

Finance (No. 2) Bill 2021 – Clause 32
Self-employment income support scheme
Briefing from the Low Incomes Tax Reform Group (LITRG)

1 Executive summary

- 1.1 Clause 32 makes certain changes to the taxation of grants paid under the self-employment income support scheme (SEISS), and allows HMRC to recover some or all of the grant(s) paid to a taxpayer if they cease to be entitled after claiming. The changes only take effect for grants paid on or after 6 April 2021, so they will apply to the fourth and fifth grants announced under the scheme.
- 1.2 Taxpayers who make amendments to their Self Assessment tax returns on or after 3 March 2021 may have to pay back some or all of the grant(s) claimed. We are concerned that unrepresented taxpayers may not be aware of their obligation to notify HMRC and accordingly may face penalties. We would like a stronger commitment from HMRC that they will help taxpayers become aware of any obligation to repay, in time to avoid such penalties.
- 1.3 In particular, it is very unsatisfactory that taxpayers who have made amendments on or after 3 March 2021 but prior to the date of the claim appear to be in a situation where they are obliged to pay back some or all of the grant immediately upon receipt. Some may be unaware they have to do so, but they may face harsh penalties originally aimed at fraudulent claims for failing to do so on a timely basis. We do not think these penalties should apply for such a taxpayer.

2 About Us

- 2.1 LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.

- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 Overview of the measure

- 3.1 Clause 32 of the Bill, inter alia, extends the application of paragraph 8(4)(a) of Schedule 16 to Finance Act 2020 to include payments made under SEISS. The effect of this is to provide a mechanism for HMRC to recover SEISS grants made to taxpayers where they were entitled to receive the grant at the time of payment, but they subsequently cease to be entitled to some or all of the grant received. Paragraph 8 already applies to SEISS payments which the person was not entitled to receive at the time the payment was made.
- 3.2 The Clause also amends paragraph 8(3) of that Schedule such that a person will be treated as not entitled to a payment under SEISS if they cease to be entitled to retain the amount after it was received, because of a change of circumstances.
- 3.3 Paragraph 10 of the Treasury Direction for the fourth payment under SEISS (SEISS 4), published on 9 April 2021, provides – in the context of that grant – what appears to be the only possible circumstances which would mean that a person ceases to be entitled to a payment after a claim when they *are* so entitled:

10.1 Subject to paragraph 10.2, where an amendment made on or after 3 March 2021 to a person's tax return would change the amount of trading profits or relevant income taken into account for the purposes of SEISS 4, if on the basis of those amounts-

(a) the person would not meet the profits condition, the person ceases to be entitled to retain any SEISS 4 payment received and it must be returned to HMRC immediately, or

(b) the amount of the SEISS 4 payment would be lower, the person ceases to be entitled to retain the excess amount of SEISS 4 payment received and it must be returned to HMRC immediately.

10.2 Paragraph 10.1 does not apply if-

(a) the amount of the SEISS 4 payment received was £100 or less, or

(b) the amount of the excess to which the person ceases to be entitled is £100 or less.¹

- 3.4 It is not yet clear, because the relevant Direction has not yet been published, how a person might cease to be entitled after the point of claim for the fifth grant payment under SEISS.
- 3.5 For SEISS 4, the above changes taken together mean that if a taxpayer makes any amendment to any tax return on or after 3 March 2021 which would mean they are no longer eligible for SEISS 4 (or would have reduced the amount of the grant) had the amendment been made on or before 2 March 2021 – then they must effectively repay the ‘overpaid’ amount of the grant back to HMRC unless it is less than £100. This is different from the first three grants under SEISS, under which it was not possible to cease to be entitled after the date of claim.
- 3.6 A charge under paragraph 8 of Schedule 16 to Finance Act 2020 does not arise if the taxpayer repays the amount of the SEISS grant to which they are no longer entitled. This is under paragraph 8(5). The effect of the Clause will therefore be limited to the cases where the taxpayer fails to make the repayment directly to HMRC.

4 General comments

- 4.1 We welcome the £100 de minimis, but in the absence of any notification from HMRC, we have concerns about how a taxpayer will know that they have any obligation to repay some or all of the SEISS 4 grant as a result of a genuine amendment to their return.
- 4.2 At the time of writing, GOV.UK states that in the absence of a taxpayer notification, they will contact the taxpayer ‘after the deadline for making amendments’ if they need to make a repayment.² We presume this means 31 January 2022, given that the 2018/19 amendment deadline has already passed: the deadline for making amendments to your return is normally 12 months after 31 January following the end of the tax year. But through different mechanisms it is still possible to make changes to your tax position beyond that deadline.³ It is not clear whether those changes which are not formal amendments, under section 9ZA of Taxes Management Act 1970, might trigger an obligation to repay some or all of the grant.

¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976964/SEISS_4_Direction_060421_Sig.pdf

² <https://www.gov.uk/guidance/how-different-circumstances-affect-the-self-employment-income-support-scheme#if-your-tax-return-is-late-under-enquiry-or-amended> (Accessed 9 April 2021)

³ If the change results in a repayment of tax, this would be made under an overpayment relief claim (Schedule 1AB of Taxes Management Act 1970) and must be made within four years after the end of the tax year. The taxpayer may disclose unpaid tax (e.g. additional untaxed income) to HMRC at any point.

- 4.3 In any case, contacting taxpayers *after* the deadline for amendments may well be too late for them to avoid a penalty for not repaying some or all of their SEISS grant soon enough. What taxpayers would reasonably expect is to be contacted *before* they might potentially receive a penalty as a result of not paying back the grant. It would be far preferable for HMRC to check their systems at the time that taxpayers amend their returns and advise taxpayers promptly in relevant cases that they are required to return some or all of their grant payment, in accordance with paragraph 10 of the Direction, in time for them to correct the position and avoid the tax charge or any penalties.

Taxpayers who amend their tax return on or after 3 March 2021 but before claiming the grant

- 4.4 We note that paragraph 10 of the Direction applies to amendments made on or after 3 March 2021 even if they are made before the date of the claim for SEISS 4 (expected to be from late April 2021). This seems to lead to a rather bizarre situation where if a taxpayer has already made such an amendment, then they will be required to pay some or all of the grant back immediately upon receipt. This is because it seems that HMRC will calculate their grant based on the tax return information as at 2 March 2021, ignoring the subsequent amendment. It would obviously be preferable for HMRC to take account of this amendment before processing the claim, but we appreciate that IT limitations may make this difficult. The issue is then, again, how a taxpayer will be made aware of their obligations under Schedule 16 Finance Act 2020 – including the requirement to notify HMRC within 90 days, under paragraph 12 of that Schedule.
- 4.5 If they do not make such a notification, then the taxpayer would appear to be exposed to a penalty for the failure to notify. Unless paragraph 13 applies, this penalty is based as a percentage of the amount of tax unpaid (that is, the amount of the grant which has been overpaid and not repaid) by 31 January 2023.¹ Thus, in practice, a taxpayer appears to be able to retain the overpaid amount of the grant for quite some time (up to 20 months).
- 4.6 However, paragraph 13 of Schedule 16 (penalty for failure to notify: knowledge of non-entitlement to payment) appears to deem a failure to notify within 90 days as a *deliberate and concealed* failure, if they knew at the time of payment that they were being overpaid. Such a failure does not carry a reasonable excuse defence, and the associated penalty can be up to 100% of the amount of the tax unpaid at the end of the 90-day period.² Thus someone in the situation described above at 4.4, who HMRC might perceive as being fully aware at the time of the payment that they are being overpaid, finds themselves in a rather

¹ That is, the normal Self Assessment due date for 2021/22. This assumes the tax charge arises in 2021/22.

² The minimum percentages for the penalty depend on whether the disclosure is prompted (50%) or unprompted (30%). See HMRC's factsheet CC/FS11 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877263/CC-FS11.pdf.

dangerous territory which was originally intended for individuals who claimed a SEISS grant fraudulently. The reality is more likely to be that the taxpayer will assume an amendment made before claiming will already be accounted for by HMRC when they calculate the grant, and that there is therefore nothing for the taxpayer to do after they receive it.

- 4.7 HMRC should, of course, make every effort in order to communicate to these taxpayers when they make a claim for the grant that the calculation does not take account of amendments submitted on or after 3 March 2021, including those before the date of claim, and that the taxpayer may need to pay some or all of the SEISS grant back if there are such amendments. But the messaging may be overlooked or misunderstood, or a taxpayer may miscalculate whether or not an amendment would trigger a repayment (given not all would).
- 4.8 As such, we do not feel this is fair in the case where the taxpayer is unaware of the requirement to pay back some or all of the grant, or has made a mistake in determining whether they need to. We therefore think such taxpayers should be carved out of paragraph 13 entirely.

LITRG
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