

What do you do when you get a section 20 Notice?

Under the Taxes Management Act 1970

This note deals with the relevant procedure and issues arising when a Bank receives a request for documentation from HM Revenue & Customs (HMRC) pursuant to S.20 Taxes Management Act 1970 (TMA) in relation to a customer's account.

S.20 (3) HMRC's power to call for documents from third parties

Under s.20 (3) of the TMA an inspector of HMRC has the power, for the purpose of enquiring into the tax liability of any person, to serve a notice on a third party to "deliver or make available for inspection, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain or may contain information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability".

Before an inspector can serve a S.20 (3) notice, the third party must be given a reasonable opportunity to deliver/make available the documents (s.20B (1)). HMRC will, therefore, first send a Bank a request for documents.

Voluntary disclosure?

As a Bank owes its customer a duty of confidentiality, it won't be in a position to voluntarily supply the documents pursuant to the request. In practice, therefore, it will be necessary to telephone HMRC once the request has been received to explain that the Bank cannot provide the documents on a voluntary basis. HMRC will expect this response from Banks.

A Bank will, therefore, require the inspector to serve a S.20 (3) notice on it so as to enable it to fall within the compulsion of law exception to the duty of confidentiality. Before an inspector can serve such a notice, he needs to apply to a General or Special Commissioner (Commissioner) to obtain consent to serve the notice on the third party.

Preserving documents

From the moment the request to voluntarily supply the documents is received the Bank must ensure that it does not destroy any documents and must check, therefore, that any automatic destruction procedures (e.g. emails being deleted from computers) are stopped. It is an offence to falsify, conceal, destroy or otherwise dispose of any documents, which is punishable by a fine or imprisonment (S.20BB (1) and (5)), unless the written permission of a Commissioner, the inspector or an officer of the Board has been obtained (S.20BB (2) (a)).

Informing customer?

It would be sensible to check with HMRC when the request to voluntarily supply the documents is received whether there is any difficulty with informing the customer about the request. There is no requirement for HMRC to inform the individual taxpayer at this stage. That requirement comes later, at the stage the notice is served (see below), unless the inspector suspects the taxpayer of fraud, in which case notice does not have to be given to the individual taxpayer at all.

S.20 (3) Notice

In order to serve a S. 20(3) notice, an inspector has to obtain the consent of a Commissioner (S.20 (7)). The notice will usually specify the name of the taxpayer but there is a provision in S.20 (8A) to enable an inspector to obtain consent to serving a notice without naming the taxpayer (see further below).

The inspector also has to give a copy of the notice to the taxpayer concerned (s.20B (1A)) and provide him with a written summary of his reasons for applying for consent to the Commissioner (s.20 (8E)).

However, if he suspects the taxpayer of fraud, the inspector can obtain a direction from the Commissioner that he need not give a copy of the notice to the taxpayer (20B (1B)) nor provide the taxpayer with the written reasons (S.20 (8F)). Further, the Commissioner can direct that the summary need not be provided to the taxpayer if it would prejudice the assessment or collection of tax.

Scope of notices

Once the notice has been served, the Bank must inform HMRC if it does not have the relevant documents or risk paying a penalty. The notice can require the documents to be made available for inspection rather than being delivered to the inspector (S.20 (3)). Alternatively, copies of documents may be delivered instead of the originals although the originals must be made available for inspection by the inspector (S.20B (4)).

Notices must be confined to documents and not request general information¹. Documents are defined as "anything in which information of any description is recorded" (S.20D (3)) other than personal records or journalistic material"² (S.20 (8C)). Documents therefore include any disk, tape or other device from which data can be reproduced; and any film, negative, tape or other device from which a visual image can be reproduced as well as maps, plans, graphs, drawings and photographs. Where the documents are produced by computer, HMRC have powers to access the computer and to require reasonable assistance in inspecting and checking the operation of the computer.

There have been a number of challenges by third parties to the notices whereby the third parties have sought to have the notices quashed by way of Judicial Review. The cases have established the principles set out below.

The notice has to be specific and not require any third party to search through records to find what may be material. Notices should not be oppressive and should not impose considerable compliance costs on third parties to produce large quantities of information, much of which would be ignored. However, there are also cases where the courts have found that the inspector had not acted irregularly in requesting the quantity of information he did or that the notices were too widely drawn.³

There is no need for the Bank to produce documents which are over six years' old from the date of the order unless the Commissioner has disapplied this time limit, which he can do if there are reasonable grounds for believing that tax has been, or may be lost, due to the fraud of the taxpayer.

Notices which don't name the taxpayer

Under S20 (8A), an inspector can apply to the Commissioner to give a S.20 (3) notice to a third party but without naming the taxpayer⁴. The Commissioner will give his consent provided that (a) the inspector does not know the identity of the taxpayer or class of taxpayers; (b) there are reasonable grounds for believing that they may have failed or may fail to comply with any provisions of the Taxes Acts; (c) such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax; and (d) the information which is likely to be contained in the documents is not readily available from another source.

The third party has the right, within 30 days of the date of the notice, to object to it on the grounds that it would be too onerous for it to comply with the notice; S.20 (8B). However, it can be seen from recent case law⁵ that such challenges are usually unsuccessful.

¹ *R v O' Kane and Clarke ex p Northern Bank Ltd and related appn* [1996] STC 1249

² Personal records are defined by PACE 1984 S.12 as records concerning an identifiable individual, whether living or dead, which relate to (a) his physical or mental health; (b) spiritual counselling or assistance given or to be given to him; or (c) counselling or assistance for the purpose of his personal welfare, given or to be given by a voluntary organisation or someone responsible for his personal welfare or supervision. Journalistic material is defined by PACE 1984 S.13 as material in the possession of someone who acquired or created it for the purposes of journalism.

³ *Simon's Direct Tax Service* A3.1608A; *R v IRC ex p Banque Internationale a Luxembourg SA* [2000] STC 708

⁴ For example, seeking information from a bank re credit card customers with UK addresses who had cards associated with offshore bank accounts; *Re an application by HMRC to serve s 20 Notice* (2005) SpC 517; or seeking information from a bank about customers with UK addresses holding non-UK bank accounts; *Re an application by HMRC to serve s 20 Notice* (No2) (2006) SpC 536, or information about a group of resident traders trading shares through a nominee company registered in the BVI and using a UK investment bank as prime broker to provide the account used to fund the purchase and sale of shares; *Tax haven company v HMRC* (2006) SpC 533 and; unnamed customers with UK addresses who held non-UK bank accounts with financial institutions; *Re an application by HMRC to serve a section 20 Notice on Financial institutions Nos 1-4* (2007) SpC 580-583.

⁵ See footnote 4 above.

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