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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



Anticipated losses may be used to reclaim corporation tax in "exceptional circumstances"

HMRC has updated paragraphs CTM92090 and CTM92650 of its company taxation manual to confirm that companies may, in "exceptional circumstances", reclaim corporation tax where the claim depends on events in a subsequent accounting period that has not ended at the time of the claim. Taxpayers will welcome this announcement, given the magnitude of losses apparently being incurred in some industries during the COVID-19 pandemic.

Corporation tax is paid by reference to accounting periods and, under the general rule, is payable nine months after the end of the relevant accounting period. Regulation 6 of the Corporation Tax (Instalment Payments) Regulations 1998 (SI 1998/3175) provides that a company may make a claim for repayment of corporation tax where it has grounds for believing that changed circumstances since an instalment was paid has rendered the original calculation excessive.

Although the Regulations make clear that corporation tax that has been overpaid may be reclaimed once the accounting period to which it relates is closed, the position is less clear where the reclaim requires the set-off of losses incurred in a subsequent period which is ongoing.

Companies will need to provide evidence to HMRC to demonstrate exceptional circumstances.

The updated paragraphs can be viewed [here](#) and [here](#).



HMRC guidance on disclosure of cross-border tax planning arrangements under DAC 6

HMRC has updated its International Exchange of Information Manual to include guidance on the disclosure of cross-border tax planning arrangements under EU Directive 2018/822 (DAC 6).

The manual confirms that it will generally be necessary to adopt a 'holistic' approach in determining what constitutes an 'arrangement', rather than viewing each step or series of steps in a transaction as a standalone arrangement. This is a welcome approach which avoids the practical difficulties of applying a detailed hallmark analysis to each individual step in a complex cross-border transaction. It is also consistent with HMRC's position on the 'main benefit test' (applicable to certain of the DAC 6 hallmarks), where HMRC states 'it is essential to look at the arrangement as a whole' when applying the test. The final guidance also explains that, in cases where a pre-existing arrangement is extended, this would not generally be viewed as a 'new' arrangement, barring a 'material change'.

One area of concern is how an intermediary with limited knowledge, or expertise, can be expected to apply the rules to determine whether a hallmark applies. HMRC now acknowledges that there may be situations where a person is too far-removed from the detail of an arrangement to assess whether that arrangement is reportable and in such a case the

person concerned would not be a service provider.

Finally, the application of legal professional privilege has concerned many advisors and commentators since the introduction of DAC 6. The commentary in the manual remains unchanged on this and lawyers are not exempted from making disclosures. Where a lawyer is an intermediary but information that would be reportable is covered by LPP, the lawyer will not have to make a report. Instead, they must notify another intermediary or relevant taxpayer of the obligation to report.

The guidance can be viewed [here](#).



Call for evidence on income tax avoidance schemes

Following the publication of next year's Finance Bill, HMRC has called for evidence on several issues including:

- what are the drivers of continuing use of disguised remuneration tax avoidance;
- whether there are any variations of disguised remuneration schemes not covered; and
- where can the Government take further action to tackle disguised remuneration tax avoidance beyond its planned approach.

This area remains a sensitive subject for HMRC, particularly in light of Sir Amyas Morse's 2019 review into the Loan Charge and the Government's eventual acceptance of most of its recommendations, which led to substantial revisions being made to the latest Finance Bill. The Government has singled out promoters and agencies to target, and indeed next year's Finance Bill already contains additional measures to pursue such persons in what HMRC terms the 'avoidance supply chain'.

The call for evidence will remain open until 30 September 2020.

The consultation document can be viewed [here](#).

Case reports



Drawing from directors' loan accounts not taxable as distributions

In *Pickles v HMRC* [2020] UKFTT 00195 (TC), the First-tier Tribunal (FTT), in a split decision, held that excessive consideration for goodwill left outstanding on directors' loan accounts was not taxable under section 1020, Corporation Tax Act 2010, as distributions.

The fact that the FTT was unable to agree on the outcome of this appeal is indicative of the complexity of the law in this area. Indeed, the FTT commented that, in relation to the distribution issue, there were no relevant authorities to assist it in determining this issue and it had been unable to reach agreement on the correct interpretation of the relevant legislation. The FTT was of the view that this is an important point of wide significance and it therefore not only gave HMRC permission to appeal on this point it positively encouraged it to do so.

Our commentary on the decision can be viewed [here](#).



Belief in procedural invalidity of APN can constitute reasonable excuse

In *Sheiling Properties Ltd v HMRC* [2020] UKUT 175 (TCC), the Upper Tribunal (UT), in dismissing an appeal against penalties for non-payment of accelerated payment notices (APNs), confirmed that a reasonable belief that the APNs were invalid could constitute a reasonable excuse for non-payment.

This decision will be of relevance to any taxpayer who has received an APN and not paid it in the belief that the APN was not issued in accordance with the legislation and was therefore issued invalidly. HMRC's position, to date, has been that a taxpayer's belief that an APN was issued invalidly can never amount to a reasonable excuse for non-payment of an APN. In other cases, the taxpayer has sought to argue that the APN was invalid through the medium of a statutory appeal against a penalty for non-payment. In the instant case, the taxpayer argued that even if the APNs were valid, the fact it believed that they were not valid at the time the sums demanded by the APNs became due and payable, could constitute a reasonable excuse for non-payment. The UT accepted that this was correct in principle, but that

on the specific facts of this case, the taxpayer did not have a reasonable excuse for non-payment.

Our commentary on the decision can be viewed [here](#).



Court of Appeal confirms HMRC can conduct informal enquiries

In *JJ Management Consulting LLP v HMRC* [2020] EWCA Civ 784, the Court of Appeal confirmed that HMRC can conduct informal enquiries and does not need to open a formal enquiry pursuant to section 9A, Taxes Management Act 1970 (TMA).

The endorsement by the Court of informal enquiries does lead one to question the purpose of section 9A, TMA. If HMRC can simply choose to conduct an informal investigation why should it open a formal enquiry under section 9A? Indeed, it may be advantageous to HMRC not to open a formal enquiry, given that if a formal section 9A enquiry is opened, a taxpayer has the right to ask the FTT to intervene and direct HMRC to close its enquiry.

Our commentary on the decision can be viewed [here](#).



And finally...

Click [here](#) to listen to our new *Taxing Matters* podcast, the first episode of which focuses on furlough fraud.

Following HMRC's recent announcement that they have made their first furlough fraud related arrest (followed closely by several more arrests) and legislation giving greater enforcement powers to HMRC to tackle furlough fraud, our first episode focuses on the main issues and provides practical tips to help businesses mitigate their risks in this important area.

We talk about:

- how has the furlough scheme evolved;
- the main types of furlough fraud to be aware of;
- the potential for criminal liability; and
- practical steps businesses can take to mitigate fraud risk and reduce exposure to criminal liability.

You can subscribe to our podcast using the link above.

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