Distributions in a winding up TAAR: new HMRC guidance

OMB

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HMRC have published their long awaited guidance 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 close company on or after 6 April 2016 if:

- 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.

During the initial consultation on the TAAR, the CIOT and ATT expressed concern regarding its scope and subjective nature. The CIOT also wrote to HMRC setting out 18 proposed examples for their guidance, and the ATT provided written evidence to the Finance Bill Committee.

In August 2016, HMRC published a standard reply sent out to taxpayers seeking clearance under the TAAR. This included some limited guidance on how the new rules would work, together with a small number of examples.

Nearly a year after this letter, and 15 months after the TAAR came into force, HMRC have published their official guidance on the TAAR in their Company Taxation Manual at CTM36300 onwards.

Given the amount of time which it has taken to be produced, the guidance is disappointingly brief.

In particular, there are only limited examples as to how the TAAR will operate in practice, with none of the CIOT's proposed examples adopted. The examples that are included are relatively basic, and the depth of HMRC's analysis inconsistent: whilst some reach a conclusion on the motive element of the TAAR others do not.

The tone of the guidance is reassuring in certain places, for example stating that in applying the TAAR consideration will be given '… in particular to whether the tax advantage is a consequence of the winding up and the continuing involvement with the same or similar trade or activity'. This however does not appear to go as far as previous statements by HMRC in their consultation response document and August 2016 letter to the effect that the vast majority of distributions from a winding up are expected to continue to be treated as capital. It is unclear whether this is deliberate or indicates a change in position from HMRC.

Despite representations made during consultation, the TAAR does not provide for a statutory clearance mechanism. In their guidance HMRC also indicate that they do not believe non-statutory clearances are appropriate, and that clearances given under ITA 2007 s701 in respect of the transactions in securities rules do not necessarily extend to the TAAR. The lack of any clearance mechanism is unhelpful given the limited practical examples provided in HMRC's guidance.

Both the CIOT and ATT are planning to write to HMRC to express their concerns over the guidance and suggest ways in which it might be improved. If you have any comments on the guidance which you would like to feed in please do send them to technical@ciot.org.uk or atttechnical@att.org.uk.