



TC04044

Appeal number: TC/2014/03978

INFORMATION NOTICE – FA 2008, Sch 36, para 3 - third party notice - summary of reasons to be given to taxpayer – para 3(3)(e) – dispensation where action might prejudice the assessment and collection of tax - para 3(4)

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**THE COMMISSIONERS FOR HER MAJESTY’S Applicants
REVENUE & CUSTOMS**

EX PARTE A TAXPAYER

TRIBUNAL: JUDGE ROGER BERNER

Sitting in private at 45 Bedford Square, London WC1 on 19 September 2014

NOTE

1. In the course of considering an application by HMRC under paragraph 3 of Schedule 36 to the Finance Act 2008 for the approval of the Tribunal to the giving of certain third party notices under para 2 of that Schedule, two points of law arose on which I consider it would be helpful to indicate the conclusions reached by the Tribunal.

2. The application was, as is customary in cases of ex parte applications of this nature, directed to be heard in private. This note is accordingly anonymised. It does not record the outcome of the application, but deals only with the two matters of law that I consider will be of general interest.

Background

3. Under Sch 36 FA 2008 an officer of HMRC may issue an information notice (that is, a notice requiring a person to provide information or to produce a document) to a taxpayer (a “taxpayer notice”) or to a third party in a case where the information or document is reasonably required by the officer for the purpose of checking the tax position of the taxpayer. Such a notice is referred to as a “third party notice” (see Sch 36, paras 1 and 2).

4. The power to issue information notices, including a third party notice, is part of a range of information-gathering powers contained in Sch 36. A clear feature of the legislation is the balance it holds between the needs of the state to ensure the proper administration and collection of tax, and the rights of taxpayers not to be subject to unreasonable or oppressive interference.

5. Thus, a third party notice can only be issued if the taxpayer consents or if the tribunal approves the giving of the notice. Approval of a third party notice can be given only if certain conditions are satisfied. One such condition is that set out in para 3(3)(e):

“in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.”

6. The condition in para 3(3)(e) can, however, be disapplied by para 3(4):

“Paragraphs (c) to (e) of subparagraph (3) do not apply to the extent that the tribunal is satisfied that the taking of the action specified in those paragraphs might prejudice the assessment and collection of tax.”

Summary of reasons

7. The short point for construction in relation to para 3(3)(e) is what reasons must be summarised. Subject only to the para 3(4) dispensation, the even shorter answer is all of them.

8. It will generally be the case that an information notice will be reasonably required for a single reason, or for a straightforward number of reasons. But in other cases, an investigation may resolve initial doubts or concerns over particular items whilst leaving other areas of enquiry for which further information and/or documents may be required. If, at the time the information notice is sought, a matter has been resolved, or has otherwise ceased to be a reason for the obtaining of the notice, nothing in that particular respect need be summarised to the taxpayer. Only the proximate reasons need be included, but all those reasons must be summarised.

9. If on the other hand there are a number of present lines of enquiry, giving rise to a range of reasons why it is considered that information and/or documents is reasonably required for the purpose of checking the taxpayer's position, it is not sufficient for the summary to include only some of the reasons. Thus, it is not appropriate for only what are regarded as the most important reasons to be given, nor, absent an application for dispensation under para 3(4), is it proper to exclude reasons because of some perception that notifying those reasons would breach an obligation of confidentiality or would otherwise impede the administration of the tax system. Subject to a para 3(4) dispensation, for which a specific application must be made to the tribunal, all the reasons for the information and/or documents being required must be included.

10. It may be the case that intelligence is received by HMRC which leads to enquiries being undertaken and ultimately to a request for approval of an information notice. In determining what the summary of reasons to the taxpayer should comprise, it is necessary to consider to what extent the intelligence received gives rise to a present reason in its own right for the obtaining of information and/or documents, or to what extent it has merely been the catalyst for an enquiry which has then provided the reasons for the information notice. In the former case, the reason disclosed by the intelligence must form part of the summary to the taxpayer; in the latter, the intelligence itself will not be a reason requiring to be summarised.

11. This, in my judgment, is the proper construction of para 3(3)(e). It cannot, in my view, be argued that because the paragraph does not refer to "all" the reasons, it should be narrowly construed. The legislation provides a balance between the government, through HMRC, and the taxpayer. In the case of the summary of reasons required to be given to the taxpayer, that balance is struck by having an unrestricted requirement for all reasons to be given, qualified only by the specific dispensation in para 3(4). That balance would be distorted if anything less than the complete set of reasons were to be included within para 3(3)(e).

12. Any application for approval of an information notice (whether a third party notice or a taxpayer notice) must be accompanied by all the relevant information. The tribunal must be informed of the reasons why the notice is sought. It will be for HMRC, having regard to the requirements of para 3(3)(e) as properly construed, to bring to the tribunal's attention all the reasons for the information and/or documents being required in each case. As the application for approval is made ex parte, HMRC has a particular responsibility to ensure that all relevant matters are before the tribunal. In case of doubt, the tribunal should be provided with all the relevant

material on which to reach its own conclusions on the proper reasons requiring to be summarised. If those reasons include matters which HMRC do not wish to disclose to the taxpayer, an application should be made for a dispensation under para 3(4).

Assessment or collection of tax

5 13. In the same way as para 3(3)(e) should not be narrowly construed, so too should
the dispensation in para 3(4) not be unduly restricted. The natural meaning of para
3(4) is that it enables the broadest consideration to be given to the possible prejudice
to the administration of the tax system of revealing certain matters to the taxpayer.
10 Para 3(4) is not to be construed as applying only to the administration and collection
of the particular tax liability of the taxpayer whose affairs are under enquiry.

14. Nor is it necessary that the tribunal should be satisfied that inclusion of the
relevant material in the summary of reasons given to the taxpayer *will* prejudice the
assessment and collection of tax. The test is one of possibility and not of certainty or
even probability. It is sufficient if the tribunal is satisfied that there is a real (as
15 opposed to fanciful) risk of prejudice to the system of administration and collection of
tax.

15. An example of a case where an application under para 3(4) might be made is
where the reasons for HMRC wishing to obtain information and/or documents include
reasons arising from intelligence obtained by HMRC by virtue of the Proceeds of
20 Crime Act 2002. Under that Act, certain bodies, including banks, solicitors and
accountants, are required to make “suspicious activity reports” in certain
circumstances. HMRC may have access to such materials subject to the information
being treated in such a manner that the content of the suspicious activity reports and
the identity of those who have made them is protected.

25 16. In many cases, such reports will amount to no more than a trigger for further
enquiry by HMRC, and it will only be the results of that enquiry that will provide
reasons for the obtaining of an information notice. In such a case, as I have described
earlier, the proximate reasons for the obtaining of the notice may not include the
suspicious activity report itself. But where the suspicious activity report provides
30 reasons in its own right for the obtaining of an information notice (whether with or
without other reasons), those reasons will require to be given to the taxpayer, unless a
dispensation is given under para 3(4).

17. In considering an application for such a dispensation under para 3(4), the
tribunal will have regard to the question of prejudice to the whole system of the
35 administration and collection of tax. That system recognises, by statute, the value of
whistle-blowing in certain areas, including tax evasion. Any requirement for reports
to be made of suspicious activity carries with it a need for confidentiality, both for the
protection of the reporter and to prevent “tipping off”. Those are relevant factors for a
tribunal to take into account in determining whether it is satisfied that the inclusion of
40 such material in a summary of reasons given to the taxpayer might prejudice the
administration or collection of tax.

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**ROGER BERNER
TRIBUNAL JUDGE**

RELEASE DATE: 30 September 2014