Volume 34 ■ Part 12 ■ June (2) 2013

Practical TAX Newsletter

'Reasonable belief' for ESC A19

Andrew Rainford recounts a success story.

The concession

Most tax advisers are aware of the potential value of extra statutory concession A19 (ESC A19). Broadly, this gives HMRC the discretion to effectively 'write off' tax that is correct and technically due, but only in circumstances in which HMRC failed to make timely use of information.

The guidance notes to ESC A19 indicate that this condition will be met if information is received by HMRC showing that extra tax is due, and it takes more than 12 months from the end of the tax year in which the information is received, to notify the taxpayer of any arrears. There is also an exceptional circumstances section which allows tax to be written off even if it was notified within these time limits, where there have been repeated failures to use information, and tax arrears have been allowed to build up over two or more tax years.

At first glance this seems like a very powerful tool (as indeed it is, in the right circumstances), as it puts a lot of responsibility for correct administration on the shoulders of HMRC. There is therefore naturally a provision which pushes the ball back to the taxpayer. In order for the concession to apply, it must be demonstrated that: the taxpayer could **reasonably have believed** that his or her tax affairs were in order.

That seems fair – after all it would preclude persons from deliberately concealing income or claiming reliefs they were not entitled to in the hope that HMRC did not discover the 'error' within the prescribed time limit, allowing it to write off the liability. I don't think anyone would disagree with the importance of having some kind of measure in place such as this. The problem is that in practice, HMRC seem to use this clause like an automatic bar to ESC A19 applying at all. Indeed The Guardian newspaper offers a template letter for the concession on its website, with the warning that in all likelihood the first letter will be rejected due to the 'reasonable belief' requirement.

It must be demonstrated that the taxpayer could reasonably have believed his or her tax affairs were in order

It's an all too familiar problem where HMRC is required to apply subjective judgement in this way. It would appear that what HMRC deems to be 'reasonable' can in practice fall far short of justifiable legitimate expectation to be placed on a taxpayer.

My experience

I recently fought a drawn-out campaign to have ESC A19 to apply to a client, which eventually succeeded. I believe this demonstrates the associated problems of using ESC A19, and gives me hope that, if handled correctly and persistently, more cases which are initially rejected will have this concession available.

CONTENTS

Claiming relief under ESC A19
Andrew Rainford tells his story
page 89

Class 2 NICs
Sarah Bradford sets out the rules
page 91

Newsfile
Finance Bill 2013
Incorrect PAYE codes
Recognised stock exchange
CT payments
Trail commission
Consultations
HMRC publications
RTI Guidance
Forum minutes
Regulations
page 93

Points of Law
SDLT sub-sale scheme fails
Loan notes loss scheme fails
Employer should have deducted PAYE
page 95

Mr M's returns

Initially I was asked to help Mr M who had been made redundant. He had received a substantial termination payment (to which the £30,000 exemption applied), and on the advice of his financial advisor, promptly squirreled £70,000 into a SIPP in 2011/12. As he had not made significant pension contributions previously, the carry forward provisions applied, and the whole amount qualified for higher rate relief. Mr M was not at the time in self-assessment. On my advice, Mr M registered for self-assessment from 2011/12, and I duly submitted his return, realising a tax overpayment of some £32,000.

Whilst doing this, I noted that class 1 NIC had been applied to the excess over £30,000 of his termination payment by his employer incorrectly (only tax should apply - it's not earnings for NIC purposes), and after a bit of wrangling, secured a further refund of around £3,200 for him. In discussion with his IFA, it was mentioned that he had made some pension payments in previous years that he had not been given relief for. I gathered the pension payment history and submitted an overpayment relief claim for the three previous tax years.

Why had the department taken so long to act on this information and update my client's P11D record?

The demand

After around six weeks, we received a demand for £3,300 from the PAYE office, with a letter acknowledging the credit for pension relief, but explaining that a reconciliation to the P11Ds had been carried out on each tax year, and it was discovered that the PAYE codes issued had not been correctly issued to capture the P11D benefits (mainly a company car and fuel). Indeed adjustments were present; they were just insufficient: "Please pay the tax due within 30 days."

I replied requesting ESC A19 to be applied to the tax demanded. After all HMRC had been in possession of the (correct) P11D forms for 2008/09 for over three years. Why had the department taken so long to act on this information and update my client's P11D record?

HMRC reaction

The response was a flat rejection. ESC A19 could not be applied because Mr M could not have reasonably expected his tax affairs to be up to date. No real clarification as to that, and a helpful sentence at the bottom stating that the amount was payable in full, and that a cheque was acceptable (good to know eh?). Naturally I appealed against this decision, stating that HMRC had included what appeared to be a spurious amount in their PAYE code, and had not updated the information when the P11Ds were filed. I also pointed out that Mr M had contacted them back in 2009 to discuss his PAYE code as he did not understand the numbers contained. "Please review your decision in light of the circumstances Ms Tax Inspector."

Rejection no. 2

A second rejection letter arrived two weeks later, stating that the original decision stood. Apparently the fact that Mr M had taken the time to phone HMRC proved that he could not have believed his affairs were up to date, and also that as the taxpayer received a P2 notice, he should have ensured it was correct.

I immediately called the tax inspector and pointed out that; following a call with a competent HMRC officer to put right a problem that he himself had taken the initiative to point out, any reasonable taxpayer would end that call in the more than reasonable belief that their tax affairs were up to date. Also I questioned whether mere sight of a P2 coding notice issued at the start of the year would be sufficient to allow a taxpayer to reconcile the complicated value ascribed to a car benefit, particularly when the P11D with the correct information may not be received by him until July the following year. The reaction of HMRC was: "Not interested. Pay up or it's going to collections."

The tax inspector did at least agree to suspend collection of the tax demanded until I could, as I informed her, gather the paperwork and request an internal review of the case from the specialist HMRC unit in Londonderry. I wrote with all correspondence, and explained how I thought it was ludicrous that the taxpayer contacting HMRC somehow 'incriminated' him and precluded ESC A19 from being available.

The result

It has taken some time (four months) but I finally received a call acknowledging that yes, ESC A19 does indeed apply to Mr M's case, and pursuit of the £3,300 will now be dropped. My client is a very happy man, and is about £40,000 better off than before he met me. My boss is happy with the glowing testimonial the client has promised for the firm's website. I'm just happy the common sense result has finally prevailed and I can put a big rubber band round the file and slip it into the archive drawer!

The lesson

The moral of this story has to be: never give up. If you genuinely believe you have a case then always push it to the next level, and never take anything stated as a fact if there is any doubt - always request the internal review if you reach an impasse. ESC A19 is an extremely powerful tool available to us (by HMRC no less) to question and query decisions which become bogged down in administrative arguments. In this case, we had privately agreed that Mr M would accept the decision from

The moral of this story has to be: never give up.

the review - we were not going to take it to the tax tribunal.

Looking to the future

I notice this decision, following around eight months of strong worded negotiation, arrived in the very month that HMRC announced that they would not be overhauling the wording of ESC A19 as originally announced. Initially it was felt among the profession that the 'clarification' exercise was simply a smokescreen to remove certain forms (eg P14s) from being 'relevant information' for the purposes of the concession.

As we all know when HMRC talks about clarifying, and simplifying, it usually means tightening up. Of course it is not always wrong to do so, as there are occasions when badly drafted guidance can give rise to artificial tax advantages which were never intended.

Following an online petition by tax barrister Keith Gordon, and criticism from the tax profession generally, HMRC has now conceded the point, and will instead apply the concession A19 more consistently. It will also introduce the concept of taxpayer responsibility into the HMRC Charter ('Your Charter'). Whether or not the application of the concession is granted more readily in truth, or if in reality HMRC will simply point to the new provisions in the Charter to deny the relief, is for the moment a matter of speculation. TPT

Andrew Rainford

Andrew Rainford is Head of Taxation at Salisbury & Company Chartered Accountants, specialising in advising private clients and owner managed businesses. He can be contacted on 01745 583606 or Andrew@salisburys.com

Class 2 NICs

Sarah Bradford explains who pays class 2 NICs and why.

Class 2 National Insurance contributions (NICs) are flat-rate contributions payable by the self-employed. Unlike Class 4 contributions which are payable by reference to profits, the payment of Class 2 contributions earns entitlement to a range of benefits, including the state pension.

Liability to pay Class 2

A person who is 16 and over but under state pension age is liable to pay Class 2 contributions for each week that he or she is self-employed unless excepted from liability. The requirement to pay Class 2 contributions applies to individual partners in a partnership as well as to sole-traders. This includes sleeping and inactive partners, who HMRC have confirmed are liable to pay Class 2 NICs from 6 April 2013.

Those offering their services through a company do not pay Class 2 contributions. Instead, Class 1 contributions are payable on any salary paid by the company. This applies even if the company is a one-man company.

The liability to pay Class 2 NICs continues as long as the self-employment continues, even if the worker is on holiday. The liability remains even if a person has no work for a particular week, provided that the business has not ceased and the worker remains available for work. Further, the weekly rate is the same regardless of whether the worker spends one day a week on his self-employment or seven. However, a person may be excepted from liability for a week in which he is incapable of working due to illness.

Example

Billy works as a self-employed painter and decorator. During 2013/14 he takes a week's holiday in May 2013, two weeks' holiday in August 2013 and two weeks' holiday over the Christmas period. He has no work for a week in July 2013, for two weeks in November 2013 and for a week in February 2012. Despite the fact that he does not actually work for nine weeks in 2013/14 he is liable to pay Class 2 contributions for the full 52 week period as the self-employment continues throughout the whole tax year.

Small earnings

Self-employed people with low earnings may be excepted from the liability to pay Class 2 NICs. The exception applies if earnings from self-employment are below the small earnings exception limit (SEE), which is set at £5,725 for 2013/14. The exception is not given automatically and must be applied for on form CF10, which can be downloaded from: www.lexisurl.com/cf10 .

To qualify for the exception, the self-employed person must be able to show that they had earnings below the limit for the previous tax year and/or are expected to have earnings below the limit for the current tax year. Where a person has more than one self-employment, the earnings from the different self-employments are added together. In this way a loss from one self-employment may be set against a profit from another, removing a person from the requirement to pay Class 2 NICs, even if their earnings from one self-employment exceed the SEE limit.

A person may be excepted from liability for a week in which he is incapable of working due to illness.

If the application is successful, HMRC will grant a SEE certificate, which is valid for three years, unless a shorter period is warranted. The certificate will run from the start of the tax year if the application is made before the 6 April. Where the application is made after the tax year has started, it can be backdated 13 weeks. It is important therefore that self-employed earners ensure that applications are made promptly. Once granted, the certificate remains valid until it expires or the person's earnings reach the SEE threshold.

Other exceptions

A person may be excepted from the liability to Class 2 contributions for any week in which they:

- are in receipt of incapacity benefit;
- incapable of work for the whole week;
- in receipt of maternity allowance;
- in prison or in detention in legal custody; or
- in receipt of a carer's allowance of unemployability supplement.

No contributions are payable by persons under the age of 16 or by those who have reached state pension age. Married women with a valid reduced rate election are also exempt from paying Class 2 contributions.

Notifying liability

A person must notify HMRC when they start self-employment. A single registration procedure applies for both tax and for NICs and a person can register:

- online (see www.lexisurl.com/sereg);
- by telephoning the newly self-employed helpline on 0845 915 4515; or
- by completing form CWF1 (see www.lexisurl.com/cwf1).

A person must notify liability for Class 2 NICs no later than 31 January after the end of the tax year in which the liability arose. Penalties may be charged for a failure to register on time, set as a percentage of the lost contributions.

A person must also tell HMRC when their self-employment ceases to bring the liability for Class 2 contributions to an end.

A person must tell HMRC when their self-employment ceases to bring the liability for Class 2 NICs to an end.

Rate of Class 2

Class 2 contributions are set a flat weekly rate, which for 2013/14 is £2.70 per week.

Share fishermen pay a slightly higher rate, set at £3.35 per week for 2013/14, reflecting their entitlement to contribution-based jobseeker's allowance.

Volunteer development workers do not have to pay standard Class 2 contributions but can opt to pay the volunteer development workers' rate (£5.45 per week for 2013/14) in order to maintain their contributions record.

Paying Class 2 voluntarily

Class 2 contributions are cheap. For 2013/14 a weekly Class 2 contribution costs £2.70, £10.85 less than a Class 3 contribution at £13.55 per week. If a person is eligible but not liable to pay Class 2 contributions (for example because their earnings are below the SEE) it makes sense to maintain their contributions record by paying Class 2 NICs rather than Class 3. Doing this will save over £550 a year.

A person may choose to pay Class 2NICs voluntarily whilst living abroad, if the eligibility conditions are met. Paying contributions while abroad may help maintain entitlement to certain benefits in EEA and reciprocal agreement countries, entitlement to certain benefits on return to the UK and entitlement to a full state pension.

To contributions voluntarily when abroad, a person must either have lived in the UK for a continuous three-year period at any time before making the payments and/or paid NICs in the UK for three years or more before going abroad. Provided these conditions are met, a person can pay Class 2 contributions when employed or self-employed abroad as long as they were ordinarily employed or self-employed immediately before they went abroad, or registered as unemployed immediately before going abroad having previously been ordinarily employed or self-employed.

A person cannot pay Class 2 contributions voluntarily while abroad if they are liable to pay Class 1 contributions. A person can apply to pay contributions abroad on form CF83, *Application to make National Insurance Contributions abroad*. This form can be found at the back of booklet NI138, *Social Security Abroad* (see www.lexisurl.com/NI138).

How to pay

Class 2 NICs can be paid either by direct debit or in response to payment requests issued by HMRC in April and October. Where the direct debit option is chosen, payments can either be made monthly or six monthly. The collection dates for 2013/14 are set out here: www.lexisurl.com/paynic.

Where payment is not made by direct debit, the due dates are aligned with those for income tax self-assessment of 31 January and 31 July. The payment request issued in October 2013 will cover the period 7 April 2013 to 5 October 2013 and payment is due by 31 January 2014. The payment request to be issued in April 2014 will cover the period 6 October 2013 to 6 April 2014 and payment must be made by 31 July 2014. Payments made in response to a payment request can be made in various ways including internet banking, over the counter at a bank or post office or by post.

Where Class 2 contributions are paid voluntarily by someone abroad, payment can be made either by direct debit every four or five weeks or annually. A person who is abroad can nominate an agent to make their payments for them.

newsfile

Finance Bill 2013

The Public Bill Committee of the House of Commons has agreed to government amendments in the following areas:

- Sch 14: R&D credits;
- Schs 16 & 17: video games tax relief.

Clauses 29 to 50 and schedules 13, 15 and 18 to 21 have been passed without amendment. Government amendments have been tabled for:

Capital allowances

This amends CAA 1002, s 538 to block claims for capital allowances on plant and machinery which are covered by contributions from another business.

SDLT

Amendments are made to FA 2003, s 45 to block sub-sale and transfer of rights tax avoidance schemes with effect from 21 March 2013.

Employee shareholders

Schedule 22 of the Finance Bill is amended to exempt from income tax and NICs the cost of any employer-funded advice given to the employee relating the proposed employee shareholder agreements. The employee will pay no CGT on the disposal of shares acquired under this process.

Incorrect PAYE codes

The transition to RTI is resulting in incorrect PAYE codes being issued to employers, as we reported in TPT34-11. HMRC has acknowledged that up to 40,000 employees may have received the wrong PAYE code. In a statement HMRC said it is working with those the small numbers of employers affected, to enable them to rectify their employee records.

David Heaton, tax partner with Baker Tilly commented; "This problem particularly affects employment agencies who often have employees with zero hour contracts who are not necessarily paid every week. The agency might not have included these people in the first EAS or first FPS. It also impacts on smaller employers which operate both weekly and monthly payrolls under the same PAYE references." He added: "HMRC is relying on employers and their employees spotting errors in their codes, and calling HMRC to get the code fixed. But many employees don't understand their PAYE code, and there is no easy way for employers to work out which codes may be wrong".

Recognised stock exchange

The GXG Official List has been recognised as a stock exchange with effect from 16 May 2013 for the purposes of ITA 2007, s 1005 and for inheritance tax purposes.

CT payments

Where companies carry-back a loss for relief in an earlier accounting period, they are requested to complete the 'repayment for an earlier period' box on the CT return. The bank account details must be supplied to enable HMRC to make the tax repayment by BACS.

Where corporation tax is payable, the company should use the correct 17 digit payment reference number as part of the banking instructions to pay HMRC. There is a different reference number for each accounting period so using the correct number will ensure the payment is allocated to the relevant accounting period.

Trail commission

Revenue & Customs Brief 04/13 set out new requirements to deduct tax from payments of trail commissions from fund managers to their customers (see TPT34-07), with effect from 6 April 2013. However, this policy has been changed for payments made to non-resident investors, as it was considered to have a profoundly negative impact on the international competitiveness of the UK funds industry.

The Authorised Investment Funds (Tax) Regulations 2006 and the Offshore Funds (Tax) Regulations 2009 have been changed to remove the requirement to deduct tax for investors in offshore funds.

Consultations

Social investment tax relief

This is a joint consultation by HM Treasury and the department for Business Innovation and Skills (BIS) into a new tax relief to encourage private investment in social enterprise. The tax reliefs on offer would include income tax relief on qualifying investments and capital gains tax reinvestment relief in a manner similar to EIS reinvestment relief. Comments are requested by 6 September 2013.

Loan relationships

The government wants to modernise the rules governing the taxation of corporate debt and derivative contracts. The goals are to reduce uncertainty, improve structural and legislative clarity, and reduce administrative burdens, as well as reduce the scope for abuse. Comments are requested by 29 August 2013.

IHT for trusts

The following areas of trust administration have been proposed for simplification:

Class 2 contributions which are paid late may have to be paid at a rate higher than that applying at time at which they were originally due. The rate will depend on when they are paid and the reason they are paid late. If the payment is made before the end of the tax year following that for which they were due, payment is made at the rate for the contribution week to which they relate. However, if payment is made after this, the contribution is due at the highest rate in the period from the contribution week for which they were due and the week in which they were paid, unless the contributor took reasonable care. **TPT**

Sarah Bradford

Sarah Bradford is director of WriteTax Ltd: www.writetax.co.uk, tel: 01280 823 607 sarah.bradford@writetax.co.uk

- calculation of IHT charges;
- standardising the treatment of accumulated income; and
- aligning filing and payment dates for ten year and exit charges within the self- assessment framework.

Comments on these proposals are requested by 23 August 2013.

Off-shore intermediaries

Legislation to ensure the correct PAYE and NIC deductions are made by offshore employment agencies will be included in Finance Bill 2014 to take effect from April 2014. The detailed design, operation and impact of these draft proposals are out for consultation until 8 August 2013.

Exchange gains and losses

This technical paper sets out proposed changes to the corporate tax rules on the taxation of exchange gains and losses which apply when assets being disposed of are matched by a hedging instrument. The changes are needed to ensure the rules will operate consistently with the approach taken in Finance Bill 2013. The current rules are in SI 2002/1970. This consultation includes draft regulations which will amend those principal regulations. Comments are requested by 2 July 2013.

Taxation of banks

Comments are requested by 16 August 2013 on proposals to strengthen the code of practice on tax for banks. From 2015 HMRC will publish an annual report on the operation of this code, which could name banks who have not fully complied with their obligations under the code.

CASCs

Comments are requested by 12 August 2013 on proposals to change the qualifying conditions for community amateur sport clubs.

HMRC publications

HMRC Service delivery

The joint initiative on HMRC service delivery has made its quarterly report in which it highlights forthcoming improvements to the debt management process including:

- a telephone number for tax agents to call when a debt collector has arrived at a client's premises demanding tax due;
- new technology for debt collection officers to enable them to be appraised of the taxpayer's latest tax debt position.

A trial is also underway to test the electronic submission of tax repayments (R40 cases), using existing software.

SRT online tool

The tax residence indicator (TRI) is an online tool which can be used to check if an individual is resident in the UK for income tax and capital gains tax purposes for 2013/14 and later years. The current TRI on the HMRC website is a pilot version, which will be updated later in 2013. HMRC warn that it may contain inaccuracies, and reliance should not be placed on the tool until at least the Finance Bill 2013 has been passed.

Advisory fuel rates

The advisory mileage rates for reimbursing the cost of fuel used for business journeys in company cars have been revised from 1 June 2013. Employers can use the previous mileage rates until the end of June. The new rates are:

Engine size	Petrol	LPG
1400 cc or less	15p	10p
1401–2000cc	17p	12p
Over 2000cc	25p	18p

Hybrid cars are treated as petrol or diesel for these rates.

Engine size	Diesel
1600 or less	12p
1601–2000cc	14p
Over 2000cc	18p

SEIS questions

The following question in the new list of FAQs on the seed enterprise investment scheme (SEIS), published by HMRC is causing some confusion:

Q. So people who lend money to my company won't get tax relief?

A. No, they won't.

If an individual lends money to a SEIS company, he is not precluded from subscribing for SEIS shares and receiving tax relief, because of the existence of that loan. As long as the connected party rules are not broken an SEIS investment can be made alongside a loan. Also an individual who works full time for the SEIS company, or holds more than 5% of the company, could qualify for tax relief on interest paid on a loan used to lend to the company.

HICBC authority

Form CH995 should be used to authorise a tax adviser to act and deal with HMRC in respect of matters relating to the high income child benefit charge.

DTT passport scheme

The double taxation treaty passport scheme applies to loans made on or after 1 September 2010 by overseas corporate lenders. The scheme has been improved from April 2013 to allow it to apply to US bodies known as LLCs or S-corporations.

MGD late returns

Machine games duty (MGD) returns are required for periods commencing from 1 February 2013, but there have been difficulties with the HMRC online reporting system which have prevented taxpayers from submitting the first return and payment. HMRC will not collect penalties for late submission of the first MGD returns which were due by 30 May 2013, although the penalty may be shown on the taxpayer's account. Penalties may be charged for late payment of MGD and for errors in a MGD return.

Notice 452: Machine Games Duty has been revised and replaced.

CFC guidance

Updated draft guidance for the controlled foreign companies (CFC) rules was published on 31 May. It includes details of the clearance procedures and the adaptation of the CFC rules for the foreign permanent establishment exemption.

RTI Guidance

Casual harvest workers

Form P38A was previously used to report payments made to casual workers such as harvest workers and shoot beaters

points of law

E Allchin v HMRC TC2613

SDLT sub-sale scheme fails

In 2007 Edward Allchin purchased a property in 2007 for which the Land Registry recorded the purchase price as £2.45 million. However, Allchin submitted a form SDLT1 declaring the purchase price as £356,250. When HMRC discovered this, they issued a discovery assessment charging SDLT on the difference.

Allchin appealed, contending that he had taken advantage of a SDLT mitigation scheme provided by Big Bracket Tax Planning Ltd, which took advantage of sub-sale relief under FA 2003, s 45(3). The scheme provided that the property was purchased by a limited company (Alpine), and Allchin was subsequently substituted as the purchaser by a deed of novation.

The First-tier Tribunal dismissed the appeal, applying the principles laid down in *Vardy Properties v HMRC* [2012] SFTD 1398, and holding that FA 2003 s 45 did not apply. Judge Khan held that Alpine 'never acquired a chargeable interest in the property nor was it involved in a land transaction'. There was 'no evidence that the

who are hired for periods of less than two weeks. Under RTI the form P38A has been abolished, and where a PAYE scheme is in place, all payments to casual workers need to be reported under RTI.

Technically as each day's work is a separate employment HMRC's guidance indicates that a separate return must be submitted for each day that payments are made, even if those returns are submitted weekly under the concession for cash paid workers. HMRC has suggested two alternative solutions, which should both be operated with an NT tax code:

1. Record each hire of the casual worker as a new employment, and show both a start date and finish date on each FPS. Show the pay frequency for the payments as made on an 'irregular' basis.
2. Treat the amount paid as a one-off payment in a continuing employment. The employer must ensure that if further payments are made to the same individual for a separate period of employment that any previous payment(s) to that person made for that tax year are excluded; ie the taxable pay in the pay period and taxable pay to date in this employment are the same for that further payment.

However, the payroll software may restrict the number of new employments which can be opened in one tax year, as each new employment is treated as a new member of staff. Also not all payroll software will permit recording of one-off payments. Where a casual worker is taken on for more than two weeks he must be treated as a normal employee with PAYE applied according to his code.

Annual schemes

HMRC said it would be able to accept new registrations for annual PAYE schemes from 17 May 2013 (see TPT34-09). However, this fix to the RTI software will not be operational until at least late July 2013.

Earlier year update

A new version of the HMRC Basic PAYE tools software has been released (no.13.1.13122.102) which includes the functionality to produce an earlier year update (EYU). Employers who were in RTI for 2012/13, and who need to make adjustments to the reports for that year after 19 April 2013, need to submit an EYU.

The normal deadline for submitting an EYU is 19 May after the tax year end. However, as the EYU was not available until 30 May 2013 when using the basic PAYE tools software, the employer is permitted to submit an EYU by 14 June 2013. If this date is achieved HMRC will cancel any penalty for late submission of end of year returns for 2012/13.

NI numbers

In TPT 34-11 we reported that HMRC had been sending employers 'corrected' NI numbers with no suffix letter. This problem has now been resolved and HMRC is now sending employers the full NI number.

Forum Minutes

IR35 forum

This forum met on 29 April 2013 and discussed the following:

- application of guidance for government departments taking on contractors;
- agencies asked to act as guarantors of tax assurance;
- planned review of IR35 pilot;
- IR35 applying to officer holders;
- contract review service was unable to give an opinion in 88% of cases.

Regulations

FATCA regs and guidance

The International Tax Compliance (United States of America) Regulations 2013 will implement the UK/US agreement on FATCA. The draft regulations together with draft guidance notes on implementation and an impact assessment are open for comments. The regulations are expected to come into effect from mid-August 2013, and will have effect for financial accounts held at 31 December 2013.

Stamp duties

The Stamp Duty and Stamp Duty Reserve Tax (Collective Investment Schemes) (Exemptions) Regulations (SI 2013/1401) allow various transactions in securities by an authorised contractual scheme, and transactions in units of such a scheme, to be exempt from stamp duty and stamp duty reserve tax with effect from 28 June 2013.

The Stamp Duty and Stamp Duty Reserve Tax (ICE Clear Europe Limited) Regulations (SI 2013/ 1382) prevent multiple charges to those stamp duties arising when share trades carried out on the LIFFE trading platform are cleared through Ice Clear Europe Limited acting as central counterparty. These regulations come into effect for instruments executed on and after 1 July 2013.

novation took place between the two transfers of money'. On the evidence here, Allchin had provided the whole of the purchase price. Therefore 'the entire amount of £2.45 million is the chargeable consideration'.

GR Bretten v HMRC TC2604

Loan notes loss scheme fails

GR Bretten QC defended himself in this case. In 2003 he established two UK trusts. The trustees of trust 1 were himself and his daughter and he was the life-tenant. The trustees of trust 2 were himself and his son in law, his daughter was the life-tenant.

Bretten acquired six loan notes from OCL, an unconnected company, for their face value of £500,000. The notes carried the right of early redemption for the first 14 days at their issue price or very slightly less. After 14 days, they were redeemable at the noteholder's option for 5% of the issue price (ie £25,000). Bretten granted a call option over the notes to trust 1. This trust exercised the call option, received £499,500 from OCL, and was substituted for OCL as the issuer of the loan notes.

On the same day Bretten gave the loan notes to trust 2, so that at the end of 2002/03, trust 1 held £499,500 while trust 2 held the loan notes, which could be redeemed for £25,000. In 2004 Bretten submitted an amendment to his 2002/03 tax return, claiming that the loan notes were 'relevant discounted securities', and that he had incurred a loss of £475,000 on his transactions in them.

HMRC began an enquiry and rejected the claim. Bretten appealed, contending that his reason for putting his assets into a trust was not tax avoidance, but was 'to avoid potential creditors'. The First-tier Tribunal dismissed his appeal. Judge Mosedale observed that, if Bretten's only concern had been asset protection, he could have transferred the £500,000 directly into a trust, and found that 'the loan notes transactions were undertaken solely for tax avoidance reasons'. She found that OCL 'did not require a loan of £500,000' and its 'grant of the call option and its issue of the loan notes was done solely to facilitate (Bretten's) tax avoidance scheme'.

Furthermore, 'the main purpose of the 14-day redemption clause was tax avoidance and in particular to establish that the loan notes were issued at full value. The scheme was pre-planned and the dramatic drop in value from £499,500 to £25,000 on day 15 was engineered on the face of the documents.' There had been a series of transactions, under which Bretten had transferred money to a family trust. Viewed realistically, Bretten had acquired the notes for £25,000 and had not made a loss on them.

H Tailor v HMRC TC2614

Employer should have deducted PAYE

Miss Tailor was employed by Enterprise Ltd and from February 2005 to May 2007 she saved in its SAYE share option scheme. In 2007 Enterprise was the subject of a management buy-out, following which it ceased to be a listed company and, by virtue of ITEPA 2003, Sch 3 para 19, could no longer operate an approved SAYE share option scheme.

Tailor exercised her share options and sold her shares to Kirk Newco Plc which was conducting the management buy-out. Tailor realised a gain of £8,410. The issue under appeal was whether this gain should have been taxed under PAYE by Enterprise, or taxed on Tailor's self-assessment tax return, with a credit given for the PAYE which should have been deducted.

The SAYE rules normally prohibit the exercise of options within three years of the grant, unless there is a change in control of the company resulting from a 'general offer' (which is not defined). As Tailor exercised her share options within three years of the grant of the option, the resulting gain was liable to income tax. On her 2007/08 tax return, Tailor declared that she had made a gain but did not declare any tax as due.

In 2011 HMRC issued an amendment to Tailor's return charging income tax on the gain. Tailor appealed, contending that the tax due should have been deducted under PAYE and should be treated as having been deducted at source under SI 2003/2682, reg 185(6).

The First-tier Tribunal accepted this contention and allowed Tailor's appeal. It held that the evidence that the offer by which Kirk Newco acquired the shares from the 'non-management' employees was 'not an offer to acquire the whole of the issued ordinary share capital of Enterprise or to acquire all the shares in Enterprise which are of the same class of the shares in question' for the purposes of ITEPA 2003, Sch 3 para 37. Therefore ITEPA 2003, s 701(2)(c) did not apply, and Enterprise should have deducted tax from the gain under PAYE. Judge Brannan held that, since 'PAYE should have been deducted by Enterprise in respect of the option gain but was not so deducted, the appellant cannot be assessed on that gain under the self-assessment rules'.

Editor: Rebecca Cave
Production: Heather Pearton

Published twice monthly by LexisNexis,
Halsbury House, 35 Chancery Lane,
London, WC2A 1EL.

Telephone: 020 7400 2500
Fax: 020 7400 2842
Email: Rebecca@taxwriter.co.uk

© Reed Elsevier (UK) Limited 2013

ISSN 1475-2352

This publication is intended to be a general guide and cannot be a substitute for professional advice. Neither the authors nor the publisher accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this publication.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission in writing of the publishers.

Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire.

FSC
www.fsc.org
MIX
Paper from responsible sources
FSC® C020438

LexisNexis®