



TC06330

Appeal number: TC/2017/08346

PROCEDURE – information notice issued when HMRC considering making a director personally liable under Regulation 72(5) of PAYE Regulations for PAYE due from a company – company dissolved – practice to be followed on issue of third party notice

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**THE COMMISSIONERS OF HER MAJESTY'S
REVENUE & CUSTOMS**

Applicants

ex parte

A TAXPAYER

TRIBUNAL: JUDGE JONATHAN RICHARDS

**Sitting in private at The Royal Courts of Justice, Strand, London on 1 November 2017
and 17 January 2018**

Lesley Hilton, Officer of HM Revenue & Customs, for the Applicants

DECISION

5 1. On 1 November 2017, I dealt with an application for approval of a “third party
notice” under the provisions of paragraph 3 of Schedule 36 of Finance Act 2008
 (“Schedule 36”). I refused to approve that notice during the hearing. However, I
 granted a renewed application for approval that was made on 18 January 2018. Officer
 10 Hilton, who made both applications on behalf of HMRC asked me to publish a summary
 of my reasons for both refusing the initial application and allowing the renewed
 application as she thought it would be of assistance in determining other similar
 applications and I am happy to do so.

2. Since both hearings were conducted in private, I have anonymised my decision
 and set out only a general summary of the background (so that relevant parties cannot
 15 be identified).

Background

3. HMRC became concerned that a company incorporated in England & Wales (the
 “Company”) had, shortly before going into liquidation, together with its shareholder
 and sole director (the “Director”) arranged matters so that an obligation to account for
 20 PAYE and national insurance contributions (“NIC”) went unpaid.

4. HMRC’s concern arose for the following reasons:

(1) For each of the tax years 2009-10 to 2013-14, the Director’s self-assessment
 returns indicated that he was receiving modest amounts of employment income
 from the Company (less than £10,000 per year).

25 (2) The Company operated a director’s loan account recording amounts due
 from, and to, the Individual.

(3) In September 2014, the Company went into creditors’ voluntary
 liquidation. However, information that the Company provided HMRC as part of
 its “real time” PAYE and NIC returns suggests that in June 2014, the Company
 30 paid the director the gross sum of £149,790.95 (which would be £80,000 grossed
 up for PAYE and NIC). This appears to have had the effect of reducing or
 eliminating the Director’s debit balance on his loan account.

(4) The Company did not pay the PAYE or NIC that would have been due on
 a salary payment of £149,790.95 and it was not clear to HMRC that the Company
 35 had deducted PAYE or NIC from the payment that it made to the Director.
 Moreover, because the Company’s assets in its liquidation were insufficient to
 meet its liabilities, HMRC did not obtain the full amount of PAYE and NIC due
 to it in that liquidation.

40 HMRC became concerned that the Director and the Company had arranged
 matters so that, shortly before the Company went into liquidation, the Company
 made a payment to the Director that cleared the balance on his loan account so

that, when the Company was liquidated, the Director no longer owed the Company any money. However, they were concerned that both the Director and the Company knew that the PAYE and NIC associated with that payment would not be deducted and therefore that the effect of the arrangement was that the Director benefited at the expense of HMRC.

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5. Given HMRC's concern, they wanted to consider making a direction under Regulation 72(5) of the Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") and s86 of the Social Security (Contributions) Regulations 2001 making the Director personally liable for the PAYE and NIC. However, before doing so, they wanted information from the accountant (the "Accountant") who dealt with the Company's PAYE compliance as to the operation of the Company's payroll system and the status of the Director's loan account at the relevant time. HMRC therefore applied to the Tribunal for approval of a third party information notice under the provisions of Schedule 36 of the Finance Act 2008 ("Schedule 36").

15 **HMRC's application for approval of a third party notice and my decision on it**

6. The power to issue third party notices comes from paragraph 2 of Schedule 36 which provides:

Power to obtain information and documents from third party

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20 (1) An officer of Revenue and Customs may by notice in writing require a person—

- (a) to provide information, or
- (b) to produce a document,

25 if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer ("the taxpayer").

(2) A third party notice must name the taxpayer to whom it relates, unless the tribunal has approved the giving of the notice and disappplied this requirement under paragraph 3.

30 (3) In this Schedule, "third party notice" means a notice under this paragraph.

Thus a precondition to the issue of a third party notice is that HMRC are "checking the tax position" of a specified "taxpayer".

7. Paragraphs 3 and 4 of Schedule 36 set out safeguards that surround the exercise of the power in paragraph 2 as follows:

Approval etc of taxpayer notices and third party notices

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(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.

5 (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)).

10 (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,
- 15 (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,
- 20 (d) the tribunal has been given a summary of any representations made by that person, and
- (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.

25 (4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

...

Copying third party notice to taxpayer

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(1) An officer of Revenue and Customs who gives a third party notice must give a copy of the notice to the taxpayer to whom it relates, unless the tribunal has disapplied this requirement.

(2) The tribunal may not disapply that requirement unless—

- 35 (a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs, and
- (b) the tribunal is satisfied that the officer has reasonable grounds for believing that giving a copy of the notice to the taxpayer might prejudice the assessment or collection of tax.

40 8. Some of the safeguards in paragraphs 3 and 4 of Schedule 36 are designed to address the interests of the “taxpayer” (the person whose tax position is being checked), whereas others are designed to address the interests of the third party who is being asked

to provide the information or indeed the interests of HMRC. Most relevantly for the purposes of this decision, paragraph 4(1) of Schedule 36 requires a copy of the notice to be sent to the “taxpayer” unless the Tribunal disapplies that requirement, which it is only permitted to do if the Tribunal considers that there are reasonable grounds for believing that giving a copy of the notice to the taxpayer might prejudice the assessment or collection of tax.

9. HMRC initially made their application for a third party notice on the footing that the “taxpayer” whose tax position was being checked was the Company. They reasoned that it was the Company who had the primary liability to pay the PAYE and NIC at issue and the power to issue notices under Regulation 72(5) of the PAYE Regulations and Regulation 86 of the Social Security (Contributions) Regulations 2001 was predicated on the Company having that primary liability. However, by the time HMRC made their application, the liquidation of the Company was complete and it had been removed from the register of companies. Accordingly, if I approved the issue of the third party notice, there was no way that HMRC could comply with their obligation under paragraph 4(1) of Schedule 36 to send a copy of the the notice to “the taxpayer” (i.e. the Company).

10. At the hearing, Officer Hilton requested that I disapply the obligation under paragraph 4(1) as she reasoned that the assessment or collection of tax might be prejudiced if an inability to comply with paragraph 4(1) (through no fault of HMRC) meant that HMRC could not obtain information that they reasonably needed from the Accountant.

11. However, the Tribunal’s power to disapply the obligation in paragraph 4(1) can only be exercised if particular conditions (set out in paragraph 4(2)) are satisfied. Those conditions are concerned with whether the assessment or collection of tax might be prejudiced if a copy of the information notice is given to the taxpayer. Paragraph 4(2) does not ask what might happen if a copy of the notice is not given to the taxpayer. Put another way, HMRC were not saying that giving a copy of the notice to the Company might prejudice the assessment or collection of tax. Rather, they were saying that it was simply not possible to give a copy of the notice to the Company (since, by the time of the hearing, the Company no longer existed).

12. I decided that I did not have power to disapply the obligation in paragraph 4(1) and having reached that conclusion, I decided to refuse to approve the third party notice even though I was satisfied that all of the requirements of paragraph 3(3) of Schedule 36 were met.

13. However, I invited HMRC to submit a fresh application that proceeded on the basis that the relevant “taxpayer” was not the Company, but rather the Director himself since there would be no obstacle to serving a copy of the notice on the Director. Even though the possible liability that HMRC are seeking to assert against the Director derives from the Company’s primary liability, I considered that HMRC were still “checking” the tax position of the Director particularly given that paragraph 58 of Schedule 36 provides that:

“checking” includes carrying out an investigation or enquiry of any kind

HMRC are clearly carrying out an investigation or enquiry since the whole purpose of seeking information from the Accountant is to help them to establish whether it would be appropriate to recover unpaid PAYE and NIC from the Director.

- 5 14. HMRC have now reapplied to the Tribunal for approval of a “taxpayer notice” (issued under paragraph 1 of Schedule 36) addressed to the Director and a “third party notice” (issued under paragraph 2 of Schedule 36) addressed to the Accountant. Having considered all of the requirements of Schedule 36, I have now approved both notices.

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JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 8 FEBRUARY 2018

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