STATUTORY INSTRUMENTS

2009 No. 1916

REVENUE AND CUSTOMS

The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009

Made - - - -	*16th July 2009*
Laid before the House of Commons	*17th July 2009*
Coming into force - -	*7th August 2009*

The Commissioners for Her Majesty's Revenue and Customs make the following Regulations, in exercise of the powers conferred by paragraph 23(3) and (4) of Schedule 36 to the Finance Act 2008(**a**).

Citation and commencement

1. These Regulations may be cited as the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 and come into force on 7th August 2009

Interpretation

2. In these Regulations—

"document" means information, a document or part of a document;

a "document in dispute" is a document over which there is a dispute between HMRC and a person who has been given an information notice as to whether the document is privileged;

"officer" means an officer of Revenue and Customs;

a "person acting on behalf of" a taxpayer or a third party means any person who is acting on behalf of a taxpayer or third party in relation to an information notice;

"Schedule 36" means Schedule 36 to the Finance Act 2008;

"taxpayer" means a person who is given a notice under paragraph 1 of Schedule 36;

"third party" means a person who is given a notice under paragraph 2 or paragraph 5 of Schedule 36;

"working day" means any day except a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971(**b**).

Application of these Regulations

3. These Regulations apply where there is a dispute between HMRC and a person to whom an information notice has been given either—

(**a**) 2008 c. 9.
(**b**) 1971 c. 80.

(a) during the course of correspondence, or

(b) during the course of an inspection of premises under Schedule 36,

as to whether a document is privileged.

Requirement to provide information and produce documents not in dispute

4. Nothing in these Regulations shall affect—

(a) the requirement under an information notice to provide information or produce a document, which is not in dispute; or

(b) the power under Schedule 36 to inspect premises.

Procedure where information notice given in correspondence is in dispute

5.—(1) The following procedure applies where there is a dispute falling within regulation 3(a).

(2) On receipt of the information notice, the taxpayer, third party or person acting on their behalf shall—

(a) by the date given in the notice for providing information or producing documents, specify in a list each document, required under the information notice, which is in dispute, with a description of the nature and contents of that document;

(b) serve that list on HMRC.

(3) But no description of a document or type of document is required where such description would itself give rise to a dispute over privilege.

(4) Within twenty working days of receiving the list referred to in sub-paragraph (2), HMRC must notify the person who served the list of any documents on the list that it requires to be produced and which it considers are not privileged.

(5) On receipt of notification under paragraph (4), the taxpayer, third party or person acting on their behalf must make an application to the First-tier Tribunal to consider and resolve the dispute and must include copies of the documents which remain in dispute with that application.

(6) The taxpayer, third party or person acting on their behalf shall provide HMRC with proof of service under paragraph (2)(b).

(7) Service for the purposes of paragraph (2)(b) must take place within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days after the date given in the notice for providing information or producing documents.

(8) An application under paragraph (5) must be made within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days of the date of the notification required under paragraph (4).

Procedure where information notice given during inspection of premises is in dispute

6.—(1) The following procedure applies where there is a dispute falling within regulation 3(b).

(2) On receipt of the information notice, the taxpayer, third party or person acting on their behalf shall indicate to the officer carrying out the inspection each document, required under the information notice, which is in dispute.

(3) The taxpayer, third party or person acting on their behalf must place the document or documents in dispute, or a copy of such document or documents, in an appropriate container which prevents the contents being visible.

(4) The container shall be—

(a) sealed, labelled and signed by that person;

(b) countersigned by the officer; and

(c) given into the custody of the officer.

(5) The officer shall deliver the container to the First-tier Tribunal with the seal intact within forty-two working days of having taken custody of it together with an application to that Tribunal to consider and resolve the dispute.

Compliance with information notice

7. Where a taxpayer or third party who has received an information notice, or a person acting on their behalf, complies with the procedure set out in regulation 5 or, as the case may be, regulation 6, those persons shall be treated as having complied with the information notice in relation to the documents in dispute until the First-tier Tribunal decides the status of the document or until an agreement has been reached under regulation 10.

Finding of the First-tier Tribunal

8. When an application is made under regulation 5(5) or 6(5), the First-tier Tribunal shall—

(a) resolve the dispute by confirming whether and to what extent the document, is or is not privileged;

(b) direct which part or parts of a document (if any) shall be disclosed.

9. The First-tier Tribunal must ensure that any document in dispute, or any copy of such document, is not inappropriately disclosed to any person pending the Tribunal's consideration of the status of the document.

Resolution of disputes by agreement

10. A dispute falling within regulation 3 may be resolved at any time by HMRC and the person to whom an information notice has been given reaching an agreement, whether in writing or otherwise.

Dave Hartnett
Bernadette Kenny

16th July 2009 Two of the Commissioners for Her Majesty's Revenue and Customs

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made in exercise of the powers conferred by paragraph 23(3) and (4) of Schedule 36 to the Finance Act 2008 (c. 9). Paragraph 23 of Schedule 36 provides that an information notice given under that Schedule cannot require a person to provide or produce information or documents which are covered by legal professional privilege. These Regulations set out the procedures which apply for referring to the First-tier Tribunal a dispute as to whether information or a document required under an information notice is subject to legal professional privilege.

There are separate procedures depending on whether the notice is given in the course of correspondence or in the course of an inspection under that Schedule. In this respect the detail of regulations 5 and 6 differ slightly to reflect the different circumstances of the requests for information or documents.

Regulation 4 makes it clear that any information or documents requested under Schedule 36, and which are not in dispute, must be provided to HMRC in accordance with the original notice requesting them.

Regulation 5 sets out procedures and time limits for referring disputes to the Tribunal which arise in the course of correspondence. The regulation requires the taxpayer to compile a list of the documents which they consider are covered by privilege. This list is then sent to HMRC to give

them the opportunity to specify which documents are in dispute. This procedure is intended to reduce the number of documents which the Tribunal eventually needs to consider.

The time for referring the matter to the Tribunal is split in regulation 5 to allow for the exchange of details by correspondence. The time allowed also includes the original time for complying with the notice.

Regulation 6 sets out procedures where the dispute arises in the course of an inspection visit.

The regulation contains rules for removing documents during an inspection. These rules protect the person providing the information by ensuring that HMRC officers cannot see that information in advance of the Tribunal's decision. The rules also protect HMRC by ensuring that the documents agreed on are not changed. Regulation 6 does not contain a requirement to produce a list as the nature and contents of documents can be discussed at the inspection visit and then only the disputed documents need to be put into a sealed container and delivered to the Tribunal.

In regulation 6 the time allowed for referral to the Tribunal is longer. This is because the request and removal of documents is more immediate and the longer time ensures that both HMRC and the person providing the documents have a similar time to reflect on whether the items actually need to be referred to the Tribunal.

Regulation 7 makes is clear that where information or documents are referred to the Tribunal under these regulations the notice under Schedule 36 will be treated as having been complied with until such time as the Tribunal makes a decision about the status of the information or documents.

Regulation 8 makes it clear that the tribunal may either direct that the whole of a document is covered by privilege or that part of it is so covered. It also provides that the Tribunal must direct which part or parts of a document (if any) may be disclosed.

Regulation 9 provides for the security of any document pending the determination of its status by the Tribunal.

Regulation 10 allows for a dispute to be resolved by agreement at any time, including after the document or information has been delivered to the Tribunal.

A full and final Impact Assessment has not been prepared for this instrument as no impact on the private or voluntary sectors is foreseen.

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