

Why All The Fuss?

The new Information Powers regime

I had originally intended to write this opinion piece on where the law stands in relation to tax avoidance, but the debate around the new Information Powers regime contained in the Finance Act 2008, Sch 36 (in relation to which I wrote when the new legislation was first published – see ‘Compliance Investigations and Litigation’, *The Tax Journal*, Issue 928, 7 April 2008) continues to run and I could not resist returning to this theme, which is of undoubted importance and (evidently) considerable interest to all tax practitioners. I hope to be able to return to the equally interesting question of anti-avoidance and abuse of rights, which is perhaps less relevant to such a wide congregation (though of very great interest and concern to a part of that congregation), on another occasion.

You may be asking, ‘Why the desire to consider further the Information Powers regime?’ The answer is simply because the tone of some of the commentary surrounding it has been rather alarmist, and also because I was myself somewhat alarmed recently when speaking at a conference to find myself in broad agreement with HMRC’s interpretation of the regime. Either HMRC has got it right, or I am going soft in my middle age!

My concern is very simple. If practitioners overblow or exaggerate the extent of HMRC’s powers under the new regime (whether in the technical press or more generally), there is a real danger that Inspectors will take as ‘received wisdom’ the idea that the new regime is considerably wider than the previous regimes and will apply it accordingly. This could be good news for practitioners advising in relation to compliance and investigations, since it means that their skills should be in ever-increasing demand. It is a less welcome development for small businesses or other taxpayers who will be at the mercy of the ‘strong arm of the law’ and/or who do not have the means of securing the advice and protection of major advisory firms with investigations specialists in-house. It is also bad for HMRC as a

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whole if Inspectors as a matter of practice are exceeding their powers.

The Tax Journal, Issue 952, 13 October 2008, entitled ‘Crossing the Drawbridge’, was a special issue on HMRC powers and contained a very comprehensive guide to the new powers and penalties regime. This consisted of ‘New Information Powers Regime’ by Iain MacLeod and Mark Howard, a highly informative article by Steven Hasson and Ray McCann on ‘HMRC’s new approach to Transfer Pricing’, and ‘Another Perspective’ on the powers by Paul Roberts and Philip Espin. In light of this, I do not intend to set out all of the provisions but merely comment on some of the key features around which the comment and debate has been formed and also where, in my view, the new regime does differ from the current.

Scope of taxpayer notices

The first area of controversy relates to the scope of taxpayer notices. Much has been made of the fact that a notice can be issued for the purpose of ‘checking’ the taxpayer’s tax position and I, amongst others, have engaged in some gentle joshing about the terminology used. Many commentators have noted that there does not have to be an enquiry or a filed return for a notice to be issued, but it is important to remember that the purpose of the new regime is to replace not only the self-assessment Information Powers contained in the Taxes Management Act 1970, s 19A and FA 1998, Sch 18, para 27, but also TMA 1970, s 20 – which did not require an open enquiry or filed return. I, for one, have known s 20 to have been used in circumstances where the taxpayer subject to the notice has never even filed a return! The key wording in s 20 is that the documents (or information) must be *relevant to the tax*

liability or the amount of the liability.

FA 2008, Sch 36 authorises the use of information notices ‘as regards any past, present or future *liabilities* to pay any tax’ (emphasis added).

The important factor here is that there has to be an actual or potential *liability* to tax. Any sensible interpretation of this *must* mean that the liability is in the cognisance of the parties. It cannot relate to some theoretical or imagined possible future liability. Accordingly, any attempt by HMRC to engage in a fishing expedition should be forcefully opposed.

One can see that this power could potentially be used to enquire in ‘real time’ into arrangements being planned by a taxpayer with a view (lawfully) to deferring or avoiding future liabilities to tax, whereas under the current s 20 regime the power is possibly more restricted. However, s 20 does refer to a tax liability ‘to which the person is or *may be* subject’ (emphasis added), which is not a million miles from the new regime. In addition, we have lived with the disclosure regime now for over four years and this has required such ‘real time’ notification to take place as a matter of course.

Precursors and judicial scrutiny

The second concern that has been raised is the lack of a specific requirement to issue precursor notices and the perceived lack of judicial scrutiny over the new regime.

Taking the lack of a precursor requirement first, the precursor requirement related to notices issued under s 20 but not to information notices under self-assessment, although the fact that the latter could only be issued once an enquiry was under way presumably gave the requisite level of

comfort as to notice that the information would be formally required.

Under Sch 36 it is possible that the first time a taxpayer becomes aware of an information notice is upon receipt of the notice in question. However,¹ in such circumstances the taxpayer would have a right of appeal against the notice to the First-Tier Tribunal – a right which does not exist under the s 20 TMA regime (and which in my experience was very rarely exercised under the self-assessment regimes). It is certainly true that it is not desirable to have a situation where the First-Tier Tribunal is besieged by aggrieved taxpayers appealing information notices (see further below). One hopes that HMRC will not allow this to happen and that it will apply the regime sensibly and will only impose an information notice once it is clear that the desired information will not be provided voluntarily – namely, following due and proper consultation with the taxpayer concerned and once informal requests have been made. If HMRC does not act sensibly, it should soon know about it!

I can recall a similar furore from the community of tax advisers when the Closure Notice regime was introduced. 'It is wholly impractical to expect taxpayers to have to go to the Commissioners to close an enquiry,' some people said. In my experience, though, this procedure works rather well and has greatly improved efficiency in terms of HMRC adopting a more disciplined approach to the conclusion of enquiries.

Unsurprisingly, the subject of professional privilege has also cropped up as a topic for debate. The status quo is essentially maintained. The definition of legal professional privilege (LPP) in para 23 clearly ties this concept into the privilege that would be maintained in legal proceedings (which is its very essence). It should again be noted that no such specific protection was present in the VAT legislation, although since the decision of the House of Lords in *R (oao Morgan Grenfell & Co Ltd) v Special Commissioner* [2002] UKHL 21 it has been accepted that LPP had to be respected, even if this was not spelled out in the legislation. The new legislation puts this on a proper footing. It remains to be seen whether the entire concept of LPP will be extended by the Courts to accountants and other suitably qualified advisers in relation to advice on the law in relation to tax matters. Certainly it would appear that Parliament has shown no enthusiasm for such an extension – we will have to wait and see whether the Administrative Court is any more sympathetic when the long-awaited judicial review in relation to the matter comes to trial.²



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Time limits

An interesting area which has received less attention is the question of time limits for making an assessment. These are contained in FA 2008, Sch 39. The basic time limit for assessments, determinations and claims is now four years from the end of the year of assessment to which they relate. On one view (that is, HMRC's) this is an example of generosity by HMRC in reducing the time limit for assessments (reinforced by the reduction of the time limits for failure to take reasonable care from 20 years to six years). However, nothing has been done to alleviate the position following *Langham v Veltema* [2004] STC 544, as a result of which HMRC takes the view that the judgment of the Court of Appeal and Auld LJ in particular means that it is virtually inconceivable that any self-assessment return can be prevented from being reopened by way of a discovery assessment. This is on the basis that there will be virtually *no* circumstances where an Officer could be said to have missed something in a return which he could have been reasonably expected to be aware of (the most pertinent example being a technical argument). The effect of this is that in order to avoid the risk of discovery, a taxpayer must spell out virtually every point that HMRC could conceivably take in challenging the taxpayer's position. This cannot have been what Parliament seriously intended, and makes a mockery of the whole concept of the enquiry window. My suspicion (and I may be taking an unduly cynical view) is that the real aim of the reduction in the time limit is to create a four-year enquiry window in the hope that this will be more palatable than six years and as such will make it less likely that the existing discovery position will be subject to further challenges from

taxpayers. Perhaps it might have been more straightforward to have done away entirely with the enquiry window.

Appeals

Another area for consideration and of some concern is how the appeal mechanism will link to the brave new world of the new Tribunal.

On the assumption that taxpayers were to take my advice and engage with HMRC in relation to any requests prior to the issue of an information notice, third-party notice or right of inspection, and there is a dispute as to the scope of the power, it will probably be the case that HMRC will seek prior approval from the Tribunal for the issue of a notice (or prior approval for an inspection). In circumstances where prior approval has not been sought, one can envisage appeals being made to the First-Tier Tribunal against information notices and in particular in relation to questions as to whether particular documents are subject to LPP. The retention – and extension to VAT – of the 'Class Notice' provision (now contained in Sch 36, para 5) – a provision which, in its current life as TMA 1970, s 20(8A), has been much favoured by HMRC in recent years – also suggests that this power is to be even more widely used. Accordingly there may be more appeals brought under para 31 in future, on the basis that it would be unduly onerous for a particular third party to comply with such a notice. In addition, there will be appeals against penalties under para 47.

It is to be hoped and expected that a proper regime will exist to ensure that appropriate consideration is given to the question of prior authorisation – and equally that facilities are made available for hearings on any of these matters, that are both accessible to taxpayers and are heard by a Tribunal Judge with the requisite experience to deal with hearings that could potentially be very complex. It is to be hoped that these arrangements will be very clearly factored into the workings of the new Tribunal system.

Transitional arrangements

Finally, a very obvious question arises – how will the new regime dovetail with the current regime? Although the legislation has been on the statute book since July, FA 2008, s 113(2) provides that Sch 36 (that is, the information regime) will come into force on a date 'to be appointed by Treasury Order'. It is understood that the date has not yet been identified (though 1 April 2009 has been mooted, coinciding conveniently with the launch of the Tribunal). However, what is clear is that it is currently proposed that there will be a 'clean break' with the existing regime from the appointed date, with effect

from which the new regime will apply. In other words, the new regime will apply to all enquiries into historic periods. There is no provision in s 113 for a transitional regime (as there is, for example, in relation to the new time limits – as provided by s 118), so one must assume that the break will be absolute. However, the Financial Secretary to the Treasury gave the Standing Committee considering the new information regime the following assurance in relation to enquiries that are under way at the commencement date:

'I make it clear to the Committee and reassure the hon. Gentleman that no new information can be sought under the new powers; it is just the mechanism that is changing. I know that our having guidance to back up the legislation is often dismissed, but reassurance on that point will be given in HMRC's guidance. In a long-running inquiry, any access that is necessary to business records will usually have already taken place under the old powers, but in the event that it has not, I hope that the hon. Gentleman accepts my reassurances.' (*Hansard*, Column 562.)

The Financial Secretary also referred to guidance which we must assume will be published in due course.

Conclusion

Any overhaul of the information regime will inevitably create a certain amount of excitement and wonderment as to how it will apply in practice – and in particular whether it will lead to a draconian extension of HMRC's powers.

A detailed consideration of the legislation demonstrates that what has in reality been achieved is a harmonisation of the various powers that have historically been applicable to direct and indirect taxpayers. Unsurprisingly, the wider power has usually 'won' in the sense of being extended to other taxes to which it previously did not apply (powers of inspection being an obvious example).

But, by and large, the new regime should not make a great deal of difference and does not represent a draconian increase in HMRC's powers. It is probably fair to say that the overall effect is to give HMRC officers a measure more discretion than they have had in the past. But there are checks and balances which (subject to the new Tribunal being able to handle them in practice) should suffice and prevent the new system from being abused. However, it will be very much for practitioners – with the support, in appropriate cases,

of Tribunal Judges and Members – to take a 'hands on' approach to ensure that this does not happen. Equally, HMRC must ensure that the powers are not exceeded and in particular that HMRC Officers are held to account and are clear that they are themselves subject to checks and balances contained within the legislation. It is down to us, the practitioners, to ensure that HMRC – as well as taxpayers – is abiding by the law.

Notes

¹ Leaving aside cases where para 3(4) applies and prior notification is dispensed with on the grounds that it might prejudice the collection of tax.

² See James Bullock, 'HMRC Powers Update – Legal Privilege and Criminal Powers', *The Tax Journal*, Issue 918, 28 January 2008; and in particular *Application by the Commissioners of HMRC to serve a Section 20(3) notice on a parent company and a Section 20(1) notice on its subsidiary company* [2007] SpC 647.

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