Exploring the past

Gary Brothers and David Pedley explain the mechanism by which HMRC can carry out historic enquiries, and ask whether there are sufficient safeguards in place in the process

A phrase often heard in relation to tax and, most specifically, enquiries or investigations by HMRC into taxpayers' affairs, is that HMRC cannot "go back" more than six years.

This broad notion, which by no means holds true in many varied circumstances, would seem to have its roots in the legislation relating to how long books, record and documents that support entries in accounts and tax returns normally need to be kept.

Such so-called 'statutory records' do indeed need to be retained for six years but no longer. However, beyond that it is still possible for HMRC to both request books, records and documents that are older than this, as well as, of course and in certain circumstances, to raise assessments for a "loss of tax" for those older periods.

HMRC's ability to request documents and information relating to periods that are more than six years old rests within the Information Powers legislation at Schedule 36 of FA 2008. Specifically, section 20 under the section 'Restrictions on Powers' which states that: "An information notice may not require a person to produce a document if the whole of the document originates more than six years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer." So, we have an important safeguard over an overly keen officer, review and sign off by an 'authorised officer' that we look at in more detail.

The 'authorised officer'

So we now know that an investigating Inspector must get the agreement of another Inspector, likely and hopefully more senior and better trained, to agree to the issuing of the Notice where 'old' items are sought.

Typically, these authorised officers are trained to deal with more sensitive or unusual circumstances. This requirement was specifically inserted at the time of the drafting of the legislation to provide a specific safeguard or 'check' on any potential abuse of what were, at the time, significantly stronger and more flexible, new powers freely available to HMRC officers. So at least two different inspectors must both reach the view that, what could be regarded as an overly onerous or unjustified request, is on balance necessary and proportionate in the context of the investigation.

To put this into context, during the consultation process when this piece of legislation was initially drafted, many commentators believed that the safeguard on HMRC's use of this new power ought to be more stringent, for example perhaps by only allowing such notices to be issued after seeking permission from a Tribunal.

Prior to the FA 2008 legislation, the equivalent power (within TMA 1970) required such judicial oversight before this type of notice could be issued. Therefore, even this internal check and balance, requiring what is effectively only an internal HMRC review, is far less onerous or jurisprudent than some considered necessary, and, than what came before.

So HMRC are, in effect, "marking their own homework" on this – so what could possibly go wrong?

Our experiences

In exchanges with HMRC, we have recently seen more than one example of HMRC not even making the effort to comply with this basic procedural safeguarding requirement when issuing information notices issued to taxpayers for documents more than six years old.

The agreement of the additional authorised officer was not sought, as required by the legislation.

In one instance, when challenged by way of a formal complaint, HMRC stated that this was because the officer 'forgot'. And whilst HMRC did, somewhat rather notionally, uphold the complaint and apologise, they did not accept that the taxpayer had in any way been prejudiced by this 'oversight'. Even more astonishing, the apology was caveated by suggesting that this lack of legal process would not have changed the eventual outcome, as the authorising officer would undoubtedly have agreed to the request anyway and the Information Notices would still have been issued.

In essence, HMRC's response could be paraphrased as "but we could have got them authorised so what's the problem?"

Not being prone to let such matters lie, the further explanations we have secured from HMRC suggest that there is a lack of both proper internal due process as well as training in this area to ensure that Inspectors follow these legislative requirements. HMRC fell back on its internal guidance to further justify its position, reflecting that "a notice will not be quashed or void …. provided that …. it meets the intentions and meaning of the law". Ironically, of course, there was a complete absence of understanding that the authorising process is required by the law and so HMRC's guidance rather supported our concern. Aside from the fact that HMRC's guidance, as many Inspectors' often overlook or forget, has little authority compared to the legislation, the suggestion, in this case, is that as the request was ultimately considered to be justified no harm was done.

However, this relied on the subjective view of the validity of the request which had then rested only with the officer who issued the Notice. The legalisation, however, quite categorically states that oversight is required and surely therefore part of its 'meaning' and 'intention' when the legislation was drafted.

This could be considered cherry picking by the complaint reviewing officer because elsewhere HMRC's guidance is quite unequivocal on the same subject. Its spells out exactly what is required and why:

"A person will not have failed to comply … if the information notice was issued without the agreement of an authorised officer, and they do not produce a document that is more than six years old." Also, that the authorising officer must "stand back and reach a fresh view, scrutinising with care reports from an investigator who seeks agreement to issue a particular kind of information notice or conduct a particular kind of inspection" and that the "proposed notice" is "proportionate to the particular risks identified" and that "any representations… have been considered". It also points out, that "It is mandatory to get the agreement of an authorised officer… these powers… are potentially intrusive."

HMRC effectively defended their position, and the complaint, by using hindsight to say there was nothing wrong with the request so there was no or little consequence that they hadn't followed due process and a successful appeal on those grounds would simply have resulted in them re-issuing the Notice in a proper manner. They may well have done, but that is not the point. What if, say, an unrepresented taxpayer had not appealed a Notice request that an authorising officer had decided should not be issued, not realising the Notice was invalid? There is a reason this legislation exists and any such Notice received reviewed with this in mind.

Why is it important?

There are two fundamental issues arising from our experience in these cases.

The first is HMRC's complaints response to our representations. This was made and reinforced within both the 'tier 1' and 'tier 2' complaint responses. This highlights an area of customer interaction where HMRC could be accused of unashamed and self-justification when it gets things wrong. We have seen other examples of this with HMRC complaints.

We are sure readers will share our similar, unsatisfactory experience of HMRC's complaints inability to be, properly, self-critical.

The second, of course, is the lack of oversight and process in what is a very important legislative aspect of the enquiry process. There is, we think, an important legal safeguard in place in serios powers of production that are available to HMRC, completely and, apparently, very easily side stepped by this Officer.

Both issues, it might be argued, have their origins in a combination of a desire to take short-cuts, an unwillingness to take responsibility and a lack of training and over reliance on delegation within HMRC, all brought about by lack of adequate resource.

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