

"Disguised Remuneration" Update Good news for employee share plans but action needed

Good news!!

In revised "FAQs" published on 5 July 2011, HMRC confirmed its view on what will and will not constitute "earmarking" under the "disguised remuneration" (DR) legislation in the context of hedging arrangements for employee share plans (i.e. where shares are held in an EBT to satisfy awards granted by a company to its employees and directors).

HMRC has now confirmed that in general there will be no earmarking where the EBT trustee has not granted the awards to employees and does not know the names of the employees to whom the awards have been granted. The wording of the 5 July FAQ now means that there is a relatively easy "fix" to ensure that conventional employee share plans operated in conjunction with EBTs are not caught by DR.

This is very good news indeed. It brings to an end a period of uncertainty when it seemed that HMRC might not be so willing to exclude "normal" hedging arrangements from the scope of DR. It seems that intense lobbying from companies and their advisers, including a direct plea to the Government which we prepared for the Employee Share Ownership Centre, has paid off and has given us the easy "fix" that we had been asking for all along.

Action needed

Although the draft legislation has not yet received Royal Assent (which is expected in late July 2011), its provisions already apply. If you use an EBT to satisfy share plan awards, the relevant agreements between you and the trustee should be reviewed and may need to be amended before you next use the EBT to avoid any earmarking taking place. The amendments should be minor and we can prepare them for you quickly.

What if there is an earmarking?

The wording of the 5 July FAQ is very good news for the operation of many employee share plans which were never intended to be caught by DR. However, there may be circumstances in which an earmarking charge could still arise (for example, where the EBT trustee grants awards). Where this is the case and, for whatever reason, it would not be feasible for the company to grant awards, then there are a number of earmarking exclusions in the DR legislation which are specifically designed for employee share plans and/or deferred remuneration. These exclusions are complex, although the revised FAQs have gone some way in clarifying the circumstances in which they will apply. Some issues remain, but we will continue to work with HMRC to ensure that the exclusions are as helpful as possible for companies which need to rely on them. Please contact us for further details on what needs to be done to your share plans to benefit from the exclusions.

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