

# Hidden costs

**Mike Landon** looks at the implications of the new 'disguised remuneration' tax charges on share plans.



**W**hen draft legislation to counter tax avoidance through 'disguised remuneration' was revealed last December, it caused widespread concern amongst companies. The proposed provisions would have resulted in unwelcome tax charges for employees participating in many absolutely standard employee share plans. Fortunately, the Government has listened to the advice it has been given since then. Most – though by no means all – share plans will now be exempt from the new tax charges.

The 'disguised remuneration' legislation was mainly targeted at family benefit trusts, which have increasingly been used to provide benefits to employees – for example, through loans or use of property or other assets – without a tax charge arising on the full value of the money or asset. It provides that there will be an income tax charge and national insurance contributions (NICs) on the value of the sum of money or asset which is transferred or otherwise made available to an employee by a third party, such as an employee benefit trust (EBT).

The provision that caused particular alarm, however, was that a tax charge would also

arise when money or assets were 'earmarked' for employees, with a view to them being transferred or made available in the future. Many share plans include arrangements for the shares to be delivered to employees through an EBT.

In the original version of the draft legislation, income tax and NICs charges were likely to be triggered at the time when the trustees of an EBT decided to allocate shares to specific employees in anticipation of the shares being delivered to the employees when they were exercised or vested. Employees would have been taxed on the full value of the shares at the time of this 'earmarking', even though they might not become entitled to the shares until many years later.

## Developments

MM&K and other leading share plan advisors have had numerous meetings with HM Revenue & Customs (HMRC) to explain the problems which the proposed provisions would cause and to suggest ways of protecting share plans that have no tax avoidance motive. The Government has taken our recommendations into account in the Finance Bill, published at the end of March. However, this contained 60 pages

of extremely complex exemptions which would have still left many standard share plans subject to the 'disguised remuneration' charge. Further amendments to the Finance Bill have dealt with most of these problems. Companies will need to obtain professional advice to ensure that their share plans fall within the new exemptions. The following arrangements are now unlikely to result in tax charges under the new rules:

- Any plan which involves new shares or treasury shares being issued by the employing company (or another group company) directly to the employee.
- Any of the HMRC 'approved' share plans – Share Incentive Plans, SAYE Option Schemes and Company Share Option Plans – and Enterprise Management Incentives.
- Standard 'unapproved' conditional share award or deferred share award plans, provided that the awards vest on a specified date and that the employees become entitled to the shares (and liable to tax) on the vesting date.
- Awards of restricted securities, including basic Joint Share Ownership Plans (JSOPs).
- Standard 'unapproved' share options, again if they become exercisable on a specific date and expire if not exercised within ten years of their date of grant.
- Share awards and share options, which vest on the occurrence of an 'exit event', such as flotation on a stock exchange or change in control of the company.
- 'Phantom' share plans which provide cash payments in similar circumstances.
- 'Cashless exercise' arrangements, provided that the loan used to exercise share options is repaid within 40 days.

Some share plans will not be covered even by the latest exemptions. These may include conditional share awards where the employee does not become entitled to the shares until the remuneration committee or trustee exercises its discretion to release them or until the specified performance targets are met.

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In cases where the current arrangements do not meet the terms of the exemptions, we recommend that, if feasible, no further action should be taken until further guidance has been issued by HMRC. The terms of new awards can then be adjusted to fit within the exemptions and, for awards which have already been granted, steps taken to minimise the risk of a double tax charge. ■

## » About the author

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