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Loan accounts for director-shareholders: tax and other issues

With the Covid-19 impact on the economy, many previously thriving companies may find it difficult to use traditional patterns of remuneration this year. As a result, the loan account may remain outstanding.

This Briefing considers how the position can best be dealt with, and looks at the tax consequences of the options involved.

Loans or advances from a company can take a variety of forms. Sometimes director-shareholders borrow a specific amount outright as a short-term loan. More often it's the informal transactions between a director-shareholder and the company, such as cash withdrawals to meet personal expenditure, or personal expenses directly paid by the company, that create borrowing. Where, overall, a director has borrowed more from the company than they have lent to it, the director's loan account is said to be 'overdrawn'. Such balances are usually cleared a few months after the year end when profits have been determined, by voting a dividend or paying a bonus.

Corporation tax charge

Where a loan is made by the company to a director who is also a shareholder in the company, there can be corporation tax implications for the company.

The area is governed by what are called the 'loans to participators' rules. These mean that a corporation tax charge arises if a close company makes a loan to a participator, or an associate of a participator, if the loan is unpaid nine months after the end of the accounting period. Most family companies fall into the category of close companies.

Definitions

- **Close company:** a company controlled by five or fewer participators, or by any number of participators who are directors
- **Participator:** someone who owns share capital or voting rights in the company. Can also extend more widely to someone who is able to direct that company income or assets be applied for their benefit
- **Associate of participator:** this includes a relative, such as spouse/civil partner, parent, child or sibling.

Excluded from this charge are loans to a close company director or employee, where these don't exceed £15,000, and where the borrower works full time for the company, but does not have a material interest (broadly 5% or more) in the company.

If the director-shareholder repays the loan balance within nine months of the end of the accounting period, there is no charge on the company. Where such a loan is not settled within this window, the company is required to make a payment equal to 32.5% of the loan to HMRC. This is often referred to as a s455 tax charge.

There are various strategies to clear the loan account and avoid the s455 charge crystallising, which would routinely be adopted when trading conditions are favourable. We outline these below, and discuss alternatives possibly better suited to the current business climate.

Paying dividends

For many family companies, crediting a dividend to the loan account is the route of choice to deal with an overdrawn loan account. But dividends can only be paid out of profits available for the purpose, and this is a prime consideration this year.

Even if profits are available to pay a dividend, it may not always be prudent to do so in current circumstances. This could be the case if, for example, there are significant repayment obligations, such as Covid-19 business loans or repayments of outstanding VAT to HMRC.

If there are not sufficient retained profits out of which to pay a dividend, any dividend would be unlawful. Recipient shareholders can be liable to repay unlawful dividends to the company, where they know or have reasonable grounds to believe that they are unlawful. In addition, directors may be held personally liable for the amount paid. There are also tax consequences to the payment of unlawful dividends if they are not repaid to the company. HMRC is likely to treat the amount as a loan to the shareholder, and thus potentially within scope of a s455 charge.

Paying a bonus

The use of a bonus to clear an outstanding balance on a director's loan account is another traditional strategy. Where there are not the reserves to pay a dividend, this may be an option. A bonus stands to be taxed as employment income. From the company perspective, this is deductible for corporation tax purposes. It can thus be used to reduce taxable profits or generate a loss.

But there are corresponding costs, both for the company and the director. Employer Class 1 National Insurance Contributions (NICs) are one of them. The director too may face a cost in terms of income tax and NIC liability. The exact equation will depend on whether there is employment allowance available to set against employer contributions, and what scope there is to increase directors' remuneration before employee Class 1 NICs are due. A further point is that the loan amount needs to be grossed up so that the net pay is enough to cover the loan outstanding. This can therefore be an expensive option.

Thought may need to be given to the danger of a loan account being credited with a net bonus if there is any possibility of the company entering insolvency and the tax and NICs going unpaid. In such a case, the director may be held personally liable for the PAYE involved.

Writing off the loan

The company can 'release' or write off a loan to a director-shareholder. This avenue is sometimes considered rather than paying a dividend to all shareholders on a pro rata basis. It is important that the write off is done formally, otherwise the liability remains. From the company's perspective, the release is treated as if the director-shareholder has repaid the loan. The director-shareholder is assessed on the amount of the loan written off as deemed dividend income, as opposed to employment income. But HMRC may consider that the payment is also liable to Class 1 employer and employee NICs if the individual is a director or employee of the company. Again, there are particular issues to consider if solvency is in question. Bespoke advice is recommended.

Using cash

An overdrawn loan account is sometimes repaid using private funds. However, the pandemic impact on liquidity may preclude this option this year.

A question that sometimes arises is whether a director can take on short-term credit to repay the loan, so that no tax charge arises on the company, with the company then providing a further loan shortly afterwards to repay the credit facility. We would recommend advice specific to your circumstances here, as complex anti-avoidance rules are designed to catch such arrangements.

Leaving a loan outstanding

A final option to consider is leaving the loan balance outstanding at the year end, and paying the s455 charge. The tax is included within the corporation tax self assessment system, the company reporting loans outstanding to participators at the year end in the company tax return. The tax is due and payable when corporation tax for the period would normally be paid. The financial implications for the company of such a payment will need to be considered.

The charge is temporary, in that when the loan is paid or written off by the company, the s455 tax will be refunded. This, however, doesn't happen immediately. Relief for the repayment is not until nine months and one day after the end of the accounting period in which the loan is repaid.

This may be a necessary option for directors and the company to consider in current circumstances, and we would be pleased to advise further on the claims procedure and time limits involved.

Example

A company has a 31 December year end. A loan is made to a shareholder in the 2020 accounting period and is not repaid by 1 October 2021. The company must pay s455 tax by 1 October 2021. If the loan is repaid in, say 2022, the tax relating to the loan would not be due for repayment until 1 October 2023.

Implications for director-shareholders

Quite separately from the issue of the s455 charge, a loan to a director-shareholder potentially stands to be treated as a taxable employment benefit. The tax position for the individual concerned therefore also needs consideration.

If a loan is interest-free, or the interest charged is less than the official rate (2.25% for 2020/21: 2% from 6 April 2021) and the total amount of loan is more than £10,000 at any point in the tax year, this is known as a beneficial loan, and a charge to income tax arises. The charge is calculated at the official rate of interest, and is reported on the P11D. The company pays Class 1A NICs on the cash equivalent of the benefit.

Special dangers around insolvency

Company law has strict rules with regard to capital maintenance and director fiduciary duties which come into play when dividends are paid or distributions made. The starting point is to justify any distribution by reference to the last annual accounts. Trading conditions in 2020 and 2021 may mean that there is a need to consider areas such as adjustments for bad and doubtful debts, and stock write downs. Directors must also satisfy themselves that the company will continue to be solvent after any dividend payment is made, and that it will still be able to pay its debts as they fall due.

A general understanding of the rules around insolvency may be helpful to inform decision making on overdrawn loan accounts, the payment of dividends and other issues. Where a company is insolvent or likely to become so, directors' duties change subtly.

Instead of the duty to promote the success of the company in the interests of shareholders, the emphasis changes to a duty to consider the interests of creditors. Insolvency legislation provides a variety of means to protect the interests of creditors. In this context, an overdrawn loan account can have particular consequences, with the possibility of a director being required to repay the amount owed in order to pay the company's creditors. This is a complex area and if there are any doubts as to business viability or solvency, specialist advice should always be taken.

Looking ahead

If, as the economy once more opens up, business begins to improve, so that the financial position has changed significantly for the better since the date of the accounts, it may be possible to justify a dividend based on interim accounts. Where there has been a period of strong trading, such accounts could be prepared in the next few months, and we should be happy to advise on the potential of this route.

In summary, while there may be various atypical factors underpinning director-shareholder decision making this year, please be assured that we are always on hand to discuss the options available to you and your company.

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