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DEAR INSOLVENCY PRACTITIONER Issue 134 – August 2021

Dear Reader

Please find enclosed the latest articles from the Insolvency Service and HMRC.

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30) Disguised remuneration and the loan charge: Insolvency practitioner information regarding insolvent employers

Disguised remuneration schemes claim to avoid the need to pay Income Tax and National Insurance contributions (NICs). They normally involve a loan or other payment from a third-party which is unlikely to ever be repaid.

The loan charge is a charge to tax that applies to disguised remuneration loans that were outstanding on 5 April 2019.

If an employer has used a disguised remuneration scheme they need to report and pay the loan charge for loans that were:

- made between 9 December 2010 and 5 April 2019 (inclusive), and
- still outstanding on 5 April 2019.

There's [more information on gov.uk](#).

Disguised remuneration settlement opportunity

If an employer has outstanding disguised remuneration liabilities, they can settle them under the 2020 settlement terms. These terms should be used for settlements in relation to all disguised remuneration liabilities. More information is available on [gov.uk](#).

HMRC has not yet sought to prove for the loan charge in corporate insolvency proceedings.

However, HMRC is carrying out compliance checks to find out whether employers reported and paid the right amount of loan charge. Office holders in an insolvency procedure may be contacted as part of these checks. HMRC may also send one or more notices stating its belief that the company, as an employer, must pay more Income Tax and/or NICs relating to remuneration paid to company employees.

Office holders may receive a notice of determination under Regulation 80 of Income Tax (Pay As you Earn) Regulations 2003 (for Income Tax) or a notice of decision under Section 8 of Social Security Contributions (Transfer of Functions, etc.) Act 1999 (for NICs), or both. The notice will explain how to appeal if the office holder disagrees.

Normal insolvency rules apply. So, if an office holder issues a notice of intended dividend, it will be for HMRC to consider whether to prove for the loan charge liabilities, if this has not already been done.

Earlier tax and NICs liabilities

Disguised remuneration schemes can give rise to more than one Income Tax and NICs liability on the same underlying income. For example, a liability could have arisen when a loan was made through a scheme, and again on 5 April 2019 when the loan charge arose on the outstanding loan amount.

HMRC refers to tax liabilities relating to the loans made for tax years before 2018 to 2019 as 'earlier tax liabilities'.

HMRC may have issued a Regulation 80 determination or Section 8 decision for one or more of the earlier years in which the loans were made.

Both the loan charge and the earlier tax liabilities are due. However, there are 'double taxation' rules to make sure that the full amount of Income Tax and NICs is only paid on the underlying income or assets once.

If an office holder pays the tax and NICs liabilities in respect of a company over which they are appointed, HMRC will calculate the full amount due, and give relief under the double taxation rules.

HMRC should include any unpaid earlier tax liabilities on its proof of debt.

Appeals may have already been made against the earlier tax liabilities before the start of the insolvency. If appeals were made, they will still be open unless the insolvency office holder has agreed and finalised the earlier tax liabilities and/or withdrawn the appeals.

Collecting the tax and NICs due from employees

A Regulation 80 determination or Section 8 decision will become final and conclusive if no appeal is received against it, or an appeal is received and either withdrawn or determined by a tribunal or court.

If the employer cannot pay, then 30 days after any Regulation 80 determination has become final and conclusive, HMRC will be able to transfer the obligation to pay from the employer to the employee. It would do this by making a direction under Condition B of Regulation 81 of Income Tax (Pay As you Earn) Regulations 2003.

The employee will have the right to appeal against any Regulation 81 direction. If successful, an appeal may result in the notice being set aside, or the amount being increased/reduced.

If the employee pays the tax due on a Regulation 81 direction relating to the loan charge, then this will reduce any earlier tax liabilities due from the employer. It will

reduce those liabilities by an amount equal to the amount the employee pays. This is done under the double taxation rules for the loan charge.

Insolvency considerations

HMRC does not consider loan charge liabilities are an expense of an insolvency. If the employee pays the tax due on a Regulation 81 direction, HMRC may reduce its proof of debt if the earlier tax liability has been previously proved for in the insolvency of an employer.

Enquiries regarding this article may be directed to karen.gaffney@hmrc.gov.uk

47) IVA Protocol COVID-19 Guidance extended

The IVA protocol Covid-19 support guidance which was extended earlier this year, to 31st July 2021, has been further extended to 31st December 2021. The revised guidance was published on 30th July 2021 and can be found [here](#).

There are some updates to this guidance, most notably:

- 1) Given the revised IVA Protocol, effective from 1st August 2021, the COVID-19 protocol guidance should not be applied to any IVAs agreed after 31st July 2021. It is expected that new IVAs should be proposed on the basis that they have a reasonable prospect of success and are sustainable.

We would not expect the consumer to need a reduction in payment or a payment break within the first 6 months of the arrangement and, if one is needed for unforeseen circumstances that the nominee and/or the consumer could not have foreseen, the provisions in the IVA protocol 2021 (including up to 9 months of payment breaks) should be used.

- 2) The provision at paragraph 1.12 on the release of equity does not apply to IVAs agreed after 31st July 2021.

Paragraph 1.12(a) on the use of discretion to add additional payments to an existing IVA, instead of releasing equity because the consumer has been adversely affected by the pandemic, continues to apply to all existing IVAs.

- 3) Removal of the provision relating to critical workers overtime not forming part of contributions.
- 4) Removal of the provision relating to redundancy payments as a result of job loss because of Covid-19. Supervisors should continue to use their discretion in respect of redundancy payments above 6 months salary, as set out in the 2021 protocol.

The regulators will continue to monitor IVAs and use of this guidance by supervisors.

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