



TC04746

Appeal number: withheld

SCHEDULE 36 THIRD PARTY INFORMATION NOTICE –taxpayer and third party given notice of hearing – whether hearing properly called – no – hearing directed to be as if without notice and in private

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**RE AN APPLICATION BY THE
COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Royal Courts of Justice on 23 September 2015

DECISION

1. This is a short note on a preliminary decision I took at a hearing of an
5 application for the issue of a notice under Schedule 36 Finance Act 2008 to a third party.

2. The background to the matter was that a similar application concerning the same taxpayer was made by HMRC to a judge earlier in the year. The judge refused that application for reasons which are not relevant here. At the same time the Judge
10 made it clear that if HMRC renewed the application, the Tribunal would give notice of the hearing of the application to the third party and the taxpayer with a view to those persons being able to attend the hearing.

3. HMRC did revise and renew its application and the Tribunal did notify the hearing to the third party and the taxpayer. Therefore, the usual direction that the
15 hearing would be in private made before such hearings was not made. For this reason the session list recorded the name of the taxpayer.

4. The hearing came before me. Present at the hearing were Mr A Reay, HMRC's presenting officer for the application, Ms E Burns who was the HMRC officer with responsibility for the enquiry into the taxpayer's affairs, and a Mr A Chaudry, an
20 HMRC officer who had come to observe the proceedings but had no responsibility for HMRC's check into the taxpayer's tax liability.

5. Also present at the hearing was a member of the public. He gave his name to the clerk (I do not record it here as unnecessary) and informed me that he was nothing to do with any of the parties to the hearing but had simply come to observe proceedings
25 in the Royal Courts of Justice.

6. No one else was present. In particular, neither the third party nor the taxpayer nor a representative for either had attended. That was no surprise so far as the third party was concerned as it had already written to the tribunal to notify it that it did not intend to appear.

7. My concern was whether the hearing had been properly called. This might seem an otiose question in view of the fact that neither the third party nor taxpayer had chosen to attend, but whether the hearing was properly "on notice" was relevant to the question whether the hearing should be in private. And the question whether the hearing should be in private was relevant because a member of the public was
30 present.
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8. I asked HMRC whether they had any submissions on the issue of whether or not the hearing should have been on notice. Mr Reay had little to say on the issue other than that HMRC considered applications for third party notices under Schedule 36 should only exceptionally be 'on notice' and the only feature which made this particular application exceptional was that the original judge had ordered that the
40 hearing would be on notice.

9. I considered the matter from first principles. Should the third party and taxpayer have been given notice of the hearing? I find this is not directly addressed in Schedule 36. While the Schedule does set out ‘procedure’ for the hearing of an appeal in this Tribunal against the issue of an information notice *without* the approval of the tribunal (paragraph 32) and against a penalty issued for non-compliance with an information notice (paragraph 48) neither of these paragraphs actually deal with the procedure in the Tribunal and don’t in any event apply to the hearing of an application to the Tribunal for the issue of an information notice. They are no help here.

10. What Schedule 36 does relevantly provide on this issue is as follows:

- 10 “3(1)
An officer of Revenue and Customs may not give a third party notice without –
- (a) the agreement of the taxpayer, or
 - (b) the approval of the tribunal.
- 15 (2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice....
- (2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).
- (3) The Tribunal may not approve the giving of a taxpayer notice or third party notice unless -
- 20 (a) ...
- (b)
- (c) The person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs
- 25 (d) the tribunal has been given a summary of any representations made by that person, and
- (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.
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11. What does paragraph 3(2A) mean? It says “...may be made without notice” suggesting it could also be made with notice. Is it referring to the hearing in the Tribunal? Does it mean that the hearing of the application for approval may be with notice? Did Parliament intend that the Tribunal could chose to hold hearings for the approval of third party and taxpayer notices under Schedule 36 paragraph 3(2) on notice? In other words, did Parliament grant the Tribunal the power to permit the third party and taxpayer to attend such hearings?

12. This is not what paragraph 3(2A) actually says. It merely says the application may be made without notice. The application is made by HMRC. And paragraph 3(2A) is clearly referring to notice given by HMRC as it says in brackets “(except as

required under sub-paragraph (3))”. And sub-paragraph 3(3) clearly refers to notice given by HMRC to the taxpayer and third party as that is how it reads: representations made by the person to whom the notice is to be addressed are to be made to HMRC and then passed on to the Tribunal. Paragraph 3(3) does not anticipate the Tribunal directly approaching either taxpayer or third party.

13. So the proper reading of paragraph 3(2A) is not that it gives the Tribunal the power to hold the hearing on notice, but that it gives HMRC the power to make the application without giving any notice save as provided by paragraph 3(3).

14. So, as paragraph 3(2A) is not a provision giving the Tribunal the ability to hold the hearing on notice, I must consider general principles. And under general principles, was it intended by Parliament that such hearings would be on notice? Certainly the normal intention for hearings in a tribunal is that they would be on notice.

15. But Schedule 36 information notices are somewhat different. The whole tenor of paragraph 3(3) appears predicated on the basis only HMRC will be present when the application is decided. This is because it provides that the tribunal must be handed a copy of the third party’s representations (3(3)(d)) and that those representations must have been made to an HMRC officer (3(3)(c)). It must be satisfied that the taxpayer knows of the application unless it is satisfied the taxpayer should not have been told: paragraph 3(4). These conditions only make sense if Parliament’s assumption was that neither the taxpayer nor third party would be present.

16. The clear implication is that neither the taxpayer nor third party would be present in the hearing; indeed it is anticipated that in some cases the taxpayer would not even know the application would be made.

17. The remedy given by Parliament to a taxpayer or third party aggrieved by the information notice is the right to appeal any penalty imposed for non-compliance. If the information notice should not have been issued, in my view that would be a reasonable excuse for not complying with it. While it might be thought unsatisfactory that a third party or taxpayer would have to risk a penalty if they considered non-compliance justified, nevertheless that is clearly the only route of challenge intended by Parliament for any recipient of a notice issued with the approval of the Tribunal. In other words, Parliament intended that the only occasion the recipient of a notice could contest the issue of it would be at a hearing to contest a penalty imposed for non-compliance with the notice.

18. And a taxpayer who wishes to contest the issue of a notice to a third party has no route under Schedule 36 to contest it at all. They are not the recipient of a third party notice so cannot be penalised for not complying with it. There is also no appeal route for a taxpayer against a third party notice and moreover HMRC are not even required to give to the Tribunal any representations made by the taxpayer (see paragraph 3(3)(e) and cf 3(3)(c) and (d)). All that a taxpayer aggrieved by the issue of a third party information notice is to seek permission in the High Court to judicially

review HMRC. Parliament clearly did not intend a taxpayer to contest the approval by this Tribunal of a third party information notice at all.

5 19. If there were any doubt on this conclusion, the explanatory notes to the Finance Act 2009, under which paragraph 3(2A) above was inserted by s 95 and Schedule 47 provides:

4.Paragraph 2 inserts new paragraph 3(2A) into Schedule 36 to make clear that applications to the tribunal for approval of taxpayer or third party notices are heard without the taxpayer being present.

10 20. My conclusion is that Parliament intended all hearings under paragraph 3(3) to be heard without notice. The Tribunal cannot invite the taxpayer and third party to attend as to do so would be to defeat Parliament's intention.

15 21. It was therefore in my view a procedural error for notice to have been given to the taxpayer and third party but it was not an error that had led to any injustice (as neither third party nor taxpayer attended) save for the fact that the hearing had not been directed to be in private. A first instance tribunal judge can reverse previous case management directions which are erroneous in law: *DDR* [2012] UKFTT 443 (TC). As I considered the direction erroneous in law, I could reverse it and did so by directing that the hearing would continue as if it was without notice.

20 22. That left the question of whether the hearing should be in private. The Tribunal's standard practice where a hearing is of an application under paragraph 3 of Schedule 36 is to direct that it takes place in private. This is because the Tribunal considering the application has to hear about the taxpayer's tax affairs in order to decide whether the information notice is justified. As the taxpayer is not given notice of the hearing and will not be present, it would be wrong to permit members of the public to turn up and hear about the taxpayer's tax matters. It is right that such
25 hearings should be in private.

23. I directed that the hearing would be in private. Mr Chaudry and the member of the public were asked to leave and did so. Another member of the public who entered the court half way through the hearing was also asked to leave and did so.

30 24. Having directed that the hearing was in private I went on to hear and determine the application.

25. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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Barbara Mosedale

TRIBUNAL JUDGE

RELEASE DATE: 6 October 2015

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Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on