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DRAFT LEGISLATION: TAXATION OF CORONAVIRUS SUPPORT PAYMENTS

Response by Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to provide comments on the draft legislation *Taxation of coronavirus support payments* ('the Draft Legislation') issued on 29 May 2020[1].

1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.

1.3 We have arranged our comments around specific topics and areas covered by the Draft Legislation. Section 2 contains our initial comments on the scope of the legislation, Section 3 addresses how coronavirus payments are to be accounted for, Section 4 sets out our comments on the provisions for recovery of payments, and Section 5 addresses the proposed penalties for failure to notify. Within each of these sections we have referenced the appropriate paragraphs in the Draft Legislation.

1.4 Overall we found the Draft Legislation challenging to read. Consequently, clear and practically focused guidance will be needed to enable taxpayers, and their advisers, to navigate through it. Wherever possible, this guidance should include examples to illustrate how the draft legislation should be applied in practice. We would be happy to assist in reviewing drafts of any such guidance before they are published.

1.5 We would be pleased to discuss any aspect of this response further. Relevant contact details can be found in Section 6.

2 Scope of the Draft Legislation

2.1 We note that the Draft Legislation only addresses the income tax / corporation tax treatment of coronavirus support payments. However, it is our understanding, based on HMRC guidance[2], that certain payments, in particular those made under the self-employment income support scheme ('SEISS'), will also be subject to Class 4 NICs. We would expect that separate regulations will be laid to cover the application of Class 4 NICs to such

[1] https://www.gov.uk/government/consultations/draft-legislation-taxation-of-coronavirus-covid-19-support-payments
[2] https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme

payments. If this is the case, then we would encourage allowing sufficient time for comments to be made on those draft regulations as well.

2.2 In the introductory section of the legislation, s1(5) defines the coronavirus job retention scheme ('CJRS') as the scheme "that is the subject of the direction given by the Treasury 15 April 2020". However, we note that a further CJRS direction was released on 20 May 2020, and we expect further directions to be published in connection with the Mark II schemes. Similarly, the SEISS is defined in s1(5) by reference to the direction given by the Treasury on 30 April 2020, but the further extension of that scheme will presumably require a new direction to be given. The definitions in s1(5) may therefore need to be amended to make them more flexible and allow them to incorporate further directions made in respect of those schemes.

3 Accounting for coronavirus support payments

3.1 Paragraph 1(2) establishes that coronavirus support payments are taxable as revenue receipts. However, there is no further detail as to what category of revenue receipt they will fall to be taxed as – i.e. trade, non-trade, miscellaneous etc.

3.2 Paragraph 1(2) goes on to say that payments are to be brought into account in calculating the "profits of that business". We assume that this means, for example, that a payment under the SEISS would be taxable as trading income. However, the position may be more complicated for other coronavirus support payments, such as those made under the CJRS. In particular, if a company that has both trade and investment activity makes a claim under the CJRS, then how should the payment be accounted for? This will be important not only for correct completion of the corporation tax return, but also for other issues such as loss relief (for example, if a company has trading losses which arose before April 2017 they can only carry those losses forward against profits of the same trade). We would recommend that the exact treatment of payments either be clarified in the legislation, or failing that, in accompanying detailed guidance.

3.3 Paragraph 2 deals with post-cessation receipts. Paragraphs 2(3) and 2(4) apply the usual rules for these receipts, but exclude those sections which cover the extent of the charge (e.g. s243 ITTOIA 2005). It is not clear why these sections are excluded in their entirety. Whilst we appreciate that it may be desirable to exclude the territorial aspects of those sections, it is less clear why other aspects would need to be excluded – for example those in s243(1) ITTOIA 2005 for amounts charged to tax elsewhere.

3.4 It appears that, under paragraph 3(1), CJRS payments are to be accounted for as a receipt only of the holder of the PAYE reference under which the claim was made– and no one else. Further, no other entity can claim relief for 'any expenses in respect of the same employment costs'. We found this area of the legislation particularly challenging to follow, but we assume that its purpose is to ensure that the grant is accounted for in the same entity which reports the associated employment expenses (thereby facilitating compliance activity). If that is the case, then it would be helpful for this to be clarified in the accompanying guidance. In addition, we note that this approach could be complicated where a single PAYE scheme covers the employees of more than one entity. Normally this would result in recharges between the different entities covered by the scheme. Any guidance published should specifically address this issue, including the treatment of such recharges.

3.5 Paragraph 3(3) states that payments received under the SEISS are to be treated entirely as profits of the tax year 2020-21. We assume that this is to assist with compliance activity. However, it will be necessary to provide clear guidance to those in receipt of the grant as to what adjustments need to be made to the relevant basis

periods to ensure that this treatment is correctly reflected. This will be particularly the case where individuals may be subject to commencement or cessation rules or have overlap profits to contend with.

3.6 If all of the SEISS grant is to be brought into account in 2020/21 regardless of whether the business is on cash accounting or accruals or the year end of the business, a separate box will be needed to report this income on the self-assessment tax return. This will be particularly important for partners in a firm where the income is not treated as a receipt of the firm, as there is no existing mechanism to add additional income to a partner's profit share as required by paragraph 3(5)(b) after the partnership return has been finalised. It would be helpful if such boxes were pre-populated based on HMRC's records of the SEISS payments made.

3.7 It is unclear what the impact of taxing the SEISS grant in 2020/21 will be on averaging claims by farmers and others. Will those applying averaging schemes be permitted to combine the 2020/21 receipts and average including the SEISS receipt, or will they average profits exclude the SEISS receipts?

3.8 Paragraph 4(4) states that the trading or property allowances cannot be set against any SEISS grant payments. We are slightly confused by the reference to the property allowance in this paragraph as, on the assumption SEISS payments are to be taxed as a trade receipt, we would not expect the property allowance to be available in any event. We would also query why only the SEISS, and no other coronavirus support payments, are excluded from being offset by the trading and property allowances?

3.9 We found paragraph 5 to be particularly difficult to interpret. The explanatory notes state that the purpose of this paragraph is to deal with the position where employment costs are deductible by another person to the one who received the CJRS payment, but as far as we can see they merely provide for the CJRS payment to remain taxable on the person entitled to the support payment as an employer. We are therefore not clear what this paragraph is intended to achieve other than to reinforce the provisions of paragraph 3(1). We would welcome detailed guidance and examples to illustrate how paragraph 5 is meant to apply in practice.

3.10 In paragraph 6(2)(a) the final mention of 'corporation tax' appears to be superfluous.

4 Recovery of coronavirus payments to which a person is not entitled

4.1 Overall, we assume that the recovery powers outlined in paragraph 8 are intended to cover both overpayments (i.e. where the amount of a support payment was incorrect) and incorrect claims (i.e. where a person claimed support who was not eligible or subsequently became ineligible). This point should be clarified in accompanying guidance.

4.2 We would recommend that, where amounts are to be recovered under paragraph 8, a separate box be provided to report them on the self-assessment return. This will be of particular importance for companies, as the current corporation tax self-assessment return does not contain any obvious place to record an income tax charge arising under paragraph 8.

4.3 We welcome the recognition in paragraph 8(4) that amounts of coronavirus support payments to which recipients are not entitled may be repaid without the need for assessment of the liability under paragraph 9. In all the circumstances, that seems very appropriate. On the assumption that HMRC would prefer recipients to make such repayment arrangements (quicker and simpler for everyone concerned), we presume that HMRC will publicise the possibility of recipients making repayments in this manner.

4.4 We believe that paragraph 8(8) also needs to apply for the purposes of paragraph 12(5).

4.5 Under paragraph 9, HMRC can raise an assessment in respect of the amount chargeable under paragraph 8. We assume that normal interest provisions would apply to the amount in question with the start date for interest being the same as the date identified by paragraph 8(3).

4.6 The wording in paragraph 9(3) is rather imprecise in saying that Parts 4 to 6 of TMA 1970 "contain other provisions that are relevant". For clarity, we would prefer the legislation to state that specific parts or sections apply to an assessment under this paragraph.

4.7 Paragraph 12(3) effectively says that if a person has claimed an amount which they are not entitled to, they need to notify HMRC by the later of 30 days after Royal Assent of the Finance Bill or 30 days of the paragraph 8 tax becoming chargeable. For many grants (including the SEISS), paragraph 8 tax becomes chargeable from the date of receipt. As a result, if an individual has claimed under the first round of the SEISS, they will need to notify HMRC of any paragraph 8 charge within 30 days of Royal Assent, something which will need to be publicised by HMRC once the date of Royal Assent is known.

5 Penalties for failure to notify

5.1 Para 13(1) imposes a penalty for failure to notify "a liability to income tax chargeable under paragraph 8 where the person knew, at the time the income tax first became chargeable, that the person was not entitled to the amount of the coronavirus support payment in relation to which the tax is chargeable." Paragraph 13(3) goes on to state that the failure to notify "is to be treated as deliberate and concealed".

5.2 Treating the failure in that way vests it with the highest degree of culpability provided for by paragraph 5, Schedule 41, Finance Act 2008 - the legislation which deals generally with failures to notify. The point is then reinforced by paragraph 13(4) which removes the possibility of a failure to notify chargeability under paragraph 8 being classified as the less culpable *deliberate but not concealed* or falling into the residual (least culpable) *any other case* category.

5.3 Categorising a notification failure in respect of a coronavirus support payment as *deliberate and concealed* has the following consequences:

a. The *standard* amount of the penalty is 100% of the potential lost revenue (PLR). (Through paragraphs 8(4) and 13(5), the PLR would be the amount of the support payment for which the recipient was not entitled). Under the general provisions of Schedule 41, FA 2008, the penalty could be a lower percentage of PLR if the failure was categorised as having lower culpability but, as just noted, this is prevented here by paragraph 13(3).

b. The minimum amount of the penalty is 50% of the PLR if the recipient discloses the failure in a manner which is *prompted* (for example in response to a question from HMRC) assuming that the recipient then provides maximum assistance to HMRC in rectifying the situation – paragraph 13, Schedule 41, FA 2008.

c. The minimum amount of the penalty is 30% of the PLR if the recipient discloses the failure in a manner which is *unprompted* (for example if the recipient advises HMRC of chargeability after the notification deadline but before any approach from HMRC) assuming that the recipient then provides maximum assistance to HMRC in rectifying the situation – paragraph 13, Schedule 41, FA 2008.

d. The recipient is prevented from asserting that they had a reasonable excuse for the failure as that is only possible where a failure is not deliberate – paragraph 20, Schedule 41, FA 2008. HMRC

would, however, still be empowered to reduce the penalty amounts referred to above if they thought it right by reason of *special circumstances* – paragraph 14, Schedule 41, FA 2008.

5.4 The wording of Paragraph 77 of the Explanatory Note states [with emphasis added] that: "Paragraph 13 deals with penalties where a failure to notify is *connected to deliberate conduct*."

5.5 Paragraph 104 of the Explanatory Note indicates [with emphasis added] that HMRC will "through these provisions, have the power" [to recover the amount to which a recipient was not entitled and] "to charge a penalty *where HMRC can demonstrate that an applicant has behaved deliberately*."

5.6 Our reading of paragraph 13(3) is that any failure meeting the conditions specified in paragraph 13(1) falls to be treated as - is deemed to be - deliberate and concealed. There is no suggestion that a penalty can only arise if the failure actually involved behaviour that would normally be categorised as deliberate and concealed. It appears to be sufficient that the recipient knew of their non-entitlement at the relevant time. Thus, the paragraph appears to require the more severe consequences of a deliberate and concealed failure to apply to any penalty arising under the Schedule without any requirement for HMRC to demonstrate that the recipient had behaved deliberately.

5.7 We find it difficult to read the two Explanatory Notes referred to above as being consistent with the draft legislation:

- Note 77 refers to deliberate conduct but does not indicate that the legislation appears to assume such conduct to exist.
- Note 104 indicates that HMRC must demonstrate that a recipient has behaved deliberately - again without indicating that the legislation appears to assume not simply deliberate behaviour but deliberate and concealed behaviour.

5.8 If these two Explanatory Notes correctly express the policy intent behind the draft legislation, we think that paragraph 13 should be amended to make it clear that a penalty can only arise if the recipient not only knew of their non-entitlement at the time it arose but also made a deliberate decision not to notify HMRC within the 30-day time limit of that non-entitlement.

5.9 If, however, the legislation correctly expresses the policy intent, the Explanatory Notes should be amended to avoid any misunderstanding of the provisions.

5.10 Assuming the legislation to correctly express the policy intent, we are concerned as a matter of principle that a deeming provision in relation to behaviour is being used in order to ensure that the consequences of the failure to notify are more severe than if the standard provisions in Schedule 41, FA 2008 were applied to the actual behaviour of the recipient. In saying this, we are not questioning the policy of charging a high penalty in relation to coronavirus support payments to which a recipient knew they were not entitled. Our objection is to the apparent short-cut route of deeming any failure to notify to involve the most culpable level of behaviour within the penalty code.

5.11 Equating the fact of knowing of non-entitlement with behaviour which is not only deliberate but also involves concealment appears to us to undermine the integrity of the modern penalty system. Identifying the relevant behaviour is fundamental to making the penalty fit the action.

The presumption of the most culpable level of behaviour also sits slightly uncomfortably with the departmental Charter's principle of *Respect you and treat you as honest*.

5.12 We are also concerned that categorising a recipient's notification failure as deliberate and concealed denies them the opportunity to assert that they had a reasonable excuse for the failure. That would appear to mean that a recipient who knew of their non-entitlement at the time that it arose and who had resolved to sort the matter out fully but who had then missed the 30-day notification deadline because of some business or personal circumstance that delayed their notification by only a matter of few days could be exposed to the same substantial penalty provisions as a recipient who had known from the outset that they were not entitled but had anticipated that they would never be found out.

5.13 Our concern about the absence of a reasonable excuse provision is heightened by the relative brevity of the period in which a recipient can notify their non-entitlement. Some of the obligations to notify which are also within the ambit of Schedule 41, FA 2008 have a notification period of six months or a year. We are not suggesting that notification of non-entitlement to a coronavirus support payment should be longer than the proposed 30-day period. The brevity of the period does, however, increase the likelihood of the notification deadline being breached because of circumstances which might constitute reasonable excuse.

5.14 Our overall concerns are therefore the introduction of a legal fiction which without enquiry assumes the greatest degree of culpability and simultaneously denies a recipient any opportunity to demonstrate that they might in fact have had a reasonable excuse for their failure.

5.15 We appreciate the attraction in terms of simplicity of the current draft wording of paragraph 13(3) and, as noted, we could also understand the policy intention of exacting a significant penalty from any recipient who was deliberately abusing one of the coronavirus support payment schemes. We have accordingly sought to identify a route of comparable simplicity which could deliver the same outcome but at the same time avoid the automatic denial of opportunity to demonstrate reasonable excuse. We offer the following for consideration:

a. In the italicised heading to paragraph 13, delete all after '*Penalty for failure to notify*'
b. In sub-paragraph 13(3), replace the whole of the existing wording with: 'For the purposes of paragraph 6 of that Schedule, the penalty is calculated as if the failure was a deliberate and concealed failure.'
c. In sub-paragraph 13(4), replace the whole of the existing wording with: 'For the purposes of paragraph 20 of that Schedule (and notwithstanding sub-paragraph 13(3) of this Schedule), the failure shall not be regarded as a deliberate failure.'

5.16 The intention in the above is to direct the calculation of the penalty to the policy purpose without having to assume any particular level of culpability on the part of the recipient or to deny them the opportunity to demonstrate the existence of a reasonable excuse for their failure.

6 Contact details

6.1 We would be pleased to join in any discussion relating to this consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Emma Rawson on 07773 087111 or erawson@att.org.uk

The Association of Taxation Technicians

7 Note

7.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has more than 9,000 members and Fellows together with over 6,000 students. Members and Fellows use the practising title of 'Taxation Technician' or ‘Taxation Technician (Fellow)’ and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.