20 questions

HMRC's civil and criminal powers

Speed read

HMRC has been provided with extensive and wide-ranging powers, which have increased exponentially in recent years. This article considers HMRC's main investigatory and assessment powers, by reference to its general enquiries, as well as specific/aspect enquiries, including criminal investigations.

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Civil investigations

1. What are HMRC's main investigatory powers?

HMRC has a range of powers that enable it to check a person's tax position, including the following:

Compliance checks

A compliance check is any action taken by HMRC to check a person's position in relation to any of the major direct or indirect taxes. Examples of compliance checks include:

- enquiries into self-assessment tax returns (SATRs);
- enquiries into land transaction returns for stamp duty land tax purposes;
- VAT assurance visits; and
- employer compliance reviews.

Compliance checks can also be used before a tax return has been, or is required to be, submitted. This is known as a pre-return check and is generally only carried out where HMRC believes there is a material tax risk (and perhaps where there has been a history of non-compliance).

Enquiries

If HMRC wants to check something in a SATR, it can do so by opening an 'enquiry'. An enquiry is a formal statutory procedure, with fixed time limits (TMA 1970 s 9A(2), (6)). The 12 month enquiry window relates to HMRC's powers to enquire into a tax return. There are other statutory provisions which may permit HMRC to make enquiries for specific purposes over a longer period. For instance, the transactions in securities rules permit HMRC to enquire into a transaction for the purposes of those rules within six years of the end of the tax year in which an income tax advantage arose.

There is no prescribed form for opening an enquiry, but it must be clear from written notice that HMRC intends to enquire into the return. In *Tinkler v HMRC* [2021] UKSC 39, the Supreme Court held that both parties had proceeded on the assumption that a valid enquiry had been opened, and so the taxpayer was estopped from arguing to the contrary.

HMRC does not have to give a reason for opening an enquiry. The enquiry can be about anything in the return, or which should have been in the return, including claims and elections. HMRC may choose to limit the enquiry to certain aspects of the return (commonly referred to as an 'aspect enquiry', although this is not a term used in the legislation). HMRC can widen the scope of an enquiry at a later stage if it chooses to do so.

2. What about partnerships?

HMRC can enquire into a partnership return by sending a notice of enquiry to the partner who made or delivered the return, or their successor (TMA 1970 s 12AC(1)). HMRC is not obliged to send the notice to all partners, so the other partners must rely on being informed by the partner who has received the notice. An enquiry into a partnership return is treated as an enquiry into any individual tax returns submitted by the partners (TMA 1970 s 12AC(6)).

The rule that only one enquiry can be opened into each tax return does not preclude HMRC from opening an enquiry into both a partnership return, and the individual returns submitted by the partners. While an enquiry into a partnership return is deemed to be an enquiry into the partners' individual returns, the First-tier Tribunal (FTT) has held that the rule against opening more than one enquiry refers to actual, not deemed, enquiries (see *Reid and Emblin* [2018] UKFTT 236 (TC)). As the FTT made clear in *Grinyer v HMRC* [2021] UKFTT 64 (TC), HMRC is entitled to enquire into any aspect of an individual's tax return, including a claim relating to a partnership, without also opening an enquiry into the partnership tax return.

3. When and how does HMRC close an enquiry?

An enquiry finishes when HMRC issues a closure notice. The closure notice must either state that no amendment of the return is necessary, or make the necessary amendment (TMA 1970 ss 28A(2), 28B(2)). A closure notice can be partial (concluding the enquiry into some aspects of the return but not others) or final (concluding the enquiry into all aspects of the return). In order to issue a partial closure notice, HMRC must be able to quantity the tax due and payable by the amendment (see *Embiricos v HMRC* [2022] EWCA Civ 3). A closure notice must state the amount of tax payable by the taxpayer (see *R (oao Archer) v HMRC* [2018] STC 38).

Where HMRC issues a closure notice that makes amendments to a partnership tax return, it must give effect to this by amending the individual tax returns of the partners. This follows from the fact that a partnership must produce a tax return but is not itself a taxable entity. Notices sent to partners making amendments to their individual tax returns in order to give effect to a closure notice in relation to a partnership return do not have the effect of closing any open enquiries into those individual tax returns. Notices sent to partners under these provisions are not closure notices and are not therefore subject to all

the requirements that apply to closure notices (see *R (oao Amrolia and Ranjit-Singh) v HMRC* [2020] EWCA Civ 488).

4. What about standalone claims?

In addition to its powers to open enquiries into tax returns, HMRC has powers to open enquiries into claims that are made outside a return. These are separate procedures and HMRC must use the correct one.

The question of whether HMRC has used the correct procedure (the intricacies of which are beyond the scope of this article) is not straightforward and has given rise to a multitude of disputes in recent years (see, for example, *Cotter v HMRC* [2013] STC 2480 and *Derry v HMRC* [2019] All ER (D) 56).

In order to issue a partial closure notice, HMRC must be able to quantity the tax due and payable by the amendment

5. What are HMRC's main powers of assessment?

There are various options open to HMRC when it suspects that tax has not been paid or has been underpaid. These include carrying out a compliance check/formal enquiry, as explained above, which can culminate in an amendment to your SATR.

If VAT has been underpaid, or no VAT return has been submitted, HMRC can issue a VAT assessment. In all other cases, issuing a discovery assessment is the main way in which HMRC can assess someone to tax. A discovery assessment is an assessment to tax issued by HMRC where it discovers that too little tax has been assessed for a past year or accounting period. HMRC can make a discovery assessment whether the taxpayer has submitted a tax return for the relevant period or not. If a tax return has been submitted, additional conditions must be met before a discovery assessment can be made (TMA 1970 s 29 for individuals and FA 1998 Sch 18 para 41 for companies).

6. How long does HMRC have to issue a discovery assessment?

There are a number of different time limits within which HMRC must make a discovery assessment, depending on the circumstances. If more than one applies, the longest prevails. The time limits are:

- four years from the end of the year or accounting period in question (TMA 1970 s 34; FA 1998 Sch 18 para 46(1));
- six years from the end of the year or period, if tax has been lost because the taxpayer (or their agent) was careless (TMA 1970 s 36(1); FA 1998 Sch 18 para 46(2));
- 12 years from the end of the year or period, if income tax or CGT (but not corporation tax) has been lost in relation to offshore income or gains (this time limit applies for 2013/14 onwards in cases of carelessness, and for 2014/15 onwards in other cases). The 12-year time limit will not apply where HMRC has received information from another tax authority under automatic exchange of information procedures on which an assessment could reasonably have been made within the four or six year time limits (TMA 1970 s 36(1); FA 1998 Sch 18 para 46(2));
- 20 years from the end of the year or period, if the loss of tax:
  - was brought about deliberately by the taxpayer (or their agent);
  - resulted from the taxpayer failing to inform HMRC that they were chargeable to tax;
  - was attributable to arrangements in respect of which the taxpayer failed to comply with their obligations under the disclosure of tax avoidance schemes (DOTAS) rules; or
  - was attributable to arrangements in respect of which the taxpayer failed to comply with certain notification obligations under the promoters of tax avoidance scheme rules (TMA 1970 s 36(1A); FA 1998 Sch 18 para 46(2A).

The Supreme Court's judgment in *Tooth* [2021] UKSC 17 rejected the concept of 'staleness' in relation to the issuing of discovery assessments; the time limits for making discovery assessments are triggered only by reference to the tax year in question and the behaviour of the taxpayer.

7. What if a taxpayer fails to file a return?

In such circumstances, HMRC can issue a 'determination' (TMA 1970 s 28C for individuals and FA 1998 Sch 18 para 36 for companies).

There is no right of appeal against a determination in respect of direct taxes. Such a determination can only be superseded:

- by an actual self-assessment return being submitted within the later of:
  - 12 months of the determination; and
  - three years after the day on which the power to make the determination first became exercisable; or
- in certain circumstances by:
  - claiming special relief; or
  - making a claim to have the determination judicially reviewed.

A determination issued in the absence of a submitted tax return should:

- be HMRC's best estimate of the amount of tax due based on the information it has available to it; and
- take into account any payments on account already made for that tax year.

The normal statutory time limit for HMRC raising a determination in the absence of a self-assessment tax return is three years from the filing due date, i.e. from the date when the self-assessment tax return was due (TMA 1970 s 28C(5)).

HMRC can make a determination in respect of corporation tax at any time within the three-year time limit after the tax return filing due date provided it can ascertain when that due date was (FA 1998 Sch 18 paras 36(5), 37(4)).

8. Can HMRC compel a taxpayer to provide it with information and documents?

HMRC's main information gathering powers are contained in FA 2008 Sch 36.

An HMRC officer can, by written notice, require a taxpayer to provide information or to produce a document reasonably required for checking the taxpayer's tax position (FA 2008 Sch 36 para 1).

According to HMRC guidance (*Compliance Handbook* at CH21620), 'reasonably required' means getting the balance right between:

- the burden put on someone to provide the information; and
- how important the information is in deciding on the correct tax position.

As the FTT noted in *Hargreaves v HMRC* [2021] UKFTT 80 (TC), 'reasonably required' is an objective test. The question is not whether HMRC's belief that information is reasonably required is a reasonable one, but whether the information is, objectively, reasonably required. Information and documents will only be 'reasonably required' if they are relevant to the potential tax liability or penalty that HMRC is considering.

Documents only have to be produced if they are in a person's 'possession or power' (FA 2008 Sch 36 para 18).

According to HMRC guidance (at CH22120):

- 'possession' means the person has physical control over the document (it does not matter who owns it); and
- 'power' means the person has the ability to get the document, or a copy of it, from whoever holds it.

9. Can HMRC ask third parties for information and documents?

An HMRC officer can, by written notice to any person, require that person to provide information or to produce a document that is reasonably required for checking the tax position of a known person (FA 2008 Sch 36 para 2).

Unlike a taxpayer notice, a third-party notice must be approved in advance by the FTT, unless the taxpayer consents to the issue of the notice (FA 2008 Sch 36 para 3(1)).

10. Can HMRC obtain information and documents from the taxpayer's bank?

HMRC can also issue a financial institution notice (FIN) to require a financial institution to provide information or documents so that HMRC can check the tax position of another person or collect a tax debt of that other person. Unlike a third-party notice, a FIN does not require approval from the FTT (FA 2008 Sch 36 para 4A).

The HMRC officer issuing the FIN must be of the reasonable opinion that the information or documents requested are of a kind that it would not be onerous for the institution to provide. An onerous request, according to HMRC, is one that involves a significant resource cost for the financial institution (see CH232400). As information notices can be issued for the purpose of collecting a tax debt, HMRC could use a FIN to establish whether there are funds available to pay a debt.

A person who is given a taxpayer notice or a third-party notice that (in either case) has not received FTT approval prior to issue, may appeal against the notice, or any requirement in the notice, except that there is no appeal against a requirement to produce statutory records. The same, however, is not true of FINs, which are not appealable.

11. What about things like cryptocurrency?

Cryptocurrency is a hot topic at the moment. One question crypto holders might be asking themselves is, can HMRC find out about my crypto holdings? There is at present no specific legislation in the UK aimed at cryptocurrency. As such, HMRC is relying on its general powers and traditional principles to ensure the right amount of tax is being declared and paid on crypto gains and profits.

In 2021, certain key crypto exchanges, such as Coinbase, contacted their customers to let them know that HMRC had issued notices under FA 2011 Sch 23 para 1, requiring them to provide information on accounts held. FA 2011 Sch 23 enables HMRC to issue a 'data-holder notice' to a 'relevant data-holder' requiring that person to provide relevant data to HMRC.

12. Can HMRC go directly to a taxpayer's bank to collect the tax?

The direct recovery of debts (DRD) measure was introduced by F(No.2)A 2015 Sch 8 and came into effect on 18 November 2015. This legislation gives HMRC the power, in certain circumstances, to secure payment of a tax debt directly from the debtor's bank or building society.

To ensure that debtors do not suffer undue hardship, certain statutory safeguards were specified:

- HMRC may only take action against those who have finalised tax debts;
- the DRD procedure can only be used to recover money from those debtors with tax and/or tax credits debts of more than £1,000;
- a minimum of £5,000 must be left in the debtor's account;
- the DRD procedure can only be used when the time period for an appeal has expired; and
- a debtor can object directly to HMRC and, if they do not agree with HMRC's decision following their objection, appeal to the County Court.

13. What are follower notices and accelerated payment notices?

HMRC has been provided with a large number of powers in recent years to assist it in combating tax avoidance.

FA 2014 Part 4 gives HMRC the power to issue:

- a follower notice (FN) informing a taxpayer that some or all of the issues in dispute regarding their tax liabilities have been determined by a final judicial ruling in HMRC's favour in another case. An FN directs the taxpayer concerned to take 'corrective action' by paying the amount of tax in dispute and withdrawing their appeal; and
- an accelerated payment notice (APN) requiring the recipient to pay tax in circumstances where there is a pending appeal or open enquiry in respect of prescribed arrangements, before resolution of the dispute.

HMRC can issue a FN where an enquiry or tax appeal is in progress in relation to arrangements where it is reasonable to conclude that obtaining a tax advantage was the main purpose or one of the main purposes of the arrangements (FA 2014 s 204). A further condition which must be satisfied before a FN can be issued is that HMRC is of the opinion that 'there is a judicial ruling which is relevant to [the taxpayer's] arrangements'. A ruling is relevant if principles laid down or reasoning given in the ruling would, if applied to the arrangements, deny the asserted advantage, or part of it.

HMRC can issue an APN to a taxpayer if a tax enquiry or tax appeal is in progress and:

- HMRC has issued a scheme reference number under the DOTAS regime in relation to the arrangements;
- a FN has been given or is given at the same time in relation to the same return and same tax advantage; or
- a general anti-abuse rule (GAAR) counteraction notice has been given in a case where the stated opinion of at least two members of the GAAR advisory panel was that the arrangements were not a reasonable course of action (FA 2014 s 219).

14. Are there any specific powers applicable in respect of large businesses?

The government has proposed (and Parliament has accepted) a number of specific statutory changes which affect large corporates, such as the framework underpinning

the diverted profits tax (DPT), including the charging notice, and the forthcoming uncertain tax treatments regime. These measures provide HMRC with powers to identify at an early stage contentious tax positions and, in respect of DPT, require payment of tax to be made on account.

Under FA 2016 Sch 9 Part 3, HMRC can also issue 'warning notices' or 'special measures notices'. Such notices are designed to act as a deterrent to the very small number of large businesses who persistently engage in aggressive tax planning and/or who refuse to engage with HMRC in an open and collaborative way (although it is understood that, to date, no such notices have been issued by HMRC).

15. Can HMRC make individuals personally liable for the tax liability of a company?

HMRC now has an extensive range of powers which enable it, in defined circumstances, to hold an individual liable for a corporate tax liability. For example, FA 2020 Sch 13 provides for an individual to be jointly and severally liable with a company for the relevant tax liability in certain circumstances where the company is subject to an insolvency or potential insolvency procedure.

HMRC now has an extensive range of powers which enable it, in defined circumstances, to hold an individual liable for a corporate tax liability

Section 121C of the Social Security Administration Act 1992 enables HMRC to recover from the officers of a company any unpaid NICs together with interest and penalties, by issuing personal liability notices (PLNs). A PLN can be issued to any individual who was acting as an officer of the company at the time of a failure to pay the NICs due, and where HMRC is of the opinion that the failure to pay was attributable to fraud or neglect by that individual. Section 121C(9) defines an 'officer' of a company as 'any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act as such; and in a case where the affairs of the body corporate are managed by its members, any member of the body corporate exercising functions of management with respect to it or purporting to do so'. Similar provisions also exist for VAT penalties where an officer of the company can be deemed liable for any deliberate loss of VAT.

16. Are any new powers on the way?

FA 2022 s 85 gives HMRC the power to present a winding-up petition to the court for companies and partnerships operating against the public interest, including those involved in the promotion, management and facilitation of tax avoidance.

Additionally, HMRC is now able to publish information on tax avoidance schemes, suspected promoters, those connected to them, and others who make such schemes available (s 86). If a person is to be identified, they must be given 30 days' notice to enable representations to be made, and any such representations must be taken into account by an authorised officer.

HMRC is now also able to apply to a court in England and Wales for an order to freeze the assets of a person if a penalty is being sought under TMA 1970 s 98C (disclosure of tax avoidance schemes); FA 2008 Sch 36 (enablers of defeated tax avoidance schemes); FA 2014 Sch 35 (promoters of tax avoidance schemes) or F(No.2)A 2017 Sch 17 (disclosure of tax avoidance schemes for VAT and other indirect taxes).

HMRC can now also apply to the FTT for penalties to be imposed on UK-based entities. The penalties can be up to 100% of the consideration received for the facilitation of a tax avoidance scheme promoted by a non-resident promoter. This applies from royal assent and the joint and several liability of directors under FA 2020 Sch 13 is extended to include such penalties (FA 2022 s 91 and Sch 13).

Criminal investigations

17. What powers does HMRC have to compel the handing over of confidential information in a criminal investigation?

The most commonly encountered powers are those contained in the Police and Criminal Evidence Act 1984 (PACE), the Serious Organised Crime and Police Act 2005 (SOCPA) and the Proceeds of Crime Act 2002 (POCA).

The PACE power is contained within s 9 and Sch 1 and provides that a judge, on the application of an HMRC officer, may order that a person, who appears to be in possession of the material to which the application relates, produce that material to an officer in a legible format or give an officer access to it.

A production order can be made under this procedure if the court is satisfied that:

- an indictable offence has been committed;
- there is material acquired or created in the course of business and held subject to an express or implied undertaking to hold it in confidence, or under an obligation of secrecy, on the premises of the subject of the application;
- the material is likely to be of substantial value to the investigation;
- other methods of obtaining the information have not succeeded or have not been tried because they appeared bound to fail; and
- having regard to the benefit to the investigation and the circumstances under which the material is held, it is in the public interest that the material should be produced.

The SOCPA power is one of disclosure of information (which can include a requirement to create records of information such as that stored in a person's head and not otherwise recorded) as opposed to production of documents, and is contained within s 62. Section 62 enables a disclosure notice to be issued by the Director of Public Prosecutions or a delegated Crown prosecutor, if it appears that:

- there are reasonable grounds to believe that a specified offence has been committed (for HMRC's purposes, this will usually be the offence of cheating the public revenue or false accounting over £5,000);
- any person has information which relates to a matter relevant to the investigation of that offence; and
- there are reasonable grounds for believing that information which may be provided is likely to be of substantial value to the investigation.

While the PACE procedure remains the most common type of order sought by HMRC, there is an increasing reliance by HMRC investigators on the powers contained in POCA, which enable both production of documents and disclosure of information.

Under POCA s 345, a judge, on the application of an HMRC officer, may make a production order if:

- a specified person is subject to a confiscation investigation, civil recovery investigation, exploitation proceeds investigation, money laundering investigation or specified property is subject to a civil recovery investigation, a detained cash investigation, a detained property investigation or a frozen funds investigation;
- there are reasonable grounds for suspecting that the criteria are met in respect of the relevant investigation type;
- there are reasonable grounds for believing that the material sought is likely to be of substantial value (whether or not by itself) to the investigation;
- there are reasonable grounds for believing that the material sought is in the possession or control of the person specified in the application; and
- having regard to the benefit to the investigation and the circumstances under which the material is held, it is in the public interest that the material should be produced.

The power in POCA s 357 is similar and enables a judge to make a disclosure order requiring a person to answer questions, provide information or produce documents if:

- there are reasonable grounds for suspecting that the criteria are met in respect of the relevant investigation type (which, unlike a s 345 production order, does not include a detained cash or property investigation or a frozen funds investigation);
- there are reasonable grounds for believing that the material sought is likely to be of substantial value (whether by itself or otherwise) to the investigation; and
- having regard to the benefit to the investigation and the circumstances under which the material is held, it is in the public interest that the material should be produced.

A production or disclosure order requires careful consideration ... Disclosing too little risks being found to be in contempt of court and possibly facing criminal charges. However, disclosing too much may constitute a breach of client confidentiality

18. How do I comply with a production or disclosure order?

Production and disclosure orders are court orders, behind which stand the power of the court, so it is essential that they are complied with. However, most information held by a professional adviser in relation to their clients will be confidential.

A production or disclosure order requires careful consideration to ensure that the scope of the order is strictly complied with. Disclosing too little risks being found to be in contempt of court and possibly facing criminal charges. However, disclosing too much may constitute a breach of client confidentiality which may open a professional adviser up to disciplinary action from their regulator and/or an action for damages for the breach of confidence.

None of the above powers can require the disclosure of legally privileged material, which can only be disclosed with the express permission of the privilege holder and cannot be waived by a professional adviser without express instructions to do so. There are two types of privilege:

- legal advice privilege, which applies to communications between a lawyer and their client, and
- litigation privilege, which applies to communications with lawyers, clients or third parties in relation to litigation which is in progress or which is in contemplation.

19. What happens if you fail to comply with a production or disclosure order?

As a production or disclosure order is an order of the court, failing to comply with an order may constitute contempt of court, which can result in a fine, imprisonment or both.

In addition, if the order is made under POCA s 357, there is a specific criminal offence of failing to comply with a disclosure order under POCA s 359.

Any person receiving a production or disclosure order should seek expert legal advice at the earliest possible opportunity.

20. Does HMRC have the power to freeze a taxpayer's bank account?

Account freezing orders (AFOs) are granted by a Magistrates' Court under POCA on application of an eligible investigator (including HMRC officers) and freeze the monies held in a bank or building society account to enable a full investigation to be conducted as to whether the monies in that account are the proceeds of crime.

If there are reasonable grounds for suspecting that the money held in the account is recoverable property or intended by any person for use in unlawful conduct, an application can be made for an AFO. The application must be made in writing to a Magistrates' Court setting out the basis for the application and the evidence relied upon (the written evidence will normally take the form of a witness statement) and a copy of the written application and notification of the hearing of the application must be given to any person by or for whom the account which is the subject of the application is operated (unless that person cannot be identified).

If the court is satisfied that the grounds for making an AFO have been met, it can order monies in the bank account to be frozen for a period of up to two years. Because the purpose of an AFO is to enable an investigation to be conducted, the threshold for granting an AFO is relatively low. ■

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