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TAX CONSULTANCY

Transfer of Assets Abroad

The Transfer of Assets Abroad ("TOAA") is a longstanding piece of anti-avoidance legislation introduced to prevent UK residents using foreign transfers to mitigate their UK tax liabilities.

The income tax rules were introduced in their original form during 1935 with the extension to capital gains tax effected during 1965. The legislation sits in Part 13, Chapter 2 of ITA 2007 and can apply to the transferor or the transferee. Additional anti-avoidance legislation, contained in Section 13 of TCGA 1992, sets out how gains realised in offshore companies can be attributable to UK resident shareholders, if the provisions apply.

The TOAA legislation is wide reaching and as such consideration is always required where a UK resident individual has an interest in an offshore entity. Put simply, it may apply where non-resident companies and trusts are created which may benefit UK resident individuals. The legislation is complex and professional advice should be sought.

The TOAA provisions assess either the transferor or the transferee. For this purpose, a transferor is an individual who makes the transfer offshore or is the economic settlor if the transfer is made indirectly using an intermediary. A transferee is an individual who receives benefits or capital from the offshore entity.

Transferor - The Income Charge

An income tax charge will arise on the transferor if the following conditions are met:

- the transferor (or his spouse/civil partner) has the power to enjoy income arising to a person abroad;
- this power to enjoy arises as a result of a relevant transfer; and
- the income of the person abroad would be taxable if it were received by the transferor in the UK; and
- the motive defence (see below) does not apply.

For this purpose, a relevant transfer is defined as a transfer of assets as a result of which income becomes payable to a person abroad, and is not confined to the transfer of assets situated in the UK.

The power to enjoy condition will be met if the transferor may:

- benefit from the income in any form;
- benefit from an increase in the value of his assets as a result of the income;
- be entitled to receive at any time a benefit provided out of the income or related money;
- become entitled to the income if powers are exercised; or
- control, whether directly or indirectly, the application of the income.

If the above applies, the effect is that the income of the person abroad is assessed on the transferor as and when it arises and for each tax year for which the transferor is UK resident.

The TOAA legislation also needs to be considered if a capital payment is received by the transferor including any sum payable by way of loan or repayment of a loan; and any other amount that is not income, is a gift or is a distribution where the recipient does not pay market value in return.

A motive defence can be used to dis-apply the income tax charge for the transferor where the transaction has been undertaken for genuine commercial reasons and was not for the avoidance of UK tax. However, the motive exemption does not apply automatically and HMRC must be satisfied that such a claim is applicable. The transferor may be able to claim the remittance basis of assessment in respect of foreign source income received by the offshore entity if he is non-UK domiciled, subject to making the relevant claim. A remittance of the income would, however, cause the transferor to be assessed at that time.

Transferee - The Benefits Charge

A transferee will be subject to an income tax charge for any tax year in which he receives a benefit or capital distribution where the following conditions are met:

- There is a relevant transfer of assets abroad such that income becomes payable to a person resident and domiciled outside of the UK;
- An individual who is UK resident receives a benefit;
- The benefit is provided as a result of a relevant transaction;
- The individual receiving the benefit is not already liable to income tax on the benefit under the transferor provisions above; and
- The motive defence (see below) does not apply.

The legislation does not define a benefit but does state that it must be capable of a valuation. HMRC guidance provides that a benefit will include payments of any kind as well as the use of assets, property and the receipt of loans.

As with the transferor charge, the transferee provisions will not apply if there is a motive defence. Furthermore, the TOAA charge will not apply to foreign source income attributable to the capital distribution being made to a transferee who is UK resident and claiming the remittance basis as a non UK domiciled individual. In this case, the income is taxable at the point it is remitted to the UK.

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Registered in England No. 04993822

Section 733 of ITA 2007 sets out the steps for calculating the benefit subject to an income tax charge on the transferee. The legislation is complex and professional advice should be sought where a benefits charge is thought to apply.

Capital Gains Tax (CGT)

There is scope for a UK resident individual to avoid UK CGT by holding assets within a non-resident company. Anti-avoidance provisions contained in section 13 of TCGA 1992 attribute gains (as calculated using the rules for UK companies) arising in such entities to the UK resident shareholder in proportion to their shareholding, where certain conditions are met. With effect from 6 April 2012, individuals who have a shareholding of over 25% (previously 10%) in an offshore company holding UK assets, either by virtue of their own shareholding or the aggregated holding of shares owned by persons connected to him need to be aware of the avoidance provisions contained within the legislation.

If the offshore company holds UK residential property, then the Annual Tax on Enveloped Dwellings (ATED) and Non-Resident CGT (NRCGT) regimes take precedence. The TOAA position should, however, still be considered for companies where the ATED charge has not been relevant for the total period of the property's ownership. The proposed reforms to the taxation of nom-domiciliaries due to become effective from 6 April 2017 will also need consideration as to the application of the anti-avoidance legislation.

For the provisions of section 13 to apply, the company must be:

- not resident in the UK for corporation tax purposes; and
- would be classed as a close company if it were UK resident.

Additionally, the UK individuals must be UK resident and a participator in the company.

A motive defence can be used to dis-apply the CGT TOAA provisions where the transaction has been undertaken for genuine commercial reasons and the main purpose was not the avoidance of UK CGT or corporation tax. However, unlike the income charge, this defence only applies to gains realised by the foreign entity on or after 6 April 2012 and no claim is required to be made to HMRC.

What does the future hold?

The TOAA provisions are targeted anti-avoidance legislation and, the "Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document" consultation document, published by HMRC on 17 August 2016 proposes to apply fines and penalties to both taxpayers and advisers for unsuccessful anti-avoidance planning. The TOAA legislation is wide reaching and difficult to interpret and it is yet to be seen how advisers will react to providing clients with offshore planning advice if the new provisions are introduced.

Contact Us:

Please do contact us if you would like further advice.

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