

TAXREP 60/08

IHT: TRANSFERS OF UNUSED NIL RATE BANDS

Memorandum submitted in September 2008 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to an invitation dated 20 June 2008 from HMRC to comment on draft guidance

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IHT: TRANSFERS OF UNUSED NIL RATE BANDS

INTRODUCTION

1. We welcome the opportunity to comment on the draft guidance published by HMRC on 20 June 2008 at www.hmrc.gov.uk/cto/iht/transfer-unusednil.htm.
2. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex A. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex B.

KEY POINT SUMMARY

3. We welcome the decision by the Chancellor in PBR 2007 to enable widows and widowers and civil law partner equivalents who die on or after 9 October 2007 to utilise the unused IHT nil rate band(s) of their late spouse(s)/civil law partner(s). However, we are concerned that in operating this new relief HMRC appears to put unnecessary obstacles in the way of executors/ personal representatives with the result that the Government's intention to provide relief will not be achieved. .
4. In view of the fact that for first deaths before 9 October 2007 there was no reason for anyone apart from HMRC as part of its care and management of the tax system to retain records once an estate had been administered with the consequence that HMRC is likely to be the only party who hold the records necessary to enable a claim to transfer the IHT nil rate band to be agreed, HMRC should, at least in these circumstances if not in all cases:
 - (i) cooperate with and be helpful to personal representatives of the second to die when agreeing claims,
 - (ii) not expect a higher standard of record-keeping from personal administrators than it abides by itself,
 - (iii) operate a "light touch" and be prepared to open its own files to personal representatives of the second to die, and
 - (iv) accept and agree claims submitted before the second person dies by the personal administrators of the first to die and agree valuations as at the first death even where in the absence of a transfer of nil rate band claim there would be no need to do so.

GENERAL COMMENTS - TECHNICAL

5. We welcome the transfer of nil rate band (TNRB) legislation but feel that a lot of real practical difficulties are likely to arise from how the new relief will operate in practice. These arise mainly from the facts that:
 - taxpayers are unlikely to have kept the records of the administration of the estate of the first to die that HMRC consider necessary to support a TNRB claim; and
 - the second death is not infrequently that of the last contactable personal representative (PR) of the estate of the first to die.

6. We consider that the difficulties could be alleviated if HMRC will allow TNRB documentation to be submitted and valuations agreed on the first death, or at any time after the first death up to the time limits for submitting claims presently specified in the legislation.
7. We appreciate that a claim might not be made in every case, but as PRs and taxpayers generally are unlikely to decide to go to the time and trouble of having TNRB documents submitted and valuations agreed on the first death unless there is a good reason, particularly as additional PR professional fees are likely to be incurred, if such a facility were brought in it is likely to reduce unnecessary or additional work overall.
8. To allow PRs and/or surviving spouses/civil law partners of the first to die to submit claims and HMRC to agree them would bring forward the time that the work is done and also enable the work to be carried out and HMRC to raise any inquiries when those with whom HMRC can communicate are alive and/or available and the information is readily to hand.
9. The approach that has been adopted of being unable to lodge a TNRB claim until after the second death is storing up difficulties. It is unhelpful to taxpayers and HMRC alike who will have to ascertain from scant resources information on the estate of the first to die that would have been readily available at that first death. The likelihood is that HMRC will consider itself unable to communicate with those making the claim on the grounds that they were not PRs on the first death. We therefore consider that the guidance at IHTM43050 and IHTM43051 is illogical as well as being unhelpful.

GENERAL COMMENTS - PRESENTATION

10. We welcome the guidance which is generally of a good standard and comprehensive. We have not worked through the examples in IHTM43020 et seq in detail but we welcome the sheer volume of different circumstances covered. However, as set down below, we do consider that there are places where further examples, and in some cases, additional examples covering more complicated situations, will be of assistance to users.
11. We note that the guidance is to be incorporated into the IHT manual. Whilst the guidance is useful overall a number of changes could be made to make it easier to follow. We are unclear whether this guidance is just for internal HMRC purposes and specialist HMRC staff and that it is going to be made available on the website for information purposes, or whether it is intended to be of assistance to lay people. To be of more use to non-specialist taxpayers, some of the guidance would need to be phrased differently:
 - for example some sections read awkwardly such as the phrase in IHTM43004 where the bullet refers to “any Deed of Variation or similar executed on the estate”; and
 - references to COMPASS, PC&S, CAR homepage and various abbreviations used in the examples are not explained.
12. There is already practical and helpful information on claiming the transferable nil rate band available on the HMRC website. Most can be accessed via

<http://www.hmrc.gov.uk/cto/ih/tnrb.htm> but not all - see Annex C. We consider that it would be simplest to have all the guidance as one comprehensive document incorporating everything, preferably accessible via this web address, but if the guidance that we have been asked to comment on is aimed internally then it would not be appropriate to combine it in this way. Nevertheless it would still be helpful to have all the HMRC guidance, both external and internal, linked from this web address, and the externally-focussed guidance referred to in Annex C could perhaps be consolidated.

DETAILED COMMENTS - TECHNICAL

IHTM 43002

13. It would be helpful if HMRC would clarify if it considers that it is possible for an individual to have more than one spouse if he entered into those relationships in a jurisdiction which recognises polygamous marriages. We believe HMRC do recognise this and if so the guidance needs to set out whether this makes any difference to what follows. We do not believe that it should make any difference but for the avoidance of doubt recommend that it be clarified.

IHTM 43004

14. It would be helpful if HMRC would explain that even if the personal representatives do not have all the relevant documents they are still allowed to submit a claim within the time limit which will give them further time to obtain whatever documents are thought to be necessary having submitted the claim. We are concerned lest people are put off from claiming before the time limits expire because they cannot find the documents.
15. As it would make things much easier for the taxpayer, and we should imagine for HMRC as well where enquiries need to be made, we consider that claims should be able to be lodged at the time of the first death. We appreciate that HMRC might not like to do this and that technically this would need legislation but we consider that in the long run it would streamline the process for both HMRC and PRs.
16. Under this section it would be helpful to provide details as to where copies of some of the necessary documentation can be found. For example:
- copies of grants of representation or confirmation and copies of wills are available from the Court Service (for England & Wales, www.hmcourts-service.gov.uk, for Scotland www.scotcourts.gov.uk, and for Northern Ireland www.courtsni.gov.uk); and
 - copies of death certificates and marriage certificates are available from the General Register Office (for England & Wales www.gro.gov.uk, for Scotland www.gro-scotland.gov.uk, and for Northern Ireland www.groni.gov.uk).
- This would be of use for those making the claim and to assist HMRC officials in providing helpful information.
17. Concerning the final para, we consider that HMRC should allow claims by persons other than the PRs to be made before the end of the two year period both where it is apparent that no PRs will be appointed (as set down in IHTM43005) and where it is not in the interests of the PRs to make a claim (for example where a £1 million PET will come into charge as death is within 7 years of the gift so the full extended NRB

will be set against the PET) and that the guidance should cover this, preferably with an example.

IHTM 43008

18. We would welcome clarification of the grounds on which HMRC considers that taxpayers should keep records that HMRC will already have. It should be made clear that this HMRC guidance was not of course available at the time of the first death before 9 October 2007 as we suspect this will be overlooked in future years. Of the bullet points listed under the section *First death on or after 9th October 2007*, several are required to have been submitted with the IHT200 relating to the first death. In other areas of Government (eg DWP who are able to tell people three years in advance when they are due to reach 65) records are kept on individuals, and we are unable to understand why this principle is not applicable to tax.
19. While we understand that HMRC considers that for reasons of confidentiality it cannot provide information from its files unless it has a proper mandate to do so, we consider that as the department will have the file, it should provide information to PRs for the second death where the PRs include anyone who was a PR in relation to the first death. Such a situation is quite likely within a family and in relation to such cases HMRC should state in this guidance that if they receive a request from a PR of the first death to provide copies from their files of relevant documents then they will be willing to do so.
20. Where the first death occurred many years ago, we cannot see anything here telling HMRC officials to employ a light touch where not all the supporting documentation is provided with form IHT216, in line with Ministerial comments and current HMRC guidance for taxpayers. HMRC have stated that:

“the personal representatives will need to make enquiries of those who inherited the first estate to see if they can recall whether or not there may have been other assets that were chargeable on the first death. If values are known, they should be included on the claim form; if values are not known, the personal representatives should complete the claim form to the best of their ability and explain the position to HMRC when they make their claim. If there is no evidence that any other assets were chargeable, the personal representatives can make their claim based on the information they have from the documents already mentioned.” (HMRC FAQs, 19.8.08 www.hmrc.gov.uk/cto/ih/tnrb-faqs.pdf)
21. This is generally interpreted as meaning that if following extensive enquiries no other assets can be established to have existed and no evidence of gifts made in the seven years prior to death is uncovered the personal representatives can make the claim on this basis even though they cannot be absolutely certain that this is the case. These points should be explicitly made in this guidance.
22. There is also a significant problem where the first death occurred well before 9 October 2007 and enquiries have uncovered the fact that there were some chargeable transfers but there are no records of the exact amount (other than they were covered by the nil rate band). We consider that HMRC needs to address these practical issues and again employ a “light touch”. It should be made clear that HMRC will accept the PRs’ best estimates and, provided the PRs flag the issue on the IHT216, if HMRC have better information they will make the necessary adjustments without imposing any penalty.

23. Some explanation of which cases go to PC&S and which to Compliance Group would be helpful.

IHTM 43010

24. First para, last line "You should always try to obtain our file for the first death" and third para, first line "The position is different where the first death is on or after 9th October 2007" - we appreciate the fact that the well-informed will be aware of the need to keep records following PBR07, but, nevertheless, as with IHTM43008 (above), why cannot HMRC keep their records? After all, nowadays, it is merely a computer record, rather than a bulky file of papers. It seems one-sided that the taxpayer is expected to keep records but HMRC is not. We would have thought that after 9 October 2007 it should be a matter of policy that HMRC should retain files. Such a policy supports our view that it would be much more efficient if claims could be lodged and agreed any time on or after the first death and values agreed on the first death when records still exist, the relevant people are still around and memories are fresh. To try and do this many years later will be more costly for everyone, including HMRC.

IHTM 43042

25. The first sentence should be re-worded as the nil rate band can be set against the estate which is subject to IHT and not just UK assets. It is only foreign domiciliaries who are not deemed UK domiciled that are only subject to IHT on UK assets. We suggest that it would be helpful to illustrate this point with an example.

IHTM 43043

26. We suggest that the first para should be expanded. The point about deemed domicile needs to be made and also that the £55K only applies if the transfer is from a UK dom/deemed dom to a foreign dom who is not deemed dom. There is no limit where there is a transfer from a foreign dom (not deemed dom) to a UK dom/deemed dom.

IHTM 43050

27. First para, "...any requests ... should be declined.". This is most unhelpful to the taxpayer, indeed it appears obstructive, particularly as HMRC as noted above seem determined not to retain records but to castigate taxpayers if they fail to keep records.

IHTM 43051

28. It is unhelpful of HMRC to refuse to agree values at the time. It is much more difficult for the taxpayer to calculate and substantiate values, and similarly for HMRC to validate them, the further it is from the date of the event in question.
29. We consider that this item should be revised to say that HMRC will be prepared to agree values on the first death where the personal representatives confirm that they believe the requirements of section 8A(1) are satisfied.

IHTM 43054

30. Subject to our recommendations above that valuations should be able to be agreed at the first death, under current policy the second sentence of the first paragraph of the example needs to be deleted as the value is not supposed to have been ascertained at the time of the first death.

DETAILED COMMENTS - PRESENTATION

IHTM 43001

- 31. Fifth paragraph, third sentence, change to say “that attracted 100% business or agricultural relief” with a separate sentence to explain that where only 50% BPR/APR is available it will just be the non relieved part that used up the NRB. An example of this would assist.
- 32. Fifth para, penultimate line, if the word “full” is misleading and we recommend it be deleted.
- 33. In the final para, we suggest that the first sentence might read better if it were turned around, thus “If IHT was paid on any part of the estate on the death of the first spouse or civil partner, then there can be no TNRB on the second estate because it is the unused nil rate band that is transferred.”.
- 34. Having said that, the expression “the second estate” in this sentence does not read well. We know what it means but perhaps it should be re-worded to be comprehensible to a lay reader.

IHTM 43002

- 35. Typo – paragraph two, sentence three - missing the word “band” at the end of the sentence.
- 36. Typo – paragraph three - insert “the” before TNRB.

IHTM 43003

- 37. At the end of the first sentence should it not be “former spouse/civil partner”?

IHTM 43004

- 38. In the first sentence relief should be plural, ie “reliefs”.
- 39. At the end of the first sentence there is no reference to civil partner, should it not read “deceased spouse/deceased civil partner”? Similarly in the second sentence.
- 40. First para, in the list of what PRs should include, we suggest delete “executed on the estate”.
- 41. In the same para we suggest insert immediately after the bullet points “all in respect of the first estate”.

IHTM 43007

- 42. Third line, should not “available to the death estate...” read “available to the second estate”?

IHTM 43020

- 43. Definition of M – to ensure that there is no confusion we suggest that the wording in brackets in the legislation at IHTA 1984 s 8A(2) should be included.
- 44. Definition of VT – we recommend clarification of the meaning of “any settled property”.

45. “E” and “NRMBD” also need to be defined.

IHTM 43032

46. First sentence line 4 should read “death of the survivor”.

IHTM 43040

47. Second line, as a matter of grammar/syntax, "to that" should be "from those". This is because "different" should be followed by "from", not "to". In addition, "rules" is plural, so "that" should also be plural, ie should read “those”.

IHTM 43043

48. The date of Royal Assent (21 July 2008) can now be given.

IHTM 43045

49. Cross referencing to the parts of the manual dealing with woodlands relief would be helpful.

50. In the example, where the statutory formula is given each fraction needs a line between the numerator and denominator.

IHTM 43047

51. Cross referencing to the parts of the manual dealing with ASPs would assist the user.

52. The guidance says “detailed example to follow” and an example to illustrate this point will be most helpful.

IHTM 43054

53. The reference given in the last paragraph of the example is incorrect. It should be either to Finance Act 2008 Sch 4 para 8 or TCGA 1992 s 274.

PCB
2.9.08

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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.co.uk/index.cfm?route=128518>.

HMRC WEBSITE GUIDANCE

Tax Faculty report on where transfer of IHT nil rate band guidance can be found on HMRC's website as at 27.8.08

Most of the HMRC guidance is at <http://www.hmrc.gov.uk/cto/iht/tnrb.htm> (reproduced below with our comments). However not all the four links on this page are to the latest versions.

HMRC Inheritance Tax: Transferable nil rate bands

The Chancellor of the Exchequer announced in his Pre-Budget Report that for deaths on or after 9 October 2007 it will be possible for spouses and civil partners to transfer their unused inheritance tax nil rate band allowances.

The following links will take you to the information we have published on transferable nil rate bands.

- [What to do on the death of a spouse or civil partner \(PDF 42K\)](#)
TF comment: this link takes you to <http://www.hmrc.gov.uk/cto/iht/tnrb-flyer.pdf>
- [Transfer of unused nil rate bands - guidance and examples \(updated 23 October 2007\) \(PDF 62K\)](#)
TF comment: this link takes you to <http://www.hmrc.gov.uk/cto/iht/tnrb-guidance.pdf>. However, it has been superseded by guidance and examples at <http://www.hmrc.gov.uk/pbr2007/it-nil-rate-guide.pdf> which includes 5 additional paragraphs (paras 19-23) on deaths before 18 March 1986.
- [Transfer of unused nil rate bands - Frequently Asked Questions \(updated 23 October 2007\) \(PDF 62K\)](#)
TF comment: this link takes you to <http://www.hmrc.gov.uk/cto/iht/tnrb-faqs.pdf>. Despite the note next to this link saying that this was updated on 23.10.07 the FAQs were actually updated again on 19.8.08 (announced in What's New – IHT <http://www.hmrc.gov.uk/cto/iht/whatsnew.htm> to clarify the position when estate duty or capital transfer tax rules applied to the first death.)
- [Form IHT216 Claim to transfer unused Inheritance Tax nil rate band \(PDF 160K\)](#)
TF comment: this link takes you to <http://www.hmrc.gov.uk/cto/iht216.pdf> which is version updated on 13.11.07 (announced on What's New – IHT)

There is also a short note at <http://www.hmrc.gov.uk/cto/tnrb.pdf> introduced via CTO IHT newsletter Dec 2007.