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Tax Investigations Newsletter

This is the first of three newsletters addressing the new HMRC powers which came into effect on 1 April 2009.

These new powers appear to be greatly influenced by the former Customs and Excise, and it will be interesting to see how vigorously income/corporation tax Inspectors apply them. The meeker individuals will undoubtedly be encouraged by group leaders to dip a toe in the water, whilst the more aggressive characters will welcome the new powers with open arms. One of our missions as advisors will be to ensure that the new powers are not abused, and also to make our clients aware of what HMRC can now do.

Further newsletters will be issued over the next month or two covering the New Tax Appeals Tribunal and the New Penalty Regime.

I have had my own first experience of the new Tribunal system. A case had been rejected by the so called 'Independent Inspector' and listed for the First-tier Tribunal. Five days before the hearing, HMRC conceded the case which tells us:

- I. A case is subjected to further review after the "Independent" Inspector whose decision can be effectively overruled.
- II. The "Independent" Inspector changed his mind once the taxpayer refused to accept his decision.
- III. HMRC were bluffing all along.

One way or another this experience shows the value of persistence and how important it is not to accept the review of the "Independent" Inspector as the final word. Everyone is fallible, and skilful drafting of the submission to the "Independent" Inspector is vital in order to place sufficient doubt in the mind of the Inspector and cause him to shy away from an awkward encounter at the Tribunal.

We are able to provide whatever assistance you may require in dealing with HMRC enquiries from the opening enquiry letter right through to drafting the submission to the "Independent" Inspector and representation at the Tribunal, or merely giving advice at any particular point.

Good luck to all!

Dave Williams
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New HMRC Compliance Regime and Powers

Major changes to the tax system came into effect from 1 April 2009:

- new obligations to maintain and keep records;
- new powers to inspect taxpayers' records;
- new time limits for making claims and assessments;
- new penalties for inaccurate or incorrect returns; and
- a new HMRC internal review procedure; which is part of
- a new Appeals' Tribunal system.

The aim is to have, from 1 April 2009, one set of overarching powers covering PAYE, VAT, Income Tax, Capital Gains Tax and Corporation Tax. These powers will cover:

- visits to business premises to inspect the premises, assets and records; and
- requesting and/or demanding from taxpayers *and* third parties information and documents.

There are some new taxpayer safeguards to ensure that these powers are used by HMRC officers appropriately, although professional bodies have generally considered the safeguards to be on the weak side and not commensurate with the enhanced HMRC powers.

The New 'Compliance Regime'

The 'core' of the new regime is the 'compliance check'. This is what HMRC calls their way of checking that taxpayers:

- comply with their obligations
- pay the right amount of tax at the right time
- claim the correct reliefs and allowances

It can include asking for information or documents and/or arranging a meeting or visit.

According to HMRC, it is intended that the changes will:

- increase HMRC's ability to make cross-tax checks;

- make it possible to look at records for different taxes on a single visit;
- introduce a more flexible approach involving a wide range of checks more geared to different taxpayer behaviours;
- ensure the checks undertaken are proportionate to the risks identified;
- ensure consistent standards in the application of powers; and
- reduce the time it takes to undertake a compliance check and therefore reduce the burden on both the taxpayer and HMRC.

Safeguards

Safeguards set out in the law, Codes of Practice and guidance are intended to ensure that, in carrying out compliance checks:

- HMRC's powers are used reasonably and proportionately.
- Taxpayers are clear about when a compliance check begins and ends.
- Officers have no right to enter any parts of premises that are used *solely* as a dwelling, whether to carry out an inspection or to examine documents produced under an information notice. They can, however, enter if invited.

Unannounced visits can be made where agreement has been given by an 'authorised officer'.

Note that not all of the safeguards are statutory.

Information Powers: Introduction

HMRC is providing a new framework of aligned information powers for PAYE, VAT, Income Tax, Capital Gains Tax and Corporation Tax. HMRC can require a person to provide them with information and produce documents by way of a written notice called an 'information notice'. The following information notice powers are included:

- To require taxpayers to provide information and produce documents.

- To require third parties (e.g. a supplier or bank) to provide information and produce documents.

Such information and documents must be reasonably required for the purpose of checking a person's tax position.

The recipient of a formal notice to disclose/produce has the protection of a right of appeal to an independent Tribunal. In some cases prior approval for a notice's issue must have been sought from the independent Tribunal first.

However; there is **no** right of appeal if the information or documents relate to records the person must keep for tax purposes (i.e. statutory records). Such material must be made available.

HMRC have said that they will normally ask for information and documents informally rather than use these powers, in the expectation that the majority of people will co-operate fully when asked for information and documents.

This seems to be a bit over hopeful.

However, if the information/documents are not provided voluntarily, an officer will use the powers to obtain them.

Supplementary Information from Taxpayers

Supplementary information may often be necessary to enable HMRC to fully understand the statutory records and to establish and fully quantify a taxpayer's position.

Examples of supplementary information could include appointment diaries, notes of board meetings, correspondence, commercial employment contracts, explanations and schedules.

Any information notice for supplementary information must be:

- reasonable
- proportionate
- reasonably required to check the tax position

There is a right of appeal against an information notice *unless* the First-tier Tribunal has already approved the issue of the notice.

Agreement is required from an 'authorised officer' before asking for Tribunal approval.

Obtaining Information from Third Parties

There may be occasions where an officer cannot get information and documents from the taxpayer or wishes to check the accuracy of information and documents provided.

Where HMRC thinks it is necessary to gather information by using a third party notice, HMRC must have the approval of:

- the person whose tax position is being checked, or
- the independent First-tier Tribunal;

before the notice can be issued.

Agreement of an authorised officer within HMRC is required before the request is referred to the First-tier Tribunal.

As with the power to obtain information directly from taxpayers the information request must be:

- reasonable
- proportionate
- relevant to establishing a taxpayer's correct tax position

Restrictions on Information Powers

One of the safeguards is that HMRC cannot require some things to be provided:

- information relating to the conduct of appeals against HMRC decisions
- legally privileged information
- documents which ask for or give advice to a client about their tax affairs held by an auditor or tax adviser
- information about a person's medical or spiritual welfare
- journalistic material

There are also some time constraints:

- information over six years old can only be included in a notice issued by or with the approval of an authorised officer

- a notice in respect of the tax position of a dead person cannot be issued more than four years after the person's death

Inspection Powers

The power to visit business premises and check assets and records allows an authorised officer of HMRC to enter business premises and inspect the premises, business assets and statutory records.

If an information notice has been issued, the documents required in that notice can be inspected at the same time.

These inspections should only be undertaken where it is reasonably required to establish the tax position and will normally be by prior arrangement, the date and time being convenient to the taxpayer.

The powers also allow any HMRC officer to enter any premises they believe are to be used in connection with taxable supplies of goods or taxable acquisition of goods from Member States, and such goods are on the premises.

There is no right of appeal against an inspection notice but the occupier can refuse entry and prevent the inspection from being completed.

The occupier can be penalised for such obstruction, but only if the inspection has been approved by the First-tier Tribunal.

There may be occasions when a pre-arranged visit will be inappropriate. For example, where there is a strong risk that the taxpayer would move the business or remove stock or other assets.

If this was the case, an unannounced visit may be undertaken subject to prior agreement by an authorised officer'.

These Inspection Powers can be exercised before a return is received in certain circumstances; for example where there is a reason to believe that a taxpayer:

- did not notify chargeability to tax;
- did not register for VAT if required; or
- is operating in the informal economy.

It is worth noting that the power is to inspect, NOT to search. Accountants need to consider having a presence at such visits to ensure that searching does not take place.

Information Notices: When a Penalty Can Be Charged

A penalty may be charged where a person:

- fails to comply with an information notice
- conceals, destroys or otherwise disposes of documents required by an information notice
- conceals, destroys or otherwise disposes of documents that they have been notified are, or likely to be, required by an information notice
- deliberately obstructs an inspection that has been approved by the First-tier Tribunal

Types of Penalties

There are three types and amounts of penalty:

1. a standard penalty of £300;
2. a daily penalty of up to £60 for every day that the failure or obstruction continues after the date the standard penalty is assessed; and
3. a tax-related penalty.

Daily or tax-related penalties cannot be considered unless a standard penalty, in respect of the failure or obstruction, has been assessed.

Daily penalties must only be assessed by, or applied with, the agreement of an authorised officer.

A tax-related penalty is in addition to the standard penalty and any daily penalties. The amount of the penalty is decided by the Upper Tribunal (not the First-tier Tribunal) based on the amount of tax at risk.

Reasonable Excuse

A person can avoid liability to a penalty if they have a reasonable excuse for either:

- failing to comply with any information notice; or
- obstructing an inspection.

The excuse will be treated as continuing until the circumstances underpinning it cease. As soon as the excuse ends the situation must be remedied and any correction necessary made. Once the circumstances cease the excuse ceases.

Normally, daily penalties will not be assessed after the failure has been remedied.

The new time limits apply from the end of the accounting period or tax year.

Record Keeping: Introduction

FA2008 amends existing record keeping legislation in respect of PAYE, VAT, Income Tax, Capital Gains Tax and Corporation Tax and is intended to align and clarify a uniform set of requirements across the taxes.

There are penalties for failure to keep appropriate, adequate records.

One of the key elements, mentioned above, in the new framework is the ability to inspect records **before** a return is submitted if such inspection is reasonably required to check a tax position.

Time Limits for Assessing

The changes to the current legislation aim to align the time limits for assessment and will be based on the taxpayer's behaviour; the greater the culpability the longer the time limit.

The basic limits for *assessing* PAYE, Income Tax, Capital Gains Tax and Corporation Tax, VAT are:

- four years - normal time limit (i.e. no taxpayer error)
- six years - careless error (except for VAT which is 4 years)
- 20 years - deliberate error, failure to register for VAT, failure to notify chargeability to tax, failure to notify tax avoidance schemes.

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