



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

ICAEW REPRESENTATION

TAXREP 26/10

SIMPLIFICATION REVIEW: CAPITAL GAINS TAX FOR GROUPS OF COMPANIES

Memorandum submitted in May 2010 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales representing a response to the discussion document published on 22 February 2010.

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SIMPLIFICATION REVIEW: CAPITAL GAINS TAX FOR GROUPS OF COMPANIES

INTRODUCTION

1. We are writing to provide a response to the discussion document published on 22 February 2010.
2. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Appendix 1.

WHO WE ARE

3. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
4. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
5. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter TAXline to more than 11,000 members of the Institute who pay an additional subscription, and a free weekly newswire.

COMMENTS

Capital losses after a change of ownership

6. The proposals for taking unrealised 'pre-entry' losses out of the pre-entry loss legislation and the extension in the 'carve-out' exemption for offsetting pre-entry losses against subsequent gains on pre-entry property business assets are very welcome.
7. We recommend that HMRC should consider introducing a *de minimis* for pre-entry losses so if they are below (say) £50,000, they are completely outside the scope of the rules. The aim here is to reduce the compliance burden where the capital losses involved are relatively insignificant.

Value shifting rules

8. We welcome the move to a 'tax motive' test in relation to the application of the value shifting rules. This probably means that if the currently 'tainted' transactions take place many years before the final sale, HMRC would be less likely to suspect tax avoidance. I also favour the new proposed six year 'look-back' time limit for depreciatory transactions.
9. Historically, HMRC have only applied the 'dividend-stripping' rule in section 177 TCGA 1992 to dividends paid out of pre-acquisition (or pre-March 1982 profits). Is there not a case for enshrining this practice in the revised law?

De-grouping charge

10. We recognise that the government have given many valuable concessions here. The proposal to bring in the de-grouping charge (in most cases) as an adjustment to the gain arising on the disposal of shares means that many trading groups will be able to shelter the de-grouping gain under SSE.
11. Furthermore, the proposal to grant quasi-SSE relief to de-grouping charges arising on goodwill etc, which have been recently been hived-down, are very welcome for companies that structure their affairs on a divisionalised basis. However, this does not appear to address the problem where companies leave the group as a result of a no gain/no loss transfer under section 139 TCGA 1992, as often happens where there is a company liquidation/reconstruction under section 110 Insolvency Act 1986. It is well known that HMRC will levy a de-grouping charge on assets that have been recently been hived-down to new subsidiaries before the section 139 TCGA 1992 transfer in such cases. Under the new proposals, the no gain/no loss transfer will trump SSE – so it would appear that the gain/loss on the relevant asset transferred into the subsidiary cannot be ‘married’ with an SSE exempt disposal. Are HMRC prepared to give relief from de-grouping charges in such cases where SSE would normally have been available but for the no gain/no loss treatment? From a policy perspective, a special de-grouping exemption is available for statutory demergers but there is not a similar exemption for section 110-based reconstructions
12. We would also suggest that the ‘look-back’ period could be reduced to three years (which would have the merit of aligning with the ‘three-year’ period for SDLT clawback charges).

IKY

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APPENDIX 1

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <http://www.icaew.com/index.cfm?route=128518>).