

HMRC takes action after the Rangers EBT ruling: issues facing trustees

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Fortified by the recent Supreme Court judgment in favour of HM Revenue and Customs in **RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) (Appellant) v Advocate General for Scotland (Respondent) (Scotland) [2017] UKSC 45** (the **Rangers Case**), HMRC have already begun to issue enforcement notices to sponsoring employers for the payment of tax and National Insurance (**NIC**) liabilities in respect of employee benefit trusts (**EBTs**) on the basis that the arrangements facilitated forms of disguised remuneration to employees.

HMRC's response is not unexpected. When the judgment was issued in July, HMRC issued a strongly-worded statement, describing the ruling as having "wide ranging implications" and underlining its determination to "always challenge contrived arrangements that try to deliver tax advantage never intended by Parliament".

Where enforcement notices have been issued, sponsoring employers may seek to recover the amounts owed from the trustees or the beneficiaries of the EBT in question.

Trustees of EBTs that find themselves in this position must consider whether any such liability to income tax and NIC is rightly payable from the trust fund of the EBT, or by the sponsoring employer.

Precisely where the liability sits will depend on the provisions of individual trust instruments constituting the EBT in question – there is no common "one-size-fits-all" answer.

The issues that affected trustees should now consider are as follows.

- Whether or not the tax and NIC liabilities are rightly payable from the trust fund. Commonly the liabilities will actually fall on the sponsoring employer. If a sponsoring employer claims that the liability falls to be met from the trust fund of the EBT, the trustees may wish to ask that the sponsoring employer share with them the legal advice which brought them to that conclusion.
- Whether the terms of the trust deed constituting the EBT in question specifically exclude the

sponsoring employer from benefit. Trustees should take advice as to whether or not the terms of the trust would therefore permit them to settle these liabilities from the trust fund or whether there is, in fact, a total prohibition against such payment.

- Bearing in mind the fiduciary duties of the trustees, whether it is indeed in their best interests to pay from the trust fund a liability that the sponsoring employer is obliged to pay.
- Whether the sponsoring employer has a "right of restitution" to recover from beneficiaries. Advice should be taken by trustees on this specific point. If such a right exists it may be in the beneficiaries' best interests to pay HMRC directly to avoid any enforcement action being taken against the beneficiaries individually, even if such payment might constitute a breach of the term of the EBT.

It is, of course, not surprising that sponsoring employers do not want to be left with liability for tax and NIC payments in the wake of the Rangers case – but the question of whether it is right that the trustees should bear the cost of such liabilities is one that will hinge on the specific terms of the trust documents and the specific circumstances of the case.

Trustees should therefore seek appropriate advice, both UK tax advice and advice in the jurisdiction of the proper law of the EBT, before taking any action.

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Meet the Author



James Campbell

Partner

Jersey

E: james.campbell@ogier.com

T: +44 1534 514230

Key Contacts



Josephine Howe

Partner

Jersey

E: josephine.howe@ogier.com

T: +44 1534 514201

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