



# Taxing Matters

## Account Freezing Orders and Account Forfeiture Notices with Michelle Sloane

**Alice** Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).

**Alice** Today we're talking about the rise in HMRC's use of a reasonably new power the power to impose Account Freezing Orders over the funds in a bank account and once those Orders are in place the two options for the funds in those accounts to be forfeit. Taking us through this frankly rather scary topic is Michelle Sloane. Michelle is a Partner in the Tax Disputes Team here at RPC. Michele specialises in both tax disputes and white collar crime. She's the ultimate guru in anything to do with HMRC and the criminal law and has a side hustle in customs and excise duty matters. Like me Michelle hails from the beautiful New Zealand, seriously take a holiday there it's stunning, where she worked as a tax investigator in the New Zealand Tax Department. Michelle, welcome to Taxing Matters.

**Michelle** Thanks Alice, great to be joining you today.

**Alice** So we're talking about Account Freezing Orders, what are they.

**Michelle** Well they came into force under the Criminal Finances Act 2017 on 31 January 2018 but they were really overshadowed by the Unexplained Wealth Orders and the corporate failure to prevent the facilitation of tax evasion. They've now been put into chapter 3B of the Proceeds of Crime Act.

**Alice** So are these being used at all?

**Michelle** Yes there's been a notable increase in their use by HMRC. In the first year HMRC froze one account, the next year 60 and in March 2020, under a Freedom of Information Act request that we did they've frozen 166 accounts and forfeit 67.

**Michelle** In total HMRC has frozen 27.6 million and forfeit 5.9 million in just two and a half years.

**Alice** So in terms of the account, the amounts that have been frozen in each of these Orders are we talking small amounts. Big amounts? What's the scale of it here?

**Michelle** We're not talking about small sums here. There is an average sum frozen of 120,000 and an average forfeited sum of over 72,000.

**Alice** That's quite significant.

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<b>Michelle</b>	Indeed.
<b>Alice</b>	So what's the actual process here?
<b>Michelle</b>	So it's an application to the Magistrates Court for an Account Freezing Order and it's made by an enforcement officer that can be a senior officer of HMRC and they basically have to have reasonable grounds for suspecting that money held in an account is recoverable property or intended for use in unlawful conduct.
<b>Alice</b>	So what does recoverable property mean?
<b>Michelle</b>	That's further defined in the Proceeds of Crime Act and it's property obtained through unlawful conduct Unlawful conduct is also further defined in the Proceeds of Crime Act, it's basically any conduct which is unlawful under the Criminal Law.
<b>Alice</b>	That sounds incredibly broad.
<b>Michelle</b>	Yes that's right, and the other important thing to note is when the court considers whether there has been unlawful conduct it does so on the balance of probabilities.
<b>Alice</b>	So nowhere near criminal standard we're used to then.
<b>Michelle</b>	No not at all.
<b>Alice</b>	And you also mentioned that there was a possible sort of future unlawful conduct. Do we have any indication of how that might work?
<b>Michelle</b>	No, it's very difficult and it is, it is of concern. How does a person know and how do they seek to prove, that they were not intending to use the property for future unlawful conduct?
<b>Alice</b>	So if an enforcement officer is making this application what do they have to do procedurally?
<b>Michelle</b>	So, there are specific rules for this in the Magistrates Court they're called the Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017, quite a mouthful. These require applications to be made on notice and in writing with evidence on oath being required. There are strict compliance obligations imposed because they are civil in nature, and it's quite an important procedural tool when faced with an AFO to actually know these rules because we do quite often see technical breaches by public bodies and then that is a route to challenging an AFO.
<b>Alice</b>	Does the owner of the account have a right to be heard on these applications?
<b>Michelle</b>	Yes, they do and also people that have an interest in the account for example a co-owner or beneficiary of trust but they have to ask the Magistrates Court to be heard.
<b>Alice</b>	That all seems pretty relaxed.
<b>Michelle</b>	Yes, indeed.
<b>Alice</b>	So assume this Account Freezing Order has been put into place what might happen next or what can enforcement officers do next?
<b>Michelle</b>	So this is really the scary bit. What HMRC can do is issue a Forfeiture Notice. This is very simple to do, the officer just has to be satisfied that the funds are recoverable property and then basically issue a Notice saying the sums are frozen, how much to be forfeit and it also has to say where to send any objection and how long the person that's received it has to make such an objection. The

really scary thing is in this Notice they don't need to say why they consider the funds recoverable property and if you don't object within the timeframe on the Notice funds are automatically forfeit.

<b>Alice</b>	Wow that's intense. So what might happen if someone receives one of these Account Forfeitures Notices what can they do?
<b>Michelle</b>	Well they can object and they have to do so within the time period specified in the Notice unless there are some exceptional circumstances.
<b>Alice</b>	How long have they got to do that?
<b>Michelle</b>	It will be specified in the Notice but if they don't do it within that period they then have another 30 days to make such an objection.
<b>Alice</b>	What happens if someone hasn't been served with a copy of the Notice but they are in fact entitled to the proceeds of the account so for example a spouse or a child?
<b>Michelle</b>	They can ask to be heard and make representations. I mean the scary thing about this is they might not even know that it's happening.
<b>Alice</b>	So is there any remedy if they don't know that it's happening?
<b>Michelle</b>	The only remedy is that after the period of objection in the original Notice has expired they have a further 30 days to object.
<b>Alice</b>	What happens if they do object at that point?
<b>Michelle</b>	It's then dealt with by the Magistrates Court.
<b>Michelle</b>	HMRC have to apply for a Forfeiture Order and it's then as if the Forfeiture Notice was not issued.
<b>Alice</b>	What happens if the person who has received the copy of this Notice does have an objection? What's the process then?
<b>Michelle</b>	So when the court receives a Forfeiture Order application the court will then serve it on the parties that are listed in the application and then will set a hearing no earlier than seven days after that date and people that wish to object can do so at that stage.
<b>Michelle</b>	The court will only serve those that are listed on the Application Notice so again there's that issue of those that might have an interest in the account being unaware of what is going on.
<b>Alice</b>	So how does this process differ from the civil process for a Freezing Order?
<b>Michelle</b>	It's significantly different from Freezing Injunctions that are typically associated with higher Court proceedings. These have a very serious degree of scrutiny and it does seem that AFOs have been transformed into a much easier route for HMRC with a lot less scrutiny to enable them to freeze accounts. One important point to note is that these Account Freezing Orders are dealt with by lay people sitting in the Magistrates Court without detailed legal knowledge and they're obviously assisted only by legal advisers, who, up until relatively recently also didn't have much experience dealing with applications of this sort.
<b>Alice</b>	So what are the principal differences in terms of your experience of the process between a Civil Freezing Injunction and an Account Freezing Order?

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<b>Michelle</b>	The Civil Injunction route there's a lot of judge scrutiny compared to this current process.
<b>Michelle</b>	The cost of the civil route is also a lot higher because obviously witness evidence, detailed witness evidence, has to be prepared and there has to be a hearing in the High Court in relation to it. Another difference is in the High Court Freezing Injunctions. The public body has to give an undertaking as to damages and this is not in the Account Freezing Order provisions.
<b>Alice</b>	So are there any downsides to an individual challenging this kind of Freezing Order, or in fact the Forfeiture application, if it is made?
<b>Michelle</b>	One big area of concern and a potential consequence, is that unlike applications for Unexplained Wealth Orders, in which persons owning property which is alleged to be outside their legitimate means to purchase are required to explain how they were able to fund their purchase, there are no such protections given against the information provided in defending an AFO being used against that person or any person connected with them in subsequent criminal proceedings.
<b>Alice</b>	There is a potential for HMRC to use this possibly as an information gathering exercise as well which allows them to either get the money or get the evidence.
<b>Michelle</b>	Yeah that's precisely right. What is said during the proceedings to protect the bank account may form part of the evidence of a later criminal trial in accordance with the normal principles of criminal law. Furthermore, just another point to add on that is that the Magistrates Court's obviously held in open court and there is a possibility of the media reporting on the grounds for the application, the opposition to the application and potentially also the documents underlying the arguments referred to during the course of arguments.
<b>Michelle</b>	For example, there's a very recent case in May 2020 when the media asked to get the papers for an AFO, and they were only refused by the District Judge on the basis that they weren't present at the original hearing.
<b>Alice</b>	So otherwise they would have been entitled to see the full information?
<b>Michelle</b>	Yes precisely and it potentially could have been splashed all over the news.
<b>Alice</b>	So they seem like some pretty significant considerations that need to be taken into account when deciding whether or not it is worth actually opposing any order.
<b>Michelle</b>	Yes that's right.
<b>Alice</b>	So what is your prediction for the use of these powers in the future?
<b>Michelle</b>	Given that they're relatively easy to obtain I think there's going to be a continued increase by HMRC in the use of them to target and tackle suspected criminal activity particularly given the low evidential and financial thresholds required to obtain them.
<b>Alice</b>	And how do you think this might be used in the current coronavirus pandemic?

- Michelle** HMRC have made clear that they are going to investigate all those who have been involved in fraudulent furlough claims etc so it is likely that this is an easy route for them to use to recover sums incorrectly claimed.
- Michelle** Further, as discussed earlier, the test is the balance of probability so you don't actually need to have the criminal trial to ascertain whether the sums were actually incorrectly claimed.
- Alice** That's quite significant given the volume of whistle blowing complaints that's been talked about in the media isn't it.
- Michelle** Yes it is. I think the latest figures are over 3,800 complaints have been made.
- Alice** So what can a person do if they receive a notice about one of these Orders or applications being made?
- Michelle** As we've discussed these are very serious and anyone who receives such a notice or application should seek legal advice as soon as possible. There are, as we've discussed tight timeframes in which to defend any application and obviously there is different strategies to take into account as to whether it is in one's interest to actually object and challenge the procedure and the process that HMRC has gone about to get this.
- Alice** Well thank you very much Michelle for taking us through that and thank you to all of our listeners for joining us. As ever a full transcript of our episode together with our references can be found on the website [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters) and if you have any questions for me or for Kelly or any topics you'd like us to cover in a future episode please email us on [taxingmatters@rpc.co.uk](mailto:taxingmatters@rpc.co.uk). We would love to hear from you.
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