



Neutral Citation: [2023] UKFTT 71 (TC)

Case Number: TC08706

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/13694

Information Notice – application by HMRC for information notices relating UK properties – third-party notice addressed to firm of solicitors - consideration of representations – consideration of legal professional privilege – application granted – Schedule 36, Finance Act 2008

Heard on: 6 December 2022

Judgment date: 19 January 2023

Before

TRIBUNAL JUDGE ALEKSANDER

Between

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Applicant

and

THIRD PARTY

Third Party

and

TAXPAYER

Taxpayer

Representation:

For the Applicant: Jordan Jackson, an officer of HM Revenue and Customs

ANONYMISED AND REDACTED DECISION

1. The application submitted on 22 November 2022 by Jordan Jackson, officer of HM Revenue and Customs, was considered in hearing held in private of which notice was only given to, and which was only attended by, representatives of HM Revenue and Customs, and which took place via a video connection with the Tribunal on 6 December 2022. In addition to Mr Jackson's oral submissions, HMRC submitted an electronic bundle of 373 pages.
2. HMRC have applied for an information notice ("the third-party notice") to be issued under paragraph 2 of Schedule 36, Finance Act 2008 ("Schedule 36") to the Third Party, which is a firm of solicitors in Northern Ireland.
3. Applications under Schedule 36 are normally subject to a direction under Rule 32(2) of the Tribunal's procedure rules, and are held in private. Decisions made at such hearings are not usually published. Such a direction was made in the case of this application. However, as the information notice is to be given to a firm of solicitors, I considered that it is appropriate for me to provide a full decision giving my reasons for approving the notice, and it is in the public interest for my decision (appropriately anonymised and redacted) to be published.¹

THE LAW

4. Paragraph 3 of Schedule 36 provides as follows:

Approval etc of taxpayer notices and third party notices

3 (1) An officer of Revenue and Customs may not give a third party notice without—

- (a) the agreement of the taxpayer, or
- (b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or 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 any representations made by that person, and

¹ The taxpayer and the third party were invited to make submissions as to the redactions. This redacted and anonymised decision notice takes into account the submissions made by the third party. No submissions were received from the taxpayer.

- (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.

[...]

5. Schedule 36 includes provisions restricting the scope of information notices. Relevant to this application are the restrictions in paragraphs 18 and 23:

Documents not in person's possession or power

18 An information notice only requires a person to produce a document if it is in the person's possession or power.

Privileged communications between professional legal advisers and clients

23 (1) An information notice does not require a person—

- (a) to provide privileged information, or
- (b) to produce any part of a document that is privileged.

(2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.

(3) The Commissioners may by regulations make provision for the resolution by the tribunal of disputes as to whether any information or document is privileged.

(4) The regulations may, in particular, make provision as to—

- (a) the custody of a document while its status is being decided,

6. The regulations to which paragraph 23(3) refers are the Information Notice: Resolution of Disputes as to Privileged Communications Regulations (SI 2009/1916) ("the Information Notice Regulations").

7. References in this decision to "paragraphs" are (unless the context otherwise requires) to paragraphs of Schedule 36.

BACKGROUND FACTS

8. On the basis of the evidence before me, I find the background facts relevant to the approval of the third-party notice to be as follows.

9. [Redacted]

10. [Redacted]

11. [Redacted]

12. [Redacted]

13. [Redacted]

14. [Redacted]

15. [Redacted]

16. [Redacted]

17. [Redacted]

THE THIRD-PARTY NOTICE

18. In accordance with paragraph 3(3)(c), on 17 August 2022 a draft of the schedule to the proposed third-party notice (setting out the information and documents being sought) was sent to the Third Party, inviting them to make representations by 21 September 2022. The information notice schedule seeks the following information

- (1) in respect of two properties ("Property 1" and Property 2" respectively) where the firm acted for the taxpayer on their purchase:
 - (a) The client account and client ledger account for the taxpayer.
 - (b) All correspondence between the firm and the taxpayer in respect of the property purchases, including but not limited to letters, e-mails, faxes, notes of telephone calls and any completed forms sent to the firm.
 - (c) All documentary evidence provided by the taxpayer as proof of the source of funds used for the property purchases.
 - (d) The Completion Notice for the property purchases.
 - (e) Details of any mortgage taken out to fund the purchases, to include the amount of any mortgage, the bank or building society from which the money was received and the account number.
 - (f) Details of any other payments made towards the cost of the purchases, to include the bank or building society from which the money was paid, the account holder and the account number.
- (2) In respect of one property ("Property 3") where the firm acted on the disposal:
 - (a) The Completion Notice for the sale of the property disposal.
 - (b) Details of how any net proceeds from the sale was distributed to include, method of payment, the bank or building society to which the proceeds was paid, the account number and sort number.
 - (c) All correspondence between the firm and the taxpayer in respect of the disposal, including but not limited to letters, e-mails, faxes, notes of telephone calls and any completed forms (to include the TR1 form) sent to the firm.

19. In the case of each notice, "document" has been defined to include electronic equivalents. The covering letter made it clear that the notice would not extend to documents for which a claim to legal professional privilege could be maintained.

20. In accordance with paragraph 3(3)(e) the taxpayer and his representative were on 17 August 2022 sent details of the information being sought from the Third Party, and the reasons for the requests, and were invited to make representations by 21 September 2022.

21. For completeness, I note that HMRC have also applied for the approval of third-party information notices to be issued to other third parties which are the subject of separate decision notices.

22. On 22 November 2022, Mr Jackson applied to the Tribunal for the approval of the third-party notice. The application was made with the agreement of an authorised officer of HMRC for the purposes of paragraph 3(3)(a).

The Third Party's representations

23. The Third Party wrote to HMRC on 5 September 2022 stating that:

We do not accept that the information and documents requested are reasonably required to help HMRC check our client's tax position because:

1. We did not act for the client in respect of the purchase of [Property 1], so the requested information and documents are not in our possession.
2. All of the information and documents that you have requested in respect of the purchase of [Property 2] and the disposal of [Property 3] are protected by legal professional privilege, save for any that you can access from the public domain.
3. Our client has a right to respect for his private and family life, home, and correspondence in accordance with Article 8 of the Human Rights Act 1998.
4. Our duty of confidentiality to our client and data protection legislation.
5. The unduly onerous nature of complying with your request for our conveyancing files.

24. The letter concluded by asking HMRC to withdraw their request for information and documents.

25. As the Third Party did not represent the taxpayer in relation to the purchase of Property 1 and was therefore not in possession of any information relating to that property, at the hearing HMRC withdrew Property 1 from the scope of the information notice sought to be issued to the Third Party.

Taxpayer's representations

26. The taxpayer's representative telephoned Mr Jackson on 17 and 25 August 2022. Mr Jackson made notes of both of these calls which were provided to me. The representative wrote to HMRC on 8 September 2022, and the substance of the telephone conversations were repeated in the letter. A copy of the letter was provided to me. As the letter is lengthy, I do not propose to set it out in full in this decision, but I summarise the points raised in the letter as follows:

- (a) HMRC's mind was already made up and they intended to issue the notices regardless of taxpayer's concerns and representations thus removing the taxpayer's rights to make legitimate representations;
- (b) [Redacted]
- (c) HMRC have removed the taxpayer's rights to provide the information himself;
- (d) HMRC have damaged the reputation of the businesses, as well as the taxpayer personally;
- (e) The notices sent to the third parties could and should only have been issued after 21 September if, indeed, it was still appropriate to do so;
- (f) There has been a breach of the confidentiality of taxpayer's tax affairs, as well as a breach of the Data Protection Act and further, the Official Secrets Act; and
- (g) The taxpayer requires full redress and reparation

27. HMRC replied on 30 September 2022 in order to address the complaints raised by the representative. As these complaints are outside the scope of the Tribunal's role, I have not set out HMRC's reply.

28. HMRC extended the time for the taxpayer to provide representations to 12 October 2022. On 6 October 2022, the representative emailed HMRC with their representations:

Thank you for your response to our complaint.

[...]

3. In our letter we also gave you the reasons and representations as to why the Third-party notices should not be sought but you have not considered them. We have information which we are in the process of providing and will do so with our next letter which is in the course of preparation. [taxpayer] has always tried to cooperate and provide full information and this will not change.

4. In summary (please also refer to our letter of 6th September and put it before any Tribunal judge) the Third-party notices are not required because:

a. As discussed on our call we do not think it is appropriate that third party notices should be issued since, and you have acknowledged this, our client has cooperated with your enquiries as fully as has been in his power and/or control to do so. The issue of a third-party notice is perceived by major institutions and other businesses as the taxpayer not cooperating with Tax Authorities and consequently has something to hide. It has been made clear on several occasions to HMRC that this is not the case here. It is in our client's best interests to have the enquiries concluded as quickly as possible and, in the spirit of cooperation and goodwill, he has already provided information which HMRC is arguably, at the moment, not legally entitled to.

b. You should be aware that when third party notices are issued it causes irreparable damage to business relationships and reputation. He has incurred considerable time and expense in providing information and answering your queries and it is not appropriate to issue third party notices.

c. Our client has, always, acted on professional advice and has not sought, in any circumstances, to evade or avoid his legal responsibilities including providing information and documents. He has already incurred considerable time and expense in providing as much information as is possible. The issue of third party notices is a heavy-handed approach which we do not believe is warranted or necessary.

d. Our client has recently received a letter from the legal firm which set up [Trust 3] and this will be included with his response to your other queries to provide as much information as is possible to provide and which is in his possession and power to do so.

e. The representations in this email as well as our letter dated 8th September 2022 represent our client representations and should be fully considered in deciding whether to apply to the Tribunal.

f. [redacted].

[...]

HMRC'S SUBMISSIONS

29. HMRC suspect that the taxpayer has not fully disclosed his worldwide assets, and in particular assets held through the three offshore trusts. HMRC suspect that the taxpayer may not have declared all of his income and gains – particularly those arising through offshore structures.

30. [Redacted]

31. [Redacted]

32. [Redacted]
33. [Redacted]
34. Mr Jackson submits that requests made to the taxpayer have failed to obtain information about the assets held offshore by or through the three trusts, and that the taxpayer has not always been fully transparent and open about the assets in which he has an economic interest.
35. Mr Jackson submits that HMRC have probably reached the limit of the information they have been able to obtain through international requests.
36. Mr Jackson submits that the taxpayer is likely to have given disclosure of his wealth to lenders and to the Third Party (the subject of this notice) in connection with the making of loans, the giving of guarantees, and the purchase and sale of properties – because of their requirements to undertake due diligence on their customers and clients for AML purposes, and the fact that lenders will only lend in line with the ability of the borrower or guarantor to service the loan.
37. HMRC seek information from the Third Party for the following reasons:
- (1) HMRC want to understand the source of funds used to purchase Property 2 (for example, whether the source was offshore), and for this reason want to see the Third Party's client ledgers, the evidence provided by the taxpayer to the Third Party as to the source of funds, and details of other payments received in respect of the cost of purchase
 - (2) The correspondence between the Third Party and the taxpayer may include information relating to the KYC/due diligence checks undertaken by the mortgage lender. The correspondence may also indicate whether offshore funds were used by the taxpayer towards payment for the property or fees.
 - (3) As regards the sale of Property 3, HMRC want to understand to whom the sale proceeds were distributed and why (for example, whether the sale proceeds were remitted offshore). The correspondence is also relevant to whether CGT is payable in respect of the sale. Although the taxpayer is claiming principle private residence exemption, HMRC consider that the timing of the sale may have restricted the relief – in particular if the sale contract was conditional. Correspondence between the taxpayer and the Third Party may establish when the contract for the sale became unconditional.
38. As regards the representations made by the Third Party, Mr Jackson made the following submissions:
- (1) HMRC acknowledge that the firm did not act for the taxpayer on the purchase of [Property 1], and have removed this property from the scope of the information notice for which they are applying.
 - (2) HMRC acknowledged in the covering letter sent to the Third Party that some of the documents and information requested may be covered by legal professional privilege, and will be outside the scope of any information notice. However not all of the information and documents requested will be subject to legal professional privilege (such as the client ledger account), and such information and documents should be provided. To the extent that there is a dispute about whether a particular document or item of information is privileged, the Information Notice Regulations provides a mechanism for the Tribunal to resolve the dispute.
 - (3) HMRC acknowledge the potential application of the Article 8, European Convention of Human Rights (as applied into UK law by the Human Rights Act 1998) which provides for the right of respect for private and family life, home, and

correspondence. Mr Jackson submits that Article 8(2) provides an exception where the interference with this right is necessary for the economic well-being of the country which applies because there is a significant amount of tax at stake, and it is in the economic interests of the UK for the information to be provided to HMRC.

(4) Paragraph 5, Schedule 2, Data Protection Act 2018 exempts a data controller from the obligations that would otherwise apply under the Act where the controller is required to disclose data under an enactment. This would include an information notice issued under Schedule 36. Any obligation of confidentiality owed to the Third Party's client is over-ridden by the statutory obligation arising under Schedule 36.

(5) HMRC submit that the disclosure obligation – now limited to two properties – is not unduly onerous. Their expectation is that the Third Party will have kept distinct files for transactions relating to specific properties in a system which would allow for fairly ready retrieval. This is especially so given that the two property transactions were reasonably recent. HMRC are open to considering how the disclosure exercise could be made less burdensome for the Third Party, for example by offering to visit the Third Party's premises to view the documents and information, rather than requiring the Third Party to copy or scan documents.

39. As regards the representations made by the taxpayer's representative, Mr Jackson made the following submissions:

(1) HMRC do not accept that the taxpayer has fully cooperated with HMRC's enquiries. In particular he misled HMRC about the continued existence of one offshore trust as having been closed in 2010, when the information now in HMRC's possession shows that it is still in existence today. The taxpayer has also refused to provide a statement of assets and liabilities.

(2) HMRC have apologised for any damage caused to the taxpayer's business as a result of writing to Third Parties about the possibility of seeking information notices. However, HMRC has explained to the taxpayer why they consider that the notices are required. The taxpayer has been given the opportunity to provide accurate information, but has not done so. HMRC submit that it is reasonable and proportionate to seek the information and documents from the Third Party.

(3) As regards the information notices being heavy-handed and the time and expense incurred by the taxpayer in providing information, Mr Jackson submitted that although the taxpayer had provided some information, there appear to be significant gaps in the information, and the taxpayer's representative has previously stated that they are unable to provide some of the information sought. Mr Jackson submits that the information is required from the Third Party to address the significant gaps in the information provided by the taxpayer.

(4) [Redacted]

DISCUSSION

40. Paragraph 3(3)(b) provides that I may only approve the giving of the third-party notice if I am satisfied that the officer giving the notice (Mr Jackson) is justified in so doing.

41. In order to satisfy me that HMRC are justified in giving the notice, HMRC must satisfy me that the information that they are seeking through the issue of the third-party notice is reasonably required for the purpose of checking the taxpayer's tax position. In addition, I would not approve the issue of a third-party notice if I was not satisfied that it was a reasonable and proportionate use of HMRC's powers.

42. On the basis of the evidence before me, I find that HMRC have reasonable grounds to suspect that the taxpayer may be liable to UK tax on income and gains which he has not declared to HMRC. It is not in dispute that the taxpayer was the settlor of three offshore trusts. It is unclear whether those trusts remain in existence, and the extent to which the taxpayer is a beneficiary of those trusts. The taxpayer has an economic interest in BVICo through the insurance wrapper arrangement. It remains unclear whether the taxpayer has received benefits from those arrangements. I find that HMRC have reasonable grounds to suspect that the taxpayer may have a liability to UK taxes in respect of the income and gains arising through those trust and insurance arrangements (including through subsidiary companies). I find also that the taxpayer may have liabilities to IHT as settlor of the three trusts.

43. I find that the taxpayer has not provided information and documents reasonably requested by HMRC for the purposes of checking his tax position. I therefore find that it is reasonable and proportionate for HMRC to seek information from third parties, and the Third Party in particular. But I make no finding as to whether the taxpayer's failure to provide information was done deliberately or with the intent of frustrating HMRC's enquiries.

44. In the light of the taxpayer's level of PAYE income, I find that it is reasonable for HMRC to suspect that (a) a source of funds for the purchase of Property 2 may be from one of the three trusts or BVICo (or a subsidiary), and (b) the destination of funds from the sale of Property 3 may be one of the three trusts or BVICo (or a subsidiary) – notwithstanding that he may have realised cash on the disposal of his previous home. I find that it is reasonable for HMRC to believe that the Third Party may be in possession of information which may indicate whether the taxpayer received funds for the purchase of Property 2 from one of the three trusts or BVICo (or a subsidiary), or whether the taxpayer distributed the proceeds of sale of Property 3 to one of the three trusts or BVICo (or a subsidiary).

Representations made by the parties

45. HMRC have provided me with copies of the representations made by the Third Party, which I have taken into account in reaching my decision. Although Schedule 36 makes no provision for the taxpayer to make representations about the proposed information notice, HMRC have provided copies of his representations to me, and I have taken them into account in reaching my decision.

46. I address the representations made on behalf by the Third Party and on behalf of the taxpayer as follows:

The Third Party is not in possession of information relevant to Property 1

47. HMRC have amended the third-party notice to exclude Property 1 from the scope of the notice.

All the information is protected by legal professional privilege.

48. I find that it is highly unlikely in relation to a conveyancing matter that all the information and documents held by a law firm on its files would be subject to legal professional privilege.

49. In relation to transactional matters (such as conveyancing), only legal advice benefits from privilege. Communications between a solicitor and his client will generally only benefit from advice privilege if they are both:

- (a) Made for the purposes of seeking legal advice from the solicitor or for the purposes of giving legal advice to the client by the solicitor; and
- (b) Confidential as between solicitor and client.

50. Many of the documents (electronic as well as hard copy) on a solicitor's conveyancing file will fall outside these requirements. To give three examples, (a) communications between

a solicitor and persons other than the client (for example, the transaction counterparty) are unlikely to be privileged, as they are not confidential as between solicitor and client; (b) the fruits of the solicitor's advice – namely the documents giving effect to the transaction - will not be privileged as they are not communications; and (c) client ledger entries will not be privileged, as they do not contain legal advice.

51. On the other hand, correspondence between the client and the solicitor which seeks or gives legal advice on (for example) the terms of the contract or conveyance will be subject to privilege.

52. Although not cited to me, I am aware that in the context of s10 Police and Criminal Evidence Act 1984, the English Divisional Court in *R v Inner London Crown Court ex p. Bains & Bains (a firm)* [1988] Q.B. 579 held that records of a conveyancing transaction (including the conveyance and the record of how the client financed it) were not “items subject to legal privilege”. The court distinguished such documents from the solicitor’s advice on the wisdom or otherwise of proceeding with a conveyancing transaction which is privileged, and in *DAC Beachcroft LLP v HMRC* [2018] UKFTT 502 (TC) this Tribunal held that various documents created in the course of conveyancing transactions (such as a signed form of authority and a deed of declaration of trust) were outside the scope of legal advice privilege. Whilst these decisions are made in relation to advice privilege under English law (and the decision of the Divisional Court is a decision of an English court in relation to English criminal law), Northern Irish law relating to privilege has similarities to English law, and these decisions give an indication of the limitations of advice privilege in relation to conveyancing transactions.

53. I have considered the potential application of the Information Notice Regulations which deal with disputes as to the extent of legal professional privilege. However, these only have application after an information notice has been issued. But should a dispute arise between the Third Party and HMRC about whether a document or information is subject to privilege, these Regulations set out the procedure for this Tribunal to resolve the dispute. The Third Party should note the strict time limits set out in Regulation 5 (particularly in view of the bank holidays), and the absence of any power on the part of the Tribunal or HMRC to extend time limits.

54. I recognise that the Third Party will need to review their files carefully in order to determine to which documents and information advice privilege attaches, and which documents and information need to be disclosed. I have required HMRC to amend the terms of the third-party notice to make it clearer that the notice does not extend to documents and information subject to privilege, and to itemise separately the underlying executed conveyancing documents as these are highly unlikely to be privileged.

Article 8, European Convention of Human Rights (as applied into UK law by the Human Rights Act 1998)

55. Article 8 provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

56. HMRC have acknowledged that the exercise of their powers under Schedule 36 engages Article 8. The question is whether – in the circumstances of this case – the exception in Article

8(2) applies. For the exception to apply, the interference must be lawful, necessary in a democratic society, and necessary for the economic well-being of the UK. In addition, the interference must be reasonable and proportionate.

57. In its decisions, the European Court of Human Rights has held that there is a public interest in effective tax inspections, but such interference must be subject to effective and adequate safeguards against abuse by tax authorities.

58. The exercise by HMRC of its powers to issue notices to third parties under Schedule 36 is lawful, and I find that the requirement to obtain authorisation of the Tribunal (where the consent of the taxpayer has not been obtained) means that there are effective and adequate safeguards against HMRC abusing its powers. For the reasons I have given, I am satisfied that it is reasonable for HMRC to seek the information that is the subject of the third-party notice, and that this represents a proportionate use of its powers. I find that the exception in Article 8(2) applies, and that HMRC are not in breach of their Article 8 obligations.

Duty of confidentiality owed to client

59. The duty of confidentiality owed to clients (whether pursuant to the professional obligations owed by solicitors to their clients, or pursuant to data protection legislation) is overridden by the statutory obligation to provide the information under the provisions of Schedule 36. I therefore find that the third-party notice overrides any duty of confidentiality that the Third Party owes to the taxpayer.

Onerous nature of compliance

60. From my experience as a solicitor, I would expect that the Third Party will keep distinct and separate files (whether electronic or hard-copy) for each conveyancing matter on which it acts. The files that are the subject of the information notice relate to domestic and not commercial properties. I would therefore expect each file relating to Property 2 and Property 3 to contain a manageable set of documents. Whilst these documents will need to be reviewed in order to consider the impact of privilege, I would not expect that this would be an unduly onerous exercise.

61. The Third Party's submission is not particularised, and no indication is given by the Third Party of the number of documents involved, the manner in which they are filed, or the time it would take to review them – and in the absence of detailed submissions setting out precisely why compliance would be onerous, I place little weight upon this submission.

62. I find that any effort required by the Third Party to retrieve its files and review the content in order to identify privileged documents and information is not disproportionately onerous in all the circumstances of the case.

HMRC's actions are heavy handed

63. The taxpayer's representative submits that if the taxpayer has overlooked any tax liabilities, this has not been deliberate on his part. For this reason, issuing the third-party notice is heavy handed and an unreasonable and disproportionate exercise of HMRC's powers.

64. In considering whether to authorise the issue of the third-party notice, I need to consider whether the information sought is reasonably required by HMRC for checking the taxpayer's liability to tax. At this stage of HMRC's enquiries, I need not decide whether the taxpayer has not paid all his taxes – or (if he has not) whether that failure is innocent or deliberate. My decision is based on whether it is reasonable for HMRC to seek information from the Third Party.

65. [Redacted]

66. I find that HMRC have requested information from the taxpayer, and taxpayer has not disclosed such information to them. Irrespective of the reasons for the failure, on which I make no findings, I find that it is now reasonable for HMRC to seek to obtain information from the Third Party in order to ascertain whether the taxpayer has effective access to funds held offshore.

HMRC's mind was made up to issue the information notices irrespective of the representations made by the taxpayer and the Third Party

67. In the case of information notices issued to third parties without the taxpayer's consent, the notice cannot be issued without the approval of this Tribunal. As HMRC is unable to issue a third-party information notice without such approval, it is irrelevant whether HMRC's mind was made up at the time the paragraph 3(3)(c) letter was sent to the Third Party, because the notice could not be issued without (in this case) my approval. I confirm that I was unaware of this application until it was listed to be heard before me, and even if HMRC's mind had been made up, mine was not.

68. [Redacted]

HMRC have removed the taxpayer's rights to provide the information himself.

69. At no point has HMRC prevented the taxpayer from disclosing information. It has always been open to the taxpayer to provide the information sought by HMRC. He has not done so. If he had provided the information – depending upon all the circumstances – I might have reached a conclusion that the information sought from the Third Party was no longer reasonably required by HMRC, in which case I would not have approved the issue of the third-party notice. I find that HMRC have not removed the taxpayer's right to provide the information himself.

HMRC have damaged the reputation of the businesses, as well as the taxpayer personally.

70. Whilst the taxpayer's representative makes allegations about reputational damage, he has not given any examples of such damage having actually been incurred. I consider that it is unlikely that the reputation of the taxpayer and his business will have been damaged by the issue of the paragraph 3(3)(c) letter to the Third Party. The Third Party is a firm of solicitors, and will be under a professional obligation to keep the letter and the information notice confidential.

71. [Redacted]

The notices to the Third-Party Institution could and should only have been issued after 21 September.

72. I read this submission as relating to the paragraph 3(3)(c) letter to the Third Party, and not to the information notice (as the information notice can only be issued after the Third Party has had an opportunity to make representations about the scope of the proposed notice).

73. The taxpayer's representative has been in extensive correspondence with HMRC during the course of the enquiry. I am satisfied, and find, that the information notice has only been sought because the taxpayer has not provided information reasonably required by HMRC. The statutory scheme under Schedule 36 requires the Third Party to be given an opportunity to make representations to HMRC about the proposed notice, and therefore the paragraph 3(3)(c) letters are required by statute to be sent to the Third Party before any application for approval is made to the Tribunal. Once HMRC had reached the decision that it was appropriate to consider issuing information notices to third parties, they were required by statute to write to the third parties to seek their representations.

HMRC are in breach of the duties of confidentiality owed to the taxpayer

74. Section 18, Commissioners of Revenue and Customs Act 2005, imposes a duty of confidentiality on HMRC officials relating to information held by HMRC in connection with the functions of HMRC. However, this duty is expressly made subject to any enactment permitting disclosure. Schedule 36 is such an enactment, so disclosures made under paragraph 3(3)(c) do not give rise to a breach of s18, Commissioners of Revenue and Customs Act 2005.

75. The collection and processing of data in the UK is governed by the Data Protection Act 2018 and the UK version ("UK GDPR") of the EU General Data Protection Regulations ("EU GDPR"). Data controllers (which would include HMRC) are required to comply with the data protection principles, which includes having appropriate security measures in place to ensure the security of data. Article 6(1)(e), UK GDPR provides that it is lawful for data controllers to process data where it is necessary of the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. Section 8, Data Protection Act 2018 provides that Article 6(1)(e) includes processing necessary for the exercise of a function conferred by an enactment. Additional exemptions from the obligations imposed by UK GDPR in relation to the assessment and collection of tax are set out in paragraph 2, Schedule 2, Data Protection Act 2018. I find that this means that the exercise of HMRC's powers under Schedule 36 will not give rise to a breach of either the Data Protection Act 2018 or UK GDPR.

76. The Official Secrets Acts 1911 to 1989 are (in essence) only relevant in a case of a damaging disclosure made without lawful authority of information relating to national security or intelligence. They are clearly not in point in this case.

77. I note that the Third Party has not been informed of the reasons why HMRC are seeking the information and documents required by the proposed notice, and has not been given any details of the tax affairs of the taxpayer. No information about the tax position of the taxpayer have been disclosed – so it is arguable whether there has been any breach of any duty of confidentiality owed to the taxpayer by HMRC. I recognise that giving the third-party notice (and previously seeking representations) may cause the Third Party to wonder why the notice has been given, but the correspondence between HMRC and the Third Party relating to the affairs of the taxpayer has been limited in their scope and I find that if there has been any disclosure, it has been proportionate and reasonable.

Redress and reparation

78. It is not within the scope of the Tribunal's powers to make orders for redress and reparation arising from the exercise of HMRC's powers under Schedule 36. But, on the basis of the evidence before me, I would have found that HMRC have not improperly exercised their powers under Schedule 36 in any event.

CONCLUSIONS

79. Having considered the evidence provided and submissions made by HMRC in support of their application under paragraph 3 for approval of the giving of a notice under paragraph 2 to the Third Party, I am satisfied that:

- (1) the application for approval was made with the agreement of an authorised officer of HMRC;
- (2) in the circumstances, the officer giving the third-party notices is justified in doing so;
- (3) the Third Party has been told that the information or documents referred to in the third-party notice to be addressed to it are required and has been given a reasonable opportunity to make representations to an officer of HMRC, and I have been provided with a copy of the representations made by the Third Party; and

(4) the taxpayer has been given a summary of the reasons why an officer of HMRC requires the information and documents.

80. I approve the giving to the Third Party the third-party notice in the form annexed to an email sent to the Tribunal on 7 December 2022 and set out in the Appendix to this decision.

81. This document contains full findings of fact and reasons for the decision.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

Release date: 19th JANUARY 2023

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 21 December 2022 and 12 January 2023. Amendments were made to correct minor typographical errors.

APPENDIX

I wrote to you on 17 August 2022 to tell you that I was considering asking the First-tier Tribunal to issue an information notice in respect of my check of the tax position of [taxpayer].

This notice has been approved by the First-tier Tribunal (Tax Chamber)

This is an information notice issued under Paragraph 2 of Schedule 36 of the Finance Act 2008 which was approved by Tribunal Judge Nicholas Aleksander on 21/12/2022.

To help with my check, I need documents and information from you. I have listed what I need on the schedule enclosed/overleaf. This notice means that you are legally required to produce the documents and provide the information I need by 02/02/2023.

Providing information electronically

Please submit the documents & information electronically using my above email address. Alternatively, please post it to me at the address shown at the top of this notice. If you need more time to do this, please phone me as soon as possible on the number shown above.

If you contact us about this notice, you need to quote the case reference [reference] and any other references shown above. If you write, you need to use the address shown at the top of this notice, and if you send documents you must tell us if you want them returned, as we may securely destroy them after 50 days.

We will not return memory sticks or any other removable media. It is our policy to destroy these rather than return them.

Legal Professional Privilege

I cannot insist that you have to give me documents or information for which you can successfully claim legal professional privilege but you can choose to waive privilege. It may assist progress of the tax position check if you do but you would be giving up your right to keep the information or documents private.

Legal professional privilege is a complex area of the law that only properly applies in limited circumstances. I may wish to challenge any claim to legal professional privilege on the basis that I disagree that the documents or information being withheld properly fall within the scope of the privilege.

If you decide not to give me documents or information because you believe legal professional privilege attaches to them you need to let me have a list of each piece of information or each document being withheld. You must make sure that I receive this list no later than 02/02/2023.

The list should say why you are not providing the items and it should describe each piece of information and/or documents being withheld. For example it should say "I am withholding the following items because I believe that legal professional privilege applies: (1) Letter dated xx/xx/xxxx from [name of client] to [name of lawyer] asking for advice on the law. (2) Letter dated xx/xx/xxxx from [name of lawyer] to [name of client] giving advice on the law."

You should let me have the items on the enclosed schedule unless you are withholding them.

What will happen if you do not do what this information notice asks

If you do not do what this information notice asks, we may charge you a penalty of £300. If you still have not done what this notice asks by the time I issue that penalty, we may charge a further daily penalty of up to £60 a day until you do.

It is a criminal offence to conceal, destroy or otherwise dispose of any document that we have asked for, or to arrange for it to be concealed, destroyed or disposed of.

Please take care when doing what this information notice asks. If you carelessly or deliberately produce a document containing an inaccuracy or provide inaccurate information, we may charge you a penalty of up to £3,000 for each inaccuracy. We will not charge a penalty if you tell us about the inaccuracy at the time you produce the document or provide the information. If you later find an inaccuracy, you must tell us without delay.

You cannot appeal against this information notice or anything it asks you to do. This is set out under Paragraph 30(3) of Schedule 36 of the Finance Act 2008.

Jordan Jackson

HMRC officer issuing the Notice with Tribunal approval

Customer name[taxpayer]

Our reference number: [reference]

This Notice applies to all documents in your possession or power other than documents or information that falls within Paragraph 19 of Schedule 36 Finance Act 2008 or is privileged.

Documents or information that we need

In this context 'document' means anything in which information is recorded. This includes all records or data held in any form, electronic or otherwise.

In relation to:

[taxpayer]

Documents and information requested:

In respect of the following property purchase by [taxpayer]:

1. [Property 2]

Please provide or make available for inspection:

- i. The client account and client ledger account for [taxpayer].
- ii. All correspondence between yourselves and [taxpayer] in respect of the property purchase above, including but not limited to letters, e-mails, faxes and notes of telephone calls.
- iii. All final executed conveyancing documents for the property purchase above.
- iv. All documentary evidence provided by [taxpayer] as proof of the source of funds used for the property purchase above.
- v. The Completion Notice for the property purchase above.
- vi. Details of any mortgage taken out to fund the purchase above, to include the amount of any mortgage, the bank or building society from which the money was received and the account number.
- vii. Details of any other payments made towards the cost of the purchase above, to include the bank or building society from which the money was paid, the account holder and the account number.

In respect of the following property disposal:

2. [Property 3]

Please provide or make available for inspection:

- viii. The Completion Notice for the sale of the property disposal above.
- ix. Details of how any net proceeds from the sale was distributed to include, method of payment, the bank or building society to which the proceeds was paid, the account number and sort number.
- x. All correspondence between yourselves and [taxpayer] in respect of the disposal, including but not limited to letters, e-mails, faxes and notes of telephone calls.
- xi. All final executed conveyancing documents for the property sale above.