

Waivers of remuneration

(Lecture P1208 – 5.38 minutes)

A significant number of people have generously announced that they intend to waive some (or all) of their salaries or bonuses in an effort to assist those who have been adversely affected by the COVID-19 crisis or to provide additional funds for the NHS. Naturally, those individuals with a high profile have received plenty of media attention, but there are many others whose unstinted generosity is equally praiseworthy.

However, it is an inevitable feature of modern life that anyone wishing to help in this way must be careful not to expose themselves to some seriously unwelcome tax consequences as a result of their benevolence.

As a general rule, the waiver of any part of a salary or bonus does not relieve the earnings from a liability to tax and NICs, unless it can be said, on a true view of the facts, that the waiver took place before the salary or bonus was paid to, or put at the disposal of, the employee (see S18 ITEPA 2003 and Para EIM42705 of the Employment Income Manual).

In Para EIM42715, HMRC emphasise this point:

‘Where remuneration waived is given up after it is treated as received for employment income purposes, . . . the employee remains taxable on the remuneration given up. All that is happening is that the employee is applying remuneration in a particular way by giving it back to the employer.’

This principle is borne out by the decision of the Court of Appeal in *Parker v Chapman* (1928). The waiver will still be valid in these circumstances, but the arrangement will not be treated as the relinquishment of the gross amount which the individual was expecting to receive.

Such an outcome is unlikely to go down well with the donor. In order to avoid an unpleasant surprise, it is necessary for the employee to execute the waiver before the entitlement to the salary or bonus has arisen. Only then will the individual not be chargeable to tax and NICs on the amount waived.

It is of course essential that the relevant documentation has the desired legal effect. In view of the fact that a waiver is a gratuitous disposition without consideration, a deed must be executed in proper form.

And what about the position where an employee repays a bonus which he has recently received in order to assist colleagues who might otherwise be furloughed or made redundant? There are clear indications that this has been going on since the start of the COVID-19 lockdown. At the moment, there is no relief for such selfless behaviour. The repayment would have to be made out of the employee's post-tax income. In other words, the position is very similar to that described above. Will HMRC find a way to help here? What about the possibility of allowing the repayment of a bonus to be treated as ‘negative earnings’?

IHT should not be an issue, given that there is a specific exemption for waivers of remuneration in S14 IHTA 1984. That is, a waiver of remuneration is not regarded as a transfer of value. However, the wording in the section indicates that it would still be necessary for the waiver to be executed in advance of any entitlement arising.

It is known that the CIOT are taking up cudgels on behalf of those who have waived remuneration. They have asked HMRC to try and find a way to protect donors from the severity of these consequences. No-one wants such magnanimity to be discouraged by uncertainty over the tax position.

Contributed by Robert Jamieson