



HM Revenue
& Customs

Mr Stephen Smith
By email: request- 504699-01c93a24
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Dear Mr Smith

Freedom of Information Act 2000 (FOIA)

Thank you for your email of 30 August 2018 asking HMRC to carry out an internal review of our response to your request for information under the FOIA.

Original Request

On 1 August 2018, we received your request for the following information:

"DR Schemes are artificial arrangements that pay a carefully calculated amount through the payroll; just enough to give enough to give the employee entitlement to state pension credits, and make full use of their personal allowance so that little, or no, tax is paid. Most of their income is paid in the form of loans, often routed through an offshore trust. Loans are not taxable, but these are loans in name only. They are usually given interest free and allegedly repayable on demand, but there is no intention to repay them and they are not repaid. HMRC has proven in court that they are taxable as earnings, but no income tax and NICs were paid at the time"

Please can you answer these questions to enable my full understanding of the legal status of such schemes:

- 1) Please can you provide a full list of schemes that you are aware of and if at anytime they were considered by HMRC legal representatives to be*
 - 1a) Legal under UK LAW (i.e not illegal)*
 - 1b) Illegal under UK LAW*
 - 1c) Are still legal under UK LAW as of the date of this request*
 - 1d) Have since been made illegal under UK LAW as of <given date>*

Initial Response

We responded to your request on 30 August 2018 confirming that HMRC holds information within the scope of your request. It was withheld under section 31(1)(d) of the FOIA.

Request for Internal Review

You have asked for a review of our decision dated 30 August 2018 with regard to:

I am writing to request an internal review of HM Revenue and Customs's handling of my FOI request 'What is the Legal Status of Disguised Remuneration Loan Schemes'.



I am disappointed with this response based on two key pieces of information

1) have in my possession an additional letter (Mar2018) from HMRC Counter Avoidance, Ministerial Complaints Division SO483 that states "This does not mean to say that these schemes are illegal"

2) On 3 July 2018 Mel J Stride addressed parliament indicating they were not legal:

Extract from Hansard 3/7/18

Peter Aldous (Waveney) (Con)

To follow on from the question asked by the hon. Member for Eastbourne (Stephen Lloyd), the retrospective nature of the 2019 loan charge could bankrupt thousands of people. Will the Government revise legislation to ensure that that does not happen, with the loan charge only applying to disguised remuneration loans made after the passing of the Finance (No. 2) Act 2017?

Mel Stride

This is not retrospective legislation. The activities and arrangements entered into by those who are in scope of this measure were not legal when they were entered into, even though they may have been entered into in the past. The loan charge is there not to apply penalties for that behaviour, but to ensure that those individuals pay the right amount of tax.

End of extract

With this in mind it is clearly in the public interest know if schemes were legal or not.

Internal Review

The purpose of an Internal Review is to assess how your FOI request was handled in the first instance and to determine whether the original decision given to you was correct.

In line with the Cabinet Office Freedom of Information Code of Practice I can confirm that I have not had any involvement in the initial response to your request and have undertaken a fair and thorough review of procedures and decisions taken in relation to the Act.

We received your request on 1 August 2018 and responded by email 30 August 2018. This was within the statutory deadline in compliance with section 10(1) of the FOIA.

The response also set out HMRC's review procedure and your right to complain to the Information Commissioner, as required by section 17(7) of the FOIA.

Considerations

In reconsidering your request I have addressed your concerns in two parts, a list of known disguised remuneration schemes and the legality of these.

The first part was interpreted as a request for a comprehensive list of the names of all known disguised remuneration schemes.

Whilst I can confirm that HMRC does hold information within the scope of your request I find it to be exempt from disclosure under section 44(1)(a) FOIA.

Section 44 of FOIA states that:

Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- a) is prohibited by or under any enactment,
- b) is incompatible with any Community obligation, or

c) would constitute or be punishable as a contempt of court.

The enactment in this case is the Commissioners of Revenue and Customs Act 2005 (the CRCA).

Section 18(1) of the CRCA states that HMRC officials may not disclose information which is held by HMRC in connection with one of its functions.

Section 19 of the CRCA makes it a criminal offence for any member of staff to disclose such information.

For the purposes of FOIA, section 18(1) only acts as a statutory prohibition where section 23(1) of the CRCA is also satisfied.

Section 23 provides that the section 44 exemption will apply where disclosure –

- a) would specify the identity of the person to whom the information relates, or
- b) would enable the identity of such a person to be deduced.

The first thing to consider is, if the information is held by HMRC in connection with one of its functions.

You have requested a list of disguised remuneration schemes known to HMRC, I therefore consider this information to be held in connection with HMRC's function of assessing and collecting of tax.

I have now gone on to consider whether disclosure of the information held would satisfy the requirements of s.23(1) of the CRCA by either specifying the identity of a person the information relates to or allowing the identity of such a person to be deduced.

It is important to note that in this context 'person' includes both natural persons and legal entities. Your request requires HMRC to provide a list of relevant 'persons'.

Therefore, I have decided that s.23(1) of the CRCA is satisfied and consequently s.44 of the FOIA is engaged.

As I am unable to comply with the first part of your request I am unable to provide the further breakdown you have requested which I consider to be the second part of your request.

Despite being unable to comply with your request, I can advise that tax avoidance involves operating within the letter, but not the spirit, of the law. Schemes involve bending the rules of the tax system to gain a tax advantage that Parliament never intended. These schemes often involve artificial or contrived arrangements. A disguised remuneration scheme that pays loans in place of ordinary remuneration (often via an offshore entity) is an example of tax avoidance.

It is HMRC's view that the law did not allow the tax consequences disguised remuneration schemes claimed to achieve. Where a scheme doesn't work, the tax legally due should be paid.

Conclusion

HMRC's response under the FOIA clearly set out the position regarding your rights and our obligations under the Act. HMRC's response complied with our obligations under the FOIA and there are no outstanding procedural issues for us to address.

I do, however, find that in this instance section 31(1)(d) was not the most appropriate exemption to apply to your request for information.

Unfortunately this does not mean that I am able to provide you with the information requested. As advised I find this information to exempt from disclosure pursuant to the absolute exemption at section 44(1)(a) FOIA. As the exemption is absolute I am not required to consider the public interest in this matter.

Appeal process

If you are not content with the outcome of this internal review, you can complain to the Information Commissioner's Office (ICO). You can make a complaint to the ICO by post to:

The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. Instructions about this process are available at the following link:
<https://ico.org.uk/concerns/>

Yours sincerely,

Freedom of Information Team