

EXPLANATORY MEMORANDUM TO
THE INFORMATION NOTICE: RESOLUTION OF DISPUTES AS TO
PRIVILEGED COMMUNICATIONS REGULATIONS 2009

2009 No. 1916

1. This explanatory memorandum has been prepared by Her Majesty's Revenue & Customs and is laid before the House of Commons by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

This instrument sets out the procedure to be followed in connection with referral of disputes over legal privilege to the tribunal where an information notice is issued under Schedule 36 to the Finance Act 2008.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None.

4. **Legislative Context**

4.1 Schedule 36 to the Finance Act 2008 introduced new information and inspection powers for HMRC to use when checking that taxpayers had returned and/or paid the right tax. The 2008 legislation applied for the purposes of Corporation tax, Income tax (including PAYE), Capital gains tax and VAT. The 2009 Finance Act contains provisions to extend Schedule 36 to other taxes.

4.2 Schedule 36 paragraph 23 (3) and (4) contains vires which allow HMRC to set out procedures in regulations for referral of disputes over legal professional privilege to the tribunal where a notice has been served requiring that information.

4.3 For criminal matters the Orders for the Delivery of Documents (Procedure) Regulations 2000 (SI 2000/2875) provide a parallel but broadly equivalent set of rules.

5. **Territorial Extent and Application**

This instrument applies to all of the United Kingdom. Where a notice was issued outside the United Kingdom the regulations would also apply in theory.

6. **European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 Schedule 36 to the Finance Act 2008 is the main tool which HMRC uses when checking that someone has returned and/or paid the right tax. It includes powers to seek information from taxpayers and from third parties who may hold relevant information about the taxpayer. This information can be obtained during an inspection visit or during correspondence. It also allows information to be obtained from third parties about a taxpayer or class of taxpayers whose identities are not known. Schedule 36 is not a criminal power. The Schedule specifically provides that an information notice cannot require legally privileged material.

7.2 During consultation on Schedule 36 it became apparent that disputes about whether or not information requested by HMRC was covered by legal professional privilege had no satisfactory way of being resolved. The recipient of a notice would have to appeal the notice, or where it was issued by a tribunal they would have to seek judicial review. Alternatively they could just refuse to provide the information and risk incurring penalties. For criminal matters the Orders for the Delivery of Documents (Procedure) Regulations 2000 (SI 2000/2875) provided a way for such disputes to be resolved without requiring the taxpayer to go to the expense of an appeal or judicial review.

7.3 It seemed sensible that there should be some way to resolve disputes about whether information requested in a Schedule 36 notice was covered by professional privilege. External respondents to consultation strongly supported such a mechanism to reduce costs for their clients. The stalemate created by disputes could also adversely affect relationships between HMRC on the one hand and taxpayers and their advisors on the other. An independent procedure was seen as one way of preventing deterioration in relationships.

- *Consolidation*

7.4 This is a stand-alone instrument. There are no plans for consolidation.

8. Consultation outcome

8.1 The draft regulations have been shared with ICEAW, the Law Society and CIOT who have made comments which are reflected in these regulations or which will be dealt with in guidance.

8.2 In particular concerns were raised about whether the list of documents required to be sent to HMRC could of itself breach legal privilege. This concern was seen as valid and the regulations now make it clear that the description of any document is limited to the basic requirement in order for a dispute to be resolved. Furthermore the regulations now state that no description is required where such a description would breach privilege. The requirement for a list of documents has been retained as it is thought that in many cases such a list will substantially reduce the number of documents which the taxpayer has to submit to the Tribunal.

8.3 Other comments made related to procedures. The Law Society suggested that the model in the Civil Procedure Rules could be followed. The reason that the procedures here differ is two-fold. First, they ensure that HMRC only pursue requests for information that is essential to the case. Secondly, the Ministry of Justice recommended a different approach to prevent the Tribunals being swamped with unnecessary referrals.

9. Guidance

HMRC will prepare and publish detailed guidance about the use of this procedure.

10. Impact

10.1 The impact on business, charities and voluntary bodies will be to provide an inexpensive way to resolve disputes about whether material required by an information notice is legally privileged.

10.2 There will be negligible impact on the public sector.

10.3 The powers that this instrument deals with are in the Finance Act 2008 for which an Impact Assessment was published. A separate Impact Assessment for this instrument has not been prepared.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 No special provision for small business has been made.

11.3 Disputes as to whether material is protected by legal professional privilege tend to arise in complex cases. It would be rare for disputes to arise in relation to small businesses.

12. Monitoring & review

It is expected that fewer than a hundred disputes a year will need to be resolved using these procedures and these will mainly be handled by a specialist unit in HMRC which will keep the effectiveness of the procedures under review.

13. Contact

Juliet Roche or Richard Davey at Her Majesty's Revenue & Customs can answer any queries regarding the instrument.

Juliet.Roche@hmrc.gsi.gov.uk 07770 496 008

Richard.C.Davey@hmrc.gsi.gov.uk 0207 147 2391