

Analysis

One Call and information notices: do you possess the power?

Speed read

The recent First-tier Tribunal decision in *One Call Insurance Services Ltd* has brought into question the meaning of 'power' in relation to formal information requests from HMRC and is relevant for all enquiry work. In that case, the FTT found that the law requires 'serious efforts' to be made to obtain the documents. Further, the 'power to obtain' documents may be through a legal entitlement or through influence. The FTT's decision broadens the expectations of HMRC in relation to the efforts made by a taxpayer to obtain documents, and it is a reminder that audit trails should be maintained of all communications relating to attempts to obtain documents and information.



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The recent First-tier Tribunal (FTT) decision of *One Call Insurance Services Ltd v HMRC* [2022] UKFTT 184 (TC) has raised a number of interesting questions regarding the meaning of 'power' in the context of FA 2008 Sch 36 which states that: 'An information notice only requires a person to produce a document if it is in the person's possession or power' (HMRC's *Compliance Handbook* at CH22120). HMRC's *Compliance Handbook* advises that 'in their possession' means the person has physical control over the document and it does not matter who the document belongs to. 'In their power' is explained to mean that the person has the ability to get the document, or a copy of it, from whoever holds it. HMRC's manual goes on to say that this ability to obtain the document may be through a legal entitlement or the influence held over the person who owns or possesses the document. The *One Call* decision provides a useful example of the application of this second meaning.

HMRC information requests

Before looking in detail at the *One Call* decision, it is useful to examine the references to 'power and possession' in the wider context of both the legislation at FA 2008 Sch 36 and the means by which HMRC obtains and gathers information and documents.

An individual or company tax return and the accompanying computations will provide HMRC with a certain level of information allowing them to examine and assess the tax position. However, in a number of instances, this information alone is not sufficient to satisfy HMRC that the tax position is correct and complete and additional details may be required. The exercise undertaken by HMRC to obtain

the required level of satisfaction can range from an informal telephone call confirming a relatively straightforward point to an extensive investigation examining every aspect of a person's tax affairs. In its *Compliance Handbook*, HMRC advises that the preference is for informal requests for information and documents, working collaboratively with taxpayers to obtain the relevant information and documents. The use of their statutory powers at FA 2008 Sch 36 tend to be called on when these informal requests are unanswered or, in HMRC's view, not complied with in full. Due to the added administrative burdens (and costs) that are likely to accompany a formal information notice and the potential sanctions for non-compliance, it is best practice to attempt to agree a way forward with HMRC that avoids one being issued. Early discussions with HMRC on receiving an informal request for information can often be fruitful and a means of reducing down a request to what is genuinely needed by HMRC to provide sufficient comfort on any given issue.

Schedule 36

The legislation at FA 2008 Sch 36 (which came into force for income tax, capital gains tax, corporation tax and VAT from 1 April 2009) provides HMRC with statutory powers to gather information and documents required to check a person's tax position.

A formal notice to request information and documents may be issued under Sch 36 either:

- during the course of an enquiry under TMA 1970 s 9A (or FA 1998 Sch 18 para 24 for a company); or
- outside the statutory enquiry window where 'the information or document is reasonably required ... for the purpose of checking the taxpayer's tax position' or where there is a 'reason to suspect' that tax may have been under assessed (FA 2008 Sch 36 para 1) and this is examined in more detail below.

The legislation allows HMRC to check an individual's past, present and future liability to pay the taxes referenced above, and it therefore allows for an information notice to be issued in advance of the tax return being filed.

It is recommended therefore that a comprehensive audit trail is maintained of all information and documents relevant to the preparation of the tax return prior to the submission of the return, as opposed to pulling this together in response to an enquiry notice from HMRC.

There are five types of information notice, but it is the first party taxpayer notice only that will be considered here.

'Reason to suspect'

When a return has been filed, HMRC has the authority to issue an information notice on certain grounds (FA 2008 Sch 36 para 21(6), (7)), including where:

- the information and documents are reasonably required for the purpose of checking the tax position; and
- an officer of HMRC has a reason to suspect that tax may have been underassessed or excessive relief allowed.

HMRC's guidance advises that it is not necessary for the officer to have sufficient information to raise an assessment; however, it is necessary for a specific risk to have been identified (CH23560). This guidance should be borne in mind when dealing with and responding to such notices issued for a period for which the enquiry window has now closed. If there are any concerns that the questions asked and the documents requested suggest that the notice is more speculative in nature, then a discussion with the issuing officer prior to embarking on any work required to comply with the notice is strongly recommended. As above in relation to informal information

requests, a discussion at this stage can help to provide clarity to both parties on the specific risks going forward. A clear understanding and agreement from both sides as to the issues in question may help to prevent the enquiry from becoming protracted.

Additional care should be taken on receipt of an information notice that relates to a period outside of the normal assessing time limits. The guidance (at CH21660) states that there should be a reason to suspect that there has been careless or deliberate behaviour before a check of a period outside of the normal assessing time limits may begin. It goes on to advise that the formal information powers at Sch 36 may be used to establish whether this suspicion is correct. In the event that a formal information notice is received for any period that falls outside of the normal assessing time limits, the recommendation for an early discussion with the issuing officer is endorsed again, although more strongly on this occasion.

Each case needs to be considered on its facts to determine whether, through a legal entitlement or through influence, there is a 'power' to obtain

Appealing a Sch 36 notice

An appeal against a Sch 36 information notice may be lodged against either the notice in its entirety or any particular item within the notice. There is no right of appeal if the notice has been approved by the tribunal in advance of being issued. Equally, there are no appeal rights where the request is for a person's statutory records, being any information or documents that a person has a statutory obligation to preserve. However, an appeal may be lodged on the basis that:

- the information is not reasonably required to check the tax position;
- the documents requested are not in the power or possession of the taxpayer; or
- the request for information and documents is unduly onerous, meaning that 'the burden on the person receiving the notice is disproportionately greater than the benefit expected to be gained from having the information or documents in question' (CH24420).

The *One Call* decision: 'power to obtain'

In the case of *One Call*, a formal information notice under Sch 36 was issued to the appellant requesting information and documents regarding the use of a remuneration trust by the company. The notice was appealed on the grounds that the relevant items:

- were not reasonably required for the purposes of checking the company's tax position (because it was standardised information provided by the promoter of the scheme and other similar schemes); and/or
- were not within the company's power to obtain.

The FTT dismissed the first argument because HMRC should not have to make assumptions about what one taxpayer has done as a result of information about others, and even if HMRC had a general picture about such arrangements, it was still reasonable to require the information from the company to address its specific circumstances.

The more interesting aspect of the FTT's judgment concerns whether the company had the power to obtain the relevant items. Here, the FTT referred to the case of *Parissis*

[2011] UKFTT 218 (TC) where (at para 19) it was said that:

'It seems to us that it is HMRC's application for a penalty and it is for them to satisfy us that the documents are in the respondents' possession or power. We bear in mind it is hard to prove a negative. But, we think, although HMRC must raise a prima facie case that the documents are in the respondents' possession or power then it is for the respondents to show that they are not.'

The FTT found that not only did HMRC establish a prima facie case that the documents requested were within One Call's power to obtain, but also that One Call failed to establish its own case to demonstrate that they were not. The relationship between One Call and the remuneration trust was examined in reaching this decision, and it was concluded that the nature of this relationship was one that would allow for the provision of documents on request from the trust to One Call. The company made very significant contributions to the trust which in turn, by way of loans or other transactions, provided monies directly or indirectly to company employees. The FTT accepted that One Call did not have any legal power under the trust deed to compel the trustees to provide the documentation as requested by HMRC, nor did the company have any economic influence over the trust after the arrangements ceased. However, the nature of the relationship between the company and trust – and the fact that 'One Call did not simply transfer money into a black hole' – was sufficient for the FTT to conclude that the company had the ability to obtain documentation from the trust regarding the use of the very significant contributions that had been made.

The case brings into question the degree of effort that should be made by a taxpayer in seeking to obtain the documents requested by HMRC. The FTT concluded that One Call had made little or no efforts to obtain the documents, and it found that 'the law requires serious efforts to be made to obtain the documents' (para 108).

Implications of the *One Call* decision

While this is a non-binding decision, this is an important point of principle that is relevant for all enquiry work. Each case will be fact specific, and the question is whether, through a legal entitlement or influence, there is a 'power' to obtain the documents. This could be a point that needs considering where HMRC issues a taxpayer notice to:

- an individual requesting a copy of a trust deed and underlying trust accounts in relation to an offshore trust where that person is a beneficiary of the trust; and
- a UK company for the accounts or board minutes of an overseas company that is connected to the UK company.

An audit trail should be maintained for all HMRC requests to obtain such documents, including those that HMRC could think the taxpayer has the 'power' to obtain by virtue only of their influence.

Despite the increased flow of information to HMRC from sources both global and domestic, HMRC remains reliant on the taxpayer in a large number of cases to provide the information necessary to assess the tax position accurately. It is therefore essential to understand the rights and obligations of both the taxpayer and HMRC when navigating through the complex realm of information notices. ■

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► Cases: *One Call Insurance Services Ltd v HMRC* (5.7.22)

► 20 questions: HMRC's civil and criminal powers (A Craggs & C Christofi, 11.5.22)

► Power to obtain documents: 'serious effort' required (B Webster, 6.7.22)