Capital Taxes Liaison Group

8th December 2017

Attendance

Adrian Cooper – HMRC - Chair
James Konya - HMRC
Tony Kelly - HMRC
Daniel Butler - HMRC
Nick Davies - HMRC
Danka Wigley - HMRC
Rob Clay - HMRC
Graham Spencer - HMRC
Shafina Malik - HMRC

Lynnette Bober - ICAEW
Andrew Cockman - ICAEW
Jenny Chambers - PLT
Tim Hughes - BVCA
Charles Pascoe - CBI
Edward Reed - LS
Kevin Slevin - ATT
John Bunker - TACT
Louise Speke - CLA
Kate Willis – CIOT
Aparna Nathan - CIOT
Diana Davidson - STEP
Brian Palmer - AAT
Susan Cattell - ICAS
Helen Thornley - ATT

1. **Introduction / Welcome / Purpose of Meeting**
   AC advised that he wanted to return the CTLG to its original purpose. It had begun to focus significantly on technical issues, rather than focus on policy/strategic issues.

   A/P – HMRC to split CTLG into CTLG (policy) and CTLF (technical) meetings

2. **Action Points**
   All action points cleared from the previous meeting or listed as agenda items.

3. **Taxing gains made by non-residents on property, broadening the UK's tax base**
   James Konya outlined the measure. The three key changes were:
   - Bringing all gains on disposals of non-residential UK property by non-UK residents into charge;
   - Removing the exemption for widely held non-resident companies on disposals of residential UK property; and

- Bringing into charge disposals by non-residents of interests in property rich entities.

James noted that two of the main drivers for the policy were to create parity for UK and overseas investors, and to simplify the rules for taxing non-residents on UK immovable property as far as was possible.

The consultation was published on 22 November, alongside a Technical Note on the anti-forestalling rule. James explained the anti-forestalling rule, and that it had immediate effect from publication.

The group asked for clarification on the timeline. The consultation will finish on 16 February 2018. Draft legislation will be published in June or July 2018 for further detailed consultation. The Law Society and others asked that the legislation be published as early as possible, and that we let them know when best to input for the greatest impact.

James confirmed that the original provisions of the Substantial Shareholding Exemption (pertaining to trading companies and groups) would be able to apply to disposals of property rich entities where the conditions were met.

In response to questions, James noted that HMRC were interested in responses on the impact on funds, and on exempt investors (including UK ones such as pension funds), and whether this measure was likely to mean taxation at lower tiers.

It was commented that there would not be parity for UK and overseas investors, because the measure proposed rebasing gains to April 2019 –rebasing is not available to UK residents. Adrian noted that rebasing reflects the fact that no charge existed previously. It is an issue of fairness.

It was commented that the third-party advisor notification requirement would need to be carefully targeted as it was otherwise likely that to avoid risk many advisors would simply notify HMRC, meaning a lot of returns and work for everyone. It was also noted that the receipt from making a disposal return under the current NRCGT regime did not provide enough detail to give assurance of a disposal having been notified to HMRC.

Adrian Cooper urged it would be helpful if all responded to the consultation with comments and suggestions for developing policy. James thanked all for their time.

4. **Entrepreneurs' Relief: disposal of trust business assets**

RC has sent letters to CIOT, ICAEW and to the agent whose enquiry in 2011 had been wrongly answered at the time by HMRC. He apologised for the delay in sending these letters, which explain HMRC's considered, corrected view of how the legislation works.

Andrew Cockman questioned the first paragraph of the letter to the ICAEW that HMRC did not need to provide its (technical) analysis in that letter. RC said he would send a supplementary letter with that analysis, but outlined HRMC's technical position for the benefit of the meeting as follows:

- It was significant that the relevant conditions at section 169J(4) and (5) referred to the *qualifying beneficiary* rather than to e.g. *the individual*. This means that the person in question must be a qualifying beneficiary at the time under consideration: it is not sufficient that the same individual who meets to condition at that time only subsequently becomes a qualifying beneficiary.
- As regards settlements which have not existed for 12 months before the disposal, there are many instances in the TCGA of explicit provision for a period shorter than the normal specified period to be acceptable where an entity came into existence after the start of that period. There is no such provision in section 169J and HMRC concludes that the 12 month qualifying period applies in all cases.
- It has been suggested that HMRC's corrected interpretation creates a disparity between the eligibility conditions for individuals and trustees in comparable circumstances. RC agreed this was so. Trustees are not individuals and are subject to different statutory provisions. In response to a comment from the meeting, RC said he had found no evidence that parliament had intended trustees to be subject to the same conditions, and to qualify for relief in exactly the same circumstances, as individuals.

After the meeting Andrew Cockman and RC agreed that RC would not now send a supplementary letter. The ICAEW and other delegates would consider the letters and respond to HMRC in due course.]

5. **Entrepreneurs' Relief: customer survey**
RC said that the research into the use and awareness of ER amongst customer groups had been published: https://www.gov.uk/government/publications/capital-gains-tax-entrepreneurs-relief-behaviours-and-motivations.

6. **Entrepreneurs' Relief: dilution consultation**
RC reminded the group of the announcement at Autumn Budget. He briefly outlined the circumstances in which an individual potentially eligible for relief in respect of a 5% holding of shares could lose future entitlement without making a disposal if the company issues new shares when raising capital. The Chancellor wished to address this unfairness and the consultation would be on the best means of doing so. The formal consultation may now begin rather sooner than announced at Budget – maybe at the end of January 2018. It would be announced and available on gov.uk on the usual pages. RC invited the Group to contribute their views and ideas.

7. **Entrepreneurs' Relief: claim time limits and company purchase of own shares**

RC referred to the ICAEW Memorandum TR745 (The Purchase by a Company of its Own Shares) issued in April 1989. He confirmed that it remained HMRC's view that it was perfectly possible for a shareholder who disposes of shares to the issuing company by way of a 'multiple completion' agreement to dispose of all of his or her beneficial interest in those shares at the time the agreement is entered into. Whether this is in fact the case will depend, as always, on the terms of the agreement and the actual nature of the transactions. It follows that, subject to the relevant conditions being met, entrepreneurs' relief will be due on the gain which accrues on that disposal. Where this is the case, the subsequent transfers under the arrangement will be of legal interests and will not be disposals for CGT purposes. After the meeting

KS sent RC a copy of an article by Peter Rayney in *Tax Adviser* (February 2017), in which the author pointed out HMRC's view that it is "not legally possible to give up voting rights via the POS contract". This could mean that the shareholder remains connected with the purchasing company after a multiple completion agreement is entered into (by virtue of section 1062(2) CTA 2010), with the result that section 1033 may not apply to payments made by the company. RC can confirm that the single disposal of beneficial interest in the shares contemplated by Memorandum TR745 would *not* imply that the shareholder necessarily ceased to be connected with the company under section 1062(2) CTA 10.

8. Equalisation and balancing payments (land pooling)

RC is awaiting a response from the Department of Communities and Local Government (DCLG). He will continue to chase DCLG. Louise Speke (CLA) said that she too had experienced difficulties contacting DCLG, possibly due to a change of staff at the Department.

9. Consultation on Trusts

A consultation on trusts was announced at Autumn Budget 2017. In line with its manifesto commitment, the government will publish a consultation in 2018 on how to make the taxation of trusts simpler, fairer and more transparent.

In response to questions at this meeting, AC confirmed that non-resident trusts are not currently in consideration and the government is at present just looking at residential trusts with a UK tax liability.

10. Trusts Registration Service

The Trusts Registration Service (TRS) has had some teething problems and the deadline for registering trusts that have a tax liability for the first time has been extended to 5 January. This cannot be extended further as we need to allow time for the trustees or agents to acquire the UTR in order to meet the tax return deadline on 31 January. Trusts required to register on TRS by 31 January will not incur a penalty if the registration is completed by 5 March (we are unable to change the 31 January date as this is within the legislation). This applies only in the first year of the TRS.

We have also published revised guidance on dummy data to be used when specific details are not known and details of when a class of beneficiaries can be used. There was a question about delegated permissions and concerns over granting permissions to other staff to see and save registration details AC said that the existing Government Gateway could be used to set up delegated permissions within a company.

We expect around 170,000 trusts to register on the TRS.

11. DOTAS update

New IHT regulations have been laid which come into effect on 1 April 2018. The regulations reflect comments from stakeholders and the 2 conditions to be met are now more targeted at specific areas of avoidance. The regulations include an exception for life insurance and other retail products which are in accordance with established practice that HMRC has already accepted. These products do not have to be disclosed if they were made available and entered into before 1 April 2018 and meet the grandfathering conditions.

HMRC is drafting guidance on how the new regulation will apply which should be available for comments by the end of January 2018. The guidance will be aimed at the general public and users but there was some concern that it may not be enforceable.

A/P – Draft guidance to be sent to CTLG members when it is available for comments and suggestions.

12. IHT Research

A research report on how people are using IHT reliefs and exemptions has now been published. Generally, people's understanding of IHT was very limited and few were aware of APR and BPR, though awareness by agents' clients was higher. Testators often wanted to keep the business or farm intact and running after their death and the reliefs were used to do that. Agents focussed on ensuring that all relevant assets qualified for relief rather than advising that assets were purchased solely to get relief. The small scale of the study was pointed out and some concern that it might not be representative.

13. Customer insight

DW explained that HMRC had limited information from IHT returns about customers and their behaviours and experience of IHT. Although research can provide some additional information about certain aspects, it will be useful to get some insight on customers and better data about who they are, what they find difficult, and their overall experience of IHT. This could inform future policy development work and help to improve IHT processes. CTLG members' cooperation would be helpful for HMRC to understand their clients as part of that work.

AOB

Draft carried interest guidance

HMRC planned to publish a new 'Investment Funds' manual in summer 2018. Meanwhile the draft guidance widely circulated in autumn 2016 remains valid: it will be reformatted for inclusion in the Investment Funds Manual but no substantive changes are expected to be necessary. Draft guidance on income-based carried interest (the FA16 provisions) should be published in January 2018. Anyone interested in receiving a copy should email Hayley Moran (hayley.moran@hmrc.gsi.gov.uk) with their request.

Purchase of own shares (also action point 5.6 from June 2017 meeting)

HMRC can confirm that it still agrees the principles in ICAEW Technical Note 745 of 1989. A company purchase of own shares achieved by 'multiple completions' whereby the vendor conveys ownership of her shares to the company in tranches may represent a single disposal by the vendor of her entire beneficial ownership in all the shares at a single point in time (e.g. when the contract is made). The TCGA focusses on transfers of beneficial (rather than legal) ownership, and eligibility for reliefs and accrual of gains is determined accordingly. HMRC does not accept that all 'multiple completion' arrangements will necessarily involve a single disposal of beneficial ownership: this will depend on the terms of each arrangement and the facts of each case.

Operation of the distributions TAAR in the context of self-assessment
Victor Baker has sent emails to Charles Pascoe and Kevin Slevin to explain how HMRC interprets condition D at section 396B(5) ITTOIA 2005 (Annex A). The condition requires the self-assessing customer to take a position on the main purpose or purposes of the company winding-up. The Group had been concerned to understand the distinction between 'purpose' and 'intention' as applied to a scheme or arrangement, and to understand what criteria HMRC would apply to determine the reliability of a taxpayer's assertions and assumptions vis-à-vis the purposes of the winding up.

ESC D33 (Charles Pascoe)
Extra Statutory Concession D33 remain in place for the time being. HMRC recognises that it needs to be legislated at some point, but pressure on the parliamentary timetable due to EU withdrawal has made the timing of any legislation less clear. We need to consult further internally on some implications of the proposed legislation.

Transactions on securities – transfers from a share premium account (Charles Pascoe)
A question was raised concerning computing the "maximum amount that could "in any circumstances have been paid… by way of a distribution" when applying section 687(2) ITA 2007. Will HMRC assume that any possible transfer from the company's share premium account be treated as having been made, thus increasing the 'maximum amount' and reducing the excess relevant consideration which is left out of account for the purposes of section 687(1)?

RC advised that assuming there are no other relevant factors, HMRC will not require these possible transfers to be taken into account. Such an increase over other reserves would automatically fall within section 685(7A) ITA which excludes from 'relevant consideration' any amount which would 'represent the return of sums paid by subscribers on the issue of securities merely (which we take to mean "solely or only") because the law of the country in which the company is incorporated allows assets of that description to be available for distribution by way of dividend'.

Annex A

Email 14 September 2017 HMRC to Charles Pascoe

I am dealing with the follow-up to the introduction of sections 396B and 404A ITTOIA 2005 by section 35 FA 2016,

On the question of penalties, I have consulted colleagues who have advised me that each case must be decided on its own facts and merits in light of the circumstances. Some assistance is given by HMRC guidance at Compliance Handbook CH81120 which explains HMRC's view of reasonable care and includes the following in relation to unusual transactions or events:

In HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice.

If after that the person is still unsure they should draw attention to the entry and the uncertainty when they send the return or document to us. In these circumstances the person will have taken reasonable care to draw our attention to the point and if they are wrong they will not have been carelessly so.

Disclosure in the white space of the return is a factor but not necessarily sufficient to discharge the requirement to bring attention to uncertainty around whether or not a particular provision applies. In reality, the taxpayer will know whether his purpose or main purpose is to avoid tax, and HMRC are given the power to draw reasonable inferences if there appears to be a reason to challenge the basis of a return. This is not temporally or otherwise limited; it is applied on the basis of all the circumstances. If the assertion is in good faith, we believe the facts and circumstances will support that when the Inspector or possibly an appeal tribunal draw their inferences. You will know that HMRC starts from the position that a taxpayer acts in good faith. Every case is different, but I think concerns about penalties are probably exaggerated where the taxpayer has the protection in appropriate circumstances of asserting what is true. I accept that there is a tension here between certainty and administrative freedom to challenge; but I think that is inevitable if a purpose test is applied properly, and in practice I think the problem will prove to be more apparent than real.

Email 27 September 2017 HMRC to Kevin Slevin

… I have taken on the responsibility of dealing with issues arising from section 35 FA 2016.

It may help to set out our thinking. I know, from articles and other comments received, that the profession would like a much stronger set of examples. But we start from a rather different position. The crux of the provisions we see as Condition D, and condition C will be interpreted widely. Condition D is a purpose test, which focuses on the object of the taxpayer, what he is aiming at achieving, which in my view should be distinguished from motive, why he is aiming to achieve it; although the distinction is not always drawn. A subjective purpose may reasonably be inferred from the objective characteristics surrounding the transactions in question, and that is what Condition D assumes. In a different field, in the lady barrister's court clothes case Mallalieu v Drummond, Lord Brightman was able to infer the barrister's purpose notwithstanding Miss Mallalieu's declared motive; not that she was misleading the court but the purpose, which was different from the motive, could be inferred from the objective facts.

The taxpayer will know whether his purpose or main purpose is to avoid tax, and HMRC are given the power to draw reasonable inferences if there appears to be a reason to challenge the basis of a return. This is not temporally or otherwise limited; it is applied on the basis of all the circumstances. If the assertion is in good faith, we believe the facts and circumstances will support that conclusion when the Inspector or possibly an appeal tribunal draw their inferences. You know that HMRC starts from the position that a taxpayer acts in good faith. What we do not believe would be appropriate in this situation is to provide a schedule of detailed scenarios which will enable definite conclusions to be drawn on the basis of hypothetical fact patterns. Every case is different, in reality, and the taxpayer will have the protection in appropriate circumstances of asserting what is true. I accept that there is a tension here between certainty and administrative freedom to challenge; but I think that is inevitable if a purpose test is applied properly, and in practice I think the problem will prove to be more apparent than real.

I know that, understandably, the profession has come to regard the winding-up of a company as a safe capital treatment harbour. It is, however, worth noting that in the run up to the introduction of CT and CGT in 1965 it was not taken as axiomatic that what is now section 1030 CTA 2010, distribution in a winding-up would not be a CT distribution. You will know that there are other capital transactions that are treated as CT distributions within what is now Part 23. There were strong arguments that accumulated profits realised on winding-up should be taxed as income. What swung the argument was, indeed, the introduction of CGT; but when the gulf between tax on capital gains and on income widens, it should not come as a surprise that the safe harbour comes under scrutiny.

On the question of penalties, I have consulted colleagues who have advised me that each case must be decided on its own facts and merits in light of the circumstances. Some assistance is given by HMRC guidance at Compliance Handbook CH81120 which explains HMRC's view of reasonable care and includes the following in relation to unusual transactions or events:

In HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice.

If after that the person is still unsure they should draw attention to the entry and the uncertainty when they send the return or document to us. In these circumstances the person will have taken reasonable care to draw our attention to the point and if they are wrong they will not have been carelessly so.

Disclosure in the white space of the return is a factor but not necessarily sufficient to discharge the requirement to bring attention to uncertainty around whether or not a particular provision applies. In this particular situation, as observed above, the taxpayer will know whether his purpose or main purpose is to avoid tax, and if the basis of completion of the return is in in good faith we believe the facts and circumstances will support that. Every case is different, but I think concerns about penalties are probably exaggerated.