Employee Benefit Trusts – a time and place for us?

You could be forgiven for thinking that employee benefit trusts (known as 'EBTs') are resolutely to be considered the 'bad boys' of the trust world. Widely used in the past to facilitate tax beneficial 'remuneration schemes' for highly paid employees, and more recently, for heavily-sold 'contractor loan' arrangements for the self-employed, EBTs have been the subject of sustained attention by HMRC.

Many of the more creative uses have been closed down through the introduction of the 'disguised remuneration' legislation and there has been a furore about the recent retroactive legislation requiring those with historic 'contractor loans' to pay up as of April this year, even where this will cause considerable hardship.

In this rather febrile atmosphere, it is reasonable to question whether there are still legitimate uses for EBTs which deliver commercial benefits to companies and their shareholders but which don't involve reputational or tax risk.

The answer is yes. Away from the tax planning sphere, EBTs remain a potentially useful vehicle for increasing employee participation, delivering benefits and creating a market in shares.

For example:

- EBTs can provide a 'warehouse' for shares allocated to an employee share scheme by holding a pool of shares to satisfy grants and by providing a ready-made buyer for departing employees;
- an EBT can be set up to acquire the shares from a major departing shareholder where a buy back by the company would give rise to income tax treatment on proceeds;
- in a particular form, an EBT can be an 'employee ownership trust', to which a majority shareholder or shareholders can sell their shares with a complete exemption from tax.

This is not to say, there are not complexities to consider. In particular:

- for owner-managed businesses, careful consideration has to be given both to how the EBT will be funded to acquire assets and to how any shares or other assets can be extracted from the trust if they are not required for employees or on a sale of the business (both of which have tax implications to be managed);
- from a trust point of view, it is important to remember that the EBT is a discretionary trust and that whilst the trustees can include directors of the company it is important that the trustee or trustees are independent and only act on recommendations (not instructions) from the company; and
- remember that once assets are held in the trust they must be held for the benefit of the employee group rather than for the shareholders – however excess funds can be used to pay bonuses or a range of other benefits either selectively or for the whole workforce if appropriate.

In short, despite the current over-heated press coverage and HMRC's ferocious approach, there's no need to avoid setting up an EBT if it suits your legitimate purposes and encourages employee retention and satisfaction.

How we can help

Our employment solicitors advise both employers and employees on a variety of different employment matters. To find out how we may be able to assist you, please contact our employment law team.