

ESC C16 – the end is nigh

In December 2010 HMRC published a consultation document which, amongst other things, called for “clarification” on the existing Extra Statutory Concessions (“ESC”) C16 provisions which allow private limited companies to make distributions to shareholders on their dissolution to be treated as “capital” as opposed to “income” subject to conditions and assurances.

Introduced in 1985 the concession was intended to benefit companies and their owners by saving the costs associated with a formal, solvent, winding up. Given lower capital taxes, compared with income tax, the ability to make capital distributions often made this route far more attractive to the company’s shareholders.

ESC C16’s problem is that whilst it allows a fiction to be treated as fact, for tax purposes, it does not satisfy the company law requirements. The action is unlawful in company law terms. Also, without a liquidation, the share capital and any other property and rights still held and not dealt with prior to dissolution, are strictly “bona vacantia” (“BV”) and become assets of “the Crown”.

In practice, the Bona Vacantia division of the Treasury Solicitor’s Department will allow up to £4,000 to be repaid without seeking recovery as an unauthorised distribution (BVC 17 refers). The explanation as to why, in this case, £4,000 is allowed is that this was the estimated cost of a Members Voluntary Liquidation (“MVL”).

Since 1 October 2008 private limited companies have been able to reduce their share capital, using a solvency statement procedure introduced in CA 2006 ss642 to 644. A statement, memorandum of capital and statement of compliance is all that is required.

Thus, where a company’s share capital exceeds the £4,000 BV limit, it is now possible to reduce share capital to within this amount and distribute the balance as part of the ESC C16 process. Capital gains or corporation tax on chargeable gains then apply.

If the proposed route forward is confirmed as being a requirement for all cases where the assets, and not simply the share capital/undistributable reserves exceed £4,000, then what started life as a simpler and cheaper way of reducing capital and distributing any balance held will be lost in all but the most trivial of cases – more MVL will be required.

Other commentators have asked “... why change ESC C16? The proposals appear to raise £nil in tax, stand to cost most people an additional £6,000 to £10,000 and add another layer of complexity to the business or running a company.”. We agree.

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MVL Cost Guidelines

If ESC C16 is changed as currently outlined then it is likely that we, insolvency practitioners, will be required to undertake more MVL. Currently, and in accordance with what we believe is best advice, we generally recommend using ESC C16. If this ceases to be an option we have devised a menu pricing schedule, available separately for cases depending upon whether there are trade debtors/creditors, pensions and cash.

Where there are multiple connected cases, capable of having meetings held at the same time, there may be a discount on both fees and the associated costs and disbursements (in particular as regards advertisements).

What can you do now?

If you have any queries on issues arising from this Briefing or on any insolvency related matter, please contact a member of the BRI Management Team. Offering the best advice to everyone, regardless of their situation and irrespective of the likely fee outcome for us, remains BRI's number one priority.

If you have a client who has a problem and feel that they would benefit from a fresh approach, please feel free to contact BRI. All initial BRI meetings are FREE OF CHARGE, completely independent, confidential and without obligation.

Important Note: This Briefing has been prepared as background information for the general professional adviser and is not a comprehensive statement of the law – we recommend that expert advice be taken on specific issues arising in practice.

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