

HMRC third party notices (Lecture P1445 – 12.09 minutes)

This article considers formal information notices issued to a third party by HMRC under the provisions of Schedule 36, Paragraph 2, Finance Act 2008. Please note that there are specific rules for partnerships, groups of undertakings (in certain circumstances), and pensions matters, which are not considered in this article.

What is a third-party notice?

A third-party notice is a notice issued under the provisions of Schedule 36, Paragraph 2, Finance Act 2008. That legislation provides that “an officer of Revenue and Customs may by notice, in writing, require a person

- a) to provide information, or
- b) to produce a document

if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer (“the taxpayer”).

The notice must name the taxpayer to whom it relates, unless the tribunal has approved the giving of the notice and disapplied this requirement (see below).

Notice approval

The officer must, generally, obtain approval before a third-party notice can be issued. The officer has, broadly, two options when seeking approval for the issue of the notice. One option is for the officer to seek the approval of the taxpayer for the issue of the third-party notice. In practice, when pursuing this option, the officer will write to the taxpayer setting out the information or documents that will be requested from the third party.

Alternatively, the officer can seek approval from the tribunal. An important distinction between the two approaches is in relation to the appeal rights of the recipient (please see below). The legislation (Schedule 36, Paragraph 3(3), Finance Act 2008) provides that the tribunal may not approve the giving of a third-party notice unless:

- a) an application for approval is made by, or with the agreement, of an authorised officer of Revenue and Customs,
- b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
- 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,
- d) the tribunal has been given a summary of 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.

The provisions at c) to e) can be disapplied if the tribunal is satisfied that to do otherwise might prejudice the assessment or collection of tax. The tribunal can also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax.

The officer does not need to obtain approval for issuing a third party notice where that document refers only to the person's VAT statutory records relating to the supply of goods or services, the acquisition of goods from an EU member state, or the importation of goods from outside the EU in the course of carrying on a business (there are other circumstances where approval is not needed, but they are outside the scope of this session).

Appeals and penalties

The recipient of a third-party notice approved by the other, named, person has the right to appeal against the notice or any requirement in the notice. However, there is only one ground of appeal - that it would be unduly onerous for the third party to comply with the notice or a requirement in the notice.

There is no right of appeal against:

- a requirement to provide information or produce any document that is part of the named person's statutory records;
- a notice that requires only statutory records, information or documents, of any person relating to the:
 - supply of goods or services;
 - acquisition of goods from an EU member state;
 - importation of goods from outside the EU in the course of carrying on a business;
- a third-party notice that has been issued with the approval of the tribunal.

As with other information notices, there are penalties for non-compliance in relation to a third-party notice. Penalties can be applied for failing to provide information or documents requested, or documents are concealed or destroyed. There is a right of appeal against the penalties, and there will not be a penalty if there is a reasonable excuse for the failure, concealment or destruction. There is also a criminal offence of concealing or destroying documents which are, or HMRC have said may be, required by an information notice which has been approved by the tribunal. This will only be considered in very serious cases.

Miscellaneous points

The officer must issue a copy of the third-party notice to the named person when it is sent to the third party. However, this provision does not apply where HMRC consider that giving a copy to the named person might prejudice the assessment or collection of tax, and the tribunal agrees.

The tribunal needs to be satisfied that there are reasonable grounds for believing that giving a copy of the notice to the taxpayer will prejudice the assessment or collection of tax (Finance Act 2008, Schedule 36, Paragraph 4).

When HMRC want to obtain information about a known taxpayer from a bank, they will, usually, use a Financial Institution Notice, to which specific rules apply, and are not considered here. However, where the information required relates to an account of the taxpayer's spouse or partner, or is in joint names, officers are instructed to consider the issue of a third-party notice to the spouse, etc, before approaching the financial institution.

In relation to a deceased person, HMRC cannot issue a notice for checking their tax position more than four years after the person's death.

The general restrictions, and general rules, that apply to information notices apply to third party notices (including restrictions on the items that can be requested, and the time to comply with a notice).

HMRC approach

HMRC's guidance to its officers is that they should try, wherever it is possible and practical to do so, to get the information or documents they need from the person whose tax position they are checking, before approaching another person for them (see CH23620).

Officers are told that they should normally seek the information or documents from the taxpayer, where it is reasonable to assume that those items are within the taxpayer's power to provide. The officer should, if necessary, issue a taxpayer notice and take penalty action if they do not apply. The guidance continues that only if that approach fails should the officer consider approaching a third party for the items needed. Where the information or documents are not in the power of the taxpayer under enquiry, or HMRC need to verify facts independently, an approach will not be made to the taxpayer.

Practical considerations

Where the adviser is aware that information or documents are needed from a third party, they should, ideally, approach the third party to obtain what is required. This will help to reduce the impact on what might be a sensitive commercial relationship. Where that is not possible, it is, usually, prudent for the taxpayer client to approve the issue of the third-party notice if requested by HMRC (subject to consideration of what is being requested).

However, the adviser, or taxpayer, may not be aware that HMRC are contacting, or intending to contact, the third party. The taxpayer does not have the right to make representations to HMRC, although they may be notified why HMRC requires the information and documents from the third party. Even where the taxpayer is aware that the HMRC are intending to obtain approval from the tribunal for the issue of a third-party notice, the taxpayer, or the third party, are entitled to be present at the hearing.

If a client receives notification, as a third party, that HMRC is going to seek information or documents from them in relation to a taxpayer, it is, usually, prudent to issue those items in response to a formal notice, rather than providing the information or documents voluntarily. In those circumstances, the information has been provided to HMRC in response to a legal notice, which may help minimise the damage to the relevant commercial relationship.

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