Distributions in a winding up TAAR: HMRC Guidance updated

OMB

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Following discussions between CIOT and HMRC, HMRC made some changes in July to their guidance on the application of the Distributions in a winding up targeted anti-avoidance rule (TAAR) in ITTOIA 2005 s396B.

1. CTM36330 ‘Condition C: ‘involved with’

   In all three examples, the words ‘the carrying on of’ have been inserted after ‘involved with’ so that the text mirrors the legislation in ITTOIA 2005 s 396B(4)(d).
   At the end of Example 2, the words ‘Condition D will still need to be satisfied’ have been added to mirror Example 1.

2. CTM 36340 ‘Condition D’

   Several new paragraphs have been inserted towards the end of this page. These are as follows:

   - ‘A decision by a company and its shareholders not to make an income distribution prior to the company’s being wound up does not, by itself, mean that the main purpose test is met’.

     To clarify that a decision not to make a pre-winding up distribution will not on its own mean that Condition D is met.

   - ‘The individual will know their purpose and, if fairly described, can be confident that there will be enough supporting evidence (‘having regard to all the circumstances’) for an officer to arrive at a sound conclusion when applying the test of whether it is ‘reasonable to assume’ that a main purpose of the winding up or the wider arrangements was the avoidance

or reduction of a charge to income tax. The individual should self-assess on that basis. HMRC can only displace this self-assessment where the individual's decision is not reasonable'.

To explain that it is for taxpayers to decide that 'it is reasonable to assume' having 'regard to all the circumstances' that tax avoidance is not the main purpose (or one of the main purposes) of the winding up and self-assess on that basis. In the event of a challenge by HMRC as regards the application of Condition D it is for HMRC to demonstrate that the conclusion reached by the taxpayer was not reasonable.

- 'The main purpose test is applied by reference to intentions known at the time the decision was made to wind up the company. However, this will be evidenced by what happens after the winding up occurs and it is likely that, in order to test assertions in relation to the main purpose, officers will review all available evidence'.

  To clarify that the test in Condition D is applied by reference to facts and intentions known at the time the decision was made to wind the company up, but that HMRC will want to look at all the evidence including that relating to what happens after the winding up has taken place (for example if the intention is that the taxpayer retires completely when the winding up occurs but is within two years offered, and accepts, a position in the same trade, HMRC will want to look at the evidence that the offer was unsolicited).

- 'Subject to the facts of the case, where Condition C is met due to an individual remaining 'involved with the carrying on of' a trade as an employee, rather than as an owner, shareholder or partner, and has no involvement in or influence over the direction or decision-making of the entity carrying on the activities, it is less likely that Condition D will be met'.

  To provide some clarity regarding the position of employees (also see examples in CTM36330).