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TAX AVOIDANCE

Interest will no longer be eligible for tax relief on certain loans used to invest in partnerships or small companies

The Treasury has announced that legislation will be introduced in the forthcoming Finance Bill to block avoidance schemes, which have been notified to HMRC, that exploit provisions under which individuals may claim income tax relief for interest payments on loans used to invest in partnerships or small companies. The legislation will have effect in relation to loan interest paid on or after 19 March 2009.

The interest relief rules encourage investment in certain small businesses carried on commercially and with a view to profit. The return on a normal investment in such a business would not be a guaranteed one but, in the schemes notified to HMRC, arrangements are in place that mean that after the availability of the relief for the interest is taken into account, the investor cannot fail to make a profit.

The new measure will deny relief for interest if the loan is made as part of arrangements that are certain (ignoring insignificant risk) to produce a profit for the investor because the interest is eligible for relief. It will not affect genuine commercial investments in businesses where there is uncertainty as to the return

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that will be produced from the arrangements.

Draft legislation and explanatory notes have been issued by H M Revenue and Customs.

COMMENT

We do not have details on the precise investments that this anti-avoidance measure is targeted at. The intent seems to be to stop specific schemes that, taking accounting of tax relief on the interest, guarantee a profit to the investor with little or no risk. The measures will not deny tax relief on interest paid on genuine business loans to trading businesses operating in a corporate or unincorporated form by a director/shareholder or proprietor.

KEY SOCIAL SECURITY BENEFIT RATES

The following benefit rates are effective from April 2009. All amounts shown are weekly benefits.

- The single person's State pension - £95.25 (£4,953 per annum)
- The additional State pension for a spouse - £57.05 (£2,966 per annum)
- Jobseeker's allowance under age 25 - £50.95
- Jobseeker's allowance age 25 and over - £64.30
- Statutory maternity/paternity pay - standard rate - £123.06
- Statutory sick pay - standard rate - £79.15
- Bereavement payment (single lump sum) - £2,000 * and **
- Widow's pension / bereavement allowance (standard rate) (age 55 and over) - £95.25 **
- Age-related widow's pension/ age-related bereavement allowance age 54 - £88.58 - reducing to £28.58 at age 45 **
- Widowed parent's allowance - £95.25
- Child benefit for a couple - only, elder or eldest child - £20.00 * from January 2009
- Child benefit - second and each subsequent child - £13.20 * from January 2009
- Child dependency increase - e.g. with short-term incapacity benefit - £11.35 for each child, reduced to £8.20 for the first child if child benefit at the higher rate is being received for that child *
- Long-term incapacity benefit - £89.80 ***
- Short-term lower rate incapacity benefit under State pension age - £67.75 *

- Short-term higher rate incapacity benefit under State pension age - £80.15.
- * *These benefits are tax free.*
- ** *Bereavement payment/bereavement allowance is available to a man or woman whose spouse dies on or after 9 April 2001.*
- *** *Long-term incapacity benefit may be tax free if it replaced invalidity benefit.*

THE NEED TO APPOINT ADDITIONAL TRUSTEES

*Is it really necessary or just advisable to appoint additional trustees under English law?
And what happens if a trustee wishes to resign?*

It is generally known that if following the death of a trustee there are no surviving trustees, the trust will nevertheless continue to exist. In this situation, the personal representatives of the last trustee to die will then assume the role of the trustee. This means that although the trust assets will not be part of the settlor's estate for IHT or probate purposes, securing probate to the estate of the last trustee to die (which could be the settlor) will still be necessary to ensure that the deceased trustee's personal representatives can act as trustee. This will almost always result in a delay. This is particularly relevant to trusts of life assurance policies where the absence of a surviving trustee will mean that the death benefit cannot be paid as swiftly as one would wish it to be.

The question may arise as to whether there are any other legal reasons for appointing additional trustees.

In England there is no requirement to appoint another trustee for a valid trust to exist – an individual can simply declare that they hold an asset as trustee for another person. However there is one caveat – this will only work where the asset is held for someone else's benefit.

Under English law the same human being can be settlor, one of the trustees and also one of the beneficiaries – they will be acting in different capacities in each context. However, the same person may not be the settlor, the **sole** trustee and the **sole** beneficiary because then no property rights would have moved at all. This is important to remember when considering setting up trusts for non-tax reasons, for example to avoid the need to obtain probate on certain assets.

Equally, it is not legally possible to make a transaction, such as a loan, with oneself. The authority for this is *Rye v Rye* (1962). So, creating a loan trust is another example where it is legally essential to appoint trustees in addition to the settlor before the loan is granted.

The same question does not arise under Scots law where the requirements for delivery or intimation apply.

It should also be remembered that if any of the trustees wishes to retire, a replacement trustee should normally be appointed unless at least two trustees remain. This is because, for a retirement of a trustee to be effective, in the absence of a specific trust provision dealing with this issue, one would need to look at the requirements of the Trustee Act 1925. Under section

39 of this Act, a trustee may retire without appointment of a successor **only** if there are at least two trustees remaining or a trust corporation.

PENSIONS MISCELLANY

- For those schemes that continue to use the earnings cap (ie. that used to apply in respect of pre A-Day occupational scheme members subject to the post '89 regime) HMRC has confirmed that the cap would have risen to £123,600 for 2009/10.
- The Pensions Act 2007 (Commencement No.3) Order 2009 – SI 2009/406 confirms that the provisions regarding the conversion of GMP benefits will take effect from 6 April 2009.
- Where a member, subject to the Pension Protection Fund (PPF), has not reached “normal pension age” (ie. the earliest age at which benefits could be taken from the scheme without actuarial reduction) by the time the assessment period of the PPF commenced, his/her benefits will be limited to 90% of the scheme benefits accrued up to the date of discontinuance and will be subject to a cap. The cap is set out in regulations.

A draft statutory instrument has been issued confirming that the cap to apply from 1 April 2009 will be £31,936.32 for those who first became entitled to benefits at age 65. This is to achieve a cap which is effectively £28,742.69 when applying the 90% level of compensation.

The cap is reduced or increased as appropriate for those who draw their benefits before or after age 65.

- The DWP has issued an initial consultation paper on proposed changes to the disclosure of information provisions in respect of occupational, personal and stakeholder pension schemes. This consultation will result in the DWP producing a set of draft regulations, on which they propose to consult by the end of this year. It is intended to introduce the new legislation by 6 April 2010. This consultation will run until 6 May 2009.
- Changes included in the Occupational, Personal and Stakeholder (Miscellaneous Amendments) Regulations 2009 – SI 2009/615 will, from 6 April 2009, allow pension credit benefit members of occupational pension schemes to take pension credit benefit before normal benefit age (usually, normal benefit age is between the ages of 60 and 65) either as a lump sum or as a pension subject to the provisions of the Finance Act 2004. This will bring members holding such rights under an occupational scheme in line with individuals with pension credit benefits under other types of registered scheme.
- The national default retirement age of 65 was introduced in 2006 as part of the Employment Equality (Age) Regulations 2006, which were meant to stamp out ageism in the UK workplace.

The default retirement age of 65 is being challenged in the UK and European courts by Age Concern, in the Heyday case, as it argued that this was in breach of the EU's

Equal Treatment at Work directive. The case was referred to the European court by the UK High Court.

The European Court of Justice (ECJ) has ruled that the compulsory retirement age of 65 could remain if it had a “legitimate aim” linked to social or employment policy. The UK High Court, which sent the case to the ECJ for clarification on the law, will now have to decide whether the aims of the government’s retirement age of 65 are “legitimate”.

- Safeguarded rights will be abolished from 6 April 2009. The Pensions Act 2008 (Abolition of Safeguarded Rights) (Consequential) Order 2009 – SI 2009/598 is designed to remove all references to safeguarded rights in various statutory instruments, as well as revoke the safeguarded rights regulations (SI 2000/1055) with effect from 6 April 2009.

In the explanatory memorandum to these regulations it is made clear that pension schemes will be made aware of the abolition of safeguarded rights by a HMRC newsletter to all pension scheme administrators.

REVIEW OF THE CHARITY SUBSTANTIAL DONOR RULES

Changes to the substantial donor rules are expected in the Budget 2009 following consultation by HMRC

Finance Act 2006 introduced new tax anti-avoidance rules designed to attack those who claim tax relief on substantial donations to charities and subsequently receive value from the charity in certain ways. The rules apply to certain transactions between charities and substantial donors – currently the rules define “substantial donors” as those who make contributions of £50,000 or more within 12 months.

The rules take the form of a reduction in the tax exemption enjoyed by the charity on its income and gains if the charity and the substantial donor enter into any of the specified transactions. These transactions are widely defined and include sale, lease or exchange of land, provision of services, provision of financial assistance and investment by the charity into the donor’s enterprise.

In July 2008 Her Majesty’s Revenue and Customs (HMRC) issued draft legislation and a consultation document. The purpose of the proposed changes, according to HMRC, was to deter tax avoidance whilst reducing the administrative costs borne by charities.

In January this year HMRC released details of the responses it received from charities and other interested bodies to its consultation. The general conclusion was that there was widespread criticism of the current regime which is perceived as complex and cumbersome. The main complaint was that charities are punished if the rules are broken, not the donor; that the penalty could be more than the original donation and that the charities are often required to monitor all the relevant individuals which imposes a substantial administration burden.

HMRC’s proposals included a redefinition of what constitutes a substantial donor, reducing the threshold for substantial donors from £50,000 worth of donations to £25,000, disregarding donations of less than £1,000 from substantial donors, a de minimis limit for

relievable gifts, disregarding any benefits worth less than £500 delivered to the donor by the charity and broadening the list of exempt transactions.

Apparently a third of the respondents felt that HMRC's proposals did not go far enough but all agreed that the present system needed either changing or throwing out. Two fifths of respondents also backed a proposal to introduce a "motive test" into the rules.

COMMENT

Clearly, especially in the current economic climate, charities would prefer to save on administration costs. On the other hand, HMRC continues to be very keen to ensure that tax reliefs on charitable gifts are not abused. HMRC is now reviewing the responses to its consultation and has committed to make a further announcement before the Budget due on 22 April this year.

STATE PENSION BENEFITS AND CONTRACTING OUT

The Social Security Pensions (Low Earnings Threshold) Order 2009 (SI 2009/610) set the Low Earnings Threshold for the State Second Pension (S2P) as £13,900 for tax year 2009/10.

The Low Earnings Threshold is a key component in determining the accrual of benefits under the S2P, which will be as follows for tax year 2009/10.

Earnings	S2P Accrual Rate
£4,940 (Lower Earnings Limit) - £13,900 (Low Earnings Threshold)	40%
£13,900 - £31,800	10%
£31,800 - £40,040 (Upper Accrual Point)	20%

For those individuals who have earnings in excess of the Lower Earnings Limit but less than the Low Earnings Threshold, their S2P benefit in tax year 2009/10 will be deemed to accrue on the assumption that their earnings are at the Low Earnings Threshold (ie. £13,900).

Changes included in the Occupational, Personal and Stakeholder (Miscellaneous Amendments) Regulations 2009 – SI 2009/615 ensure that the band of earnings on which the National Insurance rebate is paid remains in line with the band of earnings on which S2P accrues. This reflects the introduction in April 2009 of an Upper Accrual Point (UAP) to replace the Upper Earnings Limit (UEL) on the band of earnings for S2P accrual.

JERSEY SIGNS TAX INFORMATION EXCHANGE AGREEMENT

Jersey has signed a wide-ranging tax information exchange agreement which makes it far easier for the UK to investigate the affairs of those with offshore assets in Jersey

On 10 March 2009 the British government announced that Jersey is to join other Crown Dependencies and Overseas Territories in signing a Tax Information Exchange Agreement (TIEA) with the UK.

This will be the fifth comprehensive TIEA signed by the UK. The text broadly follows the OECD Model entitled “Agreement on Exchange of Information on Tax Matters”. The UK already has a TIEA in place with Bermuda and has signed TIEAs with the Isle of Man, the British Virgin Islands and Guernsey. To date, Jersey has signed TIEAs with the United States, the Netherlands, Germany, Denmark, Finland, Greenland, Iceland, Norway, Sweden and the Faroes.

What is significant about these TIEAs is their scope. Whilst joining the crusade against tax havens the British government has sought to blunt criticism that has been levelled against it with regard to our own tax havens.

The agreement, which is a two-way (bilateral) agreement, has 12 Articles which can be summarised as follows

1. The parties will provide information that is relevant to domestic laws in respect of taxes listed in (3) below. This means that if either party requires taxpayer information concerning one of the taxes listed at (3) below the other party will supply it on request. There is no stipulation that there must be suspicion of criminal activity to support the request – but the information must be relevant to tax.
2. The parties are not obliged to provide information they don’t have. In other words they do not have to search for the information in other countries.
3. The taxes concerned are income tax, corporation tax, CGT, IHT and VAT in respect of the UK. For Jersey the taxes are income tax and goods and services tax.
4. Definitions – one of which is “information” which is defined as “any fact, statement, document or record in whatever form”.
5. Information will be provided on request even if the information would not be relevant to laws in the “requested” country. If the “requested” tax authority does not have sufficient information to comply with the request it must seek out such information. To this end each party must ensure that it has the legal power to collect information from the likes of banks and other financial institutions.

In addition, it must be able to obtain information on the ownership of assets, which includes information on settlors, trustees, protectors and beneficiaries. The provision of information must not contravene the laws of the “requested” country.

Any request for information must be in writing and as detailed as possible. The information to be provided is prescribed in Article 5.

6. One party will allow representatives of the other party (with its prior consent) to enter its territory to carry out investigations, within the law permitted by the “requested” country.
7. A request for information can be refused where the party requesting has not pursued all the avenues available to it at home (except where this would cause disproportionate difficulty). Refusals are also possible where disclosure would be contrary to public policy. Further, the terms of this article will not contravene legal privilege or give away trade secrets.

8. Information received is confidential and cannot be passed to other jurisdictions.
9. Costs of providing information are to be borne by the requester of the information.
10. Difficulties or doubts concerning the implementation of the Agreement are to be resolved by mutual agreement.
11. Each party must inform the other when it has ratified the Agreement. The Agreement is effective from the latest date of ratification.
12. Either party may terminate the Agreement by three months' written notice.

PERSONAL ACCOUNTS

The DWP has commenced a consultation on the Pensions (Automatic Enrolment) Regulations 2009. The consultation concerns the practical arrangements by which employers will be required to:

- enrol workers into a workplace pension scheme, including the circumstances and arrangements for postponement of automatic enrolment, where appropriate;
- provide information to their workers and to pension schemes; and
- provide for individuals to opt out of pension saving following automatic enrolment.

Comments are required by 3 June 2009.

This is the first of three consultations regarding personal accounts and auto enrolment. The second consultation, planned for later this Spring, will cover the proposals for the personal accounts scheme order and rules. The third consultation, expected in Autumn 2009, will cover the remaining elements of the employer duties (including re-enrolment and opt-ins, staging, phasing, qualifying schemes criteria and certification) and employment safeguards and elements of the compliance regime, including information to be passed to the Pensions Regulator, sanctions and penalties.

BUDGET 2009

The Budget 2009 speech has been scheduled for 12:30pm on Wednesday 22 April. If you wish to receive details of our Budget services, please give us a call on 020 7405 1600 or email us at host@technicalconnection.co.uk.