

Hide and seek?

Mark McLaughlin looks at the status of bank statements requested in HMRC information notices, and the redaction of entries in bank statements

A request for copies of bank statements is a common feature of HMRC enquiries. For example, in an enquiry into the self-assessment return of a self-employed individual, HMRC might ask for copies of bank statements for any business accounts, and also any private accounts in which business transactions have been made.

If the taxpayer (or agent) resists this request for bank statements, HMRC may issue an information notice to obtain them. Taxpayers have a general right of appeal against HMRC's information notices, such as if the information requested is not considered to be 'reasonably required' to check the taxpayer's tax position. However, there is no right of appeal if the information or document forms part of the taxpayer's 'statutory records' (FA 2008, Sch 36, para 29(2)).

Statutory records?

Information or a document forms part of the taxpayer's statutory records broadly if the tax legislation requires the taxpayer to keep it (FA 2008, Sch 36, para 62). Thus, in the case of a self-employed taxpayer, the business records to be kept and preserved include the following (TMA 1970, s 12B(3)):

- Records of all receipts and expenditure 'and the matters in respect of which the receipts and expenditure take place'; and
- Records of all sales and purchases of goods (in the course of a trade involving dealing in goods).

HMRC's online guidance on record keeping for the self-employed (www.gov.uk/self-employed-records/what-records-to-keep) does not feature bank statements in the list of records that need to be kept, but includes them among the types of 'proof' to be kept. This begs the question: are bank statements statutory records?

Some commentators consider that bank statements do not constitute statutory records for information notice purposes. For example, in a recent article Robert Maas expressed his view that bank statements cannot as a generality be statutory records, as they duplicate a cash book, which is a statutory record. He argues that if bank statements were statutory records, it surely follows that it would be a criminal offence for a company to operate without a bank account due to company law requirements, even though some do so ('Are bank statements statutory records?', *Taxation*, 29 November 2022).

Clearly, even if bank statements are not statutory records that does not necessarily preclude HMRC from seeking access to them, if those bank statements are 'reasonably required' by HMRC for checking the taxpayer's tax position (or collecting tax debt) (FA 2008, Sch 36, para 1(1)).

Personal information?

However, even if information or documentation would otherwise be reasonably required, there are certain restrictions on what HMRC can require. These include personal records (within the Police and Criminal Evidence Act 1984, s 12), although it should be noted that the definition of 'personal records' in this context is limited. These are broadly records concerning an individual's physical, mental, spiritual or personal welfare. The scope of 'personal records' is therefore narrower than it sounds, a point noted by HMRC in its Compliance Handbook manual at CH22180.

What if personal records contain mixed (i.e., business and private) information? HMRC adds: "Where 'personal records' contain mixed information you can require the person to provide the information that does not relate to any individual's welfare. This can be done by omitting the information that makes the document 'personal records'. If you require a 'personal records' document to be produced or inspected, the welfare information can be covered up, or redacted, so that you cannot see it."

In *Smith v Revenue and Customs* [2015] UKFTT 200 (TC), the taxpayer received rental income from various properties, but unfortunately did not operate separate business and private bank and credit card accounts. The First-tier Tribunal (FTT) held that HMRC's information notice should be varied, such that the appellant was required to provide the bank and credit card statements but omitting any personal information.

Redacting full documents

Interestingly, HMRC states (at CH229610) that where a whole document is sought but some parts contain confidential information which could not possibly be relevant to the enquiry, an HMRC officer "...can permit redaction, *by concession*" (emphasis added), and that redaction could apply (by concession) where the general exclusion from information notices for audit and tax advice (in FA 2008, Sch 36, paras 24, 25) is set aside by certain exceptions (in Sch 36, para 26), on the basis that redaction is implicit in Sch 36, para 27(2): "An information notice that requires the document to be produced has effect as if it required any part or parts of the document containing the information mentioned in paragraph 26(1) or (2) to be produced."

Whilst part of a document might be accepted by HMRC instead of making redactions in the whole document, HMRC's officers are instructed (at CH23340) to normally insist on the full document being produced with nothing redacted: "You should explain that you will be able to decide for yourself what information you need from the document to progress your compliance check. Everything else will be ignored."

However, notwithstanding HMRC's statutory duty of confidentiality (in CRCA 2005, s 18), many taxpayers will prefer redaction than to rely on the HMRC officer's judgement. Unfortunately, taxpayers have not fared very well before the tribunal in disputing that bank statements are statutory records, and on the issue of redaction.

A double whammy

For example, in *Fresh Consulting and Support Ltd v Revenue and Customs* [2022] UKFTT 353 (TC), HMRC issued an information notice to the appellant relating to payments made to the appellant pursuant to claims it made for the period 16 March 2020 and 30 September 2021 under the coronavirus job retention scheme (CJRS). The information notice followed a request by HMRC for bank statements, which the appellant (through its sole director) refused to provide on the grounds that it would constitute an invasion of privacy. The

client's professional adviser subsequently advised the appellant to provide redacted bank statements (which it did) but HMRC issued another information notice. The appellant appealed.

The FTT considered that the bank statements were statutory records, so there was no right of appeal. As such, the appeal must be struck out. However, the FTT went on to note that a complete run of bank statements for the period 16 March 2020 to 31 December 2020 had not been provided. A selection did not comply with the information notice. The FTT could see no good reason why a complete run of bank statements had not been provided.

The FTT also noted that the bank statements were very heavily redacted, and considered that a complete, unredacted, run would be reasonably required within the proper meaning and effect of FA 2008, Sch 36. The FTT commented that the reason was obvious. The appellant's position was that all its employees were furloughed. As such, it would not have been conducting any business, because none of its furloughed employees, if genuinely answering to the requirements of the CRJS, would have been working for the appellant. The appellant's appeal in relation to the bank statements was struck out.

In making its decision, the FTT agreed with the earlier decision in *Andreasberg Developments LLP v HMRC* [2017] UKFTT 756 (TC), where Judge Cannan stated: "There is simply no basis for the appellant to argue that whilst the bank statement is a statutory record, the Appellant is entitled to redact information in the statutory record before providing a copy to HMRC. There is no authority to support such a submission and it is inconsistent with the scheme of Schedule 36...where a document is a statutory record, HMRC are entitled to full unredacted copies of that document..."

End of the story?

Of course, decisions of the FTT do not set a binding precedent. Until the issues of whether bank statements are statutory records for information notice purposes, and also the extent to which bank statements may be redacted, are decided at a higher judicial level disputes between taxpayers and HMRC on these issues are likely to continue.

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