



TC05299

Appeal number: TC/2015/06930

*Information – information notices– restricted right of appeal –whether
bank statements were statutory records – found, yes – appeal struck out*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR PHILIP AKRILL

Appellant

- and -

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

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR
 CAROLINE DE ALBUQUERQUE**

Sitting in public at Fox Court, London on 17 June 2016

**Edward Waldegrave, Counsel, instructed by Ann Humphrey, solicitor for the
Appellant**

**Rita Pavely, presenting officer for HM Revenue and Customs, for the
Respondents**

DECISION

1. The appellant, Mr Akrill, appeals against an information notice issued to him on
5 9 November 2015 (the “**Information Notice**”), under which he was requested to
supply bank statements for a particular bank account (the “**Requested Account**”) for
the period 1 December 2009 to 31 August 2015 to HMRC.

The law

2. There was no dispute about the relevant law applicable in this case, but it is
10 useful to set out some of the legal context in order to focus on the specific issue
arising in this case.

3. Under paragraph 1 of Schedule 36 to Finance Act 2008 (“**Sch 36**”), an officer of
HMRC has the power to require the production of information or a document in order
to be able to check a taxpayer’s tax position. There are further provisions relating to
15 the meaning of tax position but nothing turns on them in this case.

4. Under paragraph 29 of Sch 36, there is a right of appeal against an information
notice, but that right of appeal is removed where the requirement is to give
information or produce documents that form “part of the taxpayer’s statutory
records”.

20 5. Under paragraph 62 of Sch 36, statutory records are defined as follows:

“information or a document forms part of a person’s statutory records
if it is information or a document which the person is required to keep
and preserve under or by virtue of:

(a) the Taxes Acts; or

25 (b) any other enactment relating to a tax”

This is subject to certain exceptions that are not relevant to this case.

6. There are, of course, a number of different parts of the Taxes Acts and other
enactments relating to a tax which require the keeping of records. In this case, both
parties referred us to those relating to VAT, because that was the main tax at issue.
30 The record keeping requirements we were referred to in particular were:

(1) those set out in regulation 31(1)(a) of SI 1995/2518 (the VAT
Regulations), which states that a person must keep “business and accounting
records”; and

35 (2) paragraph 2.3 of HMRC’s VAT Notice 700/21 which has the force of law
(in accordance with regulation 31(2) of the VAT Regulations) and states that
“[HMRC’s] view of business records is wide and will include... bank
statements”. Bank statements are included in a long list of items that HMRC
view as business records, including annual accounts, orders, invoices etc.

7.

Evidence

8. Apart from the notice of appeal and the Information Notice itself, the only evidence presented to the Tribunal was the witness statements of:

5 (1) Mr Akrill himself, setting out his position on the Requested Account and the bank statements for it (the “**Requested Statements**”); and

(2) Mr Jonathan Leathley, a chartered accountant appointed on behalf of Mr Akrill to undertake a random sample review of the Requested Statements (in fact those from June 2010 to August 2015 that Mr Akrill provided to him, i.e. missing the first 7 months of statements).

10 9. Neither Mr Akrill nor Mr Leathley attended the hearing and so were not available for cross-examination. HMRC stated expressly that they were not requesting the opportunity to cross-examine them. Where the evidence in the witness statements was used by Mr Waldegrave to support a submission, we have referred to it below.

Summary of issues and decision

15 10. Mrs Pavely, on behalf of HMRC, submitted that Requested Statements were statutory records and therefore Mr Akrill was obliged to produce them without any right of appeal.

20 11. Mr Waldegrave, on behalf of Mr Akrill, submitted that the Requested Account was a personal bank account and therefore the Requested Statements were not statutory records. If the Tribunal agreed, then Mr Akrill would only be obliged to produce the Requested Statements if HMRC could show that they were ‘reasonably required’.

25 12. For the reasons more fully explained below, we conclude that the Requested Statements were statutory records and therefore Mr Akrill has no right of appeal against the Information Notice. As a result, the secondary issue of ‘reasonably required’ was not in issue and we do not address it further in this decision.

Parties arguments

Arguments submitted on behalf of Mr Akrill

30 13. It was accepted that bank statements from an account that was used for a particular business activity (i.e. a purely business account) would be business records and would therefore be statutory records.

14. However, it was submitted that, at the other end of the spectrum, purely personal bank statements are not business records and therefore not statutory records.

15. Mr Waldegrave submitted that the Requested Account:

- 35 (1) had been used predominately for personal banking; but
(2) there were two exceptions to this:

- (a) the receipt of VAT repayments from HMRC in relation to Mr Akrill's VAT registration, which went into this account only because Mr Akrill gave HMRC these bank account details when he registered for VAT; and
- 5 (b) the making of loans from Mr Akrill to his various businesses and companies and the repayments of those loans.

16. Mr Waldegrave referred to the decision of the First-tier Tax Tribunal in *Beckwith v HMRC [2012] UKFTT 181 (TC)* in which Mr Beckwith's bank statements were found to be business records on the grounds that the bank account was "an operational part of the business, used for making regular payments of business expenses". He submitted that Mr Akrill's use of the bank account in question was not

10 'an operational part of the business' because it was only used for these two, exceptional, classes of payment.

17. Mr Waldegrave submitted that the two exceptional items were insufficient to

15 turn a personal bank account into a business account, in particular:

(1) VAT repayments were not necessarily business payments at all, because an individual can only be registered for VAT once (even if he/she carries on several businesses) and therefore it would be necessary for VAT repayments relating to several separate businesses to be amalgamated and repaid into a

20 single bank account, even where the person does operate separate bank accounts for each business;

(2) the inclusion of the Requested Account on the VAT registration form submitted to HMRC was an administrative decision and it would not be fair to place too much focus on the information put into a form when it is the use of the

25 account that really matters; and

(3) the payments into Mr Akrill's businesses and companies were only the reallocation of resources by Mr Akrill rather than business expenses, i.e. they were only 'occasional injections of funds', and bank accounts used for that

30 purpose were not, relying on *Beckwith (para 64)*, to be regarded as business accounts for that reason.

18. Mr Waldegrave submitted that these submissions were supported by evidence in Mr Akrill's witness statement that:

- (1) the bank account was predominately for personal use; and
- (2) the VAT repayments were only made into this account because when Mr
- 35 Akrill had registered for VAT in 2006:
- (a) the form required him to include details of a bank account;
- (b) the name of the bank account had to match the name of the business being registered and his Requested Account did match the business name because he was registering as sole trader;
- 40 (c) he did not open a business bank account until later in 2006, i.e. after he submitted the VAT registration form; and

(d) he did not notify the business bank account as the nominated account for VAT repayments to HMRC until late 2015.

19. Mr Waldegrave also submitted that his arguments were supported by the witness statement of Mr Leathley who found, in his random sample of 6 months of bank statements, that 95% of the transactions were normal domestic/private expenditure and the remaining 5% were payments to companies owned by Mr Akrill all of which were shown in the relevant company records.

Arguments submitted on behalf of HMRC

20. Mrs Pavely's submissions on the statutory records were that:

10 (1) when Mr Akrill had registered for VAT in October 2006, he had included on the form VAT 1 (the VAT registration form) the account details for the Requested Account;

15 (2) the business bank account, although it had been set up in October 2006, was not notified to HMRC as the account to receive VAT repayments until late 2015;

(3) repayments of VAT have been made into the Requested Account every quarter, amounting to over 30 payments in the period in question; and

20 (4) Mr Akrill could have set up a different bank account to receive the VAT repayments and make VAT payments from at any time but since he had not done so, the only bank account for the entire period in question of which HMRC were aware in relation to Mr Akrill's business was the Requested Account.

21. Mrs Pavely also submitted that:

25 (1) The time for assessing whether the Information Notice was validly issued was at the time of issue (i.e. 9 November 2015) and at the time of issue HMRC were unaware that there was a business bank account, relying on paragraph 74 of *Beckwith* which stated that:

30 "if the validity of the Notice depended on hindsight, it would not be possible to know, until some indeterminate future date, whether the Notice was correctly issued. In our judgment, the statutory test must be applied at the date the Notice was issued."

(2) Mr Leathley's witness statement is not sufficient to support any of the arguments submitted on behalf of Mr Akrill because it only covers a random sample of the accounts and further business expenses could have occurred in the months not reviewed.

35 **Discussion**

22. We do not agree with Mr Waldegrave's interpretation of *Beckwith*. In that case the FTT found that the bank account in question was an operational part of the business and therefore constituted a statutory record. It did not find that in order for bank statements to be a statutory record, the bank account had to be an operational part of the business. They had no need to make that decision because the bank account

40

in question was an operational part of the business. Therefore we do not accept that the *Beckwith* decision has established a level of business transactions that must be met in order for bank statements to be treated as business records. In *Beckwith* the taxpayer was found to have used the relevant account for over 90 business transactions in a single year, including settling business purchases, paying rent and rates and settling phone bills for the business. If we had found that Mr Akrill's use of the Requested Account was very similar to that of Mr Beckwith then that decision could have been helpful guidance in this case. However, there is no equivalence to Mr Akrill's position.

23. Therefore we must interpret the law itself. As set out above, a person is required to keep and produce statutory records, which includes business and accounting records (regulation 31 of the VAT Regulations), which in turn includes bank statements (paragraph 2.3 of VAT Notice 700/21). The bank statements are referred to in the VAT Notice as one of a list of items that HMRC states are to be treated as business record, therefore the bank statements that HMRC can demand must be limited to those which would be treated, on a normal interpretation of the words, as business records in the facts and circumstances of each case. Therefore the question we must answer is whether the Requested Statements were business records in the case of Mr Akrill.

24. We accept Mr Waldegrave's submission (and it was not challenged by HMRC) that the bank statements relating to an account used purely for personal expenditure and receipts (a "shopping account" as Mr Waldegrave put it) is not a business record. However, Mr Akrill's account was not "purely" used for personal expenditure. Therefore we must answer the question of whether either the VAT repayments or the injections of funds turn the Requested Account into an account whose statements are business records.

The VAT repayments

25. We do not accept Mr Waldegrave's submission that a VAT repayment is attributable to the individual's personal VAT position and is therefore not a business receipt.

26. The following three concepts are essential to the operation of VAT:

- (1) VAT is only chargeable when a person makes a supply 'in the course of furtherance of any business' (section 4(1) of Value Added Tax Act 1994 (VATA 1994));
- (2) a person is only liable or entitled to register for VAT (i.e. is a taxable person) if it makes taxable supplies in the course or furtherance of a business (section 3(1) and Schedule 1 to VATA 1994); and
- (3) a person is only entitled to recover VAT where it has incurred such VAT for the purposes of its taxable business (section 26(2) of VATA 1994).

27. In our view, these elements combine to show that a person who receives a repayment of VAT from HMRC (which only arises when the input VAT on supplies

received exceed the output VAT on supplied made over a given VAT period) must be in business and the VAT repayments relate to business activities. Whilst we accept Mr Waldegrave's point that it is perfectly possible for one of a sole trader's businesses to be in a VAT payment situation and another in a VAT repayment situation, with the net effect that a VAT repayment is due. We do not accept that this means that the repayment is attributable to the individual's personal VAT position, rather than any one of the businesses. A VAT repayment remains a business payment because it can only arise in the context of a business.

28. As set out by HMRC, the Requested Account was the only account notified to HMRC in association with the business in question for a period of approximately 9 years. We do not accept Mr Waldegrave's arguments that it is a point only of administration. When a business person registers for VAT they are very much aware that they are notifying information to a tax authority. Although there might conceivably be a situation where a person simply forgot that they had notified a particular account to HMRC (because they were always in a VAT payment situation and made their VAT payments from another, business, account), that is not conceivable in the case of Mr Akrill because he received regular VAT repayments throughout the period. He therefore would have been aware, regularly, that he had still not notified HMRC of his business bank account and that the Requested Account was receiving payments relating to his business.

29. On that basis, we find that the VAT repayments were business receipts into the Requested Account and that the notification of the Requested Account, alongside the failure to notify the appropriate business account, are sufficient to render the Requested Statements statutory records.

25 *Injections of funds*

30. Since we have already decided that the Requested Accounts are statutory records, we do not need to make a decision as to whether the occasional injections of funds from an account into a person's businesses would be sufficient to turn a bank account into a business record. However, for the sake of completeness, we set out our thoughts.

31. We agree with Mr Waldegrave that the decision to invest money into one of a number of businesses which a person operates (whether through sole trader businesses or separate companies) is a question of allocation of resources or a choice of where to invest. They do not share the same qualities of business payments as the payment of business expenses or the payment or repayment of VAT. Therefore we are of the view that statements for an account that has been used only for personal expenditure and the occasional injection of funds into businesses would not be a business record. Of course, HMRC may still be able to demand the information, but the demand would be subject to an appeal and the need to be 'reasonably required'.

Timing and expert witness statement

32. Finally, for the sake of completeness, we address the two remaining arguments from HMRC:

5 (1) In relation to HMRC's argument that the Information Notice had to be assessed at the date of issue and HMRC were not aware of another bank account at the date of issue, we do not find that the remarks in *Beckwith* are helpful when assessing whether or not a record is a statutory record. A bank statement is either a statutory record or not, HMRC's knowledge of other bank accounts at the time does not influence that classification; and

10 (2) In relation to HMRC's comments about Mr Leathley's witness statement, we agree that the exercise was not a helpful one. A review of a random sample of a proportion of the requested information is rarely going to provide a satisfactory answer, and in this case it could provide nothing to oppose the basis on which we have made our decision.

15 **Decision**

33. On the basis of the reasoning set out above, we find that the Requested Statements are statutory records and that therefore this appeal must be struck out.

20 34. In accordance with the powers of the Tribunal under paragraphs 32(3) and (4) of Sch 36, we confirm the Information Notice and specify that Mr Akrill must comply with the Information Notice:

(1) with regard to the bank statements relating to the period from June 2010 to August 2015 (i.e. those that he has already made available to Mr Leathley), within 2 weeks of the issue of this decision; and

25 (2) with regard to the remainder of the Requested Statements (i.e. those that Mr Akrill says are not available on internet banking), within 4 weeks of the issue of this decision.

30 **ABIGAIL MCGREGOR**
TRIBUNAL JUDGE

RELEASE DATE: 22 JULY 2016