



TC05191

Appeal number: TC/2015/06780

PROCEDURE – information notice – meaning of “authorised officer” in context of application by the National Crime Agency

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE NATIONAL CRIME AGENCY

Applicant

ex parte

A TAXPAYER

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in private at The Royal Courts of Justice, Strand, London on 28 January 2016

Nicola Parslow of the National Crime Agency, for the Applicant

DECISION

5 1. On 28 January 2016, I dealt with an application for approval of a “third party notice” under the provisions of paragraph 3 of Schedule 36 of Finance Act 2008 (“Schedule 36”). I granted the application following a “without notice” hearing that was, as is usual with hearings of this nature, conducted in private.

10 2. Since that hearing was conducted in private, I will not publish full details of my decision and reasoning. However, there was one aspect of the application that raised a question of statutory construction of potentially wider application. I was not provided with any detailed submissions on this point during, or subsequent to the hearing. However, I felt able to reach a conclusion on it by reference to the statutory materials with which I was provided and I have decided to publish my decision on this issue in
15 suitably anonymised form.

Background

20 3. Section 317(2) of The Proceeds of Crime Act 2002 (“POCA”) permits the National Crime Agency (the “NCA”) to serve a notice on HMRC stating that it intends to carry out certain “general Revenue functions” specified in the notice in relation to a particular taxpayer for a particular period. Such a notice can be served only if the “qualifying condition” set out in s317(1) of POCA is satisfied (which, very broadly requires the NCA to have reasonable grounds to suspect that a person is liable to pay tax on income or gains arising directly, or indirectly, from criminal conduct).

25 4. Where a notice under s317(2) of POCA is served, s317(3) provides that such of the “general Revenue functions” as are specified in the notice vest in the NCA in relation to the taxpayer named in that notice, and for the period specified in the notice. Section 323(1) of POCA defines the “general Revenue functions” as being

...such of the functions vested in the Board or in an officer of the Board as relate to any of the following matters –

- 30 (a) income tax;
(b) capital gains tax...

5. Section 323(3), however, provides that the general Revenue functions do not include:

35 ...the function of authorising an officer for the purposes of section 20BA of the Taxes Management Act 1970 (c 9) (orders for the delivery of documents).

6. In the context of this application, the NCA served a notice on HMRC specifying that they were taking over all the general Revenue functions in relation to a named taxpayer for specified periods of assessment.

7. Paragraph 2 of Schedule 36 permits an “officer of Revenue & Customs” to issue a third party notice for the purposes of checking a taxpayer’s tax position. However paragraph 3 of Schedule 36 provides certain restrictions on this power by providing that a third party notice can only be issued with the agreement of the taxpayer whose
5 affairs are being investigated or with the approval of the Tribunal. Paragraph 3(2) of Schedule 36 permits HMRC to apply to the Tribunal for approval of a third party notice and paragraph 3(3) sets out the parameters within which the Tribunal must operate when deciding whether to approve a third party notice. One of those requirements is that the Tribunal must not approve a third party notice unless:

10 the application for approval is made by or with the agreement of an authorised officer of Revenue and Customs

8. Paragraph 59 of Schedule 36 defines an authorised officer in the following terms:

15 A reference in a provision of this Schedule to an authorised officer of Revenue and Customs is a reference to an officer of Revenue and Customs who is, or is a member of a class of officers who are, authorised by the Commissioners for the purposes of that provision.

9. The definition of an authorised officer that it is applicable to s20BA of TMA 1970 (referred to at [5]) is contained in paragraph 1 of Schedule 1AA of TMA 1970 in
20 very similar terms.

10. The NCA’s application for a third party notice was not made by, or approved by, any officer of Revenue and Customs (whether an authorised officer or not). However, the NCA argued that the condition referred to at [7] was nevertheless satisfied because it was approved by a member of the NCA who had been approved
25 by the NCA as an “authorised officer” for the purposes of Schedule 36.

The question of interpretation

11. It is clear that the functions of either issuing a third party notice, or of applying to the Tribunal for approval of such a notice, are “general Revenue functions” that the NCA are in principle capable of exercising.

30 12. The effect of paragraph 59 of Schedule 36, viewed in isolation, is to impose a two-part requirement. The first requirement (which I will call the “identity requirement”) is that the authorised officer must actually be an officer of HM Revenue & Customs. The second requirement (which I will call the “authorisation requirement”) is that the person in question must have been authorised by the
35 Commissioners of HM Revenue & Customs (the “Commissioners”). Viewed in isolation, these are distinct requirement. If the Commissioners purported to authorise someone who was not an HMRC officer, the authorisation requirement would be met, but the identity requirement would not be.

40 13. The question of interpretation, therefore, is whether the provisions of POCA have the effect of permitting the NCA to apply for a third party notice that is made by,

or with the agreement, of someone who is not an HMRC officer and who has been “authorised” by the NCA, rather than the Commissioners.

14. Ultimately, I was satisfied that the Tribunal could approve an information notice in the circumstances set out at [13] above. There are two potential analyses leading to that result which are set out below.

Analysis 1 – s317(8) of POCA

15. A potentially quite simple answer can be found in s317(8) of POCA which provides as follows:

(8) If –

- 10 (a) apart from this section the Board’s authorisation would be required for the exercise of a function, and
- (b) the function is vested in the National Crime Agency under this section

the authorisation is not required in relation to the function as so vested.

15 The reference to the “Board” in s317(8)(a) is a reference to the Commissioners (as is made clear by s317(2) of POCA).

16. As I have said, the function of issuing, and applying for approval of, a third party notice are “general Revenue functions” that, for the tax years in question and in relation to the taxpayer, were vested in the NCA. The Board’s authorisation might be said to be required for the exercise of that function since the Tribunal can only approve an application for approval of a third party notice if that application is made by, or with the agreement of an authorised officer and an authorised officer must be authorised by the Board. Under that interpretation the requirements of both s317(8)(a) and s317(8)(b) would be satisfied and the “authorised officer” requirement would simply fall away when the NCA apply for an information notice. While that result might seem surprising, it is clear that in order for the NCA to be able to take over HMRC’s functions there has to be a reasonable suspicion that the relevant taxpayer is involved in criminal conduct. In those circumstances, Parliament might well have intended the NCA to have to overcome fewer hurdles than HMRC before being entitled to issue third party notices.

17. However, this interpretation is not free from doubt. Strictly, it might be said that the Board’s authorisation is not required for an application to the Tribunal for approval of a third party notice. An HMRC officer who wishes to apply to the Tribunal for approval of a third party notice does not need to obtain the prior authority of the Board themselves to make that application. Rather, the officer can proceed with the approval of an authorised officer (although that authorised officer must have been duly appointed by the Board). Moreover, the requirement in paragraph 3(3)(a) of Schedule 36 does not strictly impose any restriction on an officer applying for approval of a third party notice. Rather, it imposes a restriction on the Tribunal’s ability to approve it. If that were the correct interpretation, the condition in s317(8)(a) would not be met.

Analysis 2 – purposive interpretation of s323 of POCA

18. The function of authorising officers for the purposes of making, or approving, applications for third party notices appears to be capable of constituting a “general Revenue function”. Therefore, the ability to authorise officers is vested in the NCA (in relation to the taxpayer and periods concerned) with the result that authorisation by the NCA appears to be capable of meeting the authorisation requirement. This conclusion appears to be supported by s323(3) of POCA referred to at [5] since, if the function of authorising an officer for the purposes of Schedule 1AB of TMA 1970 (a very similar provision) were not a “general Revenue function” there would be no need to exclude it.

19. However, while this analysis enables the authorisation condition to be met, it does not expressly deal with the identity condition. Nevertheless, I consider that a purposive interpretation of s323 of POCA enables that condition to be satisfied as well. As noted at [4], functions vested in the Board, or an officer of the Board, that relate to specified matters are “general Revenue functions” that vest in the NCA. One of the possible functions of an officer of the Board is to serve as an “authorised officer” who can approve the giving of third party notices. Therefore, that function too can vest in the NCA with the result that the “identity condition” can be satisfied by a member of the NCA.

20. The combined effect of paragraphs [18] and [19] therefore, is that the NCA officer referred to at [10] satisfied both the identity condition and the authorisation condition and was therefore an “authorised officer”. I consider that interpretation to be consistent with the purpose of the relevant statutory provisions. Parliament cannot have intended that, despite having taken over HMRC’s functions, the NCA would still need to involve HMRC officers when seeking approval of third party notices.

Conclusion

21. Overall, I was satisfied that under either Analysis 1 or Analysis 2, I had the power to approve the taxpayer notice and I duly did so.

22. I will not express a concluded view on whether Analysis 1 or Analysis 2 is to be preferred as I am conscious that I heard no detailed submissions on the point. I have set out what seem to me to be possible objections to Analysis 1 at [17]. If it is considered that it is important to decide which of Analysis 1 or Analysis 2 is correct, I consider it would be preferable for a Tribunal to have the benefit of full submissions before making a decision on it.

**JONATHAN RICHARDS
TRIBUNAL JUDGE**

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