HMRC Capital Taxes Liaison Group Meeting

12th January 2017

HMRC, 100 Parliament Street, Westminster, London, SW1A 2BQ
Room G/57

Attendees	
Alex McDougall	
Andrew Cockman	ICAEW
Arthur Thompson	ACCA
Charles Pascoe	CBI
Diana Davidson	STEP
Edward Reed	
Jenny Chambers	PLT
Jim Hillan	
John Bunker	TACT
Kate Willis	CIOT
Kevin Slevin	ATT
Louise Speke	CLA
Lynnette Bober	ICAEW
Susan Cattell	ICAS
Tim Hughes	
HMRC	
Adrian Cooper (**Chair**)	AC
Rob Clay	RC
Anthony Zagara	AZ
Nick Williams	NW
Craig Mason	CM

1. Introductions/Welcome

AC welcomed attendees and opened the meeting.

2. Entrepreneurs' Relief; disposal of trust business assets: time at which an individual must be a qualifying beneficiary

RC advised that HMRC's position was that the individual who was the 'qualifying beneficiary' had to be a qualifying beneficiary throughout the stipulated 12 month period. The conditions for relief would not be met if the individual had been 'parachuted in' as a beneficiary of the settlement shortly before the trustees' disposal. This followed from the terms of the statute, which was written terms of the qualifying beneficiary and not e.g. "the individual".

The contrary position (that relief would be due if the individual had been a qualifying beneficiary for only a short time prior to the disposal) could give rise to odd and unfair outcomes in the application of section 169O. HMRC's position was much to be preferred in the context of the ER provisions as a whole.

Attendees pointed out that HMRC had previously given advice that contradicted this. RC said he thought he knew the advice in question, which had been given by a previous technical adviser to a 'big 4' accountant on a specific case. He confirmed that it no longer reflected HMRC's position (if it ever truly did) and he would ask technical colleagues to withdraw that advice and clarify the position. There was discussion as to the need for HMRC to specify an effective date from which the corrected interpretation would apply to disposals.

3. Entrepreneurs Relief: associated disposal and new condition D.

FA16 – Introduced new condition D applicable to privately-held assets which were the subject of an "associated disposal" In order for ER to be due on the gain, the asset must be held for three years prior to the disposal. This "three year condition" could give rise to unfair outcomes if the disponer's interest in the asset had increased during the three year period (for instance if a fractional share had increased due to inheritance): had the asset disposed of been held throughout the necessary period, or was a new asset acquired or created when the disponer's total interest changed?

RC said that HMRC did not think it was necessary to amend the legislation further. HMRC's approach would be that (in the absence of evidence to the contrary) there was a disposal of a single asset and hence a single gain accrued on that disposal. The gain would be apportioned between relievable and non-relievable parts: the relievable part would bear the same relation to the whole gain as the minimum fractional interest held in the three year period bears to the interest held immediately before the disposal.

For instance, taxpayer P holds a 25% interest at the start of the three year period. During the period she inherits or otherwise acquires a further 25% interest. She disposes of her 50% interest for a gain G. (25/50)*G is eligible for ER.

This approach is fair to the taxpayer and it protects the Exchequer against the worst forms of abuse.

Attendees generally welcomed this, but said that it looked like a concessionary treatment by HMRC and some were concerned that it could redound to HMRC's disadvantage if it were to be cited as a precedent for HMRC adopting a "sensible" or "pragmatic" view elsewhere. RC said that he did not see it as concessionary, but rather a valid and available construction of the statute. It was certainly not an extra-statutory concession and nor was it, in his view, an exercise of HMRC's care and management powers. HMRC would draft and publish guidance explaining their position.

4. Draft legislation in December on non-doms.

CM stated the draft legislation were in three areas, the end of permanent non-dom status for IHT, CGT and income tax, including transitional protections (overseas trusts, cleansing and rebasing); The Extension of Inheritance tax to UK residential properties held by non-doms and the extension of business investment relief.

CM advised that IHT on residential property includes a new definition of UK residential property interest which includes properties held via close companies, partnerships and relevant loans. The charge also extends to disposals of property interests for 2 years following the disposal. There is special provision to charge tax where a DTA is in place with a jurisdiction which does not charge IHT.

The IHT provisions also included a new targeted anti-avoidance rule aimed at arrangements designed to avoid the new charge.

The draft legislation for offshore trusts which was published on 5th December only included Capital Gain Tax trust protections. It included a number of changes and addressed the concerns that were raised during the consultation.

Attendees were informed that the Income tax draft legislation was still in process of being published. Concerns were raised regarding the delay. TZ informed the attendees that we are awaiting parliamentary counsel however HMRC will aim to publish the draft legislation no later than the publication of the Finance Bill (The legislation has since been published on 26 January 2017). AC advised although publication is out of our hands, he was aware of the significant risk due to delay and advised that the legislation would be published even if it was not in the final form.

HMRC was asked whether it would be possible to supply a simple briefing to the parliamentary counsel and whether information about how the legislation is intended to work could be shared with stakeholders, TZ agreed he would consider further. AC commented that the idea of putting the instruction out there is not something HMRC would do but we would share as much information as possible if the draft legislation was not going to be published until the publication of the Finance Bill.

TZ has ask counsel for provision to prevent double taxation when benefits are taken out of a protected trust. RC explained that under section 103KA etc. TCGA a chargeable gain was treated as accruing to an individual who provided investment management services when carried interest “arises” to him or her. There is a statutory definition of when carried interest arises: it is not necessary for the individual actually to receive the funds him or her self. Thus a gain may accrue to and be charged to CGT on the individual when funds are received by trustees on whom the individual has previously settled the right to receive them. Hence the risk of a further tax charge e.g. under section 86 TCGA when the trustees distribute amounts matched with their receipts of carried interest. HMRC recognises this risk and is considering/has proposed/has instructed OPC to draft statutory provisions to address it [by eliminating the section 86 charge.

5. Ordinary Share Capital vs. Preferences Shares

RC said that attendees would be aware of the McQuillan case: HMRC's appeal was due to be heard in the High Court in July 2017. Until that case was final, HMRC's position on the definition of ordinary share capital would be unchanged. That said, RC had sent the list of examples provided before the meeting to his colleagues in CTIS who owned the definition and they had supplied HMRC's considered position in each case. They were happy for their notes to be shared with attendees, and RC said he would arrange for the annotated document to be sent by email after the meeting. Attendees were pleased. (Note: duly sent by email on 12 January.)

6. The uncertainty of tax treatment in respect of intangible assets held by a 'mixed' partnership

RC reported that guidance had been drafted for inclusion in the Corporate Intangibles and Research and Development (CIRD) Manual. There was a discussion about including cross references to this topic in other HMRC guidance, such as SoP D12, the Partnership Manual and the Capital Gains Manual. Attendees agreed such cross-references would be helpful.

7. Other 'grit in the CGT system' (including definition of personal company, application of *Marren v Ingles*).

RC briefly reviewed two other points raised by attendees in response to AC's request at the last meeting for things which were an impediment to the smooth and fair working of the CGT code.

Personal company definition. The 5% shareholding condition presently operates by reference to the par value of the company's issued share capital rather than by reference to e.g. the new consideration subscribed for shares (which would include any premium). (*Canada Safeway* dictum refers.) Thus 'white knight' investors who subscribed large amounts for shares with a low par value could be denied ER on a subsequent disposal. The attendee who raised this cited a real-life example and said that tax efficiency had (clearly) not been a factor in planning what had been an urgent recapitalisation. RC recognised the problem but found it difficult to think of a fair and straightforward solution. The unfairness was the converse of the familiar 'dilution' problem whereby original investors saw their interests reduced below 5% when new subscribers bought large numbers of shares for little or no premium. RC observed that a reorganisation of share capital might address the unfairness, but attendees said that it could be seen as unacceptable tax planning.

Marren v Ingles. It was suggested that an apparent unfairness arises when an amount was payable under a chose in action but no relief was available to the payer either as a deduction in computing profits or as allowable expenditure in computing chargeable gains. An example had been given of two joint legatees reorganising their interests in land so that each had an undivided interest in half the land. They agreed that each would share any gain accruing on a subsequent disposal of their land. The agreement creates a chose in action, and a payment out of disposal proceeds is not allowable expenditure in computing the

payer's gain although the sum received by the payee is treated as consideration for disposal of the chose in action. Hence a sort of double taxation. RC recognised the apparent unfairness but said that this seemed to be an inescapable consequence of the chose in action being a distinct asset for CGT purposes. One attendee suggested that section 38 should be amended in order to permit a deduction for the payer in computing gains and losses in these circumstances – he did not see very great risk in this. RC said he would ask Counter-Avoidance colleagues to comment.

8. ESC D33

HMRC were asked for some clarification about the phrase "single set of legal proceedings" used in the revised ESC D33. NW explained that the answer will depend on the facts and that at present not that may cases where this issue was a factor had been brought to our attention.

One example, concerned an asset sale. A purchaser was identified and advisers were engaged to assist with the legal process and the other sale negotiations. The various advisers made separate errors and the contract fell through. Mr C sued. We saw that as a single set of legal proceedings. Further examples would need to be considered to develop guidance.

NW explained note that simply because a claim needs to be reported, doesn't stop it qualifying for the exemption. If in doubt, a claim for relief under D33 should be reported.

9. Update on the position with the draft Carried Interest Guidance (RC)

RC said he was aware that draft guidance continued to circulate between HMRC and key stakeholders, but he did not know how close it was to being finalised and published. An attendee reported that a further meeting was planned between HMRC (CTIS) and stakeholders for 17 January 2017.

10. Update on guidance on the new distribution TAAR (section 35 FA 2016) (RC)

RC apologised on behalf of HMRC for the delay in publication. He had spoken to the author and publication was now expected in February 2017. Attendees expressed their disappointment, as the publication had been intended for December 2016.

11. AOB

An attendee cited a case where the non-statutory business clearance team had declined to comment because they asserted there was no uncertainty in the legal position. This was unhelpful, as it stopped short of confirming either of the alternative views put by the agent in the application as the correct one. AC to follow-up with NSBC team.

Transactions in securities guidance. At the meeting in January 2016 on the capital distributions proposals, HMRC had led customers to expect guidance to be published by the end of the year. Attendees were disappointed it had not yet been published. RC apologised

and said publication was expected after the distribution TARR guidance had been published in February 2017.

Attendees asked that statutory clearance letters from the transactions in securities team should include a statement that the clearance did not extend to confirmation that the TAAR (section 35 FA 2016) would not apply (this had been understood to be the intention, but had either lapsed or not been adopted). Such a statement from HMRC would be useful to agents when explaining the value of the letter to clients. RC said he would contact the clearance team [Subsequently, RC contacted HMRC's Clearance Team who confirmed that the intention is still to include a standardised 'TAAR' text in a clearance letter whenever an application involved just a members' voluntary liquidation (MVL). The team leader will remind the team about this. Where MVL is not the only issue, for example in a 'liquidation demerger', the TAAR should not normally be relevant and the standard text is therefore less likely to be used. We understand why it may be useful to have this text from HMRC: if any agent does have a problem they could ask us to clarify what the effect of a TiS clearance would be on the application of the TAAR.]

Share purchase arrangements under section 169K TCGA. Attendees were keen that HMRC should apply consistent criteria in deciding whether share purchase arrangements were present in a larger scheme or arrangement involving a purported associated disposal for ER purposes. Would the decision be left to individual caseworkers or would all relevant cases be referred to a central authority? RC said he would speak to Product and Process and Technical colleagues.

Action point summary

Paragraph location	Action Point owner	Action Point	Date action point completed
2c	*RC*	*RC to ask technical colleagues to withdraw advice and clarify the position. There was discussion as to the need for HMRC to specify an effective date from which the corrected interpretation would apply to disposals.*	
3d	*HMRC*	*HMRC to draft and publish guidance explaining their position.*	
4d	*TZ*	*TZ will review position of the Income Tax draft legislation at end of the month.*	***Published on 26th January***
4e	*TZ & AC*	*TZ agreed he would consider further. AC commented on the idea of putting the instruction out there is not something HMRC would do but we would share as much information as possible if the draft legislation was not going to be published until the publication of the Finance Bill*	
5	*RC*	*RC to email attendees the list of examples that had been explained and returned by CTIS*	***Email sent on 12th January***
6	*RC*	*RC to cross reference the guidance that had been drafted for inclusion in the Corporate Intangibles and Research and Development (CIRD) Manual to other HMRC guidance, such as SoP D12, the Partnership Manual and the Capital Gains Manual.*	
7c	*RC*	*RC to ask counter avoidance colleague to comment on the risk an attendee raised suggesting Section 38 should be amended*	
AOB - a	*RC*	*RC to follow-up with NSBC team regarding a case where the non-statutory business clearance team refused to comment because they asserted there was no uncertainty in the legal position.*	
AOB - d	*RC*	*RC said he would speak to Product and Process and Technical colleagues to clarify who the decision would be left to - individual caseworkers or would all relevant cases be referred to a central authority?*	