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EMPLOYMENT TAXES VOICE

Issue 6 – March 2021

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- **All articles were written prior to the 2021 Budget.**

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Welcome from the Chair

The last twelve months have brought immense challenges with the pandemic turning our lives upside down. The Treasury's focus has been on providing extraordinary financial support to protect the economy in these unprecedented times, including key COVID-related tax easements. But there have also been other developments which have kept the Employment Taxes Committee busy and which will shape the agenda in the months and years ahead.

We knew that we were in for an extremely difficult time ahead when, on 17 March last year, the Government abruptly announced that the Off-Payroll Working ('OPW') rules, due to be introduced on 6 April 2020 for medium and large businesses in the private sector, would be deferred until 6 April 2021. But this was just the start and the Government soon moved to introduce the Coronavirus Job Retention Scheme (CJRS), the Self-Employed Income Support Scheme and an extensive range of other financial support in order to try and keep the economy afloat. This said, the CJRS does not extend to, amongst others, company owner-managers paid largely via dividends, as HMRC said it was concerned that they had no way of distinguishing dividends received from the business from other sources. Indeed, even micro-businesses operating in the private sector and caught by IR35, i.e., who operated PAYE/NIC on deemed employment income after the end of the 2019/20 tax year, don't qualify. This approach is surely inconsistent – if the worker is being taxed as if they were an employee, why shouldn't they benefit from state support as an employee, based on the recharacterized income? In any event the IR35 compliance net tightens and Jesse Norman, Financial Secretary to the Treasury, has confirmed that the delayed move to OPW will now happen for medium and large businesses in the private sector from 6 April 2021. Nicola Pitcher has more to say about this on pages 5 to 8.

The CJRS was introduced at breakneck speed and effectively put the PAYE system into reverse with HMRC delivering funds to employers rather collecting them. This was an enormous undertaking and HMRC is to be congratulated for the way in which it rose to the challenge. This included developing an on-line calculator to assist employers in claiming the right amount for the employees they had furloughed and continuously publishing and updating their guidance. At the same time, a key condition of receiving support under the CJRS is that where an employer makes a claim then the employees to whom the claim relates must not undertake any work for the employer during that time. In this respect HMRC has begun to publish names of those employers claiming under CJRS together with bandings of the amount claimed. Employees for whom claims are made are also now notified via their Personal Tax Accounts. This is all designed to add transparency and ensure that claims are genuine and justified (e.g., allowing employees to flag if they have been asked to work when on furlough). Certainly, CJRS claims will become a key focus in HMRC's future compliance activity. Susan Ball and Carolyn Brown consider the CJRS in more detail on pages 9 to 15.

The pandemic has meant that many employees who would normally work in an office environment have no longer been able to do so. In this respect the Government announced an easement for the reimbursement by employers of the cost of home office equipment purchased by their employees and used solely for work at home (mirroring the existing exemption for employer-provided home office equipment). This is time limited and will expire on 5 April 2021, albeit it is to be hoped this exemption will be extended given the current situation. Other easements have addressed the supply of PPE, the provision/reimbursement of antigen tests, confirmation that food/drink provided to staff attending virtual Christmas parties qualified within the £150 exemption for annual parties/functions, a limited relaxation on cycle-to-work schemes (given most are not currently cycling to work!) and HMRC acceptance of a £6 per week deduction for homeworking costs (for 2020/21) when having to work at home because of COVID-19. Rob Woodward discusses this further on pages 16 to 18.

But things have also been difficult for employees who have been working away from the country in which they normally live. There have been many cases where employees have been forced to return home unexpectedly, and conversely where they would have wanted to have returned home but transport disruption or lockdowns meant this was impossible. From a UK perspective the UK confirmed its position fairly early on as regards the Statutory Residence Test and what may count as COVID-related 'exceptional circumstances' under the '60 day rule' . More recently HMRC also addressed the position of non-UK residents stranded in the UK and unexpectedly having to work extra days here in these circumstances. This is all helpful though it is very important to appreciate the conditions that apply in order rely on HMRC's interpretation of the legislation. Matthew Fox examines remote working for the globally mobile in light of COVID-19 on pages 19 to 23.

It was a great relief that in the very last days of 2020 the UK agreed new arrangements with the EU around co-ordination on social security matters. The *Protocol on Social Security Co-ordination* takes effect from 1 January 2021 and deals with individuals moving between the UK and the EU from then onwards. Those who had previously exercised their right to freedom of movement were already covered by the Brexit *Withdrawal Agreement*, albeit provided their situation continues 'without interruption'. The basic idea under the *Protocol* is that social security is due in only one country, with the default being 'pay where you work'. This said, the existing rules in Articles 12 and 13 of the EU regulations on detached duty (up to 2 years) and multi-state workers are broadly reproduced. The position for the EEA states of Norway and Iceland is covered by existing bilateral agreements, with Liechtenstein becoming a non-agreement country. Switzerland is also covered by an existing agreement. So there's now a fair bit to think about and Eleanor Meredith comments further on the post-Brexit social security position on pages 24 to 26.

There have been some significant changes proposed to the Construction Industry Scheme which are due to take effect from 6 April. These follow from the consultation document "*Tackling Construction Industry Scheme Abuse*" in relation to which HMRC published their Summary of Responses, together with draft legislation, on 12 November 2020. The Employment Taxes Committee had various concerns with these proposals, but particularly on the proposal to limit a deduction for materials to costs incurred directly by a sub-contractor (without gross payment status), and not permitting a deduction for material costs re-charged up the supply chain to that sub-contractor. HMRC's Summary of Impacts itself notes that the resultant cashflow difficulties for sub-contractors '*could lead to…the failure of some businesses operating on very tight margins*' – we very much echo this concern but are surprised that HMRC would then want to press ahead with this change. This is not least as we think that the present law is quite clear that material costs, whether incurred directly or indirectly by a sub-contractor, should be permitted as a deduction under the CIS. The logic being that, whilst the scheme is designed to accelerate payment of sub-contractor tax (for those without gross payment status), the ultimate tax due will always be computed after a deduction for all material costs. Patrick Crookes has more to say on the proposed CIS changes on pages 27 to 30.

In this edition of Employment Taxes Voice we also feature articles on termination payments and some significant changes in recent years by Paul Tucker (pages 31 to 34), the reporting of company cars for 2020/21 and beyond on by David Chandler (pages 35 to 37), and the withdrawal of the job-related accommodation representative occupier exemption by Susan Ball and Lee Knight (pages 38 to 41). I hope you will find it an interesting read and if you would like to get involved with the work of the Committee please do let me know.

Colin Ben-Nathan
Chair, Employment Taxes Committee

The Off-Payroll Working/IR35 Rules

Nicola Pitcher looks at developments in the off-payroll working rules over the last year following the deferral of their implementation in the private sector until 6 April 2021

Last year's edition of Employment Taxes Voice covered the pending changes to the IR35 rules in detail. At that time, we had just heard that due to the pandemic, the implementation of the new regime would be deferred to April 2021. The purpose of this article is not to re-examine the legislation in detail, but to look at developments over the last year.
The deferral announced last March re-ignited calls for the changes to be scrapped and even now, with 6 April 2021 a matter of weeks away there are still rumblings of discontent and speculation that changes could be announced in Budget 2021. However, any further deferral or cancellation seems highly unlikely. The legislation is in place and although businesses have been grappling with the consequences of the pandemic and Brexit, they have benefitted from an extra year to prepare for the new IR35 regime. Further, at a time when the Chancellor is considering tax rises to off-set pandemic spending, it seems inconceivable that the government would further delay a measure which is designed to enforce compliance with anti-avoidance legislation and to increase tax and NIC revenues.

A brief overview of the new rules

The legislation is included in Finance Act 2020 at Schedule 1. It extends the regime (in Chapter 10 ITEPA 2003) which has applied to public sector organisations engaging workers via intermediaries since April 2017, to all engagers other than those defined as "small" under the definition set out in Section 382 of the Companies Act 2006 (new section 60A ITEPA 2003), or who do not have a UK connection in a tax year.

Under the new rules, end users within Chapter 10 will determine whether IR35 applies to an engagement with an off-payroll worker engaged via an intermediary. Often the intermediary will be a personal service company ("PSC") but could be a partnership or another individual. There may also be other intermediaries in the supply chain, such as an agency, but the end user will still be responsible for assessing whether the engagement is "inside" or "outside" IR35. If an engagement is inside IR35, the "fee-payer" will be responsible for deducting and accounting for any PAYE and NIC due. The fee-payer will generally be the entity paying the PSC, but this can shift where there is non-compliance with the rules within the supply chain. The end-engager is required to notify the individual worker and the next entity down the supply chain (e.g., an agency) of the IR35 status of each engagement and the reasons for it. The end-engager is also required to put in place a "client-led disagreement process" to deal with disputes arising from the status determinations that it makes.

Where a private sector end user qualifies as small, the rules in Chapter 8 ITEPA 2003 apply such that responsibility for assessing the IR35 status of an engagement remains with the worker's intermediary.

For most of last summer and into the autumn the focus of many businesses was quite clearly on managing their response to the pandemic. However, over more recent months we have seen an increasing focus on preparing for the new IR35 regime and it would be comforting to think that most businesses will be reasonably well prepared. So, what has happened over the last year?

Section 61O

The Finance Act 2020 received Royal Assent on 22 July 2020. One clause that has drawn particular attention is the amendment to section 61O of Chapter 10, which sets out (from 6 April 2021) the conditions of liability to be met when the intermediary is a company. Prior to this amendment Section 61O(1)(b)(i) of Chapter 10 states that an intermediary that is a company meets the conditions for Chapter 10 if the worker has a "material interest" in the company. Material interest is defined in section 51(4) ITEPA 2003, which is broadly taken to be more than 5% of ordinary share capital or a right to receive more than 5% of the distributions from the company.

HMRC were concerned about potential avoidance arrangements whereby an individual holds a less than material interest in the intermediary, but still receives a payment or benefit for the services provided which is not taxed as employment income. The amendment to section 61O was designed to counter this potential avoidance arrangement. However, HMRC have acknowledged that the clause, as currently drafted, does not quite work as intended as it broadens the conditions of an intermediary to include all workers providing their services to a client through a company, even where the payment has already been taxed as employment income with PAYE and NIC operated. For example, it could extend to payments via an umbrella company, agency or even a supplier seconding an employee.

HMRC are proposing an amendment to this section in Finance Bill 2021 to correct the anomaly such that it will not apply where a payment for services by a worker who holds less than a material interest in the intermediary has been treated wholly as employment income. HMRC have also proposed introducing a Targeted Anti-Avoidance Rule into section 61O to deter potential abuse. We have yet to see the detailed drafting and guidance.

Avoidance schemes

As the commentary on section 61O above highlights, HMRC are very aware that unscrupulous intermediaries operating in the temporary labour market are developing new or extending existing avoidance schemes with a view to circumventing the new regime. This is nothing new – every tightening of legislation by HMRC in the temporary recruitment sector has tended to fuel inventive solutions, particularly at the lower paid end of the labour market where the pressure on margins is high.

As end users risk assess the workers that they engage via PSCs, it is inevitable that they will conclude that some roles or groups of workers are best suited to an employed arrangement. This could be a permanent role, a fixed term contract or employment via an intermediary such as an umbrella. There will be an obvious trade-off between the additional costs of employment versus an adjustment to workers' pay which can provide leverage to intermediaries marketing solutions which appear to help bridge that gap.

HMRC have been guiding end users towards effective labour supply due diligence for some years and their guidance was updated in December 2020 (Advice on applying supply chain due diligence principles to assure your labour supply chains - GOV.UK (www.gov.uk)). One avoidance model that has become more prevalent in the marketplace in the lead up to the new IR35 regime is the "mini-umbrella" model. This model involves engaging workers via a series of small companies and is designed to inappropriately claim the Employment Allowance and to profit from the VAT Flat Rate Scheme. HMRC are very aware of mini-umbrellas and in November 2020 they wrote to end users, agencies and contractors warning them not to use the model. They also say in their communication that their Fraud Investigation Service is using civil and criminal powers to challenge those involved in mini umbrella schemes and that they have made a number of arrests.

Client led status disagreement process

One criticism of the public sector IR35 rules that were introduced in April 2017 was that there was no right of appeal against a Status Determination Statement ("SDS") issued by an end client. To remedy this, from 6 April 2021 end users are required to have in place a "client led status disagreement process." Last year's edition of Employment Taxes Voice covered this process in detail. Broadly, the end client must have a status disagreement process in place to deal with disputes of SDSs by workers and deemed employers (in most cases this will be the fee-payer). The worker or their deemed employer can make representations to the client that an SDS is incorrect at any time during the engagement and prior to the final payment that is made in relation to the engagement. The end client is not obliged to respond to representations made outside of this timeframe.

Within 45 days of receiving the representations, the client must provide to the worker or deemed employer either:

- a statement that the representations have been considered, it has been concluded that the status determination statement is correct and the reasons for the conclusions reached; or
- a new status determination statement with a different determination and the dates from which the new status determination applies and the previous determination is withdrawn.

Failure to meet these obligations will result in the client being deemed to be the fee-payer.

Whilst the legislation requires the process to be in place and no doubt HMRC will ask end client to provide details when undertaking a review or "interaction", how frequently will the process be invoked? In practice, if the SDS concludes that the engagement is "outside" IR35 it is unlikely that the worker will want that decision overturned. The fee-payer may potentially be nervous as it is their responsibility to operate PAYE and NIC if required, but in practice they are more likely to protect themselves with contractual indemnities and insurance and indeed many fee-payers market their "services" on the basis that they shoulder the PAYE and NIC risk.

The disagreement process is more likely to be invoked where the SDS concludes that the engagement is "inside" IR35.   However, in practice we are seeing a tendency for end clients to adopt policies such that where a temporary contract role is likely to be akin to employment, it will not engage the contractor via a PSC – instead, it will insist on engaging the contractor on an employed basis such that the requirement for an SDS simply does not arise. Indeed, some organisations, particularly in the financial sector have taken an extremely conservative approach and will not engage with contractors via PSCs at all.

HMRC compliance strategy

In February 2021, HMRC published their Off payroll compliance strategy (HMRC issue briefing: supporting organisations to comply with changes to the off-payroll working rules (IR35) - GOV.UK (www.gov.uk)).

This confirms the approach to penalties announced in February 2020 – i.e. they will adopt a 'light touch' approach for the first 12 months of the legislation coming into effect unless there is evidence of deliberate non-compliance.

HMRC say that they will support businesses who are genuinely trying to comply and will provide advice and support to help them get things right and correct mistakes where these arise. They will use a specialist team who will use a risk-based approach to compliance activity – targeting those areas where they most expect organisations not to apply the rules correctly.

In certain circumstances HMRC may also seek to publish details of deliberate defaulters – an approach that has been used in relation to National Minimum Wage compliance.

Calculating liabilities in the event of compliance failures

Another area of concern that has prompted discussions with HMRC is how they propose to address the calculation of PAYE and NIC liabilities where tax has already been paid on income in the hands of the worker and/or their PSC. In a direct employment status compliance settlement (i.e., where the individual has a direct engagement with their client such that IR35 is not in point), Regulation 72F of the Income Tax (Pay As You Earn) Regulations (SI 2003/2682) allows HMRC to take account of the income tax self-assessed by the individual and to reduce the calculated settlement accordingly. There are similar provisions for NIC.

The circumstances are quite different where the worker is engaged via a PSC and where the PAYE and NIC liabilities are the responsibility of the deemed employer. The PSC may have paid corporation tax on the income and the individual may have paid income tax on income drawn from the PSC in the form of salary, or more often dividends. Regulation 72F does not provide for any set-off in these circumstances. Neither are there any specific provisions in Chapter 10 that allow for a set-off of taxes paid by the individual or the PSC against the PAYE and NIC payable by the deemed employer. Whilst professionals have called for legislative changes to facilitate such a set-off, HMRC are of the view that any adjustments to ensure that tax is not paid twice on the same income should be made via the tax returns of the PSC and the individual worker. HMRC's rationale is that they would have insufficient information on the income of the PSC and the worker and that the process of seeking this information would be administratively burdensome for all concerned. However, HMRC seem to be able to operate Regulation 72F pragmatically to obtain the information needed. Further, where a settlement in relation to direct employment involves a large number of employees, Regulation 72E allows HMRC to sample a selection of employees and extrapolate the amount of tax paid via their self-assessments to calculate the total off-set. There should therefore be scope for HMRC to be a bit more flexible in relation to Chapter 10 and tax professionals are pressing for a re-think of approach.

As with Brexit no doubt there will be a few teething problems with the new regime after 5 April 2021. As with Brexit, businesses have had some time to prepare! Of course, there will be a settling in period, but let us hope that this is not too disruptive.

Nicola Pitcher

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The Coronavirus Job Retention Scheme – mistakes and corrections, are underclaims just as important as overclaims?

Susan Ball and Carolyn Brown discuss the coronavirus job retention scheme (CJRS) and some of the key issues associated with reviewing employer claims and correcting mistakes, including considering the tax charges and penalties that may apply where claims have gone wrong.

On 20 March 2020, the CJRS was introduced, providing a support grant for all employers that could not maintain their workforce because their operations were affected by coronavirus (COVID-19). The scheme allowed employers to furlough their employees from 1 March 2020 where they were on a UK payroll initially as at 28 February 2020. Who could have predicted back then that the scheme would be in place for more than a year?

Employers that claimed in the early days after the initial guidance came out, worked out their own version of how reference pay calculations should be done, particularly for variable pay employees, where the 2019/20 average pay needs to be considered, as the guidance was less than clear. Those employers may not have revised the reference pay calculations each month or been aware of changes to and extensions of the HMRC guidance which, over the course of the year has ultimately made HMRC's view on how the calculations should be done much clearer.

HMRC CEO Jim Harra told MPs that the department had made an assumption for the purposes of planning that the error and fraud rate for the CJRS scheme could be between 5 per cent and 10 per cent. So HMRC is expecting that employers may have made mistakes.

Many employers have started to review claims, since the introduction of the specific CJRS penalty legislation, and as time has allowed. This has identified numerous examples of unintended errors, resulting in claims that either overstate or understate the amount of CJRS grant they are entitled to. It seems the risk of penalties has also prompted some employers to pay back the grants received to avoid any worry, although business hasn't been as bad as expected for others.

Broadly, what are the major developments in the CJRS since March 2020?

In summary, we have had:

CJRS Version 1 - 1 March to 30 June 2020. Full furlough for a minimum 21 days

- The maximum grant value is 80 per cent of a furloughed employee's wages (the reference pay, as defined in the legislation) up to a cap of £2,500 per person per month <u>plus</u> employer's National Insurance contributions (ER NICs) and employer's auto enrolment minimum pension contributions on those wages.

CJRS Version 2 – 1 July to 31 October 2020. Flexible furlough allowed if employee was eligible/claimed for under CJRS Version 1, subject to the maximum number of employees in a CJRS Version 1 claim.

- 1 July to 31 July - as for CJRS Version 1 above but only for furloughed hours.
- 1 August to 31 August - the maximum grant for furloughed hours is 80 per cent of a furloughed employee's wages (the reference pay, as defined in the legislation) up to a cap of £2,500 per person per month.

- 1 September 2020 to 30 September 2020 - as for 1 August to 31 August, but the Government grant was 70 per cent and the employer had to fund 10 per cent of furloughed employees' wages (as defined in the legislation) during furlough periods.
- 1 to 31 October 2020 - the Government grant was 60 per cent and the employer had to fund 20 per cent.
- The employer was required in August, September and October to continue to contribute ER NICs and employer's pension contributions.

CJRS Version 3 - 1 November to 30 April 2021. Flexible furlough allowed and employees can be claimed for even if not previously claimed under CJRS Versions 1 and 2.

- The maximum grant value is 80 per cent of a furloughed employee's wages (the reference pay, as defined in the legislation) up to a cap of £2,500 per person per month.

What is HMRC doing to check claims?

In the Treasury select committee hearing on 7 December 2020, there were some rather interesting statistics on the coronavirus support schemes. Approximately £12m of claims relating to the CJRS had been rejected by HMRC, which had also undertaken further reviews into 140,000 submissions prior to approving payment by the time of the hearing. HMRC's view is this approach has rejected most suspect claims, believing that the level of criminal activity for the CJRS is low, at between 0 per cent and 0.6 per cent.

As this demonstrates, HMRC is investigating claims, and several arrests for fraud have been made at the time of writing. HMRC has also written to large numbers of employers to invite them to correct any claims which, based on the data HMRC holds, may be incorrect. We understand the next step, where employers have not responded to these letters, is further investigation by HMRC.

What should employers be doing?

We would urge employers that have potentially made errors, or that have not reviewed their claims yet, to take action as soon as possible. Where errors have been made, we would advise employers to consider what actions need to be taken to rectify them.

HMRC's compliance work is aimed to identify and address incorrect claims, particularly those arising from deliberate non-compliance and criminal behaviour. HMRC have stated they will not be actively looking for innocent errors in their compliance approach, however where employers find mistakes, they must put them right.

HMRC can now require employers to provide information regarding incorrect claims and, where appropriate, can hold directors personally liable as if it were tax, pursuant to s100 and Schedule 13 Finance Act (FA) 2020, where the business is no longer solvent. Where businesses have received wrongly claimed CJRS payments, those payments are taxable at a rate of 100 per cent, allowing HMRC to recover the payment through tax pursuant to Schedule 16 FA 2020.

Schedule 16 FA 2020 also imposes a burden on employers, in a similar manner to the Bribery Act 2010, to notify HMRC of any amounts that have been wrongly claimed to avoid penalties.

A 90-day 'correction window' was included for employers to make such notification. The correction window is prescribed as the latest of:

- 90 days from the receipt of the grant;
- 90 days from circumstances changing, meaning the employer is no longer entitled to retain the grant; or
- 20 October 2020.

Each employer that has received a CJRS grant payment now has the positive duty to notify any wrongly received amount and self-assess that amount in their tax return. Any failure to notify wrongly received amounts by the above deadline could be subject to penalty (in addition to the tax charge) under Schedule 41 FA 2008.

Where an employer does not meet the above notification deadline and where they knew that they were not entitled to receive grant monies at the date income tax first became chargeable, any penalty under Schedule 41 FA 2008 may be imposed on the basis that such wrongdoing was 'deliberate and concealed', meaning a maximum potential penalty of 100 per cent of the amount improperly claimed.

For the most serious cases, criminal prosecutions are likely and there are a number of (statutory and common law) offences that may be relevant, including the strict liability corporate criminal offences under the Criminal Finances Act 2017.

So, if an employer receives an HMRC letter requesting a reply by a set date, it should be taken seriously, and work should be undertaken to review claims and reply to HMRC by the set date.

It should be noted that for entities to which it applies, CJRS grant claims fall within the senior accounting officer (SAO) regime and hence can lead to personal liabilities on SAOs of employers that are not compliant.

Also, be aware that HMRC may not be the only interested party, an organisation's auditors are likely to want to make sure CJRS claims are materially correct as well.

Errors will often tend to fall in the following broad categories.

- Administrative errors occurring when inputting details of a claim.
- Errors made when calculating the amount of grant available to claim, particularly in light of the challenges in applying complex rules.
- Incorrectly including claims for employees for whom the employer is not eligible to claim.

Further information about assessments and penalties is in HMRC's compliance factsheet CC/FS48.

Are underclaims and overclaims of CJRS grants equally important?

In short, they can be. The focus of HMRC activity and much of the reporting on the CJRS has been on overclaims so let's cover that first.

If an employer has made an error in a claim that has resulted in an overclaimed amount of grant, they must pay it back to HMRC. This can be reflected in the employer's next claim and the amount paid in respect of that claim can be adjusted accordingly.

If an employer takes this approach, they do not need to do anything further with regard to the amount overclaimed because it will be rectified in the next CJRS grant payment from HMRC. However, a record of the adjustment must be kept for six years.

Where an employer is not making any further CJRS grant claims or the overclaim is too large to recover from the next claim, they will need to contact HMRC to notify it of the issue and request a payment reference to pay the money back. This should ideally be done before the end of the penalty free window but, if not, as soon as it is possible after the issue comes to light.

Surely grant underclaims are not a problem then? Unfortunately, technically that's not correct. The legislation is drafted in such a way that an underclaim is, from a practical perspective, as serious as an overclaim. This is because it potentially makes the whole claim for the employee concerned invalid and that cannot be easily resolved in the employer's next claim.

We have seen examples of employers that have incorrectly calculated an employee's reference pay which could jeopardise each and every claim for that employee using that reference pay calculation. On discussing these examples with HMRC, it has been confirmed that where the employer followed the HMRC guidance available at the time of the claim there may be no repayment required and no tax charge or penalty. For example, employees who had significant overtime could have been designated as fixed pay employees until 7 August when the guidance changed. However, when the further guidance came out in relation to such employees, the employer should have reconsidered the position and this might have resulted in those employees being assessed to be variable pay employees for the purposes of further CJRS grant claims. In such cases, we understand HMRC would not propose taking action in relation to the earlier period. However, it does leave the employer potentially exposed to tax and penalties if they didn't review the calculations for those employees in light of the updated guidance and come to the right decision for claims made from 7 August 2020 onwards.

Unfortunately, underclaims under CJRS Version 1 and CJRS Version 2 are not able to be rectified via HMRC by claiming more grant monies. Only errors in claims made under CJRS Version 3, if they are notified within the tight correction window (see table below), can be corrected by claiming more grant.

Should employers notify HMRC and explain the issue and/or document the approach taken? Should they increase amounts paid over to employees to ensure they receive the amounts they should have received had the grant claims been calculated correctly? Both are options to consider.

If an employer has contracted in a furlough agreement to pay an agreed level of pay but the furlough pay rate does not match the agreement, the employer may be subject to an employee claim for unlawful deduction from wages or a contractual claim for wages. The latter can be made for up to six years. The same will apply if the furlough agreement fails to secure agreement in writing from the employee to a salary reduction, even if it falls within the scope of the CJRS rules.

Claim for	Claim must be submitted by	Claim amendment to increase claim must be made by
Pay for furloughed hours in February 2021	Monday 15 March 2021	Monday 29 March 2021
Pay for furloughed hours in March 2021	Wednesday 14 April 2021	Wednesday 28 April 2021
Pay for furloughed hours in April 2021	Friday 14 May 2021	Friday 28 May 2021

Common mistakes

Common mistakes we have seen in calculating CJRS claims include:

- incorrect day counts or use of working days rather than calendar days;
- reference pay including discretionary payments;
- reference pay not including non-discretionary payments (as defined);
- reference pay not including contractual overtime or employees designated as fixed pay but with significant overtime and no reassessment after the guidance changed on 7 August;
- use of 2019/20 average pay details only or an incorrect method used to calculate the average pay for variable pay employees;
- incorrect use of pre-salary sacrifice remuneration figures;
- employees only furloughed for holiday periods;
- problems with calculating the correct pension payments eligible for claims;
- not restricting NICs calculations where required;
- misunderstanding of what employees were able to do when on furlough; and
- invalid earlier furlough days/periods preventing a later valid claim under CJRS Version 2.

Can CJRS claim mistakes lead to other issues?

Yes, potentially - for example, there may be employment legal issues and, in relation to salary sacrifice, potential for unlawful deductions. Where the salary sacrifice relates to pensions contributions, there is also potential for incorrect pensions payments leading to underfunded pension schemes. The availability of the grant under the CJRS does not change an employer's usual pension contribution payment obligations or processes.

When calculating the pension contribution due for a furloughed worker who has agreed a salary sacrifice arrangement for pension contributions, any contractual obligations the employer has entered into, and the obligations in the pension scheme rules, continue to apply as normal.

However, as all of the grant claimed must be paid to a furloughed worker in the form of money (between March 2020 and June 2020) and the furloughed worker must be paid the lower of 80 per cent of their wages or £2,500 per month or the pro-rated equivalent if the member of staff is working part-time (from 1 July 2020), this may mean that, where a salary sacrifice arrangement is in place for pensions, an employer will need to amend their payroll processes to calculate the pension contribution to be paid to the pension scheme under the pension scheme rules.

The pensions regulator has provided detailed guidance at
COVID-19 technical guidance for large employers | The Pensions Regulator

What guidance should employers have used to make a claim?

We understand HMRC expects employers to have followed its guidance and have picked up on the many changes made since it was first published. More than 200 changes have been made to the guidance since the scheme was introduced in March 2020. If the factual basis of a claim is correct and it has been calculated in accordance with HMRC's guidance, then the claim is, in all likelihood, correct.

However, there are some issues where the guidance is not or has not been clear. In these cases, it seems HMRC expected employers to take professional advice or to consider the appropriate legislation in the relevant Treasury Direction that applied at the time.

From our discussions with HMRC, it is clear that employers were expected to check the HMRC guidance each time they made a claim, to consider if it had changed and what action should be taken in view of the sums of money involved. HMRC also expected claimants to make sure they kept an audit trail of key decisions or problem areas to demonstrate the decisions taken, with copies taken of the version of the guidance version relied upon for the calculations.

If, on reviewing claims, an employer spots an error but believes the HMRC guidance in issue at the time was followed, we would recommend they write to HMRC detailing the position and present their case. This would serve as notification of an error, but HMRC may agree that in the circumstances a correction is not needed.

Employers that used the HMRC tool to calculate grant claims should also review the position to make sure the correct information was input when preparing claims - although HMRC should not challenge the calculation itself, errors may have been made, for example in what is or is not included in reference pay, which may impact several claims.

HMRC has made it clear that its priority is to support customers, while addressing deliberate non-compliance and criminal attacks, so we would expect HMRC to be reasonable where innocent errors are found and brought to its attention.

As a tax adviser what should I be careful of?

CIOT has issued guidance for members on the approach to be taken in various different scenarios.

This guidance is intended to provide assistance in relation to the steps to take if you become aware of errors in coronavirus job retention scheme (CJRS) claims. Whilst this guidance specifically addresses CJRS claims, the fundamental principles and requirements set out in the professional conducts in relation to taxation (PCRT) issued by the professional bodies also apply to other coronavirus support administered by HMRC or other authorities, such as claims under the self-employment income support scheme (SEISS).

CIOT's guidance was reviewed by HMRC in January 2021 and addresses what are believed likely to be the most common scenarios.

In accordance with the PCRT, advisers have an obligation to not be associated with any tax returns it believes to be incorrect. It is therefore essential that the necessary work is undertaken to identify appropriate adjustments to recognise any necessary tax charges in accordance with Schedule 16, Finance Act 2020 in a client's tax return prior to submission.

What should employers do now?

Employers are advised to carry out a review to make sure that they have complied with the CJRS rules applicable at the time of each claim and to double check, ideally within the correction window to preclude penalties or other sanction, but in any event as soon as possible, that they have not made any errors when submitting their claims.
It is advisable also for employers to make sure they have paid employees correctly, not only for periods of furlough but also when working. There are added complications of course when dealing with flexible furlough.

Susan Ball and Carolyn Brown

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Employer Support for Employees

Rob Woodward looks at what tax breaks are available for employers to help their employees during these trying times

The current pandemic and its associated impact on employees' health, both physical and mental, has led to many employers asking what support they can offer to staff without giving rise to a benefit in kind charge. This article highlights some of the key tax and NIC exemptions available for non-cash benefits – for the avoidance of doubt I will not cover cash payments or support measures designed to maintain employment or assist employees working remotely such as the CJRS or working from home allowances.

Covid-19 tests

Healthcare, essential workers and other frontline staff are regularly tested and the Government has confirmed at these tests are not considered taxable benefits in kind (BIKs). Similarly, many employers will also pay for antigen testing to supplement the national testing programme – for example, professional sports clubs regularly test their players and coaching staff as part of the continuation of elite level sport.

In addition to confirming employer paid for testing for key workers is not considered a taxable BIK, at https://www.gov.uk/guidance/how-to-treat-certain-expenses-and-benefits-provided-to-employees-during-coronavirus-covid-19 the Government also confirmed employer paid for antigen testing kits for employees, either provided directly or by purchasing tests that are carried out by a third party, will not result in an income tax or Class 1A NIC charge. Similarly, employers and their employees will not be liable to any income tax or NIC, where an employee is reimbursed by their employer when they purchase a test.

For the purpose of this exemption, an 'antigen' test means a test which detects the presence of a viral antigen or viral ribonucleic acid (RNA) specific to Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2).

Health screening

These Covid-19 test exemptions are in addition to employer provided health screening where Section 320B ITEPA 2003 provides an exemption to income tax and NIC for one health screening or medical check-up per employee per year to identify any risk of illness or determining an employee's state of health. The screening/check-up must be either paid for directly by the employer or the employee provided with a non-cash voucher to pay the healthcare professional in order for the BIK exemption to apply.

This exemption only applies to health screening/check-ups and any other employer provided or paid for medical treatment in the UK will be considered as private medical treatment and therefore taxable. How the medical benefit charge is applied depends whether the employer contracted for the service (income tax operated via the P11D process and the employer pays Class 1A NIC), contracts for private medical insurance (income tax and Class 1A NIC again through the P11D process) or the employer reimburses the employee's treatment/insurance cost (the payment is considered additional salary liable to PAYE and Class 1 NIC via the payroll).

Due to the risk of health screening developing into private medical treatment, and therefore becoming taxable, employers should take care in agreeing the scope of the screening. It is important to check what will and will not be provided and the point at which the employee must either pay for additional services (to seek to "make good" any taxable cost to the employer) or be referred to the medical insurance (which the associated tax charge deals with under that benefit in kind provision).

Vaccinations

While Covid-19 vaccinations are only available through the NHS and can only be provided through the state-run vaccination programme, employers can pay for vaccinations against more “regular” strains of influenza. It is HMRC policy that employer paid for flu jabs or the provision of a non-cash voucher for a flu jab can fall within S323A ITEPA 2003 and therefore could be exempt from a BIK charge. However, the provision of a cash voucher, cash payment or cash reimbursement for an employee purchased flu jab would be liable to PAYE/NIC.

Welfare Counselling

The pandemic has had a significant impact on the mental wellbeing of many employees and in addition to the physical health exemptions outlined above, employer provided welfare counselling will also not be considered a BIK.

To meet the exemption for welfare counselling under the relevant Statutory Instruments enacted as part of the minor benefits exemption under Section 210 ITEPA 2003, the counselling must fit within the HMRC accepted range of support. That range is listed at https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim21845 and includes counselling for stress, problems at work, debt problems, bereavement and ill-health. Since April 2020, the scope of non-taxable counselling services also includes related medical treatment, such as Cognitive Behavioural Therapy or Interpersonal Therapy, when provided to an employee as part of an employer’s welfare counselling services.

The exemption does not though cover tax or financial advice (except debt problems), advice on leisure or recreation or legal advice. The challenge is determining where counselling goes beyond just support and becomes advice and therefore outside the scope of the exemption.

Employee Assistance Programmes

Employers often provide the welfare counselling services via an Employee Assistance Programme (EAP) - a “one-stop shop” which provides welfare and counselling services but also other advice and support services. Care is required to ensure that the other range of services does not undermine the BIK exemption thus making the whole EAP taxable, especially where it is difficult to determine where to draw the line between counselling which falls within the exemption and counselling which is outside of the exemption.

HMRC will take a common sense approach to considering the EAP so that the exemption will apply when the EAP consists substantially of facilities that satisfy the terms of the exemption but also to a not significant proportion of the services provided which do not satisfy the exemption.

Often the EAP is structured in a way to provide the initial service at no cost to the employee, but if further bespoke advice or guidance is required the employee will be obliged to pay for that separately. Such an approach can ensure the EAP itself does not give rise to a BIK although of course if the employee’s cost of that further advice is met by the employer, that payment/reimbursement will give rise an income tax and NIC charge.

Rob Woodward

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International Remote Working during the Pandemic

Matthew Fox considers some of the impacts that have materialised for employers with employees working away from their usual country of employment.

It was on 11th March 2020 that the World Health Organisation declared the COVID-19 a global pandemic. Very soon after that many countries introduced national lockdowns and other public health restrictions leading to significant business disruption. International travel restrictions made it impossible for business travel to carry on as usual. Office attendance has been largely curtailed as employees were advised by their Governments to work from home where possible to maintain social distancing.

Employers and employees embraced the challenges of remote working. However, some employees returned to their home countries to work from home, often without informing their employer, and have not returned to the country of employment whilst public health measures remain in effect and international travel remains difficult. This has ultimately led to some unintended tax and legal complexity which employers are having to identify, deal with and establish policies around.

In the early days of the pandemic, many Governments announced easements to avoid unintended tax and social security consequences that could arise from the temporary dislocation of employees. As temporary dislocations have extended any temporary easements cease to be effective and the tax and social security position of the employee may shift.

Some examples of where the tax position needs to be reviewed include:

- International assignees returned to their 'home' country to work remotely.
- International commuters who are not currently commuting.
- Individuals employed in one country have returned to their country of nationality, where the employer does not have a presence.
- Directors attending Board meetings remotely.
- New hires unable to relocate to a new country to start a new role and so are working from home in their home country.

All of these are examples where the residence status of the employee and where they need to pay tax could be impacted. Tax and social security may have been withheld in the wrong country. For displaced workers, this can lead to tax adjustments being required when completing tax returns after the end of the tax year. It can also lead to common cash-flow issues, such as where a tax liability becomes due in the 'home' country before a repayment can be claimed from the country where the tax is withheld. Employees faced with such an outcome are likely to be looking for support from their employer.

The compliance aspects are not just restricted to individuals' tax return compliance. There is often a responsibility for employers to register and account for tax and social security withholdings. Even where an employee is working from home in another country, their activities should also be monitored, as they can create a corporate presence or a permanent establishment in the country where work is performed. This could trigger further filing requirements and tax obligations for the employer. What constitutes a presence or permanent establishment varies by country. Although governments have been encouraged by the OECD to consider the temporary and exceptional change of location due to the pandemic the risk, for now and the future, will need to be considered as there is currently no uniform approach. It is likely permanent establishment risks will increase once international travel restrictions are relaxed where employees do not return to work in the country of employment as soon as it becomes practical to do so.

What announcements have been made in the UK?

Broadly speaking an individual who is tax resident in the UK is liable to tax on their worldwide income and gains. Non-UK tax residents are liable to UK tax on UK source income which includes earnings in respect of UK duties unless such duties are incidental or exempt under the provisions of a double tax agreement.

An individual's tax residence position is determined under the statutory residence test (SRT) which largely provides a series of objective tests in determining an individual's tax residence. Many of these involve assessing the number of days an individual spends in the UK (midnights). Individuals who have come to the UK to work remotely in the pandemic will need to assess if they have become tax resident in the UK as a result and similarly individuals who left the UK to work remotely elsewhere may not currently be tax resident in the UK. In both scenarios the UK and overseas tax position is likely to change or could result in potential double taxation for which relief can be sought under the relevant double taxation agreement.

The Government introduced some changes to the SRT to ensure that care workers and health professionals temporarily working in the UK would not become tax resident but for other individuals, the SRT rules still apply. HMRC has nevertheless announced some measures that may impact some individuals' UK tax position. These may help with short-term displacements but are not likely to be relevant for longer term remote working.

Exceptional circumstances

Up to 60 days spent in the UK during each tax year for exceptional circumstances can be ignored for some but not all of the SRT's day counts.

In the early stages of the pandemic, HMRC provided some helpful guidance on the application of exceptional circumstances as a result of COVID-19, which can be found in its Residence, Domicile and Remittance Basis Manual at RDRM11005.

Unfortunately, many employees working overseas use the third automatic overseas test to claim to be not resident in the UK by working full-time abroad. Many employees failed this simply by working more than 30 days in the UK or having a significant break from overseas work by being displaced in the UK. In the absence of meeting the full time work abroad test, those with a family home in the UK could easily be tax resident in the UK both under the SRT and the tax treaty with the other country, leaving them liable to tax in the UK on their worldwide income and claiming a credit for overseas tax on overseas source income.

Non-UK tax resident working whilst stranded in the UK

As set out above, a non-UK resident is liable to UK tax on UK source earnings unless such duties are incidental to those done overseas or are exempt under the terms of a double tax agreement. The amount of earnings that relate to UK duties are calculated using a just and reasonable apportionment which will usually be based on a working time apportionment. HMRC have announced that earnings of a non-UK tax resident unexpectedly stranded in the UK can be just and reasonably excluded provided it remains liable to tax in the home country of tax residence.

It is important to note, this approach only applies to the earnings of a non-UK tax resident. The same just and reasonable apportionment rule also applies to UK resident individuals claiming overseas workdays relief in assessing how much an eligible individual's earnings but HMRC has confirmed it will not apply to such cases.

National Insurance Contributions ('NICs') – countries where the UK has no social security agreement

Where a UK employee is assigned overseas to a country where there is no social security agreement, NICs are required for the first 52 weeks of that assignment. After the 52 week continuation period, contributions may become due again if the employee comes to work in the UK. HMRC has announced that it will disregard the first 6 weeks of non-incidental work undertaken in the UK before NICs are due.

Some examples of international remote workers

UK employee working from home overseas

There are many UK employees who have been working from 'home' overseas for the duration of the pandemic. These individuals may be not tax resident in the UK in 2020/21 either under the first automatic overseas test (spending less than 16 midnights in the UK in 2020/21), by meeting the third automatic overseas test by working full-time overseas or by other areas of the SRT. Such individuals will only be subject to UK tax on UK source income including earnings for UK duties. Pay As You Earn ('PAYE') and NICs are likely to have been applied throughout on all of their earnings unless they have requested and received a NT code ('No Tax'). In the absence of a NT code they will need to file a return to claim a repayment. Such individuals will also need to consider their residence status and filing position in the home country and may need to fund that overseas tax before they receive a repayment from HMRC.

The UK employer may also have registration, withholding and filing responsibilities in the employee's home country. The employer will also need to understand if there is also a risk of creating a permanent establishment there too.

Commuters

A commuter is someone who may typically be tax resident in their home country but spends a significant percentage of time working in another state. Usually, commuters pay tax on their worldwide income and gains in their home country and tax in the other state on earnings related to duties performed in the other state. They claim relief from double taxation in their home country so that they are not doubly taxed.

From a UK perspective, where someone is commuting to the UK and therefore subject to taxes in both the UK and their home country their employer will usually apply PAYE. In such cases, HM Revenue and Customs (HMRC) will issue a 's690' direction for a tax year based on a reasonable percentage of estimated UK workdays with the final position calculated in the self-assessment return.

Where an individual is resident in the UK and commutes overseas such that tax is due in that country, HMRC will allow the UK employer to operate an Appendix 5 scheme (net of foreign tax credit relief) to provide foreign tax credit relief in the payroll. In the absence of this, individuals claim relief in their income tax returns.

One of the consequences of the travel restrictions is that commuters are currently working exclusively in their home country but withholdings may have continued to be applied as they always have done. Commuters may therefore owe tax in their home country and need to seek a refund of tax from the country where duties are not currently being performed.

Some countries have sought to resolve the administrative burden of this by introducing a deeming rule, this being that duties are deemed to have been performed where they would have reasonably expected to have been performed. Such a rule may be agreed on bilateral basis between two countries as a practical way of easing the compliance and potential cash-flow burden. There have been several such announcements between

EU/EEA countries but the UK has not agreed to any such arrangement with any treaty partner. Should a country unilaterally apply a deeming rule to a UK resident commuter who has not been working in that country during the pandemic this could lead to a risk of double taxation arising because the UK would have taxing rights on earnings from work done in the UK.

Non-resident non-executive directors of UK companies

Non-resident non-executive Directors of UK companies are liable to UK tax on their income for work performed in the UK. Prior to the pandemic the Directors travelled to the UK to attend the board meeting of the UK company. PAYE, and if appropriate, NICs are deducted from their fees. During the pandemic, the Directors have not travelled to the UK and board meetings have been taking place using audio or video conferencing facilities. If such Directors have not visited the UK in 2020/21 they are not liable to UK tax on their fees as they have not performed any duties in the UK. This means they will need to claim a repayment of PAYE but they will also need to fund any tax due in their home country.

New hires from overseas

It is quite common for employers to hire new recruits from overseas. This has continued during the pandemic and some new hires have been unable to travel to start their role in the new location. They may therefore be working on their new role from home in the country of their tax residence for the time being. This means their earnings are likely to be subject to tax in their home country and home country social security is also likely to be due. This may result in the obligations for the employer to register and account for home country tax and social security withholdings.

For a new UK employee commencing work in their home country, the UK employer will still have its requirements to deal with under the PAYE regulations. However, it can use a NT code for PAYE purposes if the facts of the employee meet the following conditions in HMRC's guidance:

'Where a business in the UK or the UK branch or office of an overseas business employs someone who's non-resident, and the employee:

- *is working wholly outside the UK*
- *has not been resident in the UK before*
- *employee does not intend to and will not perform any duties in the UK'*

No NICs will become due until the employee starts to work in the UK. Once the individual does eventually arrive in the UK, PAYE and NICs will need to be applied.

Summary

This article highlights some of the potential tax and social security considerations for employers who have employees working remotely away from the country of employment during the pandemic. There are other considerations around employment law, data protection and immigration. Whilst employers have been broadly supportive to support international remote working as a result of the exceptional circumstances of the pandemic, the identification and resolution of employee tax positions and employer obligations is likely to result in policy and process tightening. Nevertheless, with appropriate policies and processes in place, it does open the discussion around the possibility of post-pandemic flexibility for employees and access to a wider global talent pool for employers.

Matthew Fox

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Social Security across Europe now the Brexit Transition Period has ended

Eleanor Meredith looks at how Social Security contributions will be applied for UK-EU cross-border workers in a post-Brexit world

Discussions between the UK government and the European Union (EU) Commission eventually concluded in a Trade and Cooperation Agreement (TCA) including provisions on social security coordination in a Protocol issued as part of the TCA. For most 'new' situations involving movement between the UK and an EU Member State from 1 January 2021, the Protocol supersedes the existing EU coordination rules on social security.

The Protocol ensures that cross-border workers who move between the UK and the EU after 1 January 2021, and who are not covered persons under the UK-EU Withdrawal Agreement, and their employers, are only liable to pay social security contributions in one state at a time. It also allows these individuals access to reciprocal healthcare cover. Further provisions apply regarding the coordination and protection of the majority of social security benefits between the UK and the EU (e.g., old-age and survivors' pensions), so that individuals preserve their social security rights.
Whilst many of the provisions in the Protocol are similar to the existing EU social security coordination rules and will be familiar, there are some key differences that employers should be aware of, as explained below.

It is also worth noting that individuals who are covered persons under the Withdrawal Agreement should continue to be covered under the existing EU social security co-ordination rules as their social security co-ordination rights are grandfathered by the Withdrawal Agreement. In the main, this applies to continuing cross-border arrangements that started prior to 1 January 2021, but may also apply to new arrangements starting on or after 1 January 2021 for individuals who are covered by the Withdrawal Agreement, for example based on their residence rights.

What does the Protocol mean in practice?

Who is covered by the provisions on social security coordination in the Protocol?

The Protocol covers EU citizens, UK and third-country nationals, stateless persons and refugees who are legally resident in the UK or the EU and who are in a cross-border situation involving the UK and an EU Member State that starts on or after 1 January 2021, where they are not covered persons under the Withdrawal Agreement. It also covers their family members.

What does this mean for cross-border workers between the UK and the EU?

Workers covered by the Protocol will be subject to social security in only one country at a time, which will generally be in the country where work is performed, although there are provisions for 'detached workers' (assignees) and multi-state workers.

The Protocol mandates employer social security obligations in the same way as the existing EU social security regulations. This means that for individuals covered by the Protocol, both employee and employer contributions will be due, and the EU or UK employer has an obligation to register with the relevant authorities to remit employee and employer contributions according to domestic legislation.

The specific rules for assignees in the Protocol cover assignments of up to 24 months, and these essentially mirror the existing posted/seconded worker rules in the EU regulations that allow continuing home country coverage for assignments of up to 24 months. Although each EU member state had the choice of opting out before 1 February 2021, HMRC have confirmed that none has done so.

The provisions on multi-state working arrangements mean that individuals should be covered on the same basis as under the existing EU social security regulations, which is good news. Less helpfully, there is no exceptional circumstances clause in the Protocol equivalent to Article 16 in the current EU agreement. As such, the UK and an EU member state cannot agree to override normal provisions, which means that certification and home country social security coverage would not be available for assignments of over two years.

Reciprocal healthcare arrangements should be in place, largely mirroring the current arrangements, although there are some quirks in practice. For example, the UK has stated it will issue Global Health Insurance Cards – GHICs – going forward through which individuals should be able to access healthcare for temporary periods of stay in an EU Member State, but that existing European Health Insurance Cards (EHICs) for UK nationals should continue to be valid until their expiry date. EU citizens with a right to reside in the UK as at 31 December 2020 and UK nationals in certain situations who are also covered persons under the Withdrawal Agreement can apply for a new style UK EHIC. UK government advice is that appropriate travel insurance with healthcare coverage should be in place.

There are provisions in the Protocol regarding the coordination and protection of most social security benefits between the UK and the EU, so that they should apply on largely the same basis as under the existing EU Regulations, and individuals should largely preserve their social security benefit rights; but there are exceptions, most notably family benefits – including Child Benefit - and long-term care benefits. Access to these benefits will be dependent on domestic legislation, which may not allow the concerned persons the same level of benefit. UK employers should be particularly aware of the impact of this on UK outbound assignees.

What does the Protocol mean for cross-border workers between the UK and Ireland?

The position is subtly different for UK and Irish nationals who are cross-border workers between the UK and Ireland, as a separate convention agreed between the UK and Ireland takes priority. This effectively mirrors the existing EU Regulations, so that the same provisions will continue for new assignments of UK and Irish nationals, which may be more generous than the Protocol. It should, for example, be possible to agree coverage for detached workers, who are UK or Irish nationals, for up to five years in exceptional circumstances for Ireland/UK assignments.

What does the Protocol mean for cross-border workers between the UK and Norway, Iceland, Liechtenstein and Switzerland (the EFTA countries)?

The Protocol does not cover the EFTA countries of Norway, Iceland, Liechtenstein and Switzerland, as the territorial scope of the TCA extends only to the relationship between the UK and the EU. Therefore, the social security position between the UK and these countries going forward will be covered by the previous bilateral social security agreements (except for Liechtenstein where there is no agreement, and therefore it is expected that the domestic legislation of both the UK and Liechtenstein will apply). There is, accordingly, a different position for movement between the UK and each of these countries. This could change in the future, depending on specific arrangements agreed between the UK and EFTA countries, or through the EFTA countries acceding to the TCA.

Conclusions

The fact that an agreement was reached on social security and reciprocal healthcare and benefits is clearly a good thing, and means that in most cases the spectre of double charges has receded. There are concerns, though, and the lack of an “exceptional circumstances” provision for longer-term assignments is likely to be challenging, in practice. There are fewer potholes than feared in the road ahead, but there remains a risk of it being a little bumpy.

Eleanor Meredith

Eleanor has been a director in Deloitte’s Tax Quality Group since June 2016, specialising in Global Employer Services and providing technical support to that part of the tax practice. She continues to work in that area, working especially on the review of new and proposed law and in liaison with HMRC. Eleanor also serves on the CIOT’s Employment Taxes sub-committee and represents that committee at HMRCs Expatriate Tax Forum. Eleanor can be contacted on 07920 417021 or at emeredith@deloitte.co.uk.

Construction Industry Scheme (CIS) update

Patrick Crookes considers the forthcoming changes to CIS from 6 April 2021, looking at the impact to both the construction sector and organisations with significant construction spend.

Tax in the construction sector is very much in the spotlight. With the implementation of the domestic reverse charge effective from 1 March 2021, and the impending introduction of the off payroll workers legislation from 6 April 2021, it would be perhaps forgiven for the forthcoming changes to CIS from 6 April 2021 to have fallen off the radar!

I have considered the impact of arguably the two most pertinent changes included in the draft legislation concerning CIS, effective from 6 April 2021.

Cost of materials

A subtle change of wording can have a lasting impact. At the time of writing (February 2021) s.61(1) of Finance Act 2004 states:

"*On making a contract payment the contractor must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to **any other person** of materials used or to be used in carrying out the construction operations to which the contract under which the payment is to be made relates.*"

However, from the 6 April 2021, this section of the draft legislation will read:

"*On making a contract payment the contractor must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to **the sub-contractor** of materials used or to be used in carrying out the construction operations to which the contract under which the payment is to be made relates.*"

The impact?

The amendment now makes it clear that **only** the sub-contractor who **directly** incurs the cost of materials purchased will be able to claim a deduction from any payments under CIS.

This is a significant change to the legislation as HMRC seek to bring clarity to the extent to which subcontractors with net payment status can claim deductions for the cost of materials and reduce the level of tax deductions made.

It brings into focus the area of material deductions, which is one of the most difficult areas of compliance for contractors operating within the scheme, as set out in last year's Employment Taxes Voice magazine: https://www.taxadvisermagazine.com/article/construction-industry-scheme-cis-—-'material-difference'.

It should not be underestimated how big a change this amendment will now have on the sector. As an example:

Company A is an electrical contractor, and is registered as a subcontractor for CIS, with payment under deduction at 20%. Over many years Company A has been engaged by contractors to supply and fit fire protection systems in commercial buildings. Payment for the work is £10,000 and Company A has provided evidence to the contractor that the materials incurred in undertaking the works are £3,000. Therefore, CIS deductions have been made to date for £1,400 (£10,000 - £3,000 @ 20%).

This work is of a specialist nature, and Company A engages Company B to supply and install the system.

Under the legislation from 6 April 2021, Company A will no longer be allowed a material deduction for materials in this instance, as Company B is the subcontractor who directly incurs the cost of the materials for the work undertaken. From 6 April 2021, the contractor will be required to operate CIS on the full payment to Company A, and therefore CIS deductions of £2,000 will be made.

The above is an example of one payment but across a number of payments from 6 April 2021, this will result in cash flow issues for the subcontractor. When you also factor in that Company A will no longer be charging VAT for standard rated supplies from 1 March 2021, the cash flow implications of this legislative change could be very problematic for smaller entities further down the construction supply chain who do not qualify for gross payment status.

HMRC have long contended that their interpretation of the legislation has always been that the subcontractor directly incurring the costs is the only person that can claim a deduction for material costs, however this has not been consistently applied and the current legislative wording is very much open to a different interpretation

The solution?

Given the legislative change now makes a somewhat grey area of CIS more clear cut, one option might be to consider lowering the threshold for the gross payment status turnover test (currently £100,000) to allow smaller businesses to receive payment gross provided they meet the compliance and business tests. Perhaps the incentive to receive gross payment status will help HMRC increase tax compliance in the sector given this is a key test for subcontractors to receive gross payment status. As making tax digital is rolled out to those subject to income tax and potentially also corporation tax, HMRC will have greater visibility over the direct tax liabilities of smaller businesses. This may make it easier for the Government to contemplate a reduction of the gross payment status threshold.

Deemed contractors

The draft legislation from 6 April 2021, will also revise the definition of a deemed contractor for CIS purposes.

Under the existing legislation, most organisations (other than those carrying on a business including construction operations and certain other specified organisations) will only be required to register as a deemed contractor for CIS where at any time construction expenditure is greater than £1 million on average over the period of 3 years ending with the end of the last period of account ending before that time.

Under the draft legislation from 6 April 2021, this category of organisation will now become a deemed contractor where construction expenditure exceeds £3 million during a 12 month period.

As an example:

A company incurs construction expenditure during the last three financial years as follows:

y/e 31 December 2018 - £950,000
y/e 31 December 2019 - £875,000
y/e 31 December 2020 - £1,500,000

Under the existing legislation, the registration point for registration as a deemed contractor will be from 1 January 2021 as the average construction expenditure will be more than £1 million on average over a 3-year *period at 31 December 2020.*

However, if we used the definition of a deemed contractor as per the draft legislation (effective 6 April 2021), there will be no registration requirement as the Company does not incur construction expenditure of more than £3m during a 12-month period.

The impact?

This appears a welcome change for non-construction businesses, however this should be welcomed with caution!

Firstly, although it may prevent a registration requirement, it may actually expedite the point of registration as this is now an expenditure review over any 12 month period rather than at the financial year end. Therefore, if a non-construction business does not monitor its construction expenditure on an ongoing basis and misses the point in which the £3 million threshold is exceeded, they will have missed the contractor registration point under CIS. HMRC can issue late filing penalties for this failure, and if this includes payments made to net payment subcontractors, a loss of tax to the exchequer will also be at stake.

Secondly, under the current legislation under s.59(3) of Finance Act 2004, an organisation will remain registered as a deemed contractor under the scheme until their construction expenditure falls to less than £1,000,000 in each of three successive years beginning in or after that period of account. However, the draft legislation effective from 6 April 2021, appears to replicate the deregistration point for a deemed contractor to that of a mainstream contractor, meaning an organisation can only exit from the scheme at the point they cease to incur construction expenditure. Given there will always be an element of construction work to undertake, i.e., repair and maintenance work, reaching this de registration point may never arrive! Therefore, this transitional provision seems unduly harsh on non-construction businesses with declining construction expenditure.

The solution?

Firstly, HMRC will have new powers, which legislates existing guidance, to provide a grace period of up to 90 days to those contractors who inadvertently or unexpectedly breach the new deemed contractor threshold.

This will give impacted organisations time to set up processes to enable them to operate the CIS rules effectively. However, such powers are at the discretion of HMRC, and there is no wording to suggest that the grace period can be applied retrospectively. Ultimately, this will not prevent the consequences for failure to register if an organisation is not properly monitoring expenditure levels.

Secondly, we await the publication of HMRC guidance around the new changes, especially the de-registration point for deemed contractors from 6 April 2021, to provide clarity on whether registration as a deemed contractor will have as lasting implications as the draft legislation suggests.

Summary

In less than 6 weeks between 1 March 2021 and 6 April 2021, the landscape of the construction sector will change significantly from a tax perspective. This will have implications for all entities operating in the sector and will shape the engagement of subcontractors indefinitely.

Crucially, from a CIS perspective, the engagement of subcontractors without gross payment status will become a problematic area if details around the level of material costs and the person incurring the costs are not forthcoming between parties in the construction supply chain.

The cash flow implications for smaller subcontractors should not be understated, and when coupled with the VAT domestic reverse charge, a revisit of the qualifying conditions for gross payment status would be a welcome easement for all parties concerned.

We hope the updated CIS guidance on when deemed contractors are required to register and deregister provides greater clarity on the points mentioned above, particularly in that the level of construction expenditure will invariably fluctuate for deemed contractors, because it is incidental to be business rather than its main purpose.

Patrick Crookes

Patrick is a Senior Manager in the Employment Tax Team at Mazars, with over 13 years' experience advising clients across all sectors on employment tax and construction industry scheme compliance. Patrick is a chartered tax adviser and a member of the Employment Taxes Committee of the Chartered Institute of Taxation. Patrick can be contacted at patrick.crookes@mazars.co.uk or on 07468 359 485.

Termination Payments – recent changes, but don't forget Rule Number 1

Paul Tucker discusses discusses termination payments and a reminder of the changes that have occurred in the past three years

The tax treatment of termination packages is complex. There have been some significant changes over the past few years. In particular:

- From 6 April 2018
  - The introduction of the Post Employment Notice Payment (PENP) charge; and
  - The legislation in respect of injury to feelings
- From 6 April 2020
  - New National Insurance (NI) legislation

Rule Number 1

It is always important to remember the first rule. **The £30,000 tax exemption is not always due!**

Consider each element

Employers should always consider how is the termination package made up? It is likely that different parts will be subject to different tax and NI treatment. HM Revenue and Customs (HMRC) will look at each element and ask:

1. Is it earnings, including contractual Payments In Lieu Of Notice ("PILON") – under S62 ITEPA 2003?
2. Is it a payment for a restrictive covenant – under S225 ITEPA 2003?
3. Is it in respect of an Employer Financed Retirement Benefit Scheme – under S394 ITEPA 2003?

It is only any remaining amount that is potentially eligible for the exemptions under S401 ITEPA 2003 (most commonly, the £30,000 tax exemption).

The PENP challenge

Having decided how much is eligible for an exemption, it is then necessary to navigate the first major piece of new legislation to be introduced for many years. Is any of the payment taxable and liable to NI as Post Employment Notice Pay (PENP)?

Many articles have been written about PENP and the calculations are sometimes complex, but it is important to remember why the change was made. The simple answer is that the change, which arose as a result of an Office of Tax Simplification review, was to level the playing field in respect of notice periods. Historically, in broad terms, a non-contractual PILON used to be eligible for the tax exemption (often using what many of you may fondly remember as the *Gourley* principle). A contractual PILON was always taxable and liable to NI.

In broad terms, if there is a contractual PILON the amount of the PENP will usually be zero, as the PILON will be taxable as earnings under S62 ITEPA 2003 (point 1 above). However, employers must always calculate the amount of the PENP as in some cases they will be different (for example in salary sacrifice cases).

Injury to feelings

There has always been a debate about the tax treatment of payments for injury to feelings. The key question to address is whether it is connected to the termination or not. HMRC confirm in their Employment Income Manual at paragraph 12965 that if the payment is solely attributable to discrimination occurring before the termination of employment they should accept that it is not connected with the termination and is outside the scope of S401 ITEPA 2003 (thus not taxable).

However, a number of taxpayers have claimed that the payment was potentially eligible for the complete tax exemption available under S406 ITEPA 2003 (for death and disability payments). New legislation was introduced from 6 April 2018 specifically excluding injury to feelings from the S406 ITEPA 2003 exemption.

Death or disability

Whilst on the subject of S406 ITEPA 2003, it is always important to consider the reason the employee is having their employment terminated. If it is as a result of death or disability then the payment may be eligible for the complete tax and NI exemption (rather than the £30,000 exemption). To be eligible for the disability exemption, in broad terms (as set out in the case of Hasted v Horner (67TC439) and summarised in HMRC's Employment Income Manual at paragraph EIM13630):

- There must be an identified medical condition that prevents the employee from carrying out the duties of their employment; and
- The payment must be made on account of that disability and nothing else.

The rules are potentially complex, but the amounts payable (and therefore the tax and Employers' NI) could be considerable. Employers sometimes only apply the £30,000 tax exemption when calculating the PAYE deductions, rather than risk making a mistake and facing a significant liability for failing to operate PAYE correctly. They would then advise the employee to make a claim on their own personal tax return if they considered the exemption under S406 ITEPA 2003 was available.

Prior to the change in the NI rules from 6 April 2020, that was often a sensible approach, as there was no NI on payments taxable under S401 ITEPA 2003. However, from 6 April 2020 with the Class 1A Employers' NI charge on the excess over £30,000, see note below, it is worth considering carefully the exemption in more detail, as an overly cautious approach could result in not only the employee paying too much tax, but also the employer paying too much Class 1A NI.

In cases of doubt, HMRC do offer the opportunity to obtain clearance via their non-statutory clearance team.

Continuing benefits – reports to HMRC

If an employee is provided with continuing benefits, such as medical insurance for six months after leaving, these are likely to be eligible for the tax exemptions under S401 ITEPA 2003. The tax exemptions are given against cash amounts first and then non-cash benefits. However, care should be taken to ensure that benefits are attributed correctly (pre-termination contractual benefits and those that are part of the termination package). HMRC's Employment Income Manual at paragraph EIM12815 provides further detail.

If the package is taxable (as it exceeds the exemption) and is made up of a cash amount (eligible for the £30,000 tax exemption under S401 ITEPA 2003) and benefits, then a report must be made to HMRC by 6 July after the end of the year for which the benefit is provided. HMRC guidance at their Employment Income Manual Paragraph 13844 onwards gives more detail (including the content of the report and frequency).

The report is important, but not all employers are aware of it, as it ensures HMRC are aware of the taxable benefit. There is no P11D requirement for a continuing benefit provided on termination so without the report HMRC would simply have to rely on the employee reporting the benefit on their return. A copy of the report is typically also provided to the employee.

Class 1A National Insurance

This major change was introduced from 6 April 2020. Payments eligible for a tax exemption under S401 ITEPA 2003 will be liable to Class 1A Employer only NI on the excess over £30,000.

This increases the cost for employers in relation to any element of a package that is eligible for a termination payment exemption under S401 ITEPA 2003 (including continuing benefits) in relation to the excess over £30,000.

To further complicate matters in some cases the liability is collected in different ways:

1. Compensation payments and benefits as part of the termination are subject to Class 1A NI via payroll and the Real Time Information process.
2. Class 1A NI on continuing benefits is payable via the P11D(b) process.

HMRC's CWG5 – guide to Class 1A NI Contributions includes a section on termination payments and some useful examples.

The Class 1A liability and reporting requirements are probably best explained in an example.

Comprehensive example of Class 1A NI payment and reporting requirements

1. **The facts**
   a. Employee salary £75,000 per annum, paid monthly
   b. Six month notice period
   c. Employment terminated on 31 December 2020 after employee worked their notice
   d. The employment is not being terminated on the grounds of ill health.
   e. Termination package
      i. Compensation for loss of employment £75,000 paid 31 March 2021
      ii. Gift of company car valued at £15,000 on 31 March 2021
      iii. Medical insurance cost £1,000 per month for 10 months to 31 October 2021
2. **The tax and NI treatment of the package**
   a. Consider each element of the package
      The employer checks each element and none are taxable as either:
      i. Earnings; or
      ii. A payment for a restrictive covenant; or
      iii. As part of an Employer Financed Retirement Benefit Scheme
      The total package should therefore be taxable under S401 ITEPA 2003
   b. Is anything taxable and liable to Class 1 NI as PENP?
      The employee worked their notice so PENP is zero.
   c. What termination tax exemptions are due?
      The total package should be eligible for the £30,000 tax and Class 1A NI exemption.
   d. How will the £30,000 tax exemption be applied?
      The £30,000 exemption will be applied to the compensation payment of £75,000, leaving the following liable to tax and Class 1A NI:

Compensation - £45,000 (£75,000 - £30,000)
Value of car provided as part of package - £15,000
Medical insurance for 10 months - £10,000 (1 January 2021 until 31 October 2021)
Total taxable and liable to Class 1A NI = £70,000

e. Payments to HMRC and reporting requirements

i. 2020/21

- Compensation payment:
  £30,000 – via payroll free of tax and any NI
  £45,000 – via the payroll subject to tax and liable to Class 1A NI
- £15,000 car as part of termination package:
  Tax
  a. Payable via Self Assessment.
  b. Employer required to report the benefit to HMRC by 6 July 2021 for tax purposes
  c. Copy of report given to employee
  Class 1A NI
  Payable via payroll.
- £3,000 medical insurance continuing benefit:
  Tax
  a. Payable via Self Assessment.
  b. Employer required to report the benefit to HMRC by 6 July 2021 for tax purposes
  c. Copy of report given to employee
  Class 1A NI
  Payable via P11D(b) process.

ii. 2021/22

- £7,000 medical insurance continuing benefit:
  Tax
  a. Payable via Self Assessment.
  b. Employer required to report the benefit to HMRC by 6 July 2021 for tax purposes
  c. Copy of report given to employee
  Class 1A NI
  Payable via P11D(b) process.

Paul Tucker

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Company Cars – Practical Advice on Reporting 2020/21 & beyond

David Chandler looks at some practical difficulties for employers when it comes to reporting company cars, especially electric and hybrid vehicles

From 2002 through to around 2015, the taxation regime for company cars was a relatively benign subject, with employees choosing the most CO2 efficient car, which invariably was a diesel, and employers putting the information on P46(car) forms and annually on the form P11D. Simple.

However, over the last few years things seem to have got increasingly confusing for both employees and employers. We now find ourselves in one of the most difficult, and uncertain, times from a company perspective. The move from New European Driving Cycle ("NEDC") to Worldwide Harmonized Light Vehicle Testing Procedure ("WLTP") has caused unintended consequences; the ban on petrol/diesel cars from 2030 means we all need to move to electric vehicles ("EVs") – but when? How long will internal combustion engine ("ICE") cars be available for? What is WLTP and what has it done to the reported CO2 of ICE cars? We now have 2 different tables for CO2 depending on when a car's registration date is and what the V5 (the logbook) states for CO2, and a new table for calculating the tax depending on the electric only range if a car has CO2 between 1g/km and 50g/km.

This article isn't going to consider all of the above (it might need a whole magazine) but, given the approaching year end compliance and new tax year, what it does focus on is how exactly do you report your company cars for 2020/21, what are the issues to think about and how do you deal with 2021/22.

Year end

As with any company provided benefits, company cars need to be reported to HMRC. They can either be voluntarily payrolled (once registered) or reported on the P11D at the end of the tax year (along with the P46(car) reporting which should be followed if not payrolling).

Either way, the information that needs to be obtained and used to calculate the cash equivalent value is still the same. HMRC state that it is the responsibility of the company to report the correct information, not the responsibility of the 3rd party providing the benefit.

Failure to get the data from the correct source could lead to filing incorrect data and potentially to an incorrect company car benefit-in-kind being calculated.

What data is required?

For a large number of company cars, the data required remains fairly easy to obtain: registration date (which is now very important as this decides which CO2 table applies), list price, fuel type, availability, CO2, contributions, etc, etc. The one point to note on fuel types is that the only acceptable entries are currently:

- 'F' for diesel cars that meet Euro standard 6d (known as "RDE2")
- 'D' for all other diesel cars
- 'A' for all other cars

No other letters are allowed and P11Ds will be rejected electronically if they are not one of F, D or A.

Care needs to be taken in respect of newer Diesels in respect of ascertaining whether they are RDE2 compliant or not. It should be noted that Mild Hybrids (MHEV) are assisted by an electric system so are not classified as Diesel cars, hence reported under A. The F & D fuel types should be used only for cars that are solely powered by Diesel (which the MHEV is not). To be clear, for example, all new BMW 520Ds from around the middle on 2020 were actually MHEV, although there was no change in what was written on the boot lid.

What about Plug-in Hybrid Electric Vehicles ("PHEVs")?

At the end of March 2020, according to the Society of Motor Manufacturers ("SMMT"), only 13,662 PHEVs were registered. However, this had risen to 66,877 by the end of December 2020. Based on this a sensible estimate would be that there could be 75,000 to 80,000 PHEV vehicles on the road now. Due to the tax advantages behind them, the majority of those will have been provided as company cars.

The new rules states that if a car has a CO2 emission figure of 1-50g/km you will now need to provide the car's zero emission range ("ZER"). This is the maximum distance in miles that the hybrid car can be driven in electric mode without recharging the battery.

Depending on when your car was registered (pre or post 6 April 2020) will determine whether the ZER will be measured under the NEDC (pre-6 April 2020) or the WLTP (on or after 6 April 2020). Under WLTP, the test is undertaken on an exact vehicle, as items such as wheel size, or optional extras such as a sunroof will impact the range of that car.

The biggest issue to that is where do you find the ZER information? Unfortunately, the ZER is not contained on the V5 document, where all of the other legislative information can be obtained. The only available place is on a document called a Certificate of Conformity ("CoC"). This document is often only produced in hard copy and delivered with the vehicle when it is purchased.

HMRC have very recently advised the following:

- If you are leasing the vehicle, you should get this new data item in the same way you currently receive your Company Car Tax reporting data from the car leasing firm or fleet provider. If this information is not available, you can get the ZER figure via the car's manufacturer.
- If you own the vehicle, the ZER figure can be found on your vehicle's CoC.

Differences between manufacturers and leasing companies means that this information may be very difficult to find. Given there are circa 75,000 PHEVs on the road (most of which are company cars), this is likely to be a problem for many companies. Anecdotally I have seen varied approaches from leasing companies already in this regard, from some having a good handle on the data, to others who are likely to struggle when we reach P11D season. There are some companies who may be able to provide this information by data mining several sources, although this may be at a cost.

In addition, this issue is not going away because the information will be needed next year and the year after and so on. As more PHEVs become available this issue is likely to grow.

If you can get hold of the CoC, the ZER can be found as follows:

- before 6 April 2020 (NEDC) the 'electric range' within section 49.2 on the CoC should be used
- from 6 April 2020 (WLTP) the 'equivalent all-electric range' ("EAER") within section 49.5.2 on the CoC should be used

One final confusing point, if it isn't already, is that on some certificates the ZER may actually be displayed in kilometers, and so the figure will need to be converted into miles and rounded-up to the nearest mile before updating this field on the P11D.

As we all move to EVs in the future simplicity may yet return, but until then we have to ensure our compliance is as robust as it can possibly be.

David Chandler

David has over 20 years of Employment Tax experience covering practice, industry and dealing with HMRC – helping clients to manage their compliance, planning and tax risks. The majority of his career in the big 4, he focuses on using technology to help deliver tools and services to clients in the Employment Tax and HR arena, especially around company cars, benefits and communication to employees.

Living Accommodation – Changes to the Tax Treatment for Employees and Retired Employees

Susan Ball and Lee Knight consider the benefit in kind treatment where an employer provides its staff, or their family or household, with living accommodation, both in respect of the living accommodation itself and the associated benefits (such as utilities, furniture, and other services paid for by the employer), as well as the treatment of former employees who remain in the accommodation after they have retired.

There are two significant recent developments that impact these individuals:

1. The change to the rules, from April 2021, whereby the 'representative occupier' (RO) concession has been removed, such that some employees will become taxable on accommodation benefits going forward.

2. The clarification from HMRC that the employer-financed retirement benefits scheme (EFRBS) regulations (SI 2007/3537) only extend to the statutory exemptions under s99 ITEPA 2003 for accommodation available by reason of employment to retirees (subject to certain conditions being met) did not and does not include those covered by the RO concession and has not since 2006.

What is the representative occupier concession?

The RO concession is an extra statutory concession based on the rules which applied prior to the current tax rules for accommodation coming into force in 1977, in line with discussions in Parliament at the time, as recorded in Hansard. These rules had applied to what were called representative occupier posts that existed before 6 April 1977. The concession allows the accommodation to continue to be treated as exempt in line with the pre 1977 rules, provided the post continues and circumstances remain unchanged. It also applies to new employees who take on an existing post regarded as carrying representative occupier status.

A representative occupier post is a post occupied by an employee who:

- resides in living accommodation provided rent-free by the employer (or by a third-party by reason of the employment);

- as a condition of their contract of employment, is required to reside in that particular living accommodation and is not allowed to reside anywhere else; and

- occupies the accommodation for the purposes of the employer, the nature of the employment being such that the employee is reasonably required to reside in it for the better and more effective performance of the duties.

Where the post meets these criteria and has continually done so since 1977, the concession has allowed for the accommodation concerned to be provided to the employee free of income tax and National Insurance contributions (NIC).

Many organisations that have been in continuous existence since 1977 could have agreements with HMRC that the concession applies and covers particular posts or groups of employees.

Whilst many employers had been expecting a review of the tax and NIC treatment of accommodation since the HMRC/HM Treasury call for evidence published in December 2015 and previous reports by the Office of Tax Simplification (OTS) on employee benefits and expenses, the change to remove the concession could not have come at a worse time for those adversely affected by it. Many readers will also remember requests made in responses to the call for evidence to have grandfathering provisions for the RO concession, but no such grandfathering rules will apply.

What statutory exemptions for accommodation are continuing?

The current statutory tax exemptions, which will continue to apply, cover situations where:

- the provision of accommodation is necessary for the proper performance of the employee's duties (s99(1) ITEPA 2003 – EIM11341 onwards);
- the accommodation is provided for the better performance of the duties of the employment and the employment is one where it is customary for employers to provide living accommodation for employees (s99(2) ITEPA 2003 – EIM11346 onwards); or
- there is a special threat to security and the employee resides in the accommodation as part of special security arrangements (s100 ITEPA 2003 – EIM11361 onwards).

The concern now is that HMRC is likely to challenge the use of the 'customary' exemption, as it has already done in the higher/further education sectors in 2019. Consequently, employers seeking to use the exemption are likely to face an uphill struggle in demonstrating that it applies, especially where they do not have adequate records of the duties undertaken to demonstrate better performance. We know from various HMRC reviews over the last 10 years that the odd evening of late-night working is not sufficient to meet the requirements.

How do employer's value the accommodation benefit?

The rules for valuing living accommodation for benefit in kind purposes are often complex and can depend on a number of factors, including whether the property is owned or rented by the employer, its gross rateable value under the old system of domestic rates, and whether it is considered an 'expensive' property for benefit in kind purposes.

For example, under the current rules, if a property is owned, the cost of the accommodation impacts the calculation of the taxable benefit. Where the cost is more than £75,000 (cost for this purpose includes expenditure incurred in acquiring the interest in the property, plus the cost of any improvements, less any contributions by the employee), the chargeable benefit is determined based on the old rating value, plus an additional charge relating to the cost over £75,000. See EIM11428 onwards.

So, to conclude, the removal of the concessionary tax exemption for representative occupiers from 6 April 2021 could result in a costly taxable benefit implication for employees, and costly NIC implications for employers.

Employer-financed retirement benefits schemes: excluded benefits: living accommodation and related benefits

Where the exemption in s99 ITEPA 2003 has operated to exclude accommodation as a taxable benefit for an employee, the provision is also an excluded benefit post retirement under SI 2007/3537, where:

- an employee continuously occupied the accommodation or similar accommodation for a period of five years immediately prior to retirement; and
- they continue to occupy the same or similar accommodation after retirement.

See EIM15022.

This rule applied from 2006 but had retrospective effect. It was long thought that this included those covered under the RO concession, but HMRC has confirmed, despite extensive representations by the CIOT and other representative bodies, that this is not the case, meaning that retired employees living in accommodation provided by their former employer who were only non-taxable because of the RO concession when they were an employee should have had a taxable benefit reported since 2006. See EIM11336.

The CIOT, with others, is now lobbying for a change to the EFRBS regulations (SI 2007/3537) to request that those previously covered by the RO concession remain exempt, but as it currently stands tax is due.

What should employers do now?

To recap, the removal of the concessionary tax exemption for representative occupiers from 6 April 2021 and the confirmation that the exemption in the 2007 EFRBS regulations (SI 2007/3537) does not extend to those who were exempt under the RO concession could result in costly tax implication for employers and employees, costly NIC implications for employers and potentially onerous reporting obligations.

We would recommend employers urgently:

- identify which employees were covered by the RO concession;
- review this group of employees to establish if any of them might be covered by one of the other statutory exemptions highlighted above (and check the evidence is available to support such a claim);
- review any HMRC agreements (or previous HMRC compliance review documentation) on accommodation and associated costs to check what exemptions apply – i.e., who was covered by the s99(1) & (2) ITEPA 2003 rules and whether the same conditions still apply, as well as the basis of any chargeable benefit;
- identify which employees have been offered a cash alternative or different pay scales to live in/out and when, and make sure it is clear how the optional remuneration (OpRA) rules might apply;
- ascertain records of the costs of all accommodation provided (identifying each property separately), including details of any improvements made over the years;
- consider whether they need to amend any employees' contract terms (employment contracts or licences to occupy) or move people to different accommodation;
- consider what records are needed to demonstrate, in the future, why the exemption continues to apply, such as rotas, call out logs etc;
- review long-term accommodation plans and objectives and plan future accommodation provision remembering that it is possible, in a few years time, that the taxable benefit calculation might be amended to be based on market value/market rent;
- make sure they communicate what is happening to all relevant employees; and, of course
- keep an eye out for further developments.

Susan Ball and Lee Knight

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Consultations and Submissions

CIOT Employment Taxes Committee – Public submissions – March 2020 – February 2021

Spring Budget 2020	05/05/2020
Taxation of coronavirus support payments	12/06/2020
Finance Bill 2020	08/06/2020
Tackling Construction Industry Scheme abuse	27/08/2020
Supporting veterans' transition to civilian life through employment	08/10/2020
Tackling disguised remuneration tax avoidance	20/10/2020
Pensions tax relief administration	20/10/2020

Contact Us

Suggestions?

If you have any suggestions for further articles, please let us know:

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