

Practice guide

HMRC's information powers

Speed read

HMRC is receiving more data, more quickly, both from UK and non-UK sources. It has increased capabilities to analyse the data available to it and is therefore more confident in using its information gathering powers. Anyone receiving an information request from HMRC needs to consider whether HMRC is entitled to that information under its statutory powers and respond appropriately. Advisers should understand the differences between formal and informal requests, so that they can advise their clients in this regard. HMRC's formal powers are developing and we should prepare ourselves for changing behavioural patterns from HMRC in this area.

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HMRC's attitude towards information gathering and its use of its formal information powers have evolved in recent years, partly influenced by broader advances in the regulatory and technological landscapes. An ever growing data set is now available to HMRC, and it has the technology to analyse this data effectively. Consequently, targeted enquiries from HMRC are increasing, as is the number of information requests, a critical element of any enquiry. It is important that tax professionals are alert to the developments in HMRC information requests, and are aware of the most effective and pragmatic responses.

Information requests generally arise during an enquiry, but it is worthwhile being aware of what information HMRC already has and the evolving ways in which this reaches

them. Traditionally, the information available to HMRC was limited, and came mainly from tax returns and financial accounts. These data sources held primarily UK focused data. Occasionally, certain teams in HMRC were able to see data from other UK agencies, for example the DVLA and Land Registry, but this wasn't automatic; meanwhile, legacy technological issues meant that HMRC officers could sometimes struggle to co-ordinate the different data sources available to them from within their own department. Consequently, much of HMRC often had to take a reactive approach to information gathering, and information requests were used to fill gaps in HMRC's data visibility. This is now changing.

HMRC already has the 'Connect' database, which identifies links between businesses, shareholders, properties and family links across the tax bases. This means that the increased data available to HMRC is of real use to it, facilitating a more nimble and targeted approach towards enquiries. Interestingly, HMRC is not the only tax authority taking this approach. Last year, the OECD published a report outlining the evolving use of data analytics by tax authorities around the world.

The global focus from tax authorities on digitising and sharing tax relevant data creates the possibility of tax authorities improving the focus and quality of their tax audits and investigations. Some tax authorities, such as Brazil and Russia, are leading the way in embracing technology. In the UK, we have the making tax digital agenda (albeit the timeframe for this occurring is now unclear, given that making tax digital was one of the measures dropped from the Finance Bill ahead of the upcoming UK general election). It will be interesting to see how far the digital provision of information will assist HMRC in tax risk analytics.

Turning from UK to non-UK data, there has again been a significant recent shift about what is available to HMRC, reflecting increasing globalisation in business and personal finances. Following data leaks from territories including Liechtenstein and Panama, emphasis on international data cooperation across tax agencies has increased. In the corporate sphere, country by country reporting to tax authorities under the OECD Action 13 BEPS initiative will soon be relevant to all groups with a turnover of more than €750m. In addition, more than 100 jurisdictions have joined the common reporting standard (CRS), an important global initiative where financial intermediaries will have to file details of individual accounts with national tax authorities. For early adopters, there will be an automatic exchange of financial data from September 2017 and a year later for others.

Reflecting the new data sources available, we are seeing a change in how HMRC is using its information powers. Previously, requests for information may have been made on a speculative basis; however, HMRC is now much more confident about its right to ask for what it is requesting, and may even have an expectation itself as to what response it will receive. In the rest of this article, we will therefore review HMRC's informal and formal information gathering powers, as well as some of the more unusual and newer powers available to HMRC.

Informal information requests

HMRC has formal information powers contained within FA 2008 Sch 36, but it is rare for HMRC to use these powers without first making an informal request. Informal requests need to be taken seriously, as providing an answer without sufficient consideration could be potentially detrimental to the overall enquiry.

An informal request allows taxpayers, advisers and HMRC

to work together to find a pragmatic way forwards for the enquiry. Ignoring an informal request usually triggers a formal notice, losing the opportunity for mutual dialogue. A more pragmatic approach could be to ring the inspector and agree a revised timetable or methodology for the informal request.

Previously, requests for information may have been made on a speculative basis; however, HMRC is now much more confident about what it is requesting

Despite the informal nature of these requests, they are underpinned by the rules and regulations in Sch 36. It is important for practitioners to be alert to HMRC wording informal requests in a broader manner than Sch 36 would conventionally allow. In responding, it may be advisable to refer back to Sch 36 as if the request were formal, and consider whether the requests are reasonable.

Formal HMRC information requests

As mentioned above, HMRC's formal powers are contained in FA 2008 Sch 36. These powers affect all the tax heads, and there are separate sub-paragraphs for non-resident CGT and SDLT returns.

Schedule 36 also sets out HMRC's inspection powers, which govern HMRC visits and raids. HMRC raids can reach the press and there are high profile raids periodically. As this is a particularly specialist area, we will not discuss HMRC's inspection powers in this article any further.

HMRC may deploy either taxpayer (first party) notices, or third party notices. Under Sch 36 para 1(1), first party notices require the taxpayer to provide information and documents 'reasonably required by the officer for the purpose of checking the taxpayer's tax position'. Under Sch 36 para 2(1), third party notices require relevant parties to provide information and documents 'reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer'. Therefore, if HMRC is issuing a third party Sch 36 notice, the notice in question and all precursor correspondence should make clear which other organisation's position is being checked.

'Reasonably required'

What is 'reasonably required' for HMRC to assess a tax position is a grey area, as it comes down to what the inspector dealing with the case thinks is reasonably required. It is therefore often a key area of debate with HMRC. Furthermore, formal notices must be approved by an officer of a certain grade in HMRC; and in some cases HMRC will also seek tribunal approval before issuing a formal request.

Practical considerations

Schedule 36 sets out clearly what HMRC can and cannot ask for and it is important to bear this in mind when responding to a notice. Practitioners should be particularly sensitive to this when assisting with responses to third party notices.

First, under Sch 36 para 18, the documents must be in the power or possession of the person receiving the notice. This means that the person providing the data either has the power to obtain it or physically possesses the relevant information. This may be particularly relevant when advising groups with more complex or disparate structures.

Secondly, under Sch 36 para 20, if the required documents were created 'in their entirety' more than six years before the date of the notice, these documents will require further approval by an authorised officer within HMRC.

Thirdly, under Sch 36 para 8, HMRC may accept copies of documents, but also has the right to require the originals. Furthermore, while HMRC may be willing to examine virtual data on site, it has limited capacity for electronic data acceptance due to internal restrictions on mailbox sizes.

Finally, while appeal and audit papers, journalistic materials and personal records are all exempt from HMRC's powers per Sch 36 para 19(1),(2) and (3), there is traditionally much greater debate over the extent to which HMRC can require legal and tax advisory documents, as these documents are linked to issues of client privilege. Privileged documents are excluded from HMRC's powers under Sch 36.

When considering a response to a formal HMRC request, advisers must be sensitive to what is 'reasonably required' for the purpose of checking a tax position. In *Taylor v Bratherton* [2005] STC (SCD) 230 a formal notice had been served requiring documents relating to the taxpayer's income and personal expenditure. The special commissioners (now the First-tier Tribunal) expressed the view that the Revenue officer's request was intrusive, and that the taxpayer should not be required to divulge details of his personal expenditure if it could be avoided, although details of income and allowable expenditure could be requested. In *Dr K Long* [2014] UKFTT 199 (TC), the tribunal found that business appointment diaries contained personal details of a health practitioner's clients, but contained no financial information and therefore were not reasonably required by HMRC.

Responding to formal requests

Recent experience suggests that HMRC is increasingly using these powers as an administrative tool to move enquiries forward. This contrasts with the more traditional view that using formal powers is a sign that a taxpayer isn't cooperating with HMRC, which has a direct impact on penalty negotiations post-enquiry. This is worth considering when discussing timeframes and methods for provision of information with HMRC. Equally, it is worth noting that an HMRC inspector may take a more cerebral view of an information request, informed by concerns around case management, while a client might be more concerned with issues of personal confidentiality or the cost of responding.

There is no set timeframe in the legislation for complying with a notice, but an appeal against a formal information notice must be made within 30 days. Any appeal needs to have good grounds attached to it, so necessary thought and consideration must be applied to this. However, tribunal-approved notices cannot be appealed, as tribunals will check the practical considerations written into Sch 36, such as 'reasonably required' at the time they are approved.

If there are negotiations about the scope of the notice, the response timeframes or the methodology, then both sides may consider whether any negotiated agreement could lead to setting a precedent. For example, HMRC may consider a situation in which it agrees that certain types of data do not need to be provided in a particular case, and whether this would set a precedent. On the other hand, advisers may consider whether providing privileged information to HMRC would mean that HMRC will use this as a lever to argue that privileged information should be provided for all of that adviser's clients.

Throughout responding to a formal request, good communication is key as it is important to consider the wider relationship with HMRC, both within the current enquiry and beyond.

Comparing formal and informal notices

| | Informal notices | Formal notices |
|--------------------------------------|--|---|
| Format of Information request | <ul style="list-style-type: none"> ● HMRC could issue this notice in any format; for example, in a letter, meeting or call. | <ul style="list-style-type: none"> ● A formal notice under FA 2008 Sch 36 will be issued by HMRC. |
| Flexibility/appeals | <ul style="list-style-type: none"> ● Discussions may be possible with HMRC around what needs to be provided. | <ul style="list-style-type: none"> ● The taxpayer will need to comply with the request unless successfully appealed. ● Appeals must be made formally. |
| Penalties | <ul style="list-style-type: none"> ● There are no penalties for not providing information, although this is practically likely to be followed by a formal notice. ● Lack of cooperation may impact penalty mitigation later. | <ul style="list-style-type: none"> ● Failure to comply penalty of £300 and an additional £60 each day in which the failure continues. ● Inaccurate information can lead to a penalty of up to £3,000. |

Additional measures

In addition to the informal and formal powers set out in the table above, HMRC can also access a range of other information request powers and data sources.

Identity unknown notices

Identity unknown notices were introduced as part of HMRC's response to the mass-marketed avoidance schemes that took off in the early 2000s. While 'standard' Sch 36 notices identify the ultimate taxpayer, FA 2008 Sch 36 para 5 allows HMRC to request details of a group of persons who can be described (for example, the persons who took advice on XYZ planning), but whose individual identities remain unknown. This power allows HMRC to gather information consistently across the board for planning used by groups of individuals or corporates, rather than relying on one-off reviews of tax and DOTAS returns.

Offshore structures

In the 2016 Autumn Statement, the chancellor announced a consultation on a potential new obligation for intermediaries to notify HMRC of offshore structures that they provide to clients, and also of the client lists connected with those structures. The consultation was high level and we await HMRC's reaction to the initial consultation responses. However, in common with the identity unknown notices, this proposed policy shows HMRC looking more closely at the taxpayer/tax adviser link, and using that link to require third parties to provide information.

People with significant control

As of April 2016, all UK limited liability partnerships and companies are obliged to identify people with significant control and to record this on a public register at Companies House. While this measure was not introduced by HMRC, but by BEIS, it would be reasonable to expect that HMRC may choose to review these registers as part of future tax reviews.

There is also currently a consultation open to extend this to foreign companies that own UK land or property, or that bid for government contracts. In addition, the UK has joined over 40 other jurisdictions in a proposal to share information from their beneficial ownership registers, albeit the practicalities of this remain to be decided.

'Know your customer' (KYC)

Finance Act 2011 Sch 23 allows HMRC to approach the UK entities of offshore service providers to request relevant data relating to any record or list that they are required by law to maintain. This could include KYC data records as defined by the Money Laundering Regulations, SI 2007/2157, in relation to offshore trusts and companies formed by the service provider for their clients. This could be seen as both a move beyond the current reliance upon treaty powers (such as the Tax Information Exchange Agreements with jurisdictions like the Channel Islands) and a shift from data provision on request to automatic data flows.

Cross-border cooperation

HMRC is increasingly working alongside other tax authorities in several areas, including handling information requests. This could be HMRC either gathering information on behalf of another tax authority or HMRC requesting other tax authorities to gain information on non-UK parties. For example, in one long-running enquiry, the UK authorities requested the non-UK tax authorities to visit a site and see if certain assets were there. The non-UK authorities made an unannounced visit and sent a site report back to HMRC. As organisations are increasingly globalised, HMRC is likely to continue to be interested in seeking information from overseas branches, offices, customers and suppliers.

Conclusion

HMRC has far more information available to it than previously, both from UK and overseas sources and it also has increased capabilities to analyse that data. As a result, HMRC can be far more assertive in its use of information requests.

While informal information requests are likely to be made at the outset, they are still underpinned by the principles set out in Sch 36. Nonetheless, informal requests allow greater opportunities for the taxpayer to find a pragmatic way to work through the issue at hand with HMRC.

On the other hand, formal information requests issued under Sch 36 powers trigger a formal dialogue between HMRC and the taxpayer. The legislation includes restrictions on the type of information that HMRC may request and advisers should take heed of this to make sure that HMRC is not acting beyond its remit.

We have also reviewed the powers available to HMRC beyond Sch 36, which demonstrate that information requests are an evolving area where HMRC is going to great lengths to utilise the new powers and data flows available to it. It will therefore be interesting to see how these powers develop over the coming months and years.

Action points

- Consider the response to an informal information request as seriously as a formal notice.
- In both informal and formal requests, is HMRC entitled to this information? Are the timeframes for complying reasonable?
- Make taxpayers aware of HMRC's increased access to information and improved analytical capabilities. ■

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- ▶ FA 2008 Sch 36 powers: five practical issues (Phil Berwick, 14.6.12)
- ▶ FA 2011 Sch 23 information powers (Aileen Barry, 14.6.12)
- ▶ HMRC's inspection powers (Rupert Shiers & Nick Clayton, 14.6.12)
- ▶ 'Reasonably required' for checking a taxpayer's position (Jonathan Fisher, 15.6.12)