



Faculty of Taxation

## **TAX REP 38/03**

### **TAX LAW REWRITE: LEASE PREMIUMS**

*Memorandum submitted in October 2003 by the Tax Faculty of the Institute of  
Chartered Accountants in England and Wales in response to  
Paper CC/SC(03)08: Lease Premiums issued in  
July 2003 by the Inland Revenue*

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## **TAX LAW REWRITE: LEASE PREMIUMS (PAPER CC/SC(03)08)**

### **A GENERAL COMMENTS**

1. We welcome the opportunity to comment on Paper CC/SC(03)08 published in early July 2003 primarily for the consideration of the Consultative and Steering Committees. Our understanding is that, following publication of the Paper on 9 July on the Revenue's website <http://www.inlandrevenue.gov.uk/rewrite/index.htm>, comments are also welcomed more widely. We commented in TAXREP 19/02 (July 2002) on the clauses as originally drafted and included in ED13. We set out below our comments on the clauses as presently drafted.
2. We note that the same basic structure as in Chapter 3, Part 3 in ED13 has been retained; any further improvement in the draft clauses being constrained by the complexity of the source legislation. We are content with the structure and of course support the redrafting aim of making the language simpler and more accessible (Introduction and Background paragraph 7).
3. We note also that those proposed changes found acceptable by respondents to ED13 have been incorporated in the revised clauses; but that the clauses rewriting s 37 ICTA have now been substantially redrafted, as redrafted clauses 247 – 253, and as explained in Introduction and Background paragraphs 10 – 18.
4. We agree that it is appropriate to redraft the relief provisions now in clauses 247 – 250 with 253 on the basis that the rewrite ought not to create the possibility of any new restriction of relief in however infrequent circumstances, as explained in Introduction and Background paragraph 13.
5. Despite its complexity still, we also welcome the drafting of clause 252 as remedying the defect in s 37(5) ICTA referred to in Introduction and Background paragraphs 15 – 18.
6. We have no objection to the inclusion of clause 254 in Chapter 4 of Part 3 and to attributing to the Inland Revenue the Board's power to allow instalment payments in s 34(8) ICTA, as referred to in Introduction and Background paragraph 19.
7. We supported the drafting of ED13 clauses 250 – 257 in paragraph 9 of TAXREP 19/02, and accordingly welcome introductory clause 236 and the essentially standardised drafting of clauses 237 – 246 as now improved. We are also content with the related Changes 24, 101-103 and 105.
8. We welcome the redrafting of ED13 clauses 258 -266 (Relief) as clauses 247 – 253.
9. Clauses 247 – 250, dealing with the additional calculation rule, are not easy reading; but they are comprehensible with some effort, any difficulty with understanding them flowing mainly from the complexity of the original legislation itself. As redrafted, the additional calculation rule works effectively. The term 'the amount of the receipt under calculation' used in clause 248(2) is somewhat cumbersome; but some such description

of the product of reducing the clause 247 receipt by the clause 248 basic relieving amount(s) is necessary in this key clause 248(2) definition of the rule.

10. ED13 clause 266 is now rewritten as clause 251 (Deductions for tenants under taxed leases) which is now further supported by clause 252 in order to take necessary account of the section 248 additional calculation rule when determining the s 251 deduction allowed in calculating the profits of a property business carried on by the tenant under a taxed lease and also of the possibility of there being more than one receipt to be reduced under the additional calculation rule. Clause 253 finally limits the total of the s 248 reductions and ss 45 or 251 deductions to the unreduced amount of the relevant taxed receipt. Clauses 251 and 252 are not easy reading, particularly clause 252(7); but again they work effectively and, given the complexity of the original legislation, it is in fairness not at all easy to see how they might be further improved.
11. We agree with the reasoning in Introduction and Background paragraph 19 that it is appropriate to now include clause 254 (Payment of tax by instalments) in Chapter 4 of Part 3.

## **B SPECIFIC COMMENTS**

### **Q1.**

12. Agreed.

### **Q2.**

13. It might be helpful to the reader's understanding to include in the Explanatory Notes an overview of the relationship between clauses 247 – 253.
14. Where the tenant himself receives a premium etc under clauses 237 – 242, the taxable amount of that premium etc in the tenant's hands is reduced if his own landlord received such a premium etc from the lease to the tenant. This is the effect of clauses 247 – 250.
15. Where the tenant does not receive such a premium etc, the tenant is allowed a deduction from the profits of his property business if his landlord received such a premium etc from the lease to the tenant, and that deduction is calculated by reference to the amount of the premium(s) etc received by his landlord. This is the effect of clause 251.
16. The complications come in where clause 252 applies. Clause 252 applies where both the landlord and the tenant receive premium(s) etc (respectively from the lease to the tenant, and from the tenant's subletting). In this situation the tenant may obtain both a clause 248 reduction and clause 251 deductions, both by reference to the same premiums etc received by his landlord; but clause 252 then provides for an appropriate interaction between the clause 248 reduction and the clause 251 deductions, restricting the latter and, through clause 253, capping the total relief under clauses 248 and 251 so that it does not exceed the amount of the relevant premium etc received by the landlord. Clause 252 is further complicated in consequence of clause 248 relief by reference to the amount of the same premium etc received by the landlord applying to more than

one (premium etc) receipt arising to the tenant, and where the receipt periods may also overlap.

17. Paragraph 4 of the Summary enquires whether clause 252 goes into too much detail for circumstances that will rarely arise in practice. If the circumstances can arise it is necessary that the rewrite recognises this and, whilst unavoidably complex, the detail of clause 252 does not appear excessive. In paragraph 16 of the Introduction and Background it would perhaps be helpful to give an example of a situation when two or more amounts are chargeable on the superior interest. With reference to paragraph 18 of the Introduction and Background we support the proposal to give rules in the rewrite for applying s 37(5) ICTA where there is more than one amount chargeable on the superior interest or more than one later chargeable amount and to give relief where the total of the appropriate fractions of the amounts chargeable on the superior interest exceeds the later chargeable amount.
18. In this context Explanatory Notes paragraphs 139 and 142 are confusing. In paragraph 139, having regard to its use in paragraph 138, are not the references to 'more than one amount treated under ss 34 or 35 of ICTA as income of a Schedule A business' and to 'more than one later receipt to be reduced under s 37(2)' both references to the same later chargeable amounts, whereas the intention presumably is to refer to more than one amount chargeable on the same superior interest (earlier 'taxed receipt'), and to 'more than one later receipt to be reduced under s 37(2)' (the 'later chargeable amount')? It would be helpful if paragraph 139 could be more clearly worded to this effect.
19. In the first sentence, Explanatory Note paragraph 142 refers to the situation where a *single* earlier taxed receipt has been taken into account in calculating the s 248 reduction to be made to more than one 'taxed receipt' (meaning the receipts described as later chargeable amounts in s 37 ICTA). The use of the description 'taxed receipt' to describe both is further confusing in a complex situation such as this.
20. The wording of Q2 itself is also not readily intelligible. The intention, **which we support**, is to rewrite s 37(5) ICTA (which allows the tenant restricted deductions against a s 34 or s 35 ICTA receipt where a clause 248 to 249 reduction is also allowed in calculating the taxable amount of that receipt) with an extended application to situations where there is more than one taxed receipt *or* more than one (later) receipt to be reduced under the additional calculation rule in clauses 248 to 249. The proposal in Q2 might have been more clearly worded as 'For the purpose of calculating deductions which may be made under clauses 251 to 252, we propose to give rules for applying section 37(5) where there is more than one taxed receipt or where there is more than one receipt to be reduced under the additional calculation rule in clauses 248 to 249'. The question also arises, having regard to the types of potential situation envisaged as to whether the reference should have been to 'or' or to 'and/or'.
21. Where clause 248 relief arises from more than one premium etc (taxed receipts) received by the landlord, our understanding is that the clause 252 application of clause 251 operates separately through clause 251(2) in respect of each of the landlord's taxed receipts.

### Q3

22. Agreed.

## **C SPECIFIC COMMENTS ON MATTERS OF PRINCIPLE**

### ***cl 236 Scope of chapter***

23. This is a neater introductory clause than ED13 clause 249 (Introduction); but appears incomplete. Whilst clause 236(5) introduces s 251 dealing with deductions for tenants under taxed leases, clause 236 does not also effectively introduce the additional calculation rule (clauses 247 – 250 and 252), the clause 253 limit, the administrative provisions in clauses 254 – 257, nor the other interpretative provisions in clauses 261 – 262. Clause 236(6) might also include a signpost to the effective duration of lease provisions clauses 258 – 260. Please also see B – Q2 as regards the inclusion of an overview of the relationship between clauses 247 – 253.

### ***cl 237 Lease premiums***

24. The drafting is an improvement on ED13 clause 250 (Receipt where premium required to be paid), and we agree in particular that clause 237(6) reads more intelligibly than ED13 clause 250(5) as commented upon in Introduction and Background paragraph 7.

### ***cl 238 Amount treated as lease premium where work required***

25. We note that clause 238 is referred to in clause 236(2) (Scope of Chapter) as applicable to short-term leases only, whereas a distinction was made in ED13 clause 249(2) for this type of premium as required by a lease not within the short-term leases in ED13 clause 249(1). We agree that, applying s 34(2) ICTA, clause 238 should only apply where the lease concerned has an effective duration of 50 years or less.

## **D DETAILED COMMENTS ON DRAFTING**

### ***Introduction and Background, para 5***

26. In the second bullet point, the reference should be to ‘clauses 258 to 266’ rather than to ‘clauses 258 to 257’.

### ***Introduction and Background, para 6***

27. In the third line, ‘clause’ should read ‘clauses’.

### ***Introduction and Background, para 17***

28. In the final line, should ‘each’ be deleted?

### ***Annex A PRC No 75***

29. The words ‘proposal to ‘ are duplicated.

### ***Draft Explanatory Notes, para 39***

30. The reference to ‘clause 240’ should be to ‘clause 239’.

### ***Draft Explanatory Notes, para 59***

31. In the third line, the second ‘does’ should be deleted.

### ***Change 103***

32. In the first line of the clause title, is it intended to say ‘leases’ or ‘lease’?

***Draft Explanatory Notes, para 109***

33. In the penultimate line, the reference should be to subsection (4)(a) and not to subsection (4)(b).

***Draft Explanatory Notes, para 117***

34. In the fifth line, the words ‘the amount’ are duplicated.

***cl 242 Assignments for profit of lease granted at undervalue***

***cl 243 Provisions supplementary to section 242***

35. The redrafting of ED13 clause 255 (Receipt on assignment for profit of lease granted at undervalue) as two clauses adds to the clarity of the main clause 242 by moving the supplementary provisions into clause 243.

***cl 244 Sales with right to reconveyance***

***cl 245 Sale and leaseback transactions***

36. The transfer of the supplementary provisions to clause 246 improves the drafting of ED13 clauses 256 (Receipt on sale with right to reconveyance) and 257 (Receipt on sale and leaseback).

***cl 247 Circumstances in which additional calculation rule applies***

37. (1) It would be helpful to explain the absence of any reference to s 238 (Amount treated as lease premium where work required). We assume that the reasoning is that s 238 feeds into s 237 and becomes a receipt under that section.
38. (2) It would perhaps be clearer if this subsection is incorporated into s 247(1) as closing words ‘if conditions A and B are met’. As drafted, s 247(1) appears to apply the rule in s 248 without qualification although it is, of course, clear that it is meant to be read together with subsections (2) – (6). S 248(1) would also then appear to become unnecessary.

***cl 252***

39. (1) The prohibition in this subsection will be apparent from the formula in clause 252(5). The bracketed signpost ‘(see section 284(4) and (5))’ could be incorporated into the clause 252(5) definition of ‘TLR’. The consequential re-numbering of the clause 252 sub-clauses would then reduce any ‘subsection (4) or (5)’ confusion in clause 252(7)(b) and (c) where the same numbered subsections in ss 251 and 252 otherwise occur.

***Change 25***

40. At the end of the first paragraph it may be clearer to refer to ‘to a single taxed receipt’ rather than to ‘to the taxed receipt’.

***cl 256 Claim for repayment of tax payable by virtue of section 244***

41. In Explanatory Notes paragraph 154, in the penultimate line, ‘may be repaid’ should be ‘must be repaid’.

***cl 257 Claim for repayment of tax payable by virtue of section 245***

42. In Explanatory Notes paragraph 156, in the second line on page 19, 'may be repaid' should be 'must be repaid'.

***cl 258 Rules for determining effective duration of lease***

43. (1) Does 'Rule' in the second line require a capital 'R'?

***cl 262 Interpretation***

44. (3) Should it also be stated, in the application of Chapter 4 to Scotland, that 'assignment' means an assignation?

14-13-36  
TJH/PCB  
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