



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Case No. EA/2011/0202

**ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50342294
Dated 8 August 2011**

Appellant: Paul Doherty

Respondents: (1) Information Commissioner
(2) Her Majesty's Revenue and Customs (HMRC)

Date of telephone hearing: 19 January 2012

Date of decision: 25 January 2012

Before

HH Judge Shanks

Marion Saunders

Malcolm Clarke

Representation:

Appellant: In person

HMRC: Holly Stout

The Information Commissioner did not participate in the telephone hearing, having indicated in writing in advance that he accepted that the appeal should be allowed for the reasons accepted by HMRC.

Subject area covered:

Law enforcement s.31

Decision

The appeal is allowed and the following substituted decision notice is issued

Substituted Decision Notice

Public authority: Her Majesty's Customs and Excise

Name of Complainant: Paul Doherty

The Substituted Decision

As set out below, the Public Authority was obliged to communicate the requested information to the Complainant under Part I of the Freedom of Information Act 2000 because, although it was exempt under section 31(1)(d), in all the circumstances of the case the public interest in disclosure outweighed that in maintaining the exemption.

Action Required

None: the Public Authority has already supplied the information to the Complainant in the course of the appeal.

Dated 25 January 2012

Signed

HH Judge Shanks

Reasons for Decision

1. This appeal concerns a request for information under the Freedom of Information Act 2000 made by Mr Doherty on 14 May 2010 by which (in effect) he sought access to certain parts of the HMRC staff manual on inheritance tax which had been redacted from the version published on the internet. The relevant sections of the manual were IHTM20511-20513. IHTM20511 described a scheme which was designed to avoid inheritance tax; IHTM20512 described legislation (para 5(4) of Schedule 20 to the Finance Act 1986) which was designed to counteract the scheme; IHTM20513, which was redacted in full, stated as follows:

A revised version of the original scheme which circumvented FA86/SCH20/para5(4) was brought out. Under this version the original policy was not put into a settlement but into a bare trust for the absolute benefit of a named beneficiary.

This exposed the loophole in the 1986 legislation – a loophole which has not yet been plugged.

2. By the time the Information Commissioner issued his decision notice in this case on 8 August 2011 the only information within his request which was being withheld from Mr Doherty was the final sentence of IHTM20513; the Commissioner agreed with HMRC that this was exempt information

under section 31(1)(d) of the Act and that the public interest in maintaining the exemption outweighed that in disclosure of the information. Mr Doherty appealed against that decision.

3. Soon after the Tribunal gave directions, HMRC conceded on 10 November 2011 that the final sentence of IHTM20513 should have been disclosed at the time it was requested on the basis that the public interest in its disclosure outweighed that in upholding the exemption, contrary to the line taken by them and the Commissioner up till then. HMRC state that this change of position arose because at the time of the request they believed that the “loophole” referred to was not widely known but they subsequently discovered that the legislative gap was more widely known among tax professionals than they had thought.
4. The withheld information was therefore supplied to Mr Doherty and it was conceded (rightly in our view) by both HMRC and the Commissioner that the appeal should be allowed. However, Mr Doherty has persisted with his appeal because it remains his contention that section 31(1)(d) did not apply to the information at all and he believes that the point may be relevant in relation to other information in HMRC’s staff manuals. HMRC and the Commissioner continue to maintain that the section did apply to the information. This is the sole issue which we are required to resolve.
5. Section 31(1)(d) provides as follows:

Law enforcement

31(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

...

d) the assessment or collection of any tax ...¹

¹ It is well established in the jurisprudence that the phrase “would be likely to” in the context of this subsection means “may very well” and connotes a “real and significant risk” of the relevant prejudice.

HMRC maintain simply that the disclosure of its own belief that there was a “loophole” in relation to inheritance tax which had not been plugged would have (or at least “may very well” have) caused some taxpayers to organize their affairs in a way they would not otherwise have done in order to take advantage of the loophole and avoid inheritance tax that would otherwise have been due; if even one taxpayer took this step “the assessment or collection of [inheritance] tax” would be prejudiced in that there would be less of it to assess and collect.

6. Although his position was not always entirely clear to us, there were, as we understood it, really three arguments made by Mr Doherty as to why section 31(1)(d) did not apply to the withheld information. First, he said in effect that section 31 is designed only to help prevent actual wrongdoing or breaches of the law and that, since taking advantage of the “loophole” would not involve any illegality, section 31(1)(d) could not apply in this case. There is nothing in the words of the subsection in our view which would lead to such a conclusion. We consider it to be clear that if disclosure of requested information would, or may very well, result in less tax being lawfully due than would otherwise have been the case, then the “assessment or collection of [that] tax” would (or may very well) be prejudiced. The heading “Law enforcement” at the top of section 31 does not cause us to change this view, both because of the general limitations on the use of headings as an interpretative aid in legislation to which HMRC referred us and in light of the fact that within section 31 there are a number of interests which could be prejudiced in ways which would clearly not involve any breach of the law (eg investigating the cause of an accident or securing health, safety and welfare of persons at work).
7. The second argument was in effect that HMRC’s views about a loophole should have been publicised and made clear so that trustees and other potential taxpayers knew where they stood rather than being left unclear as to the effect of the 1986 legislative changes. This seems to us a potentially powerful point in relation to the public interest balance (which of course HMRC and the Commissioner now concede) but irrelevant in

relation to the logically prior question whether the exemption in section 31(1)(d) applied at all. In the context of the public interest balance we would note parenthetically the distinction, in the complex world of tax, between misleading people about their legal rights on the one hand and not drawing their attention to the possibility of arranging their affairs in an artificial but legal way solely in order to avoid tax which would otherwise be due.

8. The third argument, which was really only deployed in the course of the hearing, was to the effect that public disclosure of the fact that HMRC regarded the revised scheme as a loophole which had not been plugged would have led to amending legislation and thus benefitted rather than damaged the assessment and collection of inheritance tax. This assertion is clearly rather speculative and dependent on many unknown factors and we take Ms Stout's points that HMRC has to act in a practical way and manage its resources and that there will be occasions like this one where they will choose to monitor the position as to whether a loophole is being used and, if it is not being used excessively, to save the public money and parliamentary time involved in amending legislation. In any event, it does not undermine the contention that if the withheld information was disclosed there would be a real and significant risk that, pending amending legislation, less inheritance tax would be assessed and collected than would otherwise be the case.
9. We therefore reject Mr Doherty's arguments and we accept that section 31(1)(d) applies to the information on the basis set out in paragraph 5 above. We should record that the evidence put forward by HMRC in relation to prejudice was not at all substantial; however we accept Ms Stout's point that once HMRC had made their concession on 10 November 2011 the focus of the dispute was really on the meaning and scope of section 31(1)(d) rather than the factual position and that, in any event, it is pretty much axiomatic that disclosure of HMRC's view that there is a loophole in tax legislation will lead to some taxpayers taking advantage of it.

10. In the circumstances, although we unanimously agree that Mr Doherty's appeal should be allowed and a substituted decision notice issued as set out above, we are also unanimously of the view that HMRC have succeeded on the issue which was left to be addressed at the hearing. HMRC indicated in their written submissions that in these circumstances they would invite the Tribunal to consider making a costs order against Mr Doherty under rule 10(1)(b) of the rules of procedure. If HMRC wish to make such an application they must do so in accordance with rules 10(3) and (4). Without pre-judging such an application our present view is that, although somewhat academic in the circumstances, Mr Doherty's position at the hearing was not wholly unarguable or pointless and that he was not acting unreasonably in maintaining it.

Signed

HH Judge Shanks

Dated 25 January 2011