Tax specialist Pete Miller is incensed that HMRC has published advice which is designed to scare taxpayers away from carrying out completely lawful transactions.

Posted on 15th Mar 2019
By Rebecca Cave

Spotlight 47, published by HMRC on 4 February 2019, draws attention to schemes which claim to work around the targeted anti-avoidance rule (TAAR). This may come into play when a company is liquidated and the trade is restarted in a different form, also known as “phoenixism”.

Rebecca Cave talks to Pete Miller about why this spotlight publication has made him so cross.

Rebecca Cave (RC): What is Spotlight 47 trying to warn against?

Pete Miller (PM): Spotlight 47 says that people have "come up with schemes that avoid the income tax charge". The Spotlight also refers to "an artificial modification of the arrangements aimed at defeating the intention of the legislation (by selling the company to a third party rather than winding it up, for example)".

There is a double warning here. Firstly, don’t try to get around the TAAR by using any schemes. More specifically, HMRC is warning us that it doesn’t like the idea that some people are choosing to sell their company, rather than liquidate it.

RC: Does the TAAR apply when a company is sold instead of wound-up?

PM: The TAAR does not apply when a company is sold, rather than being liquidated. The legislation is clear and unambiguous as, indeed, was the consultation document that was issued at the same time as the first draft of the new legislation in December 2015.

What HMRC says is that "in many cases, the actual outcome is that the individual is receiving distributions in a winding-up". This may be the case for other schemes or arrangements that get around the TAAR (which I don’t know about), but I don't see how HMRC can make that connection if somebody simply sells their cash-box company to a third party.

It is possible that the third party immediately liquidates the company and then pays the proceeds to the vendor shareholders, and one can understand why HMRC might find these arrangements offensive. However, in the cases I have come across, the purchasers are intending to use the cash for other purposes, themselves, and that the vendors are not, therefore, paid out of the proceeds of the winding up of the company at all.

RC: Is it still legal to build up reserves in a company and sell the company so the whole gain is subject to CGT at 20% rather than receiving dividends subject to tax at 32.5% or 38.1%?

PM: It has always been legal to build up reserves in a company before selling it. In reality, nobody is going to withdraw more cash by way of dividends from their company than they actually need to fund their day-to-day living expenses.

It is the nature of the business lifecycle that, as the owner approaches retirement, their financial needs may be substantially less, and the business income is no longer needed. There is no rule in the tax code that says shareholders should withdraw funds from their company that they don't need just to pay income tax to HMRC.

RC: In Spotlight 47, HMRC mentions that the GAAR would be invoked if the taxpayer says the TAAR doesn't apply in these circumstances. Is this correct?

PM: The comments about the GAAR almost certainly arise from the GAAR guidance, that states steps to circumvent a targeted anti-avoidance rule almost automatically mean that the GAAR should be invoked. This makes some sense, but I don't think it applies in this case, as we have to look at the intention behind the TAAR that is apparently being circumvented.

It was clearly the intention of Parliament that cases where a company is wound up and the trade is carried on in some other form by the shareholders should be caught by the TAAR, so that the proceeds are then treated as income and not capital. It is equally clear from the letter of the law that there was no intention by Parliament that the TAAR should apply in cases where the company is sold. In other words, to echo the words of the GAAR, there is no contrived or artificial transaction and there is no shortfall in the legislation that is being exploited. So it is hard to see how the GAAR can apply.

If HMRC is sure of its ground, perhaps it should put its money where its mouth is and ask the GAAR advisory panel to give an opinion.

RC: Why, in your view, is HMRC publishing incorrect advice?

PM: Sadly, it's probably because some people inside HMRC think the advice is correct!

HMRC publishes the Spotlights to frighten people away from tax avoidance schemes. That is a laudable aim, particularly since HMRC has managed to insert a moral stance into taxation, so that people may decide not to do some perfectly legitimate tax planning because they are persuaded that it is morally wrong. Other taxpayers will be dissuaded from entering into a tax scheme once they know that HMRC is sufficiently aware of it to publish a Spotlight on the subject.

I don't have a problem with HMRC publishing Spotlights in general, it's the attitude

demonstrated by HMRC in this particular case, riding roughshod over the clearly stated intention of Parliament and belittling the role of the GAAR by threatening to use it in an entirely inappropriate case.

RC: What can tax advisers do to counter HMRC's stance in Spotlight 47?

PM: The tax and accounting professional bodies will be telling HMRC what they think about Spotlight 47, and will no doubt publish articles explaining with their views (as I have done in Taxation Magazine on 21 February). In terms of advice to clients, all we can do is explain why we consider HMRC to be wrong, both in their approach to the transactions and in their suggestion that the GAAR might apply.