

From: Fiona L Bell [<mailto:FBell@memerycrystal.com>]
Sent: 03 July 2012 17:33
To: STRETCH, Nicholas; Jacques Sultan
Cc: dannyblum@eversheds.com
Subject: RE: The Quoted Companies Alliance [Protective Marking: UNCLASSIFIED]

I haven't faced this in practice which makes me reluctant to comment specifically.

Regulation 37 is the culprit that says the OT code applies if the payment is not included in the P45 and there has been a cessation of employment, which Alison Woodhouse says is a matter for employment law not tax law. I have had a brief chat with one of our employment team and of course employment law does not really have a concept of 'cessation of employment' in this situation so that does not really help. However, I am led to believe that there does tend to be a P45 in practice on a transfer of undertakings, even if one is not needed.

If we want to take this any further, do we pursue clarification on the Guidance that offers tax refunds before the end of the tax year and refers to a P54 (new to me). Could the employee make this application for the refund immediately so that it is received with the next PAYE payment? If this were possible that might give the same result as if the correct coding were applied.

On a different point but related to the HMRC meeting we had, I spoke to Tony Stirling today and he retires tomorrow leaving just 2 dealing with CSOPs. My final 'run-in' was on the definition of 'Tax Liability' that he would accept in the Rules. Perhaps this is a trivial point but I might float it at the next meeting to see if anyone else worries about it.

From: STRETCH, Nicholas [<mailto:Nicholas.STRETCH@cms-cmck.com>]
Sent: 03 July 2012 10:39
To: Jacques Sultan
Cc: Fiona L Bell; dannyblum@eversheds.com
Subject: RE: The Quoted Companies Alliance [Protective Marking: UNCLASSIFIED]

Thanks - I think the transfer of business answer is a bit muddled.

The Revenue have accepted that if someone has left employment and a post-termination payment is made before a P45 is issued, then the notified code can be used. However, they say that if someone has left employment and a post-termination payment is made when there is no intention of issuing a P45, then an OT code has to be used. I do not see the distinction myself. The legislation just refers to "and the payment has not been included in Form P45" which is true in both cases.

However, what would we like the result to be? I thought that in most cases where the payroll is transferred, the old employer wants the new employer to continue to do everything and where the notional payment is put through the new employer's payroll everyone would like the right code to be used rather than the OT code.

Any thoughts?

Regards

Nicholas

From: Jacques Sultan [<mailto:Jacques.Sultan@theqca.com>]
Sent: 02 July 2012 16:03
To: STRETCH, Nicholas

Cc: fbell@memerycrystal.com; dannyblum@eversheds.com

Subject: FW: The Quoted Companies Alliance [Protective Marking: UNCLASSIFIED]

Hi Nicholas,

We received this email today in response to our post meeting questions . As stated in the email we are still waiting for responses to some of the questions, and as soon as they do come through will forward by email.

Thanks again,

Jacques

Jacques Sultan
Policy Adviser
The Quoted Companies Alliance

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From: Chris Stapeley

Sent: 02 July 2012 14:50

To: Jacques Sultan

Cc: Kate Jalbert

Subject: FW: The Quoted Companies Alliance [Protective Marking: UNCLASSIFIED]

From: alison.woodhouse@hmrc.gsi.gov.uk [<mailto:alison.woodhouse@hmrc.gsi.gov.uk>]

Sent: 02 July 2012 14:13

To: Chris Stapeley

Cc: tom.rollinson@hmrc.gsi.gov.uk; harnaik.bajwa@hmrc.gsi.gov.uk;

brian.t.goodwill@hmrc.gsi.gov.uk

Subject: RE: The Quoted Companies Alliance [Protective Marking: UNCLASSIFIED]

Chris

With thanks to my colleagues Harnaik and Brian who are copied in to this email, please see below responses to two of the questions raised. I understand that Tom has passed the other two questions on to a different colleague for their attention.

- Alison said it was acceptable for employers to aggregate share-based payments post-P45 but this is at odds with the guidance and so perhaps you could ask Alison to confirm whether this was an unintended element of the answer or the guidance needs to change?

Revised guidance has now been issued which I hope clarifies this point, please see link below:
<http://www.hmrc.gov.uk/thelibrary/tax-payee/share-payments.pdf>

This guidance supersedes earlier versions, however HMRC acknowledge that some 2012-13 payments will already have been made or arranged to follow the original guidance. We apologise for any confusion or inconvenience caused by this change in guidance. A brief reference to this is contained in the 'What's New' message which accompanied publication of the guidance on the HMRC website; this can be found in the link below within the section dated 25 June:
<http://www.hmrc.gov.uk/news/june.htm>

- Transfer of business. Where a business is transferred, the PAYE Regulations are a little unclear as to whether a P45 must be issued by a former employer following a sale of a business. Where former employees exercise options or their awards vest under an employee share scheme run by the former employer or its group, the former employer is responsible for operating PAYE. Presumably the position is that if a P45 has been issued at the time of notional payment, the OT code should be applied by the former employer and if not, the tax code the former employer held before the transfer should be applied. It appears harsh for the employee potentially to suffer a higher rate (even though adjustments can in many cases be eventually made through a revised tax code). Could HMRC please clarify the position, and, although this question goes further than share schemes, give more details on when P45s should be issued in transfer of business situations?

As you may know, Regulation 102 of the PAYE Regulations covers succession to a business, in circumstances where the new employer is agreeing to take over the PAYE records of the former employer because they are going to continue employing the individuals. This Regulation is used to ease the administrative burden on employers.

If the change of employer is treated as a succession under Regulation 102, then the issue of P45s is not required by Regulations. It seems clear that the previous employment has ceased, however the actual cessation of an employment is a matter of employment rather than tax law. Regulation 37 applies if a relevant payment is made in respect of the former employment, and the payment has not been included in Form P45. If a P45 has not been and will not be issued, then clearly the payment has not been included in Form P45. Therefore, HMRC would expect code OT to apply.

As an alternative to treating the transfer as a succession under Regulation 102, the former employer is free to close down the existing PAYE scheme and issue P45s following Regulation 36. In this situation, whether code OT applies will depend on whether the payment has been included on the P45 or not.

I hope that this answer achieves the sensible result. As I recall the discussion in the meeting, I think the general feeling was that operation of OT in the absence of a P45 was also likely to be the most practical. If I understood correctly, this was because payments relating to the former employment could be made after delays of several months, and the former employer may not hold up to date information about what other tax code might apply.

If an individual believes they may have paid too much tax a result of the operation of OT, there is information in the guidance document mentioned above about how to seek a refund from HMRC (please see question 6 of the first link in the answer above).

Many thanks,

Alison Woodhouse

PAYE Operational Policy | Personal Tax: Product & Process | HM Revenue & Customs | 1E/07, 100 Parliament Street, London SW1A 2BQ | 020 7147 3062

From: Chris Stapeley [<mailto:chris.stapeley@theqca.com>]
Sent: 13 June 2012 15:42
To: Rollinson, Tom (Specialist PT Savings Audit and Share Schemes)
Cc: Jacques Sultan
Subject: The Quoted Companies Alliance

Dear Tom,

Please find below a message from us:

Thank you again for you and your team's attendance at our recent share scheme committee meeting. It was a very helpful discussion. I know your practice is not to approve particular minutes of meetings, but we share our note of your answers to the posed questions with you nonetheless out of courtesy and hoping that any obvious points of difference can be corrected. Please can you pass this to Tony and Alison as there are some points which are more in their areas. In particular, we have a clear recollection that in your answer to question 3, Alison said it was acceptable for employers to aggregate share-based payments post-P45 but this is at odds with the guidance and so perhaps you could ask Alison to confirm whether this was an unintended element of the answer or the guidance needs to change?

There were three additional points raised at the meeting.

- Section 222 ITEPA - Most share plans now have a term in under which the employee agrees as a term of accepting the award to indemnify the company for any PAYE that may arise under the plan. Anecdotally we hear of various Revenue inspectors accepting that this amounts to an employee "making good" and so no charge under section 222 can arise. Please can the Revenue comment on this?
- Readily convertible assets - Revenue guidance on what constitute readily convertible assets is relatively thin in terms of when "trading arrangements" come into existence. In a pre-IPO scenario, often a company may undertake preparatory work with sponsors and other quoted company advisers, but employees would be ignorant of this. Would the Revenue accept that readily convertible assets only arise (assuming no other non-trading factors are relevant) as and when employees know that a company is working towards an IPO?"
- Transfer of business. Where a business is transferred, the PAYE Regulations are a little unclear as to whether a P45 must be issued by a former employer following a sale of a business. Where former employees exercise options or their awards vest under an employee share scheme run by the former employer or its group, the former employer is responsible for operating PAYE. Presumably the position is that if a P45 has been issued at the time of notional payment, the OT code should be applied by the former employer and if not, the tax code the former employer held before the transfer should be applied. It appears harsh for the employee potentially to suffer a higher rate (even though adjustments can in many cases be eventually made through a revised tax code). Could HMRC please clarify the position, and, although this question goes further than share schemes, give more details on when P45s should be issued in transfer of business situations?

Kind regards.

Chris

Chris Stapeley (Mrs)
PA to Tim Ward, Chief Executive
The Quoted Companies Alliance (QCA)

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