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Mr Hussein Saleh
HM Revenue & Customs
Business Customer Unit
Room 3/46
100 Parliament Street
LONDON
SW1A 2BQ

10 November 2009

Dear Mr Saleh

Transactions in Securities

The Institute of Chartered Accountants of Scotland (ICAS) welcomes the opportunity to respond to the HM Revenue & Customs consultation document on 'Simplifying Transactions in Securities Legislation' published on 31 July 2009.

In the following paragraphs we set out your questions (in italics) and our answers to them.

Introduction

2.5.1 Do you welcome the package of proposals (as a whole) as simplification to the TiS legislation?

The aim is admirable, but we do not believe the package of proposals will bring about any more certainty except in a limited number of cases where there is a disposal of shares for cash.

Where the disposal of securities is for shares or other securities, clearance will still be required by taxpayers using s138 TCGA. The work involved in submitting an extra clearance under the TiS legislation is generally minimal.

2.5.2 Does the package of proposals (as a whole) capture the main opportunities to provide customers with simplification and increased certainty?

Substituting a purpose test for commerciality will not increase certainty.

The difficulty in determining whether or not there is a tax avoidance motive will lead to disagreement and uncertainty.

To paraphrase Lord Upjohn in *Brebner* 43 TC 718, if there are two ways of carrying out a transaction, and one would produce a higher tax take than the other, the taxpayer is under no obligation to choose the route that produces the greater amount of tax.

The motive for choosing a route may be to minimise tax but, where there is doubt, clearance or other reassurance (e.g. Counsel's advice) will be required by taxpayers and their advisers.

Section 4 states “the policy maker should balance the need for revenue protection against the need for certainty.” We do not understand how this statement corresponds with the aim of the new legislation and guidance providing certainty.

2.5.3 Are there any additional areas you feel we should consider to further simplify the TiS legislation?

We suggest that the Government should consider adding safe harbours in relation to MBOs and MBIs.

Proposal 1: Refocus the Transactions in Securities Purpose Test to Target Tax Avoidance

3.5.1 Do you have any thoughts on this shift in focus within the TiS legislation?

We cannot see how this will increase certainty. The tests remain highly subjective.

3.5.2 Do you consider there are there any pitfalls you can see for customers?

Yes, even if a transaction is completely commercial, if the structure of the transaction minimises the income tax liability within the legislation, then the transaction could be open to attack as having a tax avoidance motive. The definition of ‘normal commercial behaviour’ in this context is open to interpretation and therefore uncertainty – see *Ebsworth v HMRC* 2009 UKFTT 199 (TC).

Well advised taxpayers will have a detailed audit trail showing how their decisions were reached. Less well advised taxpayers may have details on file mentioning “tax savings”. HMRC is likely to use this as evidence of a tax avoidance motive. See Guidance 10400 – Evidence of Purpose.

3.5.3 Do you consider this will this help provide certainty and clarity for customers?

No.

3.5.4 Do you consider this will lead to less work or more work for our customers?

No – most transactions require more than one clearance, and the marginal cost of producing one extra clearance is minimal.

Considerable care will need to be taken to ensure there can be no future misunderstanding on motive, especially given the time lapse between planning the transaction and the later discussions.

Proposal 2: Adopt the definition of a close company for a 'Relevant Company' in section 691 ITA 2007

4.5.1 Do you consider this change will be beneficial for HMRC's customers?

We have no comment to offer on this.

4.5.2 Do you have any reservations about the change in close company definition?

Broadly, the same companies will be affected by the new definition as fall within the current definition in s 691 ITA.

4.5.3 Do you foresee any practical problems or benefits?

We have no comment to offer on this.

4.5.4 Can you foresee any issues with certain situations, such as Management Buy Outs (where more than 5 managers buy control of a company), which would be affected by the change of the close company definition?

Yes. In an MBO (or MBI), the managers will set up a close company (under the control of 5 or fewer individuals) to acquire the target company. The consideration typically will be an upfront payment and then a deferred element dependent on future profits of the target.

Clearly, as the deferred consideration is being paid out of distributable profits, there could be an argument that the deferred payments represent income. This is despite the fact that this route may be the only route available to the purchaser. If this structure is not available, the vendor would have to seek a third party purchaser who can afford to pay more up front.

Proposal 3: Simplifying the remaining circumstances in ss 686 to 690 ITA 2007

5.5.1 Do you agree with the repeals of section 686 ITA 2007 and its CT counterpart?

We have no comment to offer on this.

5.5.2 Do you agree with the repeals of sections 688, 692, 693, 694 ITA 2007?

We have no comment to offer on this.

5.5.3 Do you agree that sections 689 and 690 ITA should be merged into one single circumstance? Or would you prefer to have these two provisions retained in their current form?

Retaining them in their current form should assist comprehension.

5.5.4 Do you have any views on the new section 684?

It will widen the scope of the scope of transactions which could be caught.

5.5.5 Do you have any views or suggestions on how to amend the new section 684 so that it can be made clearer and more easily understood by our customers?

If s 684 applies to close companies, it is unclear to us whether or not the definition would cover companies which would be close if they were resident in the UK? (s 684(6))?

Proposal 4: The Fundamental Change of Ownership Rule

- 6.5.1 **Do you consider this change will benefit potential clearance applicants and their advisers?**

In limited circumstances this proposal represents a 'safe harbour'.

- 6.5.2 **Do you consider that the proposed test accurately describes what a fundamental change in ownership is? If not, what other factors should be considered?**

Yes – it does accurately describe what is intended.

Clearly MBOs are not likely to come within the definition in s 685 where the managers already have more than 25% of the share capital. Clearances will still be required in these circumstances, especially if deferred consideration is involved.

- 6.5.3 **Are you aware of any other indicators that can be used to separate genuine transactions from those implemented for avoidance purposes?**

Cessation of the vendor's voting rights could be used in an MBO situation to allow deferred consideration to be treated as capital.

- 6.5.4 **Do you consider 75% is an appropriate level for this proposal? If not, what level do you feel would be more appropriate and why?**

We have no comment to offer on this.

Proposal 5: Defining and Quantifying 'Tax Advantage'

- 7.6.1 **Do you consider there are benefits to quantifying the 'tax advantage' in statute in the way set out in the new section 683 ITA 2007?**

We have no comment to offer on this.

- 7.6.2 **Do you agree with the principle and approach detailed above?**

We have no comment to offer on this.

- 7.6.3 **Do you consider it would be appropriate to include any conditions or restrictions? If so where and why?**

We have no comment to offer on this.

- 7.6.4 **Do you have any other comments or concerns with this proposal? If so, what are they?**

There should be some level of de minimis – which would assist in providing some certainty, especially in smaller transactions.

Proposal 6: Clarifying the scope of the Transaction in Securities Legislation

8.5.1 Do you have any concerns with this proposal?

No.

Proposal 7: Framework Guidance for Transactions in Securities

9.5.1 Would better guidance increase certainty and reduce administrative burdens?

Guidance is not legislation and cannot be relied on in Court, so in any areas of doubt clearances will still be required.

9.5.2 Would better guidance reduce your need to submit clearance applications to HMRC?

No.

9.5.3 Are there any other areas or subjects you would like to see included in the guidance?

We have no comment to offer on this.

9.5.4 Does our proposed layout meet customers' needs (i.e. is it appropriate and comprehensive)? If not, what changes would you suggest to the proposed layout and content?

The guidance is comprehensive, but when discussing case law, the quotes and excerpts are chosen to favour the HMRC's arguments, so the user will have to look at the cases in detail to discover the true context of the quote. For example, Lord Nolan's dicta in *Willoughby* has regularly been misused in s 739 ITA cases to say that the relevant tests are objective, where in fact they are and always have been subjective.

9.5.5 If the proposed layout is adopted, what specific case law guidance would you like included under 'Specific Areas of Difficulty'?

We have no comment to offer on this.

About ICAS

ICAS, a representative professional body, is the world's first professional body of accountants and received its Royal Charter in 1854. ICAS has nearly 18,000 members worldwide and in the UK the CA designation is reserved exclusively for their use. Under the Royal Charter, ICAS works in the public interest. Its objective is to uphold the integrity and standing of the profession of chartered accountancy in the interests of society and the membership, through excellence in education and the development of accountancy and through service to members and the enforcement of professional standards.

Yours sincerely

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