TECHNICAL BULLETIN

ISSUE NO. 154
SEPTEMBER 2020

MAKING TAX DIGITAL

The pandemic has fast-forwarded the digital agenda and MTD for income tax has come out of hibernation. So, what do we know so far?

There are two key new documents, Building a trusted modern tax administration system and a 17 page MTD stakeholder communications pack.

These give a broad overview, but much of the detail is yet to come.

Timetable

The new timetable starts with the extension of the income tax self-assessment (ITSA) pilot and full digital links for MTD for VAT from April 2021. The digital links requirement was deferred due to Covid-19.

April 2022 extends MTD for VAT to **ALL** VAT registered businesses. Exceptions will then only be on very limited grounds of religious belief; it being 'not reasonably practicable'; or if the business is subject to an insolvency procedure.

April 2023 brings in MTD for income tax self-assessment for unincorporated businesses and landlords with business turnover or gross property income over £10,000 pa.

There is no timetable yet for Corporation tax, but the government will be consulting in autumn 2020 on how to bring this in.

The end of the tax return

'The end of the tax return' is dependent on the development of further functionality in commercial software. The longer-term aim of HMRC is to replace the self-assessment portal with the new MTD for ITSA API.

This would mean that figures for other income, such as employment and savings income, pension contributions and student loan repayments, could be entered via the same software route being used for making quarterly returns for income tax.

It is likely that HMRC will develop an alternative interface for submission of this information while commercial software is developed to plug this gap, but

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the details of exactly what this will entail are, as yet, unclear.

Currently in the income tax pilot, only those with a single source of trading or property income (excluding furnished holiday lets) can finalise their tax affairs via the API.

Timing of access to the pilot will depend on a client's mix of income as well as software capability.

Quarterly summaries and end of year procedure

MTD for ITSA will involve sending quarterly summaries of income and expenses to HMRC using MTD-compatible software. It is expected that submissions will be made from ten days before the quarter end to one month after, but this could change.

What is currently less clear is the position as regards the end of year finalisation/'quarter five' - a term that isn't used in the Communications pack. The concept of 'quarter five' is that quarterly returns submitted within 30 days of the quarter end can hardly be much more than rough and ready cash-basis figures, and therefore these quarterly figures would need adjusting at the end of the year to take account of necessary tax adjustments, accruals accounting, and general error correction – work which is usually undertaken by the accountant.

This process is expected to form part of the new 'end of year finalisation' and follow the normal self assessment income tax framework, with final submission deadline of 31 January after the end of the tax year.

The aim is for clients also to 'submit personal income and reliefs' in a 'final declaration' which is eventually to replace the self assessment tax return.

Following each quarterly submission, the business will 'receive an estimated tax calculation based on the information provided to help them budget for their tax'. Whilst a laudable objective, a number of issues would need to be addressed before this 'estimated tax bill' could be relied upon with any degree of accuracy, such as basis periods and tax adjustments.

A big question for all accountants is how much assistance clients will need with quarterly submissions. Many firms and their clients may consider that at least some level of scrutiny from the accountant is prudent before any figures are submitted to HMRC. But obviously this has cost and workload implications.

Legislation for Making Tax Digital

At this stage, there is broad enabling legislation in place, and some draft statutory instruments left over from the original, deferred attempt to bring in income tax quarterly reporting. The latter may well be revised before final enactment.

Using the published draft rules, MTD for ITSA is likely to parallel the requirements of MTD for VAT. This is likely to mean three-line reporting (analogous to the 9 box VAT return) for the smallest businesses, with more detail along the lines of that in the current ITSA annual return for businesses over the VAT registration threshold.

According to the draft regulations, the transactional detail required for digital records will be: the amount of the transaction; the dates of the transaction according to the basis used by the relevant entity for recording transactions for the purposes of income tax (cash or accruals accounting); and the category into which the transactions fall.

MTD for VAT legislation

The primary legislation for MTD for VAT was enacted in section 62 of Finance (No 2) Act 2017. The primary legislation is largely enabling legislation, with the detail delegated to secondary and tertiary legislation.

The more detailed rules can be found in Value Added Tax (Amendment) Regulations 2018 (laid before Parliament on 28 February 2018), and VAT Notice 700/22: Making Tax Digital for VAT.

MTD for income tax legislation

The primary legislation for MTD for income tax was enacted in section 60, section 61 and schedule 14 of Finance (No 2) Act 2017.

Draft secondary legislation for MTD for income tax include The Income Tax (Digital Requirement) regulations and The Income and Corporation Taxes (Electronic Communications)(Amendment) Regulations).

Perhaps the most useful, in terms of detail, is the draft MTD for income tax Income Tax Notice XX: Retail Sales, Update Information, End of Period Information and Partnership Information.

HMRC published a direction in March 2018 to enable submissions within the ITSA pilot to fulfil self assessment filing requirements for income tax (see commissioners' direction).

MTD for VAT digital links

The need for full MTD for VAT digital links was postponed at the start of the pandemic. The requirement now runs from the first VAT return period starting on or after 1 April 2021.

VAT Notice700/222 Making Tax Digital for VAT includes details in section 4, with examples of a digital link in section 8.

Cut and paste or copy and paste will not be acceptable after April from next year. Their use has been a concession for the 'soft landing period' only. But HMRC will accept, for example:

- linked cells in spreadsheets;
- emailing a spreadsheet containing digital records so the information can be imported into another software product;
- transferring a set of digital records onto a portable device, such as pen drive, memory stick, flash drive, and physically giving this to someone else who then imports that data into their software;
- XML, CSV import and export, and download and upload of files;
- Automated data transfer; and
- API transfer.

Nudge letters

There are still some businesses mandated for MTD for VAT which have not yet signed up. HMRC is recommencing compliance activity here, which has been delayed due to Covid-19 lockdown.

It is quite possible that some non-mandated businesses will incorrectly receive nudge letters. Such cases should be flagged to HMRC so that they can be removed from the mandated list and avoid further compliance activity.

Taking actions now

While April 2023 may seem a long way away, practices should be aiming to have a plan in place soon, ideally by the end of this year.

The introduction of MTD for ITSA has far wider implications for practice management than MTD for VAT. For example, MTD for ITSA is designed to operate on the cloud. Though it is possible to be fully compliant without using cloud-based systems, this would need careful consideration of data flow – e.g. how the necessary information is going to be routed to the HMRC ITSA API; at what stage, and how, professional review and adjustment of the client's figures is to be achieved etc.

If cloud-based solutions are in place or planned - as a practice, will you provide the cloud space in which the client operates, or will the client give you access to their cloud-based accounting package? Will you standardise on one software supplier or will you be able to cope with different clients using different packages?

Will your software have the required functionality to cope with your clients? Noting that change is likely to be iterative, particularly in respect of year-end finalisation processes and submission of claims, elections, and other income – the details historically included in a self assessment income tax return.

For example, will all software suppliers be able to cope with all the amendments needed? How, for example would five-year farmer's averaging be dealt with or an EIS claim?

Answers to such questions are only likely to emerge gradually, and practices will need to make allowance for such uncertainties.

The transition period into MTD ITSA quarterly reporting could mean additional workloads as, potentially, clients will need support both to finalise the last annual returns under the old system, and at the same time to prepare for their first submissions under the new system.

Communication will be vital as many of the promised benefits of MTD for ITSA may not materialise in line with HMRC's headline publicity. A key one here is the concept of HMRC responding to quarterly submissions with a calculation of expected tax liability. Given that quarterly figures could be very rough and ready, and present an incomplete picture of the client's tax affairs, any estimates of tax liability from HMRC could be very significantly adrift from reality.

For example, clients might well have a different basis period for trading income as against other income (i.e. their accounting period end is a date other than 31 March / 5 April); and significant information, such as savings income, employment income, claims, deductions, and elections, may not be available to HMRC at the time of the quarterly submission.

Client expectations will need to be managed carefully.

Conclusion

The expansion of Making Tax Digital is a vast, long-term project. There will be significant changes along the road. While it is helpful that Government is now thinking in terms of a ten-year plan, we must be under

no illusions that the process could take significantly longer.

The key matter now is to take stock of the direction of travel and build a practice business model which is sufficiently resilient to weather the storm. Bringing vision and reality into alignment will be no easy process.

Have your say

ICAS asks members to feedback experience of implementing MTD, both positive and negative, so that we can represent your views to HMRC with a view to influencing the future development of a satisfactory system. Please email tax@icas.com

A BIT OF A B*** DISASTER

The recent case of Holland-Bosworth v Revenue & Customs [2020] UKFTT 331 (TC) concerned the availability of Entrepreneurs' Relief on the disposal of 50 Ordinary B Shares in The Hayward Holding Group Ltd for £1.35 million by Mr Holland-Bosworth.

The Judge held that relief was not available as the B Shares disposed of by the Appellant were not shares in the Appellant's 'personal company' within the meaning of section 169S(3) Taxation of Chargeable Gains Act 1992, as the B Shares did not confer '*at least 5% of the voting rights ... exercisable by [the Appellant] by virtue of that holding'* at the time of disposal,.

Mr Holland-Bosworth claimed Entrepreneurs' Relief in his self-assessment return, and stated that the rights attached to the B Shares, in the Articles of Association, were incorrectly described but it was not possible for the him or any other B Shareholder to rectify the error, and for all intents and purposes his B Shares had full voting rights. Articles 4 and 5, respectively, of the company's Articles of Association stated:

- 'the holders of the B Ordinary Shares shall not be entitled to receive notice of, attend or vote at any general meeting of the company'; and
- "... all or any of the rights for the time being attached to any class of shares for the time being in issue may from time to time (whether or not the Company is being wound up) be altered or abrogated with the written consent of the holders of not less than three-quarters of the issued shares of that class or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of such shares ... [and] every holder of shares of the class shall be entitled on a poll to one vote for every such share held by him ..."

The Judge held that 'Article 4 could not be clearer' and that 'Article 5 does not provide for the conferral of share rights, effected by shareholders of a particular class of shares, unilaterally as a class. Article 5 applies to all and any modification of existing rights to shares, nothing more'. He went on to conclude that '…on any view, until the "B" Share rights were altered or abrogated, the "B" Shares had no voting rights to vote at company general meetings'. Mr Holland-Bosworth's appeal was accordingly dismissed.

This case once again highlights the importance of meeting all of the statutory conditions in the two years to the date of sale if the now named Business Asset Disposal Relief is to be available, and the particular complexities when dealing with companies with "alphabet" shares or shares of more than one class.

A company must be the vendor's personal company. S169S(3) defines this. A "Personal company" in relation to an individual, means a company -

a) at least 5% of the ordinary share capital of which is held by the individual; and
b) at least 5% of the voting rights in which are exercisable by the individual by virtue of that holding.

For disposals after 29 October 2018, either or both of two further conditions must be met:

1. The individual must be beneficially entitled to at least 5% of the profits available to equity holders and would be entitled to at least 5% of the assets available to equity holders on a winding up; or
2. In the event of a disposal of all of the company's ordinary share capital, the individual would be entitled to at least 5% of the proceeds

The condition at 1 above can be an issue where different classes of share allow dividends to be paid at differing rates, but 2 will normally eliminate this where each share ranks equally in terms of proceeds on a sale or winding up. It is worth reviewing share rights of companies with more than one class of share where shareholders will potentially qualify for Entrepreneurs' Relief, with a view to amending the Articles.

MICROSOFT – WHICH PRODUCT DO I NEED?

Just like many other software providers, Microsoft have adopted a Software as a Service (SaaS) offering for their popular business suite of Office applications. This means that you only pay for the number of users that need the software, and even then, there are different variants of the licence, dependant on your needs. Microsoft has a variety of productivity and security management offerings for small to medium-sized customers, each bringing increasingly powerful features and functionality.

Office 365 is an integrated experience of apps and services, designed to help you work collaboratively and have more time to concentrate on your business. Applications like Word, Excel and PowerPoint are updated monthly with the latest features and security updates and Microsoft protect your data with 24/7 security and support.

The SaaS model is popular, as it means you do not end up on an old, outdated version of the software. Not only is it good to be up to date with the newest functionality available, it also means you remain secure and compliant.

Microsoft recently renamed their Office 365 packages to make it clearer for end users to understand what to buy. On 21 April 2020 Microsoft renamed these packages as follows:

Previous name	New name
Office 365 Business Essentials	Microsoft 365 Business Basic
Office 365 Business Premium	Microsoft 365 Business Standard
Microsoft 365 Business	Microsoft 365 Business Premium

Microsoft 365 Business Basic (£3.80/user/month)

Microsoft 365 Business Basic represents a great value for money starter product. It provides users with Exchange Online and the familiar shared diaries, contacts, and email systems people have been using for years. It also provides access to increased OneDrive storage and Microsoft Teams built on the SharePoint platform.

Microsoft 365 Business Standard (£9.40/user/month)

In addition to the features of the basic package, this package also includes the familiar and well-known Desktop applications such as Outlook, Word, Excel, PowerPoint, Publisher and Access. The licence allows users to access these applications on a smartphone, tablet, PC and laptop. Each single user can install the software on up to five devices providing great flexibility.

Microsoft 365 Business Premium £15.10/user/month

This package brings together Office apps and powerful cloud services with comprehensive security that helps protect your business against advanced cyber threats. Microsoft 365 Business Premium was purpose built for SME's, providing them with the productivity capabilities of Microsoft 365 Business Standard plus advanced security features to safeguard business data and assets across devices. The use of Office applications in a remote working environment such as remote desktop server or a virtual desktop infrastructure is also facilitated.

Additional security features:

- Office 365 Advanced Threat Protection (ATP) – helps guard your business against sophisticated phishing and ransomware attacks designed to compromise employee or customer information.
- Access to Intune through the Azure Portal – this allows you to set up security features and device management.
- Conditional Access – allows you to control where your network can be accessed. You can limit access to within your corporate network or within the UK.
- Multi-factor Authentication – setting up multi-factor authentication is critical to securing your network

Summary

There has seen an increase in cyber-attacks since the implementation of cloud computing. Most of these attacks have been phishing scams that target businesses using Office 365. Cyber criminals are aware of security flaws in the more basic Office 365 packages and exploit this by coercing users to click on links and give away their credentials.

Microsoft 365 Business Premium provides additional layers of security that can safeguard against these attacks. Furthermore, conditional access allows your administrator to configure your users to only have access to emails from inside your corporate network, thus preventing access by unauthorised individuals.

Additionally, if your team needs to access the business network from home, this can be also be altered to allow access only from the UK. Usually, many targeted cyber-attacks originate from outside of the UK.

It is therefore important to consider not only what products/services you need, but also the level of security required. Microsoft are constantly creating and updating their products to meet these needs. Are you making the most of the technology you have access to? Why not take a look at Microsoft's Office 365 Training Centre where you can access free tips to get you started.

If you or any of your clients need further information or you would like to subscribe to Microsoft 365, please contact your ICAS IT partner, Lugo, on 03300 242 242, or visit their website for more information.

REMEMBER, REMEMBER THE CURIOUS MORTGAGE LENDER

As lockdown measures started to gradually ease, the resurgence of the property market was a welcome development and a positive sign that maybe, just maybe, society will eventually return to something resembling normality.

The Scottish Government has certainly been keen to boost the number of homeowners by announcing an increase in the starting threshold for the Land and Buildings Transaction Tax (LBTT) for residential property transactions. The threshold was raised from £145,000 to £250,000 with effect from 15 July 2020 and will remain in place until 31 March 2021.

It remains to be seen how much pent-up demand exists in the marketplace and what effect the lifting of the LBTT threshold will have, especially with Covid-19 creating uncertainty about the health of the economy, leading in turn to worries about job security. For those taking the leap and buying a property, that means trying to find a mortgage lender and providing evidence of earnings and expenditure.

It is worth remembering the Mortgage Verification Scheme ('MVS') remains in place. The MVS was launched on 1 September 2011 as a joint initiative by HM Revenue & Customs (HMRC), the Council of Mortgage Lenders, and the Building Societies Association to reduce mortgage fraud, which at the time was estimated to cost £1bn a year.

The MVS allows lenders to forward mortgage application details to HMRC for verification when they are suspicious of the evidence, or lack of it, of income received or have some other concern about what they have been told.

In the first full year of the MVS, there were 1,819 referrals from lenders to HMRC, but the numbers have climbed sharply, which shows how actively the scheme is being used:

2018/19	7,506 mortgage referrals
2019/20	9,556 mortgage referrals

Source: HMRC

When HMRC checks the mortgage application data, it also considers the information from an investigation perspective. If someone is declaring £50,000 of income on their application, but their PAYE record or self-assessment return shows a lower figure, HMRC becomes suspicious and conducts a full risk assessment to see whether an in-depth enquiry is required.

HMRC refuses to say how many enquiries have resulted from the mortgage referrals on the grounds that 'disclosure would, or would be likely to, prejudice the assessment or collection of tax.'

The lessons here are for mortgage applicants to make sure their mortgage applications are supported by documentation such as a P60 or a detailed set of accounts, and to resist the temptation to introduce any inflated or unsupported figures in the pursuit of their dream home.

THE TAILOR'S TALE

This article discusses the outcome of a case involving a well-known high street retailer which also happens to be a Limited liability Partnership ('LLP'). The First Tier Tribunal case (and as such, not binding) relates to the payments made under an executive bonus scheme and serves to provide further insight into the significance of employment income legislation. The case centres around remuneration paid to the members of the LLP after they had become members, highlights why the principles of employment income are so important in differentiating between when something is earned and when it is paid, and also provides an interesting insight into how the employment earnings regulations interact with partnership income rules.

The issue – earnings from employment or self-employed earnings?

Prior to becoming members of the LLP, five employees were offered access to an Executive Long-Term Incentive Plan ('LTIP') bonus arrangement. The members' bonuses were calculated using the profit figure from the time when they were still employees, and the LLP did in fact apply NICs to the payments when they were paid. However, the LLP subsequently received professional advice which led it to conclude it need not have done this. The LLP applied for a refund of the NICs, which triggered an enquiry into the partnership tax return of the LLP.

The LLP had treated the payments made in May and November 2013 as a profit received by the members from the LLP, but HMRC argued that these payments were in fact deferred bonuses.

The LLP argued that the bonus payments made under the LTIP were self-employed earnings and not earnings from an employment. As such, the NICs payable were due under the self-employed scheme (Classes 2 & 4) per the provisions of Social Security Contributions and Benefits Act ('SSCBA') 1992 ss 11 and 15 rather than being classified as employed earner's earnings (Class 1) per s.6 of the same Act.

Eligibility for the bonus

As regards eligibility for the bonus, the LLP board was entitled to decide which eligible employees qualified for a bonus. Eligibility was governed by being a full-time director or senior employee who was continuously employed by Charles Tyrwhitt or a group company up to a certain date, or who was a "good" or "early" leaver – otherwise they would be classified as a "bad leaver", which was defined as someone who was dismissed for breaching their service agreement (albeit not in the case of wrongful or unfair dismissal), or had resigned before the given date (known as the 'long stop' date), or in breach of the service agreement.

It transpired that if someone was to become a member of the LLP, this may inadvertently classify them as a "bad leaver" in terms of the LTIP, which was not the intention, therefore some of the original Executive LTIP clauses were changed to remedy this so the relevant individuals did not lose out when it came to paying the bonuses.

Legislative framework for LLPs

The judge examined the legislative framework governing LLPs and concluded that there was no evidence to show that the five individuals were employees and members concurrently, and that it was clear the individuals had received the bonus payments whilst they were members, not employees. However, HMRC's contention was that the five recipients were receiving deferred bonuses which accrued to them whilst they were all still employees of the business.

The Tribunal then examined the Income tax and NICs legislation, specifically noting that the employed earnings legislation within Income Tax (Earnings and Pensions) Act ('ITEPA') 2003 was particularly wide-ranging and that the NICs rules within the Social Security Contributions and Benefits Act 1992 mirror the tax treatment for employed earners under sections 11, 16 and 17 ITEPA 2003 and that self-employed earnings for NICs mirror the tax treatment under sections 7 and 198 of Income Tax (Trading and Other Income) Act 1995.

Timing is everything

ITEPA 2003 provides at sections 16, 17 and 18 that the employment status of the individual at the time at which the income is received is key to establishing a connection to employment earnings – but that their status at the time the earnings were earned overrides this if it was earlier than when the earnings were received.

Case law and the "source" principle

A number of cases were examined by the judge in connection with the above legislative principles, and specifically, the source of the income was also discussed in the judgement.

The judge was persuaded by the arguments presented by HMRC that the correct designatory source was income from an employment earned by an employed earner, and also that being members of an LLP by the time the Executive bonus LTIP was received did not preclude them from receiving employment income from another source, as happened in this case.

Findings

In simple terms, the bonus payments out of the Executive LTIP were not classed as a share of the LLPs profits, or even as income from a discrete self-employment, but they were deemed to represent payments from a specific scheme which was only open to employees and not to members.

It is not clear whether the LLP will appeal to further explore the question of whether the NICs legislation which attributes to employed earner's earnings can legitimately, independently of the tax legislation which it mirrors, continue to apply when the individuals concerned are no longer technically employed by the time they received the funds.

This principle was discussed in [RCI Europe v Woods (Inspector of Taxes) [2003] EWHC 3129 (Ch) [2004] STC 315] which concerned the chargeability of NICs in respect of payments made to an ex-employee in return for his having signed a restrictive non-compete covenant agreement, where the arguments made in favour of the NICs legislation not extending beyond the year in which the restrictive covenant payments were earned were rejected.

SEISS 1 AND 2 UPDATE – ERRORS, COMPLIANCE AND BEING 'ADVERSELY AFFECTED'

Phase 2 of Self-Employed Income Support Scheme ('SEISS') is now well underway and open to claims until 19 October 2020. It was also recently announced that there will be a further extension with a revised scheme – SEISS 3 and 4 – to April 2021. SEISS will be with us for a long while yet. For any clients who claimed it, SEISS will need to be included as taxable trading income on their 2020/21 income tax self assessment return. This opens the door to HMRC compliance activity. In fact, HMRC compliance has already started.

Key dates

With SEISS, a key date is 22 July 2020, the date of Royal Assent of Finance Act 2020. For SEISS grants received before then, HMRC need to be notified of erroneous claims by 20 October 2020. For grants received after this date, notification of erroneous claims must be within 90 days of receipt of the grant.

Note that this gives three dates in July to watch: 22 July is relevant for penalties; while 13 July 2020 marks the end of SEISS phase 1 claim period, and 14 July 2020 is the start of SEISS 2.

This gives a limited window to review claims to ensure clients are not exposed to penalties for amounts claimed in error.

As well as the duty to notify incorrectly claimed grants, normal self assessment rules apply for amounts included on tax returns.

Enquiries into SEISS grants included on income tax returns will follow the normal self assessment rules. This gives a normal closure date of twelve months from the date the return is filed. So, filing a 2020/21 return just before the usual filing deadline of 31 January 2022 gives HMRC until January 2023 to open an enquiry.

Claiming in error

SEISS has evolved, as has the guidance on SEISS. Clients' understanding of SEISS may understandably have been incomplete when an initial claim was made. They may have assumed that as HMRC was doing the calculations, it was all up to HMRC. However, significant responsibilities still lie with the claimant.

Specifically highlighted by HMRC are five likely scenarios for error, where a SEISS grant may need to be repaid and HMRC notified of the error.

1. **The amount received was more than HMRC advised was due**

This is a tricky case. It essentially involves an error at HMRC, but if it is sufficiently large, HMRC is likely to expect claimants to notice.

It is possible that in some cases, the lump sum amount paid into a claimant's bank account was substantially different from the amount shown on the eligibility statement sent to the claimant. There is no guidance on how large the discrepancy needs to be, but it would be wise to advise clients to make the cross-check. If it

is later discovered that they received £7,000 when only £2,000 was due, there could be problems.

Four further cases are all under the general heading of not being entitled to the grant. These are:

2. **The business was not adversely affected**

Thinking on what 'adversely affected' constitutes here has developed since SEISS started. It is a somewhat imprecise concept. HMRC's view is

*'Adversely affected is typically when your business has experienced lower income or higher costs due to coronavirus' (*see Decide if your business has been adversely affected).

HMRC goes on to give examples and says

'HMRC expects you to make an honest assessment about whether your business has been adversely affected. There is no minimum threshold over which your business' income or costs need to have changed'

Some key concepts here are that it is the business which must be adversely affected (according to the Treasury directive (see paras 2 and 3.3 for example), not just the business owner. Hence, if an individual were shielding, they have been affected, but has the business? This requires the claimant to look beyond their circumstances at the impact on the business.

With the shielding example, for someone with a public facing role in retail or tourism, shielding would very likely mean that the business was adversely affected – they might even have had to employ additional staff to provide cover. But if their business is one which could be run from home, over the internet or by phone, then the business may not have been adversely affected. It will all turn on the specifics of the case.

An additional point is that with the introduction of SEISS 2, the adverse effect must be in the right time period. For SEISS phase 1, this ran until 13 July 2020. For SEISS 2, it started on 14 July 2020.

Ensure that the adverse effect matches the claim period. For SEISS 3, the requirements state that the claimant's trade should be impacted by 'reduced demand' due to Covid-19 in the qualifying period, which will be from 1 November to the date of the claim (see below for further discussion of this).

3. **The business did not trade in the tax year 2019 to 2020**

One of the eligibility conditions for SEISS 1 and 2 is that the claimant has trading income during 2019-20. Eligibility for SEISS 3 will be that the claimant is currently eligible for SEISS (although not necessarily to have claimed it) and intends to continue to trade.

While HMRC performs the calculations for SEISS, it has not used tax return data for 2019-20 to double check if there was trading income in 2019-20 before paying out a claim. In any case this information would not have been available before April 2020 at the earliest.

So HMRC took the claimants' word that they were trading in 2019-20, but, if once the 2019-20 returns are filed there is no trading income, this may invite a compliance check.

It would therefore be sensible to 'tick the box' and ensure that this eligibility criterion has been met, as soon as possible, and certainly before filing the 2019-20 Income Tax Self Assessment return.

4. **The business did not intend to continue to trade in the tax year 2020 to 2021**

This condition is obviously more readily applicable to SEISS 1 grants, as by SEISS 2 the answer should be clear. What is in sight is more than a change in plan. Where a business intended to trade, but due to unforeseen events, did not actually trade in 2020-21, then the claim is valid.

This would cover the scenario of, for example, a retail business which closed due to government restrictions, fully intending to re-open when the restrictions were lifted. But in fact, once re-opening became possible, social distancing requirements made the business unviable and it closed permanently.

On the other hand, if it is clear that there was no intention to trade in 2020-21 when the grant was claimed, then HMRC should be notified and arrangements made to repay the SEISS grant made.

The prime difficulty here is likely to be evidence of intention, where a business closes without trading in 2020-21.

5. **The business was incorporated**

This is a known trap for sole traders or partnerships who incorporated their business after 5 April 2018.

The trap is that claimants might not distinguish between trading on a self-employed basis and trading via a company. The rules require trading income from self-employment, so if the business is incorporated at any stage after 5 April 2018, the self-employed trading income condition for 2019-20 would not be met.

If incorporation occurred early in 2018-19, it is likely that the 50% self-employed income test would not be met, but for incorporation later in the year both the 50% and £50,000 conditions could be met and a grant paid out, where it was not actually due.

For SEISS purposes, HMRC is not picking up commencement and cessation dates from returns, so would not be aware that the self-employment has ceased.

Notifying HMRC

Where a grant has been claimed in error, HMRC should be notified and arrangements made to pay the grant back. Penalties can apply where HMRC consider that amounts have been claimed deliberately by those who are not eligible.

Claimants may also voluntarily decide to pay some of the grant back to HMRC, but if they do so they cannot later change their mind. One feature of SEISS is the 'all or nothing' aspect of a claim. Businesses can be eligible on the basis of any level of adverse impact but will receive the full amount calculated as due based on their historic profits.

Some clients may be uneasy with this outcome. Perhaps they are entitled to a full grant of £7,500 for the first phase of SEISS, but they estimate that the financial impact on their business was perhaps only half this. In such circumstances, they are under no obligation to repay, but may do so if they wish.

HMRC has published guidance on paying grants back and on penalties to which clients may be directed.

Keeping records for SEISS

Decisions about claiming SEISS depend on a view of circumstances at the time of the claim. But HMRC compliance activity could mean questions on motivation being asked under normal self assessment rules as late as January 2023.

It is therefore key to ensure that clients have sufficient documented evidence now, to support their decision to claim. Likely to be at particularly high risk are those businesses which did not re-open after 5 April 2020.

Normal self assessment record keeping requirements apply (usually five years from the 31 January tax return deadline). But additional information may be needed for SEISS claims. The exact nature of the evidence will depend on specific business circumstances.

A good starting point is HMRC's list of examples:

- business accounts showing a reduction in turnover or increase in expenditure;
- confirmation of any coronavirus-related business loans you have received;
- dates your business had to close due to lockdown restrictions;
- dates you or your staff were unable to work due to coronavirus symptoms, shielding or caring responsibilities.

However, thought needs to be given beyond this. Is there a print out of the calculation or a screenshot of the claim? Where there were school closures which impacted the business owner's ability to work, are these recorded? How has the business evidenced loss of customers, lost contacts, reduced hours, or decreased turnover? Has the business a record of what 'normal conditions' look like to compare with the Covid-19 impacted position?

SEISS grant extension

The announcement on 24 September of a further extension does not change the compliance position applicable to the first two phases.

Details of the extension are still emerging. The basics are included in a new factsheet. This confirms that:

'the extension will provide two grants and will last for six months, from November 2020 to April 2021.

Grants will be paid in two lump sum instalments each covering a three-month period. The first grant will cover a three-month period from the start of November until the end of January.

The Government will provide a taxable grant covering 20 per cent of average monthly trading profits, paid out in a single instalment covering 3 months' worth of profits, and capped at £1,875 in total.

The Government are providing broadly the same level of support for the self-employed as is being provided for employees through the Job Support scheme. The second grant will cover a three-month period from the start of February until the end of April. The Government will review the level of the second grant and set this in due course.'

However, it should be noted that whilst the starting point looks like an extension of SEISS 1 and 2, SEISS 3 and 4 have changes to the scheme, notably in the qualifying conditions – the claimant needs to be 'currently actively trading' but affected by 'reduced demand', which is different from the test of 'adversely affected'.

The government's aim with SEISS 3 and 4 is to change the support towards providing a top up for those who are trading, and continuing to do so, i.e. to support businesses that are viable but facing reduced demand.

Conclusion

There is a limited window, until 20 October, to review eligibility for SEISS claims in phases one and two before there is a risk of penalties and HMRC compliance activity.

Encourage clients who have claimed SEISS to review the evidence they have to support their claim to ensure that it is sufficiently robust to withstand HMRC scrutiny.

Where it becomes clear that grants have been claimed in error, clients should contact HMRC and make arrangements to repay.

Guidance is expected in due course, but in the meantime should you have queries or comments for ICAS to feed back to HMRC then do get in touch by emailing tax@icas.com

PROFESSIONAL NEGLIGENCE – LIABILITY FOR ADVICE WHICH WASN'T GIVEN

Professionals are aware of the need for care when giving advice, but a recent unusual case highlighted the issue of potential liability for failing to provide advice.

The claimant was looking for more than £730,000 in damages from a firm which had not sufficiently highlighted to him the possibility of increasing the Entrepreneurs' Relief available on the sale of a business.

By the relatively simple expedient of transferring half his shareholding to his wife for the relevant holding period, the Capital Gains Tax due would have been significantly reduced.

But did the firm owe him such a pro-active duty of care?

Basic tax advice

In Hugh McMahon v Grant Thornton LLP (Hugh McMahon [2020] Scot CS CSOH 50), a motor dealer disposed of his entire business to a national chain, incurring a substantial capital gain. The Capital Gains Tax bill was over £2 million. He later discovered that the gain could potentially have been reduced if he had transferred shares before the sale, to his wife.

This, therefore, was about basic tax planning advice, not the realms of complex tax saving schemes. The position was significant because the level of sale proceeds meant that the then £10 million limit of Entrepreneurs' Relief in force was breached, and the excess taxed at 28%, rather than 10%.

Engagement letters

There were separate letters of engagement setting out the services provided to Mr McMahon, his wife, and the company. Additional ad hoc letters of engagement covered occasional specified other work.

The engagement letter between the accountancy firm and Mr McMahon, the director of the company, stated 'work on matters other than those mentioned in the appendix 1 to this letter...will not be our responsibility unless a specific engagement is entered into, and we would therefore ask you to check the appendices carefully'.

The engagement set out in the appendix was for basic compliance services of preparing and submitting Mr McMahon's income tax return.

The appendix noted 'for the avoidance of doubt, whilst we will always seek to inform you of tax planning ideas of which we become aware that may be of assistance to you, we cannot accept a duty to monitor and unilaterally suggest tax planning advice on specific matters. Advice on the tax implications of such specific matters will be given once you have referred it to us.'

Routine meetings

At year-end meetings, the firm included a factsheet on Entrepreneurs' Relief, which concluded 'If you would like advice on any of the points covered by this factsheet please contact the person …..who normally advises you, or the contact shown below.'

The director historically had held the opinion that he did not intend to sell. However, due to a buoyant market in advance of changes to the rules on dealerships, the director received a favourable offer and decided to sell. The timescale of the sale was immediate. For a transfer of shares to family members to be effective in reducing a potential capital gain, the sale would need to be delayed for 12 months.

Furthermore, the unexpectedly high sale price meant that the gain exceeded the director's personal £10 million Entrepreneurs' Relief limit.

An unexpected sale

Had the accountancy firm a duty to advise the director of the possibility of reducing the capital gain by transferring shares to family members before sale?

The court considered the matter in two phases. The initial phase was that leading up to the offer of sale. The second phase was when the sale offer had been made. During the initial phase, the court held that the firm had discharged its responsibilities by including the factsheet in papers available to the director, and by raising the issue of Entrepreneurs' Relief in outline at year-end meetings.

At that stage, there was no awareness of a particular problem with any potential sale exceeding the director's Entrepreneurs' Relief allowance, and in any case the director had expressed the opinion that he did not intend to sell.

Tax planning and general tax awareness

By the time the actual sale was imminent, the only tax mitigation route seemed to include deferral of the sale by 12 months – a potentially uncertain proposition. At a meeting prior to the sale, the firm had included a paper which outlined the tax bill expected and made it clear that the director's wife potentially had a separate Entrepreneurs' Relief allowance.

It is unclear if the director had actually considered this paper, or had followed through the consequences it implied. The firm did not appear to have specifically informed him that the tax consequences would be different if half the shares were transferred to his wife and the sale deferred for 12 months.

The Court held that inclusion of the paper setting out the capital gains position was sufficient for the firm to discharge its duties. While the firm had limited its engagement to tax compliance, the matter was sufficiently allied to routine activities, rather than elaborate tax planning, that it would be reasonable to expect a competent firm to have mentioned the issue. Yet this duty did not extend to explicitly outlining alternative ways in which the deal could be structured.

Conclusion

It must be one of a firm's worst nightmares that a good client's circumstances change such that a previously unproblematic issue turns into tax liability. Who was to know that a client who said he wouldn't sell would change his mind? Was it to be anticipated that the Entrepreneurs' Relief limit would be exceeded?

While the firm in this case escaped liability, the impact of the case should not be underestimated.

The unexpected can always happen, and firms should be alive to the need to explain basic tax issues to clients and document that advice. There can be a duty to make clients aware of potential tax issues, which falls short of advising on possible solutions. Highlighting possible tax exposure may be all it takes to avoid a damaging claim.

IR35 APPEAL CASES

KICKABOUT IS WITHIN IR35

Background

ICAS reported last year on the First Tier Tribunal ('FTT') case of Paul Hawksbee T/A Kickabout Productions Ltd v HMRC, which is an IR35 case about a Talksport Radio presenter and whether his contract was a deemed employment contract through his intermediary company. In the FTT, the Judge and the lay member came to conflicting decisions, but as the Judge has the casting vote, the decision was made in Mr Hawksbee's favour that IR35 did not apply.

Given the split decision, HMRC saw no reason not to appeal the case and the latest Upper Tribunal decision is the result of that appeal. Unfortunately for Mr Hawksbee, the Upper Tribunal reversed the FTT decision and decided that IR35 did in fact apply to the circumstances.

The historical facts were that Mr Hawksbee presented a minimum of 222 shows per annum – which translated into 44 weeks of daily weekday shows, each lasting three hours. He was paid a flat rate per show and was only permitted to carry out other work which did not compete with his radio shows on Talksport Radio. He had no right to receive statutory pay or leave under the agreements, nor was Talksport bound to pay employer's pension contributions.

Even though Mr Hawksbee had carried out the same work for Talksport Radio for 18 years by the time the case reached the FTT, the contracts examined covered the years 2012-13, 2013-14 and 2014-15. The two contracts in existence during this time period contained different provisions about Mutuality of Obligation (MOO) – the first contained no written provisions and the second denied its existence. However, it does not seem as though the complete set of verbal and written agreements were intrinsically

disparate. The offer of, and requirement to present, 222 shows a year was present throughout.

MOO prevails again

The meatiest part of the judgement transcript focuses once again on the matter of MOO – something HMRC continues to ignore in its Check Employment Status for Tax (CEST) Tool – and which the Judge in the FTT decided existed, but which did not point towards the existence of an employment contract. The UT found that MOO not only existed based on the facts of the case but that it, without question, pointed towards an employment relationship due to the existence of a hypothetical contract of employment.

When, where, how?

Control was also taken into account in the decision, and the UT found that the radio station could control what, when, and where the tasks in question were performed – even though he had discretion as to 'how' he performed those tasks. Naturally, this was found to constitute sufficient control for an employment relationship to exist in addition to the MOO factors above.

Personal service

The all-important personal service tests came in to play when HMRC were able to show that Mr Hawksbee was contractually prohibited from providing a substitute and had to undertake his work exclusively for Talksport radio.

Not in business

The above factors trumped the evidence given which pointed towards self-employment, such as the lack of entitlements to statutory pay, leave, training or medicals, the fixed fee arrangements, and not being considered 'part and parcel' of the organisation.

Kickabout - Summary

Although the UT decision is binding, and HMRC will likely hail it as a victory, it is not really the kind of case which can readily be used in other sector-based cases as the circumstances were so particular to Mr Hawksbee's own discrete contractual arrangements as a journalist and presenter.

Nevertheless, it is important to note that the method used to decide the case outcome differed slightly from the holistic overview methodology as set down in Hall v Lorimer [1994] STC 23 which has been the common approach used ever since in status cases. In this case, however, a strict order was maintained, in that the first priority was to examine MOO, followed by control and then everything else.

If HMRC considers this mechanical approach to now override the principles set down in Hall v Lorimer, they may finally have to admit that the CEST Tool must also consider MOO as a matter of course.

VARNISH IS NOT AN EMPLOYEE OR WORKER

Background

This case is important because, had the claimant won her case, the ramifications for the wider sporting community would have been huge. The case has nevertheless served to highlight some of the difficulties faced by athletes in their relationship with sporting bodies, and has assisted in the rise of a movement in which athletes are calling out their treatment.

Jess Varnish, Former Great Britain Cyclist who lost her original case against the British Cycling Federation ('BCF') and UK Sport at the Employment Tribunal ('ET') in 2019 has now also lost the Employment Appeal Tribunal ('EAT') case she brought against the cycling body. The case was brought to the EAT in December 2019 and heard in May 2020, the decision being handed down in July upholding the ET's original decision that the relationship was not one of employer and employee/worker, but rather, similar to a student receiving a grant over a period of time.

Ms Varnish's "Athlete Agreement" was terminated by the BCF just prior to the 2016 Olympics on account of performance-related issues. Her claim to the ET centred around unfair dismissal and unlawful detriment due to her having made protected disclosures under the Employment Rights Act 1996 ('ERA'), and direct sex discrimination and victimisation under the Equality Act 2010 ('EqA').

The ET decided in January 2019 that her claim for unfair dismissal under ERA 1996 was invalid because her relationship with British Cycling and UK Sport (or both bodies jointly under a tripartite arrangement) was neither one of an employee nor a worker (for the protected disclosures element). The main reason for this was that Varnish was not, in their view, personally performing work for remuneration (the EqA element).

Varnish appealed claiming the following:

1. The ET decision that no MOO existed between Ms Varnish and British Cycling was incorrect in law;
2. The ET had been incorrect to find that Ms. Varnish was not a "limb (b) worker"; and
3. The ET's conclusions in respect of some of the factual elements of the case were flawed.

Classic cases

As with most employment status cases, the following classic cases were considered:

- Ready Mixed Concrete (South East) Limited v List of Pensions and National Insurance [1968] 2QB 497
- Cotswold Developments Construction Limited v Williams [2006] IRLR 181
- Quashie v Stringfellow Restaurants Limited [2013] IRLR 99
- Hall v Lorimer [1994] STC 23

Missing MOO

The basis of the contractual terms was examined, and the following facts considered:

- Varnish has applied to, and won, Lottery funding via UK Sport to support her Athlete Agreement. The funding did not come directly from British Cycling, nor from UK Sport.
- The sum payable to Varnish was a grant, and was entirely based on the assessment of future potential, and not based on reward for services rendered.
- Varnish had been selected to take part in the "Podium Programme", the purpose of which was "to recognise the ultimate goal of everyone involved in the Podium Programme to win medals for the British Team at international competitions". Varnish had not agreed to provide work but had instead agreed to train, with the ultimate aim of "achieving success in international competition".
- MOO was found to be absent from the contractual terms due to the above because Varnish had not been supplied with conventional work, after the tests to establish whether a "wage/work bargain" had been undertaken. The tests for control and personal service did not need to be established because the "irreducible minimum" element of MOO was absent.

The EAT applied the overview test in Hall v Lorimer and concluded that the overall situation did not paint a picture of a contract of employment. The claim that Varnish was a worker also failed due to the fact that there was no "work" which Varnish had been obliged to personally perform.

Precedent?

In a rather odd statement, the EAT appeared to specify that in another athlete's claim, it may be possible for an employment contract to be established depending on the circumstances. This essentially tells us that the Varnish case does not set down a set of reference guidelines by which the relationship between an elite athlete and a sporting body should be examined.

It remains to be seen whether Varnish will be able to build a case for errors of judgement by the EAT which will allow her to seek permission to appeal to the Court of Appeal.

RESURFACING OF YARD – CAPITAL OR REVENUE?

This is a question that arises regularly in practice – is expenditure revenue or capital for tax purposes.

In the recent case of Steadfast Manufacturing and Storage Ltd (2020) TC07770, the First Tier Tribunal found in favour of the company that the resurfacing was a revenue expense.

The facts were:

1. The factory and yard had been acquired by Mr and Mrs Greenwood in 2004 and leased to the company. The relevant asset was the entirety.
2. The resurfacing cost £74,000 but the replacement cost of the entire site was £6.5 million.
3. The yard was used to load and unload articulated lorries, to move them, and provide trailer storage.
4. The yard had not been resurfaced since its acquisition by the Greenwoods, and its surface was a mixture of tarmac, concrete, cobbles and loose planings. Some areas had broken up completely and, while usable by lorries, were unstable for use by forklift trucks. Weeds had grown and, from the air, these areas appeared green rather than paved as they were used less frequently.
5. Prior to the expenditure, the yard was repaired twice a year with gravel but this was quickly dug up by fork lifts, and became a health and safety hazard.
6. The resurfacing was undertaken as a single project over the summer.
7. The work involved: removal of 1,675 square metres of existing surface; levelling the subsurface and creating a run off so that water would drain to a grassy bank rather than back to the building; resurfacing the 1,675 square metres with reinforced concrete; laying 40 square metres

of cobbles (which the company had from another project) adjacent to a building; adding a drainage channel between the factory and yard and to allow an expansion joint (at a cost of £740).

8. There was neither an increase in the usable area nor load bearing capacity of the yard.

HMRC submitted that:

1. The yard was of such size and importance that it formed an asset in itself.
2. The company obtained an enduring advantage and the surface could have a life of 20 years.
3. The builders invoice described the work as “a new car park and wagon turn around area”.
4. A larger usable area was created as a result of concreting “grassy areas”.
5. There was an improvement as a result of concrete and drainage allowing forklifts to use the whole area safely and there was greater load bearing capacity. The works would not have been carried out had there been no improvement.

The company submitted that:

1. There had been neither an increase in usable area nor load bearing capacity. What had been done was to restore an uneven and unstable surface, using modern materials, and returning the yard to its previous standard.
2. The yard was not replaced in its entirety as the sub surface had not been replaced.

In finding for the company, the Judge held that:

1. The entire yard was not replaced as the sub surface was not renewed.
2. The builder’s invoice was not conclusive.
3. The grassy areas were as a result of deterioration of certain areas rather than new usable areas being created. The levelling simply redirected water to different areas and the small, cobbled area did not create a capital asset.
4. There was no improvement, the work merely returned the yard to its original condition. There was no increase in usable area nor load bearing capacity.
5. The reduced need for repairs does not create capital expenditure.
6. The drainage channel did not alter this, was minor and did not make a substantial difference to the factory.

All cases turn on their facts but works of this nature, especially where the expenditure is significant, can look like capital in nature at first glance. One unhelpful feature, for the company, was the incorrect description of the works in the builder’s invoice, but the actual facts overcame this.

ACCOUNTING FOR COVID-19 BUSINESS SUPPORT MEASURES

ICAS has produced a document aimed at assisting preparers of accounts to account for some of the Government support measures received during COVID-19. It is intended to give general guidance and does not remove the need for the application of professional judgement depending on the individual circumstances.

Although specifically targeted towards preparers applying FRS 102, the Financial Reporting Standard applicable in the UK, the publication also considers some of the accounting treatment of these support measures under International Financial Reporting Standards (IFRS) and the Financial Reporting Standard applicable to the Micro-entities regime (FRS 105).

The guidance describes the accounting treatment of some of the key Government support packages announced to support businesses and the third sector during the COVID-19 crisis and covers:

- The Coronavirus Job Retention Scheme, (CJRS);
- The Self-employment Income Support Scheme, (SEISS);
- The Coronavirus Business Interruption Loan Scheme (CBILS);
- Coronavirus Bounce Back Loan Scheme;
- Non-domestic Rates Relief (Business rates Relief);
- Relief for Retail, Hospitality and Leisure Businesses;
- Other Grants;
- Coronavirus Future Fund;
- Research and Development support; and
- Other considerations.

The guidance is supplemented by illustrative examples of the suggested accounting treatment of many of these support measures.

It must be emphasised that the detail behind many of these measures is not yet known, or entirely clear, as

the various governments moved at pace to make the financial support available to businesses and individuals as quickly as possible during the peak of the outbreak. Therefore, the guidance will be an evolving document, and will be updated as more information becomes available.

The document does not set out the tax implications of the various measures, but does indicate which of the support measures will be, or are likely to be, subject to tax.

Business support measures in the form of government grants

Much of the government support has been made available in the form of government grants. The accounting for this is based on Section 24 of FRS 102, and Section 19 of FRS 105. Therefore, preparers should familiarise themselves with the details of these specific sections of the relevant standards when considering the appropriate accounting treatment.

Business support measures in the form of loans

Support in the form of loans was also made available for eligible businesses adversely impacted by COVID-19. The measurement and recognition of these loans will be based on the requirements of Section 11 of FRS 102, and Section 9 of FRS 105.

However, in the case of some loans, CBILS for example, the Government made a Business Interruption Payment to cover the first 12 months of interest payments and any lender-levied charges. This payment meets the definition of a government grant and should be accounted for under Section 24 of FRS 102, or Section 19 of FRS 105.

As always, and as stated in the introductory paragraphs, some judgement may be necessary when recognising and accounting for many of these support measures, depending upon the individual circumstances of the entity and the nature of the support provided.

GOING CONCERN GUIDANCE FOR CHARITY TRUSTEES

ICAS Charities Panel has published guidance on going concern for charity trustees covering reporting and accounting, financial management and external scrutiny considerations

The guide is for the trustees of UK charities preparing their accounts in accordance with FRS 102 and the Charities SORP (FRS 102), including charitable companies. It will assist charity trustees to:

- Assess their charity's ability to continue as a going concern and to prepare a trustees' annual report and accounts which properly address the relevant requirements; and
- Understand the work of their charity's auditor or independent examiner on going concern.

Crucially, it covers financial management considerations for charity trustees during times of significant financial uncertainty for their charity, including at times of national emergency.

It is the responsibility of trustees to carry out an assessment of their charity's ability to continue as a 'going concern'. In their 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 by the trustees.

While the COVID-19 pandemic has been the driver for developing the guide, it is designed to support trustees to prepare a robust assessment during more normal times too.

The guide includes commentary on the trustees' annual report and accounts requirements relevant to the going concern status of the charity. This includes linking the accounts requirements to the trustees' annual report requirements set out in the Charities SORP (FRS 102). Charity trustees must ensure that the going concern status of their charity reported in the accounts is consistent with the financial review section of their trustees' annual report.

The guide will also help charity trustees understand the role of their auditor or independent examiner in relation to the going concern status of their charity. In order to complete their work and issue their independent report on a charity's accounts, auditors and independent examiners have an obligation to consider the trustees' going concern assessment and its outcome.

SCOTTISH TAXPAYERS COMPLIANCE ISSUES

The Scottish Income Tax - HMRC Annual Report 2019 is useful reading for anyone interested in the extent of HMRC compliance activity on Scottish taxpayer status. Looking at it from a Scottish perspective, it soon becomes clear that HMRC compliance is focussed more on loss to the UK as a whole, rather than losses to Scotland alone.

This is key to the focus of compliance activity on higher income, and high net worth individuals. While the 'broad brush' compliance has focused on postcodes, when it comes to risk-based compliance, the report notes:

'for the 90% of customers with income below the higher rate threshold, the difference is less than £200. Therefore for those with average income levels, HMRC considers that the impact of the difference on compliance risk is low'.

While this may be true as regard the total UK tax take, this does not factor in the tax flow to the Scottish Government. As regards tax collected for Scotland, misclassification of basic Scottish taxpayers as rUK could still divert significant taxes from Holyrood to Westminster.

From a tax adviser's perspective what it means is that HMRC compliance is far more likely for certain groups identified as 'high risk' by HMRC. For example, those earning over £150,000 are seen by HMRC as high risk, while, perhaps surprisingly, those caught between Scottish and UK higher rate bands who face very high marginal rates, are not. The report comments:

'The largest impact is on those liable at the highest rates of tax where there is a 1% difference on all income above £150,000. The customers with the highest level of risk already have the highest level of monitoring'.

On those between the bands, interestingly only income tax is viewed, and the risk is considered low. The comments are:

'Scottish customers with income between £43,431 and £46,531 therefore pay 41% in Income Tax, compared to 20% paid by customers elsewhere in the UK with the same income. Customers affected only paid the differential rate on a small slice of their income. …. Overall, HMRC currently assesses the increased risk of a non-compliant behavioural response from customers as a result of the differences between rates and thresholds in Scotland and the rest of the UK to be low'.

If national insurance is factored in, marginal rates of tax plus national insurance can reach 53% (41% income tax plus 12% nic for employees), so from an individual perspective this is significant. However, it would seem more likely that incorporation of business activity would be a more likely tax management strategy in this group than moving to a different part of the UK or misdeclaring Scottish Taxpayer status.

Turning to High Net worth clients, *'HMRC will continue to use the existing Customer Compliance Manager (CCM) model and other interactions with wealthy customers to raise awareness, educate customers of their Scottish Income Tax obligations and assess compliance risk related to misrepresentation of Scottish taxpayer status or understatement of income liable to Scottish Income Tax'.*

Conclusion

The real significance here is that determining Scottish taxpayer status may well be more complex with higher-income/ high net worth taxpayers, who potentially may have more than one dwelling and may spend significant time in different parts of the UK, or different parts of the world.

Add to this some anecdotal evidence of HMRC being overly reliant on day counts to determine Scottish Taxpayer status, and vigilance will be required to ensure that the rules are being applied correctly and clients are aware of the boundaries.

Day counting only comes as a last resort for those without a home and no place to reside – a feat not easy to achieve. To quote the words of Lord Clyde (Reid v The Commissioners of Inland Revenue (1926) 10 TC 673):

'Take the case of a homeless tramp, who shelters tonight under a bridge, tomorrow in the greenwood and as the unwelcome occupant of a farm outhouse the night after. He wanders in this way all over the United Kingdom. But will anyone say he does not live in the United Kingdom?–and will anyone regard it as a misuse of language to say he resides in the United Kingdom?'.

A POWERFUL NEW MEASURE

In a further expansion of HMRC's information powers, the Finance Bill 2020/21 has introduced a new measure called a Financial Institution Notice ('FIN').

A FIN allows HMRC to issue notices to banks and other financial institutions (including credit card companies), where the information sought is reasonably required to check a known taxpayer's tax position.

However, a key safeguard has been removed. Previously, HMRC has required approval from the tax tribunal before obtaining information from financial institutions about people, without the individual in question's permission. That will no longer be the case.

Legislation

The new sub-paragraph 4A(1) of Schedule 36 Finance Act 2008 states;

> *"An officer of Revenue and Customs may by notice in writing require a financial institution –*
>
> *a) to provide information, or*
>
> *b) to produce a document,*
>
> *if conditions A and B are met.*

Condition A is that the information or documents requested should not be onerous for the institution to provide or produce.

Condition B is that the information or documents are required for one of two reasons. Either for the purpose of checking the tax position of a known taxpayer, or for the purpose of collecting a tax debt of a known taxpayer. The taxpayer does not have to be an individual. It could be a company.

Paragraph 4A(7) states;

> *An officer of Revenue and Customs –*
>
> *a) must give a copy of the financial institution notice to the taxpayer to whom it relates, and*
>
> *b) must give the taxpayer a summary of the reasons why an officer of Revenue and Customs requires the information and documents.*

Grounds

Aside from allowing HMRC to check an individual's tax position, one of the other grounds given for introducing FINs is to speed up the international exchange of information with other G20 countries. At the moment, the UK takes an average of 12 months, some way short of the international turnaround of 6 months.

HMRC believes a great deal of time is lost waiting for tribunal approval and has referred to the need to exchange information between tax authorities quickly to tackle cross border tax evasion and avoidance.

If a financial institution fails to comply with a FIN request, then HMRC will be able to charge penalties for non-compliance. Documents subject to legal professional privilege cannot be requested.

In practice

No doubt HMRC will use this new measure during the course of tax enquiries, perhaps to prove someone has been trading, or to dispute declared amounts on returns, based on deposits made. It will be interesting to see how often HMRC's Debt Management Unit use FINs to chase outstanding tax and VAT debt.

The underlying concern is whether FINs will be used for fishing expeditions. As many practitioners know, HMRC's definition of what is 'reasonably required' can often be a very low, tenuous bar.

FIRST TIME BUYER RELIEF Q&A

From 15 July 2020, the nil rate band threshold for Land and Buildings Transaction Tax ('LBBT') for all residential transactions has been increased to £250,000 until 31 March 2021.

This increase in the starting threshold is greater than that provided by the First-time Buyer Relief. The relief will therefore have no practical effect during the temporary period in which the £250,000 nil rate band threshold is in place.

Q: My transaction has an effective date on or after 15 July 2020. Can I still claim first-time buyer relief?

A: Yes, First-time Buyer Relief is still available, but as the nil rate band now applies to the first £250,000 of consideration, and this is more than the £175,000 limit that applies to First-time Buyer Relief, claiming the relief will not reduce the amount of tax due and payable.

Q: I'm a first-time buyer and my transaction has an effective date of 15 July 2020 or later - why can't I get a deduction of £600 against the tax due?

A: First-time Buyer Relief increased the nil rate band threshold from £145,000 to £175,000 for qualifying first-time buyers and equated to a reduction in LBTT of up to £600. However, for transactions on or after 15 July 2020, the nil rate band has been increased to £250,000 for all residential transactions with an effective date of 15 July 2020 to 31 March 2021 (inclusive). As the nil rate band threshold is now higher than the £175,000 limit for first-time buyers, claiming First-time Buyer Relief will not reduce the amount of LBTT due any further. If eligible, you can still claim First-time Buyer Relief in your LBTT return, but the amount of the relief will be £nil.

Q: I'm completing an LBTT return for a transaction with an effective date before 15 July 2020. Can I still claim First-time Buyer Relief?

A: Yes. You can claim First-time Buyer Relief on any qualifying transaction, but it will only have an impact on the total tax due for transactions with an effective date before 15 July 2020.

Q: Why is First-time Buyer Relief still showing as an option on returns even though it will not reduce the amount of tax due on transactions with an effective date on or after 15 July 2020?

A: First-time Buyer Relief is still available and hasn't been removed under the 'The Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment (No.2) (Coronavirus) Order 2020' introduced by the Scottish Government on 15 July 2020. As it still exists in legislation, the option is still there for tax payers to select this relief if they wish to do so. However, selecting this relief will not reduce the amount of tax due on a transaction.

COMPANIES HOUSE UPDATES

COPORATE TRANSPARENCY AND REGISTER REFORM

In September 2020 the Government published its response to its 2019 consultation on options to enhance the role of Companies House and increase the transparency of UK corporate entities. The full response can be viewed at: https://www.gov.uk/government/consultations/corporate-transparency-and-register-reform

In the consultation the Government explored a range of options to enhance the role of Companies House and increase the transparency of companies and other legal entities. These included:

- options to require more information about the people registering, running and owning companies, and other limited liability entities, as well as the entities themselves;
- ideas for improved checks on that information, including reform of the statutory powers of the Registrar of Companies and reforms that would improve co-operation and data sharing between Companies House and UK law enforcement agencies;
- in parallel, it set out options for greater protection of personal information on the companies register and noted that not all additional information covered in the proposed reforms would be made public.

The framework within which Companies House operates has remained largely unchanged for over 150 years, despite the vast increase in information filed with the Registrar. Growing instances of misuse of companies, concerns over the accuracy of the companies register, challenges safeguarding personal data on the register, have led to calls for Companies House to play a greater role, working in partnership with other public agencies. The Government highlights that the views expressed by respondents demonstrated a strong consensus in favour of reform. It has therefore set out the following proposed reforms, some of which will require further consultation, subject to funding being agreed in the forthcoming Spending Review.

Overview of reforms

a) Knowing who is setting up, managing and controlling corporate entities:
   - Introducing compulsory identity verification for all directors and People with Significant Control (PSC) of UK registered companies.
   - Introducing compulsory identity verification for all individuals who file information on behalf of a company.
   - Company incorporations and filings will continue to be allowed to be made either directly at Companies House or via an agent. However, in future only properly supervised agents will be able to file information. They will be required to provide evidence of the verification they have undertaken, although the duplication of identity checks will be avoided.

b) Improving the accuracy and usability of data on the companies register:
   - Reforming the powers of the Registrar of Companies to allow her to query information that is submitted to Companies House, rather than having to accept information that is validly submitted.
   - Broadening the powers of the Registrar of Companies has to remove information from the register in certain circumstances, to better ensure its accuracy.
   - Consulting on proposals to introduce full iXBRL tagging for the submission of accounts by companies to Companies House.
   - Tightening regulation on amendments to accounting reference periods.
   - Reviewing some broader aspects of accounts filings, including the exemptions that allow companies to submit micro or dormant accounts.

c) Protecting personal information:
   - Removing restrictions to enable personal information to be removed from the register.

d) Ensuring compliance, sharing intelligence, other measures to deter abuse of corporate entities:
   - Introducing an obligation on bodies that fall under the Anti-Money Laundering (AML) regulations to report discrepancies between the public register of companies and the information they hold on their customers.
   - Permitting cross-referencing of Companies House data against other data sets.

- Allowing limited partnerships to be "struck off" following a court order.
- Giving Companies House power to query, and possibly reject, company names before they are registered.
- Reforming how and under what circumstances Companies House issues certificates of good standing.

Benefits of reform

The proposed reforms are envisaged to:

i. provide access to more reliable information on UK companies.
ii. enhance transparency and provide better information which will mean business will receive better and faster decisions when seeking credit, both from finance institutions or as trade credit.
iii. improve the user experience.
iv. Assist in the UK's fight against crime by increasing the accountability of those that transgress.

Next Steps

The Government intends to continue to develop these proposals with interested parties. Many of these reforms will require legislation to implement. Before that stage the Government intends to publish a comprehensive set of proposals that will set out in detail how these reforms should be implemented.

Subject to the views received the Government will then proceed to legislate where necessary when Parliamentary time allows. Some reforms will not require legislation: Companies House will work with possible providers on the design and scope of an Identity and Access Management system. Such a system will allow the creation of individual user accounts. The aim is to start user testing by the end of the 2020/2021 financial year.

Filing Accounts – 1st Quarter 2021

Earlier this year due to the coronavirus emergency, Companies House offered the ability for companies to extend the deadline by which their accounts had to be filed purely due to the impact of the pandemic. This was then followed by the statutory provisions contained in the Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020 ("the regulations") which came into force on 27 June 2020. These regulations automatically extended accounts filing deadlines if they fell any time from 27 June 2020 to 5 April 2021 (including these dates).

In general terms, companies and LLPs were granted a three month extended deadline for the filing of accounts with Companies House resulting in private companies having 12 months (normally 9 months) after the year end date to file accounts and public companies having 9 months (normally 6 months). Therefore, a private company with a year end of 31 January 2020 had its filing deadline extended from 31 October 2020 to 31 January 2021.

These extensions were welcomed by ICAS and by the business community. Of course, companies and LLPs are still required to file their accounts by the extended deadline date. As a direct result of these extensions, Companies House anticipates that there will be a greatly increased submission of companies submitting accounts (possibly double the norm) during the first quarter of 2021.

Firms should therefore ensure, that where applicable, they have appropriate plans in place to ensure that client accounts are filed with the Registrar by the deadline. Where the firm does not lodge the accounts, they should inform their clients that Companies House is likely to be extremely busy in the first quarter of 2021 to enable clients to take any steps necessary to ensure compliance with the filing deadline.

Measures to protect businesses from insolvency extended

The changes to protect businesses from insolvency were introduced in the Corporate Insolvency and Governance Act and were due to expire on 30 September 2020. The extension of the temporary measures include:

- Companies and other qualifying bodies with obligations to hold AGMs will continue to have the flexibility to hold these meetings virtually until 30 December 2020.
- Statutory demands and winding-up petitions will continue to be restricted until 31 December 2020 to protect companies from aggressive creditor enforcement action as a result of coronavirus related debts.
- Termination clauses are still prohibited, stopping suppliers from ceasing their supply or asking for additional payments while a company is going through a rescue process.
- The modifications to the new moratorium procedure, which relax the entry requirements to it, will also be extended until 30 March 2021. A company may enter into a moratorium if they have been subject to an insolvency procedure in the previous 12 months. Measures will also ease access for companies subject to a winding up petition. The temporary moratorium rules will also be extended to 30 March 2021.

EMPLOYMENT CORNER

Coronavirus Job Retention Bonus

A 4th Treasury Direction is currently awaited which is expected to set out the legislation behind the Coronavirus Job Retention Bonus (CJRB). A September issue date has been promised. Once this has been issued, ICAS will be able to tell members more about the practical aspects of this scheme and how employers will or will not qualify.

Moving on: life after CJRS and SEISS – new measures for employers and businesses

On 8 October 2020 Justine Riccomini and Jeremy Clarke will explain the new assistance programmes announced on 24 September 2020 and what the transition between schemes might look like

TUPE arrangement and the CJRB

Something to pay particular attention to as the CJRS draws to a close will be TUPE arrangements conducted before, during and after CJRS periods and who will be eligible for the CJRB based on those TUPE arrangements. We hope to include an article from an employment lawyer on this in the next edition of Technical Bulletin. There are a possible number of traps for the unwary.

Distinguishing between Covid 19 antigen and antibody testing – one is a BIK and the other is not!

HMRC issued initial guidance which stated that Covid 19 antigen testing (which reveals whether an individual has Covid-19 at the time of the test) paid for by employers would be a taxable benefit which should be declared and paid through a PAYE Settlement Agreement if the amounts were not declared as benefits in kind on the P11Ds of the workers concerned. HMRC was unable to state anything else because of the way the legislation, and in particular, the Benefits Code, works.

However, this stance was reversed after the Commons Treasury Select Committee made representations on the subject, stating that it is inequitable for something such as this to be treated as a benefit in kind when it is so necessary to carry out the testing in certain workplaces. Taxing the testing costs as a benefit in kind would create a disadvantage to low paid workers, who were amongst those most likely to require regular testing in the environments in which they work (such as food production and social care).

Notwithstanding this, it should be noted that antibody testing, which is not widely available yet and which is able to reveal whether an individual has ever had Covid-19, does not have the same favourable treatment and is still considered to be a benefit in kind.

AML NEWS

HMRC update money laundering supervision guidance

HMRC have added an updated version of the Supervised Business Register to their guidance on how to check whether a business is registered with HMRC for supervision under the Money Laundering Regulations. Each entry contains the details supplied by the business when they registered with HMRC. Only businesses registered for supervision by HMRC will appear. ICAS firms should be supervised by ICAS, not HMRC, and should therefore not appear on the list. Please inform regulatoryauthorisations@icas.com if your firm appears in error.

The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020

SI 2020/991 amends SI 2017/692 to transpose amendments to EU directive 2015/849/EU and to ensure effective operation post IP completion day. The new regulations amend the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692).
The provisions cover a change in ID requirements, discrepancies in registers, enhanced due diligence, beneficial ownership information and EU exit amendments.

TAX and HMRC UPDATES

Updates to Loan Charge

If any individuals have disguised remuneration loans that are subject to the Loan Charge, the deadline to report the details of their loans is 30 September 2020 using the online form on GOV.uk. Anyone who wants to spread their disguised remuneration loan balances evenly across the 2018-19, 2019-20 and 2020-21 tax years also needs to do so by 30 September 2020. HMRC has published further information on the Loan Charge policy and how they support customers with tax debts. As a result of the recommendations in the Independent Loan Charge Review, certain voluntary payments made as part of a disguised remuneration settlement with HMRC can be refunded.
New settlement terms for disguised remuneration loans not subject to the loan charge have been published.

Changes for VAT registered businesses that trade with the EU

HMRC have written to VAT registered businesses that trade with the EU as there are changes from next year. On 12 June 2020, the government announced that new border controls on imports from the EU to Great Britain will be introduced in stages, and customs declarations for goods which are not controlled can be delayed until 30 June 2021.

The UK will leave the EU's Single Market and Customs Union when the transition period ends. From 1 January 2021, the UK will operate a full, external border with the EU. This means that there will be controls placed on the movement of goods between Great Britain and the EU. From 1 January businesses will need to submit declarations when importing and exporting goods that are categorised as 'controlled'.

Import processes for non-controlled goods will be introduced in 3 stages; January, April and July.

Review the letter from HMRC for further guidance on what businesses need to do if this applies to them.

HMRC have also launched a short video explaining how a customs intermediary can help businesses manage customs processes. Businesses that move goods in and out of the UK and are new to the customs processes may find this video helpful.

VAT early termination fees and compensation payments

HMRC guidance on charges described as compensation or early termination fees in a contract, have been changed to make it clear that they are generally liable for VAT. This follows recent judgements of the Court of Justice of the European Union (CJEU) in MEO (C-295/17) and most recently Vodafone Portugal (C-43/10).

VAT – Filing and Payment obligations

HMRC has begun to slowly reduce some of the measures that were put in place to support business through this difficult time. The VAT payments deferral scheme ended on 30 June and all VAT customers, including MTD customers, are required to file and pay on time. If customers fail to meet their VAT obligations, they will now be at 'default' and may face a penalty as well as being charged interest on any tax that is due. For more information on surcharges and penalties visit the GOV.uk website. If a business needs more help to pay their VAT, they may be eligible to get support with their tax affairs through HMRC's Time to Pay (TTP) service.

Tax Chamber: Practice Statement, First-Tier Tribunal

The Provisional Practice Statement on categorisation of tax cases in the Tax Chamber issued on 23 March 2020, which expires on 23 September, is extended and shall apply for a further six months until 23 March 2021. The Provisional Practice Statement can be found at here. The changes relate to the way the Tax Chamber allocates cases to the Default Paper cases category and is necessary in order to manage the Chamber's workload appropriately during the Covid-19 pandemic.

VAT charity digital advertising relief

Zero rate VAT applies for advertising services supplied by a third party to a charity when the services are designed for the general public. However, advertising services are excluded from the zero rate if a member of the public has been selected by or on behalf of the charity to receive the advertising (which is difficult to determine). HMRC has reviewed a range of digital advertising situations and has produced a brief to set out the policy and explain what advertisers and their customers need to do.

BREAKING NEWS

The latest updates following the Chancellor's Winter Economy Plan announced 24 September 2020.

Job Support Scheme

Scheme will commence on 1 November 2020 and end on 30 April 2021

A new Job Support Scheme will be introduced from 1 November to protect viable jobs in businesses who are facing lower demand over the winter months due to coronavirus. Under the scheme, which will run until 30 April 2021, the government will contribute towards the wages of employees who are working fewer than normal hours due to decreased demand.

Employers will continue to pay the wages of staff for the hours they work - but for the hours not worked, the employee will receive two thirds of their normal pay, which will be paid for equally between the government and the employer. Employees must be working at least 33% of their usual hours. The level of grant will be calculated based on employee's usual salary, capped at £697.92 per month.

The Job Support Scheme will be open to businesses across the UK even if they have not previously used the furlough scheme.

It is designed to sit alongside the Jobs Retention Bonus and businesses can benefit from both schemes. Further guidance will be published in due course.

Deferral of Self-Assessment payments

Self-assessment payments due on 31 July 2020 and 31 January 2021 may be deferred until 31 January 2022. No penalties or interest for late payment will be charged if payment is deferred.

This provision applies to anyone with a self-assessment payment on account due on 31 July 2020 or 31 January 2021, not just those who are self-employed.

No applications are required to be made to access this deferral.

New Payment Scheme (VAT)

Businesses who deferred their VAT payments under the VAT Deferral Scheme will be able to use the New Payment Scheme, providing them with the option to pay back the amount deferred in 11 instalments during the fiscal year 2021-22 rather than paying in full at the end March 2020. No interest will be payable on the VAT deferred.

Temporary VAT reduction for hospitality leisure and tourism

From 15 July 2020 to 31 March 2021, a reduced (5%) rate of VAT will apply to supplies of food and non-alcoholic drinks from restaurants, pubs, bars, cafés and similar premises across the UK. The reduced VAT rate will also apply to supplies of accommodation and admission to attractions across the UK.

Self-employed income support scheme (SEISS)

From 1 November 2020 to 31 January 2021 a claim worth 20% of average trading profits can be made, with a maximum payable for this period of £1,875.

A further grant will be available for the period 1 February 2021 to 30 April 2021. This claim is expected to be worth 20% of average trading profits, but the Government have announced that this may be adjusted to respond to changing circumstances.

Pay as you Grow

The scheme will provide flexibility to firms who have taken out a Bounce Back Loan and will allow businesses to extend the repayment period from 6 years to up to 10 years. The scheme will also allow up to six months interest only periods and payment holidays.

Extension of access to finance schemes

Four temporary loan schemes – Bounce Back Loan Scheme, Coronavirus Business Interruption Loan Scheme (CBILS), Coronavirus Large Business Interruption Loan Scheme and Future Fund – will all be extended to 30 November 2020 for new applications.

CBILS lenders will also be able to extend the term of a loan up to ten years.

TECHNICAL BULLETIN

ISSUE NO. 154
SEPTEMBER 2020

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