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THE LATEST ON CJRS – THE COMPLIANCE STANCE

The Employment and Payroll Group (EPG) met with the CJRS compliance team on 8 December 2020 to discuss the HMRC stance on compliance thus far (things will no doubt evolve!). The initial planning assumption by HMRC is that (without any previous experience to go on due to CJRS being a totally new concept) a non-compliance rate of around 5-10% is to be expected. Further work is in hand to establish the actual levels of fraud.

The CJRS compliance team have broken down the non-compliance into three main areas:

- Organised
- Opportunistic
- Error

Certain employment schemes were denied access to the CJRS scheme due to flags appearing on their records as being "bad actors" in the system. Typical examples were criminal behaviour, and PAYE schemes which have never been used except to claim CJRS, for example, no salaries have ever been paid through them. Every claim is risk-assessed, and hundreds of thousands have been subject to automated pre-payment checks using RTI data.

In terms of post-payment compliance, HMRC has called around 5,000 employers to alert them to the fact that HMRC had concerns about the claim being made – this was intended to be a friendly call to identify errors and offer an opportunity to correct.

Since Royal Assent (22 July 2020) of Finance Act 2020, so-called "one to many" (i.e. sent from HMRC to many employers at once) or "nudge" letters have been issued to employers based on various sources of information, including reported cases to the fraud hotline. The non-specificity of the letters has been criticised by clients and agents – however HMRC explained at the EPG meeting that the powers granted under CJRS compliance are the same as those

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granted under tax powers – so the 'one to many' letters were designed to give employers an informal nudge without asking to see specific records – as this would then have amounted to a formal review and may have potentially exposed the employer to penalties. The letters are not an accusation and if there was an error, or indeed other behaviour, that led to an incorrect claim being made, and the employer made a correction within the time limit – no penalty has been charged.

The intent of both the telephone calls and the 'one to many' letters was so that employers could self-correct and not leave themselves exposed to penalties.

Since the nudge letters were issued, things have moved on to more specific one-to-one interventions. These are more serious and HMRC plans around 10,000 of these. In the most serious of cases, some high-profile arrests have already been made.

What happens next?

If other indicators of non-compliance are found during the interventions made, the officers would have no option but to broaden out the inquiry into other areas such as a full employer compliance review, which could also then attract an NMW inspection.

Enforcement team staffing levels across all schemes (CJRS "classic", SEISS, EOTHO) are standing at around 500 now, but this number is set to increase as the later iterations of the schemes are reviewed. It was noted that pension issues are being left within the remit of TPR to monitor and investigate, as necessary.

HMRC will be publishing the names of employers who have made claims under the CJRS extensions, unless it is agreed that a potential special security threat exists which exempts that employer from appearing on the listing.

All claims will be reviewed on the grounds of reasonableness when considering the actions taken at the time, as well as the available guidance/Treasury Direction iteration at the time of the claim.

BREXIT, SOFTWARE SERVICES AND THE NEED TO MAINTAIN DATA FLOW

Written by Lugo Limited, ICAS IT Partner

When the UK left the EU on 31 December 2020 the UK became a third country for the purposes of the EU General Data Protection Regulation (GDPR). A four-month transition period has now begun (with the option of a 2-month extension), while the EU decides on UK adequacy.

Thankfully, this means personal data can continue to be exported from the UK to the EU without additional safeguards. At the end of the transition period, it is hoped that an agreement will be made which will allow continued ease of data transfer. However, the ICO is warning that businesses cannot be assured that a favourable adequacy decision will be made, and that it would be prudent to review your current cross-border data transfer arrangements and implement plans to mitigate the risk of disruption.

What you can do to prepare

In order to reduce the risk of disruption to your business, reviewing some of the processes you put in place previously to become GDPR compliant will support you to identify areas of vulnerability.

There are three types of data transfer you need to consider:

- Receiving data in the UK from the EEA
- Sending data from the UK to the EEA
- Sending data from the UK to a non-EEA country

Review – consider what cloud storage, bespoke software, outsourced services, and online services you currently use. Establish where each of these suppliers is storing personal information.

For example, you may be using a cloud-based document sharing platform to view clients documents online. Many free services do not allow customers to dictate their data location, therefore reducing the control the customer has over the sensitive personal information.

Contracts – establish if your current contract with the supplier is adequate, or if it needs updated to reflect the upcoming changes. Contracts may include territorial definitions that refer to the EU territory but are intended to include the UK. Request updated terms for suppliers and ask them to share with you their Brexit contingency plans.

Mitigate risk – numerous software providers and cloud storage solution providers now allow you to dictate the physical location of your data. You may consider

moving your data to the UK. If you are currently using a service that does not allow you control over the location of your data, consider moving to an alternate provider.

Moving into 2021 it should become part of your procurement process to review supplier's processes for handling your data, taking into consideration the impact Brexit may have and the possibility of disruption to data flow. Consider how you can future proof your contracts now to reduce work in the future, for example, reviewing the dispute resolution settlement options.

The good news

Many large software providers have invested millions in ensuring they are ready and compliant with any changes that Brexit may bring. Microsoft states clearly that it will continue to be compliant with GDPR legislation. Microsoft has provided reassurance that customers will continue to be able to transfer data legally between the EEA and the UK.

Although Brexit brings more uncertainty it also provides a welcome reminder about important data security processes and good practice when choosing third party software suppliers.

INCOME TAX SELF-ASSESSMENT (ITSA) FILING DEADLINE

Self-assessment penalties – update on letter to HMRC sent by ICAS

On 25 January, HMRC confirmed that there would be an easement to the penalty position regarding Income Tax Self-assessment returns. There are to be no Self-Assessment late filing penalties for those who file online by 28 February.

This is a welcome outcome and relieves firms from the need to appeal penalty notices for returns submitted after the 31 January 2021 deadline, in this exceptional year. Payment of tax and class 2 National Insurance is still due by 31 January. Time to pay requests are dependent on submission of the 2019-20 returns.

In a letter to ICAS and the other Professional Bodies, Jim Harra, Chief Executive and First Permanent Secretary at HMRC, said:

"In recent days we have seen a growing gap between forecast and actual numbers of returns coming in. The evidence is now suggesting that it is very likely that a larger than usual number of taxpayers will not be able to file on time, and will have a valid, Covid-related reasonable excuse for filing late."

Background

Following concerns voiced by members, the ICAS Chief Executive wrote to HMRC in November to highlight the impact that Coronavirus was having on professional firms. In particular, the additional demands placed on firms, from business support to staffing issues, mean that some firms face very significant challenges in meeting the 31 January 2021 income tax self-assessment (ITSA) filing deadline for 2019-21 returns.

ICAS again wrote to HMRC on 14 January 2021, expressing continuing concern. HMRC replied to this second request on 18 January. The second letter from ICAS highlighted delays on HMRC helplines and the lack of priority access for agents.

HMRC's initial response

On 18 December 2020, Jim Harra, Chief Executive and First Permanent Secretary at HMRC, wrote to ICAS and the other Professional Bodies saying that *'we do not currently plan to waive late filing penalties'*, but '*we will continue to monitor the situation during January and keep matters under review'* (HMRC responds to ICAS' call for an automatic waiver of late filing penalties).

The letter from Jim Harra specifically extends the appeal deadline to three months and reasonable excuse to cover the impact of covid-19 on a taxpayer and/or their agent. The letter says:

"We know that some customers will not be able to file on time because of the impact of the pandemic on them or their tax agent. These customers should get their returns in as soon as they can. We will not penalise people who need more time. We will accept pandemic-related personal or business disruption as a reasonable excuse.

If their return is late due to pandemic-related delay on the part of an agent, this will also be a valid reasonable excuse. In the event that someone who has been unable to file on time receives a penalty notice, they or their agent will be able to get this cancelled easily by contacting HMRC. We are giving customers and

agents more time by extending the penalty appeal period to 3 months."

Responding to the second letter from ICAS, HMRC promised to make the procedure for cancelling penalties '*as simple and easy as possible'*.

Clarification of scope of reasonable excuse

HMRC's letter clarifies the scope of reasonable excuse, meaning that for this year the impact of coronavirus on agent or client can be a reasonable excuse. In normal circumstances, reasonable excuse is viewed from the taxpayer's standpoint only and reliance on an agent is not of itself a reasonable excuse for missing a deadline.

Implications of HMRC's decision

Returns submitted until the end of February 2021 should not now attract a penalty notice. Beyond this point, unless a further relaxation is agreed, penalty notices would be raised by HMRC for returns filed on or after 1 March 2021. Reasonable excuse could still be claimed in respect of such penalties, but a formal appeal would be needed.

Late filing penalties may be avoided by submitting a return with estimated figures, though this obviously increases administration and costs.

Filing a return with estimated figures

It is quite permissible to file a return with estimated figures when circumstances are exceptional. Indeed, in some circumstances it could be prudent to do so. But doing so is not without consequences, and potential benefits must be weighed against costs.

From a practical point of view, if a firm is struggling to submit returns on time due to shortage of appropriately qualified and available staff, filing every return twice – once in draft and once in final form – might neither be advantageous nor possible. In addition, there is the question of the additional cost.

Filing an estimated return would therefore look like a last resort in exceptional cases. For example, if a client were in danger of failure to notify penalties, filing a tax return and paying an overestimate of the tax in advance of 31 January would have the double advantage of avoiding late filing and failure to notify penalties, as the latter are a percentage of Potential Lost Revenue (PLR), and PLR is based on the tax unpaid at the 31 January filing date.

Tax credit claimants

Tax credit claimants who are self-employed are permitted to renew their claim by July using estimated figures, and then supply final figures by the 31 January self-assessment filing date.

HMRC has announced a relaxation of this rule:

"Where tax credits customers are unable to report their final/actual income for the tax year 2019-20 by 31 January 2021, they should report the figure as soon as possible after 31 January.

In most cases HMRC will update the income used to calculate finalised entitlement to tax credits if the delay is due to the impact of Covid-19."

Practical issues – payment of tax and penalties

Filing 2019-20 returns within three months of 31 January would avoid the three month and possible daily penalties; only the initial late filing penalty of £100 would be incurred.

Interest on late payment / underpayment of tax runs from 1 February, and the first 5% late payment penalty is charged on the tax still unpaid 30 days after the initial 31 January filing deadline.

Late filing of a return extends the enquiry window. For a return filed on time the enquiry window is 12 months from the date the return is filed. But for a return filed after 31 January, the enquiry window is extended to the end of the quarter – so 31 March 2022 for a 2019-20 return filed between 1 February and 31 March 2021.

Should you have further comments or feedback please let the ICAS tax/ practice staff know – we will be monitoring feedback from members on this, with a view to forwarding it to HMRC.

Please send us your feedback and comments by emailing tax@icas.com.

CONSULTATION ON MAKING TAX DIGITAL FOR CORPORATION TAX

HMRC issued a consultation on Making Tax Digital for Corporation Tax on 12 November 2020. ICAS participated in informal discussions with HMRC about large and complex businesses in the summer of 2017, so the formal consultation has been expected for some time and many companies will undoubtedly have views on the proposals. HMRC now has experience with the implementation of MTD for VAT and we hope that it will use this to avoid repeating some of the problems agents and businesses experienced with the VAT rollout.

One of the main drivers behind MTD for CT (as for MTD for VAT and ITSA) is to reduce the part of the Tax Gap relating to error, and ensure businesses pay the right tax. There are mixed views on whether these aims will be achieved. HMRC's March 2020 review of MTD for VAT noted that it was too early to evaluate the impact MTD will have on the Tax Gap. However, some agents have reported problems with VAT software allowing/encouraging clients to treat transactions incorrectly.

ICAS will be responding to the consultation and would welcome members' views on the proposals.

Proposed core requirements

The intention is that MTD will apply to all entities within the charge to CT (subject to some limited exemptions). The consultation proposes that the core MTD requirements will be:

- Maintenance of records (e.g., records of income and expenditure) digitally.
- Use of MTD compatible software to provide regular (quarterly) summary updates of income and expenditure to HMRC – but there will be some entities which will not need to do this.
- Submission of an annual CT return using the MTD compatible software.

For some entities which do not already use software, this will mean implementing an MTD compatible accounting software system. Entities which use several software systems may need to ensure that these can communicate with each other digitally.

The consultation recognises that approximately 85% of entities within the charge to CT rely on agents to help them fulfil their tax obligations and notes that HMRC is committed to learning lessons from agents who experienced difficulties in helping clients transition to MTD for VAT.

Digital record keeping

The Companies Act 2006 requires entities within the charge to CT to keep any accounting records which may be needed to explain the company's transactions, disclose its financial position and to prepare accounts. Companies are also required to maintain records to allow them to prepare a correct and complete Company Tax Return.

MTD will mean that these records must be kept digitally, with transactions captured as near to real time as possible. As far as transactions are concerned it is proposed that the minimum data which would need to be kept for each transaction would be the date, the amount, and the category. For smaller businesses, the government believes that the categorisation requirements should be similar to those for MTD for income tax – there is a long list of suggested items, including trading income, income from various other sources and numerous categories for expenses.

Comments are specifically requested on whether groups would value the ability to keep digital records at group level and whether a mixed approach (with some entities within the group maintaining their own digital records) would offer any benefits.

The consultation further proposes that digital record keeping would also be required for certain non-financial data: type of company, standard industry classification, details of property addresses, details of the SAO and a breakdown of the group structure identifying all group members within the charge to CT. Views are requested on the administrative burdens of recording and providing this data through MTD software.

Regular updates

Quarterly reporting will be one of the core features of MTD for CT – as for MTD for VAT and Income Tax. It is intended to underpin digital record keeping (as close to real time as possible) and allow businesses to understand their emerging tax position and plan accordingly.

Each quarterly update will consist of summaries of information drawn from the expense and income categories maintained in software; MTD compatible

software will create the updates from the information in the underlying digital records.

One question specifically asks whether groups which maintain digital records at a group level would also want to submit quarterly updates through a nominated entity.

The intention is for the update cycle to be linked to the entity's accounting period. Where an accounting period is not divisible into quarterly periods, the entity would have the choice of providing a separate update to conclude the period or waiting and splitting the next update between two accounting periods.

Very large companies

Companies within the payment regime for very large companies (i.e. broadly those with profits at an annual rate in excess of £20 million) already pay CT in quarterly instalments during their accounting period. They are also within HMRC's Business Risk Review process and have HMRC Customer Compliance Managers so HMRC has enhanced levels of tax assurance. It is therefore proposed that these companies would not need to provide quarterly updates – but would still be required to keep digital records and submit their end of year return using MTD compatible software.

One of the principles set out for very large companies envisages that entities would move between the payment regime for very large companies and MTD quarterly updates, but it is not currently clear how this would work. The consultation notes that some entities will be on the edge of the profits threshold, either because their profits are consistently around that level, or because of profit fluctuations. Large companies could also fall below the threshold in a period when they made losses. The government recognises that varying the MTD requirements according to the annual rate of profit could impose additional burdens on these businesses so is seeking views on the impact and how the proposed principles could be applied to this group.

Accounting and tax adjustments

The consultation proposes that accounting and tax adjustments should be optional for quarterly updates. It goes on to note that there are many claims for incentives, reliefs and allowances which can be made. Over time HMRC intends to replace forms and other processes for dealing with these with MTD compatible software; this will provide guidance and tailored assistance. Views are invited on which forms and processes for claims businesses would most like to see digitised and also on the guidance and/or tailored assistance that would help.

Establishing the final CT liability

Most Company Tax Returns are already filed electronically. MTD will not substantially change that, or the requirement to supply accounts prepared under the Companies Act.

However, it is important to note that the consultation states that the *"digital records kept within the entity's software may also form the prime record for their accounts. To comply with the obligations of MTD, accounting and tax adjustments relating to the period will need to occur either in that software or alternatively in linked software."*

The government intends that entities will use their MTD compatible software to provide their Company Tax Return direct to HMRC - to include (but not limited to) the data provided through the CT600 and supplementary pages as well as the iXBRL tagged accounts and computation. This may mean that some entities will need to update or acquire new software to enable the link to HMRC.

For groups which choose to meet their MTD obligations for digital record keeping and quarterly updates through a nominated entity, the government proposes that the same nominated entity would establish CT liabilities on behalf of group members. However, it would welcome views on this proposed alignment.

The government is also considering whether MTD for CT provides the opportunity to align filing dates for tax and company law purposes by bringing forward the Company Tax Return filing date. Comments are requested on whether this would be appropriate – and what difficulties might arise.

Users of the CATO (Company Accounts and Tax Online) free service, currently provided by HMRC for small unrepresented entities, should note that the government believes that over time the maturity of the software market means that it will be appropriate to withdraw CATO (which was only used for 8% of company tax returns in 2019). Comments on the impact of withdrawal are requested.

Special cases and exemptions

There will be an exemption for the digitally excluded. Where HMRC has previously agreed that a person is digitally excluded from one set of MTD obligations, for example MTD for VAT, it will also be exempt from MTD for CT.

For insolvent companies, the government proposes that where the insolvent entity retains its responsibility to file an online Company Tax Return, then MTD for CT obligations would continue to apply. However, where an insolvency practitioner has been appointed to act on behalf of a company and an existing exemption from online filing applies, it would be unreasonable to require compliance with MTD for CT. MTD obligations would therefore cease to apply at this point.

The consultation seeks views on whether charities, CASCs, and other not for profit organisations should be within the scope of MTD for CT. The government is clearly inclined to bring all charities within the scope where they have income within the charge to CT and are required to complete a Company Tax Return. It is therefore asking for an explanation of why an alternative approach might be necessary for charities and what criteria should be applied to assess eligibility for this.

The timetable

Following the consultation, there will be continued refinement of the MTD for CT requirements which will involve working with stakeholders. There will then be an opportunity to take part in a voluntary pilot - it is proposed that this will begin in April 2024, with mandating to follow from 2026 at the earliest.

ICAS would like your input

ICAS will be responding to the consultation. We envisage that smaller entities and multinationals may have very different views on the proposals so we would like to hear from both – and from their advisers. Please send us your feedback and comments by emailing tax@icas.com.

In January, HMRC also launched a simplified online questionnaire for small businesses to use to respond to the consultation – members may wish to mention this to clients.

CROWN PREFERENCE FOR INSOLVENCIES

A recent change in the law sees the reintroduction of the “crown preference” for insolvencies commencing on or after 1 December 2020.

History

Prior to 1 September 2003, HMRC was a preferred creditor in insolvency cases in respect of certain taxes. That preference gave them priority over floating charge holders in corporate insolvencies.

Crown preference, as it was known, was abolished as a result of the Enterprise Act 2002 (“EA02”). EA02 was foreshadowed by the White Paper ‘Productivity and Enterprise: Insolvency – A Second Chance’, which made a commitment to abolish the Crown’s preferential status in insolvency, and to ensure that the benefit went to unsecured creditors.

The White Paper stated:

“As an integral part of this package of reforms, we propose to remove the Crown’s preferential rights in all insolvencies, a step which will bring major benefits to trade and other unsecured creditors, including small businesses”.

“As an important and integral part of this package of measures, we will proceed with the abolition of Crown preference in all insolvencies. Preferential claims in insolvency originated in the late 19th century, but in recent years the trend in other jurisdictions has been towards restricting or abolishing Crown or State preference as, for instance, in Germany and Australia. We believe that this is more equitable”.

Recent change

Following on from the Budget Statement by the (then) Chancellor in October 2018, and subsequent HMRC consultation, HMRC is now a secondary preferential creditor in insolvencies in respect of taxes collected from employees and customers.

Section 98 of the Finance Act 2020 amends UK insolvency legislation to this effect in respect of any insolvency where the relevant date is on or after 1 December 2020.

The legislation amends s386 and Schedule 6 to the Insolvency Act of 1986 and s129 and Schedule 3 of the Bankruptcy (Scotland) Act 2016. The effect is to move HMRC up the creditor hierarchy for the distribution of assets in the event of insolvency by making HMRC a secondary preferential creditor in respect of certain tax debts such as PAYE, CIS, employee NICs, VAT and student loan deductions, as specified by the Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020.

Ordinary preferential creditors, which will retain a higher ranking over HMRC, will continue to comprise contributions to occupational pension schemes, wages and holiday pay due to employees, levies on coal and steel production, debts owed to the Financial Services

Compensation Scheme (FSCS), deposits covered by FSCS, and amounts due by an individual debtor under the Reserve Forces (Safeguard of Employment) Act 1985, all subject to certain maximum levels of debt.

HMRC will remain an unsecured creditor for taxes levied directly on businesses, such as Corporation Tax and Employer NICs.

In anticipation of the change HMRC issued a policy paper, which includes some background to the change and some practical information for insolvency practitioners, including contact information.

Despite the new preferential status being applied to a slightly narrower band of tax liabilities, it is likely to confer a greater benefit on HMRC than the pre-EA02 preference, as it gives priority to HMRC for all employee related taxes with an unlimited look-back period, inclusive of all penalties and interest.

Under the new Crown preference, tax debts will qualify for preferential status regardless of when they arose, whereas before 2003, only tax debts arising in the 12 months prior to insolvency had preferential status. The proposal is 'retrospective', too: while it applies to insolvencies starting on or after 1 December 2020, any tax debts, and penalties from before this date will have preferential status.

Impact

There are several potential impacts resulting from the change:

- Most obviously in relation to lending, in terms of the availability of credit and pricing. Borrowing for small businesses, in particular, is likely to be harder to come by. There will be diminished returns for floating charge holders, as HMRC now sit above them in the order of priority in relation to relevant tax debts. Security holders will want to monitor the value of their security more closely going forward, which could have an impact on the cost of borrowing.
- Businesses without an asset base which can be specifically secured may particularly be seen to represent a higher risk lending proposition.
- It may prove very difficult for businesses to refinance or secure new lending to see themselves through a period of financial instability, forcing potentially viable businesses into insolvency.
- It may result in more company directors being forced into providing personal guarantees to secure lending, which effectively removes the intended benefits of limited liability status and discourages an entrepreneurial culture.
- Creditor engagement in insolvencies will likely be negatively impacted. While returns to unsecured creditors are acknowledged to be poor (an average of 4%), removing any real opportunity of any return whatsoever in most cases is likely to result in decreased creditor and public confidence in the insolvency profession.
- Restructuring mechanisms such as Company Voluntary Arrangements (CVAs) may be more difficult to obtain approval for as they require the consent of the preferential creditor. This will give HMRC considerably more influence over the direction of certain insolvency processes.

Lending

Crown preference was reintroduced on 1 December 2020 without any transitional provisions, with a resulting impact on existing lending.

When EA02 came into force, the prescribed part provision only applied to floating charges entered into after 15 September 2003, allowing lenders to plan and make provision for the change. Without any transitional arrangements, the reintroduction of crown preference may have resulted in borrowers having inadvertently breached the terms of their facility agreements overnight on 1 December 2020, potentially resulting in more business distress and failures.

To manage the increased risk brought about by the reintroduction of crown preference, lenders will have to make larger provisions. That will also require increased reporting from their customers and increased costs to lenders of monitoring and assessing risk, which will be passed on to customers making borrowing costs higher.

From a floating charge holder's perspective, this could also be perceived as the latest attack on that form of security.

It follows on from a recent increase in the 'prescribed part' level (the amount potentially ringfenced for ordinary creditors from floating charge assets) to £800,000, the recent introduction of a corporate moratorium which can prevent enforcement of the charge for an extended period, as well as proposed changes to transfer of ownership rules in consumer sales contracts which, as currently proposed, would result in more business assets escaping the charge.

The additional returns to HMRC through the reintroduction of Crown preference are estimated in

the HMRC consultation paper to reach a maximum of £185 million per year. Whilst any additional revenue raised for public expenditure is welcome, this is not a significant amount when considered in the context of the exchequer's overall revenue and its benefit may be further diminished when weighed against the impact of the change on business rescue and enterprise.

MANDATORY DISCLOSURE OF CROSS-BORDER TAX ARRANGEMENTS

Following the Free Trade Agreement reached between the EU and the UK - and the end of the EU transition period - the UK has announced a new approach to the mandatory disclosure of cross-border tax arrangements (DAC 6).

What is DAC 6?

The EU directive known as DAC 6 (it is the sixth update of the Directive on Administrative Cooperation) imposes a requirement on intermediaries (and in some cases taxpayers) to report information on certain cross-border tax arrangements, to the tax authorities in their home member state. The UK had implemented the Directive through regulations (SI 2020/25) – the details were discussed in earlier articles which noted that it was unclear what the position would be after 31 December 2020 (the end of the transition period).

In June 2020, in response to a parliamentary question about whether the UK's DAC 6 regulations would be repealed after the transition period, the Financial Secretary to the Treasury confirmed that the government remained committed to tax transparency and would continue to apply international standards on transparency and exchange of information. However, he also said that the Government would keep the Regulations under review – and that further legislative action may be appropriate in the light of the outcome of negotiations with the EU on the future relationship between the UK and the EU.

The UK's new approach

At the end of December 2020, the UK and EU reached a Free Trade Agreement (FTA). HMRC has provided the update below on what this means for the UK DAC 6 regulations after 31 December 2020 (the end of the transition period).

The two key points to note are that:

- Reporting under DAC 6 will still be required for a limited time, but only for arrangements which meet hallmarks under category D, in line with the UK's obligations under the FTA.
- In the coming year, the UK will consult on and implement the OECD's Mandatory Disclosure Rules as soon as practicable, to replace DAC 6 and transition from European to international rules.

Note that the new approach relates to the UK regulations and UK reporting requirements – intermediaries and parties to cross border arrangements based in EU member states may need to report cross border arrangements to relevant EU tax authorities, in line with their rules implementing DAC 6.

Text of HMRC's update to the professional bodies

"The text of the FTA, which is available here states that "A Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD at the end of the transition period, in relation to (a) the exchange of information…concerning… potential cross-border tax planning arrangements". The reference to OECD rules on exchange of information on cross-border arrangements is a reference to the OECD's model Mandatory Disclosure Rules (MDR). Therefore, under the terms of the FTA, the UK must not reduce the level of protection in its legislation below the level of protection afforded by the OECD's MDR.

While the UK has not implemented MDR in its domestic legislation as at the end of the transition period, the rules in SI 2020/25 provide a 'level of protection' which in certain respects is equivalent to that in the OECD's MDR, and in other respects goes beyond the MDR.

As you will be aware, SI 2020/25 was drafted to transpose Council Directive (EU) 2018/822 more commonly known as DAC 6. DAC 6 will cease to apply to the UK at the end of the transition period (11pm GMT on 31 December 2020). At that point, the UK will no longer be obliged to implement DAC 6.

Consequently, the Government has decided to legislate for changes to SI 2020/25, to restrict reporting only to those arrangements, which would be reportable

under the OECD's MDR. This means that only those arrangements which meet hallmarks under Category D of DAC 6 will need to be reported in the UK after the end of the transition period.

The Government has also amended the regulations to ensure the rules work correctly after the end of the transition period, including ensuring that references to EU member States refer to the UK or an EU member State after the end of the transition period.

The regulations have now been laid before Parliament. The changes will come into effect from 31 December 2020. While [HMRC appreciates] that this gives limited time for businesses to prepare for and implement these changes, as the amendments maintain the effect of the rules as they were during the transition period but narrow the scope of what must be reported, we anticipate that these changes will be manageable.

In the coming year, the government will repeal the legislation implementing DAC 6 in the UK and implement the OECD's MDR as soon as practicable, in order to transition to international, rather than EU standards on tax transparency. The government will consult on draft legislation to introduce MDR in due course.

HMRC will be updating the reporting guidance at IEIM600000 et seq. to reflect the changes to the legislation."

DAC 6 reporting platform

Where reports do need to be made, the reporting platform can be accessed here.

HMRC provided the following information about reporting on 18 January 2021:

"Before you can report you will need to register for the service using your Organisation government gateway credentials. The user who is registering will need to have an Administrator role rather than an assistant role. You only need to register once, and you do not need to register if you do not anticipate that you will need to make a report.

At present, you can only report via an XML file upload. We expect the manual reporting tool to be available shortly.

Mandatory fields

Where a free text field is mandatory, but the reporting person does not hold the relevant information, the person can enter 'unknown' in the relevant field. This is set out in the user guide.

However, the Date of Birth field is not free text, and so a person cannot enter 'unknown'. If this information is held by the reporting person, it must be provided. If the reporting person does not hold the information in their knowledge, possession, or control, then HMRC will accept a date of birth of 01/01/1900 as being a proxy for 'unknown'. HMRC would not charge a penalty for information being filed in this manner if the reporting person did not hold this information.

Agents reporting

Unfortunately, the facility for agents to report on behalf of their clients is not currently available. Those who are registered as agents may still report in their own capacity, if they themselves are intermediaries or relevant taxpayers."

GOING CONCERN CONSIDERATIONS FOR CHARITIES & THEIR ADVISORS

In August this year, the ICAS Charities Panel published 'Guidance for charity trustees on going concern'. The guidance is relevant to any UK charity preparing its accounts in accordance with the Charities SORP (FRS 102).

While the guidance is not specifically aimed at going concern considerations arising from the COVID-19 pandemic, it covers financial management considerations for charity trustees during times of significant financial uncertainty, including at times of national emergency.

As charities with 31 December year ends begin their accounts preparation work, charity advisers are urged to direct their charity clients to this practical tailored guidance. Likewise, for any charity clients due to file their trustees' annual report and accounts shortly the guidance will also be helpful.

A charity's trustees must carry out an assessment of its ability to continue as a 'going concern'. In the assessment, the trustees should consider all available information about the future, covering at least 12 months from the date on which the trustees' annual report and accounts are approved and signed.

Charities commencing preparation of their annual accounts

For the trustees of charities with a 31 December year-end, or a year-end which is fast approaching, planning for and then undertaking a going concern assessment at an early stage is very important. This may not feel like a priority for charities right now given the many additional challenges they continue to face, but the assessment could help identify any emerging financial risks which can then be managed. A timely assessment may also help the external scrutiny process to run more smoothly.

Updating cash flow forecasts more frequently than in more normal times is likely to be inevitable for many charities. It is vital that cash flow forecasts are updated to reflect a more challenging view of the next 12 months or more from the planned date of signing the accounts, should one emerge prior to the date of signing. Even the assumptions underlying a charity's 'worst case' cash flow forecast may deteriorate over a relatively short timescale.

For both auditors and independent examiners additional work effort on scrutinising going concern assessments will likely be needed. Therefore, they should be making charity clients aware of their expectations around the preparation of the going concern assessment when planning their work. If charity trustees undertake an initial assessment in a timely manner and update it as necessary up to the point of sign off, this will assist auditors and independent examiners meet their responsibilities.

Sections 5 to 9 of our Guide will be particularly helpful to charity clients preparing the supporting evidence for and undertaking their going concern assessment. The trustees' going concern assessment should be an exercise tailored towards the particular circumstances of their charity and where the charity has paid staff, it will be important for the trustees to work with executive staff and perhaps others to gather evidence and to conclude on the assessment.

Worth a mention at this point, is that auditors are required to apply a revised version of ISA (UK) 570 on going concern, for the audit of periods commencing on or after 15 December 2019. For the most part this will mean that the first audits where the revised ISA (UK) is applied are periods ending on 31 December 2020. The revised ISA strengthens the work auditors need to undertake on going concern, so it is not just the impact of the pandemic that will increase the auditor's focus on the trustees' going concern assessment.

Charities planning to file their trustees' annual report and accounts

The trustees of charities with a filing deadline on the horizon are faced with completing their going concern assessment amid unprecedented uncertainty. Whether the charity is seeking to meet the filing deadline or is expecting to use the flexibility offered by charity regulators to file at bit later, the trustees' responsibilities towards the going concern assessment are the same.

There are no set rules for undertaking a going concern assessment and not all charities face the same financial pressures. Therefore, the assessment should be tailored to the particular circumstances of the charity.

Evidence in support of the trustees' going concern assessment should include a cash flow forecast covering a period of at least 12 months from the expected date of approval of the accounts. Key assumptions used in preparing the forecast should be documented.

It may also be necessary for charities to present a range of potential scenarios, from the most optimistic to the most pessimistic, in the form of cash flow forecasts, to reflect the degree of uncertainty that currently exists. Scenario planning has the potential to assist trustees manage their charity as it will help them to understand more fully the risks their charity is facing, enabling plans to be put in place to address any risks which come to fruition.

Where the going concern basis of preparation of the accounts remains appropriate, the trustees are not providing a cast iron guarantee that the charity will continue as a going concern, merely making judgements about the evidence available about the charity's circumstances at the time the accounts are signed off.

A charity's auditor or independent examiner should make inquiries about the robustness of the trustees' going concern assessment and conclusions drawn about the charity's going concern status up to the point they sign their own independent report.

It is likely that more charity trustees will identify material uncertainties relating to going concern when undertaking their going concern assessment at this time. It is essential to bear in mind that any material uncertainties identified as part of this process should relate to the specific circumstances of the charity. Conclusions may be informed, for example, by knowledge of how charities with similar purposes are

being impacted by the COVID-19 pandemic or by how organisations in the charity's supply chain are being impacted.

However, the general uncertainties we all face as a consequence of the COVID-19 pandemic and related control measures do not in themselves constitute material uncertainties for a specific charity.

Section 4 of our guidance sets out the three possible outcomes of a going concern assessment and the implications for the accounts. This section may be particularly helpful for auditors or independent examiner in concluding their work on the trustees' going concern assessment and preparing their independent report.

Further Guidance

ICAS

Key going concern considerations for charity trustees: between the covers of our guide

Going concern guidance for charity trustees Reporting and accounting, financial management and external scrutiny considerations

Other

Charities SORP Committee: Implications of COVID-19 control measures and charity financial reporting

WHAT A RELIEF – A PPR RELIEF CASE

The taxpayer was successful before the First Tier Tribunal in the recent case of Core & Anor [2020] TC 07917. In brief, the facts were as follows:

1. Mr and Mrs Core purchased a Green Lane on 22 March 2013.
2. Mr Core was a builder by trade and intended to extend and refurbish the house himself.
3. In the meantime, the family lived in rented property at Victoria Road. The lease was extended to 30 June 2014 in December 2013 and, in June, further extended to 31 December 2014.
4. On 16 June 2014, Green Lane was sold to a neighbour.
5. Mr and Mrs Core did not include the gain in their 2014/15 tax returns.
6. The Cores fell out with their next door neighbours on several occasions during the refurbishment over, a boundary wall, illegally parked vehicles, when police and the council were called and then there was a further "physical argument".

Does not look promising so far for the Cores, but read on. The Judge had two factual issues to decide:

1. When did the neighbour offer to buy Green Lane and when did the Cores accept?
2. Did the Cores move into Green Lane in 2014 and, if so: when; for how long; and why?

First issue

1. Around February 2014 the neighbour first asked Mr Core if the house was for sale but was told it was not.
2. Around March or April, the neighbour made a further approach, an offer which Mr Core did not accept but told the neighbour of his problems with the next door neighbours
3. A few days later the neighbour phoned asking Mr Core to reconsider but he refused.
4. In May, the neighbour made a higher offer to Mr Core, provided there could be an immediate exchange of contracts (being on Merseyside), which Mr Core did accept.
5. The above facts were found on the evidence of Mr Core and the neighbour.

Second issue

1. The Cores moved into Green Lane about March 2014 when the work was sufficiently complete for the house to be habitable.
2. The Victoria Road lease was not terminated as the house was next door to Mr Core's builders' yard and he used it for an office, storage, and amenity for his yard.
3. The family moved back into Victoria Road towards the end of May, when the neighbour's offer for Green Lane was accepted.
4. The Judge made his decision based on evidence from the Cores and on the balance of probabilities.
5. They were held to have lived in Green Lane from late March/ early April until the end of May 2014, a period of 6 to 8 weeks.
6. The Cores purchased Southport Road, a derelict Grade 2 listed cottage on 14 May 2014, which they had wanted to purchase for some time. It was in the same town as Green Lane and needed a lot of work.
7. They purchased Piercefield Road, again in the same town, in November 2014, and moved in early in 2015 when the Victoria Road lease expired. They lived there until December 2015, at which time they moved to Southport Road.

HMRC did not accept that the occupation of Green Lane was of the quality and necessary degree of permanence or continuity to qualify as the Cores' private residence in accordance with s222 TCGA 1992.

The Cores argued that the Principal Private Residence exemption was due on their sale of the property as their intention was to live in Green Lane as a family home and they actually did so, for a short period of time. They never intended to sell Green Lane until they accepted the unsolicited offer made by the neighbour.

The Judge held that, "when the family moved into Green Lane, they expected to live there for an indefinite period. The very fact that Mr and Mrs Core moved into Green Lane with their children – when they had a continuing lease at Victoria Road and so could have stayed on there until the end of June – is strongly indicative that they expected to live at Green Lane indefinitely.

If, in late March/early April, they had thought there was a serious possibility of their accepting the neighbour's offer and selling Green Lane in the short term, they would have stayed put at Victoria Road until such a sale was made (or clearly would not be made)".

Allowing their appeal, the Judge accepted the Cores evidence and held that the entire gain was exempt from Capital gains Tax.

What a relief indeed!

WHERE TO FOCUS YOUR CYBER SECURITY

Written by Lugo Limited, ICAS IT Partner

Following the overview of Lugo's research conducted on IT in Accountancy, published in the previous issue of the Technical Bulletin (Nov 2020), we are now going to take a deeper dive into one of the key themes to come out of the study – cyber security.

We were surprised that cyber security did not feature more highly in the research in terms of items on their 'IT wish-list' with only a few respondents stating a 'bulletproof security system', 'data security' or 'incident management'. It was also quite alarming that most respondents rated themselves highly at 8/10 for their awareness of cyber threats and how secure they consider their firm to be. The study highlighted as many as 70% of firms feel secure enough, although 25% admitted they do not have a communication plan in place if they do suffer a breach.

Here is a breakdown of the cyber security findings by size of firm based on the number of clients they have:

No. of clients *(incl. personal tax)*	**How aware are you of cyber threats? *(10 highest)***	**How secure do you consider your firm? *(10 highest)***	**Do you feel the firm is secure enough?**	**Do you have a communications plan in place if breached?**	**Do you have a disaster recovery plan in place?**
Less than 500	8	9	Yes – 100%	Yes – 33% No – 67%	Yes – 100%
500 – 1,500	7	8	Yes – 67% No – 33%	Yes – 67% No – 33%	Yes – 83% No – 17%
1,501 – 2,500	9	8	Yes – 60% No – 40%	Yes – 80% No – 20%	Yes – 100%
2,501 – 2,500	9	8	Yes – 50% No – 50%	Yes – 100%	Yes – 75% No – 25%
Greater than 500	10	9	Yes – 100%	Yes – 100%	Yes – 100%

8 Ways to Boost your Cyber Resilience

1. Employee education

Employees can be your greatest asset and equally, your greatest liability, especially when it comes to keeping your systems secure. They can pose the biggest risk since it is incredibly easy to make mistakes. Thankfully, we have not been replaced with robots quite yet, so we need to ensure everyone in the firm always remains vigilant. Cyber training should be an ongoing process including running simulated phishing attacks, encouraging everyone to 'Stay Alert'!

2. Phishing

If your firm is caught off-guard you could easily be the victim of a phishing attack. Chances are you, or one of

your colleagues, have seen one or possibly even been victim to one in the past. This is where scammers send fake emails asking for sensitive information (such as bank details) or include links to further unsafe websites.

A common example requests your Microsoft account credentials on a home screen that looks very similar to the real thing. One of the first things to check is the email address and full hyperlink of any message received before taking any further action, such as clicking a link or downloading an attachment.

Lugo's M365 Secure support package, incorporates Microsoft Defender, and can help to tackle such scams by including:

- Safe links – this helps protect your business against malicious sites when people click links in Office apps. When a user receives an email with links, they will be scanned first, and only if the links are deemed safe will they be able to click on them. If the link is on the blocked list, users will receive a message stating it has been blocked.
- Safe attachments – provides an additional layer of protection for email attachments. Using a virtual environment, it will check attachments in email messages before they are delivered to recipients (a process known as detonation).
- Anti-phishing protection – detects attempts to impersonate your users and internal or custom domains. It applies machine learning models and advanced impersonation-detection algorithms to avert phishing attacks.

3. Passwords

Scheduled password changes are a thing of the past, to be replaced with only changing passwords where there has been a suspected compromise. Your firm's password policy should now recommend a longer passphrase. Longer passphrases, even consisting of simpler words or constructs, are better than short passwords with special characters. As a reminder, logins and passwords should never be shared. Finally, a password manager tool could be used to store complex passwords.

4. Multi-factor authentication (MFA)

Passwords can be easily compromised. MFA immediately increases your account security by requiring multiple forms of verification to prove someone's identity when signing into an application. It is free and easy to implement and use, and makes your account up to 99.9% less likely to be compromised.

For a Microsoft account, MFA can be easily deployed across your firm, enabling a safe and secure additional two-step verification method for your online credentials from a range of authentication options (such as phone call, text message, or mobile app notification) to access your applications.

MFA is now widely available across many applications and should be switched on whenever you are given the option to do so. It is recommended to use an authenticator app over text message where possible.

5. Administrator accounts

Everyday tasks should not be performed while logged into your computer with local administrator rights. If the machine were to become compromised, this would allow the hacker to run malicious software. There are relatively few tasks that require administrator privileges, so why risk it!

Security breaches of a Microsoft 365 subscription, including information harvesting and phishing attacks, are typically done by compromising the credentials of a Microsoft 365 global administrator account. To protect your global administrator accounts, create dedicated admin accounts and use them only when necessary. Configure multi-factor authentication for your dedicated Microsoft 365 global administrator accounts, and use the strongest form of secondary authentication.

6. Software

Firms should have an approved list of software that employees can install, with anything additional requiring business case approval. This reduces any risk by only allowing supported software, making it easier to manage updates.

It is vital that all operating systems are up to date, including servers, desktops, laptops, tablets, and phones. For example, all Windows 7 and Windows Server 2008/R2 operating systems are no longer supported (as of January 2020) and should no longer be in use. Once a Microsoft operating system reaches the end of support, customers will no longer receive security updates, leaving them exposed to hackers.

Web browsers, Office software, desktop software and anti-virus should all automatically update. It is important to regularly check all devices that access corporate information to ensure they are up to date as users may have disabled, deferred, or declined updates.

Updates should be installed promptly and have plenty of storage as the update may not complete if the device is low on storage.

7. Device lock

To remain secure and GDPR compliant, devices should be locked when you are not at your desk, whether you are working in the office or at home. On a Windows device, press the Windows key + L on your keyboard. On a Mac, press Control + Command + Q. You can also set your screen to automatically lock after a very short time of inactivity.

8. Home working

The current COVID-19 lockdown measures make it a legal requirement to stay at home, resulting in everyone working from home where they can. Being in a more relaxed home environment, employees may be more inclined to let their guard down when it comes to security. This is when cyber criminals attack, whether it be fake emails about getting the vaccine, or bogus emails requesting you pay a supplier. Keep reminding everyone to stay vigilant, and verify transactions in the usual way, while supporting them through this difficult time.

A global chip shortage is currently threatening production of laptops, so employees may still be using their personal devices to access corporate information. Home devices are risky since they may not be on the latest security update and corporate data can be saved to personal hard drives. If the device were to fail or a file be accidently deleted, the chances are this would not be backed up.

Microsoft Remote Desktop Services allows the user to take control of a remote computer or virtual machine over a network connection, enabling them to work as they would in the office. All work will then be backed up on to the corporate network as normal.

Office-based employees are usually protected by a firewall and traditional antivirus. To enhance security while working remotely, Lugo include technology such as Endpoint Detection & Response and Cloud Security in support packages. Staff need to be protected even if their network traffic is going directly to the internet. These advanced technologies provide the first line of defence against threats on the internet, wherever users go. It is the fastest and easiest way to protect every user in minutes.

Now is the perfect time to utilise Microsoft OneDrive or SharePoint, so your team can collaborate remotely on files, eliminating the need to email different versions of spreadsheets or documents.

However, many organisations mistakenly believe that Microsoft 365 data is automatically backed up, which is why Lugo’s M365 Secure support package includes SaaS Backup. An astonishing 1 in 3 companies report losing data stored in cloud-based applications. The reason for this is human error. Users remain the biggest risk to your company data, even more so when it is being accessed from more locations than usual.

Outrunning the bear

It can be daunting when there are so many ways your systems and data can become compromised. However, if you are doing something to protect your systems, remember you are doing more than someone who has their head firmly in the sand. Criminals will always go for the low hanging fruit, so the more you do to protect your firm, the less likely you are that you will fall victim to an attack.

No matter how many different layers of security you utilise, you can still be the victim of cyber-crime. Do not forget that cyber criminals are just that, criminals, so don’t punish yourself or a colleague for falling victim.

Lugo partner with the Scottish Business Resilience Centre who, in partnership with the Scottish Government and Police Scotland, have launched the UK’s first Cyber Incident Response Helpline for the SME community and the third sector to help victims of cyber-crime understand what support is immediately available to them, and to help them recover. They can help organisations confirm if they have been the victim of an attack and, if so, provide expert guidance to get them back to secure operations. Businesses can reach the Cyber Incident Helpline by calling 01786 437 472 weekdays 9am-5pm.

Look out for more insight into the key themes from Lugo’s research in future ICAS Technical Bulletins.

If you would like to discuss any element of this research or enhance your own cyber resilience, please email Liz.Smith@LugoIT.co.uk

A SOLID BASE IN POLICY – EMPLOYMENT RELATED FORUMS

An update on a handful of employment related HMRC and BEIS forums.

ICAS policy work is moving from strength to strength. The whole of the tax team is involved in high-level collaborations with the UK, Welsh and Scottish Governments and policy teams in HM Treasury, BEIS and HMRC as well as with Revenue Scotland and the Scottish Fiscal Commission. ICAS is well respected and considered to be a trusted stakeholder in these meetings, as we strive to represent ICAS members' interests and balance these against new and existing policy frameworks.

Three Forums

Three of the employment tax related forums are:

1. The Employment and Payroll Group (EPG) which is hosted by HMRC and is attended by UK professional body and industry/business body expert representatives such as ICAEW, CIOT, ATT, CIPP, FSB, CBI to name but a few, as well as leading payroll and benefits software houses. Justine Riccomini co-chairs this meeting quarterly with HMRC to facilitate discussions on the latest policy moves and practical difficulties which the legislation is throwing up for employers across the UK. The aim is to improve the legislation to make it as workable as possible and increase understanding and compliance.
2. National Minimum Wage Forum – this forum was created in 2019 with BEIS and HMRC policy and compliance leads, with a view to meeting twice a year to iron out policy issues which are leading to practical application and compliance difficulties. The forum is much smaller than EPG with only a few professional body representatives attending from CIPP, ICAS, ATT, CIOT and ICAEW, and two software developers. Thus far, the meetings have been established on an informal basis, but it is hoped to place them on a more formal footing in 2021 so that the Terms of Reference, membership, and minutes are also published on GOV.UK.
3. Construction Forum – after the demise of the CIS Operational Forum in March 2019 (minutes ceased to be published on GOV.UK from April 2016!), ICAS led the initiative for the formulation of a business case to re-convene a meeting and keep the channels of dialogue open between HMRC and the construction sector on not just CIS matters, but on any taxation issue which affects that particular sector. HMRC accepted the basis for the representations, and the inaugural meeting of the new Construction Forum was held on 25 November 2020 and was attended by professional body experts, software experts and construction industry bodies. The Forum is intended to take place once a quarter.

The latest discussions

Employment and Payroll Group (EPG) - the last EPG meeting was held on 8 December 2020, and two of the main items on the agenda were:

- Discussion on IR35 (ICAS also represents members at the main IR35 Forum) with a view to employers preparing for the new Off Payroll rules for the private sector in April 2021. Readers will be aware the start date was deferred for a year due to coronavirus.
- An update and discussion on the latest information on CJRS compliance and investigations – the HMRC standpoint. The EPG has worked extremely closely with HMRC policy teams in the production and rolling out of guidance and assistance programming.

National Minimum Wage Forum - the next NMW meeting is not until Spring 2021, but at the last one which was held in September 2020, discussions continued around the key flash points of naming and shaming, uniforms, Christmas clubs – covering off the Wagamama and Iceland cases in particular, and how NMW inspections have been taking place throughout Covid, with the Leicester operation being the most high-profile.

The Forum members have also had the opportunity to review and make suggestions on the latest iteration of NMW guidance, which really feels like getting a foot in the door on policy in this area for the first time. The difficulty is that the policy is governed by BEIS whilst the compliance work has been contracted out to HMRC, who have placed their own interpretation on the regulations and guidance.

Certain aspects of the legislation also clash with tax legislation, in that different definitions are placed on words which is something the Forum is trying to

highlight. The forum has asked BEIS and HMRC to consider cross-referencing the NMW guidance to relevant sections of ITEPA and other tax Acts so that unwary employers are not caught out. A classic example of this is that a “Uniform” for tax purposes (and it is widely acknowledged this is the definition most employers are familiar with) is not the same as a “Uniform” for NMW purposes.

Construction Forum – the inaugural Construction Forum received extremely positive feedback. The meeting was convened for two hours to establish and agree Terms of Reference as well as membership, and discussions then turned to the latest consultation (issued on 19 March but which concluded on 28 August due to coronavirus related delays) and HMRC’s response.

It was agreed that an additional short meeting will take place in January 2021 at which the new draft legislation and guidance which flows from the consultation will be discussed, with a view to it being finalised as early as possible before April 2021, when it will be coming into force. Also discussed was the possible development of group registrations, landlord and tenant exemptions and problems with deregistration, which HMRC have agreed to take away and respond to the Forum on by January 2021.

Building better relations

The Forums, which form part of a wider network of Forums held with the UK Government, are increasingly seen as a constructive way forward and which help all. HMRC is welcoming debate and discussion on its policymaking and actively trying to find solutions. This makes for more transparent Government and, hopefully, an increased understanding awareness and compliance by the general public. This definitely appears to be a move in the right direction.

PREFERENCE SHARES WERE ORDINARY SHARE CAPITAL

The Upper Tier Tribunal (UTT) has dismissed HMRC’s appeal, against the decision of the First Tier Tribunal (FTT) in the case of Revenue and Customs v Stephen Warshaw [2020] UKUT 366 (TCC), holding that the preference shares held by Mr Warshaw represented ordinary share capital, and that he therefore held the requisite 5% of the ordinary share capital and voting rights for Entrepreneurs Relief purposes.

At the time of writing, there is speculation that the now Business Asset Disposal Relief will be abolished in the forthcoming Budget on 3 March 2021. Even if it is, there will nevertheless have been disposals, and relief claimed in the meantime, when this very important point may be an issue.

The point at issue was that if Mr Warshaw’s preference shares fell within the definition of “ordinary share capital”, he held 5.777% of the ordinary share capital. If they did not, then he held only 3.5% of the ordinary share capital.

The definition of ordinary share capital is basically any shares that are not preference shares. For a share to be a preference share, the definition is very narrow requiring the shares to “carry a right to a fixed dividend”. This was the sole issue in the appeal.

The preference shares entitled Mr Warshaw to a dividend at 10%, but the dividend rights were cumulative. If a dividend was not paid then the dividends were accumulated and compounded such that dividends became due on both the subscription price of the shares plus the accumulated unpaid dividends.

The taxpayer succeeded before the FTT on the basis that the compounding resulted in the fixed rate of 10% being applied to an amount other than purely the subscription price, and therefore the dividends could effectively be paid at variable rates.

The UTR decided that the fixed percentage rate of dividend had to be applied to the original subscription price for the preference shares to be treated as preference shares for Entrepreneurs’ Relief purposes. They said that *“If no dividends had been paid when due then, after 5 years the dividend rate would equal 14.6% of the nominal value…. We do not consider that that is a right to a dividend at a fixed rate”.*

In dismissing HMRC’s appeal, the UTT concluded that the FTT had reached the right decision.

TAX & HMRC UPDATES

Preventing abuse of R&D tax relief

HMRC have published a policy paper covering a change to the research and development (R&D) tax relief rules for small and medium-sized enterprises which will take effect from 1 April 2021.

From 1 April 2021, the amount of payable small or medium sized enterprise (SME) R&D tax credit which a company can claim in a period will be limited to £20,000 plus 300% of its total PAYE and National insurance contributions liability for the period.

Further information can be found in the policy paper.

The draft legislation and explanatory notes can be found here.

Introduction of plastic packaging tax

HMRC have published a policy paper covering the introduction of a new plastic packaging tax, which is expected to take effect from April 2022.

The tax will apply to plastic packaging produced in, or imported into, the UK, that does not contain at least 30% recycled plastic. Plastic packaging is packaging that is predominantly plastic by weight. It will not apply to any plastic packaging which contains at least 30% recycled plastic, or any packaging which is not predominantly plastic by weight. Imported plastic packaging will be liable to the tax, whether the packaging is unfilled or filled.

Further information can be found in the policy paper.

The draft legislation and explanatory notes can be found here.

Capital Allowances – extension of FYA

First year allowance (FYA) rules for business expenditure on business cars, zero emission goods vehicles, and equipment for gas refuelling stations are being extended from April 2021 until April 2025.

This measure also reduces the CO_2 emission thresholds which are used to determine the rate of capital allowances available for business cars.

This extension supports businesses to move away from CO_2 emitting cars and feeds into the government's strategy to end sales of new petrol, diesel, and hybrid cars/vans by 2035 or earlier.

COVID-19 related updates

Extension of CJRS – the Coronavirus Job Retention Scheme (CJRS) has been extended until 30 April 2021 for all parts of the UK. You can claim 80% of an employee's usual salary for hours not worked, up to a maximum of £2,500 per month. Employers must continue to pay the associated Employer National Insurance contributions and pension contributions.

Job Retention Bonus and Job Support Scheme – the Job Retention Bonus will no longer be paid in February 2021, as CJRS will be available at that time. An alternative retention incentive will be put in place at the appropriate time. The launch of the Job Support Scheme has also been postponed.

VAT Deferral – businesses who deferred VAT due from 20 March to 30 June 2020 will now have the option to pay in smaller payments over a longer period. Rather than pay the full amount by the end of March 2021, businesses can make up to 11 smaller monthly instalments, interest free. All instalments should be made paid by the end of March 2022. Businesses will be required to opt-in to the scheme (it is not yet available).

Changes to the way contractors pay tax – IR35

It is now just over 60 days until changes to the off-payroll working rules (IR35) come into effect on 6 April 2021. If your clients are contractors who work through their own limited company or other intermediary, you may want to remind them that the way they pay tax may change in April.

HMRC recently published an updated contractor factsheet, which you can share with clients. If they aren't sure whether they will be affected, then this flowchart might also be helpful. Further guidance and support can be found on GOV.UK.

Brexit – Webinars

The Brexit transition period has now ended, meaning changes have now come into effect for businesses that trade goods with Europe or represent businesses who do. HMRC are holding several webinars so you can familiarise yourself with the new customs processes and what you need to do before you trade goods with the EU.

A trader checklist is available to ensure businesses are familiar with the new rules that affect them. A number of guides are also available to help businesses understand the new customs and VAT requirements.

EMPLOYMENT CORNER

CIS Update

HMRC published the responses summary on 12 November 2020 and some of the main issues within those responses were discussed at the newly re-formed Construction Forum, which is a re-convened meeting hosted by HMRC and co-chaired by ICAS aimed at discussing all aspects of taxation affecting the construction sector.

Building resistance

Back in early Spring 2020, HMRC issued a consultation entitled "Tackling Construction Industry Scheme Abuse". The original deadline for responses was 28 May 2020, but coronavirus measures led to the deadline being extended to 28 August 2020 instead. HMRC received 34 written responses and held 4 separate round table meetings to consult with stakeholders and tax experts about the proposed measures.

Key to the consultation is that HMRC has stated it is going to utilise the responses submitted to assist in and inform the formulation of legislation and guidance.

The changes

There are four main changes which are to be made to the current iteration of the secondary CIS legislation (the original version of which can be found at SI 2005/2045) The Income Tax (Construction Industry Scheme) Regulations 2005 (the primary legislation is found within FA04/S57-S77 and FA04/SCH11 & 12):

1. HMRC will gain the power to amend the CIS deductions claimed by sub-contractors on their Real Time Information (RTI) returns. The power will be used in various new ways – to correct errors and omissions, remove claims, prevent claims, and amend in-year deductions where insufficient evidence exists or where the employer does not act as directed by HMRC. All HMRC actions will be capable of review and appeal by the relevant subcontractors.
2. The cost of materials will specifically only be allowable (and therefore not subject to CIS withholding deductions) where the subcontractor can show that they have directly incurred that cost. The legislation will clarify that only a subcontractor's directly incurred costs for materials can be deducted from gross payments by the contractor, before applying the CIS deductions at the appropriate rate.
3. The "deemed contractor" legislation will be amended in such a way that the level of spend on "Construction Operations" is monitored more regularly – currently business are only required to look back at the end of the year to see if they have breached the £3m threshold (£1m in each of the last 3 years). Going forward, business will have to maintain a watching brief on a month-by-month basis and start operating CIS as deemed contractors where in any 12-month period they have exceeded the £3m threshold.
4. Penalties for provision of false information when applying for either gross payment status (GPS), or payment under deduction within the CIS, are being widened in scope to include situations whereby individuals and companies who are able to exercise influence or control over the applicant encourage that person to make a false statement, or they themselves render a false statement. Additionally, penalties will arise where they supply a false document to an applicant in support of their application, or if they themselves supply a false document to HMRC for the purpose of enabling another person to register for GPS or payment under deduction.

Further reading

The legislation will take effect from 6 April 2021 and will affect around a quarter of a million construction businesses who are registered with the scheme. Treasury estimates suggest the changes will result in additional revenues of £20m in 2022/23 and 2023/24, and £15m in 2024/25.

Payrolling benefits in kind

HMRC introduced the facility to payroll benefits in kind (BIKs) several years ago, and since then different BIKS have been added to the list of items which can be payrolled, which negates the need to complete P11Ds (although Class 1A NICs must still be paid at the right time) and the employee is taxed in real time rather than in the tax year following that in which the BIK was used or enjoyed.

Two BIKs which have not thus far been capable of being payrolled are living accommodation benefit and beneficial (low interest or interest-free) loans – which are taxed under Chapter 5 Part 3 and Chapter 7 Part 3 respectively of ITEPA 2003.

The main reason for not being able to address these two BIKs within a payrolling context is that the legislation is configured in such a way as to require retrospection when calculating the value of the BIK, rather than using contemporaneous information. Other BIKs, such as company cars for example, can be calculated on a month by month or indeed a week-by-week basis without breaching the requirements of the legislation at Chapter 6 Part 3 ITEPA 2003.

ICAS has made representations to HMRC, through both the EPG and specific policy meetings, in relation to payrolling BIKS to ensure that the legislation in relation to living accommodation provision and beneficial loans are rewritten and updated as soon as possible – not only to account for modern day scenarios, but also to bring the legislation into the modern era – bearing in mind for example that the living accommodation often requires the tax professional and the employer to look back to the 1970s for information, and to seek rateable values which often no longer exist, which results in figures being pulled out of thin air and leaving the tax adviser to defend the indefensible in the event of an employer compliance review!

HMRC has now issued a statement to the effect that they will aim to tackle this anomaly in payrolling of BIKS in 2022. One imagines this delayed timescale is because of Brexit/COVID-19/HMRC resourcing issues etc.

Dynamic Coding – an update

On 26 November 2020, HMRC published its initial equality impact assessment of Dynamic coding in Self-Assessment. HMRC makes use of this debt recovery tool when the taxpayer has failed to pay a tax debt under Self-Assessment and they also pay income tax under PAYE.

HMRC has concluded that the impact on all groups of taxpayers is minimal, and therefore not a barrier to recovering debt using its new “Dynamic Coding-out of Debt for Self-Assessment customers’. HMRC considers that it will enable HMRC to recover debts more expediently and in the current tax year as opposed to waiting until the subsequent tax year(s), or consider alternative options with taxpayers, employers, and agents, where the coding out process cannot be utilised.

Employer reimbursed Coronavirus swab tests

HMRC has issued clarification that it will introduce a ‘temporary income tax exemption and NICs disregard’ to ensure that when employees purchase their own coronavirus swab tests, and are reimbursed by their employer, the payment will not attract income tax and NICs liabilities in the current tax year.

It is understood that the test must be purchased for business reasons. An example could include where an employee needs a negative test result to travel abroad for business.

The measure will be legislated for in the next Finance Bill to have effect from 25 January 2021 until 5 April 2021. However, HMRC will exercise its collection and management powers and will not collect any income tax or NIC due on the advance payment or reimbursement of the cost of a relevant coronavirus antigen test from 6 April 2020.

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