Employee Benefit Trusts – a guide to HMRC's current policy

Following adverse coverage in the national media, HM Revenue & Customs (HMRC) are looking for taxpayers to come forward and achieve an element of certainty in their tax affairs by withdrawing from all forms of tax avoidance.

HMRC have followed a Litigation and Support Strategy (LSS) since 2007 to resolve tax disputes through a civil basis rather than through the courts.

What exactly is LSS?

HMRC has followed its Litigation and Settlement Strategy by:

- Seeking information about the schemes being used
- Introducing The Disclosure of Tax Avoidance Schemes (DOTAS) to formally register new schemes
- Investigating all taxpayers concerned
- Assessing all the taxes due (including NIC), plus interest and penalties where appropriate
- Denying corporation tax relief for all contributions made
- Leaving all tax returns "open"
- Litigating in court

How does this relate to EBTs?

Since 2009, HMRC has revised their strategy and have been seeking to engage with any taxpayer wishing to extricate themselves from tax avoidance schemes known as Employee Benefit Trusts (EBTs), Employer-Financed Retirement Benefit Schemes (EFRBs) and alike.

Key terms of this revised Settlement Opportunity include:

- Initial approaches can be on a "no-name" basis
- The punitive costs under the Disguised Remuneration can be avoided
- Tax relief will be given for <u>all</u> costs incurred if Settlement is reached
- Tax and NIC already paid as a benefit in kind on any interest element can now be repaid
- Settlements to be made in respect of all taxes including PAYE, NIC, capital gains tax and inheritance tax
- Time to pay agreements can be negotiated
- There may be the opportunity to reduce the overall "tax cost" by using the Settlement Opportunity in conjunction with other Disclosure Facilities offered by HMRC

What is happening now?

Since 9 December 2010, contributions can become "trapped" and will now be caught by the Disguised Remuneration rules. Where a "relevant step" has been taken since 9 December 2010, income tax will be levied at the current rate plus NIC, interest and penalties can also apply.

The purpose of the terms under the Settlement Opportunity is to avoid costly litigation and further delays.

Under the current government, taxpayers are taking on an increased level of risk by undertaking transactions that may be considered to be contrived and/or artificial.

HMRC are challenging transactions that include:

- Taking loans instead of remuneration
- Placing part of their wealth overseas

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What are the hazards when taking a loan?

Individuals are liable to tax (and NIC) on all forms of remuneration whether they are described as salary, wages or bonuses. Loans themselves are not taxable on the individual.

However, depending upon the full facts, where the loan is from a family company, i.e. a Close Company, then:

- The company may be liable to tax if the amount represents an overdrawn loan account
- The individual may be liable to tax on the benefit in kind if the loan has been made interest free

What are the hazards when placing your wealth overseas?

HMRC may argue that tax is due because:

- There has been a transfer of assets abroad and/or;
- There has been a depletion of an individual's Estate (for Inheritance Tax purposes)

What might happen next?

HMRC are reviewing their own files and are looking at information already provided to them, specifically the annual returns of those administrating or participating in EBTs and EFRBs.

As a result of this review, HMRC are looking to identify any "forgotten liabilities".

Forgotten liabilities facing Trustees

- EBTs and EFRBs are labile to a 10 yearly Anniversary charge equating to an Inheritance Tax (IHT) charge on the remaining asset value of the Trust.
- Forms P11d are to be submitted annually for any interest element on "interest free" loans and loans waived. Failure to submit a P11d incurs a penalty of up to £300 per annum whilst an incorrect P11d can result in a penalty of £3,000 per P11d. All penalties are levied on the Trustee.

Where returns have not been made, or have been made late, or are incorrect, **interest and penalties will apply**. Penalties can now be up to 200% of the tax where the Trustees are based outside of the UK mainland.

Forgotten liabilities facing individuals

- Loans made from an EBT or EFRB are repayable. If they are not repaid, they are distributions and are to be included on the individual's Tax Return.
- Loan interest is payable to the EBT or EFRB. If it is not paid, the Beneficiaries are to include the value of any corresponding benefit In kind received on their personal Tax Returns each year.

Where returns have not been made, or have been made late, or are incorrect, **interest and penalties will apply**.

What if taxpayers believe they have done nothing wrong?

Each taxpayer is responsible for their individual tax affairs and cannot delegate that responsibility to anyone else, including their adviser or scheme promoter.

Some tax avoidance schemes have already been proven not to work. These schemes are investigated by HM Revenue & Customs and sometimes on a criminal basis, rather than on a civil basis.

It is not always what the taxpayer has or has not done themselves; it may be what somebody else has or has not done on their behalf.

Other potential complications

The Settlor, the Company, may have since gone into liquidation. In such cases, HMRC may seek any liabilities that would have fallen on the Company from the shareholder/directors themselves.

Property companies and other corporate structures (both on and offshore) which have been set up under the EBT or EFRB will complicate matters still further.

What can be done?

Both EBTs and EFRBs can be unwound under HMRC's EBT Settlement Opportunity. Haines Watts has successfully unwound numerous schemes achieving favourable Settlements for all concerned.

In addition to the EBT Settlement Opportunity, various other Disclosure Facilities offered by HMRC can be used including the Liechtenstein Disclosure Facility, the Guernsey Disclosure Facility, the Jersey Disclosure Facility and the Manx Disclosure Facility.

Following the unwinding of any EBT or EFRB, succeeding trusts can be created, allowing for the continuation of wealth protection and other advantages to the individual.

How Haines Watts can help

We can advise you on the full terms and cost of the revised Settlement Opportunity and the benefits it offers. We can then negotiate a Settlement with HMRC and give **certainty** to all taxpayers concerned that their tax affairs are fully compliant.

To find out how Haines Watts can help, call Paul Malin on + 44 (0)7919 375 650 or email pmalin@hwca.com, anytime