Distributions in a winding up TAAR guidance: CIOT and ATT comments

OMB Personal tax

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The CIOT and ATT have each written to HMRC to express their concerns over the guidance published on the distributions on company winding up (or phoenixing) Targeted Anti-Avoidance Rule (TAAR) introduced by Finance Act 2016.

The TAAR, found in ITTOIA 2005 s396B, was introduced to prevent individuals converting what would otherwise be a dividend into a capital payment. It applies to distributions made to individuals on the winding up of a company on or after 6 April 2016 if all of the four conditions (summarised below) are met:

- The individual receiving the distribution had at least a 5% interest in the company immediately before the winding up;
- The company was a close company at any point in the two years ending with the start of the winding up;
- The individual continues to carry on, or be involved with, the same trade or a similar trade within two years; and
- It is reasonable to assume that the main purpose, or one of the main purposes of the winding up is the avoidance or reduction of a charge to income tax.

In practice, it will be the last two of these conditions (conditions C and D in the legislation) which require the greatest consideration.

On 19 July 2017 (15 months after the TAAR came into force) HMRC published their official guidance on the TAAR in their Company Taxation Manual at CTM36300 onwards.

The CIOT and ATT have both recently written to HMRC to express their concerns over the limited nature of this guidance and to highlight the difficulties that members tell us the legislation is causing in practice.

In their letters both the CIOT and the ATT set out their concern that the TAAR guidance is disappointingly brief and contains only limited examples. Given the subjective nature of the legislation and the lack of any clearance facility, more practical examples would have helped greatly in providing certainty for taxpayers.

The CIOT point out that the TAAR is already affecting business decisions. There are particular issues for the property sector where it is commonplace for each development to be structured within a new company for commercial reasons. Issues with trustee shareholders are also being reported.

The ATT also suggest that:

Whilst their preference remains a pre-transaction clearance facility, as a minimum, a post transaction ruling facility should be considered.

It would be helpful for HMRC to set out their position regarding how penalties for errors in returns under Schedule 24 FA 2007 may apply to the TAAR. If a taxpayer genuinely believes that the TAAR does not apply, but HMRC concludes it does, will penalties be imposed? Would a white space declaration provide any protection?

Finally, the ATT letter also provides some more detailed observations on the TAAR guidance and sets out some practical examples where the application of the TAAR remains unclear.

The full text of the CIOT letter can be found on the CIOT website.

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