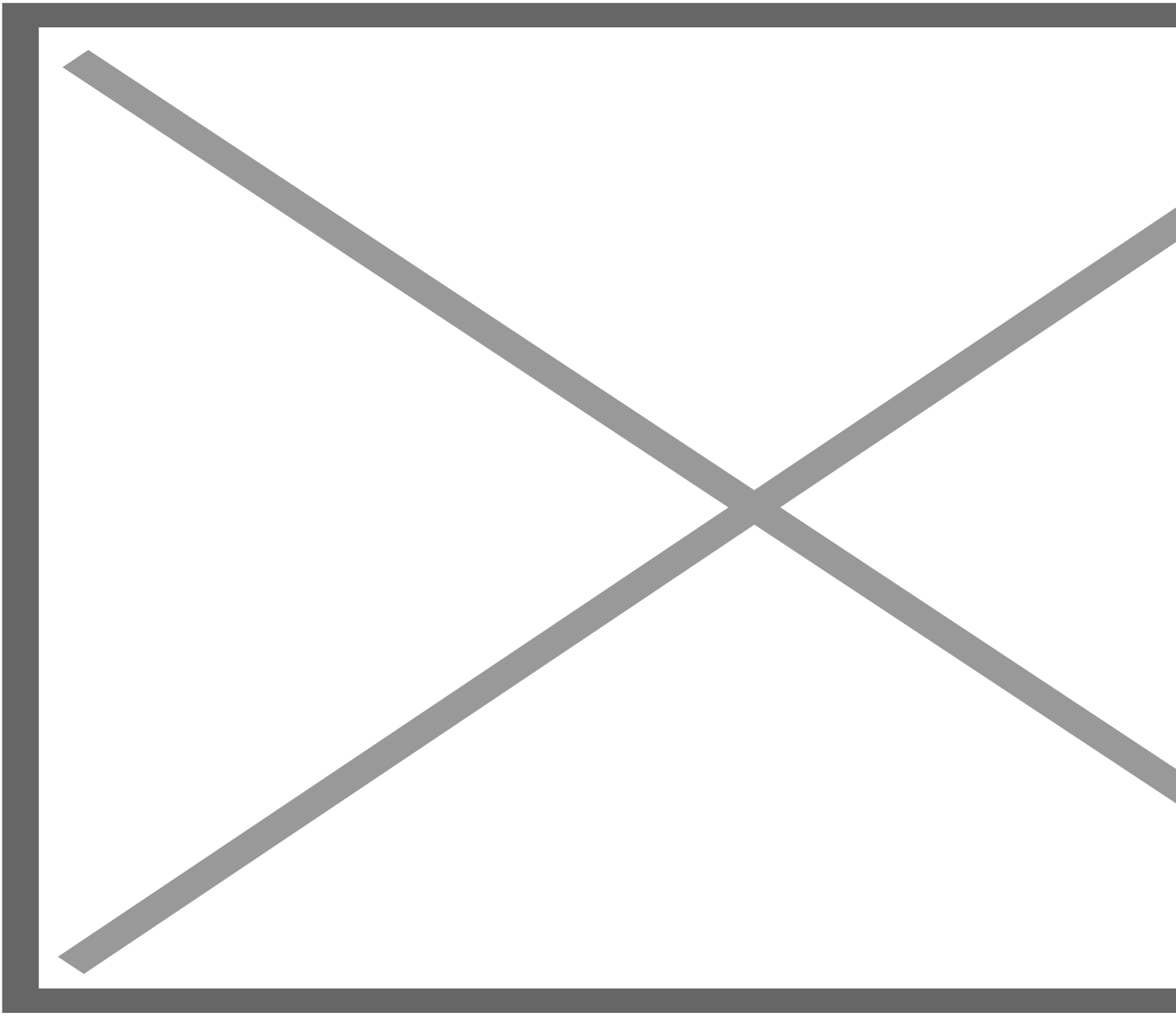
A fine line

Management of taxes



01 October 2018

George Gillham and *Hartley Foster* provide practical guidance on what information HMRC are legally entitled to – and what to do if they request information they’re not

Key Points

What is the issue?

HMRC has extensive civil powers to obtain information and documents from taxpayers and third parties, including tax advisers. HMRC very often makes informal requests for information and documents; taxpayers are not under a legal obligation to comply but need to consider whether or not to do so. HMRC also, on occasion, demands information or documents that it cannot require the recipient of the 'request' to provide.

What does it mean to me?

If you or your client receives a request for information or documents, you need to consider the legal status of that request and its ambit.

What can I take away?

Never ignore a request from HMRC for information or documents. Consider whether it is sensible to comply with the demand, whatever its legal status. And, if there are doubts, consult a specialist adviser.

We wrote in the May 2017 issue of *Tax Adviser* ('HMRC Information Powers: On or off the record?') about the information powers that HMRC has available to it under FA 2008 Sch 36 (to which all references in this article relate). We now revisit the topic from a specific angle – what should taxpayers and advisers do if they receive a demand from HMRC for information or documents that they are not legally obliged to provide. The CIOT's technical team reports that agents are seeing increasing numbers of such requests.

Informal information requests

In checking the accuracy of a taxpayer's tax position, it is HMRC's usual practice first to request that information or documents be provided voluntarily (and HMRC's Manuals indicate that that is the approach that is to be followed). There is no legal requirement to provide documents or information consequent on an informal request of this sort. But, it needs to be considered carefully how best to respond.

It is sensible for a tax adviser promptly to discuss with his client whether he holds or has access to the information or documents demanded and, if so, whether it is appropriate to supply it. As a general rule, it will often be in the taxpayers' overall best interests to provide the information or documents requested.

But, there may be scope for agreeing with HMRC a more limited ambit of the notice or that certain documents need not be provided. Advisers should always consider whether the request goes further than that which could be required to be provided under a formal notice (under Schedule 36). If the notice does extend beyond that which HMRC can require to be provided, we recommend that you raise this with HMRC.

Formal notices under Schedule 36

Generally, HMRC will issue a formal notice under Schedule 36 if the information or documents have not been supplied within the period stipulated in the informal request and they do not agree with any reasons given for non (or partial) compliance. In the notice will be specified the information or documents that HMRC seeks. Reference to the legislation under which it is made, and a warning of penalties for non-compliance will be included.

HMRC's powers to obtain information and documents from a taxpayer are given to them to enable them to obtain information that is 'reasonably required… for the purpose of checking the taxpayer's tax position' (paragraph 1(1)) (In a consultation launched on 10 July 2018, HMRC has suggested that Schedule 36 should be extended to allow information and documents to be obtained for the purposes of any HMRC tax function (including tax collection)). The power under paragraph 1 is free-standing: it allows HMRC to obtain documents and information before a tax return is filed and can be used to obtain information on future liabilities to pay tax.

HMRC may also obtain information or documents from a third party by service of a 'third party notice' (paragraph 2(1)), but it requires the agreement of the taxpayer (paragraph 3(1)(a)) or the approval of the Tribunal (paragraph 3(1)(b)) to do so. (In the July 2018 consultation, HMRC indicated that it intends to ask Parliament to remove the requirement to obtain the approval of the Tribunal before issuing a third party notice.)

There is no obligation on HMRC to obtain prior judicial approval of a 'taxpayer notice' (i.e. a notice issued under paragraph 1, Schedule 36, to a taxpayer). The HMRC officer can choose whether or not to seek approval from the First-tier Tribunal in advance. HMRC may make an application to the First-tier Tribunal for approval without notice to the taxpayer (Sch 36 para 3(2A)). Whether or not the officer has sought approval has consequences for the ability of the taxpayer to appeal the notice to the tribunal. This is addressed further below.

Save where there is 'reasonable excuse', failure to comply renders the taxpayer liable to a penalty of £300 and an additional £60 for each day on which the failure continues after the day on which the penalty was imposed (paras 39 and 40). A further tax-geared penalty may be imposed for continued failure to comply (paragraph 50).

Appealing a Schedule 36 Notice

If the officer has obtained approval, that will be stated on the notice, as will the fact that there is no right of appeal to the Tribunal. The taxpayer's only ability to challenge the notice would be by means of judicial review of the First-tier Tribunal's decision to approve the notice or challenging the imposition of a penalty on the basis that the notice was not lawfully issued.

If the officer has not obtained approval, then the taxpayer has a right of appeal to the First-tier Tribunal against the notice itself, or any requirement in it. However, this right of appeal does not apply to a requirement in a notice to produce any document that forms part of the taxpayer's statutory records.

Notice of appeal must be given in writing to the HMRC officer within 30 days of the date on which the notice is 'given' (paragraph 32(1)). Due to the inefficiencies of HMRC's internal postal system and its regular use of second class post, at least half that time may have elapsed before *receipt* of the notice.

The issue as to whether a notice is 'given' on the date that it bears or on receipt by the recipient has yet to be tested before the Tribunals. As, in practice, HMRC invariably allow 'late' appeals if it has caused the delay, the issue is unlikely to the subject of an appeal to the Tribunal. If there is not sufficient time to consider properly whether an appeal should be made, we suggest that a protective appeal is made. It can be withdrawn subsequently if, on reflection, it is determined that an appeal should not be progressed.

As a general rule, we recommend a review being undertaken. Making submissions to the reviewing officer is less expensive than an appeal to the Tribunal; and the review officer sometimes takes a different view to that of the investigating officer. If the review officer does not agree, then the appeal will need to be notified to the Tribunal (or abandoned).

The question as to whether the First-tier Tribunal may permit the hearing of an application for a Schedule 36 notice to be held *inter partes*, so as to enable the taxpayer or third party to attend and make representations at the

hearing may be considered by the Court of Appeal shortly (in the *Jimenez* case which is referred to below). In *Revenue and Customs Commissioners v Arie*l [2016] EWHC 1674 (Ch) Mann J. expressed the view that Schedule 36 did not prohibit the taxpayer or third party participating in the hearing of an application made under Schedule 36. However, the First-tier Tribunal declined to follow that view in *Ex Parte John Ariel* [2017] UKFTT 087 (TC).

The Tribunal discussed and, effectively, applied the decision of the Court of Appeal in *R, on the application of Morgan Grenfell v Special Commissioners of Income Tax* [2001] EWCA Civ 329 on the power of the Special Commissioner to hold an inter partes hearing of an application under the predecessor power to Schedule 36 (TMA 1970 s 20).

In *Jimenez*, the High Court indicated that it disagreed with that approach, saying 'the Revenue and the First-tier Tribunal may wish to address whether the *Ariel* decision, and more generally their approach to the determination of applications under Schedule 36, merit reconsideration having regard to basic principles of fairness and the general approach taken by courts to ex parte hearings and the application of the principle of open justice. For my part, there is force in the approach of Mann J that was rejected in Ariel.' Whether the Court of Appeal agrees may be known shortly.

There is no right of appeal from a decision of the First-tier Tribunal approving a Schedule 36 notice to the Upper Tribunal (see *Jordan v Revenue and Customs Commissioners* [2015] STC 2314). The only remedy would be Judicial Review.

Territorial limitation

Schedule 36 is silent as to its territorial limits. But, the High Court decided recently that Schedule 36 is subject to the normal rule that (absent explicit words contra) UK legislation applies to all persons on matters within the territory to which it extends, and not to any other persons and matters.

Accordingly, a notice given to a non-UK resident (even if a British national subject to UK tax) is not valid. (*R. (on the application of Jimenez) v First Tier Tribunal (Tax Chamber)* [2017] EWHC 2585 (Admin) (20 October 2017). In these circumstances, HMRC may able to obtain information by use of mutual assistance arrangements or (where one is in place) a Tax Information Exchange Agreement.

Reasonably required

HMRC consider that an officer does not have to have evidence that a document will definitely affect the tax position, only that it is '*reasonably required*' to carry out a check. Anecdotally, HMRC seem increasingly to take the view that information is reasonably required if they say it is. But, whether or not information is '*reasonably required… for the purpose of checking the taxpayer's tax position*' is an objective test. Taxpayers (and tax advisers) should critically assess any assertion that a document is reasonably required.

In *Long v Revenue and Customs Comrs* [2014] UKFTT 199 (TC), the First-tier Tribunal rejected HMRC's contention that a doctor's appointment diary was reasonably required. On the other hand, personal bank statements can be 'reasonably required' if business transactions are carried out through the taxpayer's personal bank account; see *Beckwith v HMRC* [2012] UKFTT 181 (TC);

Time to comply with the notice

There is no minimum period to provide information that a notice under Schedule 36 may specify, save that it must be 'reasonable' (paragraph 7).

Possession or power

A person served with an information notice is only required to produce information or documents in his '*possession or power*' (paragraph 18). However, 'information' can require the creation of new documents on service of an information notice. And, HMRC is not restricted to asking for documents that it can identify specifically. In *Wheeler v HMRC* [2017] UKFTT 743 (TC) the First-tier Tribunal held that HMRC can ask a taxpayer to confirm whether information previously provided is accurate and complete by service of a Schedule 36 notice.

But, an information notice can only request facts and not opinion. In *R D Utilities Ltd v Revenue and Customs Comrs* [2014] UKFTT 303 (TC), the First-tier Tribunal allowed a company's appeal against a notice that required 'subjective' information. A similar approach was taken in *Gold Nuts Limited and Others v HMRC* [2017] UKFTT 354 (TC).
HMRC had asked the taxpayer to explain why the taxpayer considered that a loan was not within the loans to participators rules. The Tribunal determined that an opinion on a point of law was not information. The HMRC officer may write to the taxpayer to ask why it has adopted a particular tax position. However, that is part of the enquiry process; it is not part of the purpose of an information notice.

The term 'power' was defined by the House of Lords in *Lonhro Ltd v Shell Petroleum* [1980] 1 WLR 627 as 'a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else'.

A different approach was, however, taken in *Revenue and Customs Comrs v Parissis* [2011] UKFTT 218 (TC). Here, the First-tier Tribunal held that, in the context of the Taxes Acts, 'power' should be considered in terms of both legal power and 'practical' power. The Tribunal indicated that the test as to whether documents are in a person's power for the purposes of the act is whether the person 'can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them.'

The Tribunal provided no guidance at all as to what it meant by 'great expense' or 'influence or otherwise'. Whether 'great expense' is a subjective or objective test is not known, nor is it known as to what methods 'otherwise' extends.

This decision that seeks to introduces a nebulous and wholly ill-defined concept of 'power' is wholly unsatisfactory. Unfortunately, the taxpayers' appeal to the Upper Tribunal was withdrawn. The decision in Parissis has not been referred to in any case subsequently.

Old documents

HMRC can only require a person to produce a document that was entirely created more than six years ago with the prior agreement of an authorised officer (Grade 7 or above). If that agreement has been obtained, then the ultimate time limit is 21 years, but that applies only where HMRC contend that tax has been fraudulently evaded.

Legal professional privilege; pending appeals and auditors and tax advisers' documents

Paragraph 23 provides that an information notice does not require a person to provide information or documents protected by legal professional privilege. Paragraph 19 protects documents 'relating to the conduct of any pending appeal relating to tax' from disclosure. Paragraphs 24 and 25 provide limited protection for auditors and tax advisers' documents. We refer readers to our May 2017 article in this Journal for a longer discussion of restrictions on HMRC's powers under these headings.

Conclusion

HMRC seems to be testing the limits on its powers to obtain information and documents. And, the July 2018 consultation suggests that HMRC resents that there are limits on its powers. But, there *are*. It can be an arduous option to seek to rely on those limits. Hence, a pragmatic approach to determining the benefit to a client of taking a point on whether or not HMRC is entitled to obtain information or documents should be adopted.