

DISGUISED REMUNERATION: ITEPA PART 7A

AN INTRODUCTION

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1. Introduction

1.1. The disguised remuneration draft legislation was released on 9 December 2011. In a written ministerial statement of the same day David Gauke MP explained the purposes of the proposed legislation. He said:

The legislation inserts a new part 7A into the Income Tax (Earning and Pensions) Act 2003. The legislation ensures that where a third party makes provision for what is in substance a reward or recognition, or a loan, in connection with the employee's current, former, or future employment, an income tax charge arises. Income tax is charged on the sum of money made available and on the higher of the cost or market value where an asset is used to deliver the reward or recognition, for example by transferring or otherwise making available an asset for the employee's use and benefit as if the employee owned the asset. The amount concerned will count as a payment of employment income and the employer will be required to account for PAYE.

There will be protection for specified types of arrangements involving third parties-including registered pension schemes, approved employee share schemes and ordinary commercial transactions. The tax treatment of benefits packages which are available across the employer's work force will also be unaffected by the measure, provided that the benefits are genuinely available to substantially all employees and cannot be accessed by only specially selected individuals.

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The legislation will take effect from 6 April 2011 and apply to rewards, recognitions or loans which are earmarked for the benefit of an employee, or former or prospective employee, or otherwise made available on and after that date.

1.2. The written statement clearly sets out the purposes of the legislation, as well as describing a potentially straightforward scheme of the legislation, and finally promises national insurance regulations. Unfortunately, ensuring that the legislation achieves the Government's criteria and remains simple and easy to use has proved to be easier said than done. The difficulty of drafting workable legislation which achieves its purposes can be seen from the progress of the legislation since 9 December 2010 until 19 July 2011, when the Finance Act 2011 ("**FA 2011**") received Royal assent.

1.3. A further draft of Part 7A was published in the Finance Bill 2011 on 24 March 2011. This was not in the same form as the draft legislation published on 9 December 2010. This was accompanied by a great many pages in the explanatory notes to the Finance Bill (the "**ENs**"). There were numerous subsequent changes as the Finance Bill passed through parliament. The legislation which became the Income Tax (Earnings and Pensions) Act 2003, Part 7A on 19 July 2011 is very different to the original draft published on 9 December 2010. While this was partly as a result of consultation with industry, it has caused a great deal of uncertainty and difficulty for tax planners and those with arrangements affected by the changes.

1.4. In a recent article in Taxation² (the "**Taxation Article**") Val Hennelly, deputy director at HMRC Central Policy, explained her excitement at the insertion of ITEPA, Part 7A:

² Taxation, 22 September 2011: "Disguise revealed" Val Hennelly

The legislation dealing with employment income provided through third parties was probably the most talked about measure in Finance Bill 2011. It was the first piece of anti-avoidance legislation that has been developed under the new policy-making process and was HMRC's first exercise in developing anti-avoidance legislation in a transparent way in partnership with advisers and businesses without compromising the integrity of the policy ...

Given the number of changes needed both between the initial draft and the final version of ITEPA, Part 7A (as well as those between 9 December 2010 and 24 March 2011) the professionals dealing with the legislation are likely to feel less confidence in the new process, and be less certain of its success in terms of transparency, than Ms. Hennelly appear to feel.

1.5. I turn now to consider the provisions of ITEPA Part 7A. In the remainder of this talk I discuss:

- 1.5.1. the scope of the provisions;
- 1.5.2. relevant steps;
- 1.5.3. the charging provisions (Chapter 2);
- 1.5.4. priority rules; and
- 1.5.5. the "new" form of language used in Part 7A.

2. To whom will ITEPA, Part 7A apply?

2.1. The scope of ITEPA, Part 7A is set out at the start of that Part. ITEPA, section 554A provides:

- (1) Chapter 2 applies if—
 - (a) a person ("A") is an employee, or a former or prospective employee, of another person ("B"),
 - (b) there is an arrangement ("the relevant arrangement") to which A is a party or which otherwise (wholly or partly) covers or relates to A ...

2.2. Thus the basic scenario in which the provisions will apply is an employment situation, i.e. both an employer and an employee are necessary for the provisions to apply. Secondly there must be a “relevant arrangement” to which:

2.2.1. A is a party; or

2.2.2. otherwise wholly or partly covers or relates to A.

The second way in which an employee can be caught by the legislation, i.e. where A is not a party to the relevant arrangement, but is wholly or partly covered by it, or it relates to A is the first example of the imprecise and non-legal language which is used throughout Part 7A. The (supposed) benefits and disadvantages of this new form of language are discussed below.

2.3. It is also necessary, to understand the scope of section 554A and consequently the scope of Chapter 2, to have the definition of “relevant arrangement”. ITEPA, section 554Z(3) provides that an “arrangement” “... *includes any agreement, scheme, settlement, transaction, trust or understanding (whether or not it is legally enforceable).*” As section 554A makes clear, a relevant arrangement is one to which A is a party. The breadth of the meaning of arrangement is uncontroversial and similar to its meaning in existing legislation.

2.4. ITEPA, section 554A(1) continues:

- (c) *it is reasonable to suppose that, in essence—*
 - (i) *the relevant arrangement, or*
 - (ii) *the relevant arrangement so far as it covers or relates to A, is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,*
- (d) *a relevant step is taken by a relevant third person, and*
- (e) *it is reasonable to suppose that, in essence—*

- (i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement, or*
- (ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement.*

While this part is only three paragraphs of one subsection there is a great deal of information included in them. One criticism of the legislation is that it is too complex, and tries to cover too many scenarios at the expense of certainty and ease of use. This part of section 554A(1) is an example of the density of the legislative provisions.

2.5. For example, in section 554A(1)(c)(ii) the juxtaposition of rewards, recognition and loans is not helpful. While, in the usual sense of the word a reward would almost certainly provide a benefit to A, this is not necessarily the case for loans. Recognition, in its normal sense, would not generally be applied to financial provision (or at least provision with a financial benefit) and consequently this wording is difficult to follow and its application is uncertain.

2.6. A “relevant third person” is defined later in section 554A (inconsistently with the majority of Part 7A, where definitions are generally all kept together in sections 554Z and 554Z1). Section 554A provides:

- (7) In subsection (1)(d) “relevant third person” means—*
 - (a) A acting as a trustee,*
 - (b) B acting as a trustee, or*
 - (c) any person other than A and B.*
- (8) If B is a company and is a member of a group of companies at the time the relevant step is taken, in subsection (7) references to B are to be read as including references to any other company which is a member of that group at that time.*
- (9) If B is a limited liability partnership, in subsection (7) references to B are to be read as including references to any company which is a wholly-owned subsidiary (as defined in section 1159(2) of the Companies Act 2006) of B at the time the relevant step is taken.*

(10) Neither subsection (8) nor subsection (9) applies if there is a connection (direct or indirect) between the relevant step and a tax avoidance arrangement.

Subsections (8) and (9) do slightly extend the scope of who constitutes B, and consequently in the circumstances of a company or LLP where there are no tax avoidance purposes, a wider range of people could take a relevant step without being a relevant third person and consequently bringing the relevant step within the charge to tax.

2.7. ITEPA, section 554A continues:

- (2) In this Part “relevant step” means a step within section 554B, 554C or 554D.*
- (3) Subsection (1) is subject to subsection (4) and sections 554E to 554Y.*
- (4) Chapter 2 does not apply by reason of a relevant step within section 554B taken on or after A's death.*

The meaning of “relevant step”, which is complex and covers a wide variety of different scenarios, is discussed below. ITEPA, sections 554E to 554Y set out exclusions in relation to relevant step (i.e. when an otherwise relevant step will not “count”). These are also discussed (more briefly) below.

2.8. ITEPA, section 554A(5) provides:

- (5) In subsection (1)(b) and (c)(ii) references to A include references to any person linked with A.*

2.9. The definition of “any person linked with A” is a second example of the new form of language which has been adopted. ITEPA, section 554Z1 provides the definition of “person linked with A”:

- (1) In this Part references to any person linked with A are references to—*
 - (a) any person who is or has been connected with A,*
 - (b) a close company in which A or a person within any other paragraph of this subsection is or has been a participator,*

- (c) a company in which A or a person within any other paragraph of this subsection is or has been a participator and which would be a close company if it were a UK resident company, or
- (d) a company which is a 51% subsidiary of a company within paragraph (b) or (c).
- (2) In applying [section 993](#) of ITA 2007 for the purposes of subsection (1)—
 - (a) a man and woman living together as if they were spouses of each other are treated as if they were spouses of each other, and
 - (b) two people of the same sex living together as if they were civil partners of each other are treated as if they were civil partners of each other.
- (3) In subsection (1) “participator”—
 - (a) in relation to a close company, means a person who is a participator in relation to the company for the purposes of [section 455](#) of CTA 2010 (see sections 454 and 455(5) of that Act), and
 - (b) in relation to a company which would be a close company if it were a UK resident company, means a person who would be such a participator if the company were a close company.

2.10. The definition is clearly wider than that of “connected persons” which is used elsewhere in tax legislation (though this definition is, of course, incorporated in that of linked persons). It is this approach of casting the net as wide as possible, which causes potential issues for those individuals that the provisions were never intended to catch. This also brings a highly subjective element into the disguised remuneration legislation (though this is also found elsewhere in tax legislation) because in order to determine if two people are linked, HMRC will have to decide, for example, what they believe is meant by living together as spouses or civil partners.

2.11. The remainder of ITEPA, section 554A provides:

- (6) For the purposes of subsection (1)(c) it does not matter if the relevant arrangement does not include details of the steps which will or may be taken in connection with providing, in essence, rewards or recognition or loans as mentioned (for example, details of any sums of money or assets which will or may be involved or details of how or when or by whom or in whose favour any step will or may be taken).

...

- (11) For the purposes of subsection (1)(e)—

(a) *the relevant step is connected with the relevant arrangement if (for example) the relevant step is taken (wholly or partly) in pursuance of an arrangement at one end of a series of arrangements with the relevant arrangement being at the other end, and*

(b) *it does not matter if the person taking the relevant step is unaware of the relevant arrangement.*

(12) *For the purposes of subsection (1)(c) and (e) in particular, all relevant circumstances are to be taken into account in order to get to the essence of the matter.*

This is not drafted in the usual language one would expect from a law draftsman.

The practice of giving examples is far more common in guidance and should, in my view, remain there. Including an example in legislation does little if anything to more clearly define the scope of the legislation in question because it is unlikely to be helpful to anyone who does not find themselves in the exact same circumstances as that example.

2.12. I turn now to the HMRC guidance issued on 18 August 2011 and which will eventually form part of the HMRC Employment Income Manual (EIM)³. In relation to section 554A this provides:

*First, although specialists often refer to it as the 'disguised remuneration' regime, Part 7A ITEPA 2003 is headed 'Employment income provided through third parties'. Therefore, if you are looking at a case in which the employer is providing something **directly** to the employee, and there is no third party involved, then Part 7A will not apply. There are two exceptions to this general rule.*

Part 7A can apply where the employer is acting as a trustee. But this situation will be unusual.

Part 7A can also apply as a result of steps taken by an employer when there is an undertaking that contributions will be paid to a relevant third person comprising an unregistered pension arrangement.

³ See the Taxation Article.

This is generally uncontentious, but does not tackle the issues raised by the more complex, and widely drafted parts of section 554A.

2.13. The HMRC Guidance continues:

An arrangement will not give rise to Part 7A income unless it 'comes through the Section 554A gateway' and thus meets the conditions for Part 7A to apply.

There are three fundamental questions you need to ask at this point.

1. First, is there an arrangement which might come through the Section 554A gateway?

If the answer to that is No, then the situation you are considering cannot give rise to Part 7A income.

2. Second, if there is such an arrangement, has a 'relevant third person' taken a 'relevant step'?

If the answer to that is No, then the arrangement has not come through the Section 554A gateway and has not given rise to Part 7A income.

3. Third, is that 'relevant step' connected with the arrangement in question?

If the answer to that is No, then the arrangement has not come through the Section 554A gateway and has not given rise to Part 7A income.

Unfortunately, this addresses none of the major issues which section 554A raises in relation to the new terminology used, the exact scope of the legislation, or how it is likely to be applied or interpreted by HMRC.

2.14. There is further, more detailed guidance on section 554A in the HMRC Guidance, paragraphs TEMP 5 and 6⁴. I do not set this out in full here.

2.15. In summary, and to give some examples of, situations which might be caught by section 554A, and which will go through HMRC's "554A Gateway":

2.15.1. "remuneration, reward or loans" provided by an employer to an employee either through a third party or itself as trustee or the employee as trustee;

⁴ The guidance can be found at: <http://www.hmrc.gov.uk/budget-updates/march2011/disguised-remuneration.pdf>

- 2.15.2. not restricted to those currently in employment – applies equally to future and former employees;
- 2.15.3. there must be an arrangement to which the employee is a party, or which “covers” the employee. – Arrangement is widely defined. It will include trusts, contracts, etc., but also purports to extend to less formal, non-legally binding “arrangements”; and
- 2.15.4. there must be a relevant step in relation to the arrangement. Relevant steps are discussed in the next section (along with the certain carve outs, which will not be relevant steps).
- 2.16. Thus the sort of scenarios Part 7A intended to catch will most likely be caught. There is, however, scope for the provisions to catch entirely innocent scenarios that have had to be organized in a particular way for non-tax purposes. Such scenarios are quite likely to arise in the context of owner-managed businesses and closed companies, where family members work for the family company but also have income from other family arrangements (for example trusts). It seems probable that at some point Part 7A will be invoked in relation to arrangements which had no tax avoidance motive, and may very well have been put in to place with no thought for the tax consequences or knowledge of Part 7A. On a positive note, where there are such “innocent” arrangements it is likely that, with an eye to Part 7A things can be managed differently to ensure that the arrangements are clearly not caught by Part 7A. This will of course require knowledge of the provisions, and additional advice, at an extra cost to the taxpayer.

3. *Relevant steps - introduction*

3.1. From section 554A it is apparent that the presence of a relevant step is essential.

Many of the sections in Part 7A are taken up with defining and then limiting the things which constitute relevant steps.

3.2. Before considering the individual sections it is helpful to consider the overall scheme of relevant steps. There are nine types of relevant steps, which fall into three broad categories:

3.2.1. relevant steps conferring a benefit on A (the employee);

3.2.2. relevant steps which confer a benefit on someone other than A (most likely a beneficiary in a traditional EFRBS arrangement); and

3.2.3. relevant steps which do not benefit anyone (the most obvious example being loans at a commercial rate).

In dividing relevant steps in this way, it is important to notice that relevant steps of all nine types can be within any of the three “benefit categories”. Relevant steps can also be divided along the lines of an earmarking relevant step (section 554B), a payment or transfer relevant step (section 554C) and a making asset available relevant step (section 554D).

4. Relevant steps - earmarking

4.1. Section 554B provides:

- (1) A person (“P”) takes a step within this section if—
- (a) a sum of money or asset held by or on behalf of P is earmarked (however informally) by P with a view to a later relevant step being taken by P or any other person (on or following the meeting of any condition or otherwise) in relation to—
- (i) that sum of money or asset, or
- (ii) any sum of money or asset which may arise or derive (directly or indirectly) from it, or

(b) a sum of money or asset otherwise starts being held by or on behalf of P, specifically with a view, so far as P is concerned, to a later relevant step being taken by P or any other person (on or following the meeting of any condition or otherwise) in relation to—

(i) that sum of money or asset, or

(ii) any sum of money or asset which may arise or derive (directly or indirectly) from it.

...

This targets EFRBS with sub-funds, and will prevent, at the least, sub-funds for individuals. It may, however, also catch other things. For example, in a family business situation if the founder of the business tells his son that at some future point an asset of the business or a sum of money, or shares in the family company will be given to him because he has done so much for the business, is that an informal earmarking?

4.2. Section 554B is, however, extended by sections 554Z17 – 554Z19. Section 554Z17 provides:

1) If B takes a step within section 554Z18 or 554Z19, Chapters 1 and 2 have effect in relation to the step—

(a) as if B were a relevant third person for the purposes of section 554A(1)(d), and

(b) as if the step were a relevant step within section 554B (if it would not otherwise be).

...

4.3. The steps within those sections are earmarking in relation to "relevant undertakings" and the provision of security in relation to relevant undertakings. A relevant undertaking is defined in section 554Z16, which provides:

(1) This Chapter applies if there is an undertaking ("the relevant undertaking") that a contribution to which subsection (2) would apply will be paid.

(2) This subsection applies to a contribution if—

- (a) *the contribution is paid to an arrangement which is not a registered pension scheme,*
- (b) *in connection with that arrangement (directly or indirectly), relevant benefits are to be provided (directly or indirectly) out of the contribution by a relevant third person,*
- (c) *the provision of the relevant benefits would be a relevant step, and*
- (d) *the contribution is neither a tax-relieved contribution nor tax-exempt provision.*

4.4. Before moving on to consider the other types of relevant step, it is worth noting that where an earmarking step (which is essentially a preliminary step is taken) and no further step is taken, then a claim for relief can be made. Section 554Z14 provides:

- (1) *An application for relief may be made by A (or, if A has died, A's personal representatives) to an officer of Revenue and Customs if—*
 - (a) *this Chapter has applied by reason of a relevant step (“the original relevant step”) within section 554B taken by a person (“P”),*
 - (b) *there occurs an event (“the relevant event”) which is not a relevant step in relation to a relevant sum or asset,*
 - (c) *by reason of the relevant event no further relevant step is or will be taken by P or any other person in relation to any relevant sum or asset, and*
 - (d) *there is no connection (direct or indirect) between the relevant event and a tax avoidance arrangement.*

Thus there is some scope for relief where there has been an accidental earmarking, provided that advice is obtained at an early enough stage, and no further step has been, or has arguably taken, in relation to the sum or asset in relation to which the earmarking was made, or a sum or asset derived from it. There is also a more general relief from a double charge found in section 554Z13 (see below)

5. Relevant steps – payment and transfer

5.1. Section 554C provides:

- (1) *A person (“P”) takes a step within this section if P—*
 - (a) *pays a sum of money to a relevant person,*
 - (b) *transfers an asset to a relevant person,*

- (c) *takes a step by virtue of which a relevant person acquires an asset within subsection (4),*
- (d) *makes available a sum of money or asset for use, or makes it available under an arrangement which permits its use—*
 - (i) *as security for a loan made or to be made to a relevant person, or*
 - (ii) *otherwise as security for the meeting of any liability, or the performance of any undertaking, which a relevant person has or will have, or*
- (e) *grants to a relevant person a lease of any premises the effective duration of which is likely to exceed 21 years.*
- (2) *In subsection (1) “relevant person”—*
 - (a) *means A or a person chosen by A or within a class of person chosen by A, and*
 - (b) *includes, if P is taking a step on A's behalf or otherwise at A's direction or request, any other person.*
- (3) *In subsection (2) references to A include references to any person linked with A.*
- (4) *The following assets are within this subsection—*
 - (a) *securities,*
 - (b) *interests in securities, and*
 - (c) *securities options,**as defined in section 420 for the purposes of Chapters 1 to 5 of Part 7; and in subsection (1)(c) “acquires” is to be read in accordance with section 421B(2)(a).*
- (5) *For the purposes of subsection (1)(d)—*
 - (a) *references to making a sum of money or asset available are references to making it available in any way, however informal,*
 - (b) *it does not matter if the relevant person has no legal right to have the sum of money or asset used as mentioned, and*
 - (c) *it does not matter if the sum of money or asset is not actually used as mentioned.*

In relation to loans, this provision is draconian. Like ITEPA, section 554A(1)(c)(ii) it makes no distinction between loans which are market value (and confer no benefit) and those which are beneficial. In this respect the bringing of such loans within the charge to tax is penal.

5.2. Similarly, it seems unnecessarily draconian to bring within the charge to tax assets and sums of money to which A has no legal right. While this may be included to block arrangements where there is only a beneficial entitlement, on the clear

meaning of the words it could also include situations where A had no means whatever to recover the money or asset in question (i.e. no legal or equitable right enforceable in a court).

5.3. Subsection (2) provides certain difficulties of interpretation. In this respect, the HMRC Guidance gives no assistance in relation to this subsection. One is left wondering, for example, what constitutes being chosen by A (of, course there will be circumstances which one can say with a degree of certainty would be within the wording) and what will constitute a direction or request. One possibility is that because HMRC do not make reference to the direction or request being informal, which they do in relation to other concepts, and on this basis it may be arguable that an informal request or direction would not be sufficient.

6. *Relevant steps – making available*

6.1. Section 554D provides:

(1) *A person (“P”) takes a step within this section if, without transferring the asset to the relevant person, P—*

(a) *at any time, makes an asset available for a relevant person to benefit from in a way which is substantially similar to the way in which the relevant person would have been able to benefit from the asset had the asset been transferred to the relevant person at that time, or*

(b) *at or after the end of the relevant period, makes an asset available for a relevant person to benefit from.*

(2) *If—*

(a) *before the end of the relevant period, P makes available an asset for a relevant person to benefit from, and*

(b) *at the end of the relevant period, P continues to make the asset available for the relevant person to benefit from,*

P is treated as taking a step within this section by virtue of subsection (1)(b) at the end of the relevant period.

(3) *For the purposes of subsections (1) and (2)—*

(a) *references to making an asset available are references to making it available in any way, however informal,*

- (b) *it does not matter if the relevant person has no legal right to benefit from the asset, and*
- (c) *it does not matter if the relevant person does not actually benefit from the asset....*

6.2. This provision is primarily targeting situations where, for example, a holiday property is put into an EFRBS and the beneficiaries of the EFRBS (or the sub-fund in which the property is held) are able to use it. It will also apply to loans of tangible property.

6.3. In relation to this provision, the HMRC Guidance provides (at paragraph TEMP14):

When applying the substantially similar condition you can take into account these factors:

- *Any limitations in the way in which the relevant person may benefit from the asset.*
- *The period over which the asset is being made available.*
- *... the extent to which that period covers the expected remaining useful life of the asset.*
- *The extent to which the relevant person ... has a say over the disposal of the asset.*
- *The extent to which the relevant person may:*
 - o *benefit from any of the proceeds of the disposal of the asset, or*
 - o *otherwise have a say in the way the proceeds are used*

...

For practical purposes, the key question to ask is: "Suppose the relevant person was the outright owner of the asset. What difference would that make to the way in which that person benefited from it?"

The HMRC Guidance goes on to explain that HMRC do not consider company cars on short term lease for personal use, or the occasional non-exclusive use of a holiday home while in employment would not fall within section 554D. It is not made clear on what basis (either of the application of the legislative provision or the application of their own guidance) this is the case (which would be helpful in more generally determining how the provision should be applied), but in my view both statements are likely to be correct.

6.4. There are a number of exclusions in relation to relevant steps. These are found in ITEPA, sections 554E to 554Y, but are not set out here (for the sake of brevity!).

7. Charging provisions

7.1. The charging provisions are found in ITEPA, sections 554Z2 (the actual charge) and section 554Z3 (the value of the relevant step). Section 554Z2 provides:

(1) If this Chapter applies by reason of a relevant step, the value of the relevant step (see section 554Z3) counts as employment income of A in respect of A's employment with B—

(a) if the relevant step is taken before A's employment with B starts, for the tax year in which the employment starts, or

(b) otherwise, for the tax year in which the relevant step is taken.

(2) If the relevant step gives rise to—

(a) an amount which (apart from this subsection) would be treated as earnings of A under a provision of the benefits code, or

(b) any income of A which (apart from this subsection) would be dealt with under Chapter 3 of [Part 4](#) of ITTOIA 2005,

subsection (1) applies instead of that provision of the benefits code or Chapter 3 of [Part 4](#) of ITTOIA 2005 (as the case may be).

(3) In particular, in a case in which the relevant step is the making of an employment-related loan (within the meaning of Chapter 7 of Part 3), the effect of subsection (2)(a) is that the loan is not to be treated for any tax year as a taxable cheap loan for the purposes of that Chapter.

7.2. The value is determined in accordance with section 554Z3, which provides:

(1) If the relevant step involves a sum of money, its value is the amount of the sum.

(2) In any other case, the value of the relevant step is—

(a) the market value when the relevant step is taken of the asset which is the subject of the step, or

(b) if higher, the cost of the relevant step.

(3) Subsection (2)(a) is subject to sections 437 and 452.

(4) Subsection (2)(b) is to be ignored if—

(a) the relevant step is within section 554C(1)(c), and

(b) any of Chapters 2 to 4A of Part 7 apply by virtue of the acquisition.

- (5) Subsection (2)(b) is also to be ignored if section 554Z7⁵ applies.
- (6) In subsection (2)(b) the reference to the cost of the relevant step is to the expense incurred in connection with the relevant step (including a proper proportion of any expense relating partly to the relevant step and partly to other matters) by the person or persons at whose cost the relevant step is taken.
- (7) Subsections (1) and (2) are subject to sections 554Z4, 554Z5, 554Z6, 554Z7 and 554Z8, which, so far as applicable, are to be applied in that order.

8. Priority Rules

- 8.1. There are, of course, circumstances under which there could be a charge under more than one provision. It is, therefore necessary to determine which provisions should be applied first.
- 8.2. ITEPA, section 554Z6 provides that a charge under section 62 takes priority over Part 7A. This is not, however, strictly a priority rule because the Part 7A charge is merely reduced by the amount of the section 62 charge.
- 8.3. A Part 7A charge has priority over the benefits in kind code and the Income Tax (Trading and Other Income) Act 2005, Part 4, Chapter 3 (section 554Z2).
- 8.4. Finally, section 394 (as amended by FA 2011) provides that a general earnings, and a Part 7A charge take priority over a charge under ITEPA, Part 6, Chapter 2 (benefits from EFRBS).
- 8.5. Finally, there is one more provision to prevent double charging (though it is not a priority provision as such). Where a double charge does arise under Part 7A, section 554Z13 provides:
- (1) This section applies if—
- (a) after the relevant step is taken, another event (“the later event”) occurs,
- (b) other than by virtue of—
- (i) this Chapter,

⁵ Exercise price of share options

(ii) *Chapters 2 to 5 of Part 7, or*

(iii) *Part 9,*

the later event would (apart from this section) give rise to a liability for income tax of A or any other person on an amount ("the later amount"), and

(c) *it is just and reasonable for this section to apply in order to avoid a double charge to income tax in respect of the sum of money or asset which is the subject of the relevant step.*

(2) *So far as it is just and reasonable in order to avoid a double charge to income tax as mentioned in subsection (1)(c), there is to be no liability to income tax on the later amount by virtue of the later event.*

9. *The new statutory language*

9.1. The new statutory language has provided much consternation, especially for lawyers. Generally, a law which fails to be clear, and to define the scope of its application accurately and with the minimum of ambiguity (obviously ambiguity cannot be eliminated altogether), can be considered a "bad" law. People should not be expected to comply with that which is not susceptible to comprehension or to reasonably certain interpretation. The use of wishy-washy phrases such as "in essence", "covers or relates" and "for example", leaves many people in doubt about the proper application of the law, and whether or not they are caught.

9.2. HMRC's answer of more comprehensive guidance is not really a solution, because at base it is the courts' interpretation of the provisions, and not HMRC's, which is important. This cannot at present be predicted with any certainty because of the impreciseness of the language. The provisions seem to take a double-barreled approach of very general provisions to catch everything they might want to catch with quite specific provisions to target certain schemes in existence. This potentially gives taxpayers the worst of both worlds.

9.3. In the HMRC Article it is said:

HMRC recognized that a piece of legislation as wide ranging as Part 7A was likely to generate comment and debate ... HMRC will continue to engage with advisers to understand any ongoing areas of concern, and will add to or revise the guidance as necessary to give as much clarity as possible ...

As stated above, this is hardly a substitute for properly drafted well-thought out legislation which can be applied with a degree of certainty.