Issue 2, December 2020

DECEMBER 2020 NEWSLETTER

Hardwick & Morris LLP

Introduction

Welcome to the latest edition of the H&M newsletter covering some of the recent changes in tax law and other matters that we believe may be of interest to clients, contacts, and other advisers that we work with. The intention is not to provide a full technical update but to highlight some recent developments, provide some information on changes that may be of interest or relevance to you and to give an insight into some of the things we have been up to.

In this second edition we cover updates on SEISS and our hot topic is the time to pay arrangements.

With the Brexit transitional period coming to an end we also look at the VAT changes facing businesses and the Customs procedures that will need to be followed for imports and exports.

There are some short reports on events which we have taken part in and a summary of another article for the Sports Law & Taxation journal, this time covering the employment status of referees which covers some areas that will be applicable to anyone considering whether they are employed or self-employed.

Lastly, we have a guest article from Mala Kapacee, director of London Tax Network Ltd (and formerly of Gabelle). Mala is an expert in dealing with HMRC disclosures and tax investigations as well as being a well known writer on tax matters.

H&M News

Despite the ongoing coronavirus pandemic, the firm has continued to grow with three new additions in the last quarter and H&M are delighted to welcome Sam Skelsey, William Rooke & Stephen Mills to the firm.

Sam, who is currently studying for his ACCA qualification, joins the firm from Robinsons Consultancy and will work within the accountancy department.

William joins us after graduating from the University of Exeter with a first in Mathematics with Accounting. William also had a successful internship at H&M last summer.

Stephen joins H&M from Markel Tax/Gabelle and will take on the role of Practice Manager over the coming months. Stephen is the 4th arrival from the old Gabelle team and further demonstrates the ability of H&M to attract the best people.

Finally, congratulations to Eva Grammatea who becomes the latest member of the firm to achieve ACA qualification.

The office will not be open from close of business 23rd December until 4th January. We take this opportunity to wish you a Happy Christmas and a healthy and prosperous 2021.

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Update: Self-Employment Income Support Scheme (SEISS) Extension

The UK Government have provided details of the third SEISS grant which is now open for applications until 29th January 2021.

Similar to previous grants, HMRC will be contacting those they believe may be eligible for the scheme. The rules on who is eligible to claim have, however, been changed. To be able to claim for the third grant, in addition to the conditions for the previous grants, you must either:

- be currently trading but are impacted by reduced demand due to coronavirus
- have been trading but are temporarily unable to do so due to coronavirus

You must also:

- intend to continue to trade
- reasonably believe there will be a significant reduction in your trading profits due to reduced demand or your inability to trade

The third grant is for 80% of three months' average trading profits, paid out in a single taxable instalment capped at £7,500, and will cover the period from 1 November 2020 to 29 January 2021. Self-employed people who are eligible and in need of support are able to claim the third grant at any time from 30 November 2020 to 29 January 2021.

There will also be a fourth grant (covering the three-month period from February 2021 to April 2021). HMRC will provide more detail on the fourth grant nearer the time, including how much it will be and the rules for claiming.

HMRC have also provided additional guidance on how trading conditions will affect the eligibility of the self employed for SEISS claims. The guidance sets out that it is not sufficient for there to just be a reduction of profits. Effectively, there needs to be a loss of income that is connected directly to coronavirus. The most helpful part of the guidance is probably the examples of what is not permitted. These indicate that the following will not be eligible:

- Unable to work while self-isolating but able to re-arrange contracts (builder example)
- Increased costs, even if these are to comply with health & safety requirements (electrician example)
- Need to self-isolate on returning from abroad (dentist example)
- Client cancelling a contract f no attempt is made to find additional work (dog walker example)

Taxpayers must have evidence of how their business is directly affected by coronavirus and that evidence should be retained in case of an HMRC review. As with CJRS there are likely to be prosecutions in the coming year if the conditions for the claims are not met. Also, as it is not possible for advisers to claim SEISS on behalf of clients (unlike CJRS), it will be important for taxpayers to be aware of their responsibilities when claiming.

Should you have any questions relating to SEISS or any other area related to financial support for businesses affected by coronavirus then please do not hesitate to get in touch with your usual Hardwick & Morris point of contact.

HMRC investigations update – and what can we look forward to

2020 has been a turbulent year and, at the moment, I would liken us to "sitting ducks" – very little apparent movement but paddling like crazy under the surface to stay afloat and waiting for whatever tax bullets come our way.

Part of this "crazy" paddling has been the drastic changes in HMRC's approach. Instead of collecting money, 2020 has been a year of distribution. It is therefore likely that 2021 and beyond will see us paying for the Government's generosity. Here, we review areas that HMRC are likely to focus on and things to keep in mind if approached.

Furlough Fraud (FF)

Royal Assent was given to the Finance Bill on 22 July 2020 and with it came an increase in HMRC's jurisdiction to go after those who have incorrectly claimed Coronavirus Support Payment (CSP) schemes. The powers allow HMRC to identify those who have incorrectly claimed CSPs, to ensure the correct tax is paid on those payments and to penalise the miscreants. The legislation also provides an "amnesty" window during which taxpayers who have made errors can come forward and resolve the situation without any penalties being applied.

The FF legislation applies if either the "*recipient is not entitled to the amount in accordance with the scheme under which the payment is made*" (s8 (1)) or if "*the person ceases to be entitled to retain the amount*" (s8(4)).

If either of the above cases apply, then the tax rates applicable to the CSP change. Where a business may have obtained support and should have operated PAYE on that support payment, the applicable rate of tax increases under the new legislation to 100% of the value of the support i.e. a full repayment.

"*Ceases to be entitled*" is defined in the legislation as "*(a) because of a change in circumstance, or (b) because the person has not within a reasonable period, used the amount to pay the costs which it was intended to reimburse.*"

The implication being that those who had claimed aid at the beginning of the crisis on the basis that they anticipated (e.g.) a significant drop in demand should, on an ongoing basis, have been reviewing the situation and determining whether that aid, whether a monthly employment related amount or an initial grant, was still needed. Money that was claimed "for a rainy day" or as a buffer for the future financial depression we are all told is coming may not be sufficient reason for obtaining the funds.

Demanding that the funds are used within a "reasonable period" is also extremely subjective and could vary across industries and company size, amongst others. Needless to say, HMRC's version of "reasonable period" may not correlate with that of the taxpayer.

HMRC may use the whistle-blower reports of furlough fraud to investigate companies and the most serious civil cases will be investigated under CoP9 (suspected fraud). HMRC may also look to criminally prosecute those who deliberately set out to defraud the state at the outset. They have indicated however that they will take a "soft-touch" with those employers who simply made errors.

That said, HMRC have not yet advised how they will approach this; a specific taskforce is likely though a lot will depend on the level of HMRC's resources. Another option open to HMRC is to issue third party information notices on (e.g.) employees, where they suspect fraudulent behaviour.

HMRC need to reclaim monies they have paid out and wish to be seen to be cracking down on fraud in relation to the CSP schemes. Newspaper headlines (https://www.independent.co.uk/news/uk/crime/furlough-scheme-fraud-arrested-hmrc-west-midlands-a9610111.html) clearly demonstrate these priorities given that this report was written on 9 July 2020, before the legislation had been given Royal Assent. Nonetheless, the fact that HMRC allowed the headline to go out clearly shows they are looking to make an example of those who took advantage of the system.

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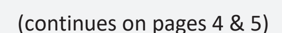

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Insolvency, furlough fraud and tax avoidance
In my article on Tax and Insolvency (https://tax.bloomsburyprofessional.com/blog/tax-and-insolvency), I wrote about the Joint Liability Notices (JLNs) that could be issued to Directors of companies being wound up with outstanding tax liabilities. Depending on the nature of the liability, HMRC can now issue a JLN meaning that even if it is a company liability, the tax can be reclaimed from the individual.

The JLN legislation also now applies to companies that are either "*subject to an insolvency procedure*" or "*there is a serious possibility of the company becoming subject to an insolvency procedure*" and where there are liabilities outstanding in relation to CSP where the other criteria discussed above are met.

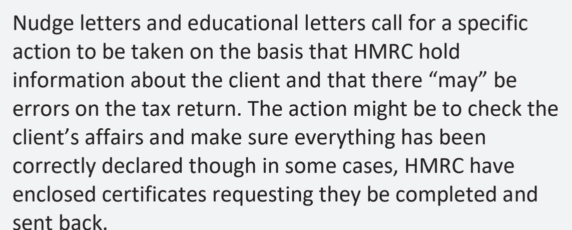
This legislation will also apply to companies where the directors have participated in Tax Avoidance schemes (regardless of whether they are still an officer of the company).

From 1 December, HMRC became preferential creditors in respect of PAYE, CIS and VAT. This means that they will be ranked above all other unsecured creditors for these taxes. In relation to corporation tax, however, they will remain on par with others.

HMRC have stated that "The lending market will not be materially affected by the proposed change in status", however perhaps they have not considered this carefully enough. If banks have large floating charge elements to their secured loans, this part will rank lower than most of the HMRC claims, so how likely are they to provide unsecured lending? They may well require personal guarantees from the directors, which only the very desperate or very confident will be happy to provide, and the banks may well also increase the cost of lending to cover their risk.

Nudge letters
Over the past year, HMRC have sent out a number of "nudge letters" and "educational briefings" on the basis of information received from various sources. These letters refer specifically to:

- Overseas assets;
- Sale of UK residential properties in 2018/19;
- ATED;
- Foreign tax credits;
- Overseas workday relief;
- Residence and domicile status including the Statutory Residence Test;
- Investment income and others.



Nudge letters and educational letters call for a specific action to be taken on the basis that HMRC hold information about the client and that there "may" be errors on the tax return. The action might be to check the client's affairs and make sure everything has been correctly declared though in some cases, HMRC have enclosed certificates requesting they be completed and sent back.

It is important to note that these certificates are not legally required and, given the Criminal Prosecution warning for incorrect statements, you, or your clients, are better protected if they do not complete and sign the form. That said, ignoring the letter is likely to instigate an enquiry. The best thing to do is discuss the matter and respond to HMRC under a separate cover explaining any actions that might be taken.

HMRC are sending out these letters to encourage compliance and to reduce the work they have to carry out. Being under-resourced (particularly with working from home still being the Government advice), they cannot investigate all these individuals themselves. They have therefore pushed the onus on to the taxpayer and their advisers. If an investigation does come to light, they may use the letters to highlight that the taxpayer was advised to look at a particular area and, if they didn't, there is a clear lack of reasonable care and penalties may increase. This isn't indefensible but should be kept in mind; ignoring the letters now can impact you or your client in the future.

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The topics covered by these letters highlight areas HMRC will likely be focusing on in future. Clearly, a number of areas will only relate to relatively few individuals, mostly High Net Worth. These individuals have more to lose if it comes to an HMRC investigation so any communications with HMRC should be reviewed carefully.

This article was contributed by Mala Kapacee. Mala specialises in the preparation of disclosures to HMRC and resolution of tax enquiries and investigations and is a well-known tax author. Mala founded the London Tax Society in 2017 and actively encourages networking and technical development for young professionals. She can be contacted by email (mala@londontaxnetwork.co.uk), telephone (07783 236 845) or through the Hardwick & Morris office.

Customs Procedures from 1st January 2021

The Brexit transition period ends on 31st December and, at the time of writing, the UK Government have advised its Ministers to prepare for trading on "Australian terms" from 1st January. In simple terms, that means a no deal scenario.

If a business trades goods with Europe they will need to be prepared for changes that will come into effect from 1 January 2021. The steps a business needs to take before they can trade from 1 January will apply whether there is a deal or not.

For businesses that are new to customs processes it may help to watch the short videos on HMRC's YouTube channel which introduce importing and exporting:

- **What you need to know to send goods out of the UK**
- **What you need to know to bring goods into the UK**
- **What are controlled goods?**
- HMRC also have a **Trader checklist** to help businesses prepare for the end of the Brexit transition period.
-
- In addition, HMRC are running live webinars where businesses and/or their advisers can hear the latest information and ask questions to help prepare for these new rules:

Exporting: Actions you need to take to prepare for 1 January 2021

This webinar explains what actions need to be taken to export goods from Great Britain to the EU and move goods between Great Britain and Northern Ireland. HMRC provide a run-through of the key export processes – staged border controls, zero-rated VAT, customs declaration, using an intermediary as well as licences, certificates and authorisations that you will need.

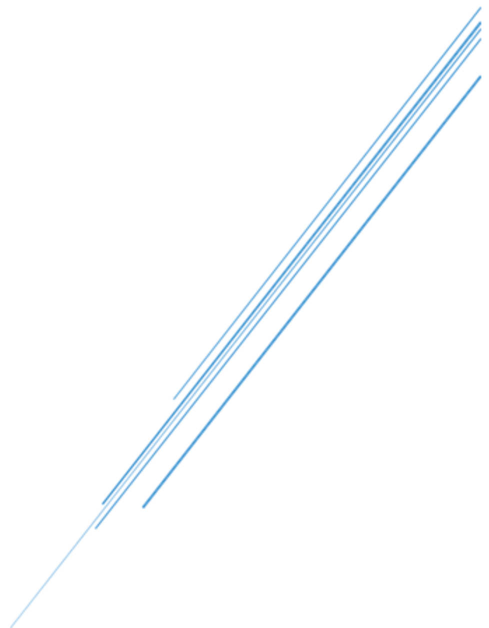
Please register to take part if you are planning to export.

What are customs import declarations?

If a business imports goods, they will need to prepare for making customs import declarations on controlled goods from 1 January, and by the end of June on all goods. This webinar will help to understand what these processes are in more detail. This includes what is needed for simplified declarations, supplementary declarations, making import declarations without authorisation and delayed import declarations.

Please register to take part if you are planning to import.

This will be a very uncertain period so do reach out to your usual contact in Hardwick & Morris if you have any questions. We will try and help wherever we can.



Brexit and the impact on VAT

The transitional period will end on 31st December 2021 and it seems like we are heading for a "no deal" conclusion. However, whether a deal comes to fruition or not, businesses will see major VAT changes come 1st January 2021.

Whilst the most significant movement in terms of VAT following Brexit will be around Goods, as a firm we are monitoring any news of updates and changes around both goods and services and would encourage clients to do the same.

In principle, most of the post-Brexit VAT rules are already known. From 1st January 2021 any sales of goods or services to/from the EU will be treated in the same way as sales to/from the rest of the world. That is not going to change whether there is a deal or not.

The base position (subject to any exceptions for place of supply rules) will be that sales of goods to the EU and all purchases of goods from the EU will be regarded as exports/imports from 1st January 2021. No UK VAT is due on exports and UK VAT will be charged on importation.

Intrastat returns will remain for importing goods (for 2021), but the requirement to file for goods dispatched to the EU will be removed. EC Sales Lists will also no longer be required.

Services supplied to and from the EU will pretty much remain unchanged. No UK VAT will be due on a supply of services to a client inside the EU and the reverse charge mechanism will apply on services received from the EU.

Customs Duty will be a little more complicated and the position is addressed in a separate article. Whether there is a deal or not, it is going to be necessary to file documents and complete Customs procedures. The only thing that will depend on a deal are the tariff rates.

Urgent Action

Any business trading across a border with the EU will require an EORI number from 1st January if there is no deal. If they have not already got one, then any business supplying/receiving goods to/from EU countries should apply for an EORI as goods imported after 1st January may not be allowed in the UK without one. They may also need an EU number to import into the EU.

Distance Selling

Distance selling thresholds will cease to exist for UK suppliers from 1st January 2021. As it currently stands, if you make a B2C sale from 1st January 2021 to a European country you will be required to register for VAT in that country. This, naturally, could result in a whole host of new registration obligations. If you do not register, then the default position will be that the customer will need to settle any import VAT before they are able to receive the goods.

The options for UK suppliers of distance sales after 1st January 2021 are as follows:

1. Do nothing and move the obligation onto the customer to deal with the Import VAT as described above;
2. Register in each EU country they make sales in;
3. Set up a presence and hold stock in an EU country, say via a distribution/fulfilment centre. (Note this has to be a direct presence and the supplier needs to hold a VAT registration in the country they are holding stock); or
4. Block sales to EU countries they do not want to register in.

From 1st July 2021, distance selling thresholds are being completely withdrawn in Europe and all suppliers will need to charge VAT at the local rate in the country of residence of the customer they are selling to. To simplify the reporting requirements, the EU is introducing a 'One-Stop-Shop' (OSS) scheme which will allow traders to charge and collect VAT at the local rates but file one single declaration in one EU state. If the supplier is established in an EU Member State, they will have the ability to file that report directly through that state. This scheme will also be open to third party countries, like the UK, although, it will still need to be filed through an EU member state.

From 1st July 2021, if a non-EU supplier does not use OSS, then import VAT will be collected from the customer via the customs declarant (customs agent, courier etc).

Unless anything changes before 31st December, a UK seller will need to consider the options detailed above between 1st January 2021 – 30th June 2021:

Customs Duties – in respect of customs duties any goods sold under €150 will be not be subject to custom duties (except goods subject to Excise Duties such as alcohol, tobacco, perfume and toilet waters). Goods will, however, be subject to customs controls and supervision.

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(continued) VAT refunds in Europe

Some businesses may currently apply for VAT refunds in other European countries, as an example, expenses incurred on tour or other costs where VAT is charged to a UK registered entity. At present this can be done online through the EU VAT refund system.

HMRC have confirmed that access to the EU VAT refund system will end on 31 March 2021 and claims relating to VAT incurred after 31 December 2020 will have to be made manually. In an update to its guidance on how UK firms can reclaim VAT incurred in an EU country and how EU firms can reclaim UK VAT, HMRC has confirmed that the facility to use the EU VAT refund system will end on 31 March 2021. Up until that point firms in the UK and those in the EU will be able to use the system to amend and view claims relating to VAT incurred before 1 January 2021. Claims relating to VAT incurred after that date will have to be made manually to the individual tax authorities concerned.

The guidance also confirms that EU businesses will not be able to start making claims for UK VAT charged on or after 1 January 2021 until 1 April 2021.

New York State Bar Association
Entertainment, Arts & Sports Law Section
Annual Music Business and Law Conference – Virtual Edition
Tax and Accounting Toolbox for Recording and Touring Artists and the Attorneys that Represent Them

Stephanie Hardwick, Hardwick & Morris partner, was one of a panel of eminent professionals presenting at the NYSBA 2020 annual conference on 6th November. Joining Steph for a lively and entertaining panel were a number of experts from across the USA:-

- Mark Kaplan, CPA – Partner & West Coast Music Practice Leader, Citrin Cooperman, Beverly Hills, CA
- Gene Salomon, Esq. – Partner, Gang Tyre Ramer Brown & Passman, Beverly Hills, CA
- Charles S. Kolstad, Esq. – Partner, Withers Worldwide, Los Angeles, CA
- Matthew J. Bonney, CPA – Tax Partner, Citrin Cooperman, New York, NY
- J. Christopher Hull, CPA – Partner & Royalty Department Practice Leader, Citrin Cooperman, New York, NY

The presentation was the story of the evolution of an artist from the day they show up at your door to their final days. Panelists aimed to point out the questions and issues that advisors would encounter along the way. Areas covered included:-

- Business set-up (sole proprietorship, partnership, LLC, S Corp, C Corp)
- Business Purposes and Income Streams (music copyrights, trademarks, performing rights organisations)
- Band/Artist Agreements (employment agreements, work for hire, royalty provisions, fees/wages, non-disclosure agreements, band agreements, profit splits, royalty splits, publishing splits, leaving member clauses)
- Building the Team (manager (commission rates, term / album cycles, sunset clauses), business manager, agent)
- Self-release or find a record deal? (outlets for self-release, search for a record deal (independent or major, basic deal points))
- Search for a publishing deal (when to make the deal, co-publishing deal or admin deal, deal terms)
- Touring and ancillary agreements
- Tax issues based on residency (foreign artists and Central Withholding Agreements, moving to the US, moving to the UK)
- Renegotiate existing deals
- Royalty audits
- Trust and estate planning (living trusts and wills, life insurance, privacy trusts, non-disclosure agreements)
- Asset sales

As the only non-US participant this is great recognition and reflects the reputation of Steph and the firm internationally.

International Tax Specialist Group

The latest online meeting of the International Tax Specialist Group (ITSG) took place on 20th November and Kevin Offer, Hardwick & Morris partner, was part of the panel discussing wealth taxes and other ways to pay for the coronavirus support. After a lively discussion, the general conclusion was that wealth taxes are popular amongst the general population so long as someone else is paying. As a measure for covering the costs of the coronavirus pandemic Kevin pointed out that any revenue generated by wealth taxes or changes to capital gains tax, inheritance tax, etc. would make little difference. What is required are increases to income tax, social security costs (National Insurance) and VAT which the current Government have pledged not to do.

The meeting was attended by members in 48 locations around the world with other speakers from Canada, Argentina, Austria, Canada, Czech Republic, Korea and the USA.

ITSG is a network of independent, like minded advisers in over 50 countries around the world. As a member firm we have used this network to provide international tax advice to our clients and to other firms. As an active member we have also spoken at conferences around the world and, more recently, digitally. If you have any international tax issues, feel free to contact us.

Loughborough University Sports Agents Course

As part of the sports agents' course run by Loughborough University a virtual session entitled "How to Succeed in the Agent Market" was held on 30th November. As part of this session Kevin Offer, Hardwick and Morris partner, gave a presentation on what type of structure an agent should operate through, how fees received by agents are taxed and the use of image rights structures.

Structures included consideration of operating as a sole trader, partnership or limited company and the pros and cons of each. The fees received by agents in relation to contracts and transfers can come from both a payer and a club with tax considerations such as VAT, benefits in kind and employment v self-employment to be taken into account. The part of the presentation on image rights provided an overview of how some sports professionals may set up an entity to receive payments for endorsements, sponsorship and use of their image and how agents may be paid and taxed from such income.

Following the presentation, a Q&A session with the students followed.

It is always great to be involved and help in the education of young people and we wish the students every success I the future with their chosen careers.

H&M's hot topic

Self-Assessment Tax Returns and HMRC's 'Time to Pay' scheme?

The 2020 tax return filing deadline is fast approaching. If an individual is obligated to file a self-assessment tax return for 2019/20 and hasn't already done so, they will have to file by 31st January 2021 in order to avoid late filing penalties.

Oh boy, this is the part I have been dreading. Income was good in 2019/20 but this year has been grim so far!

Whilst income for 2019/20 has already been earned and in an ideal world, the tax liabilities due by 31st January 2021 would have been safely tucked away, HMRC has accepted that many people are suffering cashflow issues and may have used 2019/20 tax liabilities to help get through a tough year so far.

They have already allowed all individuals to postpone July 2020 payments on account to 31st January 2021 interest free, but that was only ever a deferment. The deadline for that payment and any final balancing liability is now creeping back up. HMRC have now issued their guidance on the 'Time to Pay' scheme details which is aimed at assisting individuals who are struggling to meet their liabilities by 31st January 2021

Time to Pay? What is that?

The Time to Pay scheme is not actually new. HMRC's recent announcement is an extension to the original scheme. Time to Pay is a self-service scheme which allows individuals completing self-assessment to set up a payment plan online. The payment plan can last up to 12 months and a direct debit must be set up. There is no requirement to pick up the phone to HMRC.

The big difference between the original scheme and the updated scheme is the increase in the limit from £10,000 to £30,000.

How do I qualify?

To qualify, the following conditions must be met:

- Individual must have no outstanding tax returns
- Individual must have no other tax debts
- Individual must have no other HMRC payment plans set up
- The Self Assessment tax bill is between £32 and £30,000
- It is no more than 60 days since the tax was due for payment. In practice this will mean that most payment plans must be set up by 1st April 2021.

Assuming all conditions are met then qualification should be automatic.

I do not meet all these conditions…

You may still qualify, including if your liability is more than £30,000, but a call will have to be made to HMRC to set this up. Qualification is not automatic and there are likely to be further questions asked in respect of the individuals' situation/circumstances.

This could really benefit me under the circumstances. Are there any negatives?

Whilst setting up a time to pay arrangement will allow you to avoid any late penalties, interest will be charged on tax paid late and will be applied from 1st February 2021. HMRC's current rate of interest is 2.6%.

Also, if you miss a direct debit payment for any reason, the full balance is likely to become payable immediately. An individual may not get another agreement accepted after a default.

Individuals also have to factor in that they will still be paying tax relating to income earned in 2019/20 when they are earning income in 2020/21 and even 2021/22..

Anything else I can do

If you have a clear idea (or at least a fairly good idea) or what your final income is going to look like by the end of 2020/21, there are two possible actions that can be taken:

A request can be made to reduce payments on account for 2020/21.
If self-employment losses are likely to be incurred, then an individual may be able to accelerate a claim for a refund of any tax due back in 2020/21

Should you wish to discuss any of these matters in further detail or have any other questions on tax, get in touch with your usual H&M contact or email us at tax@41gp.com

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Professional Game Match Officials Limited – The Referee's Case

The latest article for the Sports Law & Taxation journal by Kevin Offer, Hardwick & Morris partner, looks in detail at the case of HMRC v Professional Game Match Officials Limited ('PGMOL'). This case considered the employment status of referees in English football and, potentially, has far reaching implications for contract workers and many others in the UK.

Background

The FA oversees the appointment of referees in England and divides them into 10 categories ranging from the Elite Referees who officiate the Premier League, down to Trainees. PGMOL mainly handles the appointment of referees in the National Group which is the second tier. Most of these referees generally undertake refereeing during their spare time whilst having a full-time employment.

When an individual is added to the list of referees, they are required to sign a Code of Practice. This document states that a referee is "not an employee of PGMOL and will be treated as being self-employed". The Code of Practice goes on to state that there is "no guarantee that Match Officials on the List will be offered any appointments to matches and Match Officials are not obliged to accept any appointments to matches offered to them". The referees therefore had a choice of whether to accept appointments. In addition, match fees were set each year. The referees did not, however, accept appointments from any other body and, whilst they had full control on the pitch, they were subject to rules covering matters such as social media, interviews, etc. when off the pitch.

PGMOL believed that these arrangements did not constitute an employment. HMRC, however, disagreed and raised determinations under Regulation 80 for PAYE (income tax) and under section 8 or the Social Security (Transfer of 25 Functions) Act 1999 for class 1 National Insurance Contributions.

PGMOL appealed against the determinations.

First Tier Tribunal

In 2017, the First Tier Tribunal was asked to determine whether an employment relationship existed between PGMOL and the referees within the National Group.

PGMOL argued that there was no contractual relationship with the National Group referees and so any contracts that did exist between the PGMOL and the referees could not constitute contracts of service.

HMRC argued that, other than indicating on which dates they would be available, referees could not choose which match they were to officiate. This decision was entirely at the discretion of PGMOL.
HMRC therefore submitted that referees were integrated into PGMOL and were not in business on their own account. In HMRC's opinion, the degree of continuity in the relationship was significant and the fact that the parties may not have intended to enter contracts of employment was of little relevance. The substance of the situation overrode the form of the legal agreements.

FTT Decision

The decision of the FTT referred to the case Ready Mix Concrete. This case established the principle that:

"A contract of service exists if these three conditions are fulfilled.
(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
(iii) The other provisions of the contract are consistent with its being a contract of service.

The first point is the requirement for "mutuality of obligation" whilst the second point is the requirement for "control". The third point refers to the specific terms of the contract.

The FTT concluded from the facts that there was a contractual relationship between PGMOL and the referees. There was, however, insufficient evidence of mutuality of obligation and control within the individual engagements to amount to employment.

In reaching their conclusion, the FTT accepted that the terms of the Code of Practice were clear that there was no legal obligation for PGMOL to offer work or for the referee to accept work offered and that was not superseded by the conduct or true intention of the parties.

In addition, whilst the referee had no control over which match, he is appointed to, the referee is the person in charge on match day. His decisions are final, and he has full authority during the game

The FTT did, however, grant HMRC permission to appeal to the Upper Tribunal.

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Upper Tribunal

HMRC appealed to the Upper Tribunal ('UT') on the grounds that the FTT had "erred in law", considered irrelevant considerations, failed to take into account relevant considerations and/or reached a perverse conclusion. HMRC contended that the requirement for mutuality of obligation is not relevant in considering whether a contract is one for services or employment beyond a requirement for the services to be performed personally. The UT rejected this view and set out a minimum level that it considered necessary to show mutuality of obligation

For the employee, there must be a requirement to perform at least some of the work personally. Whilst it may be acceptable to refuse to do some work without breaching a contract, it would not be possible to refuse to do any work.

For the employer, there must be a requirement to provide work or, alternatively, provide some form of retainer or other consideration in the absence of any work. These obligations must subsist throughout the period of the contract.

The UT concluded that the FTT had correctly decided that there was insufficient evidence of mutuality of obligation in both the contract covering the season and in the contracts for individual match appointments. The UT also agreed with the view of the FTT that the right of the referee and/or PGMOL to cancel an appointment without breach of contract was inconsistent with a contract of service.

The UT did consider that the FTT had erred in considering the extent of control that PGMOL was able to exercise over the referees. Although it was not possible to control the referees during a game it was possible to exert control over the appointment. However, as the appeal may be dismissed under mutuality of obligation, it was not necessary to consider this point further or to refer it back to the FTT.

In conclusion, HMRC's appeal was dismissed and so the referees were not considered to be employees of PGMOL.

Where Next?

As indicated above, the question of whether contracts constitute employment arrangements is something that is of interest to most tax advisers in the UK. HMRC are appealing the decision of the UT and so this case will go on. In the meantime, HMRC have been successful in the UT in another case involving a radio presenter on similar points, overturning the decision of the FTT in the taxpayer's favour. That case involved an individual operating through a personal service company and so the facts are a little different. We would therefore question whether HMRC could use that decision in an appeal against the UT decision in the PGMOL case.

If you would like a copy of the article in full, please contact us at tax@41gp.com.

Should you wish to discuss any of these matters in further detail or have any other questions on tax, get in touch with your usual H&M contact or email us at tax@41gp.com

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AND BUSINESS MANAGERS SPECIALISING IN MUSIC AND ENTERTAINMENT.
Hardwick & Morris LLP
41 Great Portland Street, London W1W 7LA
Tel. 020 7268 0100
Email tax@41gp.com
www.hardwickandmorris.co.uk