

## **Information notices: how far back?**

Mark McLaughlin looks at how many prior years HMRC information notices can potentially stretch

Information notices are an important and frequently-used weapon in HMRC's vast array of compliance powers.

HMRC have powers to obtain information and documents, and can issue an information notice requiring the taxpayer to provide information or produce a document if it is 'reasonably required' to check the taxpayer's tax position (FA 2008, Sch 36, para 1).

### **Restrictions on restrictions!**

HMRC's information powers are extensive. However, the scope of these powers is subject to various restrictions (see FA 2008, Sch 36, Pt 4).

For example, if an individual's tax return has been submitted to HMRC for a particular tax year, an information notice may not be given for the purpose of checking the individual's income tax or capital gains tax position for that tax year (FA 2008, Sch 36, para 21(1)).

Unfortunately, this restriction in HMRC's information powers is subject to certain exceptions (i.e. Conditions A to D in the legislation). Probably the most common exception to this restriction (Condition A) allows HMRC to issue an information notice if a tax return enquiry notice has been given to the taxpayer in respect of the return and the enquiry has not been completed (i.e. there is an 'open' enquiry into the return) (FA 2008, Sch 36, para 21(4)(a)).

Some taxpayers and advisers might assume (incorrectly) that HMRC cannot issue an information notice if no tax return enquiry notice has been issued and the deadline for an enquiry notice has passed. In most cases, the deadline for HMRC to give notice of its intention to enquire into the individual's tax return is 12 months after the day on which the return was delivered (TMA 1970, s 9A(2)).

### **Reason to suspect?**

However, a further exception to the restriction in HMRC's information powers (Condition B) applies broadly where an HMRC officer has reason to suspect as

regards the taxpayer that an assessable amount for the relevant tax year may not have been assessed, or that tax may have been under-assessed, or that tax relief given may be excessive (FA 2008, Sch 36, para 21(6)).

This exception therefore broadly applies if there is a potential 'discovery position' such that HMRC could correct the taxpayer's position through a discovery assessment (e.g. under TMA 1970, s 29, in the case of an individual). There is no explicit time limit for HMRC to give an information notice in these circumstances. However, HMRC acknowledges that it would need to be in a position to correct the tax position if a discovery was made (see HMRC's Compliance Handbook manual at CH23540). There is an ordinary time limit for discovery assessments of four years following the end of the relevant tax year, but this is extended to six years if there has been a careless loss of tax, 12 years if the loss of tax involves an offshore matter or transfer, or 20 years if the loss was brought about deliberately (TMA 1970, ss 34A, 36, 36A).

### **No speculation**

A prerequisite for a valid HMRC check in reliance of Condition B in FA 2008, Sch 36, para 21(6) is that the HMRC officer has 'reason to suspect' a loss of tax, as outlined above.

While HMRC's information powers potentially enable HMRC officers to apply their judgement in deciding whether a discovery assessment needs to be made, HMRC acknowledges that the 'reason to suspect' requirement imposes a limitation on the scope of the check. HMRC states (at CH23560): "'reason to suspect' does not allow you to make speculative enquiries, seeking information merely in the hope that something relevant will crop up. You must be able to identify specific risks".

### **Informal enquiries**

If HMRC is not yet in a position to make a valid discovery, it may nevertheless request information in the context of informal enquiries.

In *JJ Management LLP & Ors, R (On the Application Of) v Revenue and Customs and Anor* [2019] EWHC 2006 (Admin), the High Court held that HMRC was not precluded from asking questions in an investigation by the fact that a formal enquiry had not been opened into the taxpayer's tax affairs.

As indicated above, a formal enquiry could involve HMRC requesting information and documents going back up to 20 years. This time limit also applies to informal enquiries. However, in the case of 'old' documents, HMRC

cannot issue an information notice requiring a document that originates more than six years before the date of the notice, unless the notice has been given by, or with the agreement of, an authorised HMRC officer (FA 2008, Sch 36, para 20). This administrative detail could be vitally important in establishing the extent of an information notice.

For example, in *Brantjes v Revenue and Customs* [2020] UKFTT 177 (TC), on 8 November 2016, following an informal request, HMRC sent a letter to the taxpayer headed 'Notice to produce documents', attaching a 'schedule of information and documents needed to carry out our check'. On 27 October 2017, following another informal request, HMRC sent another letter to the taxpayer enclosing a second schedule setting out a different list of information and documents required.

After the first notice there was a meeting, and after the second notice there was correspondence between the taxpayer (and her advisers) and HMRC about the information and documents requested. Some of the information and documents were provided within the period specified in the notices, but not all. HMRC imposed an initial penalty of £300 and daily penalties in respect of each notice. The taxpayer appealed.

The taxpayer objected that the notices required documents and information stretching back 20 years. The First-tier Tribunal noted that an information notice may not require documents more than six years old unless the notice is given with the authority of an authorised HMRC officer. The tribunal concluded that the notices were not approved. The tribunal therefore varied the notices to limit their scope to documents created within six years of the information notices and reduced the related penalties.

### **Don't forget...**

Whether an information notice is issued in respect of a potential 'discovery position' or following an informal request for information, as mentioned earlier the information or document must still be 'reasonably required' by HMRC for the purpose of the check .

However, it should also be borne in mind that there is no right of appeal against an information notice to provide information or documents that form part of the taxpayer's statutory records (FA 2008, Sch 36, paras 1, 29(2)).

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**Mark McLaughlin** CTA (Fellow) ATT (Fellow) TEP is a consultant with The TACS Partnership LLP ([www.tacs.co.uk](http://www.tacs.co.uk)). He is also editor and a co-author of *HMRC Investigations Handbook* (Bloomsbury Professional)