

FINANCE ACT 2009

EXPLANATORY NOTES

INTRODUCTION

Section 95 and Schedule 47: Amendment of Information and Inspection Powers

Summary

1. [Section 95](#) and Schedule 47 amend Schedule 36 to the Finance Act (FA) 2008 (Schedule 36) which contains HM Revenue & Customs' (HMRC) new information and inspection powers. The section also allows for the repeal, by statutory instrument, of several other information and inspection powers that are no longer required.

Details of the Section

2. The section introduces Schedule 47 which amends Schedule 36.
3. Subsections (2) to (5) provide a power to make statutory instruments containing provisions or savings in consequence of or in connection with Schedule 36. This will allow the repeal of several information and inspection powers that are no longer required together with related provisions.

Details of the Schedule

4. Paragraph 2 inserts new paragraph 3(2A) into Schedule 36 to make clear that applications to the tribunal for approval of taxpayer or third party notices are heard without the taxpayer being present.
5. Paragraph 3(2) inserts new paragraph 5(3A) into Schedule 36 to make clear that applications to the tribunal for approval of notices under paragraph 5 of Schedule 36 are heard without the taxpayer being present.
6. Sub-paragraph (3) amends paragraph 5(4) of Schedule 36. The existing paragraph refers to a notice being given with the approval of the tribunal. Strictly speaking the tribunal approves the application rather than the notice and this change makes this clear.
7. Paragraph 4 inserts new paragraph 6(4) into Schedule 36. This makes it clear that there is no right of appeal under the Tribunals, Courts and Enforcement Act 2007 against a decision of the tribunal to approve the issue of an information notice.
8. Paragraph 5(2) amends the definition of "business assets" in paragraph 10 of Schedule 36 to make it clear that HMRC has no power to inspect documents other than statutory records unless they are trading stock or plant in the business.
9. Sub-paragraph (3) inserts new paragraph 10(4). In general "documents" other than "business documents" are not subject to inspection. But certain documents may be either trading stock or plant in the business, and this new provision makes it clear that such documents may be inspected.
10. Paragraph 6 amends paragraph 11 of Schedule 36 to clarify and extend the scope of documents that can be inspected.

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which received Royal Assent on 21 July 2009*

11. Paragraph 7 amends paragraph 12(5) of Schedule 36. The existing paragraph refers to a notice being given with the approval of the tribunal. Strictly speaking the tribunal approves the inspection rather than a notice and this change makes this clear.
12. Paragraph 8(2) inserts new paragraph 13(1A) into Schedule 36. This makes it clear that applications to the tribunal to approve an inspection of a business under Part 2 of Schedule 36 are heard without the taxpayer being present.
13. Paragraph 8(3) inserts new paragraph 13(3) into Schedule 36. This makes it clear that there is no right of appeal under the Tribunals, Courts and Enforcement Act 2007 against a decision of the tribunal to approve an inspection.
14. Paragraph 9(4) makes a consequential amendment to paragraph 21(8) of Schedule 36 and makes it explicit that the checking of payroll giving does not require the opening of a formal enquiry into a tax return.
15. Paragraph 9(5) inserts new paragraph 21(9) into Schedule 36. This makes it clear that the information powers are switched on or off for a particular person who has made a return only in relation to the capacity in which that person has made that return.
16. Paragraph 10(2) clarifies paragraph 35(2) of Schedule 36 and ensures that the references in paragraph 3(5) to “naming the taxpayer” are amended appropriately where a third party notice is given to check the tax position of a parent undertaking and any of its subsidiary undertakings.
17. Sub-paragraph (3) inserts new paragraphs 35(4) and (4A) into Schedule 36. These provisions modify the rules that apply when a third party notice is given to a parent undertaking to check the tax position of more than one subsidiary undertaking. New paragraph 35(4) makes corresponding minor changes to those made to paragraph 35(2) above. New paragraph 35(4A) clarifies and adds to the modifications in existing paragraph 35(4). In particular, the parent undertaking may appeal against such a third party notice on any grounds (except in relation to statutory records), rather than the more restricted appeal rights applying to third party notices generally.
18. Sub-paragraph (4) amends paragraph 35(5) which concerns notices under paragraph 5 to a parent undertaking for checking the tax position of subsidiaries whose identities are not known. This is partly to reflect the changes made above to paragraph 5 of Schedule 36 and also to make it clear that although HMRC is not required to obtain tribunal approval for a notice, it may choose to do so. In addition, the parent undertaking’s appeal rights are extended.
19. Paragraph 11(2) inserts new paragraph 37(2) into Schedule 36. This provides that paragraph 21 of Schedule 36 operates as intended in a partnership situation where the partnership tax return or a partnership claim or election has been submitted by any of the partners. In addition what was paragraph 37(2)(b) is no longer necessary in the light of changes made to paragraph 21 of Schedule 36 by paragraph 9 of this Schedule.
20. Sub-paragraph (3) amends paragraph 37(3) so that it applies to all third party notices, including notices issued to one partner for the purpose of checking another partner’s tax position. The changes here mirror those made to the procedures for checking group companies by paragraph 10 of this Schedule.
21. Sub-paragraph (4) makes changes to paragraph 37(4) to clarify how that sub-paragraph works and reflect the fact that paragraph 37(3) will now apply more widely by virtue of the change made above.
22. Sub-paragraph (5) inserts new paragraph 37(5) into Schedule 36. This provision modifies the rules that apply when a third party notice is given to a partner to check the tax position of more than one other partner. It clarifies and adds to the modifications in existing paragraph 37(5). In particular, the partner receiving the third party notice may

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appeal on any grounds (except in relation to statutory records), rather than the more restricted appeal rights applying to third party notices generally.

23. Sub-paragraph (6) amends paragraph 37(6) which concerns notices under paragraph 5 to a partner for checking the tax position of other partners whose identities are not known. This is partly to reflect the changes made to paragraph 5 of Schedule 36 by paragraph 3 of this Schedule and also to make it clear that although HMRC is not required to obtain tribunal approval for a notice, it may choose to do so. In addition, the appeal rights of the partner receiving the notice are extended.
24. Paragraph 12 inserts new paragraphs 37A and 37B into Schedule 36. The existing powers to ask for information in relation to a herd basis election and counteraction provisions are being repealed and Schedule 36 will be used instead. No specific provision is required to achieve this since both concern income tax and corporation tax, to which Schedule 36 already applies.
25. The effect of new paragraph 37A is that the restrictions on giving a taxpayer notice where a tax return had been made (paragraph 21 of Schedule 36) do not apply in relation to a taxpayer notice in relation to a herd basis election. Such a restriction would be inappropriate here since HMRC checks on herd basis elections are conducted outside the normal mechanism of a return and enquiry. Herd basis election rules are in Chapter 8 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) and Chapter 8 of Part 3 of the Corporation Tax Act 2009.
26. New paragraph 37B has a similar effect in relation to a taxpayer notice given to a person to whom a counteraction provision may apply. Counteraction provision is defined in new paragraph 37B(3).
27. Paragraph 13(2) provides for some tidying of paragraph 39 of Schedule 36, without any change of meaning.
28. Paragraph 13(3) and Paragraph 14 make consequential amendments to the headings of paragraphs 39 and 40 of Schedule 36 to reflect the introduction of a new penalty under paragraph 15 below.
29. Paragraph 15 inserts new paragraph 40A into Schedule 36 which provides for a penalty to apply where a person carelessly or deliberately provides inaccurate information or produces inaccurate documents in response to an information notice. Such a penalty existed in section 98(2) of the Taxes Management Act 1970 (TMA) for notices under former information provisions but the replacement is being incorporated into Schedule 36.
30. Paragraph 16 makes minor changes to paragraph 41 of Schedule 36 to improve clarity.
31. Paragraph 17 provides for consequential amendments to paragraph 46 of Schedule 36.
32. Sub-paragraph (4) inserts new paragraphs 46(3)-(5) into Schedule 36 which determine the relevant date within 12 months of which a penalty assessment must be made. The existing rules are now applied to standard or daily default penalties only, and to ensure that the time limit works properly in relation to daily default penalties a third “latest date” is added.
33. Paragraphs 18, 19 and 20 provide for consequential amendments to paragraphs 47, 48 and 49 of Schedule 36.
34. Paragraph 21(3) inserts new paragraph 63(3A) into Schedule 36 which amplifies the definition of VAT in paragraph 63(3) of Schedule 36. New sub-paragraph (3A) (a) repeats what was previously in paragraph 63(3) of Schedule 36. New sub-paragraph (3A)(b) represents new material. The effect is that Schedule 36 will apply for the purposes of amounts accounted for under a particular VAT scheme which are not VAT but are treated as if they were.

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35. Paragraph 22(2) amends the definition of tax position in connection with claims, elections, applications and notices. The purpose of the amendment is to narrow the scope of tax position so that it relates only to claims, etc, made by taxpayers themselves rather than documents given by a third person in connection with someone else's tax position. This is in line with the original policy intention, but clarifies the law.
36. Paragraph 22(3) inserts new paragraph 64(2A) into Schedule 36. This makes it explicit that a person's tax position includes matters relating to the withholding of income, for example, as part of payroll giving.

Background Note

37. [Schedule 36](#) to FA 2008 contains a new set of information and inspection powers to replace the separate main powers that existed for checking a person's position for income tax, capital gains tax and corporation tax on the one hand and VAT on the other. Those new powers also apply to PAYE, the construction industry scheme, student loan repayments and national insurance contributions. They came into force on 1 April 2009.
38. This Schedule makes amendments to clarify points that have been raised and ensure that the powers work as intended.
39. It also introduces a penalty into Schedule 36 to apply where any person deliberately or carelessly provides any incorrect documents or information in response to an information notice issued under Part 1 of Schedule 36. Such a penalty existed in section 98(2) of TMA for fraudulently or negligently providing information etc under information powers that have been replaced by Schedule 36.
40. [Section 95](#) also provides a power to make statutory instruments containing provisions or savings in consequence of or in connection with Schedule 36 to FA 2008. This will allow the repeal of a significant number of information and inspection powers that are no longer required together with related provisions. These powers presently apply to particular types of tax check. The aim is that HMRC will use Schedule 36 instead. This represents alignment, helping both taxpayers and HMRC by putting all the powers in one place. The new powers allow HMRC to ask for a wider range of information in some circumstances, but provide more explicit safeguards for the way in which HMRC asks for information.