SLAUGHTER AND MAY

# Incentives Bulletin

**August 2020**

Welcome to the August edition of our Incentives Bulletin, updating you on the latest developments in remuneration and share schemes. In this Bulletin, we look at the Chancellor's request to **review Capital Gains Tax**, **HMRC's latest guidance on the impact on COVID-19 on tax-advantaged plans** and recent developments in relation to **shareholder approval of remuneration reports.**

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## Capital Gains Tax

### Chancellor requests review of CGT

Rishi Sunak, the Chancellor of the Exchequer, has asked the Office of Tax Simplification (OTS) to carry out a broad review of capital gains tax (CGT) in relation to individuals and smaller businesses.

As well as looking at opportunities to simplify administration and correct technical issues, the review will explore "areas where the present rules can distort behaviour or do not meet their policy intent", to help ensure the system is "fit for purpose".

While the request does not explicitly make this point, it was been widely assumed that the Treasury is keen to explore options for increasing tax revenues in response to the economic impact of the COVID-19 pandemic. According to the OTS, CGT currently is "a modest source of revenue for the Exchequer", with an average tax rate of 15%, due to various exemptions (in particular the annual exempt amount) and tax rates which are, on the whole, lower than (for example) income tax.

The Chancellor's request states he would be particularly "interested in any proposals from the OTS on the regime of allowances, exemptions, reliefs and the treatment of losses within CGT, and the interactions of how gains are taxed compared to other types of income". This last comment has led to speculation that CGT rates might be aligned with income tax rates. However, it is too early to tell whether such a fundamental change is being contemplated.

The OTS has published an online survey and a call for evidence to seek views on CGT, which closes on 12 October 2020. There was an earlier deadline of 10 August for "high-level comments on the principles of CGT", which "could put the OTS in a position to provide an interim update on those bigger picture issues".

The impact on share schemes and their participants remains to be seen, and will obviously depend on whether there are proposed changes to relevant CGT rules and rates. It is also worth noting that the OTS has specifically singled out the taxation of gains and losses on the disposal of shares and securities, including share matching rules, as an area for potential simplification.

## Employment Related Securities Bulletin 36

### HMRC publishes new bulletin focusing on COVID-19

HMRC's latest bulletin, published in July, provides further guidance on a number of COVID-19 related issues for tax-advantaged share plans. The key points are:

- HMRC will accept that, from 19 March 2020, where employees do not meet EMI working time requirements for reasons connected to the pandemic, "the time which they *would have spent* on the business of the company will count towards their working time" (emphasis added). HMRC has stated that it will accept furlough, working reduced hours and unpaid leave as reasons connected to the coronavirus pandemic, where the period of reduced work is attributable to the current coronavirus pandemic and began on or after 19 March 2020. HMRC says that both employers and employees must keep evidence of the link to the pandemic.

- HMRC has also confirmed that it will disregard a reduction in working time as a disqualifying event for EMI participants if it is for reasons connected to the pandemic.

- HMRC stated that changes to legislation will be made in the current and next Finance Bills to reflect this to ensure that EMI options granted before and after 19 March 2020 will remain qualifying.

  We note that Section 107 of the Finance Act 2020 (which has now received royal assent) makes the relevant amendments to the Income Tax (Earnings and Pensions) Act 2003 "for the purposes of determining whether a disqualifying event occurs or is treated as occurring in relation to an employee". Further amendments to section 107 have been proposed under draft legislation for the Finance Bill 2020-2021, which extends section 107 to modify working time rules more generally (rather than simply preventing a disqualifying event from occurring). While this amendment will apply retrospectively from 19 March 2020, it will not come into effect until the Finance Act 2021 receives royal assent in 2021. Employers who have granted or will be granting EMI options to employees on furlough (who are presumably not eligible for EMI options because they do not meet working time requirements) will be relying on HMRC's latest guidance rather than the underlying statutory framework until the new legislation comes into force.

- Companies must have fewer than 250 full-time employees to grant EMI options. HMRC has confirmed that the assessment of an employee's hours for these purposes will be by reference to the hours they would have worked, absent the pandemic. Employees on furlough must therefore still be counted.

- HMRC has also published clarificatory examples to illustrate how the 12 month extended payment holiday for SAYE participants will apply.

- Although companies should try to meet their obligations as soon as they can, HMRC will consider COVID-19 to be a "reasonable excuse" for failing to comply with certain tax obligations on time (e.g. registering new schemes and filing returns). In this new bulletin, HMRC has expanded the list of obligations in relation to which it will accept COVID-19 as a "reasonable excuse" to include the notification of new EMI options.

Full details can be found on the HMRC website by following this link:
https://www.gov.uk/guidance/employment-related-securities-bulletin-36-july-2020

## Shareholder approval of remuneration plans

### Scrutiny of remuneration reports and policies continues, against backdrop of increasing support

Listed companies continue to face significant shareholder scrutiny in relation to executive pay. In one notable display of shareholder dissatisfaction, Wizz Air shareholders voted down the company's annual remuneration report at the Hungarian airline's 28 July 2020 AGM, with 51.63% of votes cast against the resolution. The Investment Association had issued a "red top" alert in respect of the €532,714 bonus which Wizz Air's CEO was set to receive, and Glass Lewis and ISS had recommended a vote against the remuneration report.

The airline industry has been particularly affected by the COVID-19 pandemic. Wizz Air had announced redundancies for 19% of its workforce, as well as widespread salary cuts, back in April, and had used the UK government's furlough scheme as well the Bank of England's Covid Corporate Financing Facility.

However, there are signs that UK-listed companies have managed to increase shareholder support for their remuneration plans more generally. Deloitte's annual report on executive remuneration stated that FTSE 100 shareholders have been increasingly supportive of annual remuneration reports. The number of FTSE 100 companies receiving 'low votes' (defined as fewer than 80% in favour) on their annual remuneration report resolutions was 4% in 2020, compared to 7.5% in 2019 and 13% in 2018. The report attributes this to significant cuts to executive pension packages and a greater use of remuneration committee discretions to reduce formulaic outcomes in bonus awards.

## Horizon scanning

What key dates and developments in employee incentives should be on your radar?

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| **12 October 2020** | Deadline for OTS call for evidence on CGT |
| **31 December 2020** | Transitional arrangements under the UK-EU withdrawal agreement expected to end unless extended |
| **6 April 2021** | Off-payroll working rules (IR35) come into force for the private sector |

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