Welcome from the Chair

Tax voice | Welcomes

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The taxation of labour in a fast-changing world…we need to develop a coherent approach.

If I were to pick two highlights of 2017 from an employment taxes perspective they would be the publication of the Taylor Review of Modern Working Practices ("the Taylor Review") and the judgement of the Supreme Court in *Rangers Football Club Plc v Advocate General for Scotland* 2017 UK SC 45 (*Rangers*). As it happened, both occurred in July so that was a busy month.

The Taylor Review

The CIOT welcomed Matthew Taylor's proposals to bring greater fairness to the workplace, particularly as regards those working in the gig economy. However, the proposals went well beyond employment law and considered the tax and National Insurance Contributions (NIC) position too. Even though tax and NIC were not in his original remit, Taylor appreciated that he could not ignore the fiscal consequences of the different ways people work because that is often a key driver for businesses in preferring self-employment to employment. In particular, because of the not so small matter of 13.8% employer's NIC applicable in the latter case. There is also a significant difference in the Class 4 NIC rate (9%) applicable to the self-employed and the Class 1 employee NIC rate (12%) applicable to employees. In both cases Taylor said that there needs to be a levelling of the playing field and I would certainly agree with him on this. The Chancellor tried to address the Class 4/Class 1 rate differential in his March 2017 Budget but the politics defeated him which I think was a shame. However, the taxation of labour in the 21st century is a fundamental issue and I think we do need to develop a coherent approach to taxing employment and self-employment, and to agree whether and to what extent it is still appropriate to distinguish between the two, particularly as regards employer's NIC.

We also need to consider what the alternatives are if the consensus is that employer's NIC is no longer fit for purpose. Perhaps a charge based on operational costs as a whole rather than purely payroll costs? In any event I think we urgently need a roadmap and, as CIOT put it in responding to Taylor, "*this must address what the big challenges are and how they are to be managed over the next 5 to 10 years. Not least given increasing automation and offshoring, less people paying tax and NIC and so on the face of it less revenue flowing to the Treasury*". This said, it is disappointing that in responding to Taylor the Government have said they will be acting on 52 of his 53 recommendations…but, you guessed it, not his suggestion to narrow the differences in the tax and NIC treatment of the employed and self-employed! In any event Mark Groom, my vice-chair, takes stock in two articles 'Good Tax: Status Issues' and 'Good Tax – the tax cost'.

Rangers

The judgement of the Supreme Court in *Rangers* is my second highlight of 2017. Not because the end result was a great surprise (as I felt the fact pattern was not helpful for *Rangers*) but more because of what the Supreme Court had to say as, a matter of principle, about the operation of perhaps the most important section that deals with employment income, i.e. section 62 of the Income Tax (Earnings and Pensions) Act 2003.

Rangers itself revolved around contributions to an employee benefit trust and whether those contributions were taxable in the hands of the relevant footballers and executives

(a) at the time of their payment or, as Rangers argued,
(b) only as and when they actually received the subsequent loans made to them by the trust - and then only under the benefit-in-kind rules governing loans, not as an emolument.

In delivering a unanimous decision in HMRC's favour, Lord Hodge said that in making the contributions to the trust Rangers had clearly taken action to reward the efforts of the employees, they had acquiesced in this and whether payment was made to them or was redirected to a trust mattered not; the payments were taxable as section 62 emoluments and PAYE applied accordingly. Of course, the planning undertaken by Rangers was blocked by the disguised remuneration rules introduced by Finance Act 2011. However, the question arises as to whether the wide

construction of section 62 favoured by the Supreme Court applies only in a tax avoidance context, or more generally when an employee has a choice in receiving reward either as a direct cash payment or as some other benefit, i.e. funded by the employer in lieu of salary or bonus but provided by a third party. For example, choosing a company car in lieu of an amount of salary. Some might say that the clue is in Lord Hodge's opening words that "*this appeal concerns a tax avoidance scheme…*" and that *Rangers* is therefore of more limited application. But, if so, how does this square with Lord Hoffmann's comment in *Norglen* that tax avoidance schemes either work or they don't and it is not that the legislation has "*a penumbral spirit which strikes down devices or strategies designed to avoid its terms or exploit its loopholes. There is no such spooky jurisprudence*".

HMRC are preparing guidance on how they will apply *Rangers* so no doubt we will find out shortly. David Heaton has more to say on *Rangers*.

But the reason I think that the Taylor Review and *Rangers* are key developments is because they go to the very heart of how we tax employment income in the UK.

IR35

In terms of the Taylor Review, the fact that we levy employer's NIC on the employed but not the self-employed, led to the introduction of the IR35 rules back in April 2000, to prevent the interposition of Personal Service Companies (PSCs) and the avoidance of employer's NIC. Because of course, the avoidance of employer's NIC has been a cat and mouse game which has been going on for many years. Last year the Government tightened the noose with the requirement in the public sector for businesses (rather than the PSC) to decide whether IR35 applies and, if so, to account for the PAYE/NIC accordingly. This being because of perceived widespread non-compliance with the IR35 rules. But the journey continues and Lesley Fidler has more to say on whether we can expect an extension of the 2017 changes to the private sector. This said, if we could level the tax/NIC playing field as between employment and self-employment then continued application of sticking plaster would not be necessary. I fear, however, it is "if" rather than "when" in light of the Government's response to Taylor.

Optional Remuneration Arrangements

And in terms of *Rangers*, as I have said, the introduction of the disguised remuneration rules reflected the Government's concern that HMRC may not prevail in *Rangers*, HMRC having lost in both the First and Upper Tier Tribunals. But underlying *Rangers* was planning designed to provide employees with a choice to receive not salary or bonus but "something else", taxable later and based on the form in which it was then received. And on this aspect I see parallels with the new rules on Optional Remuneration Arrangements (OpRA), introduced somewhat hurriedly in Finance Act 2017. The OPRA rules provide that where an employee gives up a right to receive earnings, or chooses to receive benefits rather than earnings, then (exceptions aside) the employee will be taxed on the greater of the earnings foregone or the benefits received. And yet, as I have already indicated, the Supreme Court judgment in Rangers suggests that section 62 may, in any event, already catch many benefits provided under OpRA, i.e. remuneration "*which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect*". If so, then we end up with a complex tapestry of legislation around section 62 and OpPRA and a lack of clarity as to precisely which rules apply and in what circumstances. Lord Hodge is certainly correct that "*the tax code is not a seamless garment*", far from it! Again, I think this illustrates the urgent need to develop a coherent roadmap around how we tax employment income. In any event Lee Knight talks further about OpRA and how employers have been coping since April last year.

And more!

If all this wasn't enough we also address a number of other important issues in this edition of Employment Tax Voices. Richard Wyatt brings us up-to-date with the latest development on pensions, Eleanor Meredith discusses the changes to the rules on termination payments, Paul Tucker assesses key focus areas for HMRC from an employer compliance perspective, Susan Ball looks at work-related training and David Chandler and Peter Moroz update us on the taxation of mileage allowances for electric vehicles, *Total People* and the future for company cars. There's a lot to keep up with, that's for sure!

I would like to thank all the contributors to this edition of Employment Tax Voices and I hope it provides you with useful insight on some of the notable developments over the last year.