

Briefing document

HMRC information powers

Introduction

Information requests generally arise during an enquiry and this could be through an Informal request or a Formal notice. In recent years we have seen an increase in the number as well as scope of the information requests being issued.

This note gives a general overview of HMRC information powers with some detail on what HMRC can demand, how much flexibility clients have and how this fits with other aspects of the enquiry.

Information powers

HMRC's information gathering powers are underpinned by Schedule 36 Finance Act 2008, and the extent of HMRC's powers as so legislated should be considered even during an informal request.

An informal request is usually HMRC's first approach and provides an opportunity to have a dialogue with HMRC. Where an informal request is ignored, or where HMRC considers that the taxpayer is uncooperative, it is likely that a formal notice will be issued.

A formal notice requires a taxpayer to provide information or produce documents reasonably required to check their tax position. Formal notices can be issued even where there is no ongoing enquiry. Formal notices are most often issued either to the taxpayer under enquiry or to a third party where the identity of the taxpayer whose position is being checked is known.

Legislative restrictions

Schedule 36 FA 2008 allows HMRC to ask for information or documents that are reasonably required to check a tax position, subject to certain legislative restrictions or exemptions:

- Legally privileged information or documents, journalistic materials, audit papers, personal records and information that relates to a pending tax appeal are all exempted from the HMRC's Schedule 36 powers
- HMRC can only require a person to produce a document in the person's power or possession. This means that the person providing the data either has the power to obtain it or physically possess the relevant information.
- Where HMRC requests documents which were created in their entirety more than six years before the date of notice, the formal information notice requires further approval from an authorised officer within HMRC before being issued. In practice, this approval is not difficult to obtain.
- Although the legislation exempts tax advisers from sharing copies of their tax advice with HMRC, these documents can be required from the taxpayer and careful consideration should be given as to the appropriate way to respond to these requests.
- The biggest restriction on HMRC's powers is that the information is **reasonably required** by the Inspector for the purpose of checking the taxpayer's tax position. Where this condition is not met, the Tribunal has been known to rule against HMRC, and it is one of the key areas of negotiation with HMRC.

How much flexibility do taxpayers have?

Where a formal notice has been issued, a taxpayer can appeal against all or part of the notice, unless the Schedule 36 notice was approved by the Tribunal before being issued. The appeal window is 30 days from the date the notice was issued. HMRC will typically set the same deadline for complying with the notice.

It can sometimes be more effective to negotiate with HMRC around the scope of the notice, either in the run up to the notice being issued or as a taxpayer responds to it. Key areas of negotiation include:

- What time periods documents should be provided for - e.g. a whole year's worth of bank statements; several years' of board minutes; several months' of email traffic versus shorter sample periods
- Whether sample search terms can be used, particularly with regards to email traffic around transactions or key events
- Whether alternative documents would be acceptable to HMRC, if information exists but in a different format

Where there is a large scale request, technology can help identify the relevant data set more quickly, giving a taxpayer more of the 30 day response window to review that data set and draft a detailed response to HMRC.

Interaction with other aspects of the enquiry

The decision taken on whether to respond in part or full or appeal an information request can have real consequences later on in an enquiry. For example, deciding not to release copies of historic advice could lead to HMRC applying higher penalties for non-cooperation in the enquiry later, or even raising a discovery assessment on the grounds of careless behaviour by a taxpayer because a business or individual has not shared a copy of the advice that they followed when filing their return. However, that should be balanced against whether HMRC are properly entitled to that information and what precedent sharing that document could set for the enquiry as a whole.

This is particularly important where HMRC has requested legally privileged documents. Whilst it is sometimes the right strategy to provide HMRC with extra amounts of information so that they can understand a transaction in its full context, unclear wording on why information has been voluntarily provided, or waiving privilege without proper caveats can cause future issues.

Financial Institution Notices

Draft legislation was published by HMRC on 21 July 2020 with amendments to HMRC's civil information powers following a consultation held by HMRC entitled 'Amending HMRC's Civil Information Powers'. HMRC is to be given new powers to issue Financial Institution Notices (FINs) requiring financial institutions to provide information to HMRC when requested about a specific taxpayer, without the need for approval from the Tax Tribunal. The aim of the policy is to reduce the time HMRC takes to deal with international exchange of information requests and bring the UK into line with international standards on tax transparency and on the quality and speed of tax information. This measure will have effect on and after the date of Royal Assent to Finance Bill 2020-21. Financial institutions should familiarise themselves with the rules or seek specialist tax advice if a FIN notice is received, to ensure the notice has been correctly issued by HMRC. There will be an annual report to Parliament on the use of FINs by HMRC.

Conclusion

HMRC now routinely issues large scale formal information requests during enquiries and has increased its capabilities to analyse the data it then receives. It is important to respond to a formal request appropriately, not just on the basis of the information HMRC have asked for, but also in the context of the enquiry as a whole and the wider relationship with HMRC.

Deloitte's Tax Controversy team has significant experience in responding to information requests and identifying an appropriate response strategy. Deloitte Legal can also review documents under legal privilege in certain cases. To find out more about any aspect of the above, please discuss with your usual Deloitte contact.

If you do not have a usual contact, please contact Annis Lampard (alampard@deloitte.co.uk), Mike Pape (michaelpape@deloitte.co.uk) or Adam Cox (adamxcox@deloitte.co.uk).

This note reflects the law in force as at 8 September 2020. Please be aware that it does not cover all aspects of this subject.

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