

Capital Taxes Liaison Group (Technical) Meeting

24th April 2018

Minutes

Attendance:

Sarah Kelsey, HMRC – Joint Chair (SK)
Martyn Rounding, HMRC - Joint Chair (MR)
Adrian Cooper, HMRC (AC)
Dave Camidge, HMRC (DC)
Dion Seymour, HMRC (DS)
Alison Hudson, HMRC – Notes

Andrew Cockman, ICAEW
Lynnette Bober, ICAEW
Kate Willis, CIOT
Aparna Nathan, CIOT
Mark Nelson, AAT (deputising for Brian Palmer)
Helen Thornley, ATT
Kevin Slevin, ATT
Susan Cattell, ICAS
Diana Davidson, STEP
Louise Speke, CLA
Edward Reed, Law Society
Chris Chapple, CBI (deputising for Charles Pascoe)
John Bunker, TACT

1. Welcomes and Introductions

MR welcomed attendees and opened the meeting. HMRC attendees gave an overview of their areas of responsibility within HMRC.

Due to this being the first meeting of the Technical Group, brief introductions were carried out to introduce all attendees.

2. Purpose and scope of the forum

MR referred to the Policy Group meeting held in December where it was decided that the forum should be split into two to concentrate matters relating to Policy and Technical separately. MR advised that this meeting would be to discuss purely technical issues and advised that a draft Terms of Reference would be provided.

SK confirmed that all stakeholder contact for the Technical group should be directed to her.

Update: *The draft terms of reference are set out at Appendix A. This is based on the terms of reference already published for the Policy group, incorporating changes to account for the new structure.*

The group asked if there would be a follow up process and MR agreed that there would be a common understanding to clarify points and that there may be times when we would have to agree to disagree where interpretation of the legislation is at point.

If a specific area needed to be discussed further, this will be done via sub-groups separately to this meeting with HMRC experts in the specific area and interested parties from the group.

3. Outstanding Issues

SK advised that a number of the group had referred to outstanding issues from previous forums. It was agreed that attendees would forward further details to SK on outstanding points.

Action Point: Stakeholders to forward details of any outstanding issues to SK.

4. Re-classification of CG as distributions – S396B

MR outlined details of the current legislation in this respect and advised that this was put in place due to changes in behaviour and thus combat avoidance practices. MR advised that there is guidance available and that lots of discussion had taken place on this particular subject. Within the guidance, CTM36340 provides a clear explanation which encapsulates who the legislation is aimed at and the activity being undertaken.

The group felt that it might be helpful if queries on this issue could be channelled through an expert within HMRC to enable in-depth assistance/guidance to be given. MR advised that HMRC would not be able to do this for various reasons and referred back to the clear fundamental objective of the changes which were to stop avoidance. Discussion was held around businesses etc who were not actively pursuing avoidance activity, but could potentially be affected by the legislation. To highlight the point brief details of an example was given where this question was being considered. It was not possible to discuss the case in any detail but MR stated that if a transaction was carried out which was purely for commercial reasons then it was far less likely that this would have been done for a main purpose of reducing or avoiding tax. The more that the transaction or the way that the transaction was structured was to get a tax advantage then the more chance there was that it would have a main purpose of a tax advantage. The group asked if the guidance could provide more detail in this aspect, but MR advised it would be very difficult to publish guidance with that much detail as this would be used to assert that there were bright lines in the legislation and to enable people to structure transactions which was arguably let out by the guidance.

There is a feeling amongst the stakeholders that HMRC concentrates too much on “what” actions were taken, but not on the impacts of “why” it was taken. MR confirmed that HMRC looks at all of the circumstances when considering what the main purposes of an arrangement are. The legislation was structured so that HMRC and the tribunal could question whether assertions of purpose were correct.

5. Cryptoassets

DS gave background to what this area covers and how crypto-currencies are being used. Guidance has been updated to cover this aspect over many of the taxes.

This is a new area and that these assets use different technology to pass from one area to another.

DS advised that HMRC is currently in listening mode and welcomes any views or suggestions. With an area of this type, there are lots of changes taking effect and quickly.

DS agreed that the RB 9/14 was useful however understanding and use of Cryptoassets had changed in the intervening years. DS stated that HMRC guidance has been updated since RB 9/14 and was included in the manuals, in particular, for CG and VAT. The guidance has been updated as and when circumstances have required. DS discussed the questions related to tax treatment. DS stated that these would turn on the facts of each case and current principles would apply, particularly in cases of trading.

DS confirmed that HMRC was actively considering a number of issues in this space. DS was asked about guidance relating to ICOs, which have become much more common since the latter half of 2017. DS confirmed that HMRC are aware that this is a particularly difficult area where there is current uncertainty. Due to this it is unlikely that HMRC will be in a position to publish guidance in the near term.

DS referred to a number of questions that had been posed by the group. The group asked if those questions could be circulated to all members to avoid any duplication. This was agreed and would be provided after the meeting.

Update: *the list of questions are provided at Appendix B.*

6. Specialty Debts

SK highlighted that attendees had asked for this topic to be deferred until after they had had their meeting on the subject. The group advised that this meeting had taken place and it was agreed that a sub-group meeting would be set up to take this matter forward.

Update: *the meeting has been arranged and is due to take place on 25th July.*

7. Entrepreneurs Relief (ER)

AC referred to an exchange from the rep bodies asking if there was an appetite for discussing wider reform of ER beyond the consultation. AC advised that we will listen to any concerns from rep bodies if it appears that legislation is not working as intended. An issue was discussed around the raising a charge against companies but not partnerships doing the same activity/process.

Action Point: Stakeholders to provide further details to AC.

8. DOTAS/IHT

DC referred to the questions posed by the CIOT representatives (see Appendix C). He advised that there had been numerous consultations with representative bodies on the new IHT Hallmark arrangements and that all guidance had been updated to reflect the changes. Talks and workshops had also taken place to various representatives to highlight the changes.

The group asked why the guidance was published late and so close to when the change came into effect. It was acknowledged that the timing of publication of the guidance was not ideal.

DC advised that the updated information on Gov.uk page had been viewed over 2000 times thus far.

DC asked if the stakeholders had any further suggestions/comments or that they saw errors/mistakes on the guidance that they please contact DC direct.

DC made reference to a question posed on Deed of Variation in relation to IHT by CIOT and gave an outline in relation to Conditions 1(a) through (d) within s142. For ease of reference DC will include all explanations within the minutes. These can be found at Appendix C.

Action point: stakeholders to contact DC with any further points to be considered in respect of this guidance.

9. Foreign Income and Gains – RDRM33170

SK referred to the questions posed by stakeholders for HMRC to confirm the current state of play. SK asked for more detail of the issue. The group gave some background

to a particular issue they had become aware of recently. SK asked if further details could be provided so that this could be considered.

Action point: Lynnette to provide details to SK of an issue relating to the operation of RDRM33170.

10. Any Other Business

- The group asked for clarification around the treatment of vineyards for agricultural property relief in the IHT manuals which DC agreed to take forward with colleagues.

Update: HMRC will provide an update at the next meeting.

- CIOT asked for clarification following publication of the April Trusts & Estates Newsletter. This gave details on when executors could expect to hear from us if we need more details and states: “where we are looking in more detail, we will give you a specific date by which you can expect to hear from us if we have any questions. The date will be 12 weeks from when we issued our first calculations.” Clarity was needed on whether this meant when the IHT421 was issued. AC agreed to consider this point further.

Update: The 12 week window is from the date we issue our first calculations. This is the date we process the IHT400, which may be the same date we issue the IHT421 but sometimes will not be (as the customer needs to have paid the tax due to be issued with an IHT421).

Update: AC has now moved from HMRC to DEFRA. Attendees are asked to provide any details that were due to be sent to AC to SK.

- **Date of next Meeting:** 17th October 2018 10.30-12.30

Capital Taxes Liaison Groups (Policy & Technical)

Terms of reference

Note: The terms of reference below are the ones currently published on gov.uk in respect of the Policy Group with proposed amendments to cover the Technical Group.

Purpose

To provide a forum in which HMRC and representatives of tax advisers and the accountancy profession, law societies, HM Treasury, and others can discuss, explain and explore how Capital Gains Tax (not including the taxation of chargeable gains of companies), Inheritance Tax and the taxation of trusts work and how they might work better.

The Policy group can, where appropriate, provide a forum for consultation on draft guidance and also provide members with an opportunity to outline any areas where they currently feel there are ambiguities within published guidance.

The Technical group can, where appropriate, provide a forum to explore more technical issues that HMRC or other attendees want to consider around Capital Gains Tax (not including the taxation of chargeable gains of companies), Inheritance Tax and the taxation of trusts.

Each group will meet every 6 months, on an alternating basis.

How the review group will operate

The meeting will be chaired by HMRC. Minutes will be drafted by HMRC and agreed by those attending the meeting before being circulated to the group as a whole. Finalised and agreed minutes will be published on Gov.uk.

Items discussed at the meeting and opinions expressed will be open unless specified. However, comments will not always be attributed to individual members of the group. Members will be free to circulate the finalised minutes of the meeting to colleagues within the body they represent.

Agenda items will be compiled by the secretary of the group from suggestions by both internal HMRC and external representatives. Agenda items and papers should normally be submitted allowing for a finalised agenda to be provided to all attendees 2 weeks in advance of the meeting.

For Technical issues, suggested items should be submitted with the following criteria in mind:

- Subject matter
- Technical issue at point
- An example to demonstrate the point
- Confirmation that it is an issue that has wider impact, and isn't client specific

The next meeting will normally be scheduled under AOB. But members of the group may request an earlier meeting if they think it necessary.

All members will be invited to each meeting unless a specific sub-group is set up with the agreement of the meeting. It is open to members to decide whether to attend on the basis of the agenda. Any subgroups set up will report to the meeting as a whole. Requests to join the group may be made at any time, and substitutions for or additions to regular delegates from member representative bodies will be welcomed.

Membership

To help ensure a diverse range of views are represented by the group, membership will be drawn from a variety of representative and professional bodies. The membership of the group will be kept under review by the secretariat to ensure it continues to meet the objectives of the group. Membership requests will be considered by the chair case by case.

Group Questions Raised on Cryptoassets

Cryptocurrencies

Having recently completed the tax return 'cycle' for the last tax year, it has become clear how many taxpayers are buying and selling or otherwise involved with 'crypto currencies'. The best known of these currencies is Bitcoin, but there are a large number of other such currencies as well as an increasing range of exchanges, funds and other financial products offering exposure to crypto currencies. These issues have been discussed widely in the press and there is correspondingly greater awareness of them.

Whilst the Revenue & Customs Brief 9 (2014) provides a helpful summary of the taxation of crypto currencies, we are conscious that this is now four years old and the market for these instruments is developing at a considerable pace.

We are aware from our membership of various trade bodies (notably in financial services) that some of these are looking for greater clarity from HMRC on specific issues that affect them.

Questions

Whether HMRC has any intention of issuing updated and/or more detailed guidance in this area in the near future?

In particular, the issue that is providing most difficulties for taxpayers are the boundaries between the possible tax treatments mentioned in the brief:

- Where buying and selling of cryptocurrencies is highly speculative, it is suggested that it may amount to betting or gambling. We take the view that this is much less likely where currencies and markets are more established. Further guidance in this area would be helpful.
- Where the buying and selling of cryptocurrency reaches a certain scale, it may fall to be treated as trading. This has pros and cons for the taxpayer in terms of higher rates of tax, but also the ability to offset losses. However, what is difficult is to determine the circumstances in which these transactions would amount to trading. For example, the use of modern exchanges mean that it is straightforward to execute a relatively large number of transactions with currency held for a short period, which might indicate trading. However, the values are often not great and it is frequently unconnected with an individual's 'day job' (being more like the activity an investor in shares would take overseeing his investment portfolio). Further guidance in this area would also be helpful.

We should be grateful if HMRC could confirm whether these are areas that HMRC are actively considering now, or might be willing to do so in future.

Queries from CIOT

Query Details:

Point 1:

In relation to Deeds of Variation (DoV): Example 6 is in the simple form of an outright gift. However further questions arise:

- Could HMRC confirm that no DoV would be within Condition 1?
- Specifically, could HMRC confirm the creation of a discretionary trust, in which the person giving up the interest is included as a potential beneficiary, would not be within Condition 1?

The query is raised as there are good tax planning, as well as legal/asset protection reasons, for creating trusts, and there is a specific statutory provision IHTA section 142 - that stops three provisions that might otherwise apply if setting up a trust: s. 142, such a DoV could satisfy:

- 1(a) avoiding a charge on creating a RPT; and
- 1(c) avoiding a GROB; and
- 1(d) reducing an estate without a PET or CLT

If HMRC are not in a position to confirm this question, it appears that advisers setting up Nil Rate Band Discretionary Trusts by DoV, on the death of a first spouse, should report them as potentially within DOTAS? Is that HMRC's expectation?

Point 2:

Condition 1 (c) refers to avoidance or reduction of an IHT charge because of a GROB, where no POAT is payable. The reversionary lease is given as Example 17 as a notifiable arrangement. Could HMRC confirm (as it seems to be) that a report is required if no POAT is payable because the taxable amount is less than £5,000 (FA 03 Sch 15 para 13), whereas a report is not needed (presumably because POAT is actually payable) if the taxable amount is more? The example refers to "no charge arises under Sch 15 FA 2004".

HMRC Reply:

Point 1:

- A deed of variation cannot be caught by condition 1(d) as the reading-back provisions of s.142 mean that the person whose interest is being varied is treated as never having acquired the property. The dispositions made by a s.142 variation are treated as having been effected by the deceased.
- A deed of variation could, however, be caught by either condition 1(a) or 1(c) if the main purpose or one of the main purposes of the variation is within either condition.
- Where a deed of variation falls within condition 1, it is necessary for condition 2 to apply for the arrangements to be notifiable. If the arrangements do not contain one or more contrived or abnormal steps without which the tax advantage could not be obtained, they will not be notifiable even if condition 1 is met.

Point 2:

- Condition 1(c) describes arrangements which avoid or reduce charges arising from the gift with reservation of benefit rules and which also do not give rise to a pre-owned assets income tax charge (the POA charge). The condition does not enquire into why the POA charge does not arise.

- A 'notifiable proposal' is defined in section 306(2) FA 2004 as a proposal for arrangements which, if entered into, would be notifiable arrangements. This applies whether the proposal relates to a particular person or to any person using the arrangements.
- If it would be reasonable to expect an informed observer, as described in regulation 4(1), to conclude that arrangements implementing a proposal would be within condition 1(c), the proposal would be notifiable. Designing a proposal that would be implemented only in cases where the aggregate notional annual values did not exceed £5,000 would not, in itself, affect the requirement to notify that proposal.
- Again, a proposal will be notifiable only if it is also caught by condition 2.