The Construction Industry
Joint Taxation Committee

JTC

JTC NEWSLINE

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Double cab pick-ups: don't panic! No change

On 14th February HMRC published updated guidance in their Employment Income and Capital Allowances Manuals, changing their opinion about the tax treatment of double cab pick-ups (DCPUs) to reclassify them as cars. (For those not familiar with the terminology, essentially DCPUs are big vans with two rows of seats so they can be used for transporting half a dozen or so people as well as goods and tools: they are often used in farming as well as construction).

What HMRC said was that "new rules" would apply from 1 July 2024 unless you bought the DCPU before then, in which case you could follow the existing rules and treat them as vans until 2028. As you can imagine, as well as everything else this would have distorted the market in these vehicles for the next couple of months. This seemed to come out of the blue. One of our member organisations asked me to look into it and I was particularly curious to see what consultation they had conducted before changing their opinion – you will see I commissioned an article on the legal status of HMRC manuals, which you can read at the end of this newsletter. HMRC also wrote to me saying that: *"we've been in discussion with industry stakeholders about these rules since Spring 2023 and they were aware these changes would be made."*

However on 19 February the two pieces of updated guidance disappeared into the archives and HMRC put out a press release cancelling the changes. At the same time they archived the updated guidance and reverted to the previous position, treating DCPUs as goods vehicles rather than cars for benefit-in-kind and capital allowances.

You may still find Arran's article on the legal status of HMRC guidance of interest, and this month we also have another guest article, tracking down why and where the IR35 rules take precedence over those for CIS. ■

Partnership capital allowances

No change in legislation but another piece of updated guidance. HMRC have updated their guidance on capital allowances claimed by partnerships consisting of both individuals (chargeable to Income Tax) and companies (chargeable to Corporation Tax) "to make clear that the partnership tax calculation for corporate members of a partnership may include a claim to capital allowances that are only available to companies within the charge to Corporation Tax." ■

Simplification?

HMRC published a policy paper in January with details of their intended actions towards tax simplification. Given that this is an election year I would take all of this with a large pinch of salt until there is a formal consultation and some legislation in the offing. But there are two intentions that might be of interest to employers. First HMRC says it "is designing" a new service where employees will be able to claim tax relief for all their reimbursed expenses "in one place", which presumably means an online service rather than the current mish-mash of paper, digital and online claims. Further detail will be published "later this year". Secondly – and this proposal sounds a lot further forwards – there will be mandatory payrolling of benefits in kind from April 2026. The announcement says "The government will mandate the reporting and paying of Income Tax and Class 1A National Insurance Contributions (NICs) on benefits in kind via payroll software from April 2026, building on the progress already made on the government's ambition to fully digitalise the reporting of benefits in kind. Mandation will simplify the tax affairs of 3 million people and reduce the need for them to contact HMRC." But who knows what the government's priorities will be between now and April 2026? ■

Tax returns

1.1 million people missed the January deadline for tax returns this year. If you were one of them, don't panic. It's going to cost you £100 whatever your tax position but that isn't the end of it. If you don't get it done within three months the penalties start to rack up. They are

- an initial £100 fixed penalty, which applies even if there is no tax to pay, or if the tax due is paid on time
- after 3 months, additional daily penalties of £10 per day, up to a maximum of £900
- after 6 months, a further penalty of 5% of the tax due or £300, whichever is greater
- after 12 months, another 5% or £300 charge, whichever is greater.

HMRC Charter

We are all, I hope, familiar with the HMRC Charter which lists the "standards of behaviour and values to which HM Revenue and Customs will aspire when dealing with people in the exercise of their functions". There is a Charter Stakeholder Group which monitors HMRC's performance against the Charter and they are asking individual taxpayers, businesses and their agents to complete a survey with detailed feedback which will be shared anonymously with HMRC. If you have views, it's worth a few moments of your time to contribute. The survey is open until 8 March.

Consultation on HMRC's enquiry and assessment powers, penalties and safeguards

There is a call for evidence, part of a long series of linked discussions, about simplifying and clarifying HMRC's powers. The main direction of travel seems to be to move towards having one regime for enquiries and penalties rather than separate ones for different areas of tax. Again, individuals, businesses and agents are invited to contribute: the call for evidence is open until 9 May.

Tax case corner

Does an umbrella company (supplying workers to agencies that then supply them to the construction industry) have an "overarching" contract of employment with the workers – in which case their travel and subsistence would be tax free because it would be travel to a temporary workplace – or were they separate contracts? They were found to be separate contracts because the workers were free to take on other work in the gaps between assignments. Travel was therefore not to a temporary workplace but disallowable as "home to office" travel. The case was a little more nuanced than my summary but you can read it in full here: Exchequer Solutions Ltd v CRC

If you have any feedback or queries relating to any of the items in Newsline email: wendy.bradley.42@gmail.com

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JTC BRIEFING

February 2024

Interaction between CIS and IR35

by Dr Liz Williams

If you're a main contractor who is employing a sub-contractor through an intermediary, such as their own limited company, familiarity with the interaction between off-payroll rules (IR35), and the Construction Industry Scheme (CIS), is crucial, and so is an understanding of when the VAT reverse charge applies.

Although the government was supposed to be reforming IR35 in 2023, they've now reversed those plans. The rules for IR35 changed in 2017 and still apply; it's the contractor, not the sub-contractor, who decides whether someone is self-employed or not.

So, firstly, are the off-payroll rules going to apply to your own sub-contractor? You can check their tax status here.

As a reminder of how IR35 works; if the rules do apply to your sub-contractor, you as the contractor will be responsible for determining your sub-contractor's employment status for tax purposes. You'll need to produce a status determination statement (SDS) which includes the reasons for your decision. Remember, if your sub-contractor counts as 'inside IR35', they're considered to be an employee by HMRC rather than being self-employed and thus PAYE applies. You'll therefore need to deduct Income Tax and National Insurance contributions from any money paid to the sub-contractor's intermediary.

But when does a sub-contractor fall under the IR35 rules, and when do they come under the CIS?

From 2021, there have been new rules set in place under the off-payroll regulations, which prioritise IR35 over CIS for a lot of medium and large companies. If your company:

- has an annual turnover of more than £10.2 million
- has a balance sheet total of more than £5.1 million
- has more than 50 employees

then you will need to use IR35.

However, if you are a small end user and have less than this in terms of annual turnover/balance sheet/number of employees, then you can rely on CIS.

What about the VAT Domestic Reverse Charge (DRC)? Are you, as the main contractor, going to have to operate a reverse charge on payments to the sub-contractor? The answer is likely to be ***yes***. The DRC came into effect in March 2021 and you will be responsible for the reverse charge if:

- the sub-contractor and contractor are unconnected
- both sub-contractor and contractor are registered for the CIS and payment for the supply is reported within the CIS
- both sub-contractor and contractor are both UK VAT registered
- there's a supply for VAT of construction services and materials
- the supply is at the standard or reduced rate of VAT
- the contractor intends to make an ongoing supply of construction services to another party
- the sub-contractor is not an employment business supplying staff and/or workers
- the contractor is not an 'end-user' (a VAT registered customer who is not intending to make further on-going supplies of construction)

Interaction between CIS and IR35 continued

It doesn't apply to

- supplies that are not covered by the CIS, unless linked to such a supply
- supplies of staff or workers
- taxable supplies made to: non-VAT registered customers or 'End Users'; (previous page)
- 'Intermediary suppliers'; who are connected (such as landlords and tenants or two companies in the same group).

You can check the guidelines **here**.

The technical guide can be found **here**.

If you have questions about the off-payroll rules, you can check with HMRC **here** and **here**.

The reference to why IR35 takes precedence over CIS is **here**.

Finally, be wary of any tax avoidance schemes that are offered to you. **This link** will tell you how to identify schemes that aren't viable and could make you liable for more tax. ■

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HMRC Guidance

by Arran Dowling-Hussey

Taxpayers may receive letters, speak to HMRC staff on calls, meet HMRC staff and use HMRC webchat and these communications will often offer HMRC's position, but I am going to focus on the status of HMRC's manuals. Such manuals are intended to provide a general overview of a defined area and therefore cannot cover each and every specific individual set of circumstances.

The starting point is that HMRC's guidance is written for the benefit of HMRC staff, is not binding on taxpayers and does not enjoy the force of law. Indeed, historically, HMRC manuals were secret but after the Freedom of Information Act they were published except for some redacted operational matters.

It is HMRC's opinion in relation to the aspects of tax law covered by the particular manual, and a tax advisor's view on the same point may differ. The tax advisor will often be as well qualified as HMRC to offer an opinion on the specific issue. But as was noted in R. (on the application of Aozora GMAC Investment Ltd) v HMRC [2019] EWCA Civ 1643 a tax advisor will not be best placed to advise on the application of parts of statutes which lack clarity. HMRC will be.

The Court stated *'… some statements issued by HMRC … go beyond a mere expression of its opinion as to the law. For example, a taxing statute may contain wording which is inherently uncertain, such as where it describes something as needing to be 'substantial' or 'material' or states that something must be done within a 'reasonable time'. HMRC will wish to ensure that all members of staff apply the term in the same way so that taxpayers are dealt with consistently, regardless of which officer handles their case.'*

A taxpayer's ability to hold HMRC to published guidance would depend on their ability to establish what is known as a legitimate expectation. Legitimate expectation is a public law principle based on the assumption that if a public body like HMRC says that it will exercise its powers in a particular way, then the public can expect them to act in accordance with what they have said.

HMRC Guidance continued

HMRC will revise guidance as and when it is necessary. It may be (as arose in Aozora) that the past guidance is incorrect. Statutory changes will have the effect of making the guidance out of date.

Where the contents of the guidance contain a clear and unambiguous representation there can be a legitimate expectation that a taxpayer can rely on that representation. However, it is then necessary to go on to consider whether it would be 'so fair as to amount to an abuse of power' for HMRC to resile from that representation (for there to be an actionable claim in public law of a legitimate expectation). As in the case of Hely-Hutchinson v HMRC ([2017] EWCA Civ 1075) this is a high bar for the taxpayer to meet.

It is also possible that there may be changes after representations to the government by affected stakeholders. A recent example of this happening can be seen with HMRC's update in mid-February 2024, of its tax treatment of Double Cab Pick Ups (DCPUs). Emphasis is usually made by attending Treasury ministers at the annual HMRC stakeholders conference as to the importance of looking to 'engage and work with stakeholders.'

Indeed, at the last stakeholder conference in 2023 the HMRC's CEO Jim Harra commented that he wanted working together to become HMRC's 'default way of doing business'.

However, whilst HMRC have stressed the importance of the stakeholder process and it is best practice to follow this approach there is no strict obligation that they should talk to stakeholders before making any changes to the guidance. They can but don't have to. In 'real time' it may be entirely legally appropriate for HMRC to make changes to their manuals at short notice. If there has been a change to the guidance that is a step that may be entirely consistent with HMRC's role to collect and not forgive tax. ■

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