

The Association of Member Directed Pension Schemes ("AMPS")

Instructions to Counsel

**Eversheds LLP
1 Callaghan Square
Cardiff
CF10 5BT**

1. **Introduction**

- 1.1 Instructing solicitors act on behalf of the Association of Member Directed Pension Schemes ("AMPS").
- 1.2 AMPS has become aware that Her Majesty's Revenue and Customs ("HMRC") has been taking a particularly hard line in relation to Relief at Source Declarations made by individual members of personal pension schemes operated by member firms of AMPS.
- 1.3 HMRC appear to have adopted a practice of asserting that the slightest perceived deficiency in a declaration renders all tax relief claims void permitting HMRC to raise assessments to recover the tax relief normally allowed.
- 1.4 In practice, HMRC assert that as an alternative to reclaiming the tax member firms may "repair" these cases by writing to the members asking them to confirm that had they signed the correct declaration the relief would still have been available. HMRC appear content to work on a negative consent basis so that if no response is received from an individual member then it can be taken that the tax relief claim was in fact valid.
- 1.5 So far as we are aware, HMRC has not sought to audit or verify these corrective letters to members. HMRC then say that the issue may be dealt with under its "simplified recovery procedure" which involves charging interest from the date the tax relief was given to the date on which the case was repaired.
- 1.6 In the cases we have seen no instances of incorrectly granted tax relief have been identified.
- 1.7 As these claims date back to A Day (6 April 2006) the amounts involved can be considerable and in some cases are of a magnitude that threatens the existence of the particular Sipp provider. HMRC do offer to take payment in instalments in these cases.

2. **AMPS**

- 2.1 AMPS recently canvassed its membership about HMRC audits and relief at source declarations. Member firms which had encountered difficulties were informed they could contact Eversheds on a confidential basis to provide details of their particular experiences - which would not be shared with any other members of AMPS or any of the AMPS committee.
- 2.2 As a consequence, instructing solicitors have received information from six providers of personal pensions revealing various degrees of non-compliance with the requirements of the Relief at Source Regulations set out in SI 2005 No.3448 of the Registered Pension Schemes (Relief at Source) Regulations 2005 ("the

RAS Regulations"). Some of these cases remain outstanding and Counsel is particularly referred to the cases 1-3 outlined below where HMRC's position seems to be particularly harsh.

- 2.3 HMRC is aware that AMPS is taking legal advice on this practice. It does appear to instructing solicitors that the stance taken by HMRC seems to be driven by a desire to maximise revenue/tax collection and seems at odds with its own update about working with the industry to simplify the process of Relief at Source which was outlined in pension schemes newsletter 41 (see tab 1).

3. **Pre A Day Declarations**

- 3.1 The issue only arises in respect of declarations made by members joining personal pensions after A Day on an individual basis. Members who joined prior to A Day are not required to enter into fresh Relief at Source declarations for any of their post A Day contributions.

- 3.2 Also for members of what are termed "Group SIPPs" it is possible for the employer to provide the relevant information rather than the individual members.

4. **The Legislation**

- 4.1 Section 192(7)(b) of the Finance Act 2004 states that HMRC may by regulations set out the requirements for information that must be provided by a member when making contributions under Relief at Source.

- 4.2 Section 192(7)(b) has been implemented by SI3448/2005. Copies of the SI and of sections 188 to 192 inclusive of the Finance Act 2004 are attached at tab 2 together with extracts from the member pages of the HMRC Pensions manual and in particular RPSM05202020, 30 and 40.

5. **Examples of Deficient Declarations**

- 5.1 Enclosed with these instructions are copies of the relevant correspondence that we have received from member firms. Some of these firms have accepted that they have been in breach and have settled their liabilities to HMRC but have provided details in case we are of the view that there are grounds for challenging the original assertions made by HMRC. There now follows a brief analysis of each of these cases with those cases which we feel most worthy of being challenged being dealt with first.

6. **Case1**

- 6.1 Sipp-provider 1 is an existing client of the firm which has agreed to make the details of its correspondence with HMRC available. Copies of the pertinent correspondence are attached at tab 3 which includes our letter to the compliance

officer leading the team dated 3 August 2011. We have very recently been informed that HMRC are still reviewing that letter before formally replying. In this case the sums involved are considerable and could lead to an interest charge of approximately £250,000. This is based on the declaration included in this client's RAS stating:

"I agree to inform [] Services Limited in writing if any event occurs as a result of which I will cease to be a UK relevant individual. Notice must be given by 5 April in the year of assessment in which the event occurs or 30 days after the event occurs if later".

- 6.2 Apart from the fact that the reference to "UK relevant individual" should actually read "relevant UK individual" (which has not been picked up) HMRC are asserting that the requirements of the RAS Regulations is for the declaration to state:

"I agree to notify [] Services Limited if any event occurs as a result of which I will no longer be entitled to tax relief and that I will give notice no later than 5 April in the year of assessment in which the event occurs or 30 days after the event occurs if later".

- 6.3 Tab 2 contains a copy of section 188 of the Finance Act 2004 which at section 188(1) states that **"a member of a registered pension scheme is entitled to tax relief ... if the individual is a relevant UK individual for that year"**.

- 6.4 The client in this case informs us that he believes that in cases where pre-2006 scheme members had deficient declarations they have been given an automatic waiver by HMRC which does not even necessitate the administrator notifying the member. He cites this as evidence that this is effectively an abuse of power on the part of HMRC which is simply seeking to raise as much tax as it possibly can without reference to any sense of fair play or indeed to the tax payers' charter.

7. Case 2

- 7.1 In this instance (tab 4) HMRC are stating that the following is deficient:

"I will advise [] Trustees (Pensions) Limited if I cease to have any relevant UK earnings by the later of 5 April in the year of assessment in which the event occurs, or 30 days after the event occurred".

- 7.2 HMRC assert that the revised declaration should read:

*'I will advise [] (Pensions) Limited **if an event occurs, for example I cease to have any relevant UK earnings (and as a result I am no longer entitled to tax relief for an earlier contribution)** by the later of 5 April in the year of assessment in which the event occurs and 30 days after the event occurred".*

7.3 The amount of interest which HMRC are claiming under the simplified recovery procedure in this case is £54,610.96.

7.4 Regulation 6(2) requires a declaration to "the effect that":

"(b) no later than the date specified in paragraph 3 the member will give notice to the scheme administrator if an event occurs, as a result of which the relevant individual will no longer be entitled to relief for his contributions pursuant to section 188".

7.5 Again in our view this seems to be particularly officious approach and instructing solicitors would be interested to learn if Counsel is of the view that the lack of the words "and as a result I am no longer entitled to tax relief for an earlier contribution" renders the actual declaration defective given that the terms of regulation 6 is to provide a declaration "**to the effect that**" etc. We are of the view that if a member were to cease to have relevant UK earnings and informed the administrator then an assessment as to whether any tax relief had been overpaid could be undertaken so that the effect of the declaration is complied with.

8. **Case 3**

8.1 The potential interest charge under case 3 is of the order of £180,000. We do not have copies of correspondence with HMRC but we do have copies of both the corrected and the original deficient declarations which are attached at tab 5. In this case it is important that the paragraph headed "Personal and Employer Contributions" is not part of the declaration but is stated to be an "understanding". However, the member does need to sign the form and we would be interested to learn whether Counsel feels that the statement that the scheme administrator would be notified if a member's contributions is "in aggregate more than the relevant UK earnings" has actually complied with the RAS regulations.

9. **Case 4**

9.1 In this instance (tab 6) there were eight cases of incorrect RAS declarations but, unfortunately, those eight members had made substantial contributions and the interest element under the simplified recovery procedure amounts to £63,870. In this case the problem arose because there were some pre A Day application forms in circulation via the provider's IFA network and these were signed post A Day and not spotted.

9.2 The provider has made an offer of £10,000 but not surprisingly HMRC have refused this on the basis that the incorrect application form had been submitted and are not prepared to make any allowance for the fact that a considerable

amount of time has passed between those members joining the particular SIPP and the HMRC audit.

9.3 We assume, but please confirm, the Counsel believes that there is no legal basis on which to challenge HMRC's stance in this case.

10. **Case 5**

10.1 This involves an insurance company which has settled its liability and the correspondence is enclosed for completeness at tab 7. The declarations were not contained in one document and the accountants appointed to correspond with HMRC were unsuccessful in persuading it that the application forms should be taken together and treated as a whole and therefore regarded as compliant with the RAS Regulations. Given the correspondence Counsel will have seen in the earlier examples it is perhaps not surprising that HMRC were not prepared to entertain such an argument.

11. **Case Study 6**

11.1 In this example the provider's application form did not include a declaration from the member about the accuracy of the information given. We have not been provided with any further information and take the view that without such a declaration HMRC are entitled to raise an interest charge under their simplified recovery procedure.

12. **Instructions to Advise**

12.1 Counsel is requested to advise generally on the stance taken by HMRC and to comment on those cases (particularly cases 1 to 3) in terms of a basis for a challenge.

12.2 AMPS has previously raised its concerns with HMRC over its treatment of RAS declarations but their representations appear to have fallen on deaf ears. It seems, given the number of cases which are being dealt with in this way, that HMRC will not change its position voluntarily so any challenge will have to be based on an argument that its interpretation of the requirements of the RAS Regulations is incorrect.

12.3 It does appear that HMRC have been taking an extremely harsh line in these cases given that none of the audits appear to have uncovered any evidence of personal pension scheme members wrongly claiming tax relief - just a general confusion within the industry as to precisely what is required to be included the RAS declarations. It also seems at odds with HMRC's stated intention in Newsletter 41 and the responses given in the accompanying FAQ's concerning the discovery of individual errors (tab1). HMRC will say the cases outlined in

these instructions did not arise out of Newsletter 41 but rather its own standard inspections but that only underlines the apparent inconsistency of approach.

- 12.4 If counsel requires any further information please contact Ian Davies on 0845 498 7601 or by e-mail at landavies@eversheds.com.

Eversheds LLP

14 October 2011