



**Edition 10**  
4 March 2021

## Tax Bites

Welcome to the latest edition of RPC's Tax Bites - providing monthly bite-sized updates from the tax world.

As always, if there are any areas you would like more information on (or if you have any questions or feedback), please let us know or get in touch with your usual RPC contact.

### News



#### **HMRC's response to loan charge review criticised**

The House of Lords Finance Bill sub-committee has criticised HMRC's response to the loan charge review on the basis that it has not given enough consideration to the individual circumstances of lower income taxpayers. The sub-committee set out its views on HMRC's response in an open letter to the government and although it acknowledged that HMRC had made progress in how it managed the loan charge, it noted that there was unequal treatment of different types of taxpayer, including different time-to-pay arrangements and different timetables for settlement.

The sub-committee has recommended that HMRC extend the time available beyond 31 December 2020 for taxpayers to choose to spread their loan charge payments. As the normal period for making elections is two years, the sub-committee recommended that the date should be extended to 31 December 2021 and should be an automatic deadline rather than one at the discretion of HMRC. It also asked HMRC to set out its intended approach to open enquiries into arrangements dating back before 2010/11 and invited HMRC to consider closing those enquiries.



#### **GAAR applies to artificial repayment of a loan to participators**

HMRC has published the opinion of the General Anti-Abuse Rule (GAAR) Advisory Panel in relation to a tax arrangement involving the artificial repayment of a loan or advance to a participator to avoid a charge under the loans to participators legislation. In the view of the Panel, the arrangement was not a reasonable course of action in relation to the relevant tax provisions. The arrangement is intended to enable taxpayers to avoid a tax liability under section 455 of CTA 2010, by repaying a loan within 9 months of the end of the accounting period in which it was advanced to them. The participator would repay the loan by setting up a company in which he was the sole officer and shareholder. The company would provide consultancy services to the participator and would issue shares but not make a call on them. The participator would guarantee that the call would be satisfied, which would increase the value of the company and the participator would sell his shares to the company which advanced the loan as payment.

The GAAR panel concluded that as the company providing consultancy services 'lacked commercial purpose and economic substance' and was purely an asset created to satisfy debt, the arrangement was contrived and artificial and therefore caught by the GAAR.



#### **HMRC publishes policy paper to assist with compliance changes to the off-payroll working rules**

HMRC has published a policy paper detailing the principles relevant to entities which engage contractors or intermediaries and the steps they need to follow in order to comply with changes to the off-payroll working rules (also known as IR35).

The paper confirms, amongst other things, that taxpayers will not have to

pay penalties for careless inaccuracies in the first 12 months relating to the off-payroll working rules, regardless of when the inaccuracies are identified. HMRC has also confirmed that it will not penalise companies who fail to apply the rules correctly or make incorrect status determinations provided they took reasonable care when making their decisions.



### HMRC updates NICs guidance for EU workers

HMRC has updated its guidance notes on social security contributions and national insurance contributions for workers coming to the UK from the EEA or Switzerland, to reflect that all EU member states have opted to apply the detached worker rules.

As part of the trade and co-operation agreement made between the UK and EU on 24 December 2020, the UK and EU agreed that they would continue the social security coordination arrangements between them. The agreement provides for the existing short-term assignment rule to continue (also known as the detached worker rules). This allows workers to move between the UK and those EU member states which choose to opt-in to the detached worker rules.

The guidance confirms that UK employers sending an employee to work temporarily in the EU (for up to two years) should apply to HMRC for certification so that UK NICs can continue to be paid in the UK. Likewise, UK employers bringing an EU-based employee to the UK to work temporarily should ensure that the employee obtains a certificate from their home EU member state so that social security contributions can continue to be paid in that home member state.

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## Case reports



### Rialas - UT dismisses HMRC's appeal in transfer of assets abroad case

In *HMRC v Andreas Rialas* [2020] UKUP 0367 (TCC), the Upper Tribunal (UT) has confirmed that the taxpayer was not liable to income tax on dividends paid from a UK company as a result of the transfer of assets abroad anti-avoidance legislation (TOAA), originally contained in section 739 et seq, Income and Corporation Taxes Act 1988 (the legislation has since been rewritten).

Following this decision, where an offshore structure acquires assets at their full market value from a third party, it will be difficult for HMRC to mount a successful argument that another individual has procured the transfer. However, this is unlikely to be the final word on this issue. The UT declined to rule on HMRC's claim that the First-tier Tribunal (FTT) was also wrong in determining that applying a charge to income tax under the TOAA regime to the appellant would infringe his EU rights to free movement of capital. This was, in part, in order to reach a swift decision on the core issue so as to enable a co-ordinated appeal by HMRC of the UT's decision in this case with its appeal in *Fisher v HMRC* [2020] UKUT 0062 (TCC) (the Court of Appeal is due to hear HMRC's appeal in *Fisher* later this year) where the core issue in dispute is the same, namely, when should an individual who has not personally made a transfer of assets abroad be treated as a transferor for the purposes of the TOAA regime? HMRC's position is that where an individual has been involved in the creation of a structure, they should be treated as the transferor. It is understood that there are a number of other cases in which HMRC is maintaining this argument and clarification of the correct interpretation of the TOAA from the Court of Appeal will be welcome.

You can read our commentary on this decision [here](#).



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### Warsaw - Cumulative preference shares constituted ordinary share capital and qualified for entrepreneurs' relief

In *HMRC v Stephen Warsaw* [2020] UKUT 366 (TCC), the UT has upheld the FTT's decision that cumulative preference shares with rights to compound accrued but unpaid dividends constituted "ordinary share capital", for the purposes of section 989, Income Tax Act 2007 (ITA) and therefore qualified for entrepreneurs' relief (ER).

This decision is one of several recent examples where HMRC has sought to disqualify a shareholder from ER (now called business asset disposal relief) on the basis that there was something unusual about the kind of shares held by the taxpayer. The decision provides helpful clarification on

how the courts are likely to approach the meaning of "ordinary share capital", for the purposes of section 989, ITA. In reaching its decision, the UT endorsed the view of the UT in *HMRC v McQuillan* [2017] UKUT 344 (TCC), that section 989 is simply intended to operate as a "bright dividing line" between shares that are ordinary share capital and shares that are not, and should not be given a purposive construction based on any particular tax regime in which it appeared.

You can read our commentary on this decision [here](#).



### **Embiricos - HMRC cannot issue a partial closure notice without specifying the amount of tax due**

In *HMRC v Embiricos* [2020] UKUT 370 (TCC), the UT has allowed HMRC's appeal and held that HMRC cannot issue a partial closure notice without specifying how much tax is due.

This issue had only been considered by the FTT on one previous occasion in *The Executors of Mrs R W Levy v HMRC* [2019] UKFTT 418 (TC), when it had reached a different conclusion. It is understood that the taxpayer is appealing the UT's decision to the Court of Appeal and it is to be hoped that some much needed clarity on this issue will be provided by the Court of Appeal.

You can read our commentary on this decision [here](#).



### **And finally...**

*From 1 January 2021, the new UK sanctions framework officially came into force under the Sanctions and Anti-Money Laundering Act 2018 (SAMLA).*

*SAMLA was one of the first Acts passed as a direct result of Brexit. In a recent podcast episode, we discussed this matter with Alex Haines, a Barrister at Outer Temple Chambers who specialises in international law, business crime and sanctions. Alex shares his considerable knowledge of sanctions, how they affect trade and the changes SAMLA is likely to bring about.*

*You can listen to our latest podcast on sanctions [here](#).*

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