

OLD SQUARE TAX CHAMBERS

Dealing with HMRC Investigations

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HMRC



Information Powers

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HMRC information powers

Philip Simpson, Q.C., C.T.A.

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- Single set of powers following creation of HMRC
- Obtain information and documents (including copying / removing documents)
- Inspect premises

Power to obtain information and documents

- Paragraph 1 – from taxpayer
- Paragraph 2 and 5 – from someone else
- If reasonably required for checking taxpayer's tax position
- *Derrin v. HMRC* [2016] 1 W.L.R. 2423 (CA) – power intended to be as wide as possible – see broad definitions of 'checking', 'tax', 'tax position' etc (paragraphs 58, 63, 64)
- Procedure:
 - HMRC can ask for FTT's approval – effect is to limit rights of appeal
 - Third party notice – if taxpayer does not agree to notice being given, HMRC must get approval from FTT

International aspects

- Notice can be issued on person outside UK: *R. (on the application of Jimenez) v. FTT* [2019] 1 W.L.R. 2956
- Foreign tax authority can request information: FA08 Schedule 36, paragraph 63
 - EU Member State where tax covered by Council Directive 2011/16/EU – NB doesn't apply to social security contributions
 - Double Tax Convention that includes mutual assistance provision

Challenge: judicial review

- Appeals to FTT on very limited grounds
 - Taxpayer notice – only for documents not part of statutory records, and not if tribunal has approved notice ‘in accordance with’ relevant provision
 - Third party notice – third party only, on ground that compliance unduly onerous, but excluded if documents part of taxpayer’s statutory records or tribunal has approved notice ‘in accordance with’ relevant provision
- So judicial review is main form of challenge
- Work backwards from that to determine approach to HMRC seeking information / documents

Reasonably required'

- Information / documents must be 'reasonably required' by officer for purpose of checking tax position
- Includes whether it is reasonable for tax authority to check tax position?
- *R. (on the application of Kotton) v. FTT* (forthcoming)

Judicial review

- Grounds: *R. v. Secretary of State for Social Services, ex parte Wellcome Foundation Limited* [1987] 1 W.L.R. 1166
 - Irrationality
 - Leaving material consideration out of account
 - Taking into account irrelevant consideration
- Court can only examine decision on basis of material before decision-maker (unless e.g. new information comes to light subsequently, and good reason why didn't have it at time)

Presumption of regularity

- Presumption of regularity: *R. v. Inland Revenue Commissioners, ex parte T.C. Coombs* [1991] 2 A.C. 283
 - Inspector and General Commissioners presumed to have acted regularly
 - Must show fact irreconcilable with rationality of decision
- Why does it arise?: *Inland Revenue Commissioners v. Rossminster Limited* [1980] A.C. 952
 - No reasons given by decision-maker, and no requirement to give them
 - Not all of material on which decision based is before court reviewing decision

Duty of officer applying to FTT

- FA08 Schedule 36 paragraph 3: unless FTT directs otherwise,
 - Requirement to notify person to whom notice to be addressed that applying to FTT and give person opportunity to make representations
 - HMRC officer must give FTT a 'summary of any representations made by that person'
 - In case of third party notice, HMRC must have given taxpayer a summary of reasons why HMRC requires information / documents
 - NB > need not give taxpayer opportunity to make representations / put any representations to FTT
- But ex parte *T.C. Coombs* > HMRC officer has duty, 'to lay before the commissioner all the information he has about the relevant circumstances including any which might be unfavourable to the giving of the notice' (Lord Mackay of Clashfern, L.C.)

What to do?

- Put in as much information as possible, in as much detail as possible
 - Trying to persuade HMRC that not justified in seeking information
 - And FTT that HMRC is not justified
 - But also laying groundwork for judicial review, to persuade court that decision is irrational
 - Challenge decision to open enquiry – scope of enquiry – potential relevance of information / documents – reasonable need for information / documents
- Officer has to take all this into account
- Has to put this all before FTT

Judicial review

- Challenge to officer's decision to give notice: *ex parte Coombs*, per Lord Lowry
- Presumption of regularity implies that fact that FTT found officer's decision to be reasonable is evidence that it was
- Disclosure under CPR Part 31 > any document referred to in witness statement, and any document necessary in order to deal fairly and justly with the case – subject to public interest immunity
- Re-visit on receiving documents – more disclosure required?

Consequences of disclosure

- Once all documents that were before the officer are disclosed, no presumption of regularity
- But must also obtain what officer put before FTT, because officer has duty to put everything before FTT and if omits relevant item, notice may be flawed
- Reveal new grounds? Requirement to act promptly

- If don't get all documents e.g. because of public interest immunity, apply for closed procedure: *R. (on the application of Haralambous) v. Crown Court at St Albans* [2018] A.C. 236, per Lord Mance, D.P.S.C., at 271-2, and *Bank Mellat v. H. M Treasury (No. 2)* [2014] 2 A.C. 700, per Lord Neuberger of Abbotsbury, P.S.C., at 737 to 739.
- Court will consider documents in closed procedure
- Presumption of regularity disapplied

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