Disguised Remuneration Legislation

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What is the Disguised Remuneration Regime?

The Disguised Remuneration Regime was implemented by the UK Government in the Finance Act 2011 as an anti-avoidance measure. Its purpose was to remove the loophole that saw employee benefit trusts (EBTs) being utilised to defer or avoid income tax or national insurance contributions (NICs). The legislation was chiefly targeted at family benefit trusts and some employer-financed retirement benefit schemes (EFRBS).

The key change resulted in the acceleration of income tax and NICs due on the value of a sum of money or an asset if an EBT trust:

1. Pays or transfers an asset or money to an employee, including as a loan;
2. Makes an asset or money available to an employee; or
3. 'Earmarks' an asset for an employee, with a view to it being transferred in the future.

Trusts simply used to satisfy share plan releases and not anti-tax avoidance schemes were caught in this complex legislation. When the legislation came into force in 2011, the key issue concerned the concept of 'earmarking', which can be triggered if trustees allocate shares to specific employees with a view to transferring those shares or their value when share awards vest or share options are exercised.

As a result, employees will be taxed on the full value of the shares when 'earmarking' takes place, despite entitlement to the shares taking place several years later and the fact that they may even forfeit their rights in the meantime (e.g. upon leaving employment).

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Exclusions

The Government has since made a large number of amendments to the legislation that have helped address some of the main concerns with the exemptions for share plans, making arrangements such as the following unlikely to result in tax charges under the ‘disguised remuneration’ regime:

- Tax-advantaged share plans - SIPs, SAYE, CSOPs and EMIs. This exclusion will only apply if the trust holds no more shares for the purposes of awards under the particular plan than it ‘might reasonably be expected’ to need over a ten year period.
- Standard unapproved performance related share awards and deferred share awards, where employees become entitled to the shares on the vesting date.
- Restricted awards, including standard JSOPs.
- Standard unapproved share options, if they become exercisable on a specified date and will expire if not exercised within 10 years of their date of grant.
- ‘Phantom’ share plans, which provide cash payments in lieu of shares under similar terms.
- ‘Cashless exercise’ arrangements providing the loan used to exercise share options is repaid within 40 days.

The above changes are in line with HMRC’s stated intention to not to interfere with “the operation of ordinary share plans on a commercial basis with no tax avoidance motive”. However, despite the addition of more exclusions for share plans, the legislation remains broad, so some share plan arrangements could still be impacted.

What action should be taken?

Companies have amended previous share plan practices and procedures in order to benefit from an exclusion, but if you are uncertain you can either approach HMRC for clearance or seek professional legal advice.

Schedule 2 ‘Employment income provided through third parties‘ of the Finance Act 2011: http://www.legislation.gov.uk/ukpga/2011/11/schedule/2/enacted

We hope you found this factsheet useful. Contact us for more information or advice on the Disguised Remuneration Legislation.

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