

THE VENTURER

Welcome

Welcome to **The Venturer**, our private equity update which keeps you informed of current issues and news in private equity industry.

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The first half of 2011 has proved as changeable for the private equity industry as this summer's weather. The outlook for the next six months looks set to provide much the same, with bailouts and public sector cut-backs across Europe set to cast a shadow over private sector driven recovery in the UK.

Whatever the outlook, good management remains key and, our lead article discusses how to reward and incentivise business owners and managers in a tax efficient way following the recent changes to **Entrepreneurs' Relief** and the introduction of the new "**Disguised Remuneration**" legislation.

The **renewable energy market** has also received considerable attention from the Coalition Government recently. Our article on page three assesses the opportunities which remain for potential investors in renewable energy technologies despite the uncertainty which the Government's recent intervention in the sector has introduced.

Last month also saw the introduction of the **UK Bribery Act** as well as a stunning victory for Novak Djokovic at Wimbledon. However, following the introduction of the new Act on 1 July, could a trip to watch the men's final on centre court lead to an entirely different kind of court appearance in the future?! There has been a lot of press speculation regarding whether corporate hospitality will be caught by the new Act and our article on page four sets out the key steps you should take if you have not considered how the new legislation will impact your business.

We hope that you enjoy this issue of The Venturer!

Incentivising management

Rewarding and incentivising business owners and managers in a tax efficient way is at the heart of any successful business. The last 12 months have brought major changes to the rules on **Entrepreneurs' Relief** and have also seen the introduction of the new "**Disguised Remuneration**" legislation.

These changes are already impacting on the way deals are structured and how owners and managers will be incentivised in the future. This article explains the current position and highlights the key points to consider.

1. Entrepreneurs' Relief

The Coalition Emergency Budget in June 2010 dramatically overhauled the CGT rules. As you know, out went the flat rate of 18% to be replaced by a maximum rate of 28%. This applies unless Entrepreneurs' Relief is available which will reduce the rate to 10%.

The amount of Entrepreneurs' Relief which can be claimed has also increased significantly. It now gives a 10% rate of tax for £10 million of qualifying gains per individual during their lifetime. This makes it worth a maximum of £1.8 million of tax saved per individual - Entrepreneurs' Relief therefore cannot be ignored.



The rules are tightly drawn and not all shareholdings will qualify. The rules require:

- (i) the company to be a trading company (which means that if the company has investments, the time spent by the directors on trading activities must be at least 80%); and
- (ii) the individual concerned to own at least 5% of the share capital and voting rights of the company and to be an employee or company officer. Crucially all of these criteria must be met continuously for the **12 months** before sale. If they are not met, there will be no relief.

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It is easy to miss out on the relief, but there is also great potential to plan within these rules to qualify for it where you might not expect it to be available. Common pitfalls and opportunities include:

There is scope to use more than one £10 million allowance

If done correctly, transferring shares to a spouse or other family member before sale can allow them to use their allowances and save up to £1.8m in tax per individual.

The shareholder must be an employee or officer at sale

The requirement to be a company officer or employee for 12 months prior to sale is strictly enforced. Individuals who retire or are dismissed just before sale will not qualify. Likewise those who are in fact self-employed may not qualify. This needs to be factored into any deal.

What if the shares have not been owned for 12 months?

This is often the case if the deal happens quicker than expected or for shareholders who immediately prior to sale exercise options or are gifted shares.

The deal can still be done and Entrepreneurs' Relief claimed, but only if the sale price is deferred. One route is to grant an option to sell the shares at a point in the future after the 12 month period has passed. Another is to roll some of the sale proceeds into shares or loan notes in the acquisition vehicle in such a way that Entrepreneurs' Relief is available on their disposal. Both routes require the shareholder to continue to be an employee or officer of the company until the options are exercised or the replacement shares or loan notes sold.

What if the shareholder has less than 5% of the shares and/or voting rights?

A 5% shareholding giving 5% of the voting rights is strictly required. Extra shares can be given to those shareholders who are short and the legislation is helpful here in that the definition of shares qualifying for Entrepreneurs' Relief is broad. This makes it possible to give shares with extremely limited rights and economic value but which still qualify to bring the shareholder up to the requisite 5% threshold.

If numerous shareholders are under the 5% threshold, a management feeder company could be created to hold their combined shareholdings. Crucially they would each own 5% or more of that feeder company and therefore all qualify for relief. Such a feeder company can be introduced into existing structures and should be considered for future structures following sale.

The key to Entrepreneurs' Relief is to start planning early so that shares are held in the right way to maximise relief for the 12 months before sale. There may be fixes if this is considered immediately before sale, but the earlier it is looked at the better.

2. Disguised Remuneration

New measures, known as the "Disguised Remuneration" provisions which are effective from 6 April 2011 are causing headaches for those involved in the provision of employee rewards and incentives.

Though targeted at loans and benefits provided through Employee Benefit Trusts (EBTs) and unregistered retirement benefit schemes (known as Employer Financed Retirement Benefit Schemes or EFRBS), the measures will have wider impact.

The measures are broad anti-avoidance provisions which are intended to catch any arrangements which concern the provision of rewards, recognition or loans in connection with a person's employment. The arrangements caught include not only those created by formal agreement, but also a mere promise or understanding between the parties.

To be caught specified steps must be taken by a "relevant third person" (such as a trust) and so direct arrangements between an employee and his employer should not be caught provided that the employer is not acting as a trustee (see below).

The steps which trigger a charge are the earmarking of assets or sums of money, the payment of a sum of money or transfer of an asset, or making an asset available to an employee. Immediate employment tax liabilities can be triggered upon those steps being taken and those liabilities can arise prior to any asset or money being received by the employee.

The full impact of the provisions are yet to be seen but some headline issues are already apparent:

PAYE and National Insurance contributions obligations – even for private company shares

Charges under the provisions will give rise to PAYE and National Insurance contribution obligations. This is the case even where the charges are triggered by steps relating to shares in a private company and there is no market for the shares.

Exemptions and reliefs available but narrowly drawn

Exemptions and reliefs from charge under the provisions are available. Share based incentives benefit from a variety of exclusions from charge which may increase their attractiveness as a means of providing deferred rewards. However, they are very prescriptive. Employers will want to take care to ensure that any arrangements at risk of being caught by the new provisions fall within those exemptions.

Problems posed for 'warehousing' shares?

Transactions in shares between employees and EBTs, even at market value, may be at risk of an 'earmarking' charge on the value of the assets or money held by the EBT. Advisors are still debating how best to arrange the mechanics of a transaction so as to avoid earmarking taking place. If earmarking does take place, there are circumstances where a charge is triggered despite full consideration passing.

Non-executives also potentially caught

Similar to many other employment tax charges, the new provisions relate to office-holders such as non-executive directors as well as employees.

Direct employer/employee arrangements should be in the clear

Save for limited cases involving retirement benefits, arrangements which only involve an employer (or its group

"The key to Entrepreneurs' Relief is to start planning early."

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companies) and an employee, should escape the measures. Group companies must meet a specific definition (broadly based on a 51% subsidiary test) to avoid being treated as a third party.

Health check on arrangements advisable

Employers and providers are now reviewing employee reward and incentive arrangements including the following:

- any provision for retirement benefits outside of a registered pension scheme (whether or not it involves a third party);
- any arrangement involving a trust;
- employee benefits or deferred remuneration involving third parties;

- share incentive arrangements using shares held in trust or by a shareholder.

Whilst the dust settles on this new legislation we expect that HMRC guidance, hoped for at some point later this month, will shed some light on its application. If it does not, employees, employers and third party providers may be left with an uncomfortable level of uncertainty when planning rewards and incentives.

If you would like any further information, please contact **Jim Aveline** on +44 (0)117 939 2283 or jim.aveline@burges-salmon.com or **Paula Hargaden** on +44 (0)117 307 6981 or paula.hargaden@burges-salmon.com

“Share based incentives benefit from a variety of exclusions from charge available...”

UK Government's Renewable Energy Policy - F-iT for purpose?



The renewable energy market unquestionably remains buoyant. However, whilst there generally remains a strong appetite on the part of investors, a range of recent initiatives and regulatory uncertainties is testing the appetite of investors to take the plunge and commit to UK projects.

Fast-track review

The Government's fast-track review of the Feed-in Tariff levels for solar PV projects reached the conclusion on 9 June 2011 that tariff levels should be cut drastically for those solar projects between 50kW and 5MW which do not achieve accreditation before 1 August 2011. The speed and the extent of the reduction of the tariff levels in support of these projects has left many solar developers and investors licking their wounds. Understandably, many are concerned that this unanticipated Government intervention may have undermined investors' confidence in the UK renewable energy market more generally.

Meanwhile, the whole energy sector is grappling with the Government's recently published proposals for electricity market reform ("EMR") which is billed as the most comprehensive and radical reform of the electricity markets since privatisation over 20 years ago. The three main objectives of the EMR are security of supply, decarbonisation and affordability, which are laudable. However, until the Government identifies how it will implement the changes, the uncertainty is clearly not helpful to those looking to invest during the intervening period.

Renewable Heat Incentive Scheme

Despite the uncertainty, plenty of opportunities remain. The forthcoming Renewable Heat Incentive Scheme will provide a much-needed shot in the arm to the renewable heat sector, increasing the attractiveness of installations using biomass, solar thermal, biogas and heat pumps. The first phase (to be introduced this month) will target the non-domestic sector, with the second phase providing for long-term tariff support for the domestic sector to coincide with the introduction of the Green Deal, the Government's scheme for targeting home energy efficiency improvements. In addition, the modest increase in Feed-in Tariff support levels for sub-500kW anaerobic digestion projects will undoubtedly help to make more of these schemes financially viable and interesting to investors.

Elsewhere, the reduction in tariffs for larger solar projects has seemingly had little impact on the appetite of those considering investing in sub-50kW (predominantly rooftop) solar schemes and there is also a queue of investors hoping to back the right technologies as marine and tidal schemes come out of development and begin to be deployed on a commercial scale.

For more information on our renewable energy capabilities please contact **Ross Fairley** on +44 (0)117 902 6351 or ross.fairley@burges-salmon.com or **James Phillips** on +44 (0)117 902 7753 or james.phillips@burges-salmon.com

“...a range of recent initiatives and regulatory uncertainties is testing the appetite of investors...”

The Bribery Act 2010 - are you ready?! If not, read on...

"The Act completely overhauls the law of corruption and imposes one of the strictest anti-corruption regimes in any country."

"...it is not too late if you have not yet considered how the Bribery Act will affect your business."



On 1 July 2011, the Bribery Act 2010 came into force in the UK. The Act completely overhauls the law of corruption and imposes one of the strictest anti-corruption regimes in any country.

The Act creates four new offences:

- 1. Giving a bribe:** It is an offence for a person to offer, promise or give a financial or other advantage to another person, where that advantage is intended to induce that other person to perform his functions or activities improperly, or reward that person for improper performance.
- 2. Receiving a bribe:** It is an offence for a person to request or accept a financial or other advantage if it is intended that, as a result of receiving that advantage, he will perform his functions or activities improperly.
- 3. Bribing a foreign public official:** It is an offence to offer or provide a financial or other advantage to a foreign public official with the intention of obtaining or retaining business or an advantage in the conduct of business.
- 4. The "Corporate Offence":** An offence will be committed by a commercial organisation if any of the bribery offences described above are committed by a person "associated" with (i.e. anyone performing services on behalf of) the organisation, with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation. However, it is a defence for the organisation to show that it had in place "adequate procedures" designed to prevent persons associated with it from committing acts of bribery.

Although many UK businesses have sought to implement such procedures in view of the 1 July 2011 implementation date, a significant number are yet to grapple with how the Act will affect them.

However, it is not too late if you have not yet considered how the Bribery Act will affect you. Private equity houses and portfolio companies will need to:

- Read the Ministry of Justice Quick Start Guide and Guidance on the Act and consider how the Act applies to you.
- Carry out a risk identification process to determine the bribery risks you face.
- Ensure that their senior management send a clear message of zero tolerance towards bribery throughout your business.
- Design and implement an overarching anti-bribery policy.
- Consider inserting into investment, commercial and employment contracts clauses requiring compliance with the Act.
- Carry out appropriate due diligence on potential new management, employees and contractors.
- Provide training on the Act to those that require it.
- Ensure that a proper reporting and investigation mechanism is in place for any suspected instances of bribery.

Through carrying out these steps, you will be better able to demonstrate that your business has the "adequate procedures" required to minimise the chances of committing the "Corporate Offence".

If you would like any further information regarding the Bribery Act or would like to discuss how it will affect your businesses, please contact **Thomas Webb in our Disputes team on +44 (0)117 307 6976 or thomas.webb@burges-salmon.com**, or contact the lawyer at Burges Salmon with whom you usually deal.

Good practice reporting

The Walker Guidelines for Disclosure and Transparency in Private Equity, first published in November 2007, set out a voluntary code to be implemented on a 'comply or explain' basis and require private equity firms to provide greater public disclosure of their activities with the aim of improving transparency in the industry.

The Guidelines apply to private equity firms authorised by the FSA that manage or advise investment funds that own or control one or more UK 'portfolio companies'. The Guidelines also apply to the portfolio companies themselves. 'Portfolio companies' are defined as those which:

- generate more than 50% of their revenues in the UK; and
- employ more than 1,000 full time equivalent UK employees; and
- satisfy a size threshold of £300 million in terms of market capitalisation plus acquisition premium (for a public to private transaction) or £500 million in terms of enterprise value (for a secondary or non-market transaction).

Requirements

The Guidelines require each portfolio company to:

- incorporate an enhanced business review and certain

additional information in its annual report and accounts;

- make its annual report and accounts available within six months of the financial year end and to publish them on its website; and
- publish on its website within nine months of the start of each financial year a mid-year update of major developments in the company.

New guidance for portfolio companies

In June, the Guidelines Monitoring Group, which was established under the Walker Report to monitor compliance with the Guidelines, issued guidance to help portfolio companies comply with the Guidelines by setting out examples for good practice in contrast with mere basic compliance.

Although the Guidelines do not apply to the majority of portfolio companies, market commentary would suggest that some are choosing to comply with the Guidelines on a voluntary basis in the belief that they represent good corporate governance. It is worth noting that voluntary compliance with the Guidelines could potentially enhance a company's reputation, particularly in advance of a sale, flotation or refinancing.

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Finance Act 2012 - Good news for UK private equity

Will Finance Act 2012 herald a rush of new business for the UK private equity industry? Revenue and the Treasury certainly think so. Reform of the tax system to make it easier for wealthy non-doms to invest in Britain is almost certain to hit the statute book from April 2012 as part of the Government's drive to make Britain open for business.

The current system

What is the problem today? Wealthy non-doms have money available for investment, and many are big players in the UK. But at present the tax system encourages them to invest elsewhere. If they have wealth offshore that consists of income or gains from investments, that money is untaxed if it stays outside the UK, but gets taxed when it is brought into the country - even for investment in UK business. So for many non-dom investors, investing in the UK could mean upfront tax at 28% or even 50% just for making the investment, with UK tax on income and any return on their investment. The Government wants to end that disincentive to putting money into the UK economy.

Consultation

A consultation paper issued by HM Revenue & Customs (Reform of the taxation of non-domiciled individuals: a consultation http://www.hm-treasury.gov.uk/consult_nondom_tax_reform.htm) proposes that non-doms

should be able to bring offshore funds into the UK to invest in UK businesses without paying taxes on the remittance basis. There will be no limits to the relief, as long as once the investment is disposed of the money leaves the UK promptly. Any business, even commercial property investment, will benefit (although at present it is not clear whether listed stocks will be included). As long as the ultimate investee is a company which has at least a permanent establishment in Britain no structuring problems are expected.

The consultation proposals are very likely to become law. While the last government confronted the non-dom community but shied away when it met resistance in 2008, the current administration understands the contribution non-dom money makes to the UK economy, and wants to enhance it. Non-doms, their advisers and individuals in the wealth-management industry are keen on the proposals and we expect only to see a little fine-tuning between now and April. Potential non-dom investors can be reassured that their private equity investments next year will suffer less UK tax drag and achieve better overall returns.

For more information, please contact **Michael Evans on +44 (0)117 939 2249 or michael.evans@burgess-salmon.com** or **Jon Rollason on +44 (0)117 307 6836 or jon.rollason@burgess-salmon.com**

Recent deals

In the private equity world Burges Salmon has recently been involved in the following transactions:

A-Gas

Advised the management shareholders on the £70 million tertiary buyout of A-Gas by LDC.

Snow & Rock

Advised the shareholders of Snow & Rock Sports Limited, the outdoor sports equipment retailer, on the sale of the company to a management buyout vehicle backed by LGV Capital.

Albion Ventures LLP

Advised Albion on the investment in Masters Pharmaceuticals.

QIB (UK) plc

Advised Islamic investment bank QIB on its Shari'a compliant investment in IOTA Nanosolutions, a venture capital backed nanodispersion technology company.

James Hull

Advised the company and management on the terms of investment by AXA Private Equity. James Hull is a leading UK dental services provider.

Helius Energy Plc

Advised AIM listed biomass energy development company Helius on a £9.3 million investment from Rabo Project Equity B.V. into an existing joint venture between Helius and the Combination of Rothes Distillers Limited.

Marketing news

New appointments

Burges Salmon has appointed five new Partners. **Dominic Davis** (Corporate Finance), **Briony Thomas** (Commercial), **Steven James** (E&P) and **Ross Polkinghorne** (Real Estate) became Partners on the 1st May.

We have made four new external appointments:



Patrick Cook has joined as a Partner in the Corporate Turnaround and Insolvency Practice. Patrick joins from Taylor Wessing and has greatly enhanced the firms CTI team.



Lynton Boardman has joined Burges Salmon from QinetiQ where he was General Counsel and Company Secretary. Lynton focuses on Risk Management and Business Development.



Philip Beer joined as Partner in the Real estate practice in March. He joins us from Simmons and Simmons.



Kari McCormick was appointed as a Partner in July. She was previously a Partner at Clifford Chance and brings a wealth of experience in dispute resolution, particularly for insurance companies.



NED Forum

We will be holding another Non-Executive Director Forum in the Autumn. If you are a non-executive director (or interested in becoming one) and would like to receive an invitation, please contact **Ellie Rose** (ellie.rose@burges-salmon.com).

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Visit our website at www.burges-salmon.com