TAXREP 1/99

TAX LAW REWRITE

Memorandum submitted in January 1999 to the Revenue by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to Exposure Draft No 3: Capital Allowances: Part 1: Industrial Buildings issued in October 1998.

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TAX LAW REWRITE: EXPOSURE DRAFT NO 3: CAPITAL ALLOWANCES: PART 1: INDUSTRIAL BUILDINGS

A GENERAL COMMENTS

Unsatisfactory state of underlying framework

1. The rewrite starkly exposes the fact that the underlying principles of IBAs are extremely complex and need fundamentally redesigning. Without this the rewrite, though worthwhile in its own right, is at best a palliative. We would urge that IBAs are treated as a priority case for review of the framework of the legislation with a view to making it substantially simpler. The rules on enterprise zones offend in particular, as we explain in 1.9 below.

Quality of rewrite

2. Within the confines of having to reproduce the existing legislation, we find that the rewrite is once again a successful project. The new language, and above all the new structure, make the provisions much easier to understand and to navigate through. Largely doing away with deeming something to be different from what it actually is is also a breakthrough.

3. The unravelling of existing section 18 (definition of an industrial building) is particularly successful. You will also see from our specific comments on clauses 1.9.10 and 1.13.3 below that considerable improvements can be made where the original legislation is so scattered that the meaning is much more restrictive than it appears to be, or even the opposite of it.

4. We have a very large number of comments to make but that is hardly surprising seeing that the existing legislation is so complex. A number of our remarks relate to relatively small points.

Status of extra-statutory material

5. We would like there to be a consensus on the status of extra-statutory material. We are concerned at the sheer bulk of material that might have to be recognised in judicial proceedings. Will the *Pepper v Hart* status of statements by Ministers in debates on Bills have to be extended to the overviews, explanatory notes and even your commentary on the rewrite? And will such material have to be taken into account only where the legislation itself is ambiguous, as in *Pepper v Hart*, or in all circumstances? Will the judges have to determine such policy as and when instances arise, or should the matter be settled by law from the start? We would favour an explicit rule that limits *Pepper v Hart* status to its present ambit and states that the other material has no legal standing.

Length of clauses

6. Connected with this point is your policy of having a large number of short sections. We favour your policy of decompressing existing sections which contain a large number of separate concepts in as few words as possible. We wonder, however, if you have taken this policy too far, making it difficult to see the tree for the branches, let alone the wood for the trees. Many of the clause are very short and do not say very much on their own. For instance, if Chapter 1.3 was condensed from its ten clauses into the four corresponding with the headings for the contents on page 77, it would be easier to find one's way around.

Difference between ordinary and legal meaning of words

7. In a number of cases, there is a dichotomy between the ordinary meaning of words and their legal meaning. Examples are 'transfer' and 'the amount ... given by way of premium' (see our comments under 1.6.3(2) and 1.9.13(2)). This gives rise to a more general question for the rewrite: how are words to be construed where they have different meanings in ordinary and legal language? So far, the latter has prevailed but it might be argued that the common meaning should prevail where legislation has been specifically rewritten for the purpose of making it clearer. If so, that rule would itself have to be enacted by statute.

Language

8. Some archaic language has been retained in the rewrite. The concept of 'workers' and 'foreign plantations' do not fit comfortably with the new style. We have referred to such instances below.

Methodology

9. Our comments below are set out under three headings:

B Responses to your questions
C Specific comments and
D Drafting points.

10. In our left-hand column, (apart from the headings) the figures in brackets refer to the draft clauses and subclauses and the figures without brackets refer to your commentary.

B RESPONSES TO YOUR QUESTIONS

Part 4 Clauses and Commentary (pages 15-19)

4.10/ 11 As a non-statutory substitute for the original approach, we find that the overviews work and should be encouraged.

The explanatory notes seem to us to be useful in principle but there are so few of them in the IBA rewrite that their benefit must be questionable. We have in fact referred in our detailed responses below to a number of occasions where additional notes would help.

In any case, we would like a policy to emerge, and be stated, as to the circumstances in which such notes would be appropriate.

In due course, the overviews and notes will need to cope with amendments to the legislation; a system will have to be developed for this.

We also feel that it would be better to confine the explanatory notes to footnotes. The ones that come in the middle of a clause tend to break its flow.

4.25 The use of deeming makes the existing legislation very difficult to follow, particularly for the non-specialist. You have used the illustration of acquiring a used enterprise zone building within two years of first use being deemed to be expenditure *both* on construction and on an unused building. This neatly makes your point. We fully support your approach of defining qualifying use, qualifying building and so on, so as to encompass the different attributes previously brought in by deeming.

4.26 The basic structure of the redrafted legislation is much better than the existing one, and the order of clauses is more logical. We have found that whenever it is necessary to go back to earlier parts for a reminder of certain concepts or definitions it is comparatively easy to find the relevant piece - something that emphatically cannot be said of the original.

1.1 Introduction

3, 5 It is helpful to address key concepts before setting out the allowances and leaving less frequent occurrences to the end.

1.1.2 Meaning of building

3 We agree that it is better to drop the repetitive ‘and structure’.

1.1.3 Certain machinery and plant treated as building

3 We agree that the 1989 cut-off should be dispensed with.

1.2 What are industrial buildings

3 It is helpful to bring the material on what constitutes an industrial building before moving onto the allowances.

5 The concept of an *industrial* building has become somewhat dated, as you point out. Dropping it would also avoid the implied deeming of (say) a hotel to be an industrial building. The terms 'qualifying building' and 'buildings allowance' could be used as alternatives. We remain reluctant to drop the term ‘industrial, however, as this conveys the main flavour of the allowance.

1.2.1 Meaning of industrial building

4 The concept of qualifying use is helpful as a core concept. As you suggest, it is more natural to include use as a hotel within the ambit of qualifying use, for instance, than to deem a hotel to be an industrial building.

1.2.2 Meaning of qualifying trade

2 The tabular form is very helpful. It allows you to see at a glance in the left column the broad category of what might qualify, and narrow it down in the right column.

8 Both Peter Whiteman QC and Lindsay J considered in the *Girobank* High Court case that there might be grounds for claiming IBAs on the cheque processing centre as a mill under s18(1)(a), distinct from whether it involved processing etc under (1)(e). (The argument was thrown out because it had not been advanced previously.) While in principle we are in favour of eliminating outdated terms such as mills and factories, it would need more justification in this case. If it was found that mills and factories could reasonably be dispensed with, 'other similar premises' could go too: we doubt if that would narrow the scope of the allowance, and no doubt you have come to the same conclusion.

10 So far as we can see, s18(11) is redundant and we agree it should be omitted.

1.2.11 Roads on an industrial estate

4 We are happy for the widening of the scope of use of the buildings on the estate to be made statutory, given that it is existing practice.

1.3 The relevant interest in the building

Overview

4 We agree that the concept and definition of the relevant interest should be brought in early. However, 1.3.10, dealing with the termination of a lease, would fit better in the part relating to balancing events.

1.3.1 Meaning of relevant interest

3 There seems no reason to change the familiar expression 'relevant interest'.

1.4 Qualifying expenditure

6 It is an improvement to introduce the concept of qualifying expenditure.

7 Having dealt with what constitutes an industrial building and the relevant interest, it is logical to bring in qualifying expenditure before dealing with the allowances.

1.4.3 Capital expenditure on acquiring building unused

4 'The net price paid' was unsatisfactory since it was taken excluding stamp duty and other transaction costs. 'Capital expenditure on acquiring that interest' is preferable for this reason. But it would be even better if it was stated implicitly that incidental costs were included.

1.4.4 Capital expenditure on acquiring building unused after construction expenditure by developer

4 For consistency, and for the reasons we have set out under 4 of 1.4.3, the use of 'acquisition expenditure' is an improvement though it would be better to make the inclusion of incidental costs explicit. We should point out that including the incidental costs is probably a change of law in the taxpayer's favour, since 'the price paid' would seem to have excluded them.

1.5 Initial allowances

Overview

6 We agree that s2 should not be rewritten. But since it affects the calculation of a balancing adjustment up to 2009, we would like to see a note to the effect that the transitional relief might have been claimed.

1.5.4 Withdrawal of initial allowance made provisionally

4 We agree that you should make it explicit that the transferor's allowance is withdrawn where he transfers his interest before the building is used. Because his construction expenditure is left out of account per s10(1)(a), there can be no doubt on this point.

1.6 Writing down allowances

1.6.5 Claim for a reduced specified amount

3 We are happy for the practice to be incorporated into the law.

1.7 Balancing adjustments

1.7.1 When balancing adjustments are made

5 We find it helpful to use both terms: balancing adjustment and balancing event.

1.7.3 Balancing event after building ceases to be qualifying hotel

4 We are content for expenditure on fire safety to qualify for IBA or plant and machinery allowances, at the taxpayer's choice. (This of course has a wider context than that of hotels and balancing events.)

1.7.4 Where building an industrial building etc throughout

3 The term 'proceeds from the balancing event' is useful shorthand, but there should be a signpost to 1.7.11.

1.7.9 Meaning of net allowances given

5 We accept the exclusion of mills, factories and exceptional depreciation allowances in the interests of simplification. However, we think that any taxpayer who is adversely affected should be given the right to use the old legislation, probably by extra-statutory concession.

1.8 The writing off of qualifying expenditure

1.8.1 Meaning of residue of qualifying expenditure

3 We are content with the phrase 'residue of qualifying expenditure', though 'written down value' would be a familiar alternative.

1.8.6 Writing-off of increase of expenditure where balancing adjustment made

3 This seems merely to be correcting a defect in the original legislation.

1.9 Special provisions relating to enterprise zones

Overview

5 We agree that the EZ provisions should be brought into a single chapter.

1.9.2 Meaning of enterprise zone expenditure

3 The concept of 'enterprise zone expenditure' is indeed useful shorthand. It is however necessary to find one's way through 'construction expenditure', 'enterprise zone expenditure', qualifying expenditure' and 'qualifying enterprise zone expenditure' (even if one is not involved with 'relevant acquisition expenditure'). This is more than a little confusing. Of course what this needs is simplification of the legislation itself. Apart from that, this seems an occasion to introduce a flowchart.

1.10 Special provisions relating to highway concessions

3 We agree that it is helpful to bring together the parts dealing with highway concessions.

1.11 Special provisions relating to VAT

Overview

4 We agree that it is helpful to have a separate chapter bringing together the parts dealing with additional VAT liabilities and rebates.

C SPECIFIC COMMENTS

Part 1 Industrial buildings

Over-view We are not sure that 'overview' is the right term in this instance. Unlike the overview of 1.1 itself, large parts of it are more a list of contents. Perhaps these parts should be expanded slightly so that it would be a genuine overview and act as a guide to the whole scheme of IBAs.

1.8 It would help at this stage to say why we need to know the qualifying expenditure. You could add 'This will affect the vendor's balancing adjustments and the allowances to which a purchaser is entitled'.

1.1.3 Certain machinery and plant treated as a building

Is it not easier to follow if the *expenditure* is treated as having been incurred on the construction of a building? The heading would also need changing. If the plant is treated as a building, it is necessary to understand also that that the expenditure on *installing* the plant is expenditure on constructing the notional building.

Better still, in accordance with your policy of eliminating 'deeming' provisions, the preparation expenditure could come within the meaning of construction expenditure in 1.1.4.

1.1.4 Meaning of construction expenditure

(1) It would help to make it clear early on that construction expenditure includes the cost of a building attributable to someone else's construction expenditure. Perhaps 1.4 should be brought in before 1.1.4 or 1.1.4 should contain a forward note to 1.4.

(1) We would like the practice of treating improvement expenditure as construction expenditure made explicit. Where the expenditure does not involve construction and is not a (capital) repair, it strictly does not qualify for IBAs, though it does in practice.

In any case, we do not like the term 'capital repairs' since, to most people, 'repairs' is a revenue concept. We would prefer 'expenditure on improvements'.

(1), (2) There appears to be a distinction between *any* expenditure on construction and *capital* expenditure on repairs. This is clarified by 1.1.6. Perhaps 1.1.6 should be brought into 1.1.4 so that the qualification for capital expenditure would apply to both construction and repairs.

(2) Is it intended to give allowances on expenditure on a building that has a dual purpose where the expenditure is not allowed under Case I because of the 'wholly and exclusively' test? An example is repairs to a building that houses both factory stock and a director's private collection of old cars. If so, this should be made clear.

(2) Is this subclause needed anyway? Does not 1.1.6 say much the same thing?

(2) To come across a reference to a trade for the first time seems a bit odd. At this stage, we do not know that IBAs have anything to do with a trade. Besides, the building could be for letting. And how does this clause tie in with 1.1.6, which does deal with lettings?

1.2 What are industrial buildings

1.2.1 Meaning of industrial building

(2) Presumably, whether in law or by practice, those carrying on a profession are entitled to IBAs. Examples are use of buildings for certain purposes by medical or veterinary practices, and sports pavilions. If so, this should be made clear.

1.2.2 Meaning of qualifying trade

Table A

(1) It seems that the second sentence could be construed as allowing Vibroplant its allowances, no doubt unintentionally.

(4) Here is the archaic concept of 'foreign plantations' that we referred to in our general comments. 'Husbandry' is similarly archaic.

(6) The working of mines and oilwells in s18(1)(g) has been omitted here. Presumably it will appear it appear elsewhere in the rewrite (other than 1.12.3)?

Table B

10 The amplification of the meaning of a hydraulic power undertaking does not appear to be in the existing legislation. We would like to be satisfied that it is well founded. If it is in the Water Consolidation Act 1991, we would like to be sure that that provision is relevant for tax.

Commentary

Presumably, s18(5)-(6), (9) re crops, (13) and (14) appear elsewhere in the rewrite?

1.2.3 Buildings used for welfare of workers

2 We are unaware of the authority (except possibly under 3 below, or implicit in 1.2.5(2)(e)) for your view that (say) a canteen in a factory does not qualify where it is used by office staff. If that is your view, it should be made explicit in the rewrite. If there is no authority for it, the change to the law should be flagged and weighed in the balance of changes overall. (See also our comment under 1.2.9)

3 We find it surprising that 'workers' are different in a legal sense from 'persons employed'. Given the cloth-cap image of the former, would it not be possible to use the latter term? Or is, perhaps the authority for your statement in 2 above that office staff are not 'workers'? We find this difficult to believe.

The same point arises under 1.2.8(5) and 1.2 9.

1.2.7 Building used by more than one licensee

(1) If a warehouse is used for storage by two licensees, A who carries on a qualifying trade and B who does not, and A and B use the whole building between them rather than being confined to separate parts (viz Saxone, Lilley and Skinner), we are troubled that the owner of the warehouse would be prevented from claiming any allowance at all because of B's shared use.

1.2.8 Use as a qualifying hotel

(1)(a) The term 'or buildings' has been omitted. Even if the Interpretation Act 1978 makes it unnecessary to include the plural, we feel that it should be included here to make it clear, for instance, that if a nine-bedroom hotel has a two-bedroom annex it is capable of qualifying - even if it does on a strict interpretation.

(2) It does not appear that the redraft caters for a trade carried on by a licensee of the owner or a lessee, as the original does.

(4) This seems to do no more than state the obvious. For instance, if a building ceases altogether to be used it cannot be a hotel open for at least four months of the season. Presumably it means to say that use in the previous 12 months under subclause (2) does not enable an allowance to be given after the building ceases to be used.

General Does the rest of s7 come in elsewhere?

1.2.9 Use as a qualifying sports pavilion

(2) Your note 2 suggests that 'workers' here has a different meaning than in 1.2.3 since it includes office workers. The distinction needs making in the text. Depending upon whether you find a new term for 'workers' in 1.2.3 (production staff?), perhaps 'employees' might be suitable here.

1.3 The relevant interest in the building

1.3.3 Interest acquired on completion of construction

(1) We find it helpful to have the meaning of this provision made specific. Without the aid of a commentary it has been very difficult to discover its meaning.

1.3.8 Meaning of long lease

(5) You appear to have changed the law here. TA88 s38(1)(c) says that where the tenant is or may be entitled to a further lease, the lease *may* be treated as continuing. Here you say the lease *is* treated as continuing. Since every business lessee is entitled to a renewed lease in certain circumstances under the Landlord and Tenant Act 1954, all business lease would have to be treated as continuing. The treatment would no longer be discretionary. In practice, however, this may not be to the disadvantage of the taxpayer.

A similar point arises under 1.3.8(4) in relation to s38(1)(b).

(5) We are not sure of the distinction made in the original between being entitled to a further lease and to the *grant* of a further lease. Possibly there is a legal distinction between the grant of an equitable right (to the lease) and the grant of the lease itself. To avoid uncertainty, or mystery, can the two be assimilated without it being a major change of policy?

1.3.9 Interpretation and other supplementary provisions

(1), (2) Interpreting 'lessee', 'premises' and 'premium' by reference to TA88 s24(1) and (2), though worthwhile, should not just be drawn attention to in your commentary but flagged as a change to the law.

(3) There is a case for defining 'connected person' here so that the rewritten Capital Allowances Act stands on its own.

(4) We assume that the separate considerations of Scottish law as applied to the whole of the IBA rewrite (and in due course of the remaining CA rewrite) are reviewed by an expert in Scottish law. (The second paragraph makes little sense to someone who is unfamiliar with Scottish law.)

(6) Does this subclause have any practical effect? Where 1.3.19(3) is potentially applicable, would not clause 1.3.8(5) produce the same result?

1.3.10 Provisions applying on termination of lease

(3) This is a good example of the greater clarity of the rewrite. Existing s16(5) can easily be overlooked if you do not read the heading of the section beyond 'requisitioned land'.

(4) This continues to be a problematical provision. Does it cover revenue payments as well as capital ones, for instance? More to the point, what are the consequences of it applying? If the lease has been terminated, what difference does it make to the IBA situation if it is also treated as having been surrendered?

Note We wonder if this note is needed. The reference the other way round, from 1.7 to 1.3.10, is the important one, and this is given in the note to 1.7.2.

1.4 Qualifying expenditure

1.4.1 Meaning of qualifying expenditure

General We would like it made clear that (eg on a secondhand building) the expenditure need not have been incurred by the person claiming the allowance.

1.4.2 Capital expenditure on construction

(1) This does not deal with the situation where the 'construction expenditure' is on improvements or capital repairs.

1.4.5 Acquisition of building from developer after it has been used

(2) At this stage, the reader is unaware of the significance of the notional allowances and balancing adjustment in the hands of the developer. Should there not be a signpost to the consequences for the purchaser? This links in with our comments under 1.4.1.

1.5 Initial allowances

1.5.1 Initial allowances

(1) Someone reading this who did not know that there were no initial allowances at present would be misled by this introductory clause. We suggest you add at the end of subclause (1) ‘and the expenditure is incurred in a period during which Parliament has granted such allowances’. (The sentence would probably then need breaking up.)

1.5.2 General conditions of entitlement to initial allowance

(1) In s1(1)(a), there has to be *occupation* for the purposes of a *lessee’s* trade, whereas in s1(4) there has to be *use* for the purposes of a *licensee’s* trade. While we prefer your simpler route of treating each as being occupation, we would like you to check that there is no practical change of meaning.

(2) We would like this to be rephrased to make it clear that (say) a freeholder who incurred the expenditure qualifies for the allowance if it is a *sub*lessee who is carrying on the trade. It is not obvious to someone unversed in the law of property that the freehold is reversionary on a sublease as well as an intermediate lease.

1.5.3 When an initial allowance is made

(2) Is a rule needed here for the commencement of a Schedule A 'trade' as well as a Case I trade?

1.6 Writing-down allowances

1.6.1 Conditions of entitlement to writing-down allowance

(1)(b) It is not clear what this 'other qualifying expenditure' is. Is it perhaps expenditure falling within 1.4.3 or 1.4.4? Is 1.6.1(1)(b) needed at all?

1.6.3 Calculation of amount after relevant event

(1) There appears to be a small change in favour of the Revenue. A/B will be greater than 1 where (say) only 8 months of the 25-year period is unexpired. At present, the taxpayer receives a 'present' of an extra 4 months' allowances, but he is denied it under the rewrite. While we would not object to the change in the interests of simplifying the formula, it should be flagged as such so that it can be weighed in the balance of changes affecting either party.

First note Treating the incurring of an additional VAT liability as a relevant event seems to be an extension of the definition of a relevant event rather than a signpost to another provision. As such, it should be in the main body of the text. (See also our comments under 1.11.6.)

(2) It is probably an improvement to refer to transfers rather than sales as it avoids deeming transfers to be sales. But are you happy that a sale not completed by a legal transfer is a transfer for this purpose?

1.7 Balancing adjustments

1.7.1 When balancing adjustments are made

(1) It seems that (here and in the original), once there has been a balancing event there can be another one. For instance, if someone purchases an industrial building and immediately uses it as a retail 'cash and carry', there will be a balancing event in the hands of the vendor - but there could be a further balancing event when the purchaser comes to sell the building - even though 1.7.10 will prevent there being a balancing charge. It would be better to provide that there cannot be a further balancing event if the building's continued use after the earlier one is not as an industrial building.

(3) Reference here needs to be made to 1.1.2, which treats part of a building as a separate building for most purposes. So if a building is constructed in 1980 and extended (or even just improved) in 1990, the first 'building' will be free from balancing adjustment in 2005, and the second one in 2015.

(4) We do not understand why, in the original and in the rewrite, it is found necessary to deal with more than one balancing event occurring when the building *is not* an industrial one, but not when the events straddle the point at which the building *ceases to be* an industrial one.

1.7.2 Balancing events

(1)(b) The part in brackets fails to make the necessary causal link. As written, it appears there would be no balancing event where the reversionary interest is acquired as a separate transaction from the expiry of the lease, and perhaps a short time after.

(1)(e) Do we still need to cater for foreign concessions, and why should they be treated differently from UK concessions? (We appreciate this goes beyond the rewrite.)

1.7.4 Where building an industrial building etc throughout

(2), (3) We are unhappy that the reference to a residue of nil in s4(3) has been dropped. If the proceeds are nil, it seems to us that no balancing allowance is possible under subclause (3).

1.7.7 Meaning of net qualifying expenditure

(2) The point being made here and in (3) is presumably too subtle to be grasped easily. The person who incurred the qualifying expenditure (QE) is (broadly speaking) the person who incurred the original expenditure, and who therefore falls within (2). A person who buys a secondhand building does not incur QE, so falls within (3). It is necessary to do a paperchase to discover this. We suggest that the matter should be clarified, either in the text or by note.

1.7.9 Meaning of net allowances given

(1) It is not obvious how, in the original and in the rewrite, a taxpayer can have a *previous* balancing charge that has to be deducted in arriving at the net allowances given. If the answer is that it refers to a VAT adjustment under 1.11.9, it would help to signpost this.

1.7.11 Proceeds from balancing events

(1) It would help to spell out what is meant by the net proceeds and the net amount received - ie, presumably, the proceeds less the incidental costs.

(1) Do we not need to bring in any compensation received on an interest coming to an end, per the original s158(b)?

1.8 The writing off of qualifying expenditure

1.8.3 Writing off of writing down allowances

(2) In the interests of simplification, though possibly involving more than a minor policy change, we wonder why it is necessary to have a WDA for the period before having a balancing event at the end of it. Why not just have a balancing event at the end ? The result will be the same. Possibly there would be a knock-on effect on deemed WDAs in 1.4.5 or 1.8.5.

1.8.4 Writing-off of scientific research allowances

(2) Essentially the same point arises as under 1.8.3.

1.8.7 Crown or other person not within charge to tax entitled to the relevant interest

General This is an accurate rewrite but we are mystified why, in the original as well, X has to be a non-company. We also find the clause hard to follow. We think the origin of this clause was in the privatisation of certain utilities, but were they not privatised into companies? And is X the present claimant or not?

(1), (2) To simplify the wording and fit in with the definition of A in (3), you could say:

This section applies where at any time either of the following is entitled to the relevant interest in the building-
(a) the Crown, and
(b) a person who is not ...

(2) Unless there is a convention that a Finance Act is deemed to have been passed before the start of a day, 'on or after 29 July 1988' appears to start a day earlier than the original 'after the passing of the Finance Act 1988' (29 July 1998).

1.9 Special provisions relating to enterprise zones

General This is undoubtedly the least successful chapter in the rewrite. To a large extent as this is the fault of the complexity of the original legislation, so possibly there is not much that can be done in the rewrite. Instead we would urge most strongly that the original legislation should be redesigned.

1.9.3 Qualifying use as a commercial building

(1) This is no doubt intended to extend the meaning of qualifying use rather than redefine it. It does, however, read as a redefinition. It excludes the extension of qualifying use in 1.2.10 (partial non-qualifying use) and 1.2.11 (roads in industrial estates), and it is not altogether clear that subclause (3) gives EZ allowances on roads in commercial estates.

1.9.4 Capital expenditure on acquiring building used within two years of first use

General The complexity of the original has clearly posed a severe challenge to the drafter. It has to be said that it is very difficult to follow the thread of the rewrite. While this is a reflection on the original, perhaps it could be restructured with more direct wording along the following lines: the purchaser is entitled to allowances on the lower of his own expenditure and the original construction expenditure; for this purpose, expenditure on a purchase from a developer is treated as if it were actual construction expenditure.

(1) We are not sure where 'whether or not section 1.4.3 ... has applied previously' comes from.

(3)(a), (b) What is the source of the limitation of the qualifying expenditure to the construction expenditure, and of the paragraph at the end of this clause?

1.9.5 Qualifying enterprise zone expenditure

General For the avoidance of doubt we would like to see it stated that non-EZ expenditure qualifies for IBAs in the normal way, though more briefly than in the original.

General — It is not immediately apparent where the concept of the enterprise zone element, here defined, is actually used in the rewritten material. On re-reading , however, one realises that 1.9.5(1) gives the answer. This is another example of a back-to-front definition (there was one in the savings and investment income of individuals too). What you are no doubt trying to say is that the term qualifying EZ expenditure means the EZ element of qualifying expenditure. Putting it in reverse may seem natural to drafters but is confusing to readers.

(4) This illustrates exactly the sort of thing we would have hoped the rewrite would have done away with: the use of a defined term which is then given a modified meaning in a subsequent clause. Although the existing legislation does something similar, the rewrite is if anything worse. The reason is that it produces the position that, in the chapter dealing primarily with EZs, one comes first to the basic definition in 1.9.4(3)(a), which is actually only correct for the non-EZ element. One then finds in the next clause the crucial modification of the definition which is actually relevant for EZ expenditure. The difficulty stems mainly from the fact that, for once, you have not adopted the 'decompression' approach but have tried to cover in two clauses the four possible permutations of EZ and non-EZ expenditure and purchase from a dealer or otherwise. This may be a case where a table would help clarify the various possibilities.

1.9.6 Entitlement to and amount of initial allowance

(1) This reads strangely. It only makes sense as a qualification to 1.5.1, which introduces initial allowances. At the least, a reference should be made to 1.5.1. We are inclined to prefer making 1.9.6 self-contained so that it has its own provision for an initial allowance.

1.9.10 Balancing adjustment on realisation of capital value

3 You point out that three vital ingredients of existing s4A are missing - the start date and confining it to EZs (which are in FA94 s120(7)and (8)), and the fact that it cannot produce a balancing allowance (which is in s4(9A)). This was an extraordinary piece of drafting which is liable to mislead even skilled practitioners. Bringing these elements together illustrates how useful the rewrite can be.

1.10 Special provisions relating to highway concessions

Overview — The second paragraph is a good example of an explanatory note casting light on why it is necessary to provide for the allowances in this particular way.

1.11 Special provisions relating to VAT

1.11.3 Additional VAT liabilities and initial allowances: 1992 - 93 cases

(1)(c) It seems that the scope for relief may have been cut down by omitting the words 'or is to be' (an industrial building) contained in s1(1A)(a). This contrasts with 1.11 4(1)(c).

1.11.9 Additional VAT rebates and balancing adjustments

(1) Where the rebate comes to no more than the residue, we are not sure of the significance of there being a balancing event without there being any balancing charge or allowance. Can it not simply be said that there is a balancing event giving rise to a balancing charge where the rebate exceeds the residue?

1.11. Additional VAT rebates and the writing off of qualifying expenditure

10

(1) We are not sure why, here and in s8(12A), it should be necessary to deal with the writing off where there is an additional rebate but not where there is an additional liability.

1.12 How allowances and charges are given effect

1.12.1 Manner of making allowances and charges

(2)(b) We are not sure what is the effect of giving someone an allowance as though he were carrying on a trade when he is not carrying on a Schedule A business at any time in the period. There should be an explanation.

1.13 Supplementary provisions

1.13.1 Apportionment of consideration partly referable to non-qualifying assets

(1) The words 'and reasonable' have been omitted after the word 'just'. We would need convincing that there are good grounds for this.

1.13.3 Other kinds of transfer taken to be at market value

(2) This is another example of the gain to be obtained from the rewrite. As currently drafted, s21(6) appears to say that the price is *not* to be an open market price when, by reference to s157(4), it means that it *is* to be an open market price.

1.13.4 Election to treat transfer as at lower of market value and residue of qualifying expenditure

(4)(b) It is very difficult to tease any meaning out of the original, and your replacement is almost identical. On the assumption that it does mean something - perhaps that one of the parties is not within charge to UK tax - we would like to see the meaning brought out and the 54-word sentence simplified and broken up.

1.13.7 Arrangements having an artificial effect on pricing

(1) Existing s10D(1) is not easy to follow but we doubt if it has been improved here. In particular, 1.13.7(1)(b)(ii) leaves the reader to work out why the qualifying expenditure might equal the acquisition expenditure. The original spells out that the cases concerned are those in which ss10-10C produce that result. In addition, neither the rewrite nor the original makes it clear that the balancing event referred to in (b) could be one occurring at any time, and is not the transaction to which the sections mentioned actually apply.

The Revenue Manual CA 1485 describes the scope of this provision much more clearly, and it appears that this wording could be adapted without serious loss of precision.

1.13.9 Preservation of transitional provisions

We note that this is only provisional.

D DRAFTING POINTS

1.1 Introduction

1.1.2 Meaning of building

Sub-title — 'What counts as a building' adds little to the heading 'Meaning of building'.

5 — It would help to refer to 1.2.10 in a Note. This would avoid people wondering if there were other exceptions.

1.1.4 Meaning of construction expenditure

(2) — The drafting of this subclause could be simplified. For instance, 'it is not an allowable deduction' might replace 'it is not expenditure that would be allowed to be deducted'.

1.2 What are industrial buildings

1.2.2 Meaning of qualifying trade

Table A

(2)(c) — Throughout the rest of the transposition from s18, 'any' has become 'a'. This seems reasonable, but there does not appear to be any reason not to change 'any purchaser' to 'a purchaser'.

1.2.5 Excepted use

(2) — This would read better if 'as part of, or for purposes ancillary to the purposes of' appeared separately after the five excepted uses.

1.2.8 Use as a qualifying hotel

(2) — Could this not be simplified? You could say that the period concerned is the 12 months ending with the end of the chargeable period limited, where relevant, to the period from when the hotel was first used.

1.3 The relevant interest in the building

1.3.2 General rule as to what is relevant interest

(2) — Can the number of times 'interest' is used be reduced?

1.3.6 Election to treat grant of long lease as sale

Defined terms — The definition of a long lease is in fact in 1.3.8, not 1.13.8.

1.3.8 Meaning of long lease

(7) — Though an improvement, this subclause is still quite difficult to understand. Defining more precisely the purpose for which the assumption is to be made might improve matters.

In the last paragraph, it is not absolutely clear that the 'not' in front of 'conferred' also governs 'made'.

1.3.9 Interpretation and other supplementary provisions

(2)(a) A comma between 'landlord' and 'to' in line 2 would help.

(3) 'Here' does not seem to be required in line 1

1.4 Qualifying expenditure

1.4.2 Capital expenditure on construction

(1)(b) A signpost is needed to 1.1.4 for construction expenditure and to 1.1.6 for the meaning of capital expenditure. Better still, 'capital construction expenditure' is an awkward term which should be decompressed.

Origin The references are cluttered up with those for enterprise zones and initial allowances, which makes them look out of place.

1.4.3 Capital expenditure on buying building unused

(1) Where there has been more than one transfer of the relevant interest before the building is first used, (1)(c) implicitly gives the allowance to the most recent purchaser. It would help to make this explicit. The same applies to 1.4.4

(2) This is a bit of a mouthful.

(2) Does the Note following this require an 'and' before 'to whom'?

Origin Again, there are references to enterprise zones and initial allowances (see our comment on 1.4.2).

1.4.4 Capital expenditure on acquiring building unused after construction expenditure by developer

(3) We find 'the acquisition expenditure on the disposal' a difficult concept to follow. Would it be easier to describe it as the capital expenditure incurred on the acquisition of the interest by the first purchaser?

1.5 Initial allowances

1.5.3 When an initial allowance is made

Origin We are not sure that s2A is relevant here.

1.5.5 Grants affecting entitlement to initial allowance

(3), (4) We are not sure of the relevance of the phrase ‘to that extent’. If it is needed to qualify grants paid or repaid after the expenditure is incurred, should it not also qualify grants paid before it is incurred?

(5) It is implied that the adjustment cannot be made after the expiry of three years. We would prefer it to be made explicit along the lines of ‘No such adjustment may be made more than three years after ...’.

1.5.6 Claim for reduced amount of initial allowance

Origin We are not sure of the relevance of s2A(1)(b).

1.5.7 Conditions of entitlement in 1992-93 cases

(1)(a) It would help to have a signpost to 1.5.8, where ‘1992-93 qualifying expenditure’ is defined.

(1)(b) The ‘the’ in the second line is obviously a ‘typo’.

(2), 2 Should not the continuing possibility of a current VAT adjustment affecting this historic allowance be referred to in a note?

1.5.8 1992-93 qualifying expenditure

(4) The top line of the fraction could appear to signify 1899 (a subtraction of 93 from 1992), rather than a tax year. What about CE in 1992-93?

We very much welcome the use of QE and CE in the formula rather than the meaningless A, B and C.

(5) Logically, we would have thought this subclause, dealing with construction expenditure, should come after (2), so the rest of the clause would be concerned with qualifying acquisition expenditure – although the construction expenditure does of course need to be known in order to arrive at the acquisition expenditure.

Origin (5) derives form s2A(3), not s10C, emphasising our point above.

1.6 Writing down allowances

Over-view There are three things which might be added so as to help the first-time reader:

(i) in para 1, saying that the allowances come to an end when there is a transfer, rather than when the expenditure has been entirely written off;

(ii) in para 2, making it clear that it is the *transferee* who gets the allowances for the periods after a transfer; and

(iii) in para 3, saying that in that event the allowances *in total* are limited to the qualifying expenditure.

1.6.2 Basic rule for calculating amount of allowance

(3) Should you not say that 1.6.3 applies where there is a relevant event *in the period*?

1.6.3 Calculation of amount after relevant event

(1) It should be made clear that it is the transferee who gets the allowance after the relevant event. If A incurs construction expenditure and later transfers the building to B, who also incurs construction expenditure, it should be made clear that the new writing-off period only relates to the first element of the expenditure.

1.7 Balancing adjustments

Over-view The most common event bringing about a balancing adjustment is of course a sale. We suggest that 'on a sale or' is inserted in front of 'on the occurrence of certain events', to take away the mystery otherwise surrounding these events.

We suggest that 'the amount of' (a balancing charge) can be deleted in this informally-expressed summary.

1.7.1 When balancing adjustments are made

(3) We are not sure why this subclause refers to when the building was first used but 1.7.6(a) refers to the when it was first used *for any purpose*.

Origin Subclause (2) also derives, in part, from the end of CAA s4(1).

1.7.2 Balancing events

Note 1 The reference to a qualifying hotel should be 1.7.3. More to the point, we would prefer to see the note incorporated in the legislation, as in 1.4.1(2).

1.7.4 Where building an industrial building etc throughout

Heading Despite the italicised top heading, the heading in bold would better encapsulate the impact of the clause if it began with 'Balancing adjustment'. The same applies to 1.7.5.

1.7.6 Meaning of relevant period of ownership

(b) could be simplified if the period started with the later of (a) and (b).

1.7.9 Meaning of net allowances given

Note We suspect that people who are not familiar with the pre-1990 assessment of wives' income on their husbands will find this note too short to explain what, on the face of it, is a curious provision.

1.7.12 Transfer subject to subordinate interest

(2) 'The net proceeds of the transfer to the former owner' could be read as meaning that the transfer is made to the former owner, not that the proceeds go to him.

(2)(b) The curious phrase 'no rent, or no commercial rent' could perhaps be rephrased as 'no rent, or rent that is less than a commercial rent'.

(3) Would it be possible to define 'premium' more economically?

1.8 The writing off of qualifying expenditure

1.8.5 Writing-off of expenditure when building not in qualifying use

(2), 2 The meaning of 'having regard to the events which occurred' is not altogether clear. The original 'having regard to any sale on which section 3(3) operated' started off by being unclear because it appeared to qualify the *rate* at which notional WDAs were given rather than the *period* for which they were given. Substituting 'the events which occurred' for 'any sale', although better placed in the sentence, does not appear to have any meaning. Should it not in any case refer to a 'transfer', to adopt consistent terminology?

1.8.6 Writing-off of increase of expenditure where balancing adjustment made

(2) Why cannot the residue simply be increased by the balancing allowance?

1.8.7 Crown or other person not within charge to tax entitled to the relevant interest

(3) Why A and X rather than A and B?

1.9 Special provisions relating to enterprise zones

1.9.4 Capital expenditure on acquiring building used within two years of first use

Heading We think the word 'used' should be dropped from this.

(3) It would be useful to include qualifying EZ expenditure in Defined terms.

1.9.7 Amount of writing down allowance

We do not think that the words '(see section 1.6.2)' are sufficiently clear either to import 1.6.2.(2) and (3) into 1.9 7 or to replace 1.6.2 (if that is the intention).

1.9.10 -12 1.9.10 and 11 are anti-avoidance provisions (sale of non-relevant interests) which will rarely apply because of the seven year let-out under 1.9.12 – if only because people will make sure to postpone disposals till after the seven years have elapsed. We suggest that 1.9.12 should come before the other two clauses.

1.9.10 Balancing adjustment on realisation of capital value

Origin The origin for subclause (6) is s8(12B), not (12A).

1.9.11 Realising of capital value

Origin s4A(12) is the origin of part of 1.9.12(1), not 11(1).

1.9.12 Payments more than seven years after agreement

(2)(c) The words 'would be, or be treated as, paid' do not flow easily. We suggest 'would be paid or treated as paid'.

1.9.13 Amount of capital value realised

(2)-(5) 'Given' rather than 'paid' in (2) sounds a little strange. The same applies in (3), but 'value is given' sounds right in (4) and (5). In relation to consideration, 'paid' would make better sense today than 'given'. A lawyer, however, would use 'paid' only for payment in cash, so we would not suggest changing 'given'.

(4)(a) It is a bit difficult on first reading to see that there are three situations dealt with here. Without any such guidance, the structure is unclear. We suggest that words like 'in any of the following three situations:' might be incorporated.

1.10 Special provisions relating to highway concessions

1.10.2 Carrying on of highway undertaking

(1) This would make better sense if words like 'even where the activity does not constitute a trade' were added.

1.10.5 Balancing adjustment on ending of concession

(1), (2) 'Brought to an end, or comes to an end' is more natural than 'brought to, or comes to, an end'. The same applies in 1.10.6. Incidentally, is 'brought to an end' necessary?

1.10.6 Cases in which period of concession treated as extended

(3) This sentence has 56 words. While its construction is clear, we wonder if it might be broken down into two or more sentences - in which case (2) should presumably follow suit. If this is done, it might even be possible to combine (2) and (3).

1.10.7 Relevant interest after extension of concession

We wonder why it has been thought necessary to make a separate clause of this rather than include it within 1.10 6.

1.11 Special provisions relating to VAT

Overview

(2)(a) This sentence has 76 words, which makes it quite difficult to read, especially to someone who is unfamiliar with the principles of these VAT adjustments. Ideally it would be broken down into two or more sentences.

1.11.6 Additional VAT liabilities and writing down allowances

The method of calculating writing down allowances could be made more explicit.

1.12.3 Mining structures etc; balancing allowances carried back to earlier chargeable periods

(1) We suggest that it should be clear from the start that (a) to (e) are cumulative rather than alternative. This would avoid having to jump to the end of (d) to see if the clauses are linked by 'ors' rather than 'ands'.

1.13 Supplementary provisions

Over-view It is of course 1.3.4 and 1.3.5 that allow connected parties to make the election.

1.13.1 Apportionment of consideration

(1)(b) Could this not be reduced to 'partly to other assets'?

1.13.4 Election to treat transfer as at lower of market value and residue of qualifying expenditure.

(2) Should it not be made clear that the residue is the residue before sale - as it does in 1.13.5?

1.13.5 Effect of election

(4) Can this 58-word sentence be simplified? It is more or less a repeat of the original.

1.13.6 Transactions to obtain tax advantage

(3) The definition of a tax advantage applies for all purposes of capital allowances except plant and machinery. No doubt you will consider putting the definition elsewhere in the Rewrite Act and cross referring from here.

(3) A 'capital allowance advantage' rather than a 'tax advantage'?

1.13.7 Arrangements having an artificial effect on pricing

(1), (2) It is not clear if both or either of these have to apply to trigger this clause.

(5) This sentence has over 60 words and would be the better for being broken down.

1.13.11 Index of defined expressions

We have not checked these.