



The new bank payroll tax

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Introduction

In the Pre-Budget Report on 9 December 2009

Alistair Darling

announced a new one-off 'bank payroll tax' ('BPT').

He said the purpose of the tax was to encourage banks to use their profits to build up their capital base and that if they insist on paying substantial rewards, he was determined to claw back money for the taxpayer.

Summary of BPT

BPT is a tax payable at 50% on bonuses (including deferred bonuses and share awards) in excess of £25,000 paid or awarded in the period between 9 December 2009 and 5 April 2010 ("the BPT Period") although the Government has already said it may extend this period. This is in addition to the income tax and employees' and employers' national insurance contributions also payable on bonuses which results in a combined effective tax rate on employers and employees of over 100%.

BPT must be paid no later than 31 August 2010.

'Bonuses' includes deferred bonuses and share awards, but awards and bonuses which a bank was contractually obliged to pay or provide before 9 December are excluded.

BPT is payable by the employer, not the employee, and no corporation tax deduction is available.

Targeted anti-avoidance provisions are also being introduced, aimed at stopping employers finding ways to avoid this liability. In particular it will not be possible to avoid BPT by the use of loans which are in substance earnings or by paying bonuses through employee benefit trusts or similar intermediaries. In addition, arrangements entered into during the BPT Period to pay bonuses after the expiry of the BPT Period will be caught. HMRC have also been given power to 'name and shame' by publishing details of 'deliberate defaulters'.

Employers within the scope of BPT

What HMRC's technical note says
HMRC's technical note published on 9 December 2009 says that 'taxable companies' are:

- > banks
- > UK resident investment companies and financial trading companies in banking groups
- > UK branches of foreign banks and UK resident branches of a foreign financial trading company in a banking group
- > building societies

- > UK resident investment companies and financial trading companies in a building society group

What the draft legislation says

A close look at the draft legislation in HMRC's technical note showed that 'bank' and 'banking group' have been very widely defined so that virtually any FSA authorised company other than an 'excluded company' (see below) carrying on a trade in the UK which consists wholly or mainly (probably more than 50%) of one or more 'relevant regulated activities' is caught.

- > A 'UK resident bank' is a UK resident trading company (other than an excluded company) which is authorised by the FSA and whose activities include accepting deposits or which otherwise consist wholly or mainly of carrying on relevant regulated activities. It also includes a corporate member of a partnership which is authorised to carry on relevant regulated activities in the UK in the course of a trade
- > A 'relevant foreign bank' is a non-UK company which is authorised by the FSA and which carries on a trade through a permanent establishment in the UK which includes accepting deposits or which otherwise consists wholly or mainly of relevant regulated activities. It also includes a corporate member of a partnership which is authorised to carry on relevant regulated activities in the UK in the course of a trade

'Relevant regulated activities' are:

- > accepting deposits (providing current and deposit accounts, i.e. retail banking)
- > dealing in investments as principal or agent (buying, selling, subscribing for or underwriting securities or derivatives)
- > arranging deals in investments
- > safeguarding and administering investments

- > regulated mortgage contracts

On a strict interpretation this therefore means that many entities which are not banks, such as independent brokers and private equity firms, are also caught.

HMRC's clarification

Not surprisingly many representations were made to HMRC. The Treasury and HMRC published a note on their website on 18 December 2009 in which they acknowledged that companies which would not be regarded as a bank from a commercial and legal perspective had been inadvertently caught. The note also states that the rules will not apply to non-banking companies outside banking groups such as insurance companies, asset managers, stockbrokers etc. The Government is proposing to amend the legislation so that:

- > 'UK resident banks' and 'relevant foreign banks' which are not deposit-takers are only caught if they are a full scope BIPRU 730k investment firm whose activities consist wholly or mainly of relevant regulated activities
- > a foreign entity which would be a full scope BIPRU 730k investment firm if it were UK resident is to be treated as if it were a full scope BIPRU 730k investment firm

HMRC have also said that the list of 'excluded companies' will be extended to include:

- > companies which are not deposit-takers and are only carrying on a relevant regulated activity on behalf of an insurance company in the same group
- > companies which do not carry on any relevant regulated activities otherwise than as manager of a pension scheme
- > companies whose activities consist wholly or mainly of operating a collective investment scheme
- > exempt BIPRU commodities firms

The amended draft legislation will also remove brokers which are full scope BIPRU 730k investment firms from the scope of the tax together with non-banking financial service groups which only fall within the definition of a 'banking group' because there is a group company which carries on a banking activity which is a minor activity within the group as a whole. That banking company will be subject to the bank payroll tax but the rest of the group will not.

Remuneration which is subject to BPT

BPT is payable in respect of 'relevant remuneration' in excess of £25,000 paid or awarded to 'relevant banking employees' in the BPT Period.

'Relevant remuneration' is defined as anything which is not 'excluded remuneration' and which is either:

- > within the definition of 'earnings' in section 62 of the Income Tax (Earnings and Pensions) Act 2003 (salary, wages, fees, gratuities or other profit or incidental benefit of any kind in money or money's worth and anything that constitutes an employment)
- > is a benefit provided by reason of that employment, such as share awards (including performance shares, restricted shares and share options), a bonus in the form of pension contributions and a bonus on termination of employment

'Excluded remuneration' means:

- > regular salaries, wages and benefits but this will not include commission if the amount of the commission varies according to the contribution or performance of the employee or the performance of the business
- > any remuneration where the obligation for the employer to provide it existed before 9 December 2009 (for example contractual bonus entitlements and share options already granted). The definition of contractual obligation for the purposes of BPT is unusual – it provides that a contractual

obligation arises when the amount of the remuneration is fixed or is capable of being fixed without the discretion of any person or when the total amount to be paid or provided to or in respect of a number of employees is fixed or is capable of being fixed. The fact that the bonus is contingent and requires the employee to comply with conditions will not prevent the bonus from being contractual

- > shares awarded under an HMRC approved share incentive plan or options granted under an HMRC approved save-as-you-earn share option scheme

Relevant remuneration will be awarded in the BPT Period if a contractual obligation to pay or provide the relevant remuneration arises in the BPT Period. This means that if a deferred bonus payable over, for instance three years, is awarded in the BPT Period all of that bonus – even the amount payable in later years – is subject to BPT.

Employees subject to BPT

An employee is a 'relevant banking employee' if:

- > he is a director and/or employee of a taxable company or an individual providing equivalent services to a taxable company via an intermediary such as a personal service company
- > he is either UK resident in the 2009/10 tax year or the duties of his banking employment are performed wholly or partly in the UK in that tax year
- > the duties of his employment are wholly or mainly concerned with relevant regulated activities or the lending of money

An employment is a 'banking employment' where its performance is mainly concerned – directly or indirectly – with relevant regulated activities or the lending of money. HMRC have confirmed that BPT is intended to extend to back-office and support staff whose duties wholly or

mainly relate to supporting these activities.

offshore arrangements may be appropriate

The way forward

BPT is a significant cost to those organisations within its scope. Organisations must carefully consider how to deal with BPT since it has the potential to affect the organisation not only financially but also on its ability to recruit and retain the best employees.

Issues that you may want to consider are:

- > identifying which parts of the group and which employees are within the scope of BPT
- > identifying which bonuses, share options/awards and benefits which are due to be paid in the BPT Period are paid pursuant to a pre 9 December 2009 contractual obligation
- > the costs of BPT and who should bear those costs
- > whether there are any ways to mitigate BPT (bearing in mind the anti-avoidance provisions noted above, the requirements of FSA Remuneration Code and the impact on your employees) for example:
 - > deferring payment or not paying bonuses
 - > awarding annual bonuses rather than deferred bonuses
 - > increasing base salary
 - > for expatriate employees ascertaining whether dual contract or other

Notes:

'Excluded companies' for the purpose of defining a 'bank' are insurance companies, investment trusts, open-ended investment companies, friendly societies, credit unions and building societies together with those companies which HMRC said on 18 December they will add to the list.

'BIPRU 730K firms' – Where an investment firm is subject to the requirements of the Markets in Financial Instruments Directive (MiFID) and is not an exempt CAD (capital adequacy directive) firm, it will generally be subject to the Prudential rules for banks, building societies and investment firms (BIPRU). A BIPRU 730K firm is a firm with an initial capital requirement of EUR 730,000 which is neither a BIPRU 50K firm or a BIPRU 125K firm and which is subject to the recast CAD.

How we can help

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