



**TC01905**

**Appeal number: TC/2011/06569**

*Information Notice, Schedule 36 Finance Act 2008*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KARL D'SOUZA**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S      Respondents  
REVENUE & CUSTOMS**

**TRIBUNAL:  
JUDGE ALISON MCKENNA  
NIGEL COLLARD**

**Sitting in public at The Appeals Service, Brighton on 21 February 2012**

**Peter Clarke for the Appellant**

**Mark Ratcliff of HMRC for the Respondents**

## DECISION

1. This appeal concerns a notice to produce documents dated 12 August 2011 (“the Information Notice”). The Information Notice was served on Mr D’Souza by HMRC pursuant to paragraphs 1 and 21 of Schedule 36 to the Finance Act 2008. The Information Notice requires Mr D’Souza to produce “bank statements in relation to accounts that you may have held outside the UK between 6 April 2006 and 5 April 2009”.
2. By a Notice of Appeal dated 18 August 2011, Mr D’Souza appealed against the Information Notice. Mr Clarke, on behalf of Mr D’Souza, argued that the Information Notice was unlawful and asked the Tribunal to set it aside.
3. The Tribunal’s jurisdiction in this matter derives from paragraphs 29 and 32 (3) of Schedule 36 to the Finance Act 2008. The Tribunal, when determining an appeal against an Information Notice, may confirm the Information Notice or any requirement in it, vary the Information Notice or such a requirement or set aside the Information Notice or such a requirement.

### *The Facts*

4. The essential facts in this appeal are not in dispute and appear at paragraph 5 below. HMRC sought to call witness evidence at the hearing of this appeal, which was objected to by Mr Clarke. Mr Clarke explained to the Tribunal that he was not contesting the question of HMRC’s “reason to suspect” that the assessment may have become insufficient in this case, but rather arguing that the Information Notice was invalid as a matter of law so that evidence as to HMRC’s reason to suspect should be excluded. In the light of this submission, HMRC withdrew its application to introduce witness evidence as to its reasons to suspect the insufficiency of the assessment. In determining this appeal the Tribunal has therefore had no regard to the witness statement of Mr King, which was withdrawn.
5. Mr D’Souza is a dentist. He had a bank account with the Cooperative Bank in Guernsey. Mr Clarke wrote to HMRC in February 2010 to inform them that Mr D’Souza had omitted tax due on the interest from this account from his self assessment returns for the years 2004-5, 2005-6 and 2007-8. He informed HMRC that this was because his client had thought the tax would be deducted by the bank and informed them that the total additional tax due was £44.61. Thereafter, HMRC notified Mr D’Souza that it had reason to believe that the assessments for these chargeable periods may have become insufficient and that it required him to produce bank statements for the Guernsey account for the relevant periods. Following correspondence in which Mr Clarke argued that HMRC had no power to call for the bank statements, HMRC served the Information Notice.

### *The Law*

6. The relevant provisions of Schedule 36 are as follows.

Paragraph 1 provides:

Power to obtain information and documents from taxpayer

1(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—

5 (a) to provide information, or

(b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

10 Paragraph 21 provides:

Taxpayer notices

21(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

(2) [...]

20 (3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of—

(a) the return, or

25 (b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed.

30 (5) In sub-paragraph (4), "notice of enquiry" means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that an officer of Revenue and Customs has reason to suspect that—

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

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(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

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(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking that person's VAT position.

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(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments referred to in paragraph 64(2) (PAYE etc).

7. Mr Clarke argued that conditions A and B should, on a plain reading of the paragraph, be construed as linked so that the reference to “the chargeable period” in condition B should be read as a reference to the chargeable period in respect of which an enquiry has been opened but not completed under condition A. He submitted that, if the paragraph were meant to be read as referring to “any” chargeable period it would say “a chargeable period” rather than “the chargeable period”. Mr Clarke argued that the Information Notice would therefore be lawful only if it were served during the currency of an enquiry, but that, as the enquiry window for the years with which we were concerned had closed, HMRC was now seeking to rely on paragraph 21 (6) (b) to take powers to itself which had not been conferred by Parliament.
8. Mr Clarke argued further that, if paragraph 21 had the meaning contended for by HMRC then it would drive a coach and horses through the statutory time limit for opening enquiries into a person’s tax affairs and that this would therefore be unconstitutional.
9. In answer to a question from the Tribunal as to why paragraph 21 (3) refers to “any” of conditions A to D being met rather than (as he argued) requiring conditions A and B to be met in conjunction, Mr Clarke submitted that this was a matter of poor drafting in the Schedule and should not be relied upon by the Tribunal. He argued that the Tribunal should adopt a plain reading of the paragraph and that this approach supported his argument as to its proper construction.
10. Mr Ratcliff argued on behalf of HMRC that the Information Notice was lawful. He argued that paragraph 21(3) of the Schedule expressly disapplied paragraph

21 (1) where “any” of conditions A to D were met, so that conditions A and B should be viewed separately and not read together, adding that if Mr Clarke’s contention that condition B required an enquiry to be open under condition A was correct, there would be no need for condition B within the paragraph at all.

- 5 11. Mr Ratcliff argued that condition B in paragraph 21 (6)(b) was met in this case as HMRC had reason to suspect that there had been an under-declaration of income (as a result of Mr Clarke’s disclosure) and that this had led them to conclude that the assessments may have become insufficient.

*Conclusion*

- 10 12. In reaching our conclusion we take into account that the burden of proof in this matter rests with HMRC, who must satisfy us on the balance of probabilities that the Information Notice is lawful. We have considered the arguments of both representatives most carefully and have concluded that HMRC has so satisfied us and that the appeal must be dismissed so that the Information Notice is confirmed. We find that Mr Clarke’s submissions as to the correct interpretation of paragraph 21, unsupported as they are by any judicial authority, would require us to adopt a reading of the paragraph which is at odds with its plain meaning. In particular, we find that paragraph 21 (3) clearly requires the conditions A to D to be read disjunctively.
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- 20 13. We accordingly dismiss the appeal, confirm the Information Notice and vary it to direct that Mr D’Souza must comply with it by no later than one month from the date appearing at the end of this written decision.
14. This document contains full findings of fact and reasons for the decision. By virtue of paragraph 32(5) of Schedule 36 to the Finance Act 2008, this decision of the First-tier Tribunal is final and there is no right of appeal to the Upper Tribunal.
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**TRIBUNAL JUDGE:**

**RELEASE DATE: 19 March 2012**

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