Distributions in a winding up – FB 2016, cl 35

OMB

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The CIOT has written to HMRC with suggestions for examples that we would like to be addressed in HMRC guidance on cl 35

We have written to HMRC to express concerns that Finance Bill 2016, cl 35 will lead to unintended consequences, and create uncertainties for taxpayers undertaking commercial transactions with no tax avoidance motive.

lause 35 introduces a targeted anti-avoidance rule (TAAR) for particular distributions made on a winding-up. According to HMRC, the TAAR is being introduced to tackle a small number of taxpayers who are exploiting the current rules in limited, specific circumstances. However, in our view the legislation encompasses a wide range of commercial situations where tax avoidance is not involved. Our concern is that the TAAR will lead to complexity in the tax code and commercial uncertainty for all taxpayers.

Moreover, despite representations from stakeholders including ourselves, there is no formal clearance procedure in the clause itself. The continuing lack of such a procedure means that it will have to be self-assessed by the taxpayer. We think taxpayers will find it difficult to know whether a transaction will fall foul of the TAAR. So, to avoid impeding commercial decisions and transactions, it will be crucial that HMRC makes enough information publicly available so taxpayers can understand how the department will interpret the conditions in new ITTOIA 2005, ss 396B and 404A.

It seems that we are likely to end up in the position of HMRC guidance being key in ascertaining the scope of the TAAR. The CIOT's consistent view has been that 'taxed by legislation, untaxed by guidance' is an unsatisfactory feature in the UK tax

system.

HMRC has said that it intends to publish guidance using various examples to show the types of transactions to which it considers the new TAAR should and should not apply. We have requested that this guidance is published as soon as possible, in draft if necessary, to minimise the uncertainty that the legislation has created.

In our letter to HMRC, we have set out several examples that we think are suitable for guidance and on which HMRC's view is needed.
We would like to thank members who contributed examples. Most of them seek to clarify HMRC's view of circumstances where Condition C in new ss 396B and 404A is met. Condition C is very widely drafted, and we have evidence that it is already causing uncertainty and therefore affecting commercial decisions.

In our letter we also asked for clarification on other issues.

1. New s 396B(4) – what does 'the same or similar trade or activity' mean? For example, if one company sold vehicle parts and another company undertook vehicle repairs would these be similar activities? If a property investment business consisted of investing in commercial property and another invested in residential property, would these be similar businesses?
2. New s 396B(4)(d) – what does 'involved' mean? On its own it is particularly vague and potentially wide-reaching. For example, can someone be regarded as 'involved with the carrying on of such a trade or activity by a person connected with the individual' if, instead of working in the business, they provide loan finance for that business or act as a mentor?
3. New s 396B(1) – meaning of 'individual'. Does 'individual' include the beneficiary of a trust?
4. Transactions in securities: company distributions – interaction. All of the transactions that the TAAR considers are in theory caught by the transactions in securities rules too, now that a transaction in securities includes a distribution of securities on a winding-up (as introduced by Finance Bill 2016, cl 33). We have asked HMRC for clarity on three matters: when it would accept that the TAAR does not apply but might consider counteraction under the transactions in securities rules instead; whether HMRC would ever seek to apply the TAAR in circumstances where transactions in securities clearance has been granted on disclosure of full facts; and whether HMRC will be putting in place the resources to deal with a likely increase in clearance applications under the transactions in

securities rules.

5. Clearances for schemes of reconstruction – interaction. We have also written to HMRC to ask whether it would consider including an additional exclusion in new ss 396B(7) and 404A(7) for transactions for which clearance has already been given under s 139(5) or, indeed, for schemes of reconstruction more generally.

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

ATT submission of written evidence on cl 35

The ATT's written evidence to the Finance Bill Committee in relation to cl 35 drew heavily on the response previously submitted to HMRC after the publication of draft legislation in December 2015.

There was a significant overlap with points made to HMRC by CIOT. The ATT's concerns centred on:

- the imprecision of language – the 'same or similar' trade or activity test and the phrase 'involved with';
- the complexity of the connection tests – which appears to mean that A and B are connected if A is the spouse or civil partner of a relative of B's spouse or civil partner;
- the inclusion of what in effect amounts to the rebuttable presumption of a main purpose of tax avoidance – which puts the taxpayer who wishes to contend that the TAAR conditions are not met in the position of having to prove a negative.
- the absence of any clearance procedure – which has the potential to mean that taxpayers and HMRC unnecessarily commit time to enquiries where the eventual conclusion is that the TAAR provisions are inapplicable.