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AN INTRODUCTION TO BUSINESS INVESTMENT RELIEF

Business investment relief (BIR) was introduced with effect from 6 April 2012 in an attempt to encourage UK resident but non-domiciled individuals to invest in the UK.

If BIR applies, the taxpayer can use his non-UK income or gains to make a UK investment without incurring the UK tax charge which would otherwise arise on the remittance of the non-UK income or gains.

ELIGIBILITY FOR BIR

The first condition is that the individual or a "relevant person" (broadly a close relative, a trust for the benefit of the individual or a close relative, or a close company in which any of these persons is a participator) must make a "qualifying investment". This means a secured or unsecured loan to, or a subscription for shares in, the target company. Shares may be ordinary or preference but must be newly issued and not transferred from another person.

The target company must be a private limited company (i.e. not listed on a recognised stock exchange and not an LLP). The target company must be carrying on a commercial trade or preparing to do so within the next two years. For this purpose, the definition of a "trade" is broadened to include a property letting business and also research and development from which it is intended that a commercial trade will be derived. A qualifying investment can also be made in a holding company which is part of an eligible trading group or in a stakeholder company whose purpose is to make investments in eligible trading companies.

The target company does not need to be a UK-incorporated company or UK resident.

The next condition is that no relevant person obtains or expects to obtain any related "benefit" from the investment. A "benefit" includes the provision of anything that would not be provided to the relevant person in the ordinary course of business, or would be provided but on less favourable terms. For instance, if the target company provides goods or services to a relevant person at a reduced rate, the investment will not qualify for BIR. If the qualifying investment is made by way of a loan, any interest payable must represent a commercial return on the investment and must not exceed what another similar investor would receive.

Finally, where the funds are brought to the UK in advance of the investment being made, the qualifying investment must be made within 45 days of the money being received in the UK.

CLAIMING THE RELIEF

Relief is not granted automatically. The taxpayer must claim BIR in his self-assessment tax return on or before the first anniversary of the 31 January following the tax year in which the income or gains would otherwise be regarded as having been remitted to the UK.

This means that if an individual brings funds to the UK and makes a qualifying investment in 2015-2016, relief must be claimed by 31 January 2018.

If there is any uncertainty as to whether BIR will be available, it is possible to seek advance assurance from HMRC before making the investment.

INTERACTION WITH OTHER RELIEFS

In addition to BIR, the taxpayer may also claim relief on the same investment under the Enterprise Investment Scheme (EIS) or Seed Enterprise Investment Scheme (SEIS), provided that the conditions for all the schemes are met.

The qualifying investment may constitute a UK situs asset in the hands of the taxpayer and, if so, will be subject to UK inheritance tax in the event of his death, even if he is not domiciled or deemed domiciled in the UK for inheritance tax purposes. However, where the BIR investment takes the form of shares which have been held for at least two years, they may qualify for business property relief from inheritance tax which would provide a complete exemption.

The normal rules will apply to determine whether any dividend or loan interest received in respect of the qualifying investment will be subject to UK income tax.

CLAWBACK

If any of the following events occur, BIR can be clawed back so that the invested funds are treated as having been remitted to the UK and a tax charge is triggered:

- ◆ a disposal of part or all of the qualifying investment;
- ◆ the target company ceases to be an eligible trading, holding or stakeholder company;
- ◆ the target company does not commence trading within two years; or
- ◆ the individual or a relevant person receives value (in money or money's worth) from the target company (an "extraction

of value”), unless this is provided in the ordinary course of business and treated as a receipt of income for tax purposes (for example a director’s salary at a market rate).

In the case of a disposal, a clawback will be triggered unless the disposal proceeds are taken out of the UK or reinvested in another qualifying investment within 45 days. In any other case, the relevant person has 90 days to sell the qualifying investment and then a further 45 days to take the disposal proceeds out of the UK or reinvest them in another qualifying investment.

If there is an extraction of value, the entire amount of BIR will be clawed back even if the value extracted is minimal. Furthermore, the clawback is triggered if value is received from any company “connected” to the target company within the meaning of the tax legislation, even if this company had nothing to do with the qualifying investment.

This means, for example, that the clawback provisions could be triggered in a situation where a taxpayer makes a qualifying investment in a UK company and the taxpayer’s non-UK resident son receives a benefit other than at arm’s length from a non-UK company controlled by the son. Even though the taxpayer’s son and his company have no involvement in the UK company or the qualifying investment, the taxpayer’s son (and therefore his company) are “connected” to the taxpayer and so clawback of the taxpayer’s BIR is triggered by the son’s extraction of value.

The potential width of the clawback provisions will discourage non-domiciled investors from making use of BIR and it has been suggested that the legislation should be amended to resolve some of the uncertainty. To date, HMRC have refused to confirm that the clawback rules would not apply in a situation like the example given above.

CONCLUSION

BIR is a useful relief for a remittance basis taxpayer wishing to invest in the UK. It is helpful that there is no upper limit on the amount of BIR which can be claimed, no restriction on the taxpayer having an involvement in the target company and that advance clearance can be obtained.

However, given the stringent clawback provisions, a taxpayer will need to take careful advice before disposing of a qualifying investment, undertaking any corporate restructuring or extracting funds from the target company or a connected company.

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JUNE 2015

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