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Access to link papers

or how the figures in the accounting records feature in the return

During the course of an enquiry it may be necessary to examine part or all of the books and records of a business. Sometimes it may not be clear exactly how the figures in the accounting records feature in the return. This is usually because accounting adjustments or journals have been made to those figures. So as to understand better how the business records reconcile with the final accounts/tax return the enquiry officer may sometimes request access to the accountants' "link papers". This can often reduce the time and costs of an enquiry. "Link papers" is a Revenue term defined in Tax Bulletin Special Edition 2 August 1997 –

"Those papers which show how the figures in the return are derived from the figures in the prime records, are held by the agent, but are available to the taxpayer"

A request for "link papers" does not go against the principles of SP5/90, which specifically refers to an accountants' "working papers". SP5/90 notes that three classes of documents are still excluded from the papers which may be called for from a third party. First, there is no change in the protection given to documents brought into existence specifically to support the conduct of a pending appeal. Second, audit papers are protected from disclosure by an auditor. Third, communications relating to giving or obtaining tax advice are protected from disclosure by a tax adviser. However, the protection given to audit papers and tax advice is limited where the papers contain essential information about the origin of figures in accounts, returns and other information submitted to the Revenue or the relationship of those figures with the books and records of the taxpayer.

It should also be borne in mind that where the business under enquiry is a limited company that the ICAEW Guidance for Members in Practice - *Documents and records: ownership, lien and rights of access* provides guidance in this area. In particular paragraph 11 says that where a company has not kept accounting records in accordance with s221 of the Companies Act 1985, and the court took a view that such schedules had been prepared for the company in order to comply with s221 then the schedules would belong to the company. Where an informal request is refused by the business under enquiry the enquiry officer will be able to use paragraph 27 to require production of the papers by the company.

Tax Bulletin is also available on the
Inland Revenue Website at
www.inlandrevenue.gov.uk/bulletins

Where the business is unincorporated and access to the papers is refused the enquiry officer will be able to proceed by way of a S19A notice to the taxpayer.

If the taxpayer cannot produce the papers because they haven't got them or cannot get them the enquiry officer will be able to consider the use of S20 (3) to require delivery of the papers from the accountant.

At all times the enquiry officer is aiming to understand the figures in the return and how they have been derived. A review of the linking documents between the books and records and the return will greatly assist in this process and will generally lead to reduced time and costs in an enquiry.

Statement Of Good Practice For Handling Enquiries Into Inward Expatriate Tax/NICs Issues

Introduction

This statement sets out the way in which the Revenue will handle enquiries into the affairs of inward expatriate directors and employees. It stems from the Review of Links with Business published in November 2001.

The statement is directed towards the handling of enquiries into the affairs of employees or directors of large companies and groups and has been developed following extensive consultation with multi-national groups and their advisers.

How will the Revenue approach enquiries?

Before the enquiry

We recognise that larger companies or groups will generally use their in-house tax department or professional advisers to handle the tax affairs of their expatriate employees and directors, who are often paid on a tax neutralised basis.

We also recognise that enquiries are often easier if the Revenue has an established working relationship with the relevant tax department or professional advisers. This is very much in line with the spirit of the Review of Links with Business. The Review is clear about the need for more frequent and direct dialogue between the Revenue and business to generate a greater awareness of businesses' commercial drivers and the Revenue's responsibilities.

In the context of inward expatriate taxation, this means that Revenue staff working in this area should have an understanding of the systems and processes that are operated in relation to the remuneration of expatriate employees, and the roles and responsibilities of those operating the processes. Where possible, Revenue staff

should also have an awareness of the constraints and difficulties that the UK staff or advisers of a group may have in obtaining data relevant to tax or NICs from overseas. The Revenue can also support voluntary compliance and ease the process for enquiring into tax and NICs risks by ensuring that in-house tax departments and professional advisers have a clear understanding of the Revenue's needs and expectations. Educational or outreach activities can play a part here.

Handling the enquiry

A good professional working relationship with tax departments and professional advisers may reduce the need for enquiries into the tax affairs of inward expatriates. There will inevitably, however, be cases where the Revenue does need to open an enquiry. The complex nature of the issues involved, and offshore links, are likely to generate greater risk and make it necessary to seek additional information and examine cases in greater depth.

From the Revenue's perspective, it is clearly essential that enquiries are carried through to the point where the facts are clearly established and a firm judgement can be made on the right tax result. There will be situations where the apparent Exchequer risk means we have to pursue enquiries which will have substantial compliance costs for the group.

Nevertheless, we recognise that

- these enquiries often relate to individuals not familiar with the UK tax and NIC system;
- employees and directors on tax neutralised packages can sometimes fail to see the need for the UK tax authorities to make detailed enquiries into their financial affairs;
- there can be considerable compliance costs to retrieving documentation, sometimes from overseas.

We will be aware of these factors when handling the enquiries. We will expect groups and individuals to respond to requests for information within a reasonable time. But for our part we will make sure that our enquiries are appropriate in the overall circumstances of the case.

We recognise that enquiries may carry on for some time, and this can be frustrating for the individuals involved, their employers, and their advisers. Although we do need to satisfy ourselves that all relevant issues have been covered, we will do our best to ensure that enquiries are concluded as quickly as possible. We will close our enquiries as soon as we are satisfied that everything is in order.

Which office will handle the Revenue enquiries?

To improve the Revenue's understanding of the commercial drivers in this complex area, and to help ensure that enquiries are handled professionally and in an appropriate way, we are looking at ways to restructure the way we carry out expatriate work.

1. Enquiries relating to inward expatriates will increasingly be undertaken by specialist units. Greater expertise can be developed in these units to improve our services to businesses and to identify areas of risk where enquiries appear appropriate. Some enquiries relating to inward expatriates will, however, continue to be undertaken outside these specialist units.
2. Special Compliance Office will retain the discretion to decide whether any particular case should be worked in SCO. But generally SCO will only undertake enquiries into the affairs of inward expatriates where additional features are present. These include cases where there is suspected serious fraud, novel avoidance or where the expatriate tax issues are secondary to the main SCO interest.
3. The Large Business Office Case Director plays an important role in co-ordinating enquiries into multi-national groups. Liaison will provide the Case Director with a knowledge of the level of activity on expatriate enquiry work and the main issues involved. However, the LBO Case Director cannot be expected to have knowledge of individual expatriate enquiries.
4. Large Business Employer Compliance Teams will continue to conduct Employer Compliance reviews of large employers and refer expatriate issues to the specialist units.
5. Employer Compliance Units in the Areas will continue to conduct reviews of some employers and refer expatriate tax/NICs issues to the specialist units through their internal channels.
6. Area Offices may refer certain aspects of an expatriate enquiry to specialist offices to deal with, such as the Centre for Non Residents on residence and domicile issues.

How will consistency be assured?

The Revenue will consider setting up a national co-ordination unit for inward expatriate tax/NICs issues. This unit would aim to ensure consistency in the provision of advice on inward expatriate issues, in the operation of procedures and in our approach to addressing compliance risks and handling enquiries.

interpretation

Revised Special NIC Rules For Entertainers

Background

The NIC treatment of entertainers is different from that which applies for tax.

Following the Special Commissioner's case for *McCowen and West* the Revenue accepted that most performers/artists in the entertainment sector were engaged under contracts for services and would generally be assessable to tax under Schedule D. However, it was acknowledged that to follow this line for NIC purposes would mean that the majority of entertainers who had previously paid Class 1 NICs would only be liable for Class 2 and Class 4 NICs which would not provide them with universal title to contributory benefits.

DSS Ministers decided to introduce regulations in 1998 which would treat the majority of entertainers as employed earners for NIC purposes. This would enable entertainers to build up entitlement to contribution based Jobseeker's Allowance and ensure that, in a precarious industry, new talent could be encouraged to weather long periods without work whilst they established themselves.

Prior to 1998, the main category of performer in the entertainment industry not paying Class 1 contributions were certain 'key talent' stars who were generally regarded as having been engaged on productions because of their celebrity status. To try and ensure this practice continued The Social Security (Categorisation of Earners) (Amendment) Regulations 1998 were introduced from 17 July 1998 which created a liability for Class 1 NICs for entertainers whose earnings consisted 'wholly or mainly of salary'. Those who negotiated a fee or received rights and additional use payments higher than the salary element were not liable to pay Class 1 NICs but were regarded as self-employed as such payments did not come within the accepted description of 'salary'.

However, in all but a few exceptional cases it has become the usual practice for the majority of entertainers to receive as part of their remuneration package pre-purchase payments as compensation for the loss of future repeat fees and rights and royalties worth many times the salary element. Very few actors were, therefore, paid 'wholly or mainly' by salary and the regulations did not achieve the object of bringing most entertainers into Class 1.

The Revenue, therefore, accepted that the 1998 regulations were not sustainable and new regulations were introduced from 6 April 2003. These are the Social Security (Categorisation of Earners) (Amendment) Regulations

2003[SI 2003 No. 736]. Equivalent regulations SI 2003 No 733 apply for Northern Ireland.

What do the new regulations mean?

The new regulations reflect the fact that instead of a 'wholly or mainly' salary test, those entertainers whose remuneration includes any element of salary would be treated as employed earners. Once subject to the regulations there will be liability for Class 1NICs on all earnings from the engagement (including rights payments.)

Where the payment is a fee for the production, not a salary, and this would have to be made clear in the contract, the entertainer would remain self-employed and would be liable to Class 2 and Class 4 NICs.

The legislative definition of Salary requires that the remuneration satisfies the following four conditions:

- made for services rendered;
- paid under a contract for services;
- where there is more than one payment, payable at a specified period or interval; and
- computed by reference to the amount of time for which work has been performed.

The third bullet point includes those entertainers engaged on a single day or two day engagement. This means that the policy intention of ensuring that the regulations apply to film extras and walk-on parts is achieved. The last bullet point ensures that key talent artistes are excluded as they will be contracted to appear in productions for which their remuneration is not directly calculated according to the period of weeks or months they are assigned to the production.

What if the entertainer is engaged through an agency?

The legislation also includes provisions which amend paragraph 10 of Schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978 to ensure that where an entertainer is engaged through a third party (an agency) the producer of the entertainment in respect of which the payments of salary are made is treated as the secondary contributor. However, this does not override the effect of the Intermediaries legislation (IR35) which provides that where an entertainer provides his services to a client through a personal service company it is the latter which is the secondary contributor.

Exceptions

In accordance with the Revenue's policy intention Session Musicians and Session Singers, who are generally engaged

through Musicians Union approved contractors and whose earnings were not previously subject to Class 1NICs, are excepted from the new regulations.

Arrangements For Claiming Refunds Of Class 1 NICs Paid In Error

Who can claim refunds

The 1998 Regulations have led to some entertainers being wrongly categorised as employed earners because their remuneration did not consist 'wholly or mainly of salary' and therefore any primary or secondary Class 1 contributions which have been paid in relation to entertainers on the footing that they were employed earners may have been incorrectly paid. There is provision under National Insurance legislation for the return of contributions which have been paid in error and refund claims will be invited for appropriate periods between 17 July 1998 and 5 April 2003.

The restriction of refund claims to 2 years provided for in section 19A of the Social Security Contributions and Benefits Act 1992 will be waived for the purposes of this exercise until a cut-off point is announced. However, individuals can choose not to have their primary contributions refunded, but to let them count instead towards their Additional Pension (AP) entitlement, as if they had been correctly paid. This does not prevent the engager from seeking a refund of the wrongly paid secondary contributions or the individual notifying the Revenue that they wish to claim a refund before they reach pension age, subject to the appropriate time limits.

Primary NICs refunded to entertainers will be reduced by the amount of any Class 2 and 4 contributions which were due from them as self-employed earners, and of any contributory benefits paid on the basis of the incorrect Class 1 contributions.

How to make a claim

An engager or entertainer who considers that Class 1 NI contributions may have been incorrectly paid between 17 July 1998 and 5 April 2003 can apply for a refund. Claims for all tax years should be submitted together. Anyone who wishes to do so in the belief that workers previously treated as employed earners should have been regarded as self-employed should write to:

Inland Revenue
National Insurance Contributions Office
Refunds Group (Erroneous 4)
Room BP1001
Benton Park View
Newcastle upon Tyne
NE98 1ZZ

Alternatively they should telephone Refunds Group on 084591 – 2254042 [calls will be charged at BT local rates]

Claim forms will be available on request from the end of June 2003 and Refunds Group will begin dealing with refund applications shortly after that. As an alternative to the written application form some engagers may find it more convenient to submit claims for refunds by CD-Rom or floppy disk and this facility will be available on request.

What information is needed?

Engagers will need to give as much information as possible when making a claim i.e. Full name of individual / Stage Name (where appropriate)/ NINO/ Date of Birth/ Correct address. They will also be required to declare:

- i) All Basic and Rights Payments made in each tax year for which a claim is made.
- ii) Total earnings on which NICs were deducted and total amount of NICs paid.
- iii) Amounts of employers and employees contributions.
- iv) The type of contract under which the individual has been engaged; If it is either of the standard BBC/EQUITY, ITVA/EQUITY or PACT/EQUITY contracts then no other proof of payment will be required. Contracts and/or invoices will be required in all other cases.

What happens when claims are received?

On receipt the claim will be registered and if sufficient information is supplied, all secondary Class 1NICs confirmed as erroneously paid will be refunded. All claims will be dealt with in the order they are received and will be processed as soon as possible. Employees named on the claim form who, as a result of previous refund action, have already notified the Inland Revenue that they did not wish to claim a refund of primary NICs, will not be contacted but applications will be accepted from those individuals who choose not to allow their wrongly paid contributions to remain on their NI record.

How do applicants know if they are entitled to a refund?

If Class 1 NICs have been paid between 17 July 1998 and 5 April 2003 in respect of entertainers whose remuneration does not satisfy the 'wholly or mainly of salary' criteria in the 1998 regulations then a refund of those contributions may be claimed. For example remuneration made up of 60% Rights Payments and 40 % Salary would not be 'wholly or mainly of salary' and there would have been no liability for Class 1 NICs. However, Class 1 NICs were properly payable in cases where, at the time of the engagement, it was known that the

salary element of the remuneration exceeded any residuals. Therefore, any subsequent residual payments not quantifiable at the time of the original engagement will not change the nature of the original payment. The rule of thumb being that the status decision at the point of first contact is the deciding factor.

The following table indicates whether or not the various elements of remuneration under any of the standard BBC/Equity, ITVA/Equity or PACT/Equity contracts satisfy the case law definition of salary:

Type Of Payment	Salary/Rights Payment
Engagement Fee	Salary or negotiable payment depending upon contract type
Attendance days	Salary
Standby days	Salary
Holiday pay	Salary
Overtime	Salary
Additional Use fee	Rights payment for pre-purchase
Retainer	Salary – to ensure services available when needed
Secondary Sales	Rights payment - 'one off' for sale of programme
Repeat fees	Rights payment - either pre-purchase or at each repeat.
Option fee	Rights payment - to ensure an engager has prioty use of an entertainers services

What now?

If any entertainers, practitioners or engagers are in any doubt about the new regulations or whether they are entitled to a refund they should contact their nearest Inland Revenue office and ask to speak to a member of the Status team. Enquiries about entertainers engaged by TV Broadcasting Companies should be made to the TV Industry Unit on 0161 2613255.

Guidance notes on the new legislation and the arrangements for claiming refunds have been prepared for the entertainment industry and these will also be available at: <http://www.inlandrevenue.gov.uk/publications/specialist> from the end of June 2003.

Fee Protection Insurance

1. This article is about premiums for fee protection insurance relating to the costs of possible future tax enquiries. We have been asked to clarify our views on whether such premiums are allowable as a deduction in computing the profits or losses chargeable to tax under Case I/II Schedule D. In particular we have been asked whether our views on this issue are affected by the decision in McKnight v Sheppard (71TC419). The comments in this article apply equally to the computation of profits/losses of a Schedule A business.
2. The Courts have approved the practice of allowing the normal accountancy expenses incurred in preparing accounts and establishing taxation liabilities (see Smith's Potato Estates Ltd v Bolland, 30TC267). Statement of Practice 16/91 as expanded by Tax Bulletin article TB37 published in October 1998, sets out our view on the deductibility of additional accountancy expenses arising out of an enquiry into a tax return. It says that additional accountancy expenses incurred because of such an enquiry are **not** allowable if:
 - the enquiry reveals discrepancies and additional liabilities for the year of enquiry, or any earlier year, and
 - those discrepancies etc result from negligent or fraudulent conduct.
3. In relation to fee protection insurance, premiums paid to insure against the risk of incurring additional costs are allowable for tax purposes only if those additional costs would themselves have been allowable. This includes the requirement that those costs would, if incurred directly by the business, satisfy the test that they are incurred wholly and exclusively for the purposes of the business.
4. A premium on a fee protection policy, which entitles the policyholder, amongst other risks covered, to claim for the cost of accountancy fees incurred in negotiating additional tax liabilities resulting from negligent or fraudulent conduct, is not an allowable deduction. Furthermore it is not possible to apportion the premiums since it is impossible to identify a part that has been incurred wholly and exclusively for the purposes of the trade or profession.
5. This means that no deduction is allowable to those taxpayers who either make no claim under the policy or only claim against the policy for expenses that are allowable under SoP 16/91. This is because the premiums covered some risks where the related costs are not allowable for tax purposes.

6. The decision in McKnight v Sheppard does not affect this analysis. That case concerned fines imposed in disciplinary proceedings and the associated legal expenses. In Lord Hoffman's judgement (71 TC at page 453) he made the point that tax fell into an entirely separate category from the set of issues concerning fines, penalties and damages dealt with in McKnight v Sheppard and earlier related cases. He said of Smith's Potato Estates Ltd v Bolland:

"In that case, the taxpayer claimed to deduct the legal costs of contesting an assessment to tax. The dispute was about the computation of the taxpayer's profits. It assumed that those profits were ascertainable, one way or another, at the time when the dispute arose. The costs of the dispute could not therefore have been an element in the computation. They were logically as well as temporally subsequent to the profits having been earned."

7. Our view therefore remains that premiums for a fee protection insurance policy, which entitles the policyholder to claim for the cost of accountancy fees incurred in negotiating additional tax liabilities resulting from negligent or fraudulent conduct, are not an allowable deduction in computing taxable profits and losses under Schedule D Cases I and II.

The interaction between the benefits code and payments or benefits received on a termination or change in the nature of employment

From 6 April 2003 most of the provisions of the Income and Corporation Taxes Act 1988 relating to Income Tax chargeable under Schedule E ceased to have effect. They have been replaced by the Income Tax (Earnings and Pensions) Act 2003.

During the writing of ITEPA, a point arose concerning the interaction between Sections 148 and 154 ICTA. Section 148 contained the tax charge on payments and benefits made either on termination of employment, or on a change in the nature of employment. Section 154 contained the rules for taxing general benefits.

Not otherwise chargeable to tax

Section 148 applied to payments and benefits "not otherwise chargeable to tax" whereas Section 154 applied to benefits "not (apart from this section) chargeable to tax". From these conditions it was clear that both Sections applied only in the absence of more specific tax provisions and where there was a charge to tax under any other specific provision, for example Section 19 ICTA, that charge took precedence over both Section 148 and Section 154.

If there was no charge under any other provision it was normally apparent from the circumstances which of Section 148 or Section 154 should apply, but in a small number of instances there could be a potential overlap between the two Sections.

Payment and benefits paid on termination or change of employment

Where payments or benefits related to termination of employment there was no overlap because Section 154 could not apply after termination. The tax charge on termination payments could arise under other provisions, such as Section 19, but if none of these applied the payment on termination fell generally within Section 148.

Where payments or benefits related to a change in the nature of employment, the position was not always so clear. If, exceptionally, the payment did not fall within Section 19 it could potentially be taxed under either Section 148 or Section 154.

Where this potential overlap existed, the order of priority was not thought to be clear in all circumstances. The Revenue's practice, applied consistently over many years, was to treat the payment as taxable under Section 148, in priority to Section 154.

Change of practice from 6 April 2003

In the light of advice received during the writing of ITEPA we now accept that, as a matter of law, and in circumstances where both Sections potentially applied, Section 154 did take precedence over Section 148. That statutory position is maintained in ITEPA. The Revenue's practice has therefore been changed to reflect the statutory position.

From 6 April 2003, where there is a potential overlap between Section 401 ITEPA (which replaces Section 148) and Section 201 ITEPA (which replaces Section 154), the charge to tax arises under Section 201, in priority to Section 401.

It is anticipated that this change of practice will only affect a small number of cases but if you have any comments or views on this change of practice please write to:

Revenue Policy
Personal Tax (Technical)
Room 131, Sapphire House
550 Streetsbrook Rd
Solihull
West Midlands
B91 1QU

National Insurance contributions liability on payments into Funded Unapproved Retirement Benefits Schemes

Introduction

You may be aware that, as a result of the High Court decision in *Tullett & Tokyo Forex International Ltd and Others v The Secretary of State for Social Security* [2000] EWHC Admin 350, the Inland Revenue has been reconsidering its position on the National Insurance contributions (NICs) liability on payments into a Funded Unapproved Retirement Benefits Scheme (FURBS). This article sets out the conclusion of its deliberations. It confirms the Revenue's existing and published view that such payments are liable for Class 1 NICs.

All the legislative references mentioned in this article are those which apply in Great Britain. Northern Ireland has its own legislation which, in the main, is the same as that for Great Britain. But, for ease, we refer only to the latter in this article.

Background

In May 1998 the Secretary of State (SofS) for Social Security decided, under section 17 of the Social Security Administration Act 1992 (SSAA 1992), that bonuses made by way of additional payments in the form of short-dated gilts to life assurance policies were earnings and liable for Class 1 NICs.

The three employers involved appealed against the SofS's decisions. In May 2000, the High Court gave judgement, when it decided in favour of the companies and allowed the appeals. Under section 18(6) SSAA 1992, a decision of the High Court is final.

Legislation

Subject to certain conditions, section 6(1) Social Security Contributions and Benefits Act 1992 (CBA 1992) provides that a Class 1 NICs liability arises when "earnings are paid to or for the benefit of an earner [employee]". "Earnings" are defined in section 3(1) CBA 1992 as including "any remuneration or profit derived from an employment".

The High Court's decision

The court decided that payments by the employers of the short-dated gilts to life assurance policies held by their employees were not earnings "paid to or for the benefit of" the employees in question within the meaning of section 6(1) CBA 1992. Mr Justice Collins held that, in construing section

6(1), it was necessary to look at what the employee receives. As such, the “earnings paid to or for the benefit” of the employees was:

- the enhancement in the value of the life assurance policies held by the employees; and
- not the gilts paid into the assurance policies, which was merely the cost to the employers of making such payments.

The enhancement in the value of the policies was a payment in kind. As such, it fell to be disregarded, for the purposes of calculating the amount of the employees’ gross earnings for Class 1 NICs purposes, by virtue of regulation 19(1)(d) of the Social Security (Contributions) Regulations 1979 (since 6th April 2001, paragraph 1 of Part II of Schedule 3 to the Social Security (Contributions) Regulations 2001 (SI No. 2001/1004; the 2001 Regulations)).

NICs liability on payments into a FURBS

Since November 1997, the view has been that employer’s cash payments into a FURBS are earnings “paid to or for the benefit of” an employee within the meaning of section 6(1) CBA 1992. Where such a payment is made in respect of two or more employees, paragraph 13 of Schedule 2 to the 2001 Regulations sets out how the amount of earnings for each employee comprised in the payments into the FURBS must be calculated.

Implications of the *Tullett & Tokyo* decision on the NICs liability on payments into a FURBS

The Revenue has been considering the effect of the *Tullett & Tokyo* judgement on the NICs liability on payments into a FURBS. After full and careful consideration, the Revenue does not accept the High Court’s reasoning as applying to a payment into a FURBS.

We consider that:

- in reaching his decision, Mr Justice Collins put too much emphasis on Schedule E tax case law when the three appeals concerned the interpretation of NICs legislation;
- the definition of “earnings” in section 3(1) CBA 1992 is much wider than “emoluments” in section 131(1) ICTA 1988 (from 6th April 2003, “earnings” within section 62 Income Tax (Earnings and Pensions) Act 2003);
- the wording of section 6(1) CBA 1992 – “...earnings...paid to or for the benefit of...” – further extends the meaning of “earnings”
- so in some circumstances, as in the case of employer payments into a FURBS, “earnings” includes payments made to a third party for the benefit of the employee.

All of which means that there is no change to the Revenue’s stated position that a payment into a FURBS is liable for Class 1 NICs. This position is set out:

- in booklet CWG2 (2003) “*Employer’s Further Guide to PAYE and NICs*”:
 - in paragraph 81 on page 57; and
 - on page 76 under “retirement benefits schemes”
- on pages 02155 to 02163 of the Revenue’s internal guidance, the “National Insurance Manual”

Unpaid Class 1 NICs on payments into a FURBS

Where due, the Revenue will seek payment of any Class 1 NICs which have not been paid on payments into a FURBS. It will also seek interest on the unpaid amount.

Requests for refunds of Class 1 NICs paid on payments into a FURBS

As a result of the *Tullett & Tokyo* judgement, the Revenue has received a number of requests for refunds of the Class 1 NICs which have been paid on payments into a FURBS. These requests have been refused.

A refund can only be made if the NICs have been paid in error (regulation 52(1)(a) of the 2001 Regulations). “Error” is defined in regulation 52(12) as meaning, and only meaning, an error which:

- is made at the time of payment; and
- relates to some present or past matter.

As explained above, the Revenue’s view is that a payment into a FURBS is liable for Class 1 NICs. It follows that the NICs paid on a payment into a FURBS have not been paid in error within the meaning of regulation 52(12) of the 2001 Regulations. So the NICs cannot be refunded.

Employer Reimbursement Of Employees' Bank Charges

Many employers pay their employees by direct credit to the employees' bank accounts. They may also pay their employees' bank charges by crediting their bank accounts with sums sufficient to cover the charges. Any such sum credited to an employee's bank account, or paid to them in cash, will normally be taxable as part of the employee's general earnings within Section 62 or Section 201 ITEPA 2003 and PAYE tax will be due. Such sums will also be liable for Class 1 National Insurance contributions (NICs) by virtue of sections 3 and 6 SSCBA 1992.

Exceptionally, the bank charges may arise solely as a result of a failure by the employer. For example, most employees are entitled to expect that they will be paid on or around a particular day each month. That entitlement may be recorded in a written agreement or it may be established by custom and practice. If the employer fails to pay the employees' salary at the proper time the employees may incur unforeseen bank charges. In that case, a payment by the employer to reimburse bank charges arising solely as a result of the employer's failure will not be liable to tax or NICs.

The reason is that there has been a breach of contract on the part of the employer (the failure to pay at the proper time) which has resulted in a loss on the part of the employee (the bank charges). Potentially, the employee can sue the employer for compensation. The payment that the employer makes to forestall that action is not earnings within Section 62 ITEPA 2003 because it comes from something other than the employment. The source of the payment is the employer's breach of the employment contract. Nor is the payment an "employment related benefit" within Section 201 ITEPA 2003. It is in the nature of a fair bargain. The employee accepts the payment in return for giving up his or her right to sue the employer for compensation. A fair bargain payment is not a benefit.

The NICs position is similar. The payment to cover the bank charges is not "earnings" as defined in Section 3(1) SSCBA 1992 as it is in the nature of compensation for the loss incurred as a result of the breach of contract. It arises for this reason rather than being derived from the employment. In those circumstances there will be no liability for Class 1 NICs. And as the payments are not taxable there will be no Class 1A liability either.

We understand that some employers may have paid tax and NICs on bank charges which were incurred and reimbursed solely because of the employer's failure to pay their employees on time. They may have done so by "grossing up" the payments, or by means of a monetary settlement after the event. We now accept that any such payments of tax and NICs were made in error, and can be refunded. Any employer who believes, in the light of this article, that they have incorrectly paid tax and NICs in respect of reimbursed bank charges should contact the Inland Revenue Office concerned.

Capital allowances for information and communication technology

1. Budget 2003 extends the **100% first-year capital allowances (FYAs) for information and communication technology** until 31 March 2004.
2. A business is small in a period of accounts if it satisfies at least 2 of the following conditions for the period of account or the preceding period of accounts.
 - Not more than 50 employees
 - Annual turnover not more than £2.8 million
 - Assets not more than £1.4 million
3. ICT expenditure is expenditure on computers and associated peripherals, software, and the latest generation of web-enabled mobile phones.
4. Computers and associated peripherals are -
 - computers, whether large or small (the whole spectrum from mainframes, down to the small laptops and palmtop computers are included).
 - peripheral devices intended to be connected to or incorporated in a computer. These include items such as monitors/ keyboards/ mice/ printers/ scanners/ disc drives/ CD ROM drives/ DVD drives/ memory add-ons,
 - equipment, including cabling, which provides a data connection to another computer or to a data communications network
 - dedicated electrical systems for computers. These are electrical systems for the purposes only of supplying electricity to computers or peripheral devices (these are circuits that protect the equipment from voltage surges etc).
 - Larger systems that incorporate computer technology such as photocopiers do not qualify for the 100% relief.

Software

5. Special rules make expenditure on computer software and rights over computer software qualifying expenditure for plant and machinery allowances. 100% FYAs are available on expenditure on software, or rights over software for use in any computer or peripheral device as listed above.

Mobile phones etc.

6. The equipment in this category is wireless application protocol (WAP) phones, 3rd generation (3G) universal mobile telecommunication system (UMTS) mobile phones and portable digital assistants (PDAs) capable of receiving and transmitting information from and to data networks including the internet

The Board Of Inland Revenue's Statement On The Issue, Renewal And Withdrawal Of Subcontractors' Tax Certificates

In 1975, in response to representations from the Construction Industry that we should not be heavy handed in applying the compliance rules when issuing, withdrawing and renewing gross certificates, the Board of Inland Revenue wrote to the industry assuring them that subcontractors would only suffer deduction of tax where their non-compliance had been "substantial".

This statement has been superseded by subsequent legislation and guidance and is therefore withdrawn. The leaflet IR40 will shortly be amended.

Revenue Prosecutions

The Inland Revenue has a policy of selective prosecution involving the most serious cases across the whole range of the tax system. The Board sees this as an important part of its strategy to deter tax fraud and evasion. As part of the wider publicity for this strategy, details of Revenue Prosecutions are occasionally published in Tax Bulletin.

Phillip George Webster

51 year old Philip George Webster, an accountant from Hull was jailed for 3 and a half years at Leeds Crown Court recently.

After a trial lasting 11 weeks Webster was found guilty late last year. Three co-defendants were acquitted and the case against the fourth was not pursued.

The charge related to a conspiracy to cheat the Inland Revenue of Corporation Tax due on the sale of a Hull nightclub in 1993.

In passing sentence, His Honour Judge Dowse said "the evidence against you is overwhelming and you have lied time and time again to the Inland Revenue investigators and the jury". The Judge added that Webster was far from being of good character and the case was aggravated because he was a practising accountant and because his actions undermined the relationship between his profession and the Inland Revenue.

The total tax loss as a result of the conspiracy was £34098.25 plus accrued interest of £17,508.37. The question of costs will be decided by Hull Crown Court at a later date.

Webster was also disqualified from being a company director for 10 years.

The trial was presented using an electronic evidence system, allowing the court to view documents on monitors rather than wading through paper copies. This was the first such electronic trial conducted in Yorkshire.

Webster was convicted of conspiring to cheat the Inland Revenue of Corporation tax due on the sale of Rumours nightclub. The nightclub was owned by Eastgate Developments Ltd a Beverly based company for whom Webster was the acting accountant. Webster falsely claimed that two Hull companies Waterloo Tavern Ltd and Skippers Tavern Ltd were subsidiaries of Eastgate Developments Ltd and therefore formed a group of companies. As such, Webster claimed the tax due on the disposal of the nightclub could be deferred against further acquisitions made by the group.

Webster was also convicted of producing false company minutes and the affidavits to support the existence of the 'group'. The investigation was initiated by the Inland Revenue Special Compliance Office in Nottingham and concluded by investigators based in Leeds. The case was prosecuted by the Inland Revenue Solicitor's Office.

Corrections

Tax Bulletin Special Edition December 2002

In the Tax Bulletin Special Edition December 2002 an error has been made in one of the examples. The example in column 2 page 3 is wrong - it should read as follows:

Alchemists PLC is a large company. It has an accounting date of 30 June. In the year ended 30 June 2002 it spends £60,000 on consumable stores for its research at a rate of £5,000 a month. It can claim R & D tax credit for the year

ended 30 June 2002 even though it has only spent £15,000 on R & D in the period from 1 April 2002 to 30 June 2002. The accounting period straddling the 1 April 2002 is split into two periods for the purposes of establishing the de-minimis limit. The limit is £6250,00 (=£25,000 x 3/12).

Tax Bulletin 63

Employees Coming From Abroad To Work In the United Kingdom

For the avoidance of doubt, the reference to UK resident employees in the 5th sentence of the article about emoluments in respect of duties performed in the United Kingdom on page 996 of Tax Bulletin 63 is to employees who are not ordinarily resident in the United Kingdom. The internet copy of the article has been amended to make this clear.

Index 2002

Page 16- Tax Bulletin 36

International Tax-offshore trusts

This article has not been deleted it remains current, please amend your copies accordingly.

Inland Revenue Statements of Practice and Extra-Statutory Concessions issued between 1 April 2003 and 31 May 2003

Extra Statutory Concessions

There have been no Extra Statutory Concessions for this period

Statements of Practice

Number	Title	Date of Issue
1/03	Extension of Disadvantaged area Relief	09/04/2003

You can get copies of SPs and ESCs by telephoning 020 7438 4266.

CONTENT

The content of Tax Bulletin gives the views of our technical specialists on particular issues. The information published is reported because it may be of interest to tax practitioners. Publication will be six times a year, and include a cumulative index issued on an annual basis.

- You can expect that interpretations of the law contained in the Bulletin will normally be applied in relevant cases, but this is subject to a number of qualifications.
- Particular cases may turn on their own facts, or context, and because every possible situation cannot be covered, there may be circumstances in which the interpretation given here will not apply.
- There may also be circumstances in which the Board would find it necessary to argue for a different interpretation in appeal proceedings.
- The Bulletin does not replace formal Statements of Practice.
- The Board's view of the law may change in the future. Readers will be notified of any changes in future editions.

Nothing in this Bulletin affects a taxpayer's right of appeal on any point.

Letters on any article appearing in Tax Bulletin should be sent to the Editor, Mr Shell Makwana, Room G7, New Wing, Somerset House, Strand, London, WC2R 1LB or e-mail Shell.Makwana@ir.gsi.gov.uk. We are sorry though that neither he nor our contributors will normally be able to enter into correspondence about Tax Bulletin or its contents.

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