

Analysis

Recent judicial review challenges to HMRC search warrants

Speed read

Several recent judicial review cases have resulted in search warrants obtained by HMRC being quashed and the searches executed pursuant to the warrants being declared unlawful. While some of HMRC's failures might have been caused by errors in drafting the warrants, the material misleading of the Crown Court judge by HMRC in order to obtain the warrants which occurred in *Hart* raises more profound concerns. HMRC needs to exercise more care when applying for search and seizure warrants, and it should temper the 'win at all cost' attitude that increasingly seems to affect its approach to tax investigations.



Patrick Cannon

15 Old Square Tax Chambers

Patrick Cannon is a barrister at

15 Old Square and is the author

of *Tolley's Stamp Taxes* published annually.

Email: taxchambers@15oldsquare.co.uk; tel: 020 7242 2744.

We all have a strong interest in HMRC being able to obtain and execute search and seizure warrants against suspected tax evaders, who might refuse to cooperate or destroy evidence if less intrusive methods of inspection were used.

However, several recent cases have resulted in search warrants obtained by HMRC being quashed and the searches executed pursuant to the warrants being declared unlawful. The reasons for this include:

- material misrepresentations by HMRC to the judge when seeking the warrant;
- the lack of proper precision by failing to specify the material sought or the offences alleged; and
- the failure to specify who the alleged offenders were.

Misleading the judge

In *R (Hart and others) v The Crown Court at Blackfriars and HMRC* [2017] EWCA 3091 (Admin) (in which the author appeared jointly for the claimants), the court noted that the applicant for a warrant has a duty to make full and frank disclosure and to draw the judge's attention to any material facts, including those which indicate that the issue of a warrant may not be appropriate. If information is withheld which, if disclosed, would have led the judge to refuse to issue the warrant, then the warrant can be set aside in judicial review proceedings.

In this case, HMRC had been conducting a detailed investigation into the claimants' business model; and the information demands made by HMRC had been so extensive as to lead the claimants to suspect that HMRC might be engaged in a strategy of economic disruption to their business. The civil investigation became a criminal investigation in July 2016. One of the claimants then made

a formal complaint and applied for a case review regarding the conduct of HMRC; and he sent copies this paperwork to HMRC's investigating officers in November 2016.

In December 2016, HMRC applied for search warrants before Judge Hillen at Blackfriars Crown Court. The application sought to justify the issuing of search warrants, rather than a less intrusive production order. (The claimants would have been given notice of such an order and time to comply with it.) HMRC said that a production order would seriously prejudice its investigation, as there had been such a serious failure of cooperation that giving notice to the claimants may result in them acting to undermine the investigation, for example, by destroying documents.

This was not true and was not accompanied by sufficient disclosure of the claimants' previous cooperation with HMRC's enquiries so as to allow the judge to give fair consideration to the matter. There had been, according to the divisional court, a material misrepresentation of the facts by HMRC and a material failure to draw relevant matters to the judge's attention. If a fair picture had been given to the judge, he might have refused to issue the warrants. The warrants were therefore declared unlawful and costs were awarded to the claimants, who remain under criminal investigation.

Too vague and too wide

In *Superior Import/Export and others v HMRC* [2017] EWHC 3172, the High Court found that search warrants executed by HMRC had been unlawful.

HMRC had carried on a criminal investigation in relation to large scale excise duty evasion and the subsequent laundering of the criminal funds generated. The total tax loss to HMRC since April 2010 was estimated at over £440m. The appellants were challenging the Birmingham Magistrates' Court's decision to grant three search warrants under the Police and Criminal Evidence Act 1984 s 8, following an application by HMRC. The appellants also challenged the lawfulness of the execution of the warrants by HMRC.

The court rejected the appellants' contentions that the warrants were too wide and that there had been excessive searching. It observed, however, that the warrants allowed HMRC to search for material that its officers deemed relevant. The warrants thus 'impermissibly delegated the responsibility of applying the access criteria of s 8 and therefore failed to provide the protection required by s 15(6)(b)'. The court also noted that there was 'no attempt whatsoever to identify the nature of the fraud or suspected offences'. Similarly, in relation to the 237 companies and individuals named on the warrants, no 'proper particulars' were given. Not surprisingly, the warrants were quashed.

Failure to state who the offenders were and what the offences were

In *Donaghy and others Re Judicial Review* [2017] NIQB 123, the applicants were former partners in KPMG and were also partners in a separate enterprise, the Focused Finance Partnership (FFP). HMRC had opened a civil enquiry into FFP's tax affairs.

On 11 August 2014, HMRC had thanked Donaghy for his 'detailed and comprehensive reply' to some enquiries and said that it would revert to him after a pre-arranged period of leave by the investigating officer concerned. No further contact was made by HMRC until 25 November

Unexplained wealth orders

Criminal Finances Act 2017 s 1 inserts a new s 362A into the Proceeds of Crime Act 2002, which allows HMRC and several other enforcement bodies to ask the High Court to make an unexplained wealth order (UWO) in respect of property worth more than £50,000. A UWO requires the person specified to provide a statement setting out their interest in the property and how they obtained it, including how they paid for it, and to produce supporting documents. Before making the order, the High Court must be satisfied that:

- there are reasonable grounds to believe that the person holds the property;
- his known sources of lawfully obtained income were insufficient to obtain the property; and
- he is either a 'politically exposed person', i.e. an individual with prominent public functions outside the UK or the European Economic Area, or someone with family or associates in that position; or
- there are reasonable grounds to suspect that he has been involved in serious crime, whether in the UK or elsewhere, or is connected with such persons.

Property obtained before s 362A came into force on 31 January 2018 is also covered. Property held within a settlement is treated as directly owned by the person to the extent of his interest in the settlement.

Failure to comply with a UWO gives rise to a

presumption that the property is recoverable as the proceeds of crime under the 2002 Act Part 5. A person making a statement that he knows to be false or misleading, or that is reckless in making such a statement, commits an offence carrying up to two years in prison, or a fine, or both.

The person is taken to hold property if he has effective control over it, e.g. via a company, or is the trustee or beneficiary of a settlement in which the property is held.

HMRC may apply to the court for a UWO without notice. When the court makes a UWO, it can also make an interim freezing order over the property, preventing anyone with an interest in the property from dealing in any way with it, and the court can appoint a receiver to manage the property in the interim period.

The European Convention on Human Rights (ECHR) article 8 and First Protocol article 1 protects a person's home and peaceful enjoyment of possessions and the right not to be deprived of them through arbitrary action. Any intrusion of those rights by the state has to be shown to have been necessary and proportionate. HMRC will therefore need to tread carefully in obtaining a UWO and it is likely to choose its first few cases by selecting persons who, by virtue of their position, lifestyle, wealth and notoriety, give them the prospect of an easy win.

2015, when it executed search warrants at the homes and workplace of the partners.

On judicially reviewing the warrants, the court found that nowhere on the face of the warrants to search the residential premises did they specify who the alleged offenders were, even though each warrant explained that the target material 'may link the alleged offenders to the offences'. The judge said this made it impossible for the recipients of the warrants to know which material fell within the authority to search and which fell outside. The warrants to search the business premises failed to specify both who the suspects were and what the offences were, and gave the recipients even less to go on in deciding the scope of the authority to search.

In addition to those defects, the warrants stated that the investigators could also search for 'other items which are likely to be kept' at the target address. This phrase was held to actively undermine all attempts to delimit and make clear the scope of the authority to search. For all these reasons, the warrants were found to have been unlawful.

Conclusion

The failures described above are shocking, given that any search and seizure will *prima facie* breach article 8 of ECHR and article 1 of the First Protocol (the right to privacy and peaceful enjoyment of possessions), unless the intrusion is shown to have been necessary and proportionate. While the failures in *Donaghy* and *Superior Export/Import* might have been caused by simple incompetence in drafting the warrants, the material misleading of the Crown Court judge by HMRC in order to obtain the warrants which occurred in *Hart* raises more profound concerns. It is to be hoped that HMRC is urgently and actively addressing these concerns, particularly in the light of its extensive new powers to seek unexplained wealth orders and to seize cash in taxpayers' bank accounts without a court order. ■



Five recent highlights on taxjournal.com

- 1. The Cross-Border Trade Bill**
Leaving all options open? Sara Luder & Philip Higham (Slaughter and May) examine the Bill which tries to accommodate all plausible outcomes for tax on trade post-Brexit.
- 2. Termination payments**
Alasdair Friend (Abiss Cadres) explains what's changing from 2018/19 onwards.
- 3. Extending CGT to non-resident investors in UK real estate**
A level playing field? Kirsten Prichard Jones & Rhiannon Kinghall Were (Macfarlanes) examine what's proposed.
- 4. The royalties withholding tax consultation**
Non-UK UK source? Jeremy Cape and Bernhard Gilbey (Squire Patton Boggs) review the proposed wider UK tax net for royalties.
- 5. US tax reform**
The 'BEAT' goes on... Donald L Korb & Andrew Solomon (Sullivan & Cromwell) examine the Act.

To access all articles, visit www.taxjournal.com/highlights.