Get on the front foot

Gary Brothers and Paul Rippon explain how HMRC's Time to Pay arrangements work, and have some top tips and pitfalls to avoid

In the aftermath of the Covid-19 pandemic, and with the closing of the government furlough scheme, we all know that businesses and individuals up and down the country have experienced serious, unforeseen financial difficulties.

Given the government imposed Covid restrictions, limits to normal levels of business trading has meant that, while many businesses now have debtors to chase, they also have hefty creditors, with HMRC being one of the more hungry and active of them!

This is why the prospect of negotiating a Time to Pay (TTP) arrangement with HMRC could provide that much needed financial flexibility, and be an attractive option for many.

What is a Time to Pay arrangement?

A Time to Pay or 'TTP' arrangement is a formal agreement between a taxpayer who cannot pay tax on the due date (or has missed payments), and HMRC, to make regular payments over a period of time that is both affordable to the taxpayer, and palatable to HMRC. TTP arrangements are specifically tailored to either the individual taxpayer or business, and are dependent on their own specific circumstances. As such, the proposals require a case-by-case approach, and any decisions are based on HMRC's own discretion.

Any tax duties, penalties or surcharges can be included in the HMRC TTP arrangements, and arrangements can cover personal taxes such as Income Tax and National Insurance Contributions (NICs) and/or business tax duties such as Corporation Tax, PAYE, NICs and VAT.

Categories of TTP arrangements

We have found that for individuals, HMRC exercise a little more flexibility when it comes to arranging a TTP arrangement. As a standard HMRC practice, individuals are required to demonstrate their ability to pay HMRC using an 'income and expenditure assessment' form. This is a very straightforward exercise of analysing the individual's income, expenditure, and disposable assets to calculate the individual's disposable income. Typically, HMRC then expect a payment of "no more than 50%" of this individual's disposable income. Naturally, we have found HMRC to be more thorough and in-depth in complex cases and thus requiring more evidence before any decision is made.

TTP negotiations are a bit more intricate for businesses for a number of reasons. For VAT and PAYE/NIC late payments, HMRC seek to pursue the liabilities soon after monthly or quarterly deadlines have been missed. On the flip side, for corporation tax, HMRC will not begin pursuing for late payments until a tax return has been submitted. In both circumstances, HMRC will only be willing to engage in any TTP negotiations once outstanding returns are submitted, for the obvious reason of quantifying the full tax liability before any further TTP discussions.

Where a business applies for a TTP with a debt of £1 million and more, HMRC may require the business to engage a qualified professional adviser to carry out an independent business review (IBR) in support of any TTP requests.

Failure to agree a TTP arrangement with HMRC can be catastrophic for businesses and could lead to HMRC issuing a winding up petition against the business. Consequently, the business would be forced into compulsory liquidation with all assets sold off to recoup the money owed to creditors. Given HMRC's relatively recent change in attaining preferential creditor status, it appears that HMRC are more willing to commence enforcement and insolvency proceedings. Therefore, early 'front foot' negotiations with HMRC

can be advantageous if they are done quickly, proactively, honestly and through maintaining regular contact with HMRC.

Navigating a TTP negotiation

We have observed that it is always advantageous to demonstrate to HMRC the actions being taken to get the taxpayer's payment back in order. HMRC require commitment from the individual that all future HMRC returns are filed on time and that all future liabilities be paid in full and on time. We recommend maintaining regular discussions with HMRC of any changes in circumstances and ability to pay, to keep the TTP agreements moving smoothly. HMRC's TTP criteria for determining how risky a TTP request is usually based on: the amount of liability owed; timescale requested; and the previous compliance of the customer. HMRC usually allow up to 12 months' time limit for TTP arrangements. A TTP arrangement lasting more than a year is uncommon but achievable, dependent on the circumstances.

Although HMRC are bound by the TTP agreements they enter into, they are entitled to withdraw at any time if it is to "protect the interest of the Exchequer" if, but not limited to; the taxpayer being dishonest and misleading HMRC, if any of the instalment conditions are not satisfied (such as missed payments) or any other reason where it comes to light that the tax duty may be at risk.

Any TTP agreements with HMRC are not set in stone, therefore, there is some flexibility down the line of taxpayers want to make any adjustments to payment arrangements.

We understand that negotiating a Time to Pay agreement with HMRC can prove to be difficult and challenging for individuals and businesses. The process can be complicated and lengthy and can add to the already stressful situation of the applicant.

Important things to consider

When negotiations with HMRC's Debt Management begin, it is vital to be well prepared, and to understand the composition of the debt. Generally, this is made up of the outstanding tax and late payment interest, however depending on the circumstances on how the debt accrued, there may be other aspects that affect the negotiations:

1. Penalties and Surcharges – The Statement of Liabilities will contain any punitive charges that have not been appealed. Often a business may find they have not met their statutory filing obligations as well if they have had difficulty in paying tax, and late filing penalties or default surcharges may arise. In our experience, it is always worthwhile appealing all surcharges and penalties that may have accrued, because:

a) The amount can be requested to be postponed pending the outcome of the appeal, meaning the total outstanding liability (in the short term) is reduced accordingly; and

b) A reasonable excuse may exist. Although the legislation states "an insufficiency of funds is not a reasonable excuse", it goes on to say; "unless attributable to events outside P's control".

Many TTPs we have dealt with have been the result of circumstances outside the taxpayer's control. Being able to remove, in some cases, fairly significant penalties from TTP consideration is always beneficial.

On the point of the default surcharge, if a TTP is agreed prior to a payment being missed, then no surcharge will be applied by HMRC. On that basis it always best to be proactive when a difficulty to pay HMRC arises.

2. Directors Loan Account (DLA) – When a participator has received a loan from a close company, and the loan is not repaid within 9 months and 1 day following the Accounting Period End, the company will be charged tax at 33.75% (32.5% pre 6 April 2022) of the outstanding loan under S. 455 Corporation Tax Act 2010.

The major issue is that HMRC are very reluctant to approve a TTP arrangement when there is an outstanding DLA. Their view is that the loan should be repaid before they offer any flexibility for the tax to be paid.

What is crucial to be aware of though, is that repayment of the loan will allow the tax charged under S. 455 to be relieved, thus reducing the outstanding balance. This is not a short-term fix, however. Despite relief being due under S. 458, it would not crystallise until 9 months and 1 day following the Accounting Period End that the loan was repaid, or written off, as the case may be.

This relief may be factored into a TTP, but cannot be wholly relied upon. HMRC will still want to see a consistent reduction of the debt, until the point that the S. 458 relief crystallises.

3. Bad Debt Relief – A number of taxpayers that find themselves in a position that requires a TTP have had issues with their debtors. Whether this was a result of the economic downturn due to COVID, where a number of businesses struggled to pay their creditors, or simply one of their main clients becoming insolvent.

Bad Debt relief is available to VAT Registered businesses who have accounted for output tax on an invoice they have issued, but have not received payment from their client. If, after 6 months of the invoice becoming payable it remains unpaid, the taxpayer may submit a claim to HMRC for Bad Debt Relief.

Such a claim will relieve the output tax that had been accounted for by the taxpayer, thus in some cases, greatly reducing any outstanding VAT that HMRC are pursuing.

Caution must be used, however. As Newton's third law states, "for every action, there is an equal and opposite reaction"; if HMRC will be repaying the output tax to the taxpayer, this means that the input tax that had been claimed by the debtor must be repaid to HMRC.

If a taxpayer is looking to maintain a professional relationship with their debtors, careful consideration must be used, and a warning to the debtor would be recommended if a claim for Bad Debt Relief is being considered.

4. Research and Development – There are a number of business that we have dealt with that, without realising, have engaged in some form of research and development. This may be one of the reasons that the business is finding it difficult to pay their liability, as huge investments have been made in that area of the business.

Of course, under the right circumstances, a business may be entitled to a credit against their liabilities if they have engaged in research and development, and which may go some way to reducing their debt.

As such, it is essential to understand the underlying business when discussing the options available, and whether a retrospective claim for research and development is possible.

5. Paying HMRC – As we have already advised, it is important, when in the process of negotiating a TTP to both:

a) Continue to pay all upcoming liabilities on time; and

b) Make regular payments against any historic debt.

The first condition is a requirement in any case for a TTP to be agreed, and would be grounds for a TTP to be revoked if this stopped. The second condition sets a good precedent with HMRC that the taxpayer is committed to paying their debt, and that they would be able to comply with a TTP if one was agreed.

6. Composition of the Agreement – HMRC have a number of "lines in the sand" before they will consider a TTP proposal. An important one being the length of the agreement itself. Since becoming a preferential creditor, and particularly following the cessation of their embargo on enforcement and insolvency action, HMRC have been very reluctant to agree to proposals in excess of 18 months, regardless of the taxpayer's circumstances.

Instead, HMRC are more than happy to approve winding-up action against profitable businesses if they cannot agree to a proposal within these time limits.

Another important aspect to consider is how the payments themselves are structured. Generally, HMRC will look for a substantial payment up-front to show that the taxpayer is committed to the proposal. If the taxpayer is unable to do this, it is not necessarily a deal-breaker, however it does engage HMRC more than a simple flat-rate proposal.

HMRC are very reluctant to accept a proposal whose payments increase over time, and are more comfortable in approving one where the payments remain the same over the length of the TTP. HMRC refer to this as “backloading”, and will refuse any attempt to use a large lump sum to satisfy the final payment as they consider the risk to be too great.

7. Other things to consider – There are various things that will sway HMRC one way or the other when discussing the reasons that a TTP is needed. Primarily, they will want to know what has been done by the taxpayer to reduce their outgoings, and whether finance has been sought elsewhere. HMRC are very much of the opinion that a TTP is a “concession, not a right”, and want to ensure they are not being used as a “credit facility”. HMRC want the taxpayer to have exhausted all other options to pay the debt before coming to them, and will view their grant of a TTP as a favour to the taxpayer.

Conclusion

TTPs have been a significant benefit to many businesses and individuals, and have allowed those that have faced temporary financial difficulties to recover. They are, however, becoming more difficult to agree with HMRC, although it may be that we generally get involved when TTP negotiations have reached a “distressed” state. They are not straightforward, and require suitable preparation before negotiations begin.

However, they can be achieved as our recent experiences demonstrate!

- *Gary Brothers is a partner at Independent Tax. Call 01757 630010, email* gary@independent-tax.co.uk *or go to* http://www.independent-tax.co.uk
- Paul Rippon, Assistant Manager , Independent Tax