

Disguised remuneration – the close company gateway

(Lecture P1082 – 21.49 minutes)

S11 and Sch 1 FA 2018 introduce further changes to tackle what the Government refer to as ‘disguised remuneration tax avoidance schemes’. These measures build on legislation which has been enacted in FA 2016, FA 2017 and F(No2)A 2017.

The main feature this year is the launch of a new close company gateway which is intended, in HMRC’s words, ‘to put beyond doubt when Part 7A of ITEPA 2003 applies to the remuneration of owners of close companies’.

Para 2 Sch 1 FA 2018 inserts six new sections (Ss554AA – 554AF ITEPA 2003) near the beginning of Part 7A of ITEPA 2003. If the conditions of either the original gateway in S554A ITEPA 2003 or the new close company gateway in S554AA ITEPA 2003 are met, a charge under Part 7A of ITEPA 2003 can arise.

S554AA ITEPA 2003 provides that there will be a disguised remuneration charge where the conditions of S554AA(1) ITEPA 2003 are met. This subsection requires that:

- there is an arrangement (‘the relevant arrangement’) to which an individual (A) is a party;
- it is reasonable to suppose that the relevant arrangement is wholly or partly a means of providing payments, benefits or loans which are in some way linked to A;
- a close company (B) enters into a ‘relevant transaction’;
- it is reasonable to suppose that the relevant transaction was entered into wholly or partly in pursuance of the relevant arrangement;
- at the time when B entered into the relevant transaction, or at any earlier time within three years ended with the date of that transaction, A:
 - was a director or employee of B; and
 - had a material interest (as defined in S68 ITEPA 2003) in B;
- a ‘relevant step’ is taken by a ‘relevant third party’ (these terms are defined in S554A ITEPA 2003 and S554AA ITEPA 2003 respectively – under the arrangement, the employer has to make a payment to a third party and the third party has to take a relevant step deriving from that payment); and
- the main purpose of implementing and maintaining the relevant arrangement is the avoidance of income tax, NICs, corporation tax or a charge under S455 CTA 2010.

A relevant transaction is one which falls within S554AB ITEPA 2003 – note that this covers a wide variety of different transactions – and it must not be an ‘excluded transaction’. S554AC ITEPA 2003 excludes distributions and certain commercial arrangements that are not connected with tax avoidance from being a relevant transaction. In order for the close

company gateway to apply, the payment by the employer must meet all the conditions in S554AB ITEPA 2003.

An important form of relief from possible double taxation is provided by Para 3 Sch 1 FA 2018. A new S554Z2A ITEPA 2003 has been inserted into Part 7A of ITEPA 2003. This sets out the circumstances when the loan to participator rules in CTA 2010 have priority over charges under Part 7A of ITEPA 2003.

Broadly, where a S455 CTA 2010 charge arises by virtue of S459 CTA 2010 at the same time as a charge under Part 7A of ITEPA 2003 by virtue of the close company gateway, the latter charge will be set aside as long as one of two conditions is satisfied:

- the S455 CTA 2010 charge must have been paid in full by the due date; or
- what the legislation calls 'the net S455 CTA 2010 charge' is nil (ie. because the loan has been fully repaid or has been written off before the due date).

It is also possible for an HMRC officer to give his consent that the charge under Part 7A of ITEPA 2003 should be dropped. Finally, S554Z2A ITEPA 2003 relieves charges under Part 7A of ITEPA 2003 from arising at the same time as a charge under Ss415 and 416 ITTOIA 2005 (loan to participator released or written off).

The amendments made by Paras 2 and 3 Sch 1 FA 2018 have effect in relation to relevant steps taken on or after 6 April 2018.

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