Volume 34 ■ Part 17 ■ September (1) 2013

Practical TAX Newsletter

Employee Shareholder Shares

Annette Morley explores this new share scheme.

Introduction

Employee shareholder shares represent a new type of share scheme introduced by FA 2013, Sch 23, which came into effect on 1 September 2013. The term "employee shareholder" is a new employment status for employment law. It has been introduced by the Growth and Infrastructure Act 2013, but required an insertion into the Employment Rights Act 1996 (ERA 1996) as well as into tax legislation.

During the consultation stage for the scheme it was popularly known as "shares for rights", which reflects the real focal point of the concept. An individual taking up a tax advantaged offer of shares in their employing company will give up some important employment rights, whilst remaining firmly an employee. The main tax advantage for the employee is an exemption from capital gains tax, but there is also an element of income tax and NIC saving.

How it works

For an individual to qualify for the new employment status both he and his employing company must enter into an agreement whereby the company allots or issues him with fully paid up shares in itself or its parent company. The shares must be worth not less than £2,000 at the time of issue. In return, the individual sacrifices some of his existing employment rights (ERA 1996, s 205A). No other consideration must be given for the shares.

A written statement which forms the basis of the agreement must be provided by the employer. ERA 1996, s 205A(5) sets out the ten items of information that must be contained therein (see below).

Once the conditions have been met, there is an exemption for gains arising on a subsequent disposal of those "employee shareholder shares". This is achieved by exempting the gain on each "qualifying share" (ie shares issued as consideration for the employee shareholder agreement), regardless of the amount of gain realised (TCGA 1992, s 236B).

Surrendered rights

The rights to be relinquished are summarised as follows:

- the right to request to undertake study or training (ERA 1996, s 63D);
- the right to request flexible working, other than within 14 days of a return to work after parental leave (ERA 1996, s 80F);
- the right not to be unfairly dismissed, although rights on the grounds of equality or health and safety are not surrendered (ERA 1996, s 94); and
- the right to a redundancy payment (ERA 1996, s 135).

In addition, the period of notice that an employee must give of their intention to return to work following maternity leave or corresponding provision for adoption leave is increased from 8 to 16 weeks. In the equivalent case for

CONTENTS

paternity leave the employee's notice of intention to return to work increases from 6 to 16 weeks.

Protecting the employee

The principle of giving up employment rights has been a key issue in the debate on this new law. As a result some extra safeguards have been built into the legislation. Particularly:

- the individual, after having been given the written statement, must receive advice from a relevant independent adviser as to the terms and effect of the proposed agreement;
- any reasonable costs incurred by the individual in obtaining the advice (whether or not the individual becomes an employee shareholder) must be met by the company; and
- the provision of the advice paid for by the employer will not give rise to a taxable benefit.

The written statement

The written statement must set out that the individual would not have the rights identified at ERA 1996, s 205A (2). It must also state whether the shares:

- have voting rights;
- carry rights to dividends;
- have rights to participate in the distribution of any surplus assets if the company were wound up;
- are redeemable and if they are, at whose option;
- have different rights from other large classes of shares in the same company;
- are restricted as to transferability and what those restrictions are; and
- are subject to drag-along rights or tag-along rights (ie whether being minority shareholders would disadvantage them).

The statement must also specify the notice periods that would apply in the individual's case as a result of the changes to the maternity/paternity notice periods, and how any of the rights of pre-emption of existing shareholders (CA 2006, ss 561 and 562) are excluded.

Income tax and earnings

This is possibly the area where the greatest difficulties lie for the operators of this new share scheme. New ITEPA 2003, ss 226A–226D provide for the income tax treatment of employee shareholder shares.

The first hurdle is the minimum value of the shares on transfer to the employee. The shares must have a value of at least £2,000 or they will fail to qualify for the scheme. This value must apply on the first day of share issue. Transferring, say, £1,000 worth on one day and £1,000 the next would not meet the criteria.

The second hurdle is the basis of valuation. For the purposes of meeting the £2,000 limit, restricted shares must be valued complete with restriction, whether or not there has been any election under ITEPA 2003, s 431. Similarly, convertible shares must be valued ignoring the normal rule of treating them as if they were not convertible.

The next consideration is the benefit gained by the employee from the acquisition of shares. In principle, the shares are employment related securities and the value the employee receives is treated as earnings and subject to PAYE/NIC. However, there is an exception to this general rule which works like this: when an individual acquires employee shareholder shares, there is a deemed payment by him of £2,000. Thus, the first £2,000 worth of the shares is effectively free from PAYE/NIC, including employer's NIC.

Returning to basis of valuation, in contrast to the second hurdle above, the value for the purposes of earnings of the employment under ITEPA 2003, s 226A is based on the unrestricted value if the s 431 election has been made. It also ignores the effect of any convertible element of the shares.

Throughout, the value of shares is a reference to their market value within the meaning of TCGA 1992, ss 272 and 273.

There is an exception from the immediate employment charge where employee shareholder shares are acquired through an employment-related securities option. In such a case, the normal rules applying to options are applied (ITEPA 2003, s 226A(4)). Ultimately, this yields a similar tax outcome, as the consideration given when the option is exercised specifically includes the deemed payment of £2,000.

Capital gains tax

TCGA 1992, s 236B allows the exemption from CGT for employee shareholder shares. To qualify for the exemption the following applies:

- the total value of qualifying shares immediately after acquisition must not exceed £50,000;
- value in this context means market value ignoring any restrictions placed on the shares (TCGA 1992, s 236C); and
- the individual, together with any persons connected with him, must not have a material interest in the company or its parent. This applies at the date the shares were issued and in the preceding 12 months. A material interest for this purpose is a holding of 25% or more of the voting rights (TCGA 1992, ss 236C–236D).

The CGT exemption is not denied where an individual has employments with companies which are associated with each other (i.e. where one controls the others or all companies are under common control). In that case there would be employee shareholder agreements with each company. However, the £50,000 limit applies across the board to all shares issued under the agreements.

On disposal, the normal share pooling rules do not apply for identification purposes. Neither do the rules relating to:

- disposals on the date of acquisition;
- acquisitions within 30 days following the disposal; nor
- the rules relating to reorganisations and other company reconstructions (TCGA 1992, ss 236E(1) and 236F)

Where the individual makes a part disposal from a holding of shares, only some of which are entitled to exemption, they may determine what proportion of the disposal is made up of exempt shares and the disposal proceeds will be apportioned accordingly. This will assist in preserving the annual exempt amount for other chargeable disposals (TCGA 1992, ss 236E(2)–(4)).

Although employment rights have been held to be an asset for capital gains purposes, it is specifically provided that the rights given up for employee shares are not assets in these circumstances. The shares are treated as having been acquired for no consideration (TCGA 1992 s 236G).

Other matters

Corporation tax relief on certain employee share acquisitions is available to the employer company, subject to the usual conditions under CTA 2009, Pt 12. However, new CTA 2009, s 1038B permits the relief to be given on the full value of the shares assessed as earnings, ignoring the deemed payment of £2,000.

Company purchase of its shares has effectively been permitted tax free by new ITTOIA 2005, s 385A. That provides that no tax is charged on a payment made to an individual by the company if:

- it is made in respect of exempt employee shareholder shares; and
- at the time of the disposal, the individual is neither an employee nor an office holder of the company or any associated company.

Conclusion

Popular speculation has been that this scheme would, at best, have a narrow market. The advantages to both employer and employee (particularly the latter) seem limited when compared with the downside.

How many employees will be induced to forfeit important rights in the mere hope of tax free gain in the future? For anything worth more than £2,000 of shares, the payment of an upfront PAYE/NIC charge must present a further discouragement. Nevertheless, when clients hear a rumour of any new ″scheme″ tax advisers must be at the ready to enlighten them. **TPT**

Annette Morley

Annette Morley CTA is a tax consultant and can be contacted on 07747 046818 and at amorley@annettemorley.co.uk.

IHT Planning for a Family Farm

Andrew Rainford recounts a tale.

This is a salutary tale involving a farm, an IHT concern, and a ″trusty″ family advisor.

Background

L has been living with her partner, Mr X for some 25 years. He owns a reasonably large plot of land in central England which he used to actively farm himself, but now lets on a tenancy arrangement.

Some time ago Mr X was diagnosed with cancer, and has been having interval treatment for several years. Six months ago he was informed his cancer had spread and was given the unwelcome news that he would be lucky to see another 18 months. "You should get married", I half-jokingly remarked with a very brief non-technical explanation of why. The date was set before the weekend – apparently David Cameron can't persuade people that marriage is the way to go, but a tax adviser can.

Mr X's brother in law is a solicitor, who was to take care of the will and any necessary tax planning once the marriage had taken place. This was until I received an email from a confused sounding L (now Mrs X) asking if I could explain what was meant by a Life Interest Trust. Apparently Mr X was enthused about this plan because it meant no IHT would be payable, but he had switched off after hearing that initial nugget.

I established that the assets in Mr X's estate are approximately:

Farm house and garden area	£500,000
Farm land subject to tenancy	£400,000
Cash	£200,000
Total	**£1,100,000**

The draft will

The draft will provided a life interest in favour of Mrs X in respect of the house and some cash, and the rental income from the land for a fixed period of time. Some cash would also be appointed to Mr X's two adult sons, on the understanding that they had benefited from large gifts from Mr X over the years, including assistance to buy a property each. Mr X was of the understanding that Mrs X would continue to assist the two sons after his passing using her own annual IHT allowances, which she was more than happy to do, and was therefore less concerned with providing for them in an immediate fashion.

Ultimately he wanted the distribution to be around 40% for Mrs X, and 30% to each of the sons. The solicitor had appeared to have ignored this, focusing instead on the point of there being no IHT under his plan. He also stated there could always be further appointments made out of the Trust once the property was sold in years to come. The solicitor mentioned the Trust would be a good way of keeping all the money in the family, and the farm wouldn't qualify for business property relief (BPR).

Client's wishes

Mr X's wishes are simple. He wants to provide a home for Mrs X, and enough money for her to live on and supplement her state pension once she reaches retirement age. This is to be achieved by some cash and proceeds from a future sale of the farmhouse, which Mrs X feels is too big to live alone in.

I explained that under a life interest arrangement, Mrs X would have no absolute power over any capital, no power to leave anything to her own daughters, and no right to actually make further assistance to the sons should the need arise. I needed to read through the draft will; as it appeared not to fulfil his wishes in the best possible way.

The detail

On a first reading of the draft will it was clear that the solicitor (Mr X's brother-in-law) had appointed himself as the remainderman, or his own children, should he die first. I will leave readers to draw their own conclusions on this. When I asked Mr X if his intention was indeed to ultimately leave all of his wealth in this way he was completely apoplectic. Mr X was not only angry at his brother-in-law but he also wanted Mrs X to have any money absolutely. The consequences of a Life Interest Trust had not been explained to him, although he admitted he had focused on the "no IHT" part of the explanations, which were jargon filled and quite confusing to the layperson. I pointed out that whilst the solicitor was correct that the farm would not qualify for BPR, there was another tax relief that may be available, and that I might be able to put together an alternative way of achieving what he wanted.

Agricultural property relief

The relief I had alluded to was of course agricultural property relief (APR) under IHTA 1984, Pt V, Ch II.

There are two broad conditions for APR to be applicable, with a ream of caveats and sub clauses attached.

1: The property is qualifying agricultural property

IHTA 1984, s 115(2) states that agricultural property means: "agricultural land or pasture and includes woodland and any building used in connection with the intensive rearing of livestock or fish if the woodland or building is occupied with agricultural land or pasture and the occupation is ancillary to that of the agricultural land or pasture; and also includes such cottages, farm buildings and farmhouses, together with the land occupied with them, as are of a character appropriate to the property".

2: Minimum occupation/ownership period

IHTA 1984, s 117, requires the qualifying property must have been:

- occupied by the transferor (i.e. owner) for the purposes of agriculture for at least two continuous years up to the date of transfer/death; or
- owned by him for at least seven years to the date of transfer/death, and throughout that seven years have been occupied by someone for the purposes of agriculture.

Provided one of these two conditions is met, APR is available at 100% or 50% (see below) on the *agricultural value* of the property concerned.

Which valuation base?

It is important to note the distinction between agricultural and market value, as the two are not necessarily the same. Agricultural value is the hypothetical value attached to the property if it is treated as having a permanent covenant prohibiting its use other than for agricultural purposes. This is usually more obvious when looking at the farmhouse; particularly large buildings which clearly have an aesthetic appeal over and above that of the requirements of farming the surrounding land (see *Antrobus (no2), Re* [2005] DET/47/2004). It can also apply to bare land where there is development value or possibly exploitation (for example mineral) potential. In the case of Mr X there was neither at the time of writing, and so the land's agricultural value was assumed to equal its market value.

It is clear that there is no way Mr X could benefit from APR on the farmhouse. Having ceased actively farming a number of years ago, the house is no longer "occupied for the purposes of agriculture"; however, the land itself along with the outbuildings should qualify. The problem was to determine how much potential relief there might be.

100% or not?

The legislation in IHTA 1984, s 116 is an example of tax law that makes me pull a face like I've just eaten a lemon segment with a wasp in it. It is based around the owner being able to obtain vacant possession within a stipulated amount of time, with a number of ifs and buts thrown in for good measure. Clearly this is automatic for a sole-trader owner/occupier, but for a tenanted farm it will depend on the terms of the lease.

The rate of IHT will always be 100%, unless the following conditions are applicable:

- the agricultural property is tenanted;
- the lease was signed prior to 1 September 1995; and
- the lease has more than 24 months to run at the date of transfer/death.

If and only if all three of these conditions are true, the rate of relief will only be 50%.

Coming back to Mr X; the land was initially let on a ten-year lease in 1997 (farmed continuously since), and this was renewed prior to its expiration for a further ten years. My conclusion is therefore that the land will qualify for APR at 100% (ie £400,000).

My suggested solution

Bearing in mind Mr X's wishes for the ultimate distribution of his assets, I suggested the following:

- leave the farm house and curtilage to Mrs X and the sons in an 80:20 capital split;
- split the cash in tranches of £100K to Mrs X, and £50K each to the two sons; and
- leave the land to the sons in two equal parcels.

By my calculation, £500K of the estate will be exempt by virtue of the spouse exemption, a further £400K is offset by 100% APR as discussed above. The remaining £200K is contained

newsfile

RTI survey

HMRC has launched an online survey to ascertain how difficult employers and tax agents are finding the requirement to report under RTI on or before the date the employees are paid. The survey is entirely confidential and will be available to complete until 13 September: www.surveymonkey.com/s/KB6BYBK.

At present there is a limited relaxation of the "on or before requirement", for employers with fewer than 50 employees, who can report when the payroll is run once a month rather than on or before each pay day. This relaxation is due to be withdrawn on 6 April 2014.

The results from the online survey will help HMRC assess whether the current relaxation for small employers should be made permanent, or whether other solutions to employer's problems with RTI can be found.

Charities can reclaim SLDT

Charities are exempt from paying SDLT on the purchase of property which is to be used for qualifying charitable purposes (FA 2003, Sch 8 para 1). However, where the property has been purchased jointly with a body which is not a charity HMRC has in the past considered that the SDLT exemption does not apply. However, the judgement in *Pollen Estate Trustee Company Limited and King's College London v HMRC* [2013] STC1479 found that charities can claim relief from SDLT on their share of the building purchase.

HMRC is inviting charities to reclaim any overpaid SDLT which was paid on a property purchase made jointly with a non-charity. However, claims will only be accepted where they are submitted within 13 months of the transaction date, which is normally the completion date for the purchase.

Legitimate expectation

The ICAEW Tax Faculty has published (in TAXGUIDE 3/13) minutes of two meetings between HMRC and interested parties concerning the concept of legitimate expectation and reliance on HMRC guidance. These meetings were held to explore concerns expressed by the CGT liaison group about the handling of the HMRC change of position in connection to the outcome of *Mansworth v Jelley* [2003] STC 53, and the resulting legitimate expectation issues.

HMRC considers there are a number of factors which have to be taken into account to decide whether legitimate expectation has been established, but that these are indicia for the purposes of reaching a decision, rather than a checklist. Each case will depend upon its own specific facts and different elements may come into play.

Non-statutory clearances

HMRC now has one set of procedures for businesses and taxpayers who are not in business to follow when applying for a non-statutory clearance. In every case the taxpayer must first fully consider the relevant HMRC guidance and/or contact the relevant HMRC helpline. Only if the information required cannot be found from these sources, or the matter relates HMRC's interpretation of recent tax legislation, should the taxpayer proceed with the clearance application.

Code of practice for banks

Both the ICAEW Tax Faculty and the CIOT are extremely critical of the Government's proposals to strengthen the code of practice on taxation of banks.

The CIOT say the proposals set a dangerous precedent by giving HMRC power to determine and publicly announce non-compliance with the code without any right of appeal. The Tax Faculty agree with this and add, "The proposed changes mean we have the worst of all worlds, an ostensibly voluntary code with great scope for HMRC to act as judge and jury and able to apply a potentially penal legal sanction for non-compliance."

NMW deniers to be named

Employment Minster Jo Swinson has announced that employers who fail to pay their workers at least the national minimum wage (NMW) will be named, under new rules to come into effect in October 2013. Currently employers have to owe at least £2,000 in NMW arrears which also average at £500 or more per worker before the employer can be named.

Deliberate defaulters

The third quarterly list of deliberate defaulters has been published on the HMRC website. This list comprises of 15 businesses, of which six were pubs, restaurants or take-away food outlets.

---

within his nil rate band as his capital gifts in recent years have been fairly modest. The sons will be able to use their own judgement as to when to sell the land individually. Mrs X is provided with a home and some cash as desired, and once the house is sold she will easily be able to down-size.

Epilogue

The result should be: no IHT. The estate is distributed reasonably close to Mr X's desired 40:30:30 split, and everyone is provided for according to his intentions. My suggested solution seems to be far more logical than the initial draft will, given the wishes of the individual. Mr and Mrs X are happy with the advice, and are probably a little more wary of taking "trusted" advice at face value.

Of course, life interest trusts can be of great use in estate planning. However, care should always be taken to ensure any structure chosen does indeed meet the needs and wishes of the person(s) concerned. **TPT**

Andrew Rainford

Andrew Rainford is Head of Taxation at Salisbury & Company Chartered Accountants, specialising in advising private clients and owner managed businesses. He can be contacted on 01745 583606 or at Andrew@salisburys.com.

newsfile

The percentage of tax due levied as penalties for each taxpayer ranges from 36% to 100%, but is generally in the higher end of that range.

Consultations

Employee benefits

The Office of Tax Simplification (OTS) has issued its interim report on employee benefits and expenses. This makes 43 suggestions for simplifications and lists the following priority areas for further study by the OTS:

- HMRC administration, including the P11D process and PAYE Settlement Agreements);
- travel and subsistence expenses;
- accommodation benefits; and
- termination payments.

The report also looks at some fundamental issues for the benefits and expenses system, such as:

- When is a benefit really a benefit?
- Can the administration of the system be simplified?
- Should out-dated allowances and exemptions be retained?

The OTS says some of these areas are too big to tackle at present but should be the subject of further study. Comments on the report are invited by 15 September 2013.

Raising the stakes on tax avoidance

These proposals are aimed at promoters of high-risk tax avoidance schemes, who will be required to provide details of their products to HMRC. The DOTAS regime will be amended to allow this information flow to occur at the right time, and penalties will be applied to those identified as high-risk promoters. HMRC is keen to ensure that ordinary tax advisers are not caught by the proposed new rules.

Taxpayers who use tax avoidance schemes will be encouraged to settle their tax affairs with HMRC, after a similar scheme has been struck down by the court. This consultation closes on 4 October 2013.

Tax avoidance disclosure regimes

HMRC is conducting a review into the effectiveness of the DOTAS regimes for direct tax and VAT, and the administrative burden those regimes place on taxpayers and HMRC. A questionnaire to collect views can be completed on the HMRC website up until 20 September 2013.

New HMRC guidance

Single compliance process

The evaluation of the trial for the single compliance process (SCP) has found that direct tax enquiries were concluded more quickly using the SCP. Taxpayers and tax agents were questioned about their experience of using the SPC and of those who responded:

- 86% of taxpayers were extremely positive about their experience; and
- 63% of tax agents reported a more positive experience under SCP.

HMRC will now fully implement the SPC, but will continue to make improvements to the process, such as working some cases via the telephone or written correspondence.

Employment histories

Individual taxpayers may be required to supply an official record of their employment history or NICs paid to another government department or the Court, to support applications for UK citizenship, residency or passport purposes or to support a compensation claim. In these cases HMRC will supply the information requested, but the application must be made on the specified form.

ATED

Technical guidance on the operation of the annual tax on enveloped dwellings (ATED) has been published, which covers the reliefs available and the returns required.

Disincorporation relief

Technical guidance on disincorporation relief has been included in the Capital Gains Manual and the Corporate Intangibles Research and Development Manual. General guidance on this new relief is available on the HMRC website.

GAAR

The general anti-abuse rule (GAAR) applies with effect from 17 July 2013 to the ATED, income tax, corporation tax, including amounts chargeable or treated as corporation tax, CGT, IHT, SDLT and PRT. Abuse of taxes which are not currently covered by the GAAR will be challenged using other anti-avoidance methods where appropriate.

Tax agent strategy

Guidance regarding the tax agent strategy has been updated to include the plans for new online services for tax agents. To access these service the agent will have to apply to HMRC for a unique agent reference (UAR). In advance of that process HMRC is asking tax agents to ensure their client lists held by HMRC are as up to date as possible.

SDLT group relief

A meeting was held between HMRC and interested parties on 3 July 2013, to discuss the uncertainly surrounding SDLT group relief and the application of the TAAR in FA 2003, Sch 7, para 2 (4A). A note of that meeting has been published, which confirms that HMRC acknowledges that buying companies instead of their individual assets is normal commercial practice. It is acceptable for a business to acquire a property-owning company and then transfer the property to a different company in the group and that SDLT group relief will not be denied on this basis alone.

Guidance on the breadth of the TAAR for SDLT is found in the Stamp Duty Land Tax Manual.

MGD

Machine Games Duty (MGD) came into effect on 1 February 2013. It requires a quarterly return to be made of the amount of duty payable within 30 days of the end of the accounting period. Penalties for late returns for the first accounting period were generally waived. However, where taxpayers have not made the required MGD quarterly

points of law

A & Mrs H Mateides v HMRC TC2750

Taper relief due in part

Mr & Mrs Mateides traded in partnership as printers. In June 1998 they purchased a four bedroomed house which was let until it was sold in June 2006 for a gain of £107,747. In their tax returns, they claimed the house was a business asset that qualified for taper relief for the entire period of ownership. This was on the basis that the house had partly been used for storage of ink and paper, partly as accommodation for specialist workers for their printing business, and also rented to nurses. However, they did not provide any documentary evidence of this business use.

Following an enquiry, HMRC accepted that the house had qualified for business asset taper relief for two years when it had been used to accommodate specialist workers, but rejected the remainder of the claim. The First-tier Tribunal dismissed the couple's appeal against this decision.

return for the second accounting period by the due date, HMRC will issue automatic penalties for late filing.

HMRC publications

Debt collection visits

Taxpayers who find themselves confronted with debt collectors demanding tax payments on behalf of HMRC will now be given one of two factsheets:

- FFC1(S) – for taxpayers in Scotland.
- FFC1 – for taxpayers in England, Wales and Northern Ireland.

HMRC has also issued a number to call to verify the debt collectors' identity: 0300 200 3962.

Tempted by tax avoidance?

This leaflet warns taxpayers not to be taken in by tax avoidance schemes. It sets out 12 indications to make the taxpayer think twice about using such a scheme, including when the scheme involves:

- money going round in circles;
- a tax haven or banking secrecy country; or
- confidentially agreements.

Form SEIS1

The seed enterprise investment scheme compliance statement (form SEIS1) has been redesigned to make it easier to use.

Agent update

Issue 37 includes articles on:

- gift aid guidance for charity shops;
- remittance basis mixed fund rules; and
- machine games duty.

Trusts & estates

The latest Trusts and Estates newsletter includes articles on:

- changes to IHT introduced by FA 2013;
- the treatment of compensation payments; and
- what to do with forms R40 and R185.

HMRC has also explained in R&C Brief 22/13, how to calculate ten-year charges for discounted gift schemes held in relevant property trusts.

IHT forms for Scotland

Scottish law regarding the administration of a deceased person's estate requires different procedures to those followed in the rest of the UK. New guidance and updated forms to return information to HMRC concerning Scottish estates have been released.

Stamp Taxes bulletin

Issue 2/2013 includes articles on:

- stamp duty reconstruction relief;
- powers of attorney; and
- using form SDLT1 for leases.

Indexation allowance

Tables showing the allowance due for corporate disposals in May 2013 are now available. The RPI for May 2013 was 250.

Employer advice

RTI: pension payments

Employers are warned not to enter zeros in the occupational pension field of the FPS unless an occupational pension is in payment and there has been no payment for that month. If no occupational pension is being paid to the individual the field should be left blank.

RTI: reconciling payments

HMRC has set up a dedicated team to investigate discrepancies which are arising under RTI between the PAYE calculated as due by employers, and the amount the RTI system records as due.

Form EMI1

The form to report that EMI options have been granted (EMI1) is available in PDF format from the HMRC website. If a MS Word version of the EMI1is required the employer should contact the small company enterprise centre on 0845 600 2622.

Employment related shares

This bulletin includes:

- employee shareholder status;
- FA 2003 changes to tax advantage share schemes; and
- self-certification of employee share schemes

Pensions

The August 2013 edition of the Pensions Newsletter includes articles on:

- fixed protection 2014;
- individual protection 2014;
- new pension regulations; and
- an update for QROPS managers.

An online form to apply for "fixed protection 2014" is available on the HMRC website.

Updated guidance has been published relating to employer asset-backed pension contributions.

points of law

Hopegar Properties Ltd v HMRC TC2734

Resurfacing was a repair

Hopegar Properties Ltd is a property development and management company. In the years 2007 and 2008 it claimed deductions for expenditure at an industrial estate it manages. The main entrance to that site needed widening and repair, due to the larger heavier lorries using the site. The road damage had put at risk a fibre optic cable laid by BT. The works undertaken included relaying and resurfacing a carriageway, re-siting a car park, reinstating a footpath and diverting telecommunications cables, for a total cost of £278,088.

HMRC rejected the majority of the claim on the basis that the expenditure was capital. The First-tier Tribunal allowed the company's appeal, holding that there was no scheme of alteration. The expenditure could be considered to be individual pieces of work and was allowable as revenue deductions.

Mehjoo v Harben Barker QB [2013] EWHC 1500

Client not fully advised by accountants

Mr Mehjoo was born in Iran and moved to the UK as a child. In 2004 was planning to sell the shares of a company he co-owned with a friend, and sort advice from his accountants: Harben Barker. The accountancy firm provided information on various tax planning schemes. The sale of the company took place in April 2005, and Mehjoo realised a gain of £8.5 million. After business asset taper relief Mehjoo was due to pay CGT of £850,000.

Mehjoo and Harben Barker continued to pursue tax schemes to wipe out the CGT liability, but the question of Mehjoo's potential non-UK domicile was not raised until a meeting with Barclay's Wealth in June 2005. A DOM 1 form was submitted for Mehjoo in March 2006 and HMRC confirmed he was non-UK domicile in April 2006.

Mehjoo took up a tax scheme known as CRP which cost £200,000 and was supposed to wipe out all the CGT due, but it was subsequently found not to work. Mehjoo was advised that as a non-dom he should have used a different tax scheme known as the bearer warrant scheme (BWS), which may have eliminated all the gain before the sale by changing the shares into off-shore assets.

Mehjoo sued Harben Baker who acted for him in relation to the sale, contending that they should have taken steps to take advantage of his non-UK domicile and should have taken advice from an appropriate specialist. The Queen's Bench Court reviewed the evidence in detail, accepted this contention and gave judgment for Mehjoo.

Mr Justice Silber found that Mehjoo "would have sought advice from a non-dom specialist very speedily as he was determined to ascertain ways of eliminating or reducing his CGT liability if he thought there were or might be potentially significant tax advantages for him as a non-dom". He held that Mehjoo should have been advised to take advantage of the BWS before the share sale, and he would have entered into the scheme before in was blocked in by TCGA 1992, s 275A. Mehjoo was awarded £945,000 plus interest.

PG Tindale v HMRC TC2749

Not reasonable to grant repayment

Philip Tindale began working as a salesman, for a Danish company (Dynaudio), in 1994. Tindale's contract stated that he was an employee. However, Dynaudio did not deduct tax from the payments which it made to him. In 2002, on the advice of an accountant who was apparently acting for Dynaudio, Tindale signed tax returns for 1996/97 to 2001/02 on the basis that he was self-employed.

In 2003 Tindale stopped working for Dynaudio and commenced proceeding in an employment tribunal. The case was settled before a hearing. Tindale engaged Mr Rice as his accountant, who considered that he should have been treated as an employee, and submitted a claim to error or mistake relief under TMA 1970, s 33 to cover the tax returns submitted for 1997/98 to 2001/02.

HMRC rejected the claim and the First-tier Tribunal dismissed Tindale's appeal. Judge Powell observed that since Mr Rice had first contacted them about the case in 2003, HMRC had handled the case very badly. Mr Rice had made formal complaints about the case to the HMRC Board and to the Adjudicator. Some apologies were given, but the matter was not resolved.

The Tribunal agreed there was an error in all the disputed tax returns, and that the income arose from an employment rather than from self-employment. However, Judge Powell determined that it was not just and reasonable to grant relief by way of a repayment to Tindale, so relief was denied.

Editor: Rebecca Cave
Production: Heather Pearton

Published twice monthly by LexisNexis, Halsbury House, 35 Chancery Lane, London, WC2A 1EL.

Telephone: 020 7400 2500
Fax: 020 7400 2842
Email: Rebecca@taxwriter.co.uk

ISSN 1475-2352