

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 August 2011

Public Authority: Her Majesty's Revenue & Customs
Address: Ferrers House
PO Box 38
Castle Meadow Road
Nottingham NG2 1BB

Summary

The complainant requested information about inheritance tax. Her Majesty's Revenue & Customs explained that some of the requested information was already published and provided links to this; it also withheld some information under section 31(1)(d). The Commissioner finds that Her Majesty's Revenue & Customs has applied section 31(1)(d) appropriately.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant has made requests to Her Majesty's Revenue & Customs ("the HMRC") for withheld information in its inheritance tax manual. He is a trustee of a loan trust and the present request is specifically concerned with establishing whether these types of trusts have resulted in loss of revenue to the public purse and potentially compromised any unsuspecting trustees.
3. Loan trusts are a way of giving away money without losing access to the assets. The assets remain the property of the donor but the growth and income made by the trust from those assets belong to the trust. It is

also a good way of creating a regular source of funds which can be used as income. Loan trusts now fall under the new rules for inheritance tax and are classed as "CLTs" (Chargeable Lifetime Transfers).

The Request

4. On 14 May 2010 the complainant made the following request:

'Thank you for your letter of 8 October 2009. I now respond in the following terms,

- 1. You accept, under "Original Schemes", the legal necessity of a "small gift" so as to create the trust before any can be made by the Settlor thus effecting tax avoidance. That is not the case here.*
- 2. The Norwich Union has confirmed that a "...promise to lend..." constitutes the legal "gift" requirement to create a valid trust. Having created a trust on that basis, the then legal appointed trustees, if the instrument so provides, borrows monies from the settlor. There is no gift in the latter set up unless a "promise to lend" so constitutes.*

Can you please confirm the revenue's view, given that I am denied access to the relevant information by the FOI exemption, that a "promise to lend" is sufficient to constitute a gift.'

5. On 9 June 2010 the HMRC responded. It explained that some of the requested information was already published and provided details. It also explained that as the request did not specify which section of the guidance the complainant was interested in, it had identified that the information the complainant wanted was held within IHTM2000 Life Policies. Within this there were two pieces of redacted information that it considered were relevant: IHTM20061 and IHTM20513. The HMRC confirmed that it was withholding these two pieces of information under section 31(1)(d).
6. On 14 June 2010 the complainant requested an internal review; on 27 July 2010 the HMRC confirmed that it had carried out an internal review and it was withholding the information on the same ground.

The Investigation

Scope of the case

7. On 10 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The public interest is best served by the release of this information as it will highlight the error that has pervaded this area of avoidance for over 25 years.
 - HMRC has been unable to remedy the confusion surrounding loan trusts for at least 25 years and continues to deny to others that the information requested is detrimental to trustees and the public purse.

Chronology

8. Over the course of the Commissioner's investigation there was correspondence between the Commissioner and the complainant and the Commissioner and the HMRC. The HMRC disclosed some information during the Commissioner's investigation. On 5 July 2011 the complainant confirmed that the remaining issue for him was one final sentence withheld under section 31(1)(d); this sentence is in IHTM20513.
9. A copy of the withheld information is contained in the Confidential Annex at the end of this notice (see appendix 1).

Analysis

Exemptions

Section 31 – Law enforcement

10. Section 31 provides an exemption where disclosure of information would, or would be likely to, prejudice various functions relating to law enforcement. The full text of section 31 is set out at the legal annex at the end of this notice (see appendix 2).
11. Consideration of this exemption is a two stage process. First, in order for the exemption to be engaged it must be at least likely that prejudice would occur to the process specified in the relevant subsection(s). Secondly, the exemption is subject to the public interest

test. The effect of this is that the information should be disclosed if the public interest favours this, despite the fact that the exemption is engaged.

12. In this case the HMRC is citing section 31(1)(d) with regard to the withheld sentence. This deals with the assessment or collection of any tax or duty or of any imposition of a similar nature.

Engagement of the exemption

13. The HMRC is responsible for ensuring the correct tax, including inheritance tax, is paid at the right time.

The nature of the prejudice

14. The Commissioner's view is that when considering the use of the term 'prejudice' it is important to consider it in the context of the exemption at section 31. It implies not just that the disclosure of information must have some effect but that this effect must be detrimental or damaging in some way.
15. In support of its reasons for withholding the information under section 31(1)(d), the HMRC explained that disclosure would be likely to undermine the compliance activity which the HMRC undertakes with regard to the assessment and collection of inheritance tax.
16. The HMRC also explained that if it disclosed information about its compliance regime and risks into the public domain, it would allow individuals intent on abusing the system to arrange their affairs or rehearse arguments to make it less likely that they would be detected.
17. The Commissioner has viewed the exempt information and is satisfied that section 31(1)(d) is engaged. Therefore he will now go on to consider the public interest arguments.

Public interest arguments in favour of disclosing the requested information

18. The Commissioner acknowledges that when considering public interest factors in favour of maintaining an exemption, a public authority should only consider the particular interest which the exemption protects. In this case it concerns the assessment or collection of any tax or duty or of any imposition of a similar nature.
19. In contrast the public interest factors in favour of disclosure are not restricted in this way. The Commissioner recognises that the factors in

favour of disclosure in this case include the general public interests in the promotion of transparency, accountability and understanding of the issues concerning the assessment or collection of inheritance tax.

20. The complainant argued that the withheld information should be disclosed as it would assist in the better understanding of loan trusts when used as tax avoidance schemes. He explained that disclosure would confirm any error and misunderstanding of these types of trusts.
21. The complainant also argued that disclosure of the requested information would result in a windfall of substantial unclaimed tax revenues. He explained that this would happen as legislative changes were successful in creating a tax event, not on death as now, but on the date of the scheme arrangement.

Public interest arguments in favour of maintaining the requested information

22. The HMRC acknowledged that there is a strong public interest in disclosing information about inheritance tax so that people understand how it works. However it argued that disclosure of the sentence in question would identify a continuing risk in relation to tax avoidance. It supported this point by providing information about its anti avoidance strategy published on its website. This explained that tax loss from avoidance is estimated to run into several billion pounds across both direct and indirect taxes.
23. The HMRC also argued that the vast majority of people do not participate in tax avoidance and will stand to benefit from its anti-avoidance strategy. It also argued that tax evasion and avoidance unfairly shifts the tax burden onto honest taxpayers and diverts funds away from the public purse.

Balance of the public interest arguments

24. The Commissioner has considered all of the arguments. He accepts that there is a public interest in knowing how trusts work. He also accepts that trustees should be able to find out how to administer trusts they have responsibility for. The Commissioner notes that HMRC has explained that it has provided the complainant with technical advice on a number of points in the past.
25. However, the Commissioner must consider whether or not it is appropriate for the requested information to be released to the general public. The wider public interest issues must also be considered when deciding whether or not the information requested should be disclosed. In reaching his decision about disclosure in this case, the

Commissioner has taken into account the fact that neither the identity of the applicant nor any specific personal reasons for wanting the requested information are relevant to the consideration of a freedom of information request.

26. The Commissioner notes that the information in question relates to both the collection of tax and tax avoidance.
27. The Commissioner considers that maintaining public confidence in the collection of tax is crucial to the public interest. In his view, the public interest is not served by releasing information which may provide people with a way to avoid paying tax. He also accepts that tax avoidance would be likely to have an impact on the public purse in that some people would be likely to use the information to avoid paying tax.
28. In this case, the Commissioner has accepted that it would be likely that an individual with access to the information could use it in ways prejudicial to the HMRC. He considers that this is more than a hypothetical possibility and that this adds weight to arguments in favour of maintaining the exemption in this case.
29. The Commissioner acknowledges that the HMRC has a responsibility to collect taxes of all kinds including inheritance tax. It follows that he considers that it is not in the public interest for the HMRC to release information which would allow individuals to avoid paying tax. He therefore considers that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

30. The Commissioner's decision is that the HMRC dealt with the request for information in accordance with the Act.

Steps Required

31. The Commissioner requires no steps to be taken.

Other matters

32. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

- Internal review: The complainant requested an internal review on 14 June 2010 but the HMRC did not confirm it had carried it out until 27 July 2010. Although the Act does not specify a time limit for carrying out an internal review, the Commissioner considers that 20 working days should be considered a reasonable length of time. If there is going to be a delay in carrying an internal review out, the Commissioner would expect a public authority to inform the complainant of the delay and provide a new date.
- The Commissioner notes that during his investigation the HMRC agreed to publish some of the withheld information; however he notes that there was a delay. If a public authority agrees to publish relevant information the Commissioner would expect it to do it as soon as possible.

Right of Appeal

33. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

34. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 8th day of August 2011

Signed

**Faye Spencer
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 31(1) provides that –

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-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

Section 31(2) provides that –

The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,

- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

Section 31(3) provides that –

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).