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it's our business

newspad of the Employee Share Ownership Centre

Chairman awarded CBE in Queen's New Year Honours

Centre chairman Malcolm Hurlston, who is founder and president of StepChange Debt Charity (formerly the Consumer Credit Counselling Service), has been awarded a CBE by her Majesty the Queen in the New Year Honours 2013 List.

Malcolm's citation from the Palace states: "Malcolm Hurlston, Commander of the Order of the British Empire, Founder and President of CCCS, honoured for financial services."

He was recognised for two decades of work leading the charity, which is now the major source of free debt counselling and advice in the UK. It has helped save hundreds of thousands of individual consumer debtors from being forced into personal bankruptcy.

In addition, Malcolm chairs Registry Trust and the Financial Inclusion Centre. He is a visiting professor at Westminster Business School and a former chair of money education charity Credit Action.

Commenting on his award, Mr Hurlston said: "You don't get to help a couple of million people without a lot of support, for which I am deeply grateful. Let's see how else we can put lives right with an efficient and non-judgmental formula."

Malcolm set up the Employee Share Ownership Centre, a not for profit organisation, in the mid 1980s to lobby, research and inform employers and employees in the interest of developing broad-based employee share plans in both the UK and in the EU generally.

Triumph for Centre 'Save Our CSOP' campaign

Centre chairman Malcolm Hurlston has pledged to work with ministers to promote the Company Share Option Plan (CSOP), which – partly due to Centre campaigning - has escaped the executioner's axe.

News of the Centre's 'Save Our CSOP' campaign triumph came in a mid December announcement by Exchequer Secretary David Gauke. He said that the government had decided not to axe CSOP, nor to amalgamate it with the Enterprise Management Incentive (EMI) scheme.

The future of CSOP looked in doubt earlier this year when the Office of Tax Simplification (OTS), which had been reviewing the 'big four' tax-approved share schemes, CSOP, EMI, Sharesave (SAYE Sharesave) and the Share Incentive Plan (SIP) questioned whether CSOP had had its day. The OTS review noted that usage of CSOPs had declined significantly over the last decade and it had found it difficult to identify the types of companies that used CSOPs and why they did so. It recommended further investigation into the relevance of the CSOP for UK businesses.

"Fortunately, there was a strong response from companies, which demonstrated that CSOPs were a very useful form of reward, in particular for junior and middle ranked employees and, in some cases, for employees generally," said Mike Landon, executive compensation director, at Centre member MM&K.

Mr Gauke agreed that many respondents to the OTS consultation had praised the efficacy of CSOP to those companies that did not qualify for the award of EMI options. Respondents had pointed out that CSOP could be used as an all-employee options scheme in companies which felt themselves too small to install either an SAYE-Sharesave or SIP scheme.

Mr Hurlston had told the OTS in the Centre's response that perhaps CSOP's greatest virtue was that it could be - and was - used to incentivise low paid and part-time

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employees, such as supermarket check-out staff, because participants did not have to put in their hard-earned cash up-front, which they could not and probably should not afford.

Finally, HMRC had accepted evidence that despite the recent decline in CSOP take-up, it remained extremely useful to companies that used it to reward employees, sometimes on a one-off basis.

Now Mr Hurlston wants ministers to accept Centre help in publicising and promoting the CSOP throughout UK business and manufacturing sectors.

According to HMRC latest statistics, 1,280 companies operated CSOP in 2010-11, compared to 7,190 companies that operated EMI. However, in that year 40,000 employees were granted CSOP options, up to a maximum value of £30,000 per participant, but only 17,000 were granted EMI options.

Some of the companies that use CSOP operate more than one scheme, according to the statistical revisions (see page 6) published November 30 last. The average value of CSOP options held by employees in the tax year 2010-11 was £7,400.

MM&K and others had pointed out that CSOPs could be made even more effective by increasing their flexibility further, in a similar way to EMI options, for example by:

- Permitting options to be granted at nil-cost, or with an exercise price below the share price at the grant date (while only giving income tax relief for any increase in value after the grant date); and
- Allowing options to be exercised with income tax relief within three years of the grant date (where the plan rules permit).

The Government accepted that many of the changes recommended by the respondents to the consultation had the potential to make CSOP even more attractive, flexible and simple for businesses and participants. For example, the current system of pre-approval of CSOPs, SAYE and SIPs schemes will be replaced with a self-certification system, similar to that for EMI, but not until 2014.

"The Government has therefore decided to retain CSOP as a tax-advantaged share option scheme available to a wide range of businesses," confirmed Mr Gauke, a former Centre Awards Dinner guest of honour.

Approved share schemes: the changes

Legislation will be introduced in the Finance Bill 2013 to amend existing provisions that govern tax advantaged employee share schemes, it was revealed as part of the government's overall response to the OTS recommendations. The main changes will be:

- Simplifying the SIP rules on reinvestment of cash dividends paid on SIP shares in 'dividend shares' held under SIP. The present condition that reinvestment is limited to £1,500 per employee per year - and must take place within three years - will be abolished. This change comes into effect **on and after April 6 2013.**
- Simpler and more consistent rules for the SIP, SAYE and CSOP to determine when employees who leave employment on retirement are entitled to favourable tax treatment.
- Simpler rules for SAYE and CSOP to determine when those leaving employment, other than on retirement, are entitled to favourable tax treatment as *'good leavers'*. There will be provision to allow tax-free exercise of SAYE or CSOP options, or tax-free payments for SIP shares, in certain cases where there is a cash takeover of the company that established the scheme.
- Abolishing the present rules for SIP and SAYE that prevent participation by employees holding a 'material interest' in the company, and aligning the level of control in the company that triggers the 'material interest' restriction for CSOP with that used for EMI, by raising it from 25 percent to 30 percent.
- Amending the rules on allocation of SIP Partnership Shares where employees purchase shares by deduction from salary during the accumulation period. Employers will be allowed greater flexibility in setting the valuation basis for determining the number of shares awarded to employees at the end of the accumulation period.
- Repealing the provision in the SIP legislation concerning the acquisition by SIP trustees of shares from qualifying employee share ownership trusts.
- Extending from 40 to 90 days the time available for those holding qualifying EMI options to exercise them with favourable tax treatment after a 'disqualifying event' occurs.
- Seven year SAYE-Sharesave option awards are to be abolished. Hardly any companies use them these days, as employees are far more mobile career-wise than they were 25 years ago.
- Entrepreneurs Relief to be extended to all shares acquired through EMI options.
- To remove the prohibition on the use of restricted shares in CSOP, SAYE and SIP schemes

These other changes outlined above will take effect on and after the date that **Finance Bill 2013 receives Royal Assent**. In total, these changes are estimated to cost the Exchequer £40m a year from 2013-4.

HMRC said that the changes could encourage further take-up of the main tax advantaged Eso schemes and increase the benefits for scheme participants.

In particular, these proposals could increase the tax advantages of those affected by cash takeovers; the material interest rules, SIP dividend re-investment and EMI disqualifying events.

Some proposals, such as changing the Good Leaver rules for SIP and CSOP; SIP dividend re-investment, the 'material interest' rules and retirement rules could reduce business costs.

Bonus Corner

Luxury goods group **Mulberry** provoked comment after awarding senior staff almost £3m of new share options in the wake of its share price fall in the second half of 2012. The new awards include more than £1m of shares to ceo Bruno Guillon, whose previous options were under water – i.e. worthless – as a result of the company's dramatic share price fall. "The news is likely to anger investors in Mulberry, particularly given the board's reasoning that it has issued the options to 'align management and shareholders interests'," said *The Telegraph.* The Centre has long been an opponent of re-pricing share options, except in very unusual circumstances. Mulberry's shares fell from highs of £24.72 last May to 970.5p in November after a fall in demand from lucrative Asian markets. Over Christmas, the board granted 225,818 shares to senior employees, worth a total £2.83m based on Jan 4's closing price of £12.57. The award included options over 83,964 shares to Mr Guillon, worth £1.05m, which will vest on June 30 2014 and be exercisable until July 1, 2019. Financial criteria for options to vest will be detailed in the company's annual report later in the year. His previous outstanding award of 200,670 shares – issued when Mulberry's shares stood at £18.89 – was exercisable at a price of £23.02, and were due to vest over three years from March 2014. A Mulberry spokesman declined to comment.

Direct Line share schemes in play: EXCLUSIVE

The partially floated Direct Line Group, which owns insurance brands like Direct Line, Churchill and Green Flag, is breaking away from the employee share scheme provision offered by its parent, the state-owned bank RBS Group.

Direct Line is in the process of planning an entirely new approved Eso scheme to offer to its 15,000 employees, the company has told *newspad.*

More than 90 percent of DLG employees took up the RBS offer of 143 free ords in DLG - then worth £250 - when about 30 percent of the equity was sold in a partial IPO last October. As the DLG share price has since risen to 212p, those free shares are now worth £300.

A spokesperson for DLG told *newspad:* "Direct Line Group has decided not to participate in any further RBS Group employee share offers."

DLG confirmed that it would share the details with Centre members, through *newspad,* once it has finalised the new Direct Line Group all-employee share scheme.

What is not yet clear is whether DLG employees will be able to continue participating in *current* RBS share schemes *until they mature*.

DLG's HR department and company secretariat has had the unenviable task of trying to work out whether simultaneous employee participation in both RBS and Direct Line share schemes would be allowable for tax relief by HMRC under the rules for approved schemes.

A related problem is that until the rest – or at least most - of DLG's equity is sold off by its parent later this year, the insurance group is technically still a subsidiary of RBS, which complicates the issue of qualification under HMRC approved share scheme rules.

Americans centre stage in Davos

The Centre's 14th global employee equity conference in Davos next month will have a distinctly American flavour – as three of the presentations will be delivered by leading US practitioners from New York and Seattle.

Our latest recruit from across the pond is **Harvey Katz,** employee benefits partner at Fox Rothschild LLP in New York, who will speak on *Employee Stock Ownership Plans: A US Success Story* on **Thursday February 7 and Friday February 8** at the five-star Steigenberger Belvedere Hotel, in Davos Platz. He will relate the astonishing success story of a smallish east coast building sector company, which used an Esop to create 40 staff millionaires when the employee owners finally decided to exit almost a decade later.

Michael Bussa, tax partner in the New York office of Ernst & Young, will address the issue of *'Making sense of equity compensation tax traps facing highly mobile employees and their employers'* and a third US speaker - **Fred Whittlesey,** principal consultant at Compensation Venture Group- will tackle: *'Performance Plans in US Compensation Practice'.*

Another star attraction in the programme will be the detailed broad-based Eso plan case study to be presented by new Centre member Imagination Technologies. Company secretary **Tony Llewellyn** and assistant company secretary **Lauren Brown** will be the co-speakers.

It's not too late to register now by email to fhackworth@esopcentre.com with copy to esop@esopcentre.com Our Davos e-brochure, which contains the full programme, can be accessed on the Centre's website 'events' at: www.esopcentre.com.

The Centre is now offering 'Conference Only' attendance rates, as the Steigenberger Belvedere Hotel is full. Member practitioners (service providers) pay GBP 500 and no VAT to attend the conference with lunch offered both days and conference cocktail party invite. Member plan issuers pay GBP 375 for the same deal. However, members taking advantage of this offer are responsible for finding their own accommodation in Davos.

Other speakers include: **Malcolm Hurlston CBE** chairman, Esop Centre; **Stuart Bailey**, md (UK) Accurate Equity; **Alasdair Friend,** associate, Baker & McKenzie LLP; **Justin Cooper**, chief operating officer, Capita Registrars; **Mike Pewton,** ceo, GlobalSharePlans; **Jeremy Mindell**, senior reward & tax manager, Henderson Global Investors; **Michael Sterchi** of KPMG Switzerland; **Mike Landon**, executive compensation director, MM&K; **David Pett**, partner, Pett, Franklin & Co. LLP; **Kevin Lim,** associate director of RBC Cees; **Don Drybrough.** VP corporate solutions, of Solium Capital (UK) and **Alan Judes**, md, Strategic Remuneration. **Peter Mossop,** director of executive incentives, Sanne Group, will chair the trustee panel on EBT and plan admin issues and **Fred Hackworth,** the Centre's international director, will mediate the delegates' Q & A session, including the topic: 'Are Esops central to CSR?'. Forty people to date have registered for this event.

Centre members Appleby Global, Computershare Plan Managers and RBC Corporate Employee & Executive Services are sponsors of the Davos conference brochure and handbook.

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Employee Owners/Shareholders

Chancellor George Osborne is pressing on with his plans to entice employees to give up some of their employment rights in return for shares in their companies, despite support from hardly any of the 200 companies who responded to the government consultation.

The Chancellor still intends to allow companies to hand employees shares and exempt the recipients from Capital Gains Tax (CGT), although experts warn that it could open up tax liabilities for some employees and allow others to avoid tax.

Osborne's idea is to reduce the tax liabilities that arise when employees are given equity in the business, in exchange for giving up some of their rights, such as unfair dismissal, or requests for flexible working.

The *Growth and Infrastructure Bill* – into which the *'Shares For Rights'* enabling clause has been shoe-horned - is grinding its way through parliament and some detail remains to be fleshed out before the final legislation can be presented for Royal Assent.

The Bill has passed through the Commons and was introduced into the Lords the next day. The new version of the Bill, incorporating all the amendments made in the Commons, is available on the parliamentary website. The Bill's Second Reading in the Lords will be this week.

The Government acknowledged that only a small number of responses to the consultation thought that there would be any take-up of employee-owner contracts. Ministers confirmed, however, that the plans were being taken forward, and would introduce some changes designed to address concerns raised in responses to the consultation.

The Coalition proposed a number of amendments to the draft legislation previously put forward, including enabling the Secretary of State to:

- Increase the minimum share value of £2,000
- Removing the upper threshold of £50,000 to allow businesses to offer more shares under the scheme, but not raising the £50,000 exemption limit from CGT
- Changing the notice period for return from additional paternity leave to 16 weeks so it is consistent with change in the notice period for return from maternity and adoption leave
- Allowing non UK-registered companies to benefit from the status
- Allowing shares to be issued by both the employing company and its parent company to ensure the scheme is sufficiently flexible to encourage widespread appeal.

Under the proposals, staff who opt for shareholder status could receive shares worth up to a *limitless* value, the Government confirmed in a consultation response. Employees in large firms could come under pressure if employers offered shares worth at least £50,000 in exchange for rights.

In addition, the Chancellor is considering offering relief on Income Tax and NI contributions to employees who receive the first £2,000 worth of shares in a company, the Autumn Statement said.

Employee shareholder shares must be fully paid up, and must be offered free of charge.

The fact that CGT would not be payable on the shares creates a potential tax avoidance loophole. Whilst the government is intent on clamping down on tax avoidance schemes generally, this initiative could, according to the Office for Budget Responsibility (OBR) cost the country £1bn in lost revenue. *The Daily Telegraph* stated: Of the £1bn, it is hinted that as much as £250m could be down to tax avoidance. The OBR pointed to a number of uncertainties about the costing of the scheme because it is difficult to assess how quickly the tax relief will be taken up and also how quickly tax loopholes will be found. "It is hard to predict how quickly the increased scope for tax planning will be exploited; again this could be quantitatively significant as a quarter of the costing already arises from tax planning," the costing document said. The OBR suggests the costs could rise to £1bn. The Treasury said the scheme could cost £20m a year by 2017 and £80m a year by 2018.

IfsProshare and the Employee Ownership Association had sent a memorandum to the parliamentary committee examining the Growth & Infrastructure Bill, demanding the removal of the clause altogether from the Bill. "Following on from this, if the clause is not dropped, at the very least we would like to avoid the confusion created by the name '*employee owner'* by replacing all mention of this in the Bill with a more accurate descriptor - '*equity contract.*'" they said. "This has the benefit of not having the words '*share shares'* or *'owner ownership'* which adds the clarity our respective members and the share plans industry are seeking. By using the word 'contract' it would make it much clearer that this is an employment contract rather than some form of share scheme or share ownership framework." The two bodies said that there was potential for considerable confusion among businesses (especially SMEs) as well as employees. In addition, they said there was a likelihood that both the employee ownership and employee share plans sectors would be undermined by the widespread negativity that already surrounds these proposals. However, their plea was rejected.

Share plans expert Matthew Findley of Centre member law firm **Pinsent Masons**, said that the changes made to the proposals were unlikely to provide an answer to the scheme's critics.

"The Government's decision to press ahead with the introduction of employee-owner contracts, despite widespread criticism, is not surprising given the amount of political capital originally invested in the idea," said Findley. "The level of opposition to the proposal is clear from the Government's response to the consultation but little of what has been said so far is likely to improve the position. Critically, the income tax position of employee owner shares has yet to be finalised. There is nothing in what the Government has said so far that would stop senior executives or substantial shareholders from participating in the arrangement," added Findley. "This may mean that an opportunity may still exist for such individuals, even if they may be viewed by some as the 'wrong' people politically."

The Chancellor confirmed that tax relief will be available for employees who take up the new employee owner status (which has now been renamed 'employee shareholder') said Peter McDonald of Centre member **PwC.** The Government had reinforced its support for the concept of employee ownership, where employees hold a significant and meaningful stake in their business, he said. "Ministers are considering further incentives to encourage this and will report at Budget 2013."

Richard Fox, chair of the Employment Lawyers' Association (ELA) said: "Everyone understands the Government's concern at the failure of the UK economy to recover in the way that it had hoped. But before introducing major changes to the way in which we employ our workforces (in an attempt to encourage more recruitment), it really ought to give more and deeper thought to such proposals before they are introduced. The new category of employee shareholders is a case in point. Encouraging more widespread employee ownership, or even more 'John Lewis' type workforces, may well have much to commend itself, as might appropriate tax inducements to allow this to happen more frequently, but the question still remains. *Why should shares be offered to employees in exchange for surrendering significant employment rights, particularly if there is such little evidence that employers are actually being put off recruiting because of the existence of these rights?* It is that question the Government has failed to answer satisfactorily and I would suggest they really do need to do a lot more thinking before bringing these proposals into force next spring."

Nicola Smith, head of economic and social affairs at the TUC, said it was opposed to the idea of employees being asked to contract away their rights.

A Liberal-Democrat Voice front-page lead article appealed to MPs from all parties to vote it down. Out of the 184 organisations and individuals which responded to the specific question on whether they would take up the new employee status only three said they would be willing to take it up. The Chartered Institute of Personnel and Development, EEF and The Federation of Small Businesses, among others, questioned the need for this new status and expressed doubts it would be taken up at all.

Because it will be hard to put a value on employment rights, there is a chance employers could offer shares which exceed the value of rights given up. Employers have no hard and fast algorithm to work out the value of rights, which could cause headaches when it came to working out how much income tax is owed. Under the scheme, industry experts argue that employers would have to calculate the value of rights for the purposes of income tax liabilities. For example, an employee receiving shares worth £50,000 in return for, say, £10,000 worth of rights, could end up with a taxable difference of £40,000. Once the potential £2,000 income tax relief is taken into account, the employee could be liable to pay income tax and national insurance on £38,000. Critics warned that it was still unclear how income tax would be calculated, despite the Government's consultation response.

The Centre, however, believes that despite the plan's shortcomings, it is helping to keep employee share ownership high up on the government's agenda and, through media coverage, encouraging employers and employees to think about the Eso concept. Chancellor Osborne's 'Shares For Rights' proposal is the first to emanate from the Tory part of the Coalition, as hitherto it has been the Lib-Dems who have been making all the running on employee ownership and employee share ownership.

Centre chairman Malcolm Hurlston said "Let a hundred flowers grow. It is good to see new thinking and time will tell what sense it makes. At the same time the real need is for a cohesive promotional campaign from the government to make people more aware of the benefits of approved schemes, once the simplifications have become law."

COMPANIES

In conformity with rule 5.6.1 of the FSA's Disclosure and Transparency Rules, and further to **easyJet's** announcement made on November 30, the company's issued share capital at December 31 comprised 395,987,536 shares with a nominal value of 272.7 pence each, with voting rights. The increase results from the issue of shares to meet the exercise of options under easyJet's employee share option schemes. No shares are held in Treasury.

Centre member **Sweett Group** was notified on December 19 that, following payroll contributions made on November 30, Cyril Sweett Trustee Co. Ltd, trustee of the HMRC approved Cyril Sweett All Employee Share Ownership Plan (Share Incentive Plan), awarded 21,344 ords of ten pence each in the company to participants. All were unallocated shares already held in the SIP. The SIP discretionary trust holds ords acquired and/or awarded under the partnership, matching, free and dividend shares sections of the plan. Following a change to the SIP Trust Deed and Rules on January 1, 2011, eligible participating employees now contribute funds to purchase partnership shares on a monthly basis. Dividends on shares held by the SIP are re-invested to purchase dividend shares. Following the appropriation, Cyril Sweett Trustee Company Ltd holds 9,733,714 ords, representing 14.4 percent of the issued share capital of the company. Under SIP rules, ceo Dean Webster purchased 714 ords, as did director Derek Pitcher, for 17.5 pence per share, via contributions made on November 30.

Share scheme statistics: the doubts linger

Latest employee share scheme statistics, covering the fiscal year ended April 2011, showed that almost **8,900 companies** - *of which at least 7,000 were using the Enterprise Management Incentive (EMI) plan* - were operating an ***approved*** share scheme in the UK in the tax year 2010-11.

However, this *revised* figure indicates that there were 3800 fewer Eso participating companies in the UK than was originally estimated, admitted the report by the National Statistics Office (ONS), but published by HMRC: www.hmrc.gov.uk/statistics/share-schemes/ess.pdf

For example, while the original ONS estimate for the number of employees granted SAYE options in the tax year 2009-10 was 760,000, it has now been revised down to just 480,000 – a level 37 percent below what was earlier recorded.

Some participating companies are operating more than one type of scheme or have more than one scheme of the same type, so statistical collation is not easy, though eyebrows will be raised at the extent of the large discrepancies, as revealed by HMRC.

Michael Landon, director of executive compensation at centre member **MM&K,** points out the difficulty of interpreting even the revised statistics: "For example, Table 6.5 shows that in 2010-11 there were 4.08m awards of partnership shares under a SIP but only 420,000 awards of free shares. However, as partnership shares tend to be awarded 12 times a year and free shares only once year, it is likely that the total number of individuals participating in each type of award is about the same. Similarly, Table 6.2 states that 1,280 companies operated CSOP in 2010-11 but that a much bigger total of 7,190 companies operated EMI. However, in that year 40,000 employees were granted CSOP options but only 17,000 were granted EMI options."

Mike concludes that the number of SAYE and SIP participants has fallen substantially below the levels achieved ten years ago by Profit Sharing and SAYE schemes. Ditto for CSOP and EMI option holders, he adds. Clearly, the continuing economic recession, with its squeeze on household financial resources, has played a major role in share scheme take-up and loyalty.

However, the overall number of active ***schemes*** appears to be broadly unchanged since 2007-8, with a rise in the number of companies using EMI being offset by a fall in the numbers of companies using the other three approved schemes.

- The statistics for EMI participation were revised again to show a small increase – up by 80 to 2280 in the number of companies that granted EMI options in the 2010-11 tax year. Though the number of employees to whom EMI options were granted remained the same – 16,700 - between the two tax years 09-10 and 10-11, the number of employees who exercised EMI options in 2010-11 rose from 5,300 to 6,000, an increase of 13 percent. The cost to taxpayers of the tax and NIC relief rose from £70m to **£110m** over the year. *Under EMI, small higher-risk trading companies, quoted or unquoted, with gross assets of no more than £30m, can grant options over a maximum of £3m worth of shares at any one time. The award limit has risen to £250,000 per employee. The options are normally free of income tax and NI charges on grant and on exercise. When the shares are sold, capital gains tax taper relief normally starts from the date the options were granted. From April 6 last year, entrepreneur's relief can be claimed too.*
- In 2010-11 the total cost to the Exchequer of Income Tax and NI relief on all four approved UK share schemes was **£510m**, 19 percent higher than in 2009-10 but *less than half of the cost in 2006-07*. The falls in lost tax revenue since 2006-07 are partly due to the falls in share prices from 2007-08.
- The number of employees exercising share options in 2010-11 fell by 18 percent compared to 2009-10 and is now 71 percent below its peak in 2006-07. This was mainly driven by falls in the number of SAYE employees exercising options, as SAYE is the dominant scheme in the options sector. Numbers of employees exercising EMI and CSOP options both increased compared to 2009-10

although are lower than in 2006-07. (Employees are not granted options under SIP.)

- The total value of shares and options awarded in 2010-11 was **£3bn**, nine percent lower than in 2009-10 and 22 percent below 2006-07 levels. Again, the fall between 2009-10 and 2010-11 was due to falls in SAYE, but awards in the other three schemes increased slightly over this period, where there were smaller awards from some of the large companies.
- Though there was an increase in the number of companies with an EMI scheme, the number of live CSOP, SIP and SAYE schemes all fell. EMI schemes were used by 80 percent of companies with a tax-advantaged employee share scheme in 2010-11.

GAAR is on the way

The Finance Bill 2013, published on December 11 last, included draft clauses (together with guidance) on the UK's first ever General Anti-Abuse Rule (GAAR), intended to provide a significant new deterrent to what the Government views as abusive tax avoidance schemes, reported employee share ownership lawyer **Postlethwaite**.

Jon Richardson, tax partner at Centre member **PwC**, said: "The draft legislation and guidance notes have provided more clarity on the scope of the General Anti Abuse Rule. The GAAR aims to counter contrived tax arrangements that are entered into simply to avoid UK tax. There are some useful examples of the type of arrangements that will, and won't be caught, however these may well change depending on whether the Interim Advisory Panel can reach a consensus. While this is a good start, we're going to need many more examples, particularly showing the boundary between acceptable and unacceptable, and covering transactions that private individuals and private businesses might undertake.

"The GAAR is not intended to affect the way the profits of multinationals are allocated between the UK and other countries. Any review of these transfer pricing rules would involve international tax authorities and other organisations such as the OECD," he added

Guernsey 2012: a new start for EBTs?

ESOP Centre chairman, **Malcolm Hurlston**, welcomed delegates to the 2012 joint employee share schemes conference with the Society of Trust & Estate Practitioners (STEP-Guernsey branch) by praising the island's transformation into a centre of expertise, which now ranks higher than the UK in the OECD rankings for transparency. Despite this, Malcolm said, employee benefit trusts and sub-trusts had been targeted for their role in perceived tax avoidance structures. This had brought unwelcome media attention on EBTs, which could play an increasingly important role as the government seeks to increase employee ownership.

Jane Bateman from the **Department for Business, Innovation and Skills** (BIS) told delegates that the government's focus on employee ownership this year was unprecedented. Its interest went beyond just financial aspects to increased participation and engagement, which, evidence showed, gave a boost to companies and increases resilience to financial downturns. One of the government's aims was to increase the diversity of ownership models within the economy as the plc monoculture was seen to have contributed to the severity of the current ongoing crisis. HM Treasury and HMRC had agreed to work with BIS to ensure that employee ownership – including share schemes and shares held in trust using an EBT – was given a boost. It was highly unusual for three departments to work together and proved that the government was serious in its intentions.

Graeme Nuttall, author of the eponymous Nuttall Review of Employee Ownership and partner at **Field Fisher Waterhouse** said that he was amazed how far the government had come in just one year, to the position where there is now a dedicated minister for employee ownership (Jo Swinson). Graeme explained that EBTs were crucial in achieving an expansion of employee share ownership and could form a genuine commercial part of how the business was run. Using a trust provided a solution to the financing challenges of employee ownership; a stable long-term structure; gave employees a vehicle to make their collective voice heard and made dealing with employees in different jurisdictions less of a headache. Graeme challenged trustees of existing EBTs, which served only selected employees, to use their discretionary powers to put pressure on companies to extend the beneficiaries to include all employees.

David Pett of **Pett, Franklin & Co. LLP** began by explaining that HMRC was not pleased to have lost the Glasgow Rangers EBT case and had already applied to appeal against the decision. Two of the judges in the case had defended the Rangers position since the trust and loan arrangements were, legally, what they said they were. However, Dr Heidi Poon looked at the situation in the whole and reasoned that the loans were receipt of earnings, which should be subject to income tax, regardless of the structure used to get them into the hands of the employees. David then explained the use of a JSOP (Joint Share Ownership Plan) as usually providing the best outcome for both company and employee when financial modelling was undertaken. An EBT could be used to hold the shares or, even better, a Guernsey purpose trust could be used, which unlike an EBT would allow any remaining funds to be transferred back to the company when the trust was wound up.

Alison MacKrill, of **Carey Olsen** and **STEP Guernsey,** gave a summary of cases, during the last year in the Jersey and Guernsey courts, which had affected trustees. She explained that cases that might not *explicitly* deal with EBTs could still impact day-to-day decisions. Similarly EBTs had been involved in civil cases like divorce, especially where the number of beneficiaries was few. For example such a case had been brought where the issue was whether a trustee must disclose information on the trust to one of the parties involved in the divorce. It was ruled that neutrality must be the highest consideration for a trustee. Alison then spoke about what to do if a mistake was made in a trust document – easily done with the rush to meet deadlines. She explained that there were principles trustees should follow when deciding whether to rectify the mistake, namely: whether there was sufficient evidence of the error, whether it had been established to the highest degree of civil probability that it was a genuine mistake; whether there had been full and frank disclosure; where there was another practical remedy and whether there had been any undue delay. In all cases, it was best to keep a detailed note of how decisions were reached either in the minutes or in a separate document.

Paul Malin of **Haines Watts** explained that there has been a hardening of attitudes at HMRC towards disguised remuneration. The number of staff focused on tax avoidance had increased and, following a series of decisions in its favour, there was a renewed sense of determination. Those companies that wanted to achieve certainty regarding their future tax obligation could engage with HMRC to negotiate a settlement. There was no guarantee that this would achieve a certain outcome, however, Paul said. HMRC was now willing to discuss cases on a 'no names' basis so clients could decide once the decision was given whether they would like to proceed.

David Craddock's presentation on how to cope with underwater options and share price volatility was timely, given uncertainties in global markets and the prospect of a triple dip recession. When options were underwater, they worked as a disincentive - exactly the opposite of what the company needed. Companies therefore needed to act to maintain the motivation of their employees, but were restricted by accounting standards and ABI Guidelines among other factors. However, companies could not simply ignore the problem, David said. He outlined several solutions, including repricing strategies, satisfying replacement options through the repurchase of existing shares to reduce dilution, the introduction of an LTIP and settlement through free shares.

George King IV of **RBC Wealth Management** said that despite an array of looming structural risks, including a Greek bank run and Spanish national debt, the global economic outlook was not as bad as it had been. However, he expressed doubts that these problems were being properly dealt with and suggested that more lasting resolutions needed to be found for the quick fix crisis solutions. The much heralded US fiscal cliff would not present as much of a challenge as some commentators suggested, George said, because the problem was a political one rather than an economic one and it would become politically expedient, even if unpopular, to balance the lost revenue either through budget cuts or tax increases (or both).

Jersey: April 19

The Centre is accepting speaker proposals of interest to a trustee/trust law audience for the Centre's annual joint share schemes conference with the Society of Trust & Estate Practitioners **(STEP)**, Jersey branch, on Friday April 19 2013 in St Helier. Send your proposed slot title along with three headline bullet points to Centre UK director Dave Poole at: dpoole@esopcentre.com.

BARCELONA: June 6 & 7

Seven speaker slots have been confirmed already for the Centre's 25th annual European conference at the five-star **Le Meridien Hotel**, la Rambla, in central Barcelona on **Thursday & Friday June 6 & 7.** The Centre has received an exceptional number of enquiries about this event, both from service providers and plan issuers, including as yet non-member companies.

The speaker slot holders so far are: **Arne Peder Blix** of Accurate Equity; **Patrick Neave,** of the Association of British Insurers; **Joe Saburn** of Ogletree Deakins, one of the biggest US employment law firms; **Phil Ainsley** of Equiniti, who, together with a colleague, is putting together a client case study; **Mike Pewton** of GlobalSharePlans; a plan case study from **MM&K** and **William Franklin** of Eso law firm, Pett, Franklin & Co. LLP. Would-be speakers at this prestige event should contact Centre international director Fred Hackworth asap, email: **fhackworth@esopcentre.com** with copy to **esop@esop.com** Confirmed speakers qualify for a substantial reduction (from £995 to £860 and no VAT) in the Centre's two nights half-board accommodation + conference package deal attendance fee.

US slated over FATCA law

The US is guilty of behaving like a bully in imposing unfair costs on UK investment managers and banks, which work with American clients, via its Foreign Account Tax Compliance Act (FATCA), said Simon Culhane, ceo of the Chartered Institute for Securities & Investment (CISI). In the current edition of CISI's membership magazine, *Securities & Investment Review*, Mr Culhane discussed the FATCA legislation, the aim of which is to force non-US financial institutions to identify their US clients and report them to the Internal Revenue Service (IRS).

"The Americans have slipped in an extraterritorial requirement that will impose significant costs on all asset and investment managers and banks. This US requirement is resulting in a double whammy. It is completely extraterritorial and seeks global compliance while imposing significant additional costs of compliance on virtually every financial organisation globally. It has resulted in many financial organisations, including private client and wealth managers, turning away clients simply because they have a link with the US. That strategy alone will not get a financial institution out of the net," said Mr Culhane.

The IRS wants to recover taxes due from any US citizen who has accounts outside the US and has not declared them. However, while this was understandable, "It is wrong to penalise firms based outside the US and impose significant costs and draconian individual responsibility."

He said this was illustrated by the fact that the legislation is making it necessary for any firm that has any investment in the US first to identify which of its customers, or unit trust holders, are American and then report them to the US tax authority, the IRS. If the firm does not comply, it will be deemed non-compliant and face a range of sanctions, including a 30 percent withholding of any investment in the US, such as the sale of securities.

"Furthermore, the US authorities require each foreign financial institution (FFI) to appoint a so-called responsible officer. That named individual from a foreign firm has to be identified during the FFI registration process and will receive a US Employee Identification Number (EIN). This individual will be responsible for compliance with the FATCA regulations within that financial institution and may be personally liable for any substantial non-compliance. In addition, each FFI is required to search for indicators of a US nexus, and this includes whether the FFI has on record any US telephone number and requires the financial organisation to monitor actively and continuously that the individual does not become a US citizen," added Culhane.

The magazine said there were signs that things might improve a little as HM Revenue & Customs had signed an Inter-Governmental Agreement (IGA) and announced a consultation process aiming to reduce the compliance burden. "No one is advocating tax evasion, but putting the costs on the UK is unfair and our Government should have the courage to say so," said Mr Culhane.

FATCA threatens to drive billions in foreign investment from the US, said Geneva based Walter Stresemann of Vistra Group**.** "FATCA was included as a provision of the 2010 HIRE Act, a government jobs bill to help pay for various tax break provisions. But while the HIRE Act is basically off the books as a political issue, the rest of the world, but also Americans, are continuing to pay the economic price for the FATCA beast to a delighted compliance and audit industry," he said. "As we know, the US economy traditionally depends on foreign capital flows to finance its well-being. These have declined an alarming 39.2 percent, perhaps because certain foreign investors do not want to burden themselves with the cost of FATCA compliance. To put matters into perspective, according to *Forbes:* "the Joint Committee on Taxation estimates FATCA will raise less than US $1bn annually, which means that even after ten years the total new revenues – should they materialize – won't even pay for a single day of government operations at today's spending levels."

Stresemann claimed: "The US Treasury Department is actually incapable of implementing FATCA and has repeatedly announced delays. As an alternative, the Treasury has begun negotiating directly with foreign Governments, without any congressional authorization or other legal basis, effectively transferring its responsibility of implementation, by holding out a carrot of reciprocity to revenue hungry counter parties, thereby saddling US financial institutions with enormous new compliance costs."

***The latest twists in the FATCA saga will be explained in our Davos conference next month by speaker Justin Cooper, who is chief operating officer at Capita Registrars*.**

INTERNATIONAL

EBTs escape new French tax

The French tax authorities confirmed that trusts created by a company or by a group of companies in order to manage employee savings or employee shares will ***not*** fall within the new tax regime announced by President Hollande's government.

In **Germany** ESOPs showed no progress in 2012, writes Centre contact Elisabeth Fuchs of **IBU NachfolgeManagement.** She told *newspad*: "Although we guided a few companies in the implementation of a company succession by an employee buyout, we still have not found a company which was both suitable for an ESOP and willing to install an ESOP. Our institute becomes more and more known for company succession by employee buyout and next year, when the study is finished which we currently are undertaking in co-operation with a university, we will know more about the reasons why employee share ownership in Germany is in such a sorry state."

Revised Principles of Remuneration

The Centre has extracted Twelve Golden Rules' from a comprehensive summary provided by member law firm **Pinsent Masons** on the ABI's recently published updated remuneration principles:

1. Companies should be aware of the multiplier effects of a rise in basic executive salaries, because it is a key reference point for other reward elements, expressed as a percentage of salary – e.g. bonuses. When considering awarding executives increases in base salary, remuneration committees should take into account the general level of pay rises awarded to the broader workforce.
2. Benchmarking should be used with caution – while it should be used to provide a point of reference, it should not used to 'chase a median' – a practice which, says the ABI, has been "a major contributor to spiralling levels of pay"
3. Enhanced pensions should not be used as a way of increasing total remuneration. The ABI warns that investors are starting to focus on executive pensions and that this scrutiny can only increase in future years. Pensions are to be included in the 'single figure' once the new rules for reporting directors' reward come into force.

4. Differences in pension contribution rates between senior executives and the workforce should be disclosed and justified
5. Annual bonuses should be clearly linked with corporate strategy. Performance metrics should be quantifiable, disclosed in the annual directors' report and targets should be set at the beginning of the year.
6. Bonus payments should not be made if the company has suffered an exceptional negative event during the year, even if targets have been met.
7. Although deferring part of the bonus into shares is encouraged to create greater alignment with shareholders, this should not lead to an overall increase in the quantum, as has often happened in the past.
8. Equity based long term incentives are identified as the most effective way to align the interests of participants and shareholders
9. Performance measures in LTIPs should preferably be financial, measured over at least three years and linked to implementation of strategy and value creation.
10. Where operational measures are used in LTIPs, at least one should relate to overall business volume or growth and at least one relating to business efficiency or profitability.
11. When determining vesting levels, remuneration committees are encouraged to look more generally at the company's overall performance, future prospects and shareholder experience – e.g. dividend payments.
12. To align their interests with those of shareholders, directors and other senior execs should build up high levels of shareholding in the business.

Commission homes in on tax avoidance and evasion

The European Commission announced proposals designed to tackle the "scandalous loss of much-needed revenue" EU members suffer through tax evasion and tax avoidance. These include a tougher stance on tax havens and ways to close loopholes.

Some big companies take advantage of these loopholes to avoid paying millions of euros in tax. The Commission said around £800bn is lost every year in the EU by tax avoidance and evasion.

"While member states must toughen national measures against tax evasion, unilateral solutions alone won't work," said Commissioner for Taxation Algirdas Semeta. In a single market, within a globalised economy, national mismatches and loopholes become the play-things of those that seek to escape taxation. A strong and cohesive EU stance against tax evaders, and those that facilitate them, is therefore essential."

The package of measures includes two main recommendations. The first encourages member states to identify tax havens and place them on 'national blacklists'. Measures to persuade these havens to apply EU law are also laid out. The second suggests ways for member states to address the kinds of legal technicalities and loopholes companies use to pay less tax. Members should adopt a common General Anti-Abuse Rule, whereby they can ignore artificial tax avoidance schemes and tax the underlying sum of money, the Commission said.

It also called for a clampdown on what it called 'harmful tax competition,' where member states compete with each other to provide the most benign tax environment. If necessary, the Commission said it would come up with the legislative proposals.

Crisis changes work patterns

The ILO's Global Wage Report 2012/13 said many companies had adopted new working practices in response to the global economic crisis as a way of staying afloat. According to the report, employees have seen changes in their hourly wage rates, as well as in the number of hours they work. "In many countries, the global economic crisis has led to shorter hours of work due to reductions in the amount of overtime or an increase in involuntary part-time work, as well as increases in the proportion of part-time relative to full-time employees. This has negatively affected wages," says Patrick Belser, co-author of the report. Companies in several countries have reduced employees' working time as part of work sharing programmes. Often, three or four-day weeks have replaced the traditional five-day week; daily hours have been reduced, or plants have been shut down for periods of several weeks or even months. But rather than being a universally negative aspect of the economic crisis, reductions in working hours due to work sharing policies should be seen as a positive development, says Jon Messenger, ILO Senior Research Officer. "Work sharing is a reduction in working time to avoid lay-offs. The company temporarily gets a reduction in its wage bill and the employees don't lose their jobs. It is a measure that helps to stabilize the economy," Messenger explains. Although work sharing means a proportional reduction in wages, these are often supplemented by partial unemployment payments funded by governments. In addition, employees may be offered training, which helps them in the long term.

The Employee Share Ownership Centre Ltd is a members' organisation which lobbies, informs and researches on behalf of employee share ownership