more enquiries in relation to somebody's individual tax return that they may well have avoided or was not even necessary. So, that's just something to bear in mind.

HMRC also can't request information or documents if there is a live appeal going on before the Tribunal, because arguably they should have conducted all of their enquiries before they issued a decision that you then appealed. So they can't have a second bite

of the cherry, so to speak, although we sometimes do see information notices issued during an appeal, and there may be grounds for objecting to such notices on the basis that there is already an appeal.

HMRC can't ask for subjective information or opinion. They can only ask for facts in terms of information.

They can only ask for what's in your possession or power. So obviously documents that are not within your possession or power you can't possibly be expected to provide them.

Another thing, if the whole of the document originates more than six years before the date of the notice then they have to have the authority of an authorised HMRC officer in order to request that.

Alice	So, what do you mean by that if the whole of the document originates more than six years earlier?
Alexis	So, in terms of the whole of the document originating six years ago, it would be things like an attendance note of a meeting that happened six years or more ago. So, a complete document that was finished six or more years ago basically.
Alice	So, who can these notices be issued to - do they have to be for UK residents or is it possible to issue them overseas as well?
Alexis	It is possible to issue them overseas; a recent Court of Appeal case actually allowed HMRC, for the first time, to push for information related to a UK taxpayer who was resident outside the UK, in Dubai. So, HMRC can do that and there's evidence that it's going more that way. In previous years it was really just the UK, but it will be interesting to see in the coming years what they do in that regard. And because it's a Court of Appeal case, until that's overturned, they've got their authority to do it there.
Alice	So, what are the consequences of not complying with an information notice?
Alexis	<p>So, the consequences of not complying are a £300 fine, straight off, and then there's an additional £60 fine for each day that the non-compliance continues. So just to give you an idea, if you got an information notice, the deadline lapsed and then a whole month went by before you noticed it or dealt with it, you could rack yourself up a fine that was just short of £2,000. So, that's quite a lot of money to just throw down the drain.</p> <p>And also, there is a further tax geared penalty that might be imposed. So, for example, they might say '15% of whatever tax we allege is due, that's going to be the penalty'. So, if the tax due is substantial, then you're looking at a potentially huge penalty there.</p> <p>A penalty doesn't arise if the person can satisfy HMRC, or the Tribunal (if it's on appeal), that there's a reasonable excuse for why you didn't comply and if the failure is remedied without unreasonable delay; pretty much as soon as the excuse ceases to exist.</p> <p>Another thing, there is also a penalty for providing inaccurate information. So, there's two strands to this. There's the inaccuracy, careless or deliberate, and then the second one is where a person has provided inaccurate information or documents, who then later discovers the inaccuracy, then doesn't take reasonable steps to notify HMRC. So for those two strands the maximum penalty is £3,000 for each inaccuracy.</p>

First of all, it's important to make sure that the information you give to HMRC is correct to the best of your knowledge and secondly, if you notice a mistake or some sort of error, to correct it as soon as possible with HMRC to avoid getting yourself into that territory.

So just another thing to bear in mind if you do provide deliberately false information to HMRC you can not only get these penalties but you can also stray into the realms of potential criminal prosecution and the consequences which would follow from such a prosecution. So that's just another thing to bear in mind.

Alice So, what are your top tips for how to comply with one of these notices?

Alexis Yes, I've got a few tips that I can share and I'd be happy to.

One thing to bear in mind is that before HMRC issue a formal Schedule 36 notice, they usually send an informal request. So one thing I always say to clients is 'treat this as a formal request' because you've got a real opportunity here to avoid a formal request because if you form a good rapport and communicate with HMRC from the very beginning in terms of the informal request, you may be able to scope and shape the information request and document request with HMRC onboard.

So, instead of just receiving a formal notice and then having 30 days to reply and having to deal with all the stress and getting it all together and all that stuff. So, a lot of client's they'll get an informal request and think "Oh well it's informal we don't really need to do anything with that, we'll wait till we get the formal request" - my advice would be treat the informal request like a formal request.

Anyway, if and when you do get a formal request, take care when it is received because HMRC when they issue these notices, they often go through several different teams before they leave the building and then inevitably they are sent by second class post. So basically, quite often, half of the time of the deadline has disappeared before it is even received. So if you had 30 days to respond we often get clients who come to us with only 15 days left to go.

And also, when you get a notice, take early action so don't just ignore it, don't sit on it and think "I've got ages to deal with that". The best thing to do is to speak to whoever you need to within your organisation, get together the relevant team and start thinking about whether what they've asked for is reasonably required; whether or not you can provide it if you need to go off and get the information from various different people or departments, start that process going; if you think that the information isn't reasonably required then start thinking about instructing lawyers potentially to challenge the notice for you.

All of that takes time, so starting as soon as possible is the way to go.

Another thing - check the scope of the notice, I've already said, make sure that what they're asking you for is reasonably required. Don't give information or documents that you're not obliged to because this can lead to further enquiries, that either aren't needed or take up more business time that you didn't need to do.

Document retention and preservation; so as soon as HMRC indicate that they are interested in a particular area of your business or they make enquiries, make sure you keep all relevant documents until the conclusion of those enquiries. It won't be good

enough to say 'oh well actually we've just got rid of those documents' when you actually receive the notice beforehand.

Keep a record of everything you give and when you provide it to HMRC because things can go missing within HMRC and you just need to demonstrate well actually we did give you that on X date, we did comply with that notice.

Keep a record of the searches that you do in case HMRC ask how you did your searches, or what material you located, or where you looked. Quite often that will come up if, for example, one of the things HMRC can do in an information notice is actually ask you to prepare a new document that would help them. One of the things they often say with those documents is 'okay how was this document prepared? Who prepared this document?'

I've mentioned this already but it's very important so if you omit something in error, correct your mistake as soon as possible, otherwise penalties can apply.

And really my main tip is to keep very good communication lines with HMRC; try and build up a rapport because it's very important to have a good relationship with HMRC not just for the information notice, but also for the current enquiry that you might be involved in, or anything beyond that really. So, the better the communication lines are, the more you're likely to get something back, if you see what I mean.

Alice And, if someone is going to come to a lawyer, what kind of material should they think about collating to make the process of getting that lawyer up to speed as easy as possible?

Alexis One thing would be, obviously, a copy of the information notice you've received; any previous correspondence you've had with HMRC, all of the documents that you've received from HMRC to date basically, anything you've sent to HMRC, details of any telephone calls you've had with them, any attendance notes of those calls, any meetings you've had with them.

The lawyer is going to want to know everything that's been said between you and HMRC.

They're probably going to want information in order to decide whether the documents or information they've requested is reasonably required to check either your tax position or a third party's if it is a third party notice.

If after those discussions, the documents are reasonably required, then you are probably going to need to go off and find those documents wherever they are, collate them, review them, get them together, find a way of getting them over to your lawyer - whether it's in electronic or hard copy form - and all of that normally needs to be done quite quickly.

Alice So you've mentioned that these information notices can also be served on third parties. What are we talking about here and maybe you can just expand on that?

Alexis

Yes, happy to. So yes, information notices, in addition to being sent to businesses and individuals, they can also be sent to third parties to request information or documents that are reasonably required for checking the tax position of a known third party.

Third party notices, so just for example, quite often HMRC will issue a third party notice to banks in order to get copies of their bank statements for their customers, things like that. But the key difference with a third party notice is that it does have to have judicial approval before it can be sent to a third party, unless the taxpayer consents to the issue of the notice.

So HMRC have to go to the Tribunal to get the third party notice approved and the Tribunal would have to be satisfied that in the circumstances the HMRC officer is justified in issuing a third party notice and basically that the information is reasonably required for checking the tax position of a known person.

So, the Tribunal will look at a few things, one of which is has the application been made by an authorised HMRC officer? Has the HMRC officer got reasonable grounds to issue an information notice and then there's a few other conditions. Basically, a summary of the reasons has to be provided, and an opportunity to make representations has to be given to the taxpayer, a summary of any representations made has to then be given to the Tribunal.

In a case of a third party notice, the taxpayer has to have received a summary of the reasons why the officer requires the information from the third party. Now the key thing to remember here is that the Tribunal can actually disapply quite a few of those requirements and not need them if it is satisfied that taking this action might prejudice the assessment or collection of tax.

So quite often if the Tribunal decides actually this is going to affect HMRC's ability to assess or collect tax, all the Tribunal would need is the first two, which is basically has the application been made by an HMRC officer and does the HMRC officer have reasonable grounds for the information notice?

So as you can see, a lot of the conditions could be disapplied by the Tribunal, depending on the circumstances.

Alice

What are the circumstances in which that might happen?

Alexis

I think it is more likely to happen in a situation where there is some sort of deliberate conduct or collusion or something or tax planning that would affect HMRC's ability to assess or ascertain the facts.

If HMRC obtains a third party notice without prior notice to either the third party or the tax payer, there's actually no right of appeal against a Tribunal's decision to disapply any of those conditions, so you basically just have to accept the Tribunal's decision. Of course, the only other recourse is judicial review again.

Alice

So, you also mentioned that there are circumstances in which a taxpayer can consent to a third party notice. What might the reasons for a taxpayer consenting to a third party notice be?

Alexis So, for example, if there is some issue in getting hold of a taxpayer's bank account, for whatever reason, maybe they go back a long period of time and the bank is taking a long time to do it and the tax payer thinks well actually a Notice from HMRC will get things moving quicker.

You often get that situation where they'll consent to it because they've got no problem giving their bank information and it will help HMRC swiftly conclude whether any tax is due and actually it just speeds up the whole process. So circumstances like that really.

It's also common if the bank would intend to charge the tax payer a large sum of money for accessing all of the bank accounts from years ago. So, one way of circumventing that is for HMRC to request that information directly from the bank.

Alice So, when would an information notice under Schedule 36 be used?

Alexis So, as I've touched upon previously, most of the time HMRC are likely to use an informal request first to try and get the information or documents, sometimes they don't, sometimes they go straight to a Schedule 36 Notice. But quite often the reason they'll issue a Schedule 36 Notice is because there'll be maybe they've issued an informal request and it hasn't been responded to, or maybe there's history of non-compliance for a particular business or individual and HMRC have reason to believe that the information will not be provided if it's requested informally. So, they issue a formal notice.

Or there could be, for example HMRC, might consider an informal request will cause unreasonable delay, you know maybe they need the information sooner than they think they'll get it if they issue an informal request.

Perhaps, for example, if they consider that pre-approval of a taxpayer notice by the Tribunal is appropriate. So, for example, as we have just talked about, with third party notices they have to go to the Tribunal and get permission unless the tax payer consents, so that might be why they do that, because a third party is very unlikely to comply with an informal request because obviously they'll be potentially handing over confidential information or documents that relates to a taxpayer. So they're probably not going to do that without a formal notice from HMRC.

Another common reason is if HMRC are investigating a tax avoidance scheme and they think that a formal notice would benefit them at an early stage in order for them to get information and documents quickly. But they are really the main reasons.

In July 2018 HMRC launched a consultation of options for targeted amendments to HMRC Civil Information Powers and these included possible changes to Third Party Notices and extending Schedule 36 to allow information to be obtained for the purposes of any HMRC tax function and the response was expected this spring actually, but it hasn't materialised, so watch this space.*

***NOTE:**

Since recording this episode, the mentioned July 2018 consultation has been completed and HMRC summarised the responses received to that consultation. In response HMRC issued a policy paper and draft legislation which:

- Introduces a new Financial Institution Notice (FIN) requiring financial institutions (banks, etc) to provide information to HMRC about a specific taxpayer, without the need for approval from the FTT.
 - The information must be ‘reasonably required’ to check the taxpayer’s tax position.
 - An authorised officer of HMRC will need to approve the decision to issue a FIN.
 - Penalties can be charged if the financial institution fails to comply. These can be appealed to the tribunal.
- Extends HMRC’s powers under schedule 36 to allow them to give a taxpayer or third party an information notice for the purpose of collecting a tax debt, not just checking a tax position.

Prevents third parties from informing the taxpayer of a third party information notice or FIN where the FTT has decided it may prejudice the assessment or collection of tax, with failure to comply resulting in penalties of £1,000.

Alice

Well thank you very much Alexis for taking us through some of the powers HMRC have in relation to gathering information and thank you to all of our listeners for joining us.

As ever, a full transcript of this episode together with our references can be found on our website www.rpc.co.uk/taxingmatters.

If you have any questions for me or Alexis or any topics you'd like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.

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