

Business Investment Relief

9 November 2017

INTRODUCTION

Business Investment Relief (BIR) was introduced in April 2012 to stimulate overseas investment into the UK. To further encourage investment, changes to the relief were introduced on 6 April 2017 relaxing certain provisions.

In effect, BIR allows the individual to make a tax-free remittance of their overseas income and gains to the UK, as long as they use the funds for a commercial investment in a company.

WHO CAN CLAIM THE RELIEF?

As mentioned above, BIR is available to non-UK domiciled individuals who are, or have been, assessed to UK tax on the remittance basis.

The individual or a 'relevant person' must make a 'qualifying investment'. A 'relevant person' includes a close relative, a trust for the benefit of the individual (or close relative), or a close company in which any of these persons is a participator.

WHAT IS A 'QUALIFYING INVESTMENT'?

A 'qualifying investment' includes both subscription for ordinary or preference shares in an eligible company or a loan to an eligible company (the 'target company').

Previously, the share subscription had to be for newly issued shares. However, from 6 April 2017, a qualifying investment can also be made by acquiring existing shares (i.e. purchased from a third party).

If the funds are brought to the UK in advance of the investment, then the investment must be made within 45 days of the money being received in the UK.

There are no restrictions on the size of the investment or the amount of remitted income or gains that can be used.

THE 'TARGET COMPANY'

The 'target company' must be an unquoted trading company. For these purposes, an AIM listed company is treated as an unquoted company. Investments in partnerships or limited liability partnerships do not qualify for relief.

The company must be carrying on a commercial trade or do so within 5 years (2 years for investments made prior to 6 April 2017).

Where the trade accounts for at least 80% of a company's total activities, and it is carried on with a view to making profits, the company will generally be regarded as meeting the commercial trade requirement.

The definition of 'trade' is extended to include businesses that generate income from land or property (i.e. property letting businesses) and activities involving research and development which are intended to lead to a commercial trade.

The recent changes make it clear that a company which is a partner in a partnership is not to be regarded as carrying on the trade of the partnership, meaning that unless the target company is carrying on a commercial trade in its own right, it will not qualify for BIR.

Holding and stakeholder companies will qualify if they are part of an eligible trading group (holding company) or making investments in eligible trading companies (stakeholder company).

From 6 April 2017, the investment can be made in a hybrid trading and stakeholder company. Previously the company either had to be one or the other to attract the relief.

The company does not need to be incorporated or resident in the UK.

THE INVESTOR MUST NOT RECEIVE A BENEFIT FROM THE COMPANY

BIR will not be available if the investor has directly or indirectly obtained, become entitled to obtain or expects to obtain a benefit as a result of making the investment.

A benefit represents anything which would not be provided in the ordinary course of business. Receiving a salary at a market rate, dividends paid out of profits, loan interest not exceeding commercial rates and anything else a similar investor might reasonably expect to receive will not disqualify the investment.

HOW TO CLAIM THE RELIEF

BIR does not apply automatically. It must be claimed by the first anniversary of the 31 January following the tax year in which the foreign income or gains would otherwise be treated as having been remitted to the UK.

For example, relief for funds brought to the UK for investment in the year ending 5 April 2018 must be claimed by 31 January 2020.

If there is any uncertainty as to the availability of BIR, it is possible to seek clearance from HMRC before making the investment.

CLAWBACK OF THE RELIEF

A clawback of the relief may be triggered, and the invested funds treated as a taxable remittance, if any of the following potentially chargeable events occur:

- a disposal of all or part of the investment;
- the target company ceases to be an eligible company;
- the target company does not commence trading within 5 years; or
- the individual or a relevant person receives value from a company (an 'extraction of value') that is directly or indirectly linked to the investment, unless the value received is subject to income tax or corporation tax and provided in the ordinary course of business and on arm's length terms.

If appropriate mitigation steps are taken, following the occurrence of the potentially chargeable event but within the relevant grace periods (detailed below), there will be no taxable remittance.

Where there is a disposal, the investor has 45 days, from the day on which the proceeds become available, to send the proceeds offshore or reinvest them in another qualifying investment.

Where the company ceases to be eligible or there was an extraction of value, the investor has 90 days to dispose of the holding and then a further 45 days to either send the proceeds offshore or reinvest them in another qualifying investment.

In the event that the company does not commence trading within 5 years (2 years for investments made before 6 April 2017), the grace period has been extended (following the 6 April 2017 rule changes) allowing the investor 2 years to dispose of the holding and to either send the proceeds offshore or reinvest them in another qualifying investment.

'Proceeds' for these purposes means the lower of:

- the actual disposal proceeds; and
- the sum originally invested less any part of the sum that has previously been treated as remitted to the UK, sent offshore or invested in another qualifying investment.

It is important to note that where there is an extraction of value, which has not been appropriately mitigated, the entire amount of BIR will be clawed back even if the value extracted is minimal.

INTERACTION WITH OTHER UK TAX RELIEFS

Claiming BIR does not affect entitlement to other reliefs. Providing the relevant conditions are met, the investor can, in addition to BIR, claim relief under the Enterprise Investment Scheme or Seed Enterprise Investment Scheme.

If the investment is UK situs and the relevant conditions are satisfied, Business Property Relief might also be available providing a full exemption from UK inheritance tax.

CONCLUSION

BIR is undoubtedly a valuable relief for a non-UK domiciled remittance basis taxpayer looking to invest in the UK. It is useful that there are no restrictions in relation to the size of the investment, the value of the remittance, the connection with the target company and the interaction with other UK tax reliefs.

However, to prevent the occurrence of an unplanned taxable remittance, it is recommended that the investor seeks professional advice and, where there is uncertainty, clearance from HMRC in advance of making the investment.

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