Bank Payroll Tax - Responses to Some Questions

The following information is intended to be general guidance only. The application of the legislation, when enacted, will turn on the particular facts and circumstances of the arrangements entered into by individual taxpayers.

Shares and Long-Term Incentive Plans

Q1. Before the pre-budget announcement a taxable company becomes contractually obliged to provide to a relevant banking employee a specified amount of restricted stock in the chargeable period. The restrictions are that the employee cannot sell the shares for a specified number of years and that the stock may be forfeit if the employee leaves before a specified number of years. Is this within the scope of the bank payroll tax?

A1. Broadly speaking, if the amount of stock is to be paid or provided in these circumstances by virtue of a pre-PBR contractual obligation, it would be treated as "excluded remuneration" i.e. not within the scope of the bank payroll tax, provided that the anti-avoidance provisions in draft legislation were not applicable.

"Excluded remuneration" includes anything in the case of which a contractual obligation to pay or provide it to or in respect of the employee concerned arose before the beginning of the chargeable period. For these purposes a contractual obligation to pay or provide something does not arise until the amount (or, in respect of a number of employees including the employee in question, the total amount of things) to be paid or provided is fixed or is capable of becoming fixed without the exercise of a discretion by any person; but will arise for this purpose even if payment or provision of it is dependent on compliance by the employee with any conditions.

Q2. What would be the position if the facts were the same as question 1 except that the contractual obligation arose between now and 5 April 2010? Would this be subject to the tax, and how is this is determined?

A2. As the contractual obligation arises in the chargeable period, and it is "relevant remuneration", there would be liability to the bank payroll tax, to the extent that the amount of relevant remuneration exceeds the £25,000 threshold. Under paragraph 7 of the draft legislation, the relevant remuneration would be calculated as though the stock was not subject to restriction of any sort, and the charge would be based on the higher of money's worth or market value.

Q3. Would there be any liability to bank payroll tax if, under a Long Term Incentive Plan (LTIP) a relevant banking employee is told during the chargeable period that they will be provided with a stated amount of shares after the end of the chargeable period, provided that the Remuneration Committee do not, as they are entitled to do under the terms of the LTIP at their absolute discretion, resile from what they have told the employee?

A3. This would depend on whether relevant remuneration has been "awarded" within the meaning of paragraph 6 (1) (a) and (b) of the draft legislation, namely whether, on the basis of the terms of the LTIP, and the facts, giving the employee that information gives rise to a contractual obligation on the part of the taxable company. If the facts and the terms of the LTIP do not give rise to a contractual obligation, then nothing is awarded pursuant to paragraph 6 in this period.

Q4. Are Restricted Stock Units (RSUs) "arrangements" or are RSUs relevant remuneration? And if so, what about unvested RSUs that may never deliver? If RSUs are includable and viewed as arrangements, how is the amount determined to calculate bank payroll tax?

A4. Whether the award of an RSU is an award of relevant remuneration as defined by the draft legislation is a matter of fact that will depend upon the detail of the RSU plan rules. If the award of a RSU is an award of “relevant remuneration” then the amount will be determined in accordance with paragraphs 7, 11 or 13 of the draft legislation, as applicable.

Q5. What would happen in relation to existing RSU awards if the contractual obligation predated the 9 December 2009 announcement and there was no discretion to vary amounts payable?

A5. It is a question of fact whether these earnings or benefits are “excluded remuneration”; if they are not, the earnings or benefits would be liable to bank payroll tax. “Excluded remuneration” includes anything in the case of which a contractual obligation to pay or provide it to or in respect of a relevant banking employee arose before the beginning of the chargeable period.
For this purpose a contractual obligation to pay or provide something does not arise until the amount (or, in respect of a number of employees including the employee in question, the total amount of things) to be paid or provided is fixed or is capable of becoming fixed without the exercise of a discretion by any person. A contractual obligation will arise for this purpose even if payment or provision of it is dependent on compliance by the employee with any conditions.

Q6. Would existing options exercised in the chargeable period be excluded if the option grant predated 9 December and if the employer had no discretion to vary amounts payable?

A6. Yes; provided the option was in fact granted before the PBR announcement on 9 December, and the terms of the option met paragraph 5(1) (b) as taken with paragraph 3 so e.g. there was no discretion (whether exercisable by the employer or anyone else) to vary the amount; and no other facts that would cause HMRC to take a different view under paragraph 13 of the draft legislation.

Q7. How is the amount of relevant remuneration calculated when it is awarded in the chargeable period in the form of restricted shares where the restrictions are lifted at a later date (whether within the chargeable period or later), and where neither paragraphs 11 nor 13 of the draft legislation apply?

A7. The "amount" of relevant remuneration is calculated according to paragraph 7. On the basis of those rules, in this scenario the charge is on the higher of money's worth or market value when the relevant remuneration is awarded; there is no further charge to bank payroll tax when the restrictions lift. Note that in the case of relevant remuneration awarded subject to any "restriction" (or restrictions), the restriction (or restrictions) are ignored when determining the amount of the relevant remuneration. (But it is important to note that this is separate from the question of the income tax liability on the employee, where existing law continues to apply.).

Q8. Is there any provision for refunding tax paid where a deferred bonus (within the meaning of "relevant remuneration") is subject to a future claw-back e.g. under terms analogous to those included in the Financial Services Bill?

A8. There is no such provision; this applies for any form in which benefits are paid, including cash, shares, etc.

Meaning of "banking employment" and "banking services"

Q9. Would relevant remuneration, for instance a bonus award, to someone say, seconded from a US subsidiary working in London but wholly paid in New York who got a bonus based on her London performance be liable to the bank payroll tax?

A9. Whether a payment to that individual would come within the charge to bank payroll tax will depend upon the contractual arrangements in place.

Q10. What about bonuses awarded to individuals in overseas branches whose remuneration was taxed overseas and brought back to the UK?

A10. This would depend upon a number of factors, for instance whether the employer was a taxable company as defined by the legislation. More detailed information about the individual and the employer would be required in order to determine whether any bank payroll tax would be due in respect of such an award.

Q11. What would be the position of an individual employed by a taxable company which was a UK permanent establishment of an overseas bank (a "relevant foreign bank")?

A11. There would be no liability to bank payroll tax as far as the individual was concerned, but the UK permanent establishment would be would be liable to bank payroll tax if the individual was a relevant banking employee; who received relevant remuneration exceeding £25,000 during the chargeable period.

Q12. Would there be any liability to bank payroll tax in respect of an individual who was on secondment to a UK company, but was in fact employed by an overseas company and paid entirely abroad?

A12. If the individual personally performs banking services for a UK business which is a taxable company within the legislation, then paragraph 10 of the draft legislation will apply and the individual would be regarded as a "relevant banking employee" of that company. A bonus awarded during the chargeable period by the overseas company would be regarded as the award of relevant remuneration, and the taxable company would be liable to bank payroll tax in respect of relevant remuneration exceeding £25,000.

Q13. Would this be the case even if the payment was made by an overseas company within the group which may not be a subsidiary or parent company?

A13. Whether there was any liability in these circumstances would depend on the specific facts. Paragraph 10 of the legislation may apply because it deals with "anything done by an intermediary in relation to the individual" in circumstances where an individual personally performs banking services for a taxable company other than under a contract between the individual and the taxable company. "Intermediary" is defined as being any other person involved in arrangements under which the individual personally performs banking services for a taxable company.

Q14. Why does the draft legislation have a definition of "relevant banking employee" if all employees of a taxable company are meant to be included? Is it intended to cover, for example, employees engaged in asset management, any other front office staff whose activities are not wholly or mainly concerned with relevant regulated activities or the lending of money and support staff?

A14. The definitions of "relevant banking employee" and "banking employment" are intended to bring awards to all employees, including back-office and support staff, within the charge to the extent that their duties, wholly or mainly, relate, whether directly or indirectly, to relevant regulated activities or to activities which consist of the lending of money. Any awards made to employees who are not within the definition of "relevant banking employee" will be outside the scope of the charge to bank payroll tax.

Q15. What is "personally performs" in paragraph 10 of the legislation (payments to intermediaries) intended to cover? Is it employees seconded to a taxable company or costs borne by a taxable company? Or is this just meant to catch personal and group service companies?

A15. Paragraph 10 will apply where an individual personally performs banking services for a taxable company but those services are not performed under a contract directly between the individual and the taxable company. The phrase "personally performs" is not defined and therefore must be construed within context according to its ordinary meaning. Our view is that paragraph 10 will apply where, for instance, the individual undertakes banking services, whether the basis of that action is as a contractor engaged through a personal (or managed) service company, or as an employee of a group service company or an employee of another group company who temporarily works for the taxable company.

Q16. What exactly is meant by 'provide' in Paragraph 6(1) (a) and (b) of the draft legislation. Does this include provided in the statutory accounts?

A16. Paragraph 6(1) explains which events constitute the award of relevant remuneration. "Relevant remuneration" means anything that constitutes either earnings in relation to an employment or a benefit provided by reason that employment. In that context, the expression "pay or provide" in paragraph 6(1)(a) and (b) reflects the fact that relevant remuneration includes benefits in kind, for which "pay" alone is inappropriate. Paragraph 6(1) (a) is concerned with whether a contractual obligation to "pay or provide" relevant remuneration arises during the chargeable period. In that regard, it would be necessary to legally analyse all the facts to determine whether the provision of an amount in the statutory accounts in this example means that a contractual obligation to pay or provide relevant remuneration arises during the chargeable period.

Relevant Remuneration

Q17. Would employer pension contributions constitute a benefit within the definition in Paragraph 4(1) (b)?

A17. The award or payment of a bonus in the form of employer pension contributions (i.e. contributions that are not regular or payable under an existing contractual obligation) would constitute a benefit.

Q18. Since the definition of "benefit" in Paragraph 25(1) could be read to include redundancy payments and other termination payments (taxed by section 403 of ITEPA) would such payments be included in relevant remuneration?

A18. Redundancy payments are not normally earnings or benefits in relation to the employee's employment but are rather in the form of compensation for loss of employment. However, where a redundancy payment, a termination payment or any part of either (e.g. a discretionary terminal bonus) does constitute earnings or a benefit in relation to the employee's employment, it will be within the scope of the charge.

Q19. Would any amounts put aside for future potential payments of remuneration be within the ambit of the bank payroll tax?

A19. It is not intended that simply putting aside profits for the future will constitute the award of relevant remuneration.

Q20. Are loans made to employees before 9 December but still outstanding during the relevant period included in the definition of remuneration to which the charge will be applied?

A20. The intention is that loans made before 9 December where there is no ability for the employer to vary the amount provided to the employee should not be caught by the legislation.

Returns, etc

Q21. Will banks be required to submit details of every bonus they award?

A21. Banks will only be required to make returns of bonus awards in excess of £25,000.

Banking employment

Q22. What is the relationship between the list of activities at paragraph 20 (1) and the concept of "banking employment" as defined in paragraph 8(2)? What is the position where the duties of the employee relate to an activity which is a regulated activity for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the 2001 Order") but which is not defined as a relevant regulated activity in paragraph 20(1) of the draft legislation?

A22. Banking employment is defined in paragraph 8(2) of the draft legislation as "an employment the duties of which are wholly or mainly concerned (whether directly or indirectly) with activities to which sub-paragraph (3) applies. Sub-paragraph (3) applies to:

- relevant regulated activities (i.e. those activities listed in paragraph 20(1) of the draft legislation); or

- activities which are not relevant regulated activities but consist of the lending of money".

If the duties of an employee are wholly or mainly concerned directly with activities to which sub-paragraph (3) applies then those duties will always amount to banking employment.

If the duties of the employee consist wholly or mainly of activities which are regulated activities for the purposes of the 2001 Order but are not relevant regulated activities listed in paragraph 20(1) of the draft legislation, it will be a question of fact as to whether or not the duties of the employee are, nevertheless, directly or indirectly concerned with activities to which sub-paragraph (3) applies.

For example, entering into a regulated mortgage contract as lender is a relevant regulated activity (see paragraph 20(1) (f) of the draft legislation and article 61 of the 2001 Order). Arranging a regulated mortgage contract (as defined in article 25A of the 2001 Order) is not a relevant regulated activity but is either indirectly related to the relevant regulated activity of entering into a regulated mortgage contract or directly or indirectly concerned with activities that consist of the lending of money and is thus caught. Similarly dealing in investments as principal, dealing in investments as agent, arranging deals in investments and safeguarding and administering investments are relevant regulated activities (see paragraphs 20(1)(b) to (e)) of the draft legislation and articles 14, 21, 25 and 40 of the 2001 Order). Although activities within article 53 (advising on investments) are not listed as relevant regulated activities, they may be directly concerned with the activities listed, and therefore the bonuses paid to employees wholly or mainly engaged in such activities may be within the scope of the tax.
Similarly, activities carried on in connection with the sale of a body corporate (as defined in article 70 of the 2001 Order) are not a relevant regulated activity but is an activity which, depending on the facts, may be either directly or indirectly related to a relevant regulated activity in paragraphs 20(1) (b) to (e). ‘Indirectly’ is to be given a wide meaning, and includes ancillary activities such as IT support for the sub-paragraph (3) activities.

Q23. What activities within a banking group would you regard as not falling within the scope of banking employment?

A23. The activities of a banking group will comprise a diverse mixture of proprietary activity, on behalf of the group, and non proprietary activity on behalf of the group’s clients and customers. Non-proprietary activity will be excluded from the scope of ‘banking employment’ if it is neither directly nor indirectly concerned with relevant regulated activities or the lending of money. For

example, HMRC consider that the following do not amount to ‘banking employment’:

- providing non-financial insurance services to external policyholders,
- operating a collective investment scheme for external investors,
- dealing and arranging deals as agent, rather than for own account, as part of the discretionary management of the assets of external clients, or of insurance companies which are members of the same banking group.

It follows that any activity that is wholly or mainly subordinate to one of these activities, rather than to relevant banking activity, is also not a ‘banking employment’.

Conversely, proprietary activity undertaken on behalf of a bank or banking group is potentially a banking employment, whether regulated or unregulated, if that activity is directly or indirectly concerned with relevant regulated activities or the lending of money. This would include, for example, deposit taking, lending, underwriting and trading in securities, derivatives, commodities, currencies or foreign exchange, and the management of assets for group entities or entities mainly funded by the group. Such activities underpin the banking activities within the group and are therefore an activity directly or indirectly concerned with relevant regulated activities or the lending of money.

Q23A. Paragraph 8(2) of the draft legislation defines “banking employment” as “an employment the duties of which are wholly or mainly concerned (whether directly or indirectly) with activities to which sub-paragraph (3) applies.” What is “wholly or mainly” intended to cover? Does it mean that if more than 50% of the activities undertaken by the employee in the performance of the duties of his employment are either concerned with relevant regulated activities or with activities which are not relevant regulated activities but consist of the lending of money then the employment is a “banking employment”?

A23A. The phrase “wholly or mainly” is not defined and must therefore be construed within context according to its ordinary meaning. The point for consideration is whether the duties of the employment are wholly or mainly concerned (whether directly or indirectly) with activities that are either relevant regulated activities or consist of the lending of money. Our view is that in most cases this will not require a detailed time-based analysis of the activities actually undertaken by the employee. If the job description for the employment is such that it is reasonable to expect that the employee will devote the majority of his or her time undertaking duties that are concerned either with relevant regulated activities or which consist of the lending of money then the employment will be a “banking employment. In those cases where a more detailed analysis is required we would consider whether a simple “more than 50% test” is satisfied”.

Accounting for liability to bank payroll tax, etc

Q24. How will “taxable companies” be required to account for bank payroll tax?

A24. Taxable companies will be required to self-assess their liability. The payment of bank payroll tax will have to be made electronically, and have to reach HMRC by 31 August 2010. Further details about the self-assessment requirements and payment mechanisms will be published in due course.

Q25. Will there be any penalty provisions?

A25. Penalty provisions will apply to incorrect or late filed returns and penalty and interest provisions will apply to late payments.

Q26. What would happen if taxable companies fail to self-assess their liability to bank payroll tax?

A26. HMRC will have the power to issue a determination of the estimated bank payroll tax due. HMRC will also have the power to issue determinations where it believes that the bank payroll tax self-assessed is less than that due.

Temporary residents

Q27. Isn't it disproportionate for a taxable company to be subject to bank payroll tax in respect of a bonus awarded to someone who is only on a very brief visit to the UK e.g. a single day?

A27. It is our intention to make clear in the legislation, when it is enacted, that where the duties of the banking employment are performed by an employee who visited the UK for 60 days or less in the tax year 2009/10, that employee will not fall within the definition of a relevant employee and the bank payroll tax will not apply to relevant remuneration awarded to that employee.

Q28. Are there any apportionment rules within the legislation to cater for the situation that the person awarded a bonus in excess of £25,000 may have only been a "relevant banking employee" for part of the chargeable period?

A28. There are no apportionment rules for the bank payroll tax but it applies only to relevant remuneration from a relevant banking employment. If the employee is engaged in a relevant banking employment for the full year and the exception in FAQ27 does not apply, relevant remuneration awarded during the chargeable period will be subject in full to the bank payroll tax.

Q29. Would there be any liability to bank payroll tax in respect of bonuses in excess of £25,000 awarded to relevant banking employee in the following circumstances: (a) the individual makes a series of business trips to the UK; (b) the individual is assigned for a number of years from a foreign employer to work in the UK branch office; or (c) the individual is assigned to a foreign branch or overseas subsidiary early in the tax year 2009/10?

A29. An employee will be a relevant banking employee if the employment is a banking employment and either the employee is resident in the UK in the tax year 2009/10 or the duties of the banking employment are at any time in that tax year performed wholly or partly in the UK. Such an employee will only be a relevant banking employee if he spends more than 60 days in the UK in the tax year 2009/10. It does not matter whether the 60 days accrue during one assignment or visit or several shorter assignments or visits.

Q30. How will HMRC count the days for the 60 day test – will it be days of presence, or presence at midnight, or some other rule?

A30. The 60 day test should be based on days counted as for the residence rule.

Paragraph 6: Definition of "Awarded"

Q31. What does "a contractual obligation to pay" mean in the context of awards that are subject to a contingent requirement? If, for example, if an award was made in January 2010 but payable in January 2013 provided the employee is still in employment at that date, when would the award be treated as being made?

A31. HMRC would treat the award as arising in January 2010.

Q32. What does the expression "fixed without the exercise of discretion" in paragraph 5 (3) (a) mean in the context of an award that is variable – for instance where the final amount will be determined by the amount of profit generated by a business unit? Is that 2010 on the basis that the amount is not subject to discretion, or 2013 because it is subject to the discretion of, for example, the company Finance Director who signs off the accounts?

A32. HMRC would treat the award as arising in January 2010.

Q33. What does the expression "fixed without the exercise of discretion" in paragraph 5 (3) (a) mean in the context of an award that is subject to discretion – for instance an award to pay up to £50,000, the final amount to be agreed by a committee by reference to the performance of the share price over a given period? Would paragraph 5(3)(a) mean that the contractual obligation is not taken as arising before the committee decides, or would paragraph 11 override this?

A33. HMRC are of the view that the power of discretion over payment is likely to be sufficient to prevent the award being relevant remuneration awarded during the chargeable period for the purposes of paragraph 6 of the draft legislation. Depending on the circumstances, the award may be treated as relevant remuneration by virtue of paragraphs 11 or 13.

Paragraph 3: Definition of "Taxable Company"

Q34. Do you intend to publish further draft legislation following the announcement on 18th December (published at www.hmrc.gov.uk/pbr2009/bank-payroll-18-12.htm)?

A34. There are currently no plans to publish a further version of the draft clauses before the introduction of the Finance Bill. The aim is that the clauses published when the Bill is introduced will reflect the results of discussions with stakeholders since PBR. However HMRC does intend to publish further detail on how we propose to exclude standalone pure brokerage businesses from the scope of BPT and proposed amendments to the definition of 'banking group'.

Q35. In applying paragraph 19 of the draft legislation, how does one assess whether the activities of a company consist "wholly or mainly" of relevant regulated activities? By volume of trade, numbers of staff, size of profit, or by some other criteria?

A35. HMRC considers ‘mainly’ to mean more than 50%. Ordinarily, we would expect that where the relevant regulated activities generate the majority of the entity’s trading income then that entity would be a “UK resident bank” or “relevant foreign bank” (unless otherwise excluded) for the purposes of the BPT.

Paragraphs 4 and 7: Equity awards

Q36. Can you confirm that equity awards taxable under the provisions of part 7 ITEPA 2003 (other than where a relevant election is made under S425 or S431) are within paragraph 4(1)(a?

A36. Equity awards are likely to be within paragraph 4(1)(a) or (b). The various provisions in Part 7 ITEPA 2003 may modify the amount chargeable to tax on award or introduce a charge to tax as employment income on the happening of a subsequent event but that does not change the form of the transaction that the employee is receiving something that either constitutes earnings or constitutes a benefit. The amount of the relevant remuneration will be determined in accordance with paragraph 7.

Paragraph 7: “Amount” of remuneration

Q37. When an employee changes his function during the tax year 2009/10 from being a relevant banking employee to not, or vice versa, please confirm that the amount of the relevant remuneration to be taken into account in computing the liability to Bank Payroll Tax is that part of his earnings represented by the relevant remuneration which relates to the period during which he is working as a relevant banking employee.

A37. Paragraph 1(2) states that BPT is chargeable on the aggregate of the amounts of chargeable relevant remuneration awarded during the chargeable period to or in respect of relevant banking employees of the taxable company by reason of their employment as relevant banking employees. Paragraph 4(1) refers to “relevant remuneration” in relation to a relevant banking employee.

HMRC is of the view that the BPT will only apply to any award within the meaning of "relevant remuneration" that relates to the period in which the employee was a relevant banking employee.

Q38. Please explain how the provision at paragraph 7(2) is intended to apply. It would be useful to understand the proposed interaction with the provisions of paragraph 6(1) and 5(3)(a).

A38. Paragraph 7(2) states that where remuneration is awarded by virtue of paragraph 6(1) (a) ("a contractual obligation to pay or provide arises during the chargeable period") and the amount is not fixed when it is awarded, the amount is such as it is reasonable at the time to assume would be its amount in accordance with paragraph 7(1) if and when paid or provided. The amount of any relevant remuneration would be the amount which it would be reasonable to assume the employee would receive when the award is paid.

Paragraph 11: "Arrangements"

Q39. Would a formal or an informal discussion between a line manager and an employee about a recommendation the former is making to a separate decision making body for a bonus constitute an arrangement within paragraph 11 of the draft legislation?

A39. This would depend on the circumstances. Consideration of whether there were arrangements for the purposes of paragraph 11 may require a wider perspective than looking at one particular event in isolation. A discussion between a line manager and an employee about a recommendation the former is making to a separate decision making body for a bonus will not, in isolation, normally constitute an arrangement for the purposes of the legislation. If it is followed within the chargeable period by any formal or informal agreement, understanding or decision by or with a person or persons who have the authority to award a bonus, then HMRC may take the view that an arrangement exists.

Paragraph 13: Anti Avoidance

Q40. Does paragraph 13 only apply where there is an “arrangement” (as defined in para 25) in existence? Would it apply, for example, where a company simply decides to defer making decisions concerning the amount of method of delivery of its discretionary incentive pay until the legislation is final?

A40. Paragraph 13 will only apply where an “arrangement” (as defined in para 25) exists. It would not apply merely where a company simply decides to defer making any decision about its discretionary incentive pay until after the end of the chargeable period. If, however, the company enters into arrangements with its employees during the chargeable period as to what they might expect to receive by way of discretionary incentive pay after the chargeable period when the company starts the decision-making process, then paragraph 11 or paragraph 13 may be applicable.