UK Tax Round Up

July 2022

Welcome to July's edition of the UK Tax Round Up. This month has seen an interesting decision of the First-tier Tribunal on the salaried member rules as they apply to asset manager LLPs, a surprising decision on the terms required in intragroup/shareholder loans for transfer pricing purposes and the first GAAR panel opinion defeat for HMRC. In addition, the government published the scope of tax provisions to be covered in the Finance Bill 2022-23 and has reported on its consultation on codifying employment status.

Finance Bill 2022-23

Draft provisions published

On 20 July, or Legislation Day, the government published draft provisions to be included in Finance Bill 2022-23 together with accompanying explanatory notes, other supporting documents and consultation responses.

The majority of the tax-related provisions have been announced previously, including in relation to the implementation of OECD Pillar Two (global minimum tax proposal) and the reform of R&D relief. There were also some new announcements, including amendments to the application of the recently introduced qualifying asset holding company (QAHC) rules to asset holding companies owned by investment funds.

Amendments to QAHC rules

Amendments will be made to the QAHC rules which clarify how the rules will apply to QAHCs owned by investment funds which are structured with a number of “parallel” fund vehicles or with a master/feeder structure. The regime as introduced contains some limitations on how an asset holding company owned by an investment fund structured with a number of “parallel” fund vehicles or using a master/feeder structure could qualify as a QAHC. In particular, one of the main conditions to qualify for the regime is that the asset holding company’s owners are at least 70% “Category A” investors. In the context of investment fund structures, the most useful Category A investor is a “qualifying fund”. That is a collective investment scheme (as defined for UK purposes) which meets a “genuine diversity of ownership” (GDO) test. Under the existing rules, individual fund vehicles in a parallel or master/feeder structure are considered separately. This raised concerns that asset holding companies owned by investment funds structured in this way would not (or might not) qualify as QAHCs. The changes to be introduced seek to address this concern by applying the GDO test to parallel fund and master/feeder fund structures by looking at the parallel/master fund vehicles in aggregate with the other parallel funds or the feeder funds in the structure and treating all of the vehicles as satisfying the GDO requirement when one of them does. For further information on these rules and the Finance Bill 2022-2023 amendments to the regime, please see our recent blog post on this topic.

Global minimum tax rules

The implementation of the OECD Pillar Two global minimum tax rules will be effective for multinational enterprises with fiscal years beginning on or after 31 December 2023 (following the recent announcement on its delay from 1 April 2023). The rules will introduce a new tax on UK parent entities within a multinational group operating in the UK and other jurisdictions, broadly, where global group revenues exceed €750 million. The objective is to ensure that multinational enterprises operating in the UK pay a global minimum level of tax. A top-up tax will be charged on UK parent entities with non-UK subsidiaries where the group’s profits arising in the subsidiaries’ jurisdiction(s) are taxed at below the minimum rate of 15%. This will require the group to calculate its effective tax rate in each jurisdiction in order to determine whether the rules will apply. Notably, there are exemptions for entities that are typically exempt from corporation tax, such as pension funds and international organisations, as well as for investment funds and real estate investment vehicles.

The complexity of the rules is highlighted by the draft provisions running to 116 pages with 107 clauses and four schedules.

R&D tax reliefs

Changes to the research and development (R&D) tax reliefs for companies will apply for accounting periods beginning on or after 1 April 2023. The changes apply to both the R&D expenditure credit and the scheme for small and medium enterprises. The reforms include the introduction of new categories of qualifying expenditure for data licenses and cloud computing services and relief for subcontracted work and externally provided workers will be limited to focus on UK activity. Further, all claims for R&D reliefs will have to be made digitally and claims will have to include a breakdown of costs across the qualifying categories and provide a description of the R&D.

UK Case Law Developments

Salaried member rules for asset manager LLPs

The First-tier Tribunal's (FTT's) decision in *BlueCrest Capital Management (UK) LLP v HMRC* is the first time that the UK's salaried member rules have been considered in the context of an asset management limited liability partnership (LLP). BlueCrest was engaged in providing hedge fund investment management services and HMRC claimed that certain of its members should be treated as salaried members and so taxed as employees. The FTT found that those of BlueCrest's members who were responsible for managing significant investment portfolios were not salaried members by virtue of having 'significant influence' over the affairs of the LLP but that other members who were not engaged in portfolio management did not have significant influence for these purposes and were salaried members.

The significant influence conclusion for those members responsible for significant portfolio management is in contrast to HMRC's public guidance, that only members involved in the top level management of an LLP should treated as having significant influence over its affairs, and will be welcomed by asset management LLPs. However, it is considered likely that HMRC will appeal the decision, so further clarity in this area might be given by the courts in due course.

By way of recap, the salaried member rules treat an individual member of an LLP as if they were an employee for income tax purposes unless the member meets one of three tests set out in the rules. The rules are intended to identify LLP members who are more akin to employees than traditional partners in a partnership.

For an LLP member not to be treated as a salaried member, they must meet at least one of the following conditions:

- Condition A – it is reasonable to expect that less than 80% of the total amount to be paid by the LLP to the member in the following tax year will be “disguised salary”;
- Condition B – the LLP member has “significant influence” over the affairs of the LLP; or
- Condition C – the LLP member makes a sufficient capital contribution to the LLP.

The BlueCrest decision considered Conditions A and B as applied to the relevant members.

In respect of Condition A (disguised salary), the BlueCrest LLP members who were responsible for portfolio management were paid annual variable amounts which were calculated, broadly, by reference to the performance of the investment portfolio that they were responsible for. Other LLP members (not responsible for portfolio management) were paid variable amounts based on their individual performance metrics. The FTT found that, in order for the variable pay element not to be disguised salary, it was necessary for there to be a demonstrable link between the LLP’s overall profits, on the one hand, and the basis of the calculation of the variable remuneration, on the other, although the bar to showing that there was such a link was set low.

BlueCrest had changed its formal remuneration policy applicable to the members involved in portfolio management in early 2014, just before the introduction of the salaried member rules. It had added a term that stated that the additional, variable remuneration of each member would be scaled back if the overall profits of the LLP were insufficient to pay all of the portfolio managers the amounts calculated based on the individual portfolio performance formula. The FTT held that this scaling back term was not sufficient to mean that the variable remuneration was not “disguised salary” since it simply stated what would happen in any partnership and there was no evidence that any variable remuneration had ever been reduced because of this term.

In respect of Condition B and significant influence, BlueCrest argued that financial influence as well as managerial influence should be considered “significant” when it was important enough to the LLP’s business. HMRC’s position was that only managerial influence over the overall affairs of the LLP should be considered. The FTT agreed with BlueCrest and found that there is no justification for limiting significant influence “over the affairs of the LLP” to managerial influence, that there does not necessarily need to be influence over the affairs of the LLP as a whole and that financial influence (or influence other than top level managerial) could be over a sufficiently important aspect of the affairs of the LLP to qualify as significant influence for the purpose of the test.

Applying this, the FTT found that the portfolio manager members made key investment decisions daily and their main function was to generate revenue by engaging in the LLP’s core activity and, as such, they exercised significant influence over the affairs of the LLP. Furthermore, it was found that, operationally, they were involved in the sort of activities which a partner in a traditional partnership would have undertaken, including recruitment, identifying and exploiting new business opportunities and managing relationships. In light of this, it was held that certain of the portfolio manager members did have significant influence and, therefore, were not salaried members.

In contrast to this, the “infrastructure” LLP members, who were involved in business support rather than portfolio management activities, were found not to have significant influence based on the evidence provided and the FTT considered that the activities that they were engaged in (legal, risk, HR, finance, tax etc.) were not ones which would have generally been undertaken by partners in a traditional partnership, but, rather, would be undertaken by specialist employees. So, while they contributed indirectly to the operations of the LLP and assisted the portfolio managers in exercising their significant influence, the infrastructure members did not themselves exercise significant influence over the affairs of the LLP, meaning they should be treated as salaried members.

The FTT also considered whether the anti-avoidance provision in the salaried member rules should apply to the change in remuneration policy adopted by the LLP in January 2014. The anti-avoidance provision says that any arrangements that have a main purpose of securing that the rules do not apply to an individual should be ignored when determining whether the rules do apply. The FTT stated (albeit this is not directly relevant to the decision) that had the change in policy terms meant that the variable remuneration was not disguised salary, the anti-avoidance provision would have applied such that the change would have been ignored. It is difficult to extrapolate from this part of the decision quite how broadly the anti-avoidance provision should be applied to changes made to LLP remuneration arrangements with a view to avoiding members being salaried members when those changes are effective in turning what would be disguised salary into something that wouldn't be. HMRC's published guidance on the anti-avoidance rule states that it should not apply to "genuine and long-term restructuring that causes an individual to fail one or more of the conditions" in the rules and it might be that HMRC did not consider the change in January 2014 to be sufficient to equate to "genuine and long-term restructuring" whereas other, more material, changes to remuneration policy would be even if they did have a main purpose of ensuring that a member was not a salaried member.

This decision as to the scope of significant influence will be welcomed by the UK asset management industry, but, as noted, above might well be appealed by HMRC as it gives a materially broader interpretation of Condition B than HMRC has applied to date.

Ramsay principle not applicable to tax avoidance arrangement

In *Altrad Services Ltd and another v HMRC*, the Upper Tribunal (UT) overturned the FTT's decision and allowed the appeal against HMRC's assessment denying increased capital allowances resulting from the implementation of a tax motivated long funding finance lease arrangement intended to increase the appellant companies' (referred to as the taxpayer below) capital allowance claims without any increase in real commercial expenditure. In reaching this conclusion, the UT rejected HMRC's assertion that the so-called *Ramsay* approach should apply in the manner put forward by HMRC to defeat the intended tax consequences of the transaction notwithstanding the parties' acceptance that the transaction had been entered into to secure a tax advantage and that it had been reported to HMRC under the disclosure of tax avoidance scheme (DOTAS) rules.

The decision was based on the particular argument that HMRC had put forward but highlights how the so-call *Ramsay* principle is not one which allows HMRC to ignore purely tax motivated transactions and deny their intended tax consequences but, rather, simply the requirement to apply a realistic view of the facts to a purposive interpretation of the particular tax legislation in question. In this case, that tax legislation was in terms that meant that the tax motivation for and overall terms of the wider transaction were not relevant in deciding whether or not the taxpayer had "ceased to own" the assets that were the subject of the lease.

In *Altrad,* the arrangement in question involved the sale by the appellant companies (referred to as the taxpayer below) of assets to a leasing company for market value, the short term lease of the assets back to the taxpayer for an agreed rental payment and the grant of cross options that would allow the lessor to sell the assets back to the taxpayer of a company in the taxpayer's group to buy back the assets for, broadly, the difference between the original sale price and the rental payments. The intention was that the taxpayer would refresh its capital allowance pool with an amount equal to the price paid to acquire the assets under the option with no corresponding capital allowance disposal value being brought into account applying the detailed terms of the long funding lease rules.

The FTT had held, applying the *Ramsay* principle as argued by HMRC, that there was no disposal (or "cessation of ownership") for the purposes of section 61(1)(a) Capital Allowances Act 2001 (CAA) since there was no legitimate business purpose underpinning the arrangements and, barring unforeseen consequences, the taxpayer would reacquire the assets within a few weeks of selling them. Consequently, there was no entitlement to increased capital allowances because the disposal of the assets and purchase of them on exercise of the option should be ignored. The UT makes clear that the FTT accepted and applied HMRC's argument that the *Ramsay* principle should be applied to determine that the taxpayer did not cease to own the assets for the purposes of section 61(1)(a) and that, therefore, the tax consequence claimed by the taxpayer did not apply (UT emphasis).

The UT accepted that the FTT's conclusion would have been valid if it was correct that the taxpayer had not ceased to own the assets, but considered that the FTT had not interpreted correctly what a cessation of ownership constituted for these purposes of section 61(1)(a) CAA. It was held that, construed purposively, the section requires that a taxpayer has lost legal and beneficial ownership of the asset at a given point in time, without considering the motives of the taxpayer in question or the possibility that the taxpayer might reacquire the asset at some point thereafter.

Notably, the UT acknowledged that it may be a surprising outcome that this arrangement was effective in increasing the taxpayer's capital allowance pool given that it comprised of an artificial series of transactions intended to be undertaken as a whole and without legitimate commercial purpose. The UT made clear, however, that the appeal was successful because HMRC had sought to apply the *Ramsay* principle to the question of whether the taxpayer "ceased to own" the assets and a purposive construction of section 61(1)(a) CAA didn't allow for motive or other related transactions to be taken into account (unless, of course, they had meant that the taxpayer had retained beneficial ownership of the assets).

The decision highlights, as a general matter, that the *Ramsay* approach only requires a realistic view of the facts applied to a purposive construction of the statutory provision in question. If such an approach permits the arrangement to work, whatever its motivations and commercial consequences (or lack of), the *Ramsay* principle does not give not a catch all basis on which to invalidate the relevant arrangement.

Shareholder loan interest deductions denied under transfer pricing and unallowable purpose

In *BlackRock Holdco 5 LLC v HMRC*, the UT has overturned the decision of the FTT and reinstated HMRC's assessment that disallowed all of the taxpayer's (LLC5's) interest deductions on an intragroup loan used to make an acquisition in the US on the basis of both a transfer pricing adjustment and application of the loan relationship unallowable purpose rule in section 441 CTA 2009.

The case related to a structure put in place by BlackRock to finance an acquisition in the US that involved a chain of newly established US limited liability companies (LLCs) including LLC5. LLC5 was resident in the UK and the other companies were resident in the US. All of the LLCs were treated as disregarded entities for US tax purposes. LLC5 raised $4 billion on the issue of loan notes to its parent, BlackRock Holdco 4 LLC (LLC4), in consideration for about $2 billion of cash and shares in the BlackRock group parent. LLC5 then contributed the cash and shares to its new LLC subsidiary which used the cash and shares to make the US acquisition. LLC5 had been included in the structure as a UK resident company to generate a tax deduction in the UK for the loan note interest (and other loan expenses) without generating a matching taxable receipt in the US.

The FTT had allowed the LLC5's appeal against HMRC denial of the deductions on the basis that:

- for transfer pricing purposes it was accepted that the taxpayer could have borrowed the same amount at the same interest rate from a third party lender, albeit that the third party lender would have required a number of group company covenants to be included in its loan which were not included in the LLC5 loan note terms; and
- although LLC5 did have a purpose of securing a tax advantage in issuing the loan notes, it also had a commercial purpose of funding of the US acquisition by its subsidiary and, since LLC5 would have issued the loan notes even if it had not generated a UK tax deduction, none of the deductions should be attributed to the tax advantage on a just and reasonable basis.

In relation to the unallowable purpose element of the decision, the funding structure was very similar to that discussed in the recent FTT decision in *JTI Acquisition Company (2011) Limited v HMRC*, reported in our [May UK Tax Round Up]. While some surprise was expressed about the FTT's decision to disallow all of the deductions in that case applying the unallowable purpose rule, the UT had no difficulty in this case in overturning the FTT's decision and saying that LLC5 should be denied all of its deductions on a just and reasonable basis because the only reason for establishing LLC5 and having it issue the loan notes was to secure the UK tax advantage. The UT considered that the FTT had applied the unallowable purpose and just and reasonable apportionment test incorrectly by treating both as depending on the subjective intentions of LLC5. Rather, the FTT said that the purpose or purposes behind issuing the loan notes was subjective but that, once a tax advantage purpose had been identified, how to apportion the purposes between commercial and tax advantage was objective. The UT then applied a "but for" test and held that LLC5 and the loan notes would never have existed but for the tax advantage. Based on that approach, they apportioned all of the deductions to the tax advantage purpose and none to the commercial purpose.

Of more surprise is the transfer pricing element of the decision. The loan notes issued by LLC5 to LLC4 were on standard intragroup terms with no covenants provided by other group companies to facilitate dividend payments or other terms to ensure that LLC5 had sufficient money to service the loan notes. The FTT had found against HMRC's assessment disallowing the loan note deductions on the basis that LLC5 could have borrowed the same amount at the same interest rate from a third party provided that the third party loan contained the sort of additional covenant protection that a third party lender would require. HMRC argued that this was the wrong comparison to make for the purposes of the test in section 147(1)(d) TIOPA 2010 as to whether the actual provision (the advance of the $4 billion by LLC4 to LLC5 under the loan notes) differed from the provision that would have been made between independent enterprises (the hypothetical third party loan). HMRC argued that the test was how much a third party would have lent on the same terms as the loan notes (that is, with no covenant protection for the lender). The UT agreed with HMRC that the transfer pricing question was whether an independent enterprise would have lent on the same terms as the intragroup loan notes and held that the hypothetical third party would not have lent at all on those terms. The UT disallowed all of the loan note deductions accordingly.

This decision appears to run contrary to general practice in relation to intragroup and other shareholder loans which are generally drafted in reasonably short form terms and do not include the sort of group covenants and protections that a third party lender would require because they are not relevant in an intragroup loan where control over group cash flows and loan servicing are effectively taken for granted.

The decision appears to mean that groups will have to be in a position to anticipate what additional covenants and/or other protections a third party lender would require to make the loan in question and then include those terms in the intragroup/shareholder loan document even though the group companies are likely to agree to include pretty much any term that would be required in a commercially agreed document. As well as raising questions about the transfer pricing efficacy of a lot of intragroup loans that are currently in place, this will simply place additional cost on the process of documenting intragroup and shareholder loans.

Given that this decision appears contrary to longstanding commercial practice, and which might be considered to extend beyond the finance terms referred to in HMRC’s model ATCA, it is to be hoped that it will be appealed and that HMRC will provide some guidance in the near future on the practical implications for intragroup and shareholder loan documents.

Payment to amend pension terms not “from employment”

In *E.ON UK plc v HMRC*, the UT has overturned the previous decision of the FTT and held that a one off payment made by E.ON to its employees for changes to the terms of their defined benefits pension arrangement was not “from” their employment and so was not subject to tax as employment income and so not taxable under PAYE with national insurance contributions.

The case involved a package of changes made between E.ON and is employees who were beneficiaries under a number of pension schemes (the case actually related to one employee and one scheme) under which the employee agreed to changes to his future pension rights and pension payments in consideration for a “facilitation payment” in the context of an overall agreement relating to future pay increases and E.ON agreeing not to make any further changes to its pension schemes and certain other employment related commitments. The future pay increases were only available to employees who agreed to the pension changes.

The FTT agreed with HMRC that the facilitation payment was “from” the employment, and so taxable as employment income under section 9(2) ITEPA 2003, because it related to changes to future rights linked to employment and was part of a package that included the future pay increase. The FTT’s decision was based largely on its interpretation of the decision in the *Tilley* case and its interpretation that the exception from treating payments for changes to contractual rights of employees as being “from” employment extended only to accrued rights and not future and/or contingent rights.

The UT agreed with E.ON and held that the FTT had been wrong in law to limit the *Tilley* decision in that way and that the requirement was to assess, on the facts and circumstances, whether the payment in question, whether made in respect of changes to accrued rights or future rights, was from the employment or from something else. In addition, while it might be relevant to an assessment of the facts that the facilitation payment was part of a package including increase in future pay, there was a requirement to consider the source of each individual element of the package of payments and the FTT had also been wrong in deciding that the facilitation payment was from employment because it was part of the package including an increase in future salary.

Having decided that the FTT had applied the law incorrectly in coming to its decision, it stated that the *Tilley* decision could extend to changes to future rights and that the facilitation payment was derived from the changes to those rights and not from the employment itself.

The case shows that a careful analysis is needed to determine whether payments made to employees should or should not be treated as “from” the employment and so subject to employment tax and that where employees have subsisting rights (accrued or future) it might be, depending on the facts, that payments to amend those rights are not from the employment.

Other UK Tax Developments

GAAR advisory panel finds in favour of taxpayer for the first time

The general anti-abuse rule (GAAR) applies to transactions which are “abusive” and provides a basis to set aside the intended tax consequences of such arrangements if they are considered not to be reasonable (applying a so-called double reasonableness test). Before HMRC can apply the GAAR to an arrangement, the arrangements must be considered by the advisory panel, which gives its opinion as to whether the arrangements in question are or are not a reasonable course of action. Prior to this opinion, the advisory panel had concluded that all of the arrangements put before it were unreasonable and could be counteracted.

The transaction considered in this case involved a subsidiary company (Y) making a loan (with arm’s length interest) to the majority shareholder (M) of the parent company (Z) in order to enable M to repay loans previously advanced to him by Z. This was in order to avoid company Z suffering a “loan to participator” charge under section 455 CTA2010 by repaying the loan from company Z with a new loan from company Y.

HMRC argued that this was an unreasonable course of action and exploited a loophole in the loan to participator rules. The taxpayer’s advisers argued that the making of loans by Y was not abusive and was a perfectly reasonable course of action, even if motivated by an intention to prevent a tax liability arising for company Z.

The panel agreed that the arrangements were “tax arrangements” and that there was what was considered to be a loophole in the loans to participator rules but found that there were no “contrived or abnormal” steps in the transaction. Further, the panel noted that there was still a prospect of a tax charge in relation to the replacement loans from company Y. As a result, the panel concluded that the arrangements constituted a reasonable course of action for the taxpayer to take and could not be counteracted under the GAAR.

It is somewhat surprising that HMRC considered trying to apply the GAAR to this transaction, particularly given that a similar transaction had been unsuccessfully attacked a number of years ago in the *Westmoreland* case in which HMRC tried to apply the *Ramsay* principle to a company making a loan to its lender to allow the lender to satisfy interest payments on an existing loan between the two. It is welcome that, following a run of successful HMRC GAAR challenges of structured tax arrangements involving obviously contrived steps, the panel has put a marker down that the GAAR does not provide a general basis on which HMRC can counteract transactions that HMRC would hope would have been ineffective under the relevant legislation if the “loophole” identified had been covered by the rules.

Proposed reforms to sovereign immunity from UK tax

HM Treasury and HMRC have published a consultation document calling for engagement regarding proposed reforms to clarify entitlement to sovereign immunity and possibly narrowing sovereign immunity from UK direct tax compared to the current position.

Broadly, if the proposals in their current form are adopted, sovereign immunity from direct tax will only apply to passive interest or dividend income, which would represent a large shift from the existing regime. In particular, income and gains arising to a sovereign entity from UK immovable property (including the disposal of shares in UK companies that are “property rich”) and income from UK trading activities may become taxable.

To date, UK sovereign immunity from tax has been implemented by granting foreign sovereigns (including emanations of the state such as state owned funds or bodies corporate) blanket exemption from direct tax liability regardless of the activity undertaken by the sovereign entity (e.g. even where such activities may be regarded as more commercial as opposed to associated with state investment functions). The current UK position differs from, and is more generous than, the equivalent regimes in other jurisdictions where, often, there are limitations on tax exemptions available to state bodies.

In summary, the reforms proposed by the consultation are:

a) codification of the sovereign immunity regime into legislation in order to provide greater clarity and certainty. At present, this is based on case law and HMRC guidance:

b) limitations on the type of income which would benefit from sovereign immunity from direct tax, such that it would only apply to the following categories:

i. income derived from investment, as opposed to trading, activity;

ii. income that arises in respect of investments that are of a more passive nature and that are more commonly held as part of an exercise of sovereign functions; or

iii. income that arises in respect of investments where the sovereign immune exemption balances supporting investment in the UK and delivers fairness between different participants in the UK market.

If these proposals are adopted, income and gains arising to a sovereign from UK immovable property (including the sale of shares in UK property rich companies) and income from UK trading activities would be brought within the scope of UK direct tax. However, it is likely that a transitional regime would be implemented such that capital gains will only begin to accrue from when the regime is enacted;

c) sovereign immunity will only be available following approval of a formal application made to HMRC, and the status will be retained unless there is a change in circumstances; and

d) the existing reporting requirements in the Taxes Acts will apply to sovereign persons with an obligation to file income and corporation tax returns to the extent that they are within the scope of UK direct tax.

The treatment of sovereign immunes as qualifying institutional investors for the purposes of beneficial tax treatment pursuant to various statutory provisions (e.g. the UK substantial shareholding exemption and the new qualifying asset holding company regime) has also been acknowledged in the consultation document as something which requires further consideration. However, it is also noted in the consultation that to maintain the status quo in this regard may undermine the tax collection motives underpinning the proposed reforms.

The consultation closes on 12 September, with a view to HMRC/HM Treasury publishing a summary of the responses received in due course. The new legislation enacting the conclusion of the consultation is currently expected to come into effect from April 2024.

End of the 120 day EMI valuation window

When EMI options are granted it is possible (and advisable) to contact HMRC and agree a current valuation of the shares under option in order to know what the exercise price for the option should be. The value agreed with HMRC remains valid for a period of time to allow companies to grant the options. The period has always been 90 days but in June 2020, in response to the COVID pandemic, it was extended to 120 days

On 14 July, HMRC stated, in its Employment Related Securities Bulletin 44, that the period of validity of an EMI share valuation will revert back to 90 days from 1 December 2022.

Once the window has reverted to 90 days, it will be important for companies that wish to grant EMI options to do so promptly following valuation confirmation from HMRC.

Employment status consultation response

Following on from the Taylor Review and Good Work Plan published by the previous government in early 2018, the Department for Business, Energy and Industrial Strategy (BEIS), HMRC and HM Treasury (HMT) carried out a joint consultation on issues around employment status including adding legislative certainty, which sought to explore how wider employment status reform could operate. In the Good Work Plan, the previous government has committed to legislate to improve the clarity of employment status tests and to work towards alignment between the tests for employment rights and tax.

The government has now published its response to the consultation and concludes that, while improvements could be made to the delineation between the employed, workers and the self-employed and better alignment between employment rights and tax status would be welcomed, now is not the right time to overhaul the employment status frameworks for rights and tax given the current challenges posed by building back the economy following the COVID-19 disruption and the current increased costs for businesses. It states, however, that greater clarity around the frameworks for individuals and employers will be provided by publishing guidance on employment status.

The response also notes that, in the tax context, the majority of employment status cases are simple and clear, and that HMRC's Check Employment Status for Tax (CEST) tool helps support status determinations. However, it also notes that there will inevitably be complex borderline cases and further uncertainty may be caused by the lack of alignment of the status frameworks for tax and employment rights, which means that, in some instances, an individual can hold the status of self-employed for tax but not for employment rights or vice versa. The government acknowledges that this lack of clarity may create fiscal risk for the exchequer, where individuals are misclassified (intentionally or unintentionally) as self-employed. The government also recognises that whilst the employment status frameworks for rights and tax serve different purposes, there could be benefits in greater alignment between the two systems.

Given the number of recent cases on the IR35 rules and employment versus self-employment status and the difficulty of identifying clear distinctions between contrasting decisions, it is to be hoped that HMRC seeks to fill the gap in this area with a clearer approach to the tax status of individuals operating as self-employed.

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