Questions and Answers – Employee Share Schemes

The QCA Share Schemes Expert Group welcomed the HMRC Employee Shares Scheme team to its quarterly meeting on Thursday 17 May 2018 to discuss the questions that had been posed by both the Expert Group and QCA corporate members. Please find below a summary of the questions asked and their accompanying answers.

Topics

1. General questions

1.1 Are there plans to develop the HMRC share schemes team?

No – there are no plans to further develop the HMRC share scheme team.

1.2 What can organisations such as the QCA, as well as companies, do to make HMRC's job easier?

Many organisations – such as the QCA – will be aware that HMRC's employee share schemes team has been shrunk in the last few years. Therefore, due to the team's finite resources, we ask that organisations consider the most appropriate route to pursue their queries. There are generally two ways to contact the team:

i) The share schemes mailbox: shareschemes@hmrc.gsi.gov.uk – for general enquiries on employment related securities (ERS) and shares, including the registration of ERS schemes and arrangements; or

ii) Non-Statutory Clearance Service – for use if you are uncertain about HMRC's interpretation of tax legislation, despite having fully read the relevant guidance or contacted the relevant helpline.

1.3 What are the most common enquiries that HMRC receives?

The most common enquiries received by HMRC concern EMI options, restrictions in option plans and notifications to individual participants. HMRC will circulate slides from a conference in January 2018 highlighting the main areas of enquiry.

1.4 Is there a dedicated team or inspector within HMRC Share Schemes that considers questions arising in connection with corporate events (such as admission to a stock exchange, takeovers, schemes of arrangement and return of capital to shareholders)?

No. HMRC's Employee Share Schemes Unit (ESSU) is the primary team – Individuals Policy Directorate leads on considering any questions regarding corporate events. It does, however, frequently liaise with other relevant directorates, as required.

1.5 Where there is cross-over between the ITEPA legislation and the TCGA (for example, in the context of paragraph 86 of Schedule 2, relating to company reconstructions affecting tax-advantaged Share Incentive Plans), who, within HMRC, should be contacted?

The HMRC Clearance team – outlined in 1.2 – should be contacted but if there is a share scheme element, tis should be clearly identified in the clearance application.

2. Registrations

2.1 If a company establishes a second tax-advantaged Plan of the same type, e.g. a new EMI Scheme or SIP, should it register the new Plan with a separate registration or can it continue with a single registration?

*If a company establishes **a second EMI plan**, it can keep a single registration.*

*If a company establishes **a second CSOP, SIP, or SAYE**, then it must register each new plan with a separate registration.*

Please see ERS Bulletin 25 for more information.

2.2 Is the answer different if:

- **The second plan is a renewal so that no more awards will be made under the original plan;**

  No.

- **The second plan will run in parallel with the original plan; or**

  This depends on the plan. Please see 2.1.

- **The second plan is results from a corporate restructuring so that the new plan offers shares in the new holding company and the original plan has rolled over shares into the new holding company?**

  As long as a company within a group has a live PAYE ref or a Live scheme registration then we don't see any reason why that can't be used. Please see ERS Bulletin 16 for more information.

- **If, as a result of an internal restructuring or takeover, options or awards over a company's shares are exchanged for options or awards over a new holding company or an acquiring company's shares, but all other terms and conditions remain the same: Does the original company have to register a new Plan?**

  Yes.

- **Does the new holding company or the acquiring company have to register a new Plan?**

  As above. Generally, if he restructured group still has access to the PAYE reference and log-in details, the same registration can be used.

- **Is the answer different if the plan is tax advantaged (EMI, CSOP, SAYE, SIP)?**

  Yes.

2.3 We have a number of dormant trusts that will eventually be terminated. Do we need to register a trust in order to terminate the trust?

As above.

3. Save As You Earn (SAYE)

3.1 Can HMRC update us on the 12 month SAYE 'payment holiday' proposed to come into effect from 1 September 2018? Specifically:

The 12 month SAYE 'payment holiday' has been confirmed and will apply to SAYE options on or after 1 September 2018 regardless of when the option was granted. It will be available to all SAYE option holders whether on parental leave or otherwise.

A HMRC Bulletin will be published shortly to outline HMRC's view on plan rules that specifically refer to options lapsing in the event that a participant misses more than 6 months' worth of contributions. HMRC's view is that such rules will not need to be amended but will be treated as if the rules were amended. If an actual amendment is made to the rules, this amendment will not need to be reported.

3.2 Employee Tax Advantaged Share Scheme User Manual section ETASSUM35440 provides information where a scheme participant having left the original scheme-related employment, moves to an associated company, which is not a constituent company, and can continue in the SAYE scheme until maturity.

The Prospectus requires that the monthly contributions should normally be made through deductions from pay. In the Employee Tax Advantaged Share Scheme User Manual, section ETASSUM34120 has a list of exceptions where payments can be made direct rather than through payroll. This includes 'secondments' but not transfers to associated companies.

HMRC has been pragmatic and has agreed to allow transferred employees to make alternative arrangements to the savings carrier to fulfil the rest of their SAYE contract. This is decided on a case by case basis (and where the associated company hasn't been able to accommodate deductions through payroll).

<u>Question:</u> Rather than referring each case to HMRC, can we have this included as an additional exemption under ETASSUM34120 along the lines of:

- **If an employee moves to an associated company, and the associated company is unable to make adjustments to their payroll, alternative payment arrangements can be agreed with the SAYE carrier.**

There are no plans to change the guidance in this regard at the current time. HMRC is not aware that this is a significant problem for customers and historically have dealt with these issues, pragmatically, on a case by case basis.

4. Enterprise Management Incentives (EMI)

The European Commission issued a press release on Tuesday 15 May 2018 announcing that it had approved under EU State aid rules the prolongation of the UK Enterprise Management Initiative scheme and the EU website shows there were no objections and an expected expiry date of 6 April 2023.

HMRC will publish a Bulletin when it has received and considered the formal confirmation letter from the European Commission regarding the terms of the approval. In the meantime the current guidance on new EMI options that have been established and/or granted from 11 pm on 6 April 2018 remains in place. The EMI scheme will operate as usual for share options granted from 15 May.

4.1 The requirement for employees who are contractually required to work 25 hours or more a week for a company, to make a working time declaration to this effect and to receive a copy of said declaration within 7 days of making it, is illogical and unnecessarily cumbersome. Can HMRC confirm that a failure to comply with this requirement (where the working time condition is, in fact, met) will not cause an otherwise qualifying EMI option to lose its tax advantaged status?

If the working time declaration is omitted from the option agreement and there is no evidence of the declaration being signed at the date of grant of the option, HMRC will normally treat the option as not qualifying as an EMI. If the 7 day limit is exceeded application should be made for consideration on a case by case basis.

4.2 Are there any plans to permit an agent to certify and complete the registration of an EMI (or any other) share scheme as well as completing the notification process?

There are no plans to allow agents to register Plans – that will remain the responsibility of the company.

4.3 Why has HMRC changed its position (as at 28 July 2016) in relation to the requirement to incorporate or otherwise bring all restrictions attaching to the shares to an EMI option holders attention? It is becoming increasingly common to see options granted post 28 July 2016, without regard to the new guidance, especially by companies who operate their EMI plans in-house.

There is a legislation requirement that all restrictions attached to shares are notified to the option holders at the date of grant.

The 2016 guidance changes have made the requirements stricter for new options granted and restrictions should be clearly stated to employees.

If you think options have been granted, which may not meet the guidance and legislation requirements, please submit these cases for review however HMRC is not aware of any options that have yet been disqualified for this reason.

4.4 Is it possible to extend the date by which vested options have to be exercised after the options have been awarded? For example, the scheme maximum is 10 years from date of option grant to exercise. If an option agreement was originally drawn up with an exercise date of less than 10 years, is it acceptable post-grant to extend this to the 10 years maximum and still retain the benefits of the EMI scheme, or would these benefits be lost as a result of amending the terms of the award?

No – it is not possible to extend the date by which vested options have to be exercised after the options have been awarded.

If a company sought to extend an EMI option's lapse date within the maximum 10 year limit, but after the original lapse date, then the option would cease to qualify as an EMI.

Similarly, an amendment to the vesting period would be considered a fundamental change and considered to be the cancellation and re-grant of an option.

5. Tax-advantaged plans

5.1 A number of companies have faced queries on their tax-advantaged plans which are not (in their lawyers' view) well made. The companies are then faced with legal costs if they debate further and in some cases choose instead to accept fines. To what extent are letters querying compliance with ITEPA requirements for tax-advantaged plans co-ordinated internally at HMRC? Is there a senior person signing off on the issues raised?

This is not an issue that has been raised with HMRC. HMRC encourages companies with any queries to contact HMRC (as per 1.2) for advice.

5.2 Are increases to individual limits on tax-advantaged plans on the agenda in the short or medium term?

All employee share schemes are subjected to continual review. Views on whether any individual limits should be revised should be submitted to HM Treasury via the QCA's proposals for taxation reform ahead of the Budget.

6. Thinly traded companies and cashless exercise facilities

6.1 ERSM220060 permits companies to use the sales proceeds received as the market value for shares for PAYE purposes for the taxation of options which are exercised through a "cashless exercise" procedure and the shares are sold on the day of exercise or the next day. Where sales extend beyond the second day, the closing price on the date of exercise must be used.

It is our experience that some companies (whose shares are thinly traded) struggle to enable the employees to sell of all the shares within two days. Can HMRC agree that a longer period can be used?

No, there are no plans to change this requirement and the two day rule for determining the market value will remain.

7. Form 42 reporting

7.1 ERSM140070 permits shares acquired by directors and employees in their employer on the open market independently of the company and through an opportunity made available to all employees to be omitted from reporting on the online year end return, but only where the shares are quoted on a recognised stock exchange. As AIM does not qualify as such an exchange, it does not qualify for such exemption.

It is our experience that many AIM companies struggle to comply with the need to report shares acquired independently by its employees.

On the assumption that the information about independent share acquisitions in AIM companies is of limited value to HMRC, can HMRC agree that AIM companies need not report such transactions?

AIM companies must comply with the requirement to report shares acquired independently by its employees. There are no plans to change this.

8. Other

8.1 Question 42 on the "Other_Options_V3" tab of the Other Share Schemes and Arrangements return template asks "Was any adjustment made for amounts subject to apportionment for residence or duties outside the UK"? The guidance notes refer to the rules relating to the apportionment of securities income for internationally mobile employees – however, there are other circumstances where an adjustment might be made, including where the employer has entered into an Appendix 5 agreement to operate PAYE net of foreign tax.

In HMRC's view, should an employer answer "yes" to Question 42 if the employee is not subject to the IME rules, but whose income tax is subject to an adjustment by virtue of an agreement of this type?

HMRC has not encountered this issue in practice and would like further details on the types of adjustments this might cover to identify if there needs to be a change to the guidance or a change to add an additional question to the form.