

AAT Tax update 31 January 2015

In this edition of the tax update we look at:

1. Clamp down on travel expenses of agency workers and contractors
2. Consultation: Improving small business access to R&D tax credits
3. Sponsorship payments are denied a tax deduction because of dual purpose
4. Non cash transfers to a non-approved pension scheme are taxable on employees
5. HMRC webinars to help agents

1. Clamp down on travel expenses of agency workers and contractors

The first podcast of 2014 included a decision of the Upper tribunal that doctors travel expenses were likely to be challenged more (*Dr Samad Samadian v HMRC* [2014] UKUT 13). The final podcast of 2014 mentioned the publication of a consultative document announcing proposals to stop the perceived abuse for contractors and agency workers obtaining an unfair advantage for travel expenses to 'temporary workplaces'. This consultation closes on 10 February 2015.

Many European countries allow a deduction for the expense that a worker incurs in getting to their work. The UK does not and in some ways that is inherently unfair because the worker is being taxed on a profit or gain from their labours that they do not have. For employees, the expenses which they can deduct are very limited indeed because of the need to incur an allowable expense wholly exclusively and necessarily in the performance of the employment duties.

Inevitably, paying tax on money which the worker had to spend in order to travel to the place where the work was done has proved to be unpopular with the workers. After the *builder case* (*Horton v Young*) the self-employed arranged their base of business and the expense of travelling from the base of business to where they were working was allowed for tax purposes.

With the considerable growth in the use of personal service companies and umbrella companies there was a growing perception that many ordinary employees were at a disadvantage because others were manipulating the rules to take advantage of the temporary workplace rules to obtain a tax deduction for the expenses being incurred in travelling to work. Workers seconded to a temporary place of employment are entitled to deduct for tax purposes the qualifying travel expenses of getting to the temporary workplace. A temporary workplace is a secondment for a period of no more than 24 months, and he or she is not expected to work there for more than 24 months.

The government believes that certain employment agencies and umbrella companies (UC) are abusing the rules for claiming tax relief on travel to temporary workplaces. With the use of personal service companies (PSC) and UC the PSC/UC employs the worker on overarching contract of employment, such that PSC/UC's address is the permanent workplace for the worker, and each work placement is a temporary workplace. The worker can then claim, and be reimbursed, expenses for traveling to each work placement plus reasonable subsistence and any necessary accommodation costs. The proposals on which the government are consulting are a form of stealth tax designed to deny a tax deduction for travel, subsistence and accommodation costs to contractors and agency workers who have to travel to obtain work. If your clients include subcontractors and agency workers you should read this consultation and send your views to the government before the 10 February deadline.

Hopefully everyone reading this met the filing deadline of 31 January 2015 for all clients comfortably. Tax is complex and filing a tax return can be quite burdensome. This consultations proposal will add yet more complexity so reading 26 pages might be worthwhile: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387335/Employment_Intermediaries_-_Temporary_workers_relief_for_travel_and_subsistence_expenses.pdf

2. Consultation: Improving access to small business R&D Tax credits

The government aspires to assist small business in claiming R&D tax credits so it has published a three page summary. This consultation focuses on the four main areas that drive claims to the relief:

- **Awareness:** Are key decision makers in small companies aware of the relief?
- **Design:** Are the rules appropriate for small companies?
- **Understanding:** Do decision makers in small companies understand the rules, how they apply to the company, and the claims process?
- **Administration:** Does the process operate smoothly (speed, and ease of use) for small companies?

Getting the definition of “research and development” right is important and complex rules govern this. Small companies could be given an option of setting aside the current definition and instead using accounting rules to identify qualifying R&D.

Consultation closes on 27 February 2015. If interested:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396033/HMRC_Consultation_Summary_-_Improving_access_to_RandD_tax_credits_for_small_business.pdf

3. Sponsorship payments are denied a tax deduction because of dual purpose

In June 2014, the Court of appeal decided unanimously against the taxpayer and the Supreme Court has refused permission for the appeal to continue. This means that the decision not to allow the sponsorship of a rugby club by a fishing industry company is final and practitioners can expect to see HMRC challenging a tax deduction for sponsorship more enthusiastically.

In three accounting periods between 2003 and 2006, the holding company of a group of companies involved in the fishing industry paid about £1.2 million to Plymouth Albion, one of the largest rugby clubs in the South West. The club was in severe financial difficulties. Although it drew considerable crowds when playing in the Rugby Football Union's National Division 1 and national cup competition, it needed substantial sums to make up a deficit in its player budget and to improve, amongst other things, its squad of players. The company claimed that it paid the money to promote its business but at the first tier tribunal there was a finding of fact that there was a dual purpose to promote the business and to help financially the rugby club. This dual purpose was fatal to the claim for a tax deduction for the sponsorship expense in *Interfish Ltd v Revenue and Customs* [2014] EWCA Civ 876

4. Non cash transfers to a non-approved pension scheme are taxable on employees

In *Allan v Revenue & Customs* [2015] UKUT 16, the taxpayer was a director and shareholder of a company which transferred Treasury stock to the value of £349,317, of which 55.44% (£193,661) was allocated for the Appellant and 44.56% for the other employee. The transfer was to a non-approved pension scheme and HMRC raised a discovery assessment with the tax at issue for Mr Allan of £77,464.53.

This point at issue had been considered in 2008 (*Irving v HMRC* [2008] EWCA Civ 6 by the tribunals and courts and ruled that such a transfer of assets, not cash, was assessable under s386 on the employee who benefits. Accordingly, the First tier Tribunal struck the case out of appeal on the grounds that Mr Allan's contention was hopeless and had no prospect of success (Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009).

Mr Allan prepared his self-assessment tax return for the year in question (2004/05) on the basis that the Employer's contribution to the Scheme on his behalf did not give rise to a

charge to tax on the Appellant under s.386 ITEPA because it was a transfer of non-cash assets, and was therefore not “a sum paid” within the meaning of that section.

The right of appeal against a HMRC decision to an independent tribunal or higher court is an important safeguard in the tax system. Litigation is expensive and should never be undertaken lightly. The HMRC has very deep pockets and if the appellant should lose, they can face an award of costs.

Mr Allan’s counsel, Michael Sherry, submitted that there is a real prospect of ultimate success in the Court of Appeal or the Supreme Court, on the ground that in construing the relevant provision in *Irving* the Court of Appeal did not take account of A1P1 or of the rule of construction in s.3 HRA. That is an interesting argument. In essence Mr Sherry is arguing that the *Irving* case was wrongly decided. The consequence of the Court of Appeal’s approach in *Irving* is that a tax charge is levied on the employee in respect of whom the contribution is made, and that this charge is penal in that the employee has to pay income tax even though he has received no income out of which he might pay the tax, and may never receive any income.

Justice Barling ruled in the Upper Tribunal that the FTT was correct in finding that the Appellant’s challenge based on s.3 HRA/A1P1 has no real prospect of success, and was entitled to strike out the appeal before it pursuant to Rule 8(3)(c) of the 2009 Rules. Accordingly this appeal fails.

5. HMRC webinars to help agents

On 23 January 2015, HMRC issued a press release advising that live webinars would consider Individual expenses and would run on three consecutive days for 27th to 29th January. HMRC had published a webinar which is available as a recording on this topic in October 2014. <https://www.gov.uk/government/news/webinars-e-learning-and-videos-if-youre-a-tax-agent-or-adviser>

As an avid reader of tribunal and Court decisions on tax, I was very interested to read the HMRC Learning together online teaching product which promises that after completing the course I will be able to:

- explain HMRC's reviews, appeals and the tribunal processes
- outline HMRC's approach to tax disputes
- explain the role of HMRC Decision Makers and Review Officers
- prepare and present evidence for a review
- explain the options available following a review

According to last year’s report, HMRC win 83% of cases at tribunal. Sadly, reading published decisions, I conclude that all too often the performance of both parties at a tribunal needs to be improved. All too often it is clear that arguments have been poorly presented and there is confusion between assertions and evidence.

In our busy working lives, it is often difficult to find the time to study and learn. If you are thinking of pursuing a contentious appeal, I recommend http://www.hmrc.gov.uk/courses/Learning_Together/Resolv_disp/HTML/Resolv_disp_menu.html

Derek Allen

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Set your diaries for the next edition of the general tax update which will be published at the end of February 2015

The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy.