Corporate newsletter

Corporate Quarterly Newsletter

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The Finance Act 2011 has now received Royal Assent. This brings with it generally positive changes to the corporation tax and pensions regimes in particular.

In this issue, we look at the impact of some of those changes on the environment for investing in businesses. We also update you on disguised remuneration rules and some indirect tax issues of relevance to those conducting cross-border business.

If you have any questions about any of the matters covered then please contact your usual Rawlinson & Hunter partner.

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1 Remuneration planning

Are we there yet? The latest on disguised remuneration

HM Revenue & Customs ("HMRC") announced the rules on disguised remuneration on 9 December 2010 and also published the draft legislation, which now forms part of the Finance Act 2011. Very broadly, unless an exclusion applies, PAYE and NIC will be due under the disguised remuneration provisions where there is:

- a "relevant" arrangement relating to the provision of rewards, recognition, or loans to employees;
- a "relevant" third person takes a "relevant" step; and
- it is reasonable to suppose that the "relevant" step is connected to the "relevant" arrangement.

The definition of what is "relevant" for these purposes is complex and will not be explained further in this article.

Although mainly targeted at the use of Employee Benefit Trusts ("EBTs") and Employer Funded Retirement Benefit Schemes ("EFRBS") to defer liabilities to income tax and national insurance on remuneration, often using long term loans, the legislation is very widely drawn.

Practitioners raised concerns that the draft legislation as published could catch many common arrangements (particularly in relation to normal employee share and share option plans) which had no tax avoidance motive. In response, HMRC published guidance in February 2011 and more latterly which took the form of Frequently Asked Questions ("FAQs"). These identified that HMRC intended to amend the legislation to provide exclusions for certain types of common transactions. So where are we now?

The Finance Act as enacted, includes a number of amendments to the draft legislation. Although these have not provided the level of "safe harbour" that practitioners had hoped for, there have been a number of concessions to the concerns expressed. In particular:

- Companies in the same group as the employer (where the employer is a company); and
- Any wholly-owned subsidiary of a limited liability partnership ("LLP") where the employer is an LLP;

will not generally be treated as a "relevant third person" unless, and to the extent that, it takes a relevant step in its capacity as trustee.

This means that a group share plan can cover all the companies in the group - something which would not have been possible under the legislation as originally drafted. It is also clear that straightforward loans from an employer to an employee (such as season ticket loans) will not be caught by these new provisions, even if the loan is from another group company, provided no third party (as defined) is involved.

However, there can still be problems where there is no EBT trustee involved in a group share plan, or where there is an EBT trustee but one of the exclusions for share and share option plans does not apply. As a result, great care is still needed when implementing share or share option plans to ensure that the numerous potential traps and pitfalls associated with the new legislation are not triggered.

2 Entrepreneurs

A better deal for budding business angels

In his 2011 Budget, George Osborne introduced some very welcome enhancements to the reliefs available under the Enterprise Investment Scheme ("EIS" or "the Scheme"). These have now been enacted in the Finance Act 2011 and have been summarised below:

For qualifying shares issued on or after 6 April 2011:

- The rate of income tax relief has been increased from 20% to 30%
- The requirement for the trade of the EIS company to be carried on wholly or mainly in the UK has been removed. Instead, there is a requirement that the EIS company has a UK permanent establishment. This will give greater flexibility for companies which have an overseas bias to their trade.
- Finally the EIS company must be in good financial health at the time of the share subscription.

For qualifying shares issued on or after 6 April 2012:

- The annual investment limit will be increased from £500,000 to £1 million
- The qualifying conditions for the EIS company will change:
    - The gross assets test of £7 million before investment and £8 million after investment will be increased to £15 million immediately before investment
    - The employee limit will be increased from 50 to 250
    - The amount which can be invested in any one company per year will be increased from £2 million to £10 million

Note that all the above are subject to approval by the EU under the State Aid rules.

The Government has also promised consultation on further changes to the Scheme to provide more support for entrepreneurial companies.

These changes are to be welcomed, but the EIS legislation is very complex and although the reliefs are generous, it can be all too easy to fall foul of the detailed requirements which can then result in a clawback of the relief already given. We can guide you through the maze of legislation and assist with obtaining advance assurance from HMRC that new projects will qualify for EIS and hence investors will be able to obtain the various benefits available under the Scheme.

More relief gained for entrepreneurs

In a further effort to encourage entrepreneurship, the Chancellor announced an unexpected doubling of the lifetime limit for Entrepreneurs' Relief ("ER"). As a result, from 6 April 2011 qualifying gains of up to £10 million will now be taxed at only 10%, compared to a rate of 18% or 28% for ineligible gains.

It should be noted that gains realised before that date which exceeded the lifetime limit at that time will still be liable to the higher rates of capital gains tax, but the balance in excess of that limit will be available to carry forward against future gains. For example:

If an entrepreneur with income in excess of £150,000 had made a qualifying gain of £7 million in November 2010, he would have used all of the then £5 million lifetime limit, and £2 million would have been taxed at 28%. From 6 April 2011 he has a further £5 million of Entrepreneurs' Relief he can utilise against qualifying gains he makes on or after that date.

Again this is welcome news for entrepreneurs and means that the 10% rate is available for a much larger gain than was the case when the relief was first introduced in 2008. However, the position is still a long way from that available under the Business Asset Taper Relief ("BATR") regime.

In particular the category of assets eligible for relief is far more limited than under BATR. For example shareholder employees with less than 5% of the share capital and voting rights are not entitled to ER. This can be a problem where employees have only a small stake in the company and hence will pay a higher rate of tax on subsequent gains than those with a larger stake. Having recognised this issue we have developed techniques which can assist such employees in maximising their opportunities to obtain ER.

3 Personal tax and financial planning

More changes to tax relief for pension contributions

The pensions industry has seen a number of major changes over recent years and the once relatively generous tax reliefs available for pension contributions have gradually been eroded. Further changes relating to the introduction of a high income excess relief charge which had been proposed by the Labour government were abandoned by the Coalition in favour of a less complex and more favourable regime than had been anticipated.

In summary, the following changes have been made in the Finance Act 2011:

From 6 April 2011:

- The annual allowance has been reduced from £225,000 to £50,000 (higher than the £30,000 limit originally expected)
- Tax relief will be available at the taxpayer's highest marginal rate (ie 20%, 40% or 50%), but limited to the annual allowance
- A carry-forward mechanism will be available to allow individuals to take advantage of their unused annual allowance for the previous three years. For these purposes an annual allowance of £50,000 will be assumed for 2008/09, 2009/10 and 2010/11.

From 6 April 2012:

- The lifetime limit will be capped at £1.5 million (a reduction from the current £1.8 million).

The introduction of the carry-forward mechanism will offer opportunities for those whose pension contributions were capped under the anti-forestalling measures to the "Special Annual Allowance" of £20,000 (or £30,000 in certain circumstances) to make additional contributions up to the assumed £50,000 limit for those earlier years. For example, if an individual had paid the maximum contributions of £20,000 in the tax years 2008/09 to 2010/11 under the previous regime, they could pay an additional £90,000 (ie 3 x £30,000 unused relief for each year) in 2011/12 assuming that the other requirements are met.

This facility to carry forward unused relief will be helpful where individuals have fluctuating income or have a "spike" in the value of their pension contributions (for example where there is a pension enhancement on early retirement). In addition, there is no requirement for the unused relief to be set against any particular pension scheme; the individual must simply be a member of a registered pension scheme at some point during the tax year. Furthermore, the rate of tax relief is not restricted to the tax relief which would have been available at the time, ie it is possible to obtain relief at 50% even though this tax rate was only introduced in 2010/11.

4 VAT and indirect tax compliance

Temporary removals

Changes to temporary removal rule

From 2013, changes are being made to the regime covering temporary removals from Customs warehouses. This is of particular relevance to those involved in the import and onward sale of works of art.

Present rules

It is permitted to remove goods temporarily from a Customs warehouse for a period of up to three months. However, it is not permitted to temporarily remove goods under the following circumstances:

- Removals to private residences for any purpose
- Repetitive removals where the goods are returned to the warehouse for a few hours/days after the three month period and temporarily removed again to the same place for the same purpose

Goods that are constantly being temporarily removed to the same location will have the 90 day period aggregated.

The most common items that are temporarily removed for display, exhibition or put up for sale are works of art, antiques etc. HMRC provide examples of the 90 day aggregation:

- Painting A is sent to X for 89 days
- Returned to Customs warehouse, stored for two days and then temporarily removed back to X
- In this scenario only one further day of temporary removal may be approved

It is permissible to temporarily remove goods for 90 days to a different location/for a different purpose without aggregating the period of temporary removal. HMRC use the following example to demonstrate this:

- Painting A is sent to X for 89 days
- Returned and stored in the Customs warehouse for several months
- Removed to Y for up to 90 days
- Returned and stored in the Customs warehouse for a few months then temporarily removed to Z for up to 90 days

In the above example the 90 days will not be aggregated as long as there is a period of storage involved between movement and the period the goods are in storage that exceeds the amount of time the goods have been temporarily removed on an annual basis.

Changes to temporary removals with effect from 2013

Goods being removed from Customs warehouse for the purposes of exhibition and possibly put up for sale or for similar activities will not be permitted to use the temporary removal procedure. The removal for any of these reasons will require payment of Customs duties unless a declaration for relief under another Customs procedure can be made, for example, Temporary Admission ("TA"). The use of TA will require some form of guarantee (eg bond with bank or other financial institution).

From 2013 temporary removals will therefore come at a cost either by paying the Customs duties or providing HMRC with a guarantee which will give rise to facility fees from the bank/other financial institution.

EU VAT recovery made easy

If a VAT registered business incurs VAT in a Member State where they are not established and make no taxable supplies, then dependent on local VAT law, all business input VAT incurred is potentially recoverable.

With the general move to electronic filing within HMRC VAT procedures have followed suit including the procedure to claim VAT incurred in the course of business in other EU Member States.

The previous paper based system, being the 8th Directive procedure, relied upon paper claims being made six months following the calendar year end that the VAT was incurred. The claims had to be made directly to the Member State of Refund and in their local language. Original copies of invoices had to be supplied with the claim. The process was both lengthy and costly to businesses and often resulted in businesses making commercial decisions to simply suffer the lost input VAT rather than take up valuable management time.

The new electronic cross border refund system allows UK VAT registered businesses to recover VAT using the online HMRC Gateway service (the same service that is used for online submission of VAT returns). It should be noted that VAT incurred outside the EU is still presently recoverable under the paper based 13th Directive procedure.

For EU VAT refunds, a business (or its agent) must first apply to use this service, similar to the application process to submit EC Sales Lists online. Once the service is activated, submissions can be made up to nine months after the calendar year end (ie by 30 September). The application is made online and must cover a period of at least three months but less than a calendar year with a minimum claim value of €400, or equivalent in national currency.

A further positive step is that most Member States are now accepting the claim to be made in a second language, usually English, which eliminates the need for any translation

services. A separate claim has to be made for each Member State where the VAT has been incurred.

It is worth considering that if your business is partially exempt, then you must apply the partial exemption calculation to the input VAT recovery. Similarly, where you would normally apply a private usage adjustment to VAT incurred in the UK, this must also be applied to any overseas VAT claim.

The most burdensome part of the new reclaim process, which remains unchanged from the previous 8th Directive regime, is that claims must follow the VAT laws applicable in the Member State for which the claim is being made. VAT reclaim rules can be complex and what is and is not reclaimable in the UK may be treated differently in another Member State. As an example, VAT on business entertainment is not recoverable under UK VAT law. However it is recoverable if it is incurred in Denmark and various other EU countries. Advice should be sought to ensure a correct claim is being made.

For each claim submitted to HMRC, it will be subject to automated verifications prior to onward forwarding to the Member State from which the refund is being claimed. Assuming the submission is not rejected at this stage, the Member State of Refund has the right to make further inquiry within four months of receiving the application. If an inquiry is made, the business or its agent must provide the requested information within one month of receiving the request. A decision must be made by the Member State of Refund within a maximum of eight months of receiving the application. Refunds will be made within 10 working days of that decision.

The applicant has a right to appeal against the decision made and a right to interest where the specified timeframes have not been met. Furthermore, where an error is found on the applicant's part, the excess refund can be recovered with penalties and interest imposed.

5 Upcoming deadlines

Date	Area	Matter to be addressed
1 August	Corporation Tax	Non-large companies to pay tax for accounting periods ended 31 October 2010
7 August	VAT	June 2011 returns to be filed and electronic payments made
14 August	Corporation Tax	Quarterly instalment payments/ final payments due for large companies with January, April, July or October period ends
19 August	PAYE	Payment of PAYE and NIC liabilities for the month to 5 August 2011
31 August	Financial Statements	Private companies with a November 2010 period end to file accounts
31 August	Financial Statements	Public companies with a February 2011 period end to file accounts
1 September	Corporation Tax	Non-large companies to pay tax for accounting periods ended 30 November 2010
7 September	VAT	July 2011 returns to be filed and electronic payments made
14 September	Corporation Tax	Quarterly instalment payments/ final payments due for large companies with February, May, August or November period ends
19 September	PAYE	Payment of PAYE and NIC liabilities for the month to 5 September 2011
30 September	Financial Statements	Private companies with a December 2010 period end to file accounts
30 September	Financial Statements	Public companies with a March 2011 period end to file accounts
1 October	Corporation Tax	PNon-large companies to pay tax for accounting periods ended 31 December 2010
7 October	VAT	August 2011 returns to be filed and electronic payments made
14 October	Corporation Tax	Form CT61 to be submitted and tax paid for the quarter ended 30 September 2011 in respect of any interest payments
14 October	Corporation Tax	Quarterly instalment payments/ final payments due for large companies with December, March, June or September period ends
19 October	PAYE	Payment of PAYE and NIC liabilities for the month/ quarter to 5 October 2011
19 October	PAYE	Any PAYE Settlement Agreement liabilities for the 2010/11 tax year to be paid

What to do next...

If you are interested in any of these issues and wish to discuss them in more detail, please call the Rawlinson & Hunter partner who normally acts for you. If you are not one of our regular clients but would like more information or advice, a full list of partners is provided on this page and any of them will be delighted to help you.

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