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TACKLING DISGUISED REMUNERATION AVOIDANCE SCHEMES

HMRC TECHNICAL NOTE

On 16 March 2016, at Budget 2016, HMRC published a Technical Note on proposed changes to the employment income tax regime for employment income provided through third parties, commonly known as "disguised remuneration" (DR). The primary target of DR is the employee benefit trust (EBT) which receives contributions from an employer and either uses them to make investments which are earmarked for a specified employee, or to make a loan to the employee which typically will not be called in unless the employee wishes to repay it.

The DR legislation, introduced in 2011, was reasonably successful in putting an end to remuneration arrangements based on EBTs, and various settlement opportunities offered by HMRC bore fruit. However, the Government is concerned that many employers and employees have continued to operate their historic EBTs without coming forward to settle the tax liabilities that HMRC regard as having arisen on contributions to the EBTs (or loans made by the EBTs) and that promoters are still promoting ever more contrived and aggressive schemes designed to circumvent DR.

The announcement at Budget 2016 and the Technical Note provide details of further measures to be enacted against EBTs and, in particular, against loans made by EBTs. There will be legislation in the Finance Bill 2016 and further legislation will follow in the future after a technical consultation over the summer.

Finally, at the Autumn Statement 2015, the Government announced that retrospective legislation back to November 2015 will be considered if new schemes to avoid income tax and NICs on earned income are created following these changes.

FINANCE BILL 2016

The Finance Bill 2016 will contain measures:

- to apportion the DR charge where DR gives rise to employment income of more than one person;
- to counteract, by including a targeted anti-avoidance rule, schemes to avoid DR based on employees buying assets from the EBT; and
- to cap the exemption from DR of payments out of EBTs representing prior year earnings and their growth in value where the employee has agreed a settlement with HMRC relating to those earnings at an amount equal to the prior year earnings (and, therefore, to withdraw that exemption from their growth in value) if tax under the settlement has not been paid before 1 December 2016.

FINANCE BILL 2017

Following the summer consultation, HMRC expect that legislation with follow in the Finance Bill 2017 to bring the following schemes within DR:

- schemes under which a loan is made to an employee by an employer (often offshore), and not therefore by a third party, but the benefit of the loan comes to be held by an EBT; and
- schemes which claim that the employee who receives a loan does so in another capacity (e.g. as shareholder).

NEW CHARGE ON OUTSTANDING DR LOANS

The most significant DR measure announced at Budget 2016 is the proposed introduction of a new tax charge on all outstanding loans ("Untaxed DR Loans") which: (i) do not derive from taxed earnings; and (ii) have not been taxed under DR but would have been if the loan had not pre-dated the introduction of DR in 2011 or been made under one of the avoidance schemes mentioned above.

If all or part of an Untaxed DR Loan is still outstanding on 5 April 2019 (and is not taxed under DR under an HMRC settlement entered into before then), it will be liable to employment income tax and NICs, which will be collected under PAYE in the usual way.

The new charge will not apply if the Untaxed DR Loan is repaid before 5 April 2019 but, in this case, the repayment proceeds now held by the EBT will be within the scope of DR and will, therefore, be charged to tax under that regime if they are "earmarked", paid out to the employee or subject to one of the other heads of charge under that regime.

Although there may be arguments based on the reasoning of the Court of Session in *A-G for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77 against the new charge to tax on Untaxed DR Loans, it is unlikely that HMRC will not agree with those arguments and, of course, there is plenty of time for HMRC to address any weaknesses in the charging regime.

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This note is intended to provide general information about some recent and anticipated developments which may be of interest.
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