From: Support <support@osmaimanagement.com>
Subject: RT HMRC Enquiry and NOVA - Update – 2024 – Part 1

Dear All,

We're writing today with a general update on HMRC Enquiries, Litigation Strategy, NOVA and other matters for Business trust or Remuneration Trust (RT) clients.

Last week (week commencing Monday 15th January) we were invited to Heathrow to a conference run by Buckingham Wealth marking 30 years of the RT.

Over 3 hours we received a detailed briefing on how HMRC had been responding to the RT over that period of time, the events that have given rise to certain changes in how the trust works (including NOVA) and what we can expect in the future.

It was an eye-opening and very positive few hours. It was ironic that we spent most of the time talking about government agencies malpractice in the weeks after the fall out from "Mr Bates Vs the Post Office". The comparisons presented right home exactly how badly HMRC have behaved.

As you know Buckingham Wealth (BW) provide the services of the consultants who draft replies to HMRC enquiries.

It may interest you to know that they are expanding their enquiry team to reinforce success, and to get ready for NOVA Part 2 they have hired an ex-HMRC Litigator to work with Paul Baxendale-Walker, providing high-level advice and strategy. They have added real weight to an already talented and able team.

Over the next week or so we will send 3 emails to you which will break down what was discussed and what this will mean for you and your experience at the sharp-end. As above, the updates are positive and HMRC will not enjoy the next few years.

This email will go into a brief history of RT's, HMRC strategy and then look at NOVA and how it has played out since inception up to the present.

Time Line:

1993 - 2010 - During this period HMRC largely ignored the RT because they did not know how to deal with it. Enquiries were received by clients on an occasional basis but never went anywhere.

2010 - The coalition came into power and the Disguised Remuneration Rules 2011 (DRM 2011) were brought in. These concerned the use of Loans to pay Employees of Companies which made contribution to an Employee Benefits Trust. This was, by and large, the model that was used for the RT at the time. Before DRM 2011 became law BW changed the RT to reflect the change. The RT became a Non-Employee Remuneration

Trust which was able to loan money to "Creditors" of the Trust. This was the model which required clients to make a £100 loan in order to qualify for loans.

2017 - The Loan Charge was brought into legislation with an operative date of April 2019. In general terms, the outcome was not as intended and the Loan Charge itself was severally curtailed after a campaign by MPs and a Select Committee at which HMRC were hauled over the coals regarding their treatment of taxpayers. As you know, this treatment had real and horrible effects. Of course, BW took steps to ensure that the Loan Charge would not affect clients. In 2017, Fiduciary Receipts replaced Loans and in 2019 Sunrise was rolled out successfully. As a consequence, no RT client has ever faced a genuine threat from the Loan Charge.

2020 - HMRC litigated 4 cases at the First Tier Tax Tribunal with mixed results. The Marlborough and Dukeries cases were a mixed bag for HMRC and the Strategic Consulting case was a badly run trust where the client falsified documents. Then came the CIA Insurance case in which HMRC achieved a pyrrhic victory and accidentally created NOVA. More of this later....

Litigation Strategy

Although it might appear that HMRCs litigation and enquiry strategy is coherent, the reality is different. It is common place for different teams within HMRC to use contradictory arguments and even change approach during an enquiry. In the post-NOVA landscape they remain consistently inconsistent.

Before 2020, HMRC strategy in enquiries, and at most tribunals, took broadly the same shape:

Strategy 1:

Identify the Trustee.
Identify and show the relevant Tax Legislation.
Compare them.
Try and show a direct line connection between the Trustee and the Client such they were one and the same.
Fail, and try the same thing another day.

Post-2020 saw a different approach from HMRC, which had unintended consequences.

Strategy 2:

Identify and show the relevant Tax Legislation.
Show the Trust Deed
Compare them.
Make the argument that the Trust is Void and a sham.

This is the strategy they adopted in the CIA Insurance Case.. They won, kind of, but it was a hollow victory which had unintended consequences.

NOVA

NOVA is a confirmation of HMRC's argument that the Trust is void. If it is void it does not exist, and never existed. If it never existed then enquiries against it are void and information notices cannot be complied with. How can one give information on a Trust which doesn't exist and never existed?

NOVA comes in 2 parts.

Part 1 is a confirmation that HMRC are right and that the trust is void. It is void because certain aspects (intent, the form of the contribution, the object of the trust) have been made uncertain, and where there is uncertainty there cannot be a working trust. This is what the CIA case achieved. It made the Trust uncertain and therefore void. The activity thus far has been making HMRC aware that we agree with them and then dealing with their responses.

Part 2 of NOVA is the creation of a new Trust, the NOVA Trust and the movement of contributions and assets to that Trust. HMRC are dimly aware of this but not really clear on the consequences. They are certainly not aware that this new Trust includes a new clause which will void and restart the Trust each time a new enquiry begins.

Post-NOVA Enquiries

We all know that enquiry letters have not stopped. But, and this is key, they have shown us that HMRC are deeply, deeply confused. Their arguments have been as follows:

1 - The trust is not void. Give me the information I asked for.
2 - The trust is void and now I want penalties.
3 - The trust may or may not be void. I'm not sure. Give me information or penalties or both.

This presents a problem to you, the client. It is not a nice process at all but, do bear in mind that HMRC lashing out is a function of where they are in their thinking. They don't know what to think and where they are thinking, they are not thinking clearly.

We are in a dimension where HMRC are their own worst enemy. By deploying NOVA we have put them in a position where they are arguing with themselves.

They created NOVA through their arguments in the CIA case, and now they are stuck with it. They sense that they are the edge of a trap but they can't stop themselves from walking into it.

In reality, they are not on the edge of the trap, they are in the middle of it.

Springing the Trap

We outlined the 2 parts of NOVA above. Now let's look at these Parts from HMRC's perspective.

Part 1 is the realisation of what has happened. HMRC argued that the Trust is void and we have agreed with them. It was their argument, not ours, we have just gone along with it. This is the position that has been taken in enquiry letters. HMRC's response is to become confused and start lashing out with fines, information notices and Spotlights. BW predicted all of this back in 2021.

Part 2 is the recognition that the contributions and assets have moved to a new Trust and that new enquiries will make the Trust void again. What does Part 2 achieve? It makes all Information Notices and Fines void and HMRC have to start again.

That is worth repeating.

The second part of NOVA makes ALL Information Notices, and Fine Demands pertaining to the old trust void and HMRC will have to start enquiries again.

The Matching Principle

One of the aspects of NOVA that challenges people is this:

How does a contribution move from an old trust to a new trust without any change in the company or business accounts?

This is where "The Matching Principle" comes in. Imagine your company paid their electricity bill in 2014 by writing a cheque for £100 and sending it off in the post. You would send the cheque and promptly forget about it. Imagine that the cheque did not get there, and you find out in 2024. What would you do? You would pay the £100 because you've used electricity you haven't paid for.

So, the accounting entry was in 2014 but the actual payment was in 2024. Where does the expense sit in accounting terms. It is sits in 2014. That is when the liability was incurred. That is where the intent to pay, matched to the book entry occurred.

HMRC will have a lot of trouble with that concept. You now know more than they do!

What Happens Next?

That's a lot to download so we will leave it there for now. In the next email, which you will receive in a few days, we will look at what happens next, how HMRC will be forced to accept a new state of affairs with the Arbitral Aware strategy.

To summarise for now:

HMRC changed their litigation strategy with the CIA case and gave birth to NOVA.
NOVA voids the old trust and creates a new Trust onto which all contributions are settled.
As the old Trust is void all Information Notices and Fines pertaining to it are voided also.
HMRC are soon to appreciate exactly how bad this is for them.

Have a great day and look out for the next email.

Kind regards,
OSMAI Support Team