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2017/18 P11D reporting

As recruiting key employees becomes more critical and challenging in an increasingly competitive labour market, a well-defined benefits package can be the deciding factor when it comes to employees choosing between potential employers. HM Revenue and Customs (HMRC) rules on benefits and expenses are complex and having detailed policies and efficient compliance processes are vital to operating these programs.

An annual Form P11D, must be prepared and submitted to HMRC for each employee and director you have provided expenses or benefits to by 6 July 2018 following the end of the tax year. Each benefit and expense (other than those covered by an exemption or taxed via payroll) must be reported on this form.

The employer must also submit Form P11D(b) by this deadline, which is a declaration of total benefits provided to employees and the corresponding Class 1A National Insurance Contribution (NIC) charge. Even where benefits have been taxed via the payroll, the employer must still disclose these on the annual Form P11D(b).

Penalties will arise for late submission of the above forms, starting at an initial £300 penalty for late P11D's and £100 per 50 employees for each month or part month for late P11D(b)'s.

From 6 April 2017 there are new rules on how the taxable value of salary sacrifice schemes (Optional Remuneration Arrangements (OpRAs)), are calculated. The taxable value is now the higher of the cash foregone or the taxable value under the normal 'Benefit-in-Kind' (BIK) rules. This applies to all BIKs including those that were previously exempt such as workplace parking and employers must now report all OpRA's on form P11D. However, the new rules do not apply to pensions, pension advice, childcare, cycle-to-work schemes and cars with emissions of 75g CO_2/km or less.

Brexit

The UK government has stated its ambition to deliver a comprehensive free trade agreement with the EU - what this will look like and mean remains uncertain. Despite this uncertainty, businesses should understand their own interactions with the EU and seek to mitigate supply chain risk by developing contingency plans and exploring alternative procurement options.

Whilst much uncertainty exists, it is important for businesses to take steps now to develop contingency plans, assess the possible risks and harness the opportunities. Rather worryingly, much complacency still exists, with the most recent Business Monitor results released by Intertrade Ireland for Q1 of 2018 indicating that 92% of businesses surveyed, with cross border sales, still had no plans in place for Brexit.[1] With less than 12 months until the official

1 Inter Trade Ireland Quarterly Business Monitor Survery Q1 2018

leave date businesses should utilise all available support. As an accredited Intertrade Ireland advisor, business can also claim financial support of up to £2,000/€2,000 towards professional advice provided by our Brexit specialists.

Requirement To Correct tax due on offshore assets

This new statutory requirement creates an obligation on anyone, who has undeclared UK tax liabilities that involve offshore financial connections, to disclose the relevant information about their non-compliance to HMRC before 30 September 2018. This date coincides with the sharing of financial information by over 100 jurisdictions under the new global standard for automatic exchange of tax and banking information, the Common Reporting Standard (CRS) on an annual basis.

If taxpayers are unsure whether they have undeclared offshore tax, they will need to review their UK tax affairs to ensure that all tax returns are correct and check whether any action is needed to comply with the Requirement To Correct (RTC).

Failure to disclose relevant information to HMRC by 30 September 2018 will result in the person becoming liable to a penalty of between 100% and 200% of the tax involved. Additionally, for the most serious cases additional penalties of up to 10% of the relevant asset value as well as the prospect of being 'named' on a public website will also apply. A further penalty of 50% of the amount of the standard penalty may apply for cases where it can be shown the taxpayer moved assets to avoid having details reported to HMRC under the international agreements on exchange of information.

Provided the taxpayer corrects the position prior to 30 September 2018 the tax and interest will be collected and existing penalty rules will apply.

The RTC rules relate to liabilities to income tax, capital gains tax and inheritance tax involving offshore (non-UK) matters or transfers.

Tax non-compliance involves an offshore matter if the unpaid tax is charged on or by reference to:

- income arising from a source in a territory outside the UK;
- assets situated in a territory outside the UK;
- activities carried on wholly or mainly in a territory outside the UK; or
- anything having effect as if it where income, assets or activities of a kind described above.

Anyone who owns (or previously owned) an interest in assets held offshore, or has a source of income that is offshore, or has moved the proceeds of capital gains offshore, is potentially affected by the RTC.

Anyone in such a position should consider a 'health check' to ensure that they have declared all UK tax liabilities that arise as a result of these offshore assets and if they find that they have unpaid tax liabilities they should come forward and correct them as soon as possible before 30 September 2018.

Public beneficial ownership in overseas territories

Following a recent debate in the House of Commons, the UK government will force the British Overseas Territories (which include the British Virgin Islands, Bermuda and the Cayman Islands) to adopt public registers of company beneficial ownership by 31 December 2020.

This new transparency measure will be introduced by way of an amendment to the UK's Sanctions and Anti-Money Laundering Bill and will bring the British Overseas Territories in line with that of the UK.

The amendment does not include Britain's crown dependencies of Jersey, Guernsey and the Isle of Man. However, the members of parliament who campaigned for the amendment have already indicated that they will push to force the crown dependencies to also introduce public registers of company ownership if they are not willing to follow suit by the end of 2020.

IR35 update

IR35 legislation was introduced to tackle tax avoidance by 'disguised employees' supplying their services through intermediaries (usually Personal Service Companies (PSC's)). Payments are typically made gross to the PSC with the worker being able to receive dividends taxable at lower tax rates and avoid employment taxes. The IR35 rules make provision in certain circumstances to tax any income received by the PSC which has not been subject to PAYE taxes, as if it were employment income.

Emphasis of HMRC's focus on 'disguised employment' is gaining traction with recent successful cases and changes to the IR35 rules for public sector bodies engaging with contractors.

A recent case involved former BBC presenter, who provided their services through their PSC at the insistence of the BBC. HMRC successfully argued the IR35 rules applied, issuing a £400,000 tax bill in retrospective PAYE and NIC. They have since confirmed a number of cases involving BBC presenters engaged in similar situations are being investigated.

Changes in April 2017 have affected public sector contracts specifically, by placing the burden and exposure of reporting a contractor's IR35 status on the client public body, rather than the contractor. HMRC are now consulting on rules for private sector contracts to follow suit.

Employed vs self-employed

Determining how a worker is engaged is key in establishing not just their employment rights but also how their income is to be taxed and the employer's compliance obligations.

Individuals who are classed as employed pay tax through PAYE and are subject to class 1 primary NICs. The employer is also liable to class 1 secondary NICs. Self-employed individuals are taxed through self-assessment and are liable to class 2 and class 4 NICs. Aside from the savings that can be made by not being obliged to provide statutory employment benefits, there is an obvious NIC cost saving for companies when engaging self-employed workers.

Unfortunately, there is no single satisfactory test which determines whether a worker is employed or self-employed, instead HMRC has identified various tests and indictors to assist in defining the status with case law also playing an important part.

Firstly, a crucial factor to look at is the right of control. The more control an individual has over how and when work is carried out provides a strong indicator that they are likely to be self-employed. Similarly, those who are self-employed are often subject to real financial risk than those employed, using their own resources and assets to carry out their service.

The ability to provide a substitute and/or engage helpers is also another key indicator HMRC consider closely when deciding an individual's status. The more freedom there is to provide a substitute the more likely a self-employed status will be determined.

As the question over employment status has always been the subject of complex HMRC legislation, guidance and case law, it is important that each situation is looked at individually and all factors present in the case are considered before a conclusion is made.

To try and assist employers navigate the minefield of "employed/self-employed" status, HMRC have published the 'check employment status tool', the results of which they are prepared to stand over.

However, whilst employers have been advised by HMRC to trust the tool, there are limitations, and a number of results will require further investigation.

Share incentives

The European Commission has recently approved the prolongation of the UK Enterprise Management Incentive scheme (EMI) on the basis that the "scheme is necessary to help UK SMEs attract and retain talented and skilled personnel". Share based incentive schemes can be tax-efficient and flexible methods of remunerating, incentivising and retaining key employees and can align the needs of the business with the objectives of the employee.

HMRC approved plans such as Share Incentive Plans (SIPs) and Save As You Earn (SAYE), allow employees to acquire shares at 'discounted rates' and receive shares tax free. Company Share Option Plans (CSOP) and EMI's provide for the grant of options over shares and subject to certain conditions and the exercise price being set at market value, no income tax or NIC charges arise. Any future growth is subject to favourable Capital Gains Tax (CGT) rates which could be as low as 10%, where the shares qualify for entrepreneur's relief on disposal.

Unapproved plans allow for greater flexibility and can still provide tax efficient reward structures.

Flowering share plans typically involve the issue of shares with a low initial value due to limited rights attaching to them however, upon the achievement of certain stretch targets the shares 'flower' and establish certain rights. Separately, 'growth' shares may be used to protect the equity value for the existing shareholders and have specific rights allowing the holder to growth of the company above the current value.

Compliance

Employers must report annually all employee related securiy transactions to HMRC and this includes transactions involving office holders and even existing shareholders if it can be shown the transaction is employment related.

Consultation on reform of the taxation of the digital economy

In March 2018, HMRC provided an update on their original consultation on proposed reform of the taxation of the digital economy. According to the original consultation the existing system taxes value as represented by activity, human enterprise and innovation that take place within a given jurisdiction. HMRC's view is that digital businesses derive value through a new type of driver, user participation. The businesses which are most relevant in relation to user participation are online networks, search engines, file-sharing platforms and online marketplaces. The value is created by a more active user relationship than simply a passive transactional relationship. Users may generate content and provide services and build a network. It reflects the interaction that users have with digital platforms and how this then generates value for the business. It is different to customers who use the platform to purchase goods.

The aim is that jurisdictions in which users are located should be entitled to tax a proportion of those businesses' profits based on user participation. They consider these profits to be currently residing in the principal company where the brand, trademark and other customer related intangibles reside. The UK government thinks that some reallocation of these profits to the user jurisdictions is justified.

They accept that reform will require a long term multinational approach. In the meantime they propose an interim based measure to tax the revenues of digital businesses based on users in the UK. However, it recognises that there may be technical challenges in identifying the location of users.

They have stated that there should be a high de-minimis threshold to ensure this tax does not affect digital start-ups.

The UK government intends to continue engaging with businesses, the OCED and the EU to develop this policy.

VAT and Transfer Of a Going Concern (TOGC)

Purchasing an existing business is likely to represent a significant investment and a purchaser may believe that they have the additional cashflow burden of suffering VAT on the purchase costs. A purchaser may be of the view that all is not lost as the VAT suffered can be reclaimed, albeit with a potential wait of up to three months depending on VAT return periods.

However, if a business is sold and that business is transferred as a going concern, then the supply is outside the scope of VAT. This can represent a significant cashflow benefit to the purchaser of a business and where property is also being sold with a business, it can further represent a Stamp Duty Land Tax (SDLT) saving as SDLT is chargeable on the VAT inclusive price.

There are six conditions that must be met in order to treat such a supply as outside the scope of VAT and, if those conditions are met, the TOGC provisions are compulsory and no VAT can be charged on the transfer of the trade and assets. This is a common area of misconception and can arise where a purchaser chooses to err on the side of caution and charge VAT rather than run the risk of incorrectly applying the TOGC provisions. The danger with this approach is that if a seller has charged VAT, a purchaser will, in most circumstances, be unable to reclaim the VAT paid as it was incorrectly charged. In this instance, the purchaser will need to seek repayment of the VAT previously paid directly from the seller. The purchaser would be relying on the protection of a robust clause in the legal contract for sale in this regard.

From HMRC's perspective, the reason the provisions are compulsory is because they prevent the scenario whereby a seller, who has ceased to trade, fails to pay over the VAT collected on the sale. The key point to takeaway is that it is very important to establish from the outset, whether the business is being sold as a going concern, so that the appropriate treatment can be applied.

Corporate interest restriction

The corporate interest restriction rules have been in effect since April 2017 and groups of companies with a net interest expense exceeding £2 million per year should have made their appropriate elections by 31 March. Whilst HMRC extended the first reporting deadline to 31 March 2018 due to the late enactment of the new legislation last November, going forward any elections for exemptions or to utilise the group ratio method calculation should be made prior to the end of the accounting period. Each group is required to nominate a relevant group company, which then reports any interest restriction to HMRC each year alongside the corporation tax return. The nomination of the reporting group company is usually due for submission six months after the year end however, due to the transitional rules all nomination returns should be completed and submitted online to HMRC by 30 June 2018.

If there has been no nomination, HMRC will appoint a reporting company for the group. Once nominated, or elected a reporting company, the company is granted statutory powers to retrieve the relevant data to complete a return from other UK group companies. These new powers may cause conflict where the group is managed separately via sub-groups.

Offices in Belfast, Dublin, Cork, Galway, Kildare, Limerick and Longford.

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