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IN THIS ISSUE

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7 Staple Inn, London, WC1V 7QH.
Tel: 020 7405 1600 Fax: 020 7405 1601
E-mail: enquiries@technicalconnection.co.uk
www.techlink.co.uk

PENSIONS ANTI-FORESTALLING PROVISIONS

The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements)(Amendment) Regulations 2009 - SI 2009/2033 - come into force on 1 September 2009.

Sections 306 to 319 Finance Act 2004 introduced a "disclosure" regime which requires the notification to HMRC of certain tax arrangements and proposals for arrangements ("schemes"). Disclosure requires certain persons, usually the promoter, to disclose information about schemes falling within certain descriptions within 5 days of the scheme being made available or implemented. The descriptions of schemes to be disclosed are prescribed in the principal Tax Avoidance Schemes Regulations (SI 2006/1543, as amended).

The Amending Regulations add to the list of prescribed schemes in the principal regulations any schemes that seek to avoid or reduce the restriction of pension relief (ie via the special annual allowance) in ways that Parliament did not intend.

HMRC has also updated its guidance note on the disclosure of tax avoidance schemes to cover the above new reporting requirement. This provides more information on the circumstances in which a scheme or arrangement will need to be reported. It provides little new guidance although it does make clear that where an individual's relevant income is reduced below £150,000 it will not be necessary to report circumstances where this is as a result of a reduction in hours worked or bonuses received.

This is because a salary reduction in itself is unlikely to fall within the definition of "arrangements" and, even if it does, it would not amount to a 'tax advantage' within the definition in section 318(1)(a) Finance Act 2007.

The Special Annual Allowance Charge (Application to Members of Currently-Relieved Non-UK Pension Schemes) Order 2009 – SI 2009/2031- extends the special annual allowance provisions to members of pension schemes established outside the UK that are not registered pension schemes but for which UK tax relief is being given.

This Order modifies Schedule 35 to the Finance Act 2009 and makes sure that the anti-forestalling provisions apply to high-income individuals, who are receiving UK tax relief in respect of the pension contributions they and their employers pay to schemes established outside the UK. The Order also provides equivalent protections from the restrictions on tax relief for members of non-UK schemes, who became or become resident in the UK between 6 April 2006 and 5 April 2011, compared to those provided for individuals who remain UK resident throughout that period.

TRUSTS MISCELLANY

- HMRC has produced a tax pool calculator to enable trustees to keep a record of income tax paid by trustees of a discretionary trust (including any unused amounts carried over from earlier tax years). This can be used to work out a discretionary trust's available tax pool or to work out its likely value by the end of the year.

- HMRC has issued guidance on the residence status of overseas trust companies. The guidance is comprised of detailed background notes and a number of examples and scenarios.

- HMRC has withdrawn its guidance to trustees regarding the 2008/09 tax credit on foreign dividends, which it admits was misleading and has caused confusion. The guidance, on page TEN5 of the SA904 Notes, wrongly implied that trustees of an interest in possession trust or a settlor-interested trust were not entitled to these tax credits. HMRC is now preparing revised guidance.

NEW RULES FOR DEPENDANTS' PENSIONS

Extension of the circumstances where a dependant's pension can be paid without being treated as an unauthorised payment

The Taxation of Pension Schemes (Transitional Provisions) (Amendment No.2) Order 2009 – SI 2009/1989 - extends the circumstances where a dependant's pension can be paid to a dependant aged over 23 without being treated as an unauthorised payment. These Regulations come into force on 1 September 2009 and have effect in respect of payments of pension death benefits made on or after 6 April 2006 where certain conditions are met.

These regulations reword Article 34 of the main Transitional Provisions Regulations (SI 2006/572) entirely and insert a new Article 34A, allowing some pensions to be paid to dependent children who are over the age 23 without attracting tax charges of up to 70% as unauthorised payments. It also creates a new Article 34B, permitting the same transitional protection to continue following a block transfer (or a series of block transfers) arising from a corporate or pension scheme reorganisation.

Until 1 September 2009, when the new rules come into force (backdated to 6 April 2006), the pension tax rules require that a pension paid to a child of a deceased member of a registered pension scheme must cease when that child reaches age 23, unless the child qualifies for a dependant's pension on grounds of incapacity or the pension is covered by the transitional provisions in Article 34. In particular, Article 34 covers cases where the scheme rules permit this pension to be paid until the child ceases full-time education or vocational training.

The new Article 34A will permit a dependant’s pension to be paid to a dependant who is aged over 23, and who has ceased full-time education and vocational training, where the dependant is either:

- financially dependent on the member at the time of the member’s death, or
- the financial relationship with the member at the time of the member’s death is one of “mutual dependence”.

This will apply where any one of the following 4 conditions is met and the scheme rules condition is met:

- The member’s pension was in payment on or before 1 July 2008
- The pension death benefit was in payment on 1 July 2008
- The entitlement to the pension death benefit arose before 1 July 2008
- The entitlement to the pension death benefit was subject to the discretion of the trustees of the scheme and the discretion was capable of being exercised (in favour of the child having such an entitlement) so that entitlement could have arisen before 1 July 2008.

The scheme rules condition is that the rules of the scheme on 5 April 2006 allowed a pension to be paid to a child of the member following the member’s death if, at the date of the member’s death, the child was financially dependent on the member or the child’s relationship with the member was one of mutual dependence.

LIFE POLICIES AND INHERITANCE TAX – MORE IMPORTANT THAN EVER?

HMRC amends the basis for calculating the interest due on unpaid inheritance tax

When a life assurance policy is effected in trust the policy proceeds do not form part of a deceased policyholder’s estate. This gives rise to two advantages:-

(i) the policy proceeds are not subject to IHT and
(ii) the policy proceeds are not part of the estate for probate purposes

This means that the policy proceeds can be paid before probate is granted which is important because probate is not granted until the IHT on the estate is paid. This aspect is set to become even more important following the recent HMRC announcement that they will charge interest from September on unpaid IHT at a rate of 2.5% over base rate - currently, using a base rate of 0.5%, this equates to interest of 3%.

This means that if IHT is not paid within 6 months after the end the of month in which the deceased died, interest will start to clock up at 3% pa. Clearly this will have a particularly harsh effect on those estates which consist of illiquid assets which are difficult to sell quickly such as property. Although IHT on such assets can normally be paid in 10 equal instalments such payments with still clock up interest.

It is for this reason that a life assurance policy in trust will be even more important as a form of IHT planning in the future.

REGISTERED PENSION SCHEMES - EMPLOYER CONTRIBUTIONS AND TAX RELIEF

Clarification has recently been obtained from HMRC on the date an employer contribution will be deemed to be paid for tax relief purposes

The question was raised with HMRC on whether a contribution paid by an employer would obtain tax relief in the company's accounting period ending 30 June 2009 where the company cheque passed to the insurer of the pension plan on 29 June 2009, but the cheque was not cleared until 2 July 2009.

Section 196(2)(b) Finance Act 2004 refers to employer contributions being deductible in computing the amount of the employer's profits for the period of account in which they are paid. However, the key question is how is the date "paid" defined?   Page 46010 of the Business Income Manual states: "Employers' contributions are deducted for the period of account in which they are paid by the employer (S196 (2)(b)), and for no other period (S200), unless either the deduction is required to be spread over a number of periods, as described below (S197) or the deduction is allowed for an earlier period (S199)." [*All references here are to Finance Act 2004*]

However, there is no definition as to what is deemed to be the "date paid" in any given set of circumstances or payment method. Page 05300080 of the Registered Pension Schemes Manual gives specific details as to the deemed "date of payment" based upon a number of different payment methods, but only in respect of **member** contributions.

HMRC has confirmed that employer contributions would be treated in the same way as for member contributions for the purpose of determining the "date paid".

This means that the date of payment of the contribution depends on what method is used to pay it and will be as follows:

Cheque:
The date the cheque is given to the scheme administrator or, if posted, the date the scheme administrator receives it.

Debit/credit card:
The date on which details are received by the scheme administrator.

Direct debit:
The date the scheme administrator is authorised to draw the sum from the member's bank account, i.e. the date set out in the direct debit mandate. This is subject to the proviso that the scheme administrator

- receives the correctly completed direct debit mandate, and
- actually receives the funds requested under the direct debit mandate.

In specie transfer:
The date the asset becomes the property of the scheme.

Conclusion

Returning to the original example, this means that the employer contribution should be relievable in the employer's accounting period ending 30 June 2009 as the employer's cheque was received by the scheme administrator on 29 June 2009, even though the cheque was not cleared until 2 July 2009. Of course, the contribution will also need to meet the "wholly and exclusively for the purposes of the trade" requirement for relief to be granted. There may also be evidential issues as to when the cheque was received. For this reason, it is always a good idea to keep records.

INHERITANCE TAX REVALUATION RELIEF

Death within 7 years
Relief for a fall in the value of assets

Sections 131 – 140 IHT Act 1984 provide revaluation relief in certain circumstances when a person dies within seven years of making a transfer of value (either a chargeable lifetime transfer or potentially exempt transfer) so that IHT or additional IHT is payable. The relief takes the form of a reduction in the value of the property transferred as a result of a fall in the market value of the property between the date of the transfer and the date of death. The availability of the relief in sections 131 to 140 can be complex and what follows is a summary of the main points.

For the relief to apply:-

(a) at the date of the donor's death the property must still belong to the transferee or the transferee's spouse/civil partner; or

(b) the property must have been sold before the donor's death by the transferee or the transferee's spouse/civil partner by a "qualifying sale". In this respect, a qualifying sale is, broadly speaking, a sale at arm's length for a price freely negotiated at the time of sale where the vendor is not connected with the purchaser.

The relief is available for all types of property with the exception of tangible movable property that is a wasting asset (ie. an asset which immediately before the transfer had a predictable useful life of less than 50 years, having regard to the purpose for which it was held by the donor). For this purpose plant and machinery are treated as wasting assets.

Tax is calculated (or recalculated) as if the value transferred were reduced by the amount by which the market value of the property at the date of the transfer exceeds the market value at the date of death. For example, if a PET is made of properties with a market value of £490,000 and death of the donor occurs after two years when the market value of those properties is £390,000, then the value of the PET is reduced by £100,000 to £390,000. The relief must be claimed by the person liable to pay the whole or part of the tax.

There are some important points to be noted:-

- The reduction in the value transferred has no effect on the size of the gift that comes within the nil rate band.
- The reduction in the value transferred has no effect on the transferor's seven year cumulative total.
- If tax was paid on the value transferred, (ie because the gift was a chargeable lifetime transfer), none of this tax will be repaid. This means that the relief for chargeable lifetime transfers will only apply to the calculation of the IHT on the death of the donor within 7 years of the gift.

PENSIONS MISCELLANY

- In November 2008 the PPF issued a consultation paper regarding the long-term future of the levy. It has now issued an update on the future development of the levy which sets out the responses the PPF has received in respect of that consultation together with its initial conclusions, and how it will take this forward by means of a steering group that will develop the proposals.
- The PPF has launched a consultation concerning changes it is proposing to make to the assumptions used for pension scheme valuations under sections 143 and 179 of the Pensions Act 2004.
- The DWP is consulting on a draft of the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010, which are being introduced to deliver the remaining elements (ie third tranche) of improvements to the FAS announced by the Government on 17 December 2007. This consultation takes into account the responses to its earlier consultation on this in April this year.

This set of draft regulations includes provisions for the Government to absorb the assets remaining in relevant FAS qualifying schemes. It also amends the structure of Assistance to ensure that members of those schemes do not lose out as a result of the transfer of assets to the Government.

- Following its consultation on a proposed revised Code of Practice regarding trustee knowledge and understanding, the Pensions Regulator has now issued its response to that consultation and has laid a revised version of this Code of Practice before Parliament for approval.

  This revised Code of Practice has not changed substantially but does recognise the unique requirements of trustees of very small defined contribution schemes, with 12-99 members, and the Regulator has developed slimmed down guidance for this group. Trustees of schemes with less than 12 members remain exempt from these requirements.

- The Pensions Regulator has been given the power to outsource some of its powers by the Pensions Regulator (Delegation of Powers) Regulations 2009 – SI 2009/1888. This is principally designed to ensure that the compliance regime for the duties on employers (with regard to auto enrolment etc) is delivered in the most cost effective manner.

- The DWP has issued the following two research reports on workplace pensions:

  - ♦ Current practices in the workplace personal pension market: Qualitative research with pension providers and

  - ♦ Pensions industry responses to the workplace pension reforms: Qualitative research with pension providers and intermediaries.

- HMRC has issued an updated version of its leaflet "Approaching retirement: A guide to tax and National Insurance contributions" (IR 121). This guide provides an excellent starting point for people approaching retirement regarding the tax and NI position in retirement. It also provides links to where further information can be obtained.

CLARITY IN A WILL

A man whose elderly great uncle got his name wrong in his Will has recently convinced a High Court judge he is entitled to his inheritance.

When Leslie Fawdon, who lived in Cornwall, passed away, he left half of his estate to "my nephew Mark Parkinson of Ditching Road Brighton in the County of Sussex".

But there is no trace of a "Mark Parkinson" ever having lived at “Ditching Road”, an address which also does not exist. Instead, Justin Parkinson, Mr Fawdon's great nephew, who lives in Brighton and whose family home is at “Ditchling Road”, says the Will referred to him.

The other half of the estate was left to the testator’s sister.

The Court ruled that the reference to the Brighton man was a "misdescription". Clearly three mistakes had been made. The first, and probably the most surprising, was that he referred to Mr Parkinson as "Mark" rather than "Justin". The second was that he referred to him as his nephew rather than great nephew and the last was the misspelling of Ditchling. Justin Parkinson was therefore awarded half of his great uncle's estate.

Presumably if there was a Mark Parkinson in the family (wherever he lived) this would have caused further confusion. Will provisions can fail, or have unfortunate consequences or even lead to bitter family wrangles in Court if they are not properly constructed to reflect the true intentions of the testator.

EXECUTORS' FEES

Test case pending
Level of fees charged by professional executors

A test case to decide whether banks and solicitors can be prevented from taking large fees out of inheritances for administrating a deceased's Will is due to be heard in the High Court later this year.

A person may appoint a bank or solicitor to carry out the paperwork relating to their Will before their death. However, some charge fees of up to 4.5% of the deceased's estate, equating to a bill of £18,000 on an estate worth £400,000. There can also be hourly fees of several hundred pounds charged on top of this, which the heirs do not have the power to challenge as the appointment of an executor is the preserve of the person making their Will.

The case going before Court concerns David Khan, a beneficiary of his step-father's estate. The respondent is a company called Will Drafters. Mr Khan argues that the fees being charged are too high at 1.75% of the estate, equating to £7,662 plus other charges. Mr Khan obtained a quote through another company for less than half that price.

Will Drafters responded by saying: "This issue is fundamental to a person's rights when making a Will and whether after their death their wishes should be respected or not."

Before appointing a professional to act as executor, an individual should be clear on what the costs to the estate will be. But, as stated above, it is the preserve of the person making the Will to appoint an executor, not the beneficiaries.

It is, of course, possible for the beneficiaries to try to persuade the executors to resign voluntarily. Also, it is possible to have an executor removed from handling a Will in certain circumstances.

We will have to wait and see whether or not a beneficiary can remove an executor simply because he feels the executor's fees are too high.