

## Out Of Time, But A Timely Reminder

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On 31 July the latest HMRC Settlement Opportunity came to a close. This opportunity gave employers who used an EBT before 6 April 2011 the ability to settle any PAYE and national insurance liability at both employer and employee level on more beneficial terms than would usually be available. The settlement window meant the employer must have notified HMRC of their intention to settle by 31 March 2015, with agreement being reached by 31 July 2015 and all liabilities settled within an agreed timeframe.

If an employer did not take advantage of the Settlement Opportunity they can still settle by agreement with HMRC. However, any settlement will not be on such beneficial terms as during the settlement window. HMRC's decision to close the settlement window is not unexpected. Since it opened in 2011 over 700 employers have made use of the opportunity that was instigated as part of HMRC's clampdown on avoidance schemes. HMRC have made it abundantly clear that employers had a simple decision to make; settle before the deadline or litigate.

It has to be said that this was perhaps a surprising stance, given the lack of success to date in litigating on EBTs, but a clear sign that HMRC feel they can win on those types of cases. In any event, large numbers of employers, often advised by their accountants who originally set up the schemes, decided better the devil you know and agreed to settle any potential PAYE and NIC liabilities, even where there was the possibility that HMRC were out of time to make any claims in any event.

The settlements have largely been negotiated between the employing company, the accountants and HMRC; with the trustee (who often is being asked to bear the burden of tax) and the beneficiary (again who shares in the liability) only being involved after negotiations are

more or less complete and matters being more or less a “fait accompli”. Employing companies have also used the Settlement Opportunity as a means of distancing themselves from the EBT, regardless of whether its existence is beneficial to its employees.

Given the potential competing interests if the settlor company and the employee beneficiaries, the Settlement Opportunity has served as a timely reminder to trustees, of all trusts, not just EBTs, about what their duties are to the various parties and also what safeguards they should consider putting in place to ensure they have fulfilled those duties and protected their own position if in future a beneficiary seeks to reclaim losses from the trustee for breach of trust away from its agreement to an involvement in the settlement opportunity or indeed any payment out of the trust.

In the context of the Settlement Opportunity, commonly trustees have been asked to consider settling the employee PAYE and NIC liabilities agreed with the HMRC to be due in respect of contributions made to the EBT by the company.

Often these contributions have been appointed on to sub-funds or allocated for the benefit of a particular employee and the tax due is assessed against their personal position. It is this personal tax liability of the beneficiaries that the trustee is being asked to settle, not usually the company liability as EBTs invariably exclude the settlor company from benefit.

Given the potential contentious nature of agreeing to settle liabilities for which there has been no actual assessment delivered, trustees are well advised to give full consideration to all the facts. Starting with the very basics of whether or not the settlement or payment is in fact of benefit to some or all of the beneficiaries of the trust. In the case of the Settlement Opportunity, questions in particular need to be asked in respect of overseas beneficiaries against whom HMRC have little or no recourse, why would they want to voluntarily settle something that is unenforceable against them?

In most cases the employing company will make a recommendation to the trustee that it should agree to settle the liabilities. This recommendation must contain details of the tax advice they have received and confirmation that the trustee can rely on this advice; if not the trustee may have to consider obtaining its own advice at the expense of the trust, which would be unlikely to be a popular decision amongst the beneficiaries. The recommendation and tax advice should set out a clear rationale as to why it is in everyone’s best interests to settle. The standard pitch being that the terms negotiated with HMRC are significantly more favourable than any potential assessment that may be raised and by settling in the window you are avoiding the widely known risk factors of litigating, particularly given HMRC’s publically stated position that they have dedicated resource to litigating these types of trust.

Once established that the payment/settlement is beneficial and, of course, having checked it has the power to make the payment, what other considerations should trustees be aware of?

In all appointments out of a trust, it is strongly advisable to have paperwork in place to which the beneficiary is a party. In Jersey trusts, this will often take the form of a deed of appointment and indemnity whereby the trustee appoints assets to or for the benefit of the beneficiary, who in turn, indemnifies the trustee in respect of liabilities up to the value of the appointed assets. In the case of settlements, this can be expanded to include full recitals of the terms of the settlement and that the beneficiary is aware of the facts and has had the opportunity to take their own advice and again indemnifies the trustee.

The trustee may also want to consider asking the settlor company to be a party to the deed and to indemnify the trustee in respect of its recommendations.

Finally, following conclusion of the negotiations and settlements many employer companies are looking to extract themselves. Careful consideration would need to be given to this and also any requests to terminate the trust entirely. It is common that there are rights, duties and obligations attaching to the settlor company as to who will inherit these needs to be established if the trust is to continue. If the request is to terminate, is this in the best interests of the beneficiaries; there may still be advantages to assets being held in trust and the advice the trustee will have seen may not deal with these considerations.

When noting any decision to pay out of a trust, trustees are reminded to go back to their basic fiduciary duty, get all the facts and carefully document their decision making process.

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