



# Taxing Matters

## Episode 1 – Furlough fraud with Kelly Thomson

**Alice** Hello, and welcome to Taxing Matters, your one-stop audio shop for all things tax, brought to you by RPC.

My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes.

Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth.

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**Alice** Today we will be talking to the font of all employment law wisdom, Kelly Thomson, about furlough and its associated fraud risk.

Kelly is a partner at RPC in the employment team. She has experience working with clients on complex national and international employment matters and hands-on employment project experience. Kelly eats, sleeps and breathes significant organisational change programmes, including large scale complex restructuring and now, of course, furlough.

Kelly, welcome to Taxing Matters.

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**Kelly** Thank you Alice. I can't think of anywhere better to be on a 30 degree day than recording a podcast and I'm actually not being sarcastic.

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**Alice** And just for our listeners out there, we are both in fact recording this from under a blanket to ensure that the sound quality is perfect for you guys, or as good as we can make it.

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**Kelly** Sorry to cut across you Alice, but they are two separate blankets, we are observing all social distancing rules during the recording of this podcast.

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**Alice** That is completely accurate, of course, and a very important qualification for a law firm to be making. So, Kelly, furlough, what is it?

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**Kelly** Well that's such a good question. In February, possibly even the start of March, I would have been Googling it and telling you that it was related to prisoners being allowed leave from prison, or people in the army being allowed leave from their duties, but it has taken on a completely different meaning during this lockdown period.

So, what we're talking about when we talk about furlough, is one of the various measures that the UK Government introduced to support businesses during this pandemic and to enable them to keep on, perhaps, as many staff as they could, for as long a period as was economically viable. And so, it's essentially a kind of short name for what's actually called the Coronavirus Job Retention Scheme and it's about government funding, on a grant basis, to support employers in keeping their staff on, but at home, whilst on the books.

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**Alice** So how exactly does this scheme work? Who does it apply to?

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**Kelly** So, the way it has worked since March has been quite different to how it will work from July onwards.

The original kind of iteration of this scheme is based on this idea that you have people who you want to retain as employees, but who you aren't giving work to, and that's been a really important condition of the scheme actually. In order to access the grant, for any individual employee that person is not permitted to work for their employer or for a linked company. And so, that's been a really important condition and that is actually changing in July.

So, the way it's worked up until now is that as an employer you might decide you've got individuals for whom you don't have enough work, or perhaps during the emergency period your business has been forced to close; a lot of retailers, for example, have been in that position. And so, they are unable to provide work to any of their staff, or some of their staff, depending on the organisation. The scheme has allowed them to put those individuals on furlough, where they're not working, they're at home, but they're being paid their wage and a proportion of their wage has been funded by the government.

And the way that it's been paid out is that the employer puts in a claim through a government portal and it's paid via HMRC, so the grant goes to the employer and they then distribute it out to the employees. So that's being the basis of the scheme to date.

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**Alice** You keep mentioning this date of July. What's changing in July?

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**Kelly** Yes, so the scheme itself has been iterative.

So, it was originally in place for a particular period, that was then extended by the Chancellor, and then it's been extended until the end of October; which we are told is the sort of final end date.

But in order to try and get the economy back up and running, which has obviously been the sort of approach of more recent changes. What's happening is rather than having this condition where the individual can't do anything for the employer.

In order to be eligible for the grant, what the Government is saying is that 'we want to try to assist organisations to get people back into work at the right time and in the right way' so we will permit you as a business to have an individual who is sometimes furloughed, sometimes at work and you can claim for the time during which they are furloughed and for the time during which they are working for you, you pay them as normal.

So, the idea here is that you could have a business that could rotate people on and off furlough to enable social distancing. So, you could have teams of people, your A team, your B team. When A team's at work, B team is furloughed and vice versa. Or, you could use it as an organisation to bring back part of your workforce or to bring back all of your workforce on a part time basis. So it's kind of trying to ease

people and organisations back into some semblance of normality whilst funding part of the costs of doing that.

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**Alice** What does that mean will need to happen between now and when the system changes in July?

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**Kelly** So, we know that there needs to be a written confirmation of this new arrangement. Quite interestingly, well interestingly for employment lawyers, the Government guidance that has been issued on this what is now being called the Flexible Furlough Scheme has come out very recently but hasn't necessarily answered all of the questions that we might have. And we also haven't got an update on what is called the Treasury Direction which is the effectively the more sort of important rules that apply to the scheme – there is one in place for the old scheme but not one in place yet for the new scheme. **[NOTE: THIS PODCAST WAS RECORDED THE DAY BEFORE THE ISSUE OF THE NEW TREASURY DIRECTION ON 25 JUNE 2020]** So, all of that is to say we don't yet entirely have all of the rules, which is quite tricky because if you're an employer, like certain of our clients that we're helping, they want to do the right thing, they want to get this in place up and running but there aren't necessarily answers to all the questions they might have.

So, what we do know is you need to be putting something in place between the employer and the individual employees and so, for example, writing to those individuals and saying, as of 2 July, 5 July – whatever your relevant date is for that person, we will be placing you on this Flexible Furlough Scheme. The difference with this is we are able to have you back to work. This is what we propose we'll be doing, for example, you will be working Monday, Tuesday, Wednesday or whatever the arrangement is, and seeking their agreement to that and to any other changes that that may entail. So, on the face of it it's quite simple but there are all sorts of, as you would imagine, nuances around how you will be able to calculate what hours you can claim for the furlough scheme, what hours are "worked hours", and all of that will need to be worked through, particularly as we get updated guidance over the coming weeks.

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**Alice** What are the major areas that you see being risky areas where there is currently no guidance?

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**Kelly** So, I think there are a few. I think what we'll find in time is challenges that employers will face from individuals who were either not furloughed at all; who were furloughed and not brought back to work flexibly once the scheme allowed or vice versa; who were brought back to work flexibly and perhaps struggled with that either from an individual perspective (perhaps because they had an underlying vulnerability or a medical condition) or also childcare perspective because you know there are individuals who might be being required to come back to work but whose children are not able to go to school and they can't get childcare.

So, there are all sorts of individual circumstances but the guidance won't cover those – I don't imagine ever – because it's an application of lots of existing employment law and HR policy and practice. But they're the exactly the kinds of issues that employers are having to grapple with as they make what, on the face of it, look just like quite straightforward shift rota-ing arrangements, but which actually have lots of these other implications behind them.

And then the other aspect is more of a kind of calculation / operational point really but is in terms of how you as an employer work through what are the working hours that you will need to pay yourselves as an organisation and then what are the furloughed hours that you will be able to claim under the grant. And the ability to be really precise and clear and correct about those calculations will be so important for making sure that you are making a valid claim and you're not, as a business, inadvertently exposing yourself to the potential of HMRC coming after you or finding that you've perhaps claimed something you shouldn't have, albeit potentially inadvertently.

That is the real difficult area I think that everyone is grappling with at the moment.

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**Alice**

Right, so there's been a lot of media reporting around what has happened with fraud risks and fraud complaints and just from a sort of criminal risk perspective there has been a bit of neglected focus on what exactly we're talking about here.

So, I think what we need to be clear about is we're talking about three different kinds of risk. We're talking about:

- a third- party risk so someone who is trying to insert themselves into the process either between HMRC and employers, or employers and employees
- employer risk, so the risk that the employer is defrauding either HMRC or employees, or
- an Employee risk, where the employee is defrauding HMRC through their employer.

So there has been a rise in reporting of fraud, and HMRC have particularly talked about this in relation to third party fraud they've talked about; it's the phishing texts and emails – and there are examples of those all over HMRC's website.

There's also social engineering which has been happening which is where someone pretends to be someone from HMRC, calls up and manages to trick either an unwitting employee or an external third party, such as a payroll provider, into disclosing all of these details that allow someone with unscrupulous aims to go in and change their bank details or possibly the paid amounts.

And then, the only one that the media seems to be focusing on, is the employer fraud. So HMRC's fraud complaints have been bandied all over the newspapers and websites and things like that as originally on 12th May, there were 795 fraud complaints, by 29th May there were 1,868 and in mid-June, now reporting over 3,000.

Now, of course HMRC don't have the capacity at the moment to currently investigate all of those 3,000 complaints. It involves a lot of staff, they need access to documents they simply don't have and they don't have the time to do it. So, it seems like they're doing a bit of a pay it all now and then see if you can reclaim it or claw it back later for anyone who wasn't entitled, which is I think what you were talking about there, Kelly, with not exactly knowing where the boundaries are of what you can and can't do.

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**Kelly**

Yes, I think that's right, and I think there are some, so, some of those boundaries are difficult to establish with certainty; some boundaries are relatively well known and understood. But this changeover between the scheme as it previously was and a new iteration of the scheme introduces additional difficult areas so, you know, things like establishing which of your employees are eligible under this new scheme because it's not just as simple as were they employed on X date, which was essentially the position under the original iteration of the scheme although X date

also changed so that wasn't necessarily that simple but it was relatively, you know, definitive.

Here you've got to think about whether that individual was previously furloughed under the original scheme and if they weren't then they won't be eligible, unless they are coming back from a period of family leave and that is why they weren't furloughed, because they were on maternity leave for example. So there is already that introduction of, you know, being able to understand which of the people on your list, and that might sound really obvious and easy but if you are talking about an organisation with a very large workforce, that could be quite an undertaking, that assessment.

So, there is quite a lot of work to be done in a relatively short space of time and clearly that brings with it potential risks as well.

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**Alice** Presumably also it brings with it the risk that someone in the workplace might have an arrangement, a side arrangement with someone to list them as previously being furloughed when in fact they weren't. Can you see that being a possibility?

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**Kelly** I can understand how that could happen and, you know, certainly none of the clients that I have been speaking to would ever intend that kind of situation and would always be doing what they can to avoid that, but the reality is how can you prove to HMRC that you avoided that and what procedures have you got in place and records of those procedures have you got in place if you are asked to justify that and sort of prove that later down the line.

And I think it's almost that piece of the jigsaw, isn't it, that is the difficult one it's if something goes awry and goes wrong how, as an organisation, are you going to be able to retrofit the jigsaw and say "well look, we did this, this and this, and we did everything we could", or actually given the speed at which this is all moving are there potential gaps in your ability to justify something if it goes wrong? And that is the worry I think for lots of businesses.

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**Alice** So what is it exactly that HMRC are able to do in terms of looking at these claims, now that they've received fraud claims?

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**Kelly** Well I think that's actually going to be really interesting to see, in terms of the next period of time, how it pans out. Because there are, there's the kind of bucket of complaints that are, that you flagged, that are individuals understandably ringing HMRC and saying "look I'm concerned that my employer is making a claim they shouldn't be", the sort of, you know, what you might describe as the kind of "deliberate fraud" which I know you'll be cringing with your own criminal law hat on, 'that's not, you know, that's not how it's described in the statute!' But kind of like, someone is trying to pull the wool over.

But I'm also really interested to see what happens with the other ones that may be less deliberate but may be seen to be a claim that shouldn't have been made.

And with this new scheme, as I was saying, there's kind of changes to it and one of the changes as well is the tapering off of what is permitted to be claimed under the scheme and the kind of adjustment between the pot of money so that less and less, over the coming months, is payable by the Government, and more and more is topped up by the employer. And that will be, that I can see could be ripe for mistakes, miscalculations, wrong dates etc.

And so you could see how there could be some issues around that. And my understanding, you'll know better than me Alice, is that the length of time that HMRC can look back is likely to be fairly, fairly long as we go forward.



**Alice** Yes, that seems to be the picture – that they've got five years that they can go back and look at it; so they do have some time to play around with what information they can get and what exactly has happened.

So as you were saying earlier, it is going to be incredibly important that all of these decisions about policy around what exactly the grey area lines are going to be are clearly documented so that they can, any business that is approached by HMRC can say "well look, these are the reasons and this is what we decided to do given the understanding available at the time".

So there have also been some amendments to the Finance Bill 2020 proposed, which currently is proposing two things.

The first is, as you were talking about, because of these changes in the way that it operates and what exactly is allowed and not allowed, there is a period of time which is going to be made available to businesses and employers to say "oops, we made a mistake, we've not exactly got this right" and they will be allowed to declare any claims that have been either improper or didn't quite follow what we now understand to be the rules.

Those can be declared and repaid and nothing further will happen, that will be it. Kind of a clean slate approach.

But then there's going to be a kicker, which is, if you didn't get around to declaring it, if you didn't make those payments, if you didn't say "whoops, I made a mistake", then there is going to be a penalties process.

So, at the moment, what is proposed is that not only would you have to repay 100% of whatever was paid out improperly or against what HMRC have decided the rules are, you would also have to pay 100% penalty for failing to put your hand up. So 200% of whatever was paid to you. That is quite a significant penalty, particularly if we're not in a situation where it was deliberate. If this is just one of those, as we were talking about, grey areas where you've made a judgment call which now no longer aligns with what the understanding is.

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**Kelly** Yes, and it seems to me that there is a kind of window of opportunity for businesses in the coming kind of weeks perhaps, perhaps no longer than coming weeks, to do a check – to get an independent assessment ideally – of those areas, those decisions and establish whether there is a concern because of this, effectively this kind of amnesty period, moratorium in a way, to say if there has been a problem to find it, to spot it, and to own up about it. And, that seems to be a fairly short, and potentially rapidly, closing window of opportunity from what the current consultation would suggest anyway.

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**Alice** Yes, it's currently proposed to be around about 30 days, \* [NOTE: SINCE THIS PODCAST WAS RECORDED THE PROPOSED TIME PERIOD HAS BEEN INCREASED FROM 30 DAYS TO 90 DAYS] do you think that is going to be long enough for businesses to get a true handle on whether or not they have overstepped the mark with their claim.

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**Kelly** Yes, it's very, it's potentially very tight isn't it.

Certainly for organisations that have complex employment arrangements, you know. It's one thing if you're a business that has a relatively small number of people who are employed in a similar way, on similar contracts, with a base salary and fixed hours, and it's pretty, pretty easy to work out who has been furloughed, perhaps the whole thing has been shut down completely.

And there is, there is everything on the scale from there up to organisations with various different entities within a group, with different employee structures, with different working arrangements and locations, with different people who have been furloughed perhaps for certain periods and brought back for other periods.

All of those complexities obviously bring with it, not just a potential for risk to creep in, but also the logistical difficulties of sense checking that.

The other bit as well for me that I don't think has, and correct me if I'm wrong, but I don't think has yet been completely confirmed is when the 30 days begins to run. Because that is going to be quite important isn't it. If it's 30 days from when you've made a claim, well, what about all the claims that were made months ago, is it, are they just, is it too late or is it sort of 30 days from when the scheme is closed or, you know, 30 days from when HMRC contact you, like what's the situation? That is going to be quite important to establishing how much of an analysis you can do as an organisation to check that, you know, you've got everything as right as you hoped you did. **[NOTE: THIS HAS SINCE BEEN CLARIFIED AS THE LATER OF THE DATE OF ROYAL ASSENT OF THE FINANCE ACT 2020 OR WHEN THE INCOME/CORPORATION TAX BECOMES CHARGEABLE]**

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**Alice** Yes, that's right. And because we don't actually know at the moment how that is going to be defined, the legislation is in consultation its coming back to parliament on 25 June and from there, there is going to be a whole host of factors that will be taken into account and what exactly they are going to do with it. It's just impossible to tell at the moment.

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**Kelly** Yes, which is difficult isn't it, and there's something to, I think we'll look back as lawyers on this period, we'll all look back as individuals on this period of time and reflect on the weirdness of lots of things. But I think as lawyers, you know, we're not, we don't see this type of situation where over a period of time vast swathes of legislation and guidance and really fairly complex interrelating and, you know, high octane – in the world of employment and tax anyway – pieces of legislation and rules just come in, out of left field, and are amended over and over again.

And obviously, you know, to a degree that's unavoidable because we are operating in a crisis state, but this, the legislation and the rules and the guidance that everybody in these organisations are starting to make decisions on, has not been through the same rigour as you would expect in normal times – consultation, issues being spotted, issues being addressed, dealt with, understood, by, you know, industry bodies and things, it doesn't have that and in fact that, and that is the difficult bit is that these issues will be flushed out, to a degree, when it's too late for some organisations to correct them, and that is really difficult to get your head around.

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**Alice** Exactly. And there's always that horrible threat hanging over everyone in any type of situation where you are talking about a regulator, which is what is going to happen if they decide it was deliberate? If it was a criminal charge?

So there are of course criminal sanctions here, which is if anyone was doing it dishonestly.

So the fraud risks that we were talking about, if that has happened, there are criminal penalties, which could follow and, depending on what numbers we're talking about here, they could be significant. Particularly because the courts are going to look to who did this deliberately and they are going to look to punish and punish severely.

So we're talking about a situation where the entire society has kind of mobilised behind this idea of the communal good and anyone who is going to be stepping outside of that, is really going to be putting their head above the parapet.

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**Kelly** Yes, absolutely. And I think that dovetails with, you know, the economic reality that you touched on, Alice, that, you know, we're paying out as a society to try and keep things as much on track as we can, and then we'll move into this different period, won't we, where if you are HMRC, you will be looking for the gaps and the ways in which to claw back that vast, vast, vast amount of money that has been paid out. And the obvious place to start is the dishonest claims, but then, perhaps as we get further down the track, the ones that are more nuanced will be, will merit equal focus because if they are outside the rules they are outside of the rules.

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**Alice** Yes, that's true, that's very true. So what can businesses do? What are we looking at here, how can you safeguard yourself?

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**Kelly** I think there is something to be said for looking to take stock at this point.

So a lot of these decisions around furlough were made at speed, necessarily because people were trying to keep the business on the road and also keep individuals in jobs which remember was the thrust of the scheme, you know. And there was a lot of discussion about, you know, taking people back onto the books who had been made redundant in order to access the furlough scheme and that was a real, that was a push behind the scheme actually, I think in hopes that those people would potentially have a job to stay in at the other end, whereas if they were made redundant at the start that opportunity may be taken away so the thrust of it was very much about "let's just keep as much status quo as we can".

So quick decisions were made understandably. We've now got, in the world of coronavirus and business, perhaps a relative state of calm in the sense that furlough is up and running – if you are accessing the scheme you have already accessed it, otherwise, you know, you're now too late. So there's a level of understanding about some of the operational processes including some of the legal pieces around you, how you, you know, validly implement it with individuals and all of that good stuff; although there is work to be done around making sure that your processes are fit for purpose under the new iteration of the scheme.

I think there's a little bit, potentially, of breathing space that is important to take now to see whether you think it would make sense, as an organisation, to get a review of what you've done.

And that may be, you know, for some organisations, that may be the first time that they've looked externally for somebody to look at it. You know, many organisations will have dealt with this themselves, internally, via payroll and their finance teams. There's nothing wrong with that at all. For other organisations they may have had some advice, so they may take a view that that's fine, or they may want to take this opportunity to test, you know, if there is any concerns that they have, whether they think they have got the robust processes in place to ensure that, you know, the delegation structures haven't left them with a risk in built.

I don't know whether you agree but I feel like that, this is an opportunity that will disappear quite quickly, that could be quite important for any organisation that has a concern.

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**Alice** Absolutely. Absolutely.



**Alice** So, why would you go to a law firm to conduct this kind of review – what is the point?

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**Kelly** It's a good question because, you know, we're not normally known for carrying our calculators around with us necessarily, but actually in this situation it's really important to take into account what are the advantages you get from going to, going externally and going to lawyers if you're going externally.

And the one advantage that you get from instructing lawyers is the potential for taking advice that is covered by legal privilege and that is really important in the context of any sort of investigation; that you decide actively whether or not you want that to be covered by legal privilege such that you have a bit more control over what you can then do with the information and a bit more time to deal with it.

And that's something I think Alice in your practice that you come across often isn't it?

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**Alice** This is absolutely crucial.

So the amount of organisations that have either not consulted a lawyer at all, and any advice they've got is immediately discoverable by any regulator coming along particularly HMRC.

The other point is that there is a lot of ways that you can go out to a lawyer, get good privileged advice, and then lose that privilege either by waiving or sending it to a third party, copying an accountant in, any of these steps that you take to make sure that the advice is given to anyone that is not the lawyer and your business do mean that all of that protection that you had in place is now gone.

So it is incredibly important that both you think about what advice you are getting, and how you might lose that protection that you have carefully crafted.

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**Alice** So is there any last advice that you've got for businesses?

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**Kelly** Yes, I'd love to say something super sexy and whizzy, but actually, in reality, I think a big part of this is almost future gazing and saying "if I am asked, or if we, as a business, are asked, in four or five years' time, to explain the decisions that we made, the process that we followed, which we are confident is great, we are confident we've made all the right decisions, we're confident we've taken advice, how will we demonstrate what we've done?". And particularly, "how will we demonstrate if me, the individual in finance, or payroll, or HR, isn't here any more?". "How as a business will we be able to, sort of, 'show our workings' if HMRC come knocking to test the sort of answer that we input into the system?". And, unsexy as this may be, this is down to records and clear consistent complete records that show your workings as an organisation, there's really no way of getting away from that.

Put another way, if you don't keep them, there's a potential risk that you are building in, not because you've done something wrong, but because you can't prove you did something right. And that's such a shame.

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**Alice** Yes, and also I'm sure that you would also reiterate, make sure you know what your data retention policies are. There is nothing worse than having all of these beautiful, beautiful records and then suddenly discovering when you need them, you've actually destroyed them.

**Kelly** Yes, you've automatically deleted them because you didn't switch that thing off on your IT system, yes. Yes, that would be, that's a gut-wrenching moment isn't it.

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**\*Alice** Hi all, this is Alice breaking in from the future. One of the challenges of operating in an ever-changing landscape is that, well, it's ever-changing. Since recording this episode on a very hot day in June, the Finance Bill has been amended changing the time businesses have to notify HMRC of any furlough payment they shouldn't have received from 30 days to a more reasonable 90 days and explaining that this starts to run from the earlier of the date of Royal Assent (estimated to be late July) or the date on which the tax becomes payable.

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**Alice** Well Kelly thank you so much for taking us through furlough and all of its nuances and thank you to all of our listeners for joining us.

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As ever a full transcript of our episode together with our references can be found on the website [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters) and if you have any questions for me or for Kelly or any topics you'd like us to cover in a future episode please email us on [taxingmatters@rpc.co.uk](mailto:taxingmatters@rpc.co.uk). We would love to hear from you.

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