HMRC - CTM06210 - Avoidance

CTA10/S941 does not lay down a minimum period throughout which the predecessor and successor companies must be in common ownership (see CTM06010). Parties who are otherwise unconnected for tax purposes can exploit this feature. They arrange for the trade to appear to be in common ownership before and after its transfer from one company to another.

The procedure such parties normally adopt is as follows:

The trading company acquires a non-trading subsidiary.

The trading company transfers the trade to the non-trading subsidiary, and claims that the conditions of CTA10/S941 are satisfied.

The trading company then sells the shares in that subsidiary to the new owners.

If these arrangements succeed the predecessor avoids balancing charges on the assets sold to the subsidiary, and the new owners acquire the predecessor’s unused CTA10/S45 carry forward losses along with the trade. A case where there may be exploitation of CTA10/S941 can normally be identified by the sale of the subsidiary shortly after the transfer of the trade - often on the same day or within a matter of days or weeks.

The primary counter to exploitation is the relevant liabilities restriction under CTA10/S945 - see CTM06250. If it is evident from the accounts and computations that:

are significant, consideration should be given to whether the conditions of CTA10/S941 were properly satisfied. A critical test here is whether the subsidiary to which the loss-making trade was transferred began to carry on the trade before the predecessor company lost the beneficial ownership of the subsidiary’s shares. If not, if the trade transfer took place at the same time as or after the share sale, CTA10/S941 will not apply because the successor company will not be able to demonstrate that it commenced to carry on the trade at a time at which it was in common ownership with the predecessor company. See Barkers of Malton Ltd v HMRC SPC00689 (2008) for a consideration of this issue.

In such cases an officer should:

determine the sequence of events and the precise date and timing of each step,

obtain copies of any agreements for the transfer of both the trade and the shares, and

obtain the files for both the predecessor and successor companies,

(This content has been withheld because of exemptions in the Freedom of Information Act 2000)

In some cases it may not be possible to ascertain whether the remaining losses are significant without obtaining additional information from the company. In such cases enquiries about the amount of the relevant liabilities restriction should be made at the same time as the request for copies of the agreements referred to above. However, care should be taken not to give the impression that it has been accepted that CTA10/S940A does apply. Rather, the basis of the approach should be that it is necessary to quantify the losses which may transfer if, after examining the agreements and obtaining any additional information which may be necessary, it is possible to be satisfied that the conditions for CTA10/S940A to apply were genuinely met.

The ‘new approach’ brought out in the judgement of Lord Wilberforce in W T Ramsay Ltd v CIR (1981) 54TC101 at page 187 is not usually appropriate in these CTA10/S940A exploitation cases. In its letter of 20 September 1985 the Board of Inland Revenue made the following comments.

‘Hive-downs

‘This is one of the topics on which it is particularly difficult to see at present where exactly the new approach might apply, if at all. On the face of it, the new approach might have some relevance in cases where little more than the tax losses are being hived down, though even then it would be necessary to demonstrate that there was a composite transaction and the insertion of a ‘non-commercial’ step in that transaction. However, we would not normally expect the new approach to be relevant in cases where an entire trade, or part trade, together with its related assets and liabilities, are hived down with a view to its being carried on in other hands - although of course in those circumstances [what is now] CTA10/S673 might apply.’

It should also be considered whether the transferred losses should be cancelled under CTA10/S674, whether or not a challenge over the conditions of CTA10S940A is made. There is guidance on CTA10/PART14/CHAPTER2, disallowance of trading loses, at CTM06300+.

There is guidance at CTM06400 on the situation where:

a trade (or a part of a trade) is transferred under CTA10/S940A,

the provisions of CTA10/S944 and CTA10/S948 apply, and

there has been an earlier change of ownership of the predecessor company.

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