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# Information notices

## 1. Introduction

In a system of self-assessment it is essential that the tax authority, HMRC, has the power to obtain information to be able to execute their responsibilities for managing the tax system. The information powers are a necessary power so that HMRC can check, where appropriate, the details that taxpayers include in their tax returns. The HMRC Compliance Handbook Manual has extensive detail on information and information powers.

This module looks at the information notices, the penalties and the first case on tax related penalties – the Romie Tager case.

## 2. Information notices

General powers were introduced in Sch.36 of FA 2008 to give HMRC the ability to police the self-assessment system. Some of these have been subsequently modified in other Acts.

The provisions included at FA 2008 Sch. 36 Para 1 enable an officer of HMRC to require a person to provide information or documentation where that information is reasonably required for the purposes of checking that person's tax position. See below for the definition of "tax position".

FA 2008 Sch. 36 Para 2 enables an officer to require a third party to provide information or documentation where that is reasonably required for the purposes of checking the tax position of a person whose identity the officer knows.

Such a notice can be issued only if it has been approved by the First Tier tribunal (FTT), or is subject to the agreement of the taxpayer to whom it relates (para 3(1)).

FA 2008 Sch. 36 Para 4 provides that HMRC must give a copy of any third party notice to the taxpayer to whom it relates. The tribunal can disapply this requirement if it is satisfied that giving a copy of the notice to the taxpayer could prejudice the assessment or collection of tax.

FA 2008 Sch.36 Para 5 extends this third party information power to enable an officer to obtain information or documentation reasonably required for checking the tax position of a person or a class of persons whose identity he does not know.

A notice under Para 5 can only be issued with the approval of the FTT. Before giving its approval, it is necessary for the tribunal to be satisfied that the person or persons to whom the notice relates have failed, or may fail, to comply with their obligations under the Taxes Acts or the Value Added Tax Act 1994, and that the failure is likely to have led to, or will be likely to lead to 'serious prejudice to the assessment and collection of tax' (Para 5(4)).

Para 5A was inserted by FA 2012 and extends HMRC's powers to request information from a person about another person (or class of persons) whose identity can be ascertained. A notice served under Para 5A may only be issued under certain conditions:

a) the information is reasonably required to check the taxpayer's tax position;

b) the taxpayer's identity is unknown but sufficient information is held from which the identity can be ascertained;

c) an officer has reason to believe that the person will be able to ascertain the taxpayer's identity from the information held and the person obtained relevant information about the taxpayer in the course of a business; and

d) the information cannot readily be ascertained by other means from the information already held.

'Relevant Information' is defined as all or any of the taxpayer's name, last known address and date of birth. This new power was effective from 1 April 2012.

Para 64 defines the concept of tax position:

"64(1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards:

a) past, present and future liability to pay any tax,

b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax,

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.

64(2) References in this Schedule to a person's tax position include, where appropriate, a reference to the person's position as regards any deductions or repayments of tax, or of sums representing tax, that the person is required to make:

a) under PAYE regulations,

b) under Chapter 3 of Part 3 of FA 2004 or regulations made under that Chapter (construction industry scheme), or

c) by or under any other provision of the Taxes Acts.

64(2A) References in this Schedule to a person's tax position also include, where appropriate, a reference to the person's position as regards the withholding by the person of another person's PAYE income (as defined in s683 of ITEPA 2003).

64(3) References in this Schedule to the tax position of a person include the tax position of:

a) a company that has ceased to exist, and

b) an individual who has died.

64(4) References in this Schedule to a person's tax position are to the person's tax position at any time or in relation to any period, unless otherwise stated.

**Right to Appeal**

FA 2008 Sch.36 Part 5 enables appeals to be made against information notices issued under FA 2008 Sch.36 Paras 1, 2, 5 and 5A.

However an appeal cannot be made against a requirement in a taxpayer notice or a third party notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records. in the case of *Jordan* [2014] TC04010, the FTT decided that in respect of an information request issued to a taxi driver, specific requests for 'a record of all sales and takings', 'a record of all purchases and expenses' and 'a record of the business costs of any asset that is used for both business and private use' were references to statutory records and even though the notice went on to include examples and further explanations of what was being requested that did not invalidate what was demanded. These items on the taxpayer notice could therefore not be appealed against.

In *Couldwell Concrete Flooring Ltd* [2015] TC04340, the FTT found that it had no jurisdiction to hear an appeal against a notice requiring statutory records even if the request was vague and ambiguous (although this could be relevant if there was an appeal against a penalty for non-compliance with the notice).

FA 2008 Sch.36 Para 32(5) provides that a decision of the FTT on an appeal against an information notice is final. Therefore when the taxpayer in the above case sought to appeal the FTT's decision to the Upper Tribunal (UT) in *Jordan v R & C Commrs* [2015] BTC 518 the case was struck out because the UT had no jurisdiction to hear the case.

## 3. Procedures before the First-tier Tribunal

FA 2009 s95 and Sch. 47 amended para. 3, and 5, to make it clear that applications by HMRC to the tribunal for the approval of taxpayer notices and third party information notices may be heard ex parte.

FA 2009 s95 and Sch. 47 also amended FA 2008 Sch.36 Para 6 to make it clear that there is no appeal under the *Tribunals, Courts and Enforcement Act* 2007 against the decision to approve a notice.

**Restrictions on use of information notices**

Of particular importance to practitioners are the circumstances in which notices can be issued, which are no longer restricted by reference to a particular enquiry.

The key point is that the 'tax position' which can be subject to a notice includes a taxpayer's 'past, present and future' tax liabilities as well as penalties or other amounts which may be payable in connection with any tax (FA 2008 Sch.36 Para 64). Consequently, Sch. 36 notices can be issued before tax returns have been filed, or for historic years where returns are closed.

Notices in respect of historic, closed years can be issued only where an officer has reason to suspect that an amount of tax which ought to have been assessed may not have been assessed, that an assessment has, or may have, become insufficient or that a relief from tax may be or has become excessive (FA 2008 Sch.36 Para 21(6)).

In respect of non-resident capital gains tax (NRCGT) returns such notices can only be issued where an officer has reason to suspect that an amount that ought to have been assessed has not been assessed or that an assessment has become insufficient (FA 2008 Sch 36 Para 21ZA(5)).

It is not necessary for an inspector to make a discovery assessment in order to obtain information in respect of a closed period. There has to be a real and sensible prospect of a discovery assessment following the provision of the information – an information notice may not be issued speculatively, in the hope that information showing an under-assessment may crop up or even in circumstances where an under-assessment realistically *might* be identified.

The key is whether or not an officer can realistically show, in the absence of the information sought, that there is sufficient evidence to show that there is a reasonable prospect that the information sought will enable an under-assessment to come to light.

## 4. Pre-authorised information notices

A mechanism exists under FA 2008 Sch.36 Para 3 enabling HMRC to obtain the consent of the FTT to the issuing of a notice under either Para 1, a first party notice, or Para 2, a third party notice.

These provisions broadly mirror the provisions of TMA 1970 s20, under which an *ex parte* application for approval to the issue of a notice was made to the former general or special commissioners. The features of the previous s20 regime, that the taxpayer had to be given a reasonable

opportunity to provide the information or documentation, and was given an opportunity to make representations, are retained at Para 3(3).

In *R & C Commrs, ex parte a taxpayer* [2014] TC04044, HMRC applied to the FTT under FA 2008 Sch.36 Para 3 for the approval of the giving of certain third party information notices. In the course of the FTT's considerations it looked at two specific points of law and as Judge Berner considered these points to be of general interest he decided to publish the conclusions reached.

FA 2008 Sch.36 Para 3(3)(e) provides that one of the conditions that has to be satisfied for the FTT to be able to approve a third party notice is that the taxpayer has to have been given a summary of the reasons why HMRC require the information and documents. The FTT considered what reasons must be summarised and concluded, subject to the dispensation provided by Para 3(4), 'all of them'. The FTT went on to give examples of what this means in practice, where an information notice is not being sought for a single reason or a straightforward number of reasons:

- if an investigation has led to some initial areas of concern being resolved whilst leaving other areas of enquiry for which HMRC require further information and/or documents, only the reasons that are still relevant at the time the information notice is sought need to be included, but all those reasons must be summarised;

- if there are a number of ongoing lines of enquiry, giving rise to a range of reasons why it is considered that information and/or documents are reasonably required all reasons must be summarised: it is not sufficient to only summarise some of the reasons; and

- if HMRC receive intelligence causing them to enquire into a person's tax position which in turn leads to a request for approval of an information notice, it is necessary to consider to what extent the intelligence itself provides the reason for HMRC to require the information and/or documents, or to what extent it is the catalyst for an enquiry which then lead to the reasons for the information notice. Only if it is the former does the reason disclosed by the intelligence need to be summarised to the taxpayer.

In accordance with FA 2008 Sch. 36 Para 3(4), the above condition and all those in Para 3 (c) – (e) can be disapplied if the tribunal is 'satisfied that the taking of the action specified in those paragraphs might prejudice the assessment and collection of tax'. The FTT found that the broadest consideration should be given to the possible prejudice that might be caused to the administration of the tax system if certain matters are revealed to the taxpayer. For example:

- it does not just apply to the administration and collection of the tax liability of the taxpayer under enquiry, but to the whole system of tax administration and collection; and

- the tribunal does not have to be satisfied that the disclosure of the material will prejudice the assessment and collection of tax, just that there is a *real* risk of prejudice.

In *Re an application by R & C Commrs* [2015] TC04049, the FTT confirmed that notice of a hearing of an application for the issue of a third party information notice should not be given to either the taxpayer or the third party. It also confirmed that such cases should be heard in private because to consider the application the tribunal has to hear about the taxpayer's tax affairs and as the taxpayer is not given notice of the hearing and will not be present, it would be wrong to allow members of the public to hear about the taxpayer's tax affairs.

**Alignment with international information powers**

FA 2008 Sch.36 was further amended by FA 2012 to bring HMRC's information powers into line with the international standard for the exchange of information for tax purposes. It concerned ways to ensure that HMRC can collect information in specific cases where the full identity of the taxpayer is not known but can be ascertained by reference to other available information.

The new provisions allow HMRC to require a third party to provide information about a taxpayer if:

- the information is reasonably required for the purposes of checking the taxpayer's tax position;
- the taxpayer's identity is not known to the officer but the officer holds information from which the taxpayer's identity can be ascertained;
- the officer has reason to believe that the third party will be able to identify the taxpayer from that information;
- the third party obtained that information in the course of carrying on a business; and
- the taxpayer's identity cannot be readily ascertained by any other means from the information held by the officer.

Amendments were also made to FA 2008 Sch.36 by F(No.3)A 2011 Sch.24 to extend Sch.36 to tax of other countries, to reflect international obligations. Some of the amendments took effect on and after F(No.3)A 2011 received Royal Assent, while others affect only inaccuracies and failures on or after 1 April 2012. The effect of these amendments is as follows:

- FA 2011 Sch.24 Para 2 amended FA 2008 Sch.36 Para 5 so that all of the information powers in Sch.36 may now be used to obtain information in relation to relevant foreign tax of a territory outside the UK;

- FA 2011 Sch.24 Para 3 amended FA 2008 Sch.36 Para 40A to introduce a new category for which a penalty may be charged, which is where a person knowingly provides information containing an inaccuracy but does not notify HMRC at the time;

- FA 2011 Sch.24 Para 4 inserted new paras 49A-49C into FA 2008 Sch.36 to allow for a daily penalty to be charged which is greater than that chargeable under Sch.36 Para 40. This applies where there is a continuing failure to comply with a notice under Sch.36 Para 5. Such an increased penalty must be approved by the tribunal and the person involved must be given prior warning and may attend the hearing. New Para 49B and 49C are administrative provisions about notification and payment of the penalty. The provision of an increased daily penalty corresponds to that introduced for FA 2011 Sch.23;

FA 2011 Sch.24 Para 5 amended FA 2008 Sch.36 Para 50 to clarify the relevant date for the purpose of charging a tax-related penalty.

## 5. Penalties

Where the recipient of a notice fails to comply with the notice, including concealing, destroying or disposing of documents, or obstructs an officer of HMRC in carrying out an inspection approved by the FTT, a penalty of £300 is chargeable (FA 2008 Sch.36 Para 39(2)).

Following the imposition of an initial penalty, further daily penalties of up to £60 are chargeable for each day on which the failure to comply or obstruction continues (Para 40).

Penalties are assessed by HMRC (Para 46) and an appeal can be lodged to the FTT in respect of either the imposition or the amount of a penalty (Paras 47 & 48).

A penalty will not be chargeable where the recipient of a notice, or person subject to an inspection, can demonstrate that they have a reasonable excuse for non-compliance or obstruction (FA 2008 Sch. 36 Para 45) or where the failure is a failure to comply within time-limits but compliance took place within further time allowed by an officer of HMRC (Para 44).

Penalties for non-compliance or obstruction are payable within 30 days of notification of the penalty being given or within 30 days of an appeal against the penalty being determined. Penalties will be enforced as though they are amounts of income tax charged in an assessment (FA 2008 Sch.36 Para 49).

*Tax Geared Penalties*

A further significant penalty provision, under FA 2008 Sch.36 Para 50, enables HMRC to charge a tax-related penalty where there has been failure or obstruction and HMRC have reason to believe that ‘ . . . as a result of the failure or obstruction, the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been’ (Para 50(1)(c)).

Penalties are determined by the UT on application from HMRC in an amount decided by the tribunal by reference to the amount of tax which has not been, or is not likely to be, paid as a result of the failure or obstruction.

A penalty under Para 50 is charged after the initial £300 penalty and is chargeable in addition to the initial, and any daily, penalties.

Penalties under Para 50 must be paid within 30 days of the date of notification of the penalty and are charged in the same way as income tax charged in an assessment.

In *Tager v R & C Commrs* [2018] BTC 30,(discussed in more detail later) the Court of Appeal made these general observations about the ability of the UT to impose tax related penalties under FA 2008 Sch.36 Para 50:

1. The provision is a penal one, and must be reserved for serious cases of non-compliance.

2. A link has to be established between the taxpayer's failure to comply with the relevant notice and the amount of tax that he has paid or is likely to pay.

3. The UT must decide that it is appropriate for an additional penalty to be imposed having regard to the usual considerations which apply when the imposition of a tax penalty is in question, including:

    a. the reasons for non-compliance;

    b. the extent to which the position has been remedied;

    c. the gravity and duration of the non-compliance;

    d. the presence of aggravating or mitigating factors;

    e. the availability of other methods for HMRC to recover the tax at risk (most obviously by making an assessment, if necessary on a best of judgment basis); and

    f. generally the need to achieve a fair and proportionate outcome, having regard to the interests of the public purse and the general body of taxpayers as well as the circumstances of the non-compliant taxpayer himself.

4. The UT must decide the amount of the penalty having regard to the amount of tax which has not been, or is not likely to be, paid by the person. The UT should itself form a view on the amount of tax unpaid or likely to be unpaid on the basis of the evidence before it.

It is an offence to destroy, conceal or otherwise dispose of a document required to be produced in an information notice which has been authorised by the First-tier tribunal. However, where a document has been produced to HMRC, it is possible to dispose of it unless an officer of HMRC has indicated

in writing that the document must be retained. Additionally, it is possible to dispose of documents where the notice enabled production of copy documents, those copies have been produced, and a period of six months from the date of production of the copy has expired (FA 2008 Sch 36 Para 53 (2)&(3)).

Additionally, FA 2008 Sch.36 Para 54 indicates that where an officer of HMRC notifies a person in writing that a document is, or is likely to be, subject to an information notice, it is an offence to destroy, conceal or otherwise dispose of the document. Where a period of six months has expired since notification, or where an information notice is issued, no offence is committed under Para 54 if the document is disposed of.

Where an offence is committed under Para 53 or 54, a fine not exceeding the statutory maximum or a term of imprisonment not exceeding two years can be imposed.

## 6. The Tager Case

*R & C Commrs v Tager (Personal Representatives of the Estate of Tager (deceased))*[2015] BTC 509 was the first case in which the UT considered an application by HMRC for the imposition of a 'tax-related penalty' under FA 2008 Sch.36 Para 50, for failure to comply with information notices.

The facts in brief were: The taxpayer, a barrister, submitted his tax returns for the years 2008/09, 2009/10 and 2010/11 in April 2012. HMRC were not satisfied that the returns were correct and issued information notices. The taxpayer supplied only some of the documents requested. HMRC therefore imposed penalties under FA 2008, Sch 36 para 39 and para 40.

As a result of his father's death in 2005, the taxpayer was liable to pay inheritance tax. HMRC had issued an information notice in relation to the inheritance tax return but the taxpayer failed to comply with this also.
HMRC applied for permission from the Upper Tribunal to impose tax-related penalties under FA 2008, Sch 36 para 50 for his personal tax returns and the inheritance tax return. The tribunal decided to give the taxpayer "a last chance" to respond fully. Despite assurances that he would comply with the notices, he failed to do so. HMRC therefore returned to the Upper Tribunal.

The UT noted that unlike penalties under Para 39, 40 and 49A, which were engaged by non-compliance or continuing non-compliance only, for Para 50 to be invoked required additionally for there to be reason to believe that tax has been, or is likely to be, lost by reason of that non-compliance. However, that did not mean that a Para 50 penalty penalty was intended to operate as a proxy for an assessment, or to be mainly or wholly restitutionary. Instead, Para 50 was essentially punitive and intended to have a deterrent effect not only on the person penalised but on others who might be tempted to disregard information notices.

The UT agreed with HMRC's suggestion of a comparison between Para 50 penalties and those (of 100%) for 'deliberate concealment' and decided that a penalty ought to be imposed on Mr Tager for his non-compliance with the information notices and that the starting point ought to be 100% of the tax at risk.

The UT accordingly imposed a penalty of £1.17m representing 100% of the inheritance tax at stake (as calculated by HMRC) with no mitigation and a further penalty of £75,000 representing 100% of the income tax at stake (£80,549) with mitigation of a modest rounding down only.

The amount of the penalty was then corrected by the UT in *Tager (Personal Representative of the Estate of Tager (deceased)) v R & C Commrs* [2015] BTC538. This was because the evidence regarding the amount of 'tax at risk' was not as the UT thought it was at the time of the first decision. The UT found it was able to correct the decision because it had not finally determined an earlier application for tax-related penalties in relation to which the taxpayer had breached his undertakings and the over overriding objective (set out in rule 2) of dealing with cases 'fairly and justly'. The parties were sent away to try and agree the correct value of 'tax at risk' on which the penalties would be recalculated.

In the third decision in this case, *Tager (Personal Representative of the Estate of Tager (deceased) v & C Commrs* [2017] BTC509, the UT decided that it could not admit new evidence regarding the amount of 'tax at risk' to be used as the penalties had already been finally determined. Despite what the UT said before, the UT concluded that it did not have the jurisdiction to admit the new evidence on which the taxpayer sought to rely. The UT was accordingly persuaded that it was mistaken in inviting the parties to agree upon the correct amount of tax at risk, or to return for further argument should that prove impossible. However, the UT recognised that the invitation was made in the second decision which, like the first, has been released publicly, and that as a result it could be challenged only by way of appeal.

In *Tager v R & C Commrs* [2018] BTC30, the Court of Appeal set aside the UT's above decision. The Court of Appeal ruled that it was wrong for the UT to have drawn a comparison between penalties under FA 2008 Sch.36 Parta 50 and FA 2009 Sch.55.

FA 2009 Sch.55 provided a prescriptive tax-geared system of penalties where an error had been 'deliberate and concealed', whereas the only requirement in FA 2008 Sch.36 Para 50 is that the UT must 'have regard' to the amount of tax unpaid and it was never argued that the appellant had been guilty of conduct of that nature.

The Court of Appeal remade the decision reducing the penalties to £200,000 for inheritance tax and £20,000 for income tax.