



TC05642

Appeal number:TC/2016/02829

PROCEDURE – information notice – Sch 36 FA 2008 – taxpayer’s representations – tribunal approval – tribunal has no discretion or jurisdiction to direct that the taxpayer can attend the approval hearing – no abuse of process in HMRC seeking an approved notice.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Without Notice Application

**THE COMMISSIONERS FOR HER MAJESTY’S Applicant
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in private in Manchester on 1 September 2016 and 19 January 2017

Mrs Fiona McVitty of HM Revenue & Customs appeared for the Applicant

1. On the above dates I heard an application by HM Revenue & Customs (“HMRC”) for approval of an information notice pursuant to Paragraph 3 Schedule 36 Finance Act 2008 (“Schedule 36”). HMRC wish to give an approved notice to the taxpayer who I shall call MB. The practice of this Tribunal is to hear such applications in private. Further, where such a notice is approved the practice of the Tribunal is not to record in a written decision the reasons for finding that all the relevant statutory conditions were satisfied. That practice has been referred to in a number of anonymised decisions of the Tribunal which have been published and was referred to by the Court of Appeal in *R (otao Derrin Brothers Properties Ltd & Others) v First-tier Tribunal (Tax Chamber) [2016] EWCA Civ 15*. I have adopted the same practice in releasing this decision.

2. Paragraph 3(3)(c) Schedule 36 requires HMRC to tell the person to whom the notice is to be addressed that the information or documents referred to in the notice are required and to give that person a reasonable opportunity to make representations to an officer of HMRC. The Tribunal is to be given a summary of those representations.

3. In the present case HMRC’s enquiries concern the residence status of MB in tax year 2007-08. MB’s tax advisers wrote to the Tribunal on 18 July 2016, with the approval of HMRC, setting out their representations. In summary they objected to the notice being approved on the following grounds:

(1) The conditions in Paragraph 21 Schedule 36 were not satisfied because Condition B in that paragraph did not apply. It was said that there was no reason to suspect that an amount that ought to have been assessed to tax may not have not been assessed.

(2) A notice can only be issued for the purpose of “checking the taxpayer’s tax position”. There is no tax position to check because in order to make an assessment for the tax years under investigation HMRC would have to establish pursuant to section 36(1A) Taxes Management Act 1970 (“TMA 1970”) that the loss of tax was brought about deliberately by MB. It was alleged that HMRC had no case to assert that there had been a deliberate loss of tax.

(3) The documents and information had already been provided and therefore they were not reasonably required by HMRC.

(4) It was an abuse of process for HMRC to seek an approved notice at a hearing in the absence of the taxpayer and in respect of which the taxpayer would have no rights of appeal.

4. In addition MB’s representative asked that the Tribunal’s decision on approval be published.

5. The taxpayer relied on a decision of the Tribunal in *Betts v HMRC [2013] UKFTT 430 (TC)* to support her argument that there was no reason to suspect that an amount that ought to have been assessed to tax may not have been assessed. That is a decision of the First-tier Tribunal and as such it is not binding. In any event there is no real point of principle involved here. I was satisfied on the facts presented to me that HMRC do have reason to suspect that an amount that ought to have been assessed to tax may not have been assessed.

6. I do not accept the taxpayer's argument that there is no tax position to check because there is no evidence that any loss of tax was brought about deliberately by MB. The same arguments in relation to the requirements of section 29 TMA 1970 (discovery assessments) and section 36 TMA 1970 were rejected by Judge Berner in an anonymised decision relating to an information notice reported at [2016] UKFTT 361 (TC). I agree with the reasoning of Judge Berner at [15] where he states:

“ 15. Those requirements relate to the assessment process and are not relevant to the reasonableness of the enquiries, including the giving of a taxpayer notice, which HMRC may undertake. The information gathered as part of that process will be as apt to the question of assessment as it will be to the question of the underlying liability; both are encompassed within the expression “tax position” in Sch 36, para 1(1).”

7. Mrs McVitty on behalf of HMRC made various amendments to the proposed information notice both in the light of representations made by MB's advisers and in the light of observations I made during the course of the hearings. I was satisfied that the amended notice required documents and information which had not previously been provided and which were reasonably required by HMRC.

8. MB's advisers submitted that the application was an abuse of process. As I understand the submission there were two aspects to it:

(1) That the taxpayer ought to have been afforded an opportunity to appear at the hearing, and if necessary could have been excluded when HMRC presented any sensitive material to the Tribunal, and

(2) That HMRC ought to have proceeded by way of an unapproved notice, which would have given the taxpayer a right of appeal and the right thereby to appear and make representations.

9. The present application came on for hearing on 1 September 2016. Having heard Mrs McVitty's submissions in support of the application I adjourned it so that I could receive further more detailed submissions on the question of whether the tribunal has jurisdiction and/or discretion to direct an inter partes hearing for approval of an information notice. By the time the application resumed Judge Mosedale had released her decision in *ex Parte John Ariel* [2017] UKFTT 87 (TC). That case concerned the hearing of an application for a third party notice and in the circumstances Judge Mosedale had the benefit of full argument from both HMRC and the third party. At [80] and [81] she stated as follows:

“ 80. As the Court of Appeal in *Morgan Grenfell* said, Parliament's clear purpose in giving the Tribunal only a limited jurisdiction was to prevent tax investigations being compromised. Investigations are likely to be compromised if when making a Sch 36 application the Tribunal had a discretion to order an inter partes hearing whether for the benefit of the third party, taxpayer, or both ...

81. The Court of Appeal in *Derrin* also referred to Parliament's intention in limiting the Tribunal's role to that of a monitor being to prevent compromise of the investigation. See [68]. In addition, they considered that delay would also have been a factor: an inter partes process is necessarily a longer process, particularly as there would be a right of appeal (at least from a case management decision not to order direct representations). For this reason too, Parliament did not intend the Sch 36 process to be inter partes.”

10. Judge Mosedale concluded that this tribunal has no jurisdiction to direct an inter partes hearing of an application for approval of a third party notice under Schedule 36. I agree with that conclusion for the reasons given by Judge Mosedale. The reasoning applies with greater force to an application for approval of a taxpayer notice.

11. Finally, MB's advisers argued that it was an abuse of process for HMRC to seek approval of an information notice against a taxpayer when they could issue an unapproved notice. The effect was to remove any right of appeal against the notice. I do not accept that argument on the facts presented to me in the present application. The Court of Appeal in Derrin described the purpose of the statutory scheme as follows:

“ 68. The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them.”

12. It seems to me that HMRC are entitled to consider in any particular case whether proceeding by way of an unapproved notice might prejudice their investigation, either because it might lead to undue delay or because it might disclose their emerging analysis and strategy or the sources of information available to them.

13. It is clear that the role of this tribunal is to monitor HMRC's use of approved notices. I am satisfied in the present case that Mrs McVitty is justified in seeking approval of the information notice.

14. Paragraph 29(3) Schedule 36 Finance Act 2008 provides that there is no right of appeal against the approval of an information notice.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 1 FEBRUARY 2017

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