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HMRC ISSUES CUSTOMER BRIEFING ON TAX AVOIDANCE

HMRC has issued a short briefing note for the general public entitled “Tackling Tax Avoidance”.

The briefing succinctly describes the difference between “tax avoidance” and “tax planning”. The latter it finds acceptable but the former it does not. It then goes on to outline the methods that HMRC intends to employ in tackling avoidance. There is the Disclosure of Tax Avoidance Schemes (DOTAS) legislation, the soon to be introduced General Anti-Abuse Rule (GAAR) and also direct legal challenges in front of the tribunals or courts.

The briefing is an easy and interesting read which is suitable for anyone who wants to understand HMRC’s views and approach on the subject of tax avoidance.

HMRC REVISES FORM IHT35

HMRC has revised form IHT35 which should be used by executors and others wishing to revalue certain investments for IHT purposes that have been sold within twelve months of death for less than their value at death.

If the estate of a deceased person includes “qualifying investments” and executors or other persons paying the tax on them sell any of them within twelve months of the death, they may claim that the aggregate value of sales is substituted for the death value of the qualifying investments sold. In this respect the "aggregate value of sales" is the gross proceeds of sale before deduction of any expenses. Qualifying investments are, broadly, quoted shares and securities, UK gilts and authorised unit trusts.

A revised value may also be included for qualifying investments that are 'cancelled', or in which dealings are suspended, within twelve months after death. It is important to note that if a claim is made, all the qualifying investments sold within twelve months of the death of the deceased have to be revalued in this way. A claim cannot be confined to only those qualifying investments that have fallen in value. This means that the relief is available only if the executors or other persons paying the tax have sustained an overall loss. The relief is restricted if any purchases of qualifying investments take place in the period between the date of death and two months after the last sale within the twelve month period after death.

Example

Anne died on 1 August 2012. Her estate includes quoted shares worth £20,000, on which IHT of £8,000 is paid. Within twelve months her personal representatives sell all of these quoted shares for £15,000 before expenses.

The 'loss on sale' is £5,000 and the value of these shares is reduced by £5,000 for IHT purposes. This means any IHT is calculated on a value of £15,000. So the relief reduces the estate chargeable to IHT and a refund of £2,000 (£5,000 @ 40%) is obtained. The relief also applies to trustees of a Will trust that has come to an end on the death of a life tenant.

If the personal representatives or trustees then repurchase the qualifying investments within two months of sale, the loss relief would be withdrawn. However, if the beneficiary under the Will (rather than the personal representatives or trustees) repurchases the qualifying investments immediately after the sale there is no loss of relief. This approach therefore crystallises the inheritance tax saving and allows the beneficiary to continue owning the securities. But as the beneficiary acquired the qualifying investments at prices lower than their value at death it should be noted that the base value for capital gains tax purposes is reduced as a result of this exercise. It is also advisable before proceeding with this strategy to ensure that the tax saving is greater than the costs involved in undertaking the transactions (e.g. stockbroker's commission, stamp duty and administration fees).

POST-TRANSACTION VALUATIONS AND CGT

HMRC has recently updated the notes to form CG34. This form captures the information necessary for HMRC to carry out a post- transaction valuation check for capital gains tax purposes. This service is free of charge but valuations will only be considered after the relevant transaction has taken place. The service is available to individuals, trustees and companies and the completed form CG34 should be sent to HMRC at least two months before the relevant filing date to give it time to carry out the check.

If HMRC agrees the valuation it will not be challenged when the return is filed unless some information which affects the valuation was not supplied. If HMRC disagrees with a valuation it will suggest an alternative.

COMPANY CAR ADVISORY FUEL RATES

HMRC has published revised advisory fuel rates that took effect from 1 September 2012. The new rates may be used to negotiate dispensations for mileage payments for business travel in company cars, or where employees are required to repay the cost of fuel used for private travel.

For one month from the date of change, employers were able to use either the previous or new current rates as they chose. Employers could therefore make or require supplementary payments if they so wished, but were under no obligation to do either.

Engine Size	Petrol	LPG
1400cc or less	15p	10p
1401cc – 2000 cc	18p	12p
Over 2000 cc	26p	17p

Engine Size	Diesel
1600cc or less	12p
1601cc – 2000 cc	15p
Over 2000 cc	18p

Petrol hybrid cars are treated as petrol cars for this purpose.

NICs ON CONTRIBUTIONS TO A FURBS

Do contributions made to a FURBS constitute earnings for the purposes of NICs?
HMRC v Forde & McHugh Ltd

In the case of HMRC v Forde & McHugh Ltd the Court of Appeal had to decide whether a contribution made, in 2002, by the taxpayer company to a FURBS to make pension provision for one of its directors, constituted "earnings" for the purposes of Class 1 national insurance contributions (NICs). Reversing the decision of the Upper Tribunal, the Court of Appeal held, by a majority, that the contribution did constitute earnings. Therefore, as it was common ground that the contribution was "paid to or for the benefit of an earner" (SSCBA 1992 s. 6(1)), it was liable to Class 1 NICs. Unless there is an appeal to the Supreme Court, the result of this decision is that the concept of "earnings" for NICs purposes is a self-standing one and not, therefore, restricted by some of the constraints which limit the concept of "emoluments" (now, confusingly, also "earnings") for the purposes of employment income tax.

COMMENT

Companies should now consider whether any of their incentive arrangements include features which might fall foul of this decision. For instance, if a payment is made by an employer company to a third party (eg a group company or an employee benefit trust) to fund a conditional, performance-related award of cash or shares to an identified group of employees and the *earmarking of the fund (to reflect the contingent entitlements of each individual) falls within one of the exclusions to the disguised remuneration regime for deferred awards, that payment could now be liable to Class 1 NICs under the decision in Forde & McHugh Ltd (unless it fell within one of the "disregards" in the Social Security (Contributions) Regulations 2001).*

Even if no payment by the employer company was necessary because the third party already had a sufficient fund, the mere earmarking of the fund for the purposes of the conditional award might now be liable to Class 1 NICs under the decision in Forde & McHugh Ltd, depending on whether the NICs concept of "payment" is wide enough to include an earmarking.

TASKFORCES TO CHASE TAX DODGERS

HMRC has announced that taskforces now operate around the country with the aim of catching tax dodgers. Their operations are expected to recover more than £19.5 million in unpaid tax. The taskforces will be targeting specific professions based on where the taxpayers' businesses are located. This regionally-based anti-avoidance programme will target the following:-

- The legal profession in London
- Grocery and retail in South and North Wales, the North West and the South West
- Hair and beauty in the North East
- Restaurants in the South East and Solent
- The motor trade in Scotland

Taskforces are specialist teams that undertake intensive bursts of activity in specific high risk trade sectors and locations in the UK. The teams will visit traders to examine their records and carry out other investigations.

GOVERNMENT CONSULTS ON AUTO ENROLMENT EARNINGS THRESHOLDS FOR 2013/14

With the first employers due to automatically enrol eligible employees from 1 October this year, the Government has already turned its attention to the earnings thresholds to apply for 2013/14.

In a consultation, issued by the DWP, the Government has proposed the following earnings thresholds for 2013/14 (current thresholds are shown in brackets):

- Automatic enrolment eligibility earnings trigger £9,205 (£8,105), in line with next tax year's standard personal allowance.
- Lower qualifying earnings band limit £5,720 (£5,564), in line with the estimated level of the lower earnings limit for NI contribution purposes, assuming a 3% rise, for the next tax year.

- Upper qualifying earnings band limit £41,450 (£42,475), in line with next tax year's upper earnings limit and higher rate threshold.

It should be noted that if these revised earnings factors are adopted there will be a £1,181 fall in the maximum qualifying pension earnings when compared with 2012/13.

Although the Government is proposing to reduce the upper qualifying earnings band, it has also asked for views on whether it would be better to freeze it at its 2012/13 level of £42,475 or to index the 2012/13 figure in line with earnings inflation to provide a new upper limit of £42,971.

Comments are required by 17 October 2012, while the Government intends to respond to the consultation in the Autumn.

The coalition government's target of reaching a £10,000 personal allowance is distorting matters here. To help finance the over-indexation of the personal allowance, the higher rate threshold (and thus upper earnings limit) is being frozen (2012/13) or cut (2013/14). Linking the auto-enrolment earnings thresholds to income tax thresholds has obvious appeal, but when the latter are being manipulated for political/fiscal reasons, the price of such symmetry is shrinking pension coverage. There is also a danger of creating the step contribution threshold issue that used to exist for NICs. As soon as the earnings trigger is reached, auto-enrolment contributions are based on £3,485 (2013/14) for employer and employee.

Meanwhile the Pensions Regulator has updated its detailed guidance on auto enrolment while the Government has launched a new advertising campaign, designed to promote automatic enrolment, which runs from 17 September until mid October 2012. This new campaign will see advertisements running on ITV, Channel 4, Sky, Channel 5, commercial radio stations and online, as well as print advertisements across the national press, key magazines and the business and trade press. Different types of print advertisement with specific messages will target individuals and employers.

With each passing week it becomes more and more important to be aware of the auto enrolment changes. The new advertising campaign is likely to generate more enquiries from employees and employers alike, and will also highlight the need for private pension provision.

PREPAID INTEREST

Taxpayer prepays interest in order to inflate tax relief and succeeds

The First-tier Tribunal found that a taxpayer, who prepaid interest on loans taken out for a qualifying purpose (to buy shares in a trading company), was entitled to relief for the whole amount of the payment in the tax year in which it was made, even though the prepayment represented the present value of the total interest that would be payable during the 30 year term of the loans.

The appellant, Garrett Curran, is a managing director in the investment banking division of the Credit Suisse Group. He was able to defend and justify each of his investment decisions using sound commercial principles, and the numbers stacked up. The fact that there was no documentation setting out a series of transactions that might be viewed as constituting a scheme was extremely helpful to Mr Curran. A less sophisticated investor, carrying out identical transactions recommended in writing by a tax adviser, might not have fared so well.

The three loans in question totalled £5.35m. Only days after taking out the loans Mr Curran was offered the opportunity to prepay the interest. He did so and paid a total of £4.24m. A condition attaching to the loans was that he was required to pay them back in full if they ran for the full 30 years. However, if he repaid them early a reduced amount would be payable in accordance with an algebraic formula which took account of the fact that no further interest was payable on the loan up to the date of maturity.

In 2007 it was calculated that £606,000 would have been required to clear the outstanding capital balances. Therefore in 2007 the interest plus the capital repayments would not have exceeded the original amount of the loan but the taxpayer would have got tax relief on an amount that equalled 79.25% of the original capital value of the loans.

COMMENT

This was quite a clever series of manoeuvres that netted the taxpayer a disproportionate amount of tax relief. However, with the change in the law capping unlimited tax relief such schemes, if they work, will have limited use after 6 April 2013.

AMPS CALLS FOR THE RELAXATION OF INVESTMENT RULES

The Association of Member-directed Pension Schemes (AMPS) has called on the Government to make the following easements to the pension scheme investment rules to enable pension fund monies to stimulate economic growth:

1. To amend the authorised employer loan criteria

   i) to allow loans secured by a charge that is not the highest ranking charge but with an increase in the minimum interest rate to 3% over base rate, and

   ii) to increase the maximum term to ten years.

2. To enable SIPPs to make loans to a business run by the SIPP member on similar terms as authorised employer loans under a SSAS. This is considered less risky than unsecured loans to individuals which are currently permitted.

3. To exclude large items of plant & machinery from the definition of taxable property so enabling pension schemes to undertake leasebacks with companies to inject cash into businesses.

4. To increase the scheme borrowing limits, preferably to pre A Day levels, which would make it easier for pension schemes to arrange the finance to undertake leasebacks with company premises.

AMPS had previously put similar proposals, without avail, to the previous Labour government. It will be interesting to see if the current government is prepared to adopt any of these proposals.

THE GOVERNMENT CONSULTS ON THE IMPLEMENTATION OF THE UK-US FATCA AGREEMENT

Following the signing of the FATCA Agreement with the US, the Government published a consultation document seeking views on its proposed approach to implementation.

Background

By way of brief reminder, the Foreign Account Tax Compliance Act (FATCA) is US legislation and its goal is to stop US persons from evading US tax through undeclared overseas investments. It aims to do this by requiring foreign financial institutions (FFI's) to identify which of their accounts are held by US persons (which include not only US residents but also US citizens, who of course may or may not be resident in the US) and report certain specified information about those accounts to the US Internal Revenue Service (IRS). A FFI is any non-US entity that accepts deposits, holds financial assets for the account of others or is engaged in the business of investing or reinvesting. This will catch banks, building societies, fund managers, insurance companies and probably many more financial organisations.

In order to comply with the FATCA provisions a FFI must enter into an agreement with the IRS to identify accounts held by US persons or US-owned foreign entities and report specified information about those accounts on an annual basis.

If a FFI does not enter into an agreement with the IRS to disclose information about its US accounts then there is a financial penalty. This is a deduction of 30% made from any US source withholdable payments payable to the FFI (and potentially to any of its associate companies). More detail on this subject can be found in the November 2010 issue of this Bulletin.

The consultation

The UK's information exchange relationship with the governments of other jurisdictions are a key tool to achieving the dual objective of tackling tax evasion and increasing international tax transparency. To this end the UK government has recently enhanced its information exchange relationship with the US through signature of the agreement to improve tax compliance and to implement the FATCA (the Agreement). The Agreement is a commitment by both governments to significantly increase the scope of information automatically exchanged.

The subsequent consultation paper, published on 18 September, sets out how the Government intends to legislate to deliver the commitments made in the Agreement and seeks views on the proposed approach - the final legislation will be put forward as part of the Finance Bill 2013. It also requests information on the expected costs of complying with the Agreement to help compile the impact assessment.

As the objective of the consultation document is to consult on implementing the Agreement into UK law, the content and consultation questions focus solely on aspects requiring implementation in the UK (rather than, for example, the requirements placed on US financial institutions by the US).

The closing date for comments is 23 November 2012.

GIFT AID SMALL DONATIONS SCHEME

Draft regulations for top-up payments published

In the March 2011 Budget it was proposed that from April 2013 certain charities and Community Amateur Sports Clubs (CASCs) that receive small donations of £10 or less would be able to apply for a top-up payment equivalent to Gift Aid without the need to obtain Gift Aid declarations for those donations. This change will help in situations, for example, where it is difficult to collect donors' details or donors may be reluctant to give them.

Under the Small Charitable Donations Act (the Act), which is the legislation that will govern the Gift Aid Small Donations Scheme (GASDS), the small donations limit is £20, not £10 as originally proposed, up to an annual total of £5,000 of donations per charity (as originally proposed).

As its name implies the GASDS is largely based on the Gift Aid rules, with two significant differences.

1. The payment is not a repayment of basic rate income tax. It will be an item of public spending so it will not earn interest.

2. The period of time within which a payment can be claimed is one year compared with four years under the Gift Aid scheme.

Because the payment to the charity will not be a refund of basic rate income tax made by HMRC, new rules are necessary to enable a charity to claim relief by way of top-up payments. The draft regulations which will govern the administration of top-up payments were published on 13 September. Known as the Small Charitable Donations Regulations 2013, they are put forward for consultation and the consultation period ends on 5 December 2012.

AUTUMN STATEMENT

The Autumn Statement has been scheduled for Wednesday 5 December 2012.

INCOME WITHDRAWAL RATE FOR OCTOBER 2012

The appropriate gilt yield, used to determine the 'relevant annuity rate' from HMRC's tables for an adult member commencing income withdrawals (or reaching an income withdrawal review date), in October 2012 is 2.25%.