SLAUGHTER AND MAY

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Responding to Schedule 36 Notices: A Practical Guide

Client briefing

Receiving a Schedule 36 notice requires a measured, strategic response. Taxpayers should assess validity before challenging or complying, ensuring requests are "reasonably required" to check the tax position and only cover documents within their "possession or power". Case law limits fishing expeditions and supports challenging overly broad notices. Early engagement with HMRC to narrow scope, agree search parameters and manage deadlines is key. Careful thought around privileged documents is paramount and a thorough, litigation-standard review upfront supports informed engagement, preserves control of the enquiry process and avoids repeated work in any later litigation.

As one of HMRC's key information-gathering tools, Schedule 36 of the Finance Act 2008 ("Schedule 36") notices can (rightly) be an effective part both of establishing the relevant facts needed to resolve enquiries and disputes and giving HMRC stakeholders assurance that the taxpayer's version of events has been properly tested. However, the receipt or threat of one often provokes a combination of frustration and fear of forthcoming cost for taxpayers. This is particularly so when a notice is cast widely or appears to proceed on a misunderstanding of the relevant transaction or associated law.

In many instances, the combination of financial penalties for failing to comply with a valid Schedule 36 notice and/or broader consideration of the downsides of engaging in satellite litigation means taxpayers spend considerable time and effort producing voluminous materials in short order that HMRC then take time to consider (and, often, discount). Helpfully, recent decisions are a reminder of the importance of first considering whether HMRC have the power to request the information in the notice.

For a Schedule 36 notice to be valid, HMRC may only require documents that are:

- "reasonably required" to check the taxpayer's tax position; and
- within the taxpayer's "possession or power".

Both are matters that HMRC must establish and that the taxpayer should consider and can challenge.

Reasonably required

The first test is whether the information or document is reasonably required for the purpose of checking the taxpayer's tax position. It is not whether HMRC would find the material interesting, whether it might be useful in a general sense, or whether it could open up a new or wider line of enquiry.

That said, the "reasonably required" threshold does not mean that HMRC must prove their case before they can ask questions. Schedule 36 is an investigatory regime, and a notice may be justified precisely because HMRC do not yet know the answer. HMRC are entitled to know the full facts relevant to a person's tax position before deciding whether, and what, to assess (*S Price v HMRC* [2011] UKFTT 264 (TC)) and an element of uncertainty or speculation on HMRC's part does not render a request invalid.

HMRC's information-gathering powers do nonetheless have limits. The case law makes clear that there must be a rational connection between the information and documents requested and the underlying investigation or enquiry (*R (Kotton) v First-tier Tribunal (Tax Chamber)* [2019] EWHC 1327 (Admin)). A mere desire for background information is insufficient to justify a notice and equally a broadly drafted request will not be valid if, in reality, HMRC are saying give us "all available documents because they form so large a class of documents that we are bound to find something useful" such that it essentially amounts to a "fishing expedition" (*R (Derrin Brothers Properties Ltd) v HMRC* [2016] EWCA Civ 15). Documents that are merely informative, or that provide useful context, are not reasonably required (*Parker Hannifin (GB) Limited v HMRC* [2023] UKFTT 00971 (TC)).

Against this background, the most effective course of action will be to engage early with the case team and press them to articulate why the information is needed. Targeted suggestions to narrow the scope, rather than refusing engagement altogether, usually result in the best outcome. Where a notice is very broadly drafted, such as the all too common example of asking for any documents and emails relating to a particular project, useful limiters include: agreeing particular relevant individuals whose mailboxes will be searched, narrowing date ranges for any collection or review, and using technology to filter irrelevant material (whether established tools like continuous active learning to rank documents or newer AI systems). There can also be real merit in taking a search in stages so as to avoid advancing too far down any evidentiary cul-de-sacs. Upfront agreement on search parameters helps avoid later argument that the search was too narrow and incurring disproportionate cost reviewing material that HMRC did not really need.

The amount of information already provided before the notice is issued will also be relevant. In *Lifeplus Europe Ltd v HMRC* [2026] UKFTT 797 (TC) ("Lifeplus"), the FTT observed that "HMRC have not explained why the information they need is not contained in all of the information and documents they have received so far". It is therefore always advisable to keep a clear log of everything provided to date.

If compliance by the deadline HMRC have set in the Schedule 36 notice is unrealistic, ask for an extension promptly and explain why. Schedule 36 requires compliance within the period reasonably specified in the notice, so reasonableness cuts both ways: taxpayers should not ignore deadlines, but HMRC should be prepared to accommodate a credible review timetable for large or complex requests. If HMRC push for a shorter deadline, test whether they will match that in their review of what is provided.

Possession or power

The second major question is whether the requested documents are in the taxpayer's possession or power.

Whether requested documents are in the taxpayer's possession or power can and does raise difficult questions in a modern corporate group, where documents may be held by a non-UK parent, a central tax function or a cloud provider. The position is further complicated by modern technology, including AI tools that allow data to be mined from a wider set of sources across the group. It is worth noting that the Government introduced draft legislation on 13 July 2026 as part of the Finance Bill 2026-27 to bring in a number of changes to Schedule 36 to 'help HMRC access and process information in a modern digital economy'. This includes changes to section 114 of the Finance Act 2008 which currently allows inspection of 'computer records'. The amended provisions would instead refer to 'digital information' in an effort to clarify how section 114 applies where relevant tax records or information are found in, or through, modern digital, cloud-based and/or software-driven systems.

It is sufficient for HMRC to raise a *prima facie* case that the documents and information are in the taxpayer's possession or power; the burden then shifts to the taxpayer to show that they are not (*HMRC v Mattu* [2021] UKUT 245 (TCC)).

Power includes a presently enforceable legal right to obtain a document, but it also extends to situations where there is a "standing or continuing practical arrangement" with a third party to access it (*Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation* [2021] EWHC 2904 (Comm) ("Airfinance") and *Lifeplus*). It is not generally sufficient, however, to demonstrate a close legal or commercial relationship between the party and the third party — such as parent and subsidiary, or employer and employee — because "something more is required" (*Airfinance*). The fact that the same individuals hold positions in multiple group companies does not alter this: they owe duties to each company separately and cannot be compelled to use their influence in a way that would create conflicts of interest (*Lifeplus*).

In practice, where documents are held by a central tax function or another group company outside the UK, HMRC are unlikely to be impressed by a formalistic assertion that the documents are held elsewhere without serious attempts being made to request those documents (*One Call Insurance Services Ltd v HMRC* [2022] UKFTT 184 (TC)).

It is also worth considering whether HMRC could obtain the requested documents through exchange of information mechanisms in any event. Forcing HMRC down a treaty route may achieve little if the documents will ultimately be obtained and the taxpayer simply appears obstructive.

Conversely, if the taxpayer genuinely has no right or practical ability to obtain the material, that should be explained clearly and properly evidenced. A careful record should be kept of the searches conducted, requests made and responses. Such records may prove important if HMRC later allege non-compliance or seek to impose penalties.

It is worth noting that in transfer pricing disputes Paragraph 37C qualifies the "possession or power" restriction for certain transfer pricing documentation, allowing HMRC to compel a UK group company to produce such documents that are in the possession or power of another company within the same MNE group.

Another often encountered source of friction is around deleted documents (especially non-email communication channels where retention is commonly less clear-cut than emails). There is often a balance to be struck between relying on what's expected under a retention policy and the time and cost of a full investigation of potential backup sources. If litigation is reasonably in prospect – whether on the whole enquiry or specific issues – care will need to be taken to adhere to court preservation obligations too. In short, careful investigation and documentation of what is (and is not) available at the outset is key.

Privilege

Both legal advice privilege, which protects confidential communications between a client and its lawyers made for the purpose of giving or receiving legal advice, and litigation privilege, which protects documents created for the dominant purpose of litigation, may apply depending on the nature of the material in question.

Privileged documents are excluded from HMRC's information-gathering powers, but HMRC may still ask for them.

It is worth considering whether to waive privilege tactically where a document is helpful to the taxpayer's position, although this commonly requires consideration beyond the specific tax matter (e.g. if the transaction under HMRC investigation involved third parties). For documents of the same type or subject matter, cherry-picking is generally not permitted: if privilege is waived over one document, all other privileged documents of the same type or subject matter may be treated as waived too.

A limited waiver to HMRC would not prevent HMRC from disclosing the documents to other tax authorities under information-sharing obligations in treaties, or under OECD international exchange arrangements, where HMRC may be obliged to pass relevant information on spontaneously, without even being asked. If a document is helpful in the UK but damaging elsewhere, disclosure may solve one problem while creating another. We have seen this play out in both directions: HMRC opening an enquiry on the basis of information passed to it by another tax authority, and HMRC passing information to another tax authority, prompting an enquiry in that jurisdiction.

As with the scope of an information notice, agreeing an approach with HMRC is hugely preferable to resolving the position document by document before the FTT under the Information Notice: Resolution of Disputes as to Privileged Communications Regulations SI 2009/1916.

Data protection and confidentiality

Two further questions which arise frequently. Schedule 36 gives no exclusion for personal information (e.g. of individuals involved in the relevant project) or confidentiality (e.g. obligations owed to transaction counterparties). Both require consideration on a case-by-case basis, usually with an emphasis on removing irrelevant material or, more costly, redactions.

The importance of a full review and clear approach

All of that means that a taxpayer will rarely be comfortable handing over materials in bulk without first establishing an overall process (and approach to key issues such as privilege) and then reviewing what will ‘cross the line’. That review should generally be conducted to a standard appropriate for potential litigation, even where the parties hope the enquiry will settle. The purpose is not only to avoid over-disclosure, for example of irrelevant, privileged or out-of-scope material, and to comply with data protection obligations. It is also to understand the taxpayer’s own evidential position and avoid having to do the same thing again if matters end up before the FTT. The taxpayer and its advisers need to assess the strengths and weaknesses of the technical position and decide how best to explain that position to HMRC.

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