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Tax Bites

Welcome to the latest edition of RPC's Tax Bites - providing monthly bite-sized updates from the tax world.

As always, if there are any areas you would like more information on (or if you have any questions or feedback), please let us know or get in touch with your usual RPC contact.

News

Company Taxation Manual guidance on EEA loss relief updated

HMRC has updated the guidance in its Company Taxation Manual on group relief for losses incurred by a non-UK resident company that is resident in, or carries on a trade through a permanent establishment in, an EEA state. The revised guidance:

- contains HMRC's views on how to determine whether arrangements have a main purpose falling within section 127, CTA 2010;
- addresses the Supreme Court's decision in HMRC v Marks and Spencer plc [2014] UKSC 11; and
- expands on the description of how the amount of overseas loss that is eligible for EEA loss relief is recomputed in accordance with UK tax principles, including the steps to be documented by companies claiming that relief.

The guidance can be viewed here.

HMRC guidance on R&D relief for costs of furloughed employees

HMRC has updated page CIRD83200 of its Corporate Intangibles Research and Development Manual to provide guidance on whether costs of furloughed employees benefit from research and development relief (**R&D relief**) and research and development expenditure credit (**RDEC**).

Broadly, R&D relief and RDEC are available for the costs of staff who are directly and actively involved in the R&D activity. If the employee is not involved in the R&D activity on a full-time basis, the costs must be apportioned. Any costs that are met by the grant of a subsidy do not qualify for R&D relief.

HMRC's updated guidance states that, as furloughed employees will not have been directly and actively involved in the R&D activity when furloughed, costs of these employees will not qualify for R&D relief or RDEC. Similarly, costs of flexibly furloughed employees do not qualify where those costs are in respect of the period that the employee was not working. Relief will be denied for both furlough payments made under the coronavirus job retention scheme (**CJRS**) and any top-up payments made by employers. In addition, R&D relief is not available if the staff costs are met by furlough payments under the CJRS because such payments are a subsidy.

The guidance can be viewed here.

A General Anti-Avoidance Rule?

A House of Commons Library Briefing Paper looks at the case that has been made for a general anti-avoidance rule (**GAAR**) and the Government's introduction of a "narrower" GAAR in 2013 .

The Paper can be viewed here.

HMRC issue guidance on how it will support taxpayers and the economy following the COVID-19 pandemic

HMRC has published new guidance entitled: “COVID-19: how HMRC will continue to support customers and the economy”, in which it sets out HMRC's position in relation to tax collection, compliance checks and collection of tax debts, following the policy changes and support schemes introduced in response to the COVID-19 pandemic.

With regard to compliance checks, HMRC intends to give businesses and individuals affected by coronavirus time to focus on more urgent priorities (including keeping their businesses afloat) but will still open enquiries and raise assessments where necessary.

The guidance can be viewed here.

HMRC issue coronavirus job retention scheme compliance letters to employers

The ATT reports that HMRC issued the first set of CJRS compliance letters in August as part of the post-transaction review phase of the scheme. The ATT notes that HMRC intends to focus on fraudulent claims rather than cases where the employer has made an innocent error, and intends to publish more details of its approach to compliance in the coming weeks.

Employers who become aware of an error should contact HMRC to correct the position. The deadline for correcting overclaims is the later of:

- 90 days after the date the employer received the grant they were not entitled to;
- 90 days after the date the employer received the grant that they are no longer entitled to keep because their circumstances have changed;
- and 20 October 2020.

HMRC has also published additional examples to help employers calculate claims for flexibly furloughed employees during September and October 2020, and separate updated guidance for employers who are claiming for 100 or more employees under the CJRS from 1 July onwards.

The guidance can be viewed here.

Cross-border tax arrangements

HMRC has published a report containing details of research carried out by IFF Research, which is intended to enable HMRC to better understand the role of intermediaries in cross-border tax arrangements and the potential impact of the new DAC6 regulations.

DAC6 requires intermediaries to report details of certain types of cross-border tax arrangements to tax authorities. The research aims to deepen HMRC's understanding of:

- the profile of the UK intermediary population (accountants/tax advisers, banks, lawyers and wealth managers) in the context of cross-border arrangements;
- the possible impact of the new regulations on tax planning and avoidance related activity, particularly among high net worth individuals and multinational corporates; and
- the potential impact of the new regulations on the intermediary population and awareness of the new regulations.

The report can be viewed here.

Case reports

Hackett - HMRC's decision to proceed by way of civil penalty rather than criminal prosecution was not an abuse of process

In *Lindsay Hackett v HMRC* [2020] UKUT 212 (TCC), the Upper Tribunal (**UT**) confirmed that the decision whether to bring civil or criminal proceedings is a matter for HMRC to decide with any such decision being amenable to challenge by way of judicial review.

A taxpayer who wishes to argue abuse of process by HMRC will have to do so by way of judicial review proceedings in the Administrative Court of the High Court rather than on appeal to the First-tier Tribunal (**FTT**). This case is yet another example of how important choice of forum can be. In circumstances where there is some doubt as to the correct forum, given the relatively short time limit applicable to judicial review proceedings, consideration should be given to making a 'protective' application for judicial review which can then be stayed pending the outcome of any appeal before the FTT.

Our commentary on the decision can be viewed here.

Jones - Taxpayer's appeal allowed as FTT failed to consider vital evidence

In *Heather Jones v HMRC* [2020] UKUT 229 (TCC), the UT allowed an appeal against a decision of the FTT upholding a discovery assessment issued in respect of income tax on a severance payment.

It is surprising that the FTT chose not to set aside its decision pursuant to an application which had been made by the taxpayer to the FTT under Rule 38 of the Tribunal Rules, following the receipt of email evidence in support of the taxpayer's appeal. Although the position has now been rectified by the UT, it is unfortunate that the taxpayer, who represented herself both before the FTT and the UT, had to take her case all the way to the UT.

Our commentary on the decision can be viewed here.

Kickabout - HMRC wins IR35 re-match

In *Kickabout Productions Ltd v HMRC* [2020] UKUT 216 (TCC), the UT allowed HMRC's appeal and confirmed that the relationship between a radio station and one of its sports presenters fell within the IR35 regime.

While rarely determinative on its own, mutuality of obligation is a key test in establishing employment status and this decision, together with the UT's recent decision in *Professional Game Match Officials Ltd* [2020] UKUT 147 (TCC) provides some welcome guidance when considering this test.

Interestingly, as private sector businesses prepare for the extension of the off-payroll IR35 regime from April 2021, the crucial issue of whether a hypothetical contract is one of employment will fall for determination and yet HMRC's online CEST tool does not take into account whether there is mutuality of obligation between the parties. Concerns about this have been raised by practitioners, but HMRC remains of the view that mutuality is not a relevant factor in a tax context.

Our commentary on the decision can be viewed here.

And finally...

Confused about where HMRC actually gets its powers from and what it is (or is not) able to do?

Why not listen to our latest podcast on HMRC's powers and functions here.

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