Briefing

BURGES SALMON

UK Remittance Basis

Collateral and relevant debts

HMRC has changed how it treats loan arrangements for non-doms who use the remittance basis. The change is likely to have a very significant and immediate impact on many non-doms who have taken out loans secured on offshore assets to assist with UK funding. Banks dealing with non-doms may also have to review and revise their security arrangements.

Relevant Debts

If borrowing is undertaken in or brought to the UK then there can be a remittance if foreign income or gains are "used in relation to" that borrowing outside the UK. This obviously catches paying interest or repaying such borrowing, but the rules arguably go wider. There has always been a question over whether using foreign income or gains as collateral for such borrowing is caught.

Previously, HMRC ignored the "use" of the income and gains as collateral – provided the loan was on commercial terms, the collateral was not treated as remitted. Instead, HMRC took the view that only the funds used to service and/or repay the loan would be treated as remitted. This was logical – the collateral is only "used" if it is claimed by the lender because the borrower defaults. This practice was set out in HMRC's manuals (RDRM 33170).

New Approach

HMRC altered their Manual with immediate effect on 4 August 2014. They now state that where a loan is secured against offshore income or gains and the borrowed funds are used in the UK, there is a remittance of the offshore income or gains used as security (up to the value of the borrowed funds brought to the UK). Further, if the loan is serviced or repaid using offshore income or gains this will also be a remittance: so the same loan can lead to more than one remittance which may exceed the value of the loan. This will have a significant effect on many entirely commercial arrangements put in place by well-advised non-doms.

Transitional arrangements

Where taxpayers have existing arrangements which are affected by this change, HMRC says they will either need to repay the loan or replace the security with clean capital before 5 April 2016 to avoid a UK tax charge on the borrowed funds previously remitted, and will need to notify full details of any existing arrangements to HMRC.

Ongoing Discussions

The changes to HMRC's view are disruptive, ill-thought-out and will prejudice many people. Professional bodies including the British Bankers' Association, the Society of Trust and Estate Practitioners and the Chartered Institute of Taxation have lobbied HMRC to reduce the impact of the change. The professional bodies are seeking:

- Significantly better transitional arrangements for existing loans – HMRC may well face litigation or judicial review if they do not offer more generous arrangements, particularly as it was HMRC's own promises which led to many doing this in the first place;
- Confirmation that a general right of set-off in a bank's terms and conditions does not result in a remittance of all income or gains that a taxpayer has in accounts with the lending bank;
- Specific rules dealing with the priority of security where a debt is secured on several assets or several debts are secured on the same asset; and
- Legislation on this issue to provide certainty to tax-payers.

Self-Assessment and Enquiries – Fighting Talk

One point on which HMRC is clear is the time at which the remittance arises. This is when the borrowed money is brought to the UK. This gives rise to some interesting anomalies.

continued overleaf

Most loan arrangements set up before April 2012 are now outside HMRC's usual enquiry-window. HMRC does have power to issue "discovery assessments" into older returns, but not where they were completed in line with "prevailing practice". It seems unlikely that HMRC could argue that their own manuals were not prevailing practice, so arrangements which predate 6 April 2012 may well be out of time.

By 31 January 2015 the same will - unless HMRC launches an enquiry - also be true for arrangements up to 5 April 2013. Indeed if the tax return was filed early, that may already be the case: HMRC's deadline is 12 months after the return was actually filed.

Returns already filed for the 2013/14 year will potentially be out of time in another 12 months. Returns not yet filed are, however, in a different position. The legislation treats a failure to correct a return as careless and - with the prevailing practice defence having gone after 4 August - that gives HMRC 6 years to make a discovery.

Revolvers and renewals

The most difficult question is for those who have loans coming up for renewal shortly. HMRC have asked for further information about loans which automatically renew ("revolvers") but appear broadly sympathetic. More difficult are loans which have actually matured or are about to do so. The essence of HMRC's previous treatment was that such loans would ultimately be repaid using clean monies, but some may have planned to roll over and now find themselves unable to do so. Options range from repaying the loan through to litigation through, ultimately, to leaving the country. Some planning may be possible but cannot be guaranteed until HMRC's views are clearer, by which time it may be too late. Those in this position should therefore seek urgent advice.

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