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Tax Bites

Welcome to the latest edition of RPC's Tax Bites - providing monthly bite-sized updates from the tax world.

As always, if there are any areas you would like more information on (or if you have any questions or feedback), please let us know or get in touch with your usual RPC contact.

News

HMRC issues 'nudge' letters for remittance basis charge

Following a recent **briefing**, HMRC has issued a new batch of 'nudge' **letters** to individuals with a non-UK domiciled status who it believes may not have declared the correct income/gains on their tax returns, or failed to pay the remittance basis charge.

The individuals being targeted are those that HMRC believes became liable to pay the remittance basis charge in 2019/20. The remittance basis is an alternative tax treatment available to individuals resident, but not domiciled, in the UK, who have foreign income and gains.

Records that indicate individuals who have claimed to be non-UK domiciled but have lived in the UK for seven out of nine years or twelve out of fourteen years prior to the tax year starting 6 April 2019, are likely to receive a nudge letter. These individuals will be asked to amend their 2019/20 tax return, or explain why no amendment is required. Whilst there is no legal obligation to respond, failure to do so may trigger an enquiry and appropriate expert advice should therefore be sought.

HMRC updates its guidance on enabler penalties

HMRC has updated its **guidance** on penalties under the enablers of defeated abusive tax avoidance schemes regime to incorporate, with only minor changes, the part of the draft technical guidance published on the Spring 2021 Tax Day (23 March 2021) that dealt with the changes to enabler penalties made by the Finance Act 2021.

HMRC will be able to use its information gathering powers contained in Schedule 36, Finance Act 2008, to check penalty liabilities for tax arrangements before it is established that such arrangements are ineffective. Information notices will only be issued where HMRC considers the arrangements may be abusive tax arrangements and has no reason to suspect the recipient has enabled those arrangements. HMRC will have the power to contact and investigate other potential enablers. The restriction on requiring tax advisers to produce documents or information in response to information notices will also be removed for enquiries into enablers.

High Court provides guidance on duty of care of accountants when acting as an introducer to tax schemes

In **Knights v Townsend Harrison Ltd [2021] EWHC 2563 (QB)**, it was held that a firm of accountants was not liable for introducing its clients to certain tax avoidance schemes.

The accountant's clients failed to show breach of duty and causation regarding the schemes. In particular, alleged negligent advice was not provided, there was no assumption of responsibility by the firm for the introduction, and its clients failed to show that they would not have taken part in the schemes in any event.

The High Court suggested that accountants may owe a duty not to introduce clients to unsuitable tax avoidance schemes and there may be circumstances where the nature of the professional relationship would oblige an accountant to provide advice relating to tax schemes (and the implications of entry into such schemes). However, this would only occur where the accountant had assumed responsibility for such matters, and reasonably foresaw that the client would rely on their advice.

HMRC publishes guidance on joint and several liability notices for directors and other individuals

HMRC has published **guidance** on Schedule 13 of the Finance Act 2020, which enables it to issue joint and several liability notices (**J&S notices**) to directors, shadow directors and certain other individuals who are involved in tax avoidance, tax evasion or phoenixism.

HMRC may issue J&S notices to individuals for facilitating tax avoidance and tax evasion where there is a serious possibility of a company entering an insolvency procedure (for example, HMRC has good reason to believe an insolvency event is likely and there is clear evidence for this) and a serious possibility of a penalty or tax liability going partially or entirely unpaid (for example, directors stripping a company of its assets, resulting in inadequate assets to pay a penalty).

HMRC may issue J&S notices for phoenixism where an individual has a relevant connection (**RC**) to the new company which carries on similar or the same trade as the earlier company. Where the character or appearance of the new business resembles the previous business, this will be an indication of similarity. Individuals acting in good faith with no material influence over the actions of the company will not be issued a notice despite an RC. Turnaround specialists are likely to have an RC but will not be issued with J&S notices where they are genuinely trying to save the company. Companies in genuine members' voluntary liquidation will also not be given a J&S notice if outstanding tax liabilities are settled within one year of the winding up process commencing.

Case reports

Vermilion Holdings – Court of Session confirms that the grant of a share option by an employer was not an employment related securities option

In *Vermilion Holdings Ltd v HMRC* [2021] CSIH 45, the Court of Session (by majority) allowed the taxpayer's appeal and confirmed that an option granted by a company as part of a refinancing exercise was not an employment related securities option, for the purposes of section 471, Income Tax (Earnings and Pensions) Act 2003.

It is relatively rare for the appellate courts to deliver a split decision and Lord Doherty (one of the two judges in agreement) noted in his opinion that he was initially inclined to the view that the appeal should be refused, before changing his mind upon reflection and having read the other Lords' opinions in draft. Given the far-reaching consequences of this judgment, which reverses what had generally been the previously accepted interpretation of sections 471(1) and 471(3), and the ambivalence of the Court of Session, it is likely that HMRC will seek to appeal the judgment to the Supreme Court.

You can read our commentary on the judgment **here**.

Professional Game Match Officials - Court of Appeal sends football referees case back to the Tax Tribunal

In *HMRC v Professional Game Match Officials Ltd* [2021] EWCA Civ 1370, the Court of Appeal (**CoA**) held that the First-tier Tribunal (**FTT**) and the Upper Tribunal (**UT**) both erred in law in their approaches to the question of 'mutuality of obligation' and upheld the UT's decision that the FTT had erred in its approach to the issue of control. The case has been sent back to the FTT to reconsider whether there was sufficient mutuality of obligation and control in the individual contracts for them to be contracts of employment.

Whether an individual is employed (under a contract of service), or self-employed (under a contract for services), for tax purposes is a question that continues to present difficulties for taxpayers, HMRC and the courts alike. This is the latest decision in a long-running dispute between

Professional Game Match Officials Ltd (**PGMOL**) and HMRC as to whether payments made to a group of elite football referees should be properly taxed as payments to employees (with the associated tax and national insurance contributions). Both the FTT and the UT concluded that the referees and other match day officials were not employees of PGMOL.

However, the CoA held that both the FTT and the UT had erred in law on the key questions as to the presence of sufficient (i) mutuality of obligation; and (ii) control in the contracts between the referees and PGMOL.

As each of the decisions in this case demonstrate, whether an individual is, or is not, an employee for tax purposes, remains a highly fact-dependant question.

You can read our commentary on the decision **here**.

DNAe Group Holdings – Higher R&D relief claims available

In *DNAe Group Holdings Ltd v HMRC* [2021] TC/201804348, the FTT held that 125% research and development tax credits for an SME was available, despite the company being the strategic investment vehicle of a larger group.

Whilst the FTT set out criteria that could be considered in determining whether a company qualified as a venture capital company, it stressed that the criteria referred to should not be used as a 'tick box' exercise in other cases. The circumstances of a company's investment will therefore need to be carefully considered in each case.

Companies that have received investment from venture capital vehicles forming part of a larger group and who have claimed relief at the lower rate (following HMRC's guidance in relation to strategic benefit in paragraph CIRD92100 in its Corporate Intangibles Research and Development Manual) may wish to consider whether any additional relief is available.

You can read our commentary on the decision **here**.

And finally...

*Deciding what constitutes tax evasion and the 'enabling' of tax evasion is not always easy. We have written an **article**, which has been published in Taxation magazine, which considers these very issues, together with HMRC's strategy in this area. We hope you find it useful. If you have any questions or queries on the subject, please get in touch.*

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