230 Grossing up

Income may be received which has already had tax deducted from it at source, i.e. before it is received. Where this is done, a calculation must be made to ascertain the gross figure which forms part of the taxpayer's total income. The process of calculating this gross figure is called 'grossing up'. The calculation is as follows:

- multiply the net amount received by the grossing-up fraction;
- the grossing-up fraction is 100 divided by (100 less the rate of tax).

Example

If £160 is received after the basic rate income tax of 20% has been deducted, the grossed-up figure is as follows:

$$£160 \times \frac{100}{100 - 20}$$

$$£160 \times \frac{100}{80} = £200$$

Therefore £200 is the grossed-up figure.

Example

If £160 is received after income tax of 40% has been deducted, the grossed-up figure is as follows:

$$£160 \times \frac{100}{100 - 40}$$

$$£160 \times \frac{100}{60} = £266.67$$

Therefore £266.67 is the grossed-up figure.

A special grossing up process is required for inheritance tax. Tax in respect of a disposition made by a transferor, which is chargeable, is calculated by reference to the reduction in value of his estate. If he also agrees to pay any tax due, the reduction in his estate is that much greater. A complex grossing up of the value of the disposition is required (see 16125).

In-Depth: ¶117-000ff.

Management of taxes

KEY POINTS

- HMRC have powers to enable them to obtain information and documents from taxpayers and third parties, and to inspect business premises, business assets and statutory records. There are various restrictions on HMRC's powers and a penalty system for non-compliance and the provision of inaccurate information (see 350ff.).
- The main penalty provisions in relation to tax returns apply to: incorrect returns and documents; failure to notify liability; and late filing and payment (see 530ff.).
- Taxpayers have various record keeping obligations (see 970ff.).
- Appropriate use of the white space section of a tax return (or a note in a computation) can reduce the risk of an enquiry. It can also limit the risk of a discovery by HMRC (see 1000ff.).
- In recent years, the Government has introduced many provisions in an attempt to prevent tax avoidance and evasion (see 1030ff.).
- Practitioners need to understand the appeals process, including: the statute-based internal review of HMRC decisions; the Alternative Dispute Resolution process; and the workings of the tribunal system (see 1120ff.).
- HMRC are able to make enquiries into a return without any need to demonstrate grounds for dissatisfaction (see 1240ff.).
- The Government plan to move to a fully digital tax system though their making tax digital initiative (see 2390).

Information and inspection powers

350 Information and inspection powers – overview

HMRC's information and inspection powers include:

- requiring a person in receipt of a 'taxpayer notice' to make available information and documents reasonably required to check the person's tax position;
- requiring a third party in receipt of a 'third party notice' to produce documents or provide information about named or unnamed taxpayers;

- requiring a person to give HMRC access to business assets, business documents and premises if reasonably required to check the person's tax position;
- requiring an 'involved third party' to give HMRC access to business assets, business documents and premises if reasonably required to check a person's (or a class of persons') tax position; and

There are various restrictions on HMRC's powers. For example, a person is only required to produce a document if it is in their possession or power.

A person can generally appeal against a taxpayer notice or any requirement in the taxpayer notice. But there is no right of appeal against the requirement to produce statutory records or against an information notice approved by the tribunal.

A person can appeal against a third party notice or any requirement in the notice if it would be unduly onerous to comply. But again there is no right of appeal against the requirement to produce statutory records or against an information notice approved by the tribunal.

HMRC can charge penalties if a person:

- fails to comply with an information notice or obstructs an inspection approved by the tribunal; or
- complying with an information notice provides inaccurate information or produces a document that contains an inaccuracy, and either:
  - the inaccuracy is careless or deliberate;
  - the person knows of the inaccuracy at the time the information is provided or the document is produced but does not tell HMRC at that time; or
  - the person later discovers the inaccuracy and fails to tell HMRC.

If an information notice has been approved by the tribunal (or if the officer has indicated an intention to seek such approval), the subsequent concealment, destruction or disposal of a document constitutes a criminal offence. A person guilty of the offence is liable on indictment to imprisonment for a term not exceeding two years or to a fine, or to both.

Legislation: FA 2008, Sch. 36

HMRC Manuals: CH20000ff.

In-Depth: ¶186-550ff.

355 Information and inspection powers – relevant taxes

The information and inspection powers apply to:

- income tax (including employers' obligations to deduct and account for PAYE & NIC);
- National Insurance contributions;
- deductions under the Construction Industry Scheme;
- capital gains tax;
- corporation tax (including any amount assessable or chargeable as it were corporation tax);
- diverted profits tax;
- apprenticeship levy;
- VAT (as defined);
- insurance premium tax;
- inheritance tax;
- stamp duty land tax;
- stamp duty reserve tax;
- annual tax on enveloped dwellings
- petroleum revenue tax;
- aggregates levy;
- climate change levy;
- landfill tax;
- relevant foreign tax (as defined); and
- bank payroll tax.

Legislation: FA 2008, Sch. 36, para. 63; FA 2010, Sch. 1, para. 36

HMRC Manuals: CH21050

In-Depth: ¶186-550ff.

380 Information powers

The powers enable HMRC to issue a formal notice to a taxpayer (a taxpayer notice) requiring them to provide information and documents reasonably required to check their tax position. There does not have to be an open enquiry except where a return has been submitted and the

- personal records concerning the health, spiritual or welfare counselling or assistance in respect of an individual but note that provision is made for the editing out of such information from general records;
- documents more than six years old unless the notice is given by or with the agreement of an 'authorised officer';
- information for the purpose of checking the tax position of someone who died more than four years before the date of the notice;
- information or any part of a document that attracts legal professional privilege;
- subject to significant limitations, information held by that person in connection with his or her performance of a statutory audit or documentation created by him or her or on his or her behalf in connection with that function; and
- again subject to significant limitations, information held by a tax adviser about 'relevant communications' or documents belonging to the tax adviser, which are communications between the tax adviser and his client or any other tax adviser of the client (but note that the same communications in the hands of a client are not protected).

The restrictions and limitations can be applied in an appropriately selective manner where some information is and some is not protected.

Legislation: FA 2008, Sch. 36, Pt. 4, para. 18–28

HMRC Manuals: CH22000ff.

In-Depth: ¶186-600ff.

395 Taxpayer notices following tax return

The legislation specifies restriction of HMRC's powers where a return has been made in respect of the relevant chargeable period but in reality the provision means that an information notice may be issued to a taxpayer notwithstanding that he has made a tax return in respect of the relevant chargeable period in any of the following circumstances:

- there is an open enquiry;
- an HMRC officer has reason to suspect that circumstances would permit the making of a discovery assessment; or
- the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking that person's tax position as regards any tax other than the taxes covered by the submitted return.

Legislation: FA 2008, Sch. 36, para. 21, 21ZA, 21A, 21B

Case: *Betts* [2013] TC 02824

HMRC Manuals: CH23526

In-Depth: ¶186-550ff.

400 Third party notices

HMRC's powers extend to obtaining information and documents from third parties. The purpose of a third party notice is the same as that for a taxpayer notice; the information or document has to be reasonably required for the purpose of checking the tax position of the relevant person.

There are additional constraints upon the issue of a third party notice. Except in relation to information that forms part of any person's statutory records and relates to the supply of goods or services (or certain imports), a third party notice can only be issued with either the agreement of the taxpayer or the approval of the tribunal.

HMRC must give a copy of any third party notice to the taxpayer to whom it relates. The tribunal can disapply this requirement if it is satisfied that giving a copy of the notice to the taxpayer could prejudice the assessment or collection of tax.

The National Crime Agency is also entitled to apply to the tribunal for permission to issue a third party information notice where it has taken over all the 'general Revenue functions' in relation to a taxpayer.

Legislation: PCA 2002, s. 317; FA 2008, Sch. 36, para. 3 and 4; FA 2011, Sch. 23

Cases: *PML Accounting Ltd* [2015] TC 04612; *Re an application by R & C Commrs* [2015] TC 04649; *National Crime Agency, ex parte a taxpayer* [2016] TC 05191; *R & C Commrs ex parte a Taxpayer* [2018] TC 06330

In-Depth: ¶186-550ff.

405 Client confidentiality

HMRC will not accept that a legal or professional adviser's duty of confidentiality towards their client is sufficient reason for not complying with a taxpayer notice addressed to themselves for the purpose of checking their own tax position.

Legislation: FA 2008, Sch. 36, para. 25

HMRC Manuals: CH22300

In-Depth: ¶186-550ff.

410 Medical records

The information powers cannot be used to obtain medical records. Where the records mix both medical and financial information, HMRC take the view that they can be requested but that a request for a patient's records (or other records containing patient information) should only be made if:

- there is reason to believe that fees have been omitted from the return because the records examination shows weaknesses that may have led to an understatement of fees;
- it has been established that the patient record cards are prime income records; and
- the patient record cards are the most effective way of working out the true amount of liability.

Legislation: FA 2008, Sch. 36, para. 19(2)

Case: *Cherian* [2016] TC 05085

HMRC Manuals: CH22180, CH22200

In-Depth: ¶186-650

415 Legal professional privilege

HMRC cannot obtain any documents in respect of which a legal professional is entitled to legal professional privilege. Where privilege is claimed in respect of information relating to a client of the professional or another third party, there is a strong presumption in favour of the privacy of the information.

Legislation: FA 2008, Sch. 36, para. 23; *Data Protection Act* 1998; *Human Rights Act* 1998

HMRC Manuals: CH22240ff.

Cases: *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] BTC 45; *Behague* [2013] TC 02983; *Lewis* [2013] TC 03102

In-Depth: ¶186-700

420 Penalties for non-compliance with information notices

As noted, an informal request will normally be made for information before HMRC consider issuing a formal notice. If the informal request does not allow sufficient time, the practitioner can request an extension. However,

if the officer does not consider that there is a good reason for such a request, they may issue a formal notice as soon as the time limit in the informal request has expired.

If the time limit set in a formal notice is too short, the practitioner should contact the officer as soon as it is clear that more time is needed. Delay in contacting the officer could lead to complications and possibly the imposition of a penalty for delay. When considering any eventual penalties, the issue of a formal notice could have implications for the subsequent consideration of the quality of the taxpayer's disclosure.

If the officer refuses to accept that more time is needed, a subsequent appeal against the notice or a penalty for non-compliance can be made to the tribunal on the grounds that the officer allowed insufficient time. In such a situation, a clear file note should be made of the conversation in which the refusal was made in order that this can be produced in evidence.

If a taxpayer or third party fails to comply with a notice requiring the provision of information or the production of a document, HMRC may impose an initial penalty of £300 and a daily penalty of up to £60 until the notice is complied with. Before doing so, the officer should try to contact the taxpayer to find out why the notice has not been complied with and, if necessary, agree more time. They should also explain that a penalty will be charged if they do not comply with the notice.

If the failure continues for more than 30 days beginning with the date of the assessment of a daily penalty, HMRC can apply to the tribunal for an increased daily penalty to be imposed. Before making such an application, HMRC must warn the person concerned that such an application might be made. In determining the amount of any such increased daily penalty, the tribunal must consider the likely cost of complying with the information notice and any benefits (to that person or any other) of not complying with it. The penalty awarded by the tribunal cannot exceed £1,000 for each day starting with the applicable day.

R & C Commrs v Tager (Personal Representatives of the Estate of Tager (deceased)) was the first case in which a tribunal considered an application by HMRC for the imposition of a 'tax-related penalty', for failure to comply with an information notice. The tribunal determined that the starting point for each penalty was 100% of the tax at stake and imposed a penalty of £1.17m representing 100% of the inheritance tax at stake (as calculated by HMRC) with no mitigation and a further penalty of £75,000 representing 100% of the income tax at stake (£80,549) with mitigation of a modest rounding down only. The inheritance tax related penalty has subsequently been reduced, and the Upper Tribunal has refused to suspend the penalties until the case is decided by the Court of Appeal.

No penalty should be imposed while the appeal period is still open or if an appeal has been made against the notice and the appeal is still open.

In addition to any non-compliance penalty, failure to comply with an information notice may limit the practitioner's scope to argue for a reduction of any penalty charged in respect of any inaccuracies found in a return.

Legislation: FA 2008, Sch. 36, para. 39, 40, 49A, 50

Cases: *R & C Commrs v Tager (Personal Representatives of the Estate of Tager (deceased))* [2015] BTC 509; *Tager (Personal Representative of the Estate of Tager (deceased)) v R & C Commrs* [2015] BTC 538; *R & C Commrs v Tager (Personal Representative of Tager (deceased))* [2017] BTC 509; *R & C Commrs v Tager (Personal Representative of Tager (deceased))* [2017] BTC 515; *PML Accounting Ltd* [2015] TC 04612; *Doshi* [2016] TC 04813; *Spring Capital Ltd* [2016] TC 05007; *Cherian* [2016] TC 05085; *R & J Birkett (t/a The Orchards Residential Home) v R & C Commrs* [2017] BTC 511; *Chohan* [2017] TC 06186

HMRC Manuals: CH26220

In-Depth: ¶187-075

425 Tribunal approval

HMRC can seek advance approval of the tribunal for an information notice. There is no right of appeal against a taxpayer notice that has been approved by the tribunal.

If HMRC want to inspect documents and business premises at the same time, they can ask the tribunal for their approval for both the inspection visit and the taxpayer notice.

Legislation: FA 2008, Sch. 36, para. 3

Case: *Taxpayer* [2016] TC 05116; *R & C Commrs ex parte a Taxpayer* [2018] TC 06330

HMRC Manuals: CH24100ff.

In-Depth: ¶186-575

Inspection powers

450 Inspection powers

HMRC have the powers to inspect business premises, business assets and statutory records.

The powers must be used reasonably and proportionately and can only be used to inspect *business* premises, not premises that are used wholly for residential purposes. If they are used only partly for business purposes, then they are partially subject to HMRC's inspection powers.

There are safeguards built into the legislation that are intended to ensure that the use of the powers is reasonable and proportionate. Over and above such safeguards, HMRC must take care not to breach a taxpayer's right to privacy. under the *Human Rights Act* 1998.

Legislation: FA 2008, Sch. 36, Pt. 2, 3, 4

HMRC Manuals: CH25000ff.

In-Depth: ¶186-850ff.

455 Business premises, business assets and business documents – definitions

Business premises are defined in relation to a person as premises that an HMRC officer has reason to believe are used in connection with the carrying on of a business by or on behalf of that person. Premises are given an extended definition to include any means of transport.

Business assets are defined as assets that an HMRC officer has reason to believe are owned, leased or used in connection with the carrying on of business by any person.

Business documents are defined as documents that relate to the carrying on of a business by any person and that form part of any person's statutory records. Statutory records are themselves defined but precisely what forms part of a particular client's statutory records will depend on the client's circumstances. For example, if he is a sole trader or partner, he will need to keep (amongst other things) specified records.

Legislation: FA 2008, Sch. 36, para. 10, 58 and 62; TMA 1970, s. 12B

HMRC Manuals: CH25180, CH25260, CH25280

In-Depth: ¶186-850ff.

460 Why visits will be made

Situations where a visit to premises is more likely include those where an HMRC officer considers it necessary in order to:

- inspect the business records on site (not restricted to those of the enquiry period);
- inspect the business assets, for example to check the stock held;
- detect people operating in the black economy;
- collect evidence of suspected deliberate understatements; or
- to carry out credibility checks.

Before an inspection visit is made, the risk should have been identified and a note made by the HMRC officer of why it is best addressed by way of a visit instead of calling for documents and information. The timing of the visit should be reasonable and the officer must be able to show that the compliance check is reasonable and proportionate.

The officer should be told if there is a good reason why the business premises should not be visited. This might be due to lack of space, disruption caused to the operation of the business or the adverse effect on customers. The officer may then arrange to see the business records at an HMRC office or the premises of the practitioner or perhaps at a different time.

Legislation: FA 2008, Sch. 36, para. 12, 12B; *Human Rights Act* 1998, s. 8(2)

HMRC Manuals: CH20000ff.

In-Depth: ¶186-850ff.

465 Visits arranged or with notice

Visits can be announced or unannounced. Announced visits will usually be made by prior arrangement, following an informal request for information and an inspection of the business records and premises. If the taxpayer refuses an informal request for a visit, the officer can arrange a visit by issuing a formal notice. Examples of the various formal notices are included in HMRC's *Compliance Handbook*.

When an announced visit is arranged (whether by agreement or by formal notice), the taxpayer will be notified of the date and time of the visit, the name of the visiting officer and the records that are to be inspected. They will also be sent the factsheet on visits explaining relevant rights and responsibilities.

If the visit is arranged by way of a formal notice rather than by agreement, the officer will probably also issue a notice requiring that the records should be produced at the business premises whether or not they are normally kept there.

Although a visit arranged with the taxpayer's agreement might be made with less than seven days' notice, if it has not been possible to reach agreement on the time of the visit, the officer must give at least seven days' notice (whether in writing or otherwise) unless a shorter period is approved by an authorised officer.

An officer may seek advance approval for an inspection by the tribunal (see 475) even where the taxpayer is to be notified in advance. There is no right of appeal against a notice of an inspection visit but only in relation to a tribunal-approved visit is there a penalty for obstructing a visit.

Legislation: FA 2008, Sch. 36, para. 12, 12B, 13

HMRC Manuals: CH253000, CH253500

Other Material: HMRC factsheet *Compliance checks: visits by agreement or advance notice* - CC/FS3

In-Depth: ¶186-850ff.

470 Unannounced visits

If the nature of the risk requires it, HMRC may carry out an unannounced visit, without giving any notice of the intended visit. No unannounced visit should be carried out unless it has been approved by an authorised officer. An authorised officer is a senior officer authorised for the purpose of the legislation.

If an officer believes that their inspection may be obstructed they can, with the approval of an authorised officer, apply to the tribunal for their approval to a visit (see 475). There is no right of appeal against a notice of an inspection visit but only in relation to a tribunal-approved visit is there a penalty for obstructing a visit.

As with announced visits, unannounced visits must be made at a reasonable time and the occupier of the premises must at the start of the visit be given written notice of the inspection together with the relevant factsheet on unannounced visits (CC/FS4 or CC/FS5 if tribunal-approved). The officer will then explain the reason for the visit and how they intend to carry it out.

If the taxpayer is present, the officer must advise them of their right to ask their agent to be present but need not delay the start of the inspection to

await their arrival. Clients should be advised that if an officer makes an unannounced visit, they should ask to see the tribunal's authorisation for the visit. The client does not have to allow access to the premises. Only if the tribunal's authorisation has been obtained will HMRC be able to assess a £300 obstruction penalty (see 475). Otherwise, there is no risk of a penalty and it will be sufficient to agree a more convenient date and time for the officer to call back.

Legislation: FA 2008, Sch. 36, para. 12, 12B, 13

HMRC Manuals: CH25520

Other Material: HMRC factsheets: *Compliance checks: unannounced visits for inspections* - CC/FS4, *Compliance checks: unannounced visits for inspections approved by the tribunal* - CC/FS5

In-Depth: ¶186-850ff.

475 Visits authorised by tribunal

A penalty can be imposed on a taxpayer who obstructs a visit that has been approved by the tribunal. The initial penalty is a fixed £300 and there can additionally be daily penalties of up to £60 for each day on which the obstruction continues. There is no right of appeal against a tribunal authorised visit.

At the same time as seeking the tribunal's approval for the inspection visit, the officer will probably also seek approval for a taxpayer notice to make the records available at the premises. By obtaining the tribunal's approval, the officer ensures that no appeal can be made against any requirements in the information notice.

Legislation: FA 2008, Sch. 36, para. 39, 40

HMRC Manuals: CH26240

Other Material: *Compliance checks: unannounced visits for inspections approved by the tribunal* - CC/FS5

In-Depth: ¶186-850ff.

480 Private residences

HMRC do not have the power to inspect premises that are used *wholly* as a private residence but they can do so if invited to do so by the taxpayer. If the premises are used partly for business and partly as a private residence, HMRC can only inspect the parts used for the business.

HMRC's departmental instructions advise officers, 'Wherever practicable you should avoid inspecting at premises that are also a person's home. You will normally be able to find an alternative location such as at an agent's premises or an HMRC office'. Practitioners may wish to remind officers of this if the advice is overlooked.

It is the view of HMRC that they can inspect a private residence if:

- the business is run from the home;
- business assets are stored at the home;
- business records are kept at the home;
- the business accounts include a claim for 'use of home as office'; or
- a home is registered as the principal place of business for VAT.

HMRC accept that storing records at home because there is nowhere else to keep them is not sufficient to allow them to inspect the private residence unless invited to do so.

> **Example**
> A dental surgery is run from the dentist's home. The officer can inspect the offices and waiting rooms and any consulting rooms that are not in use. The inspection cannot be extended into any areas that are used solely as a private residence.

Legislation: FA 2008, Sch. 36, para. 10(2)

HMRC Manuals: CH25220, CH25240

In-Depth: ¶186-850ff.

485 Record-keeping obligations

Practitioners can help to strengthen their clients' position in the event of an enquiry or a business records inspection by advising on the maintenance of adequate business records. This advice will also ensure that clients are not penalised for failing to comply with the record-keeping obligations.

HMRC have published a range of factsheets and online tools to help businesses understand their record-keeping obligations.

Further commentary on record-keeping obligations is included in the consideration of tax returns and record keeping (see 975).

Legislation: TMA 1970, s. 12B(5)

HMRC Manuals: CH10000

Other Material: GOV.UK *Keeping your pay and tax records*

In-Depth: ¶181-900

490 The visit itself

At the start (or in advance) of the visit, the officer will give the taxpayer a copy of a factsheet on visits and explain what will happen during the visit. The officer may indicate that they would like to discuss the records with the person who keeps them. They can only do this with the agreement of the taxpayer.

The taxpayer has the right to refuse to allow the officer to enter the premises. However, unless the taxpayer agrees to a visit at a later date, the officer will consider asking the tribunal for approval for the inspection. If the tribunal has approved the inspection, the taxpayer can be penalised for obstructing the visit unless there is a reasonable excuse such as illness. The penalty for obstructing an inspection that has been approved by the tribunal is a fixed £300 plus a daily penalty of up to £60.

There is no statutory definition of what inspection involves. Some guidance on the point is included in HMRC's *Compliance Handbook*.

The officer should not mark the records that are inspected in any way, even to indicate that they have been checked. Goods or assets can, however, be marked to show that they have been inspected, although the officer must not damage them when doing so.

The officer can record the information obtained in the course of the inspection and can take copies of the documents inspected or make extracts from them, if necessary by removing them from the premises. If a written receipt for any documents removed is not offered, the taxpayer can request one.

Documents removed by an officer should not be retained longer than necessary. If any are lost or damaged, the taxpayer is entitled to compensation.

Legislation: FA 2008, Sch. 36, para. 10–17, 39, 40, 50

HMRC Manuals: CH25140, CH25160

Other Material: HMRC factsheets: *Compliance checks: visits by agreement or advance notice* - CC/FS3; *Compliance checks: unannounced visits for inspections* - CC/FS4, *Compliance checks: unannounced visits for inspections approved by the tribunal* - CC/FS5

In-Depth: ¶186-850ff.

Other information powers

520 Data gathering powers

In addition to the information powers explained at 380ff. which are commonly used to obtain information in the course of an enquiry, there are other, less commonly used powers. These include the bulk data-gathering powers, which provide a framework of powers for HMRC to obtain third-party data from a range of specified data-holders, subject to appeal, with penalties for non-compliance.

There is an initial penalty of £300 for failure to comply with a data-holder notice and increased daily penalties can be approved and assessed if a data-holder does not comply with a data information notice request. From 15 September 2016, the administration of the increased daily penalty has been clarified and the amount of the maximum daily penalty increased from £60 to £1,000. The tribunal will decide whether an increased daily penalty is allowed, determine the new maximum amount of such a penalty and the date from which it can be applied, although the process for assessing the increased penalty remains with HMRC.

Legislation: FA 2011, Sch. 23; *Data-gathering Powers (Relevant Data) Regulations* 2012 (SI 2012/847)

HMRC Manuals: CH28000ff.

Other Material: HMRC guidance: *How to complete your statutory notice return*

In-Depth: ¶187-197ff.

525 Powers to obtain information about certain tax advantages and publish state aid information

With effect from 15 September 2016, HMRC have the power to collect information on certain state aids for the purpose of complying with EU obligations in relation to state aids granted through tax advantages. HMRC may determine that claims for a tax advantage specified must include (or be accompanied by) such information, presented in such form, as the determination may specify.

The specified tax advantages are:

- enhanced capital allowances (business premises renovation allowances, zero-emission goods vehicle allowances and expenditure on plant and machinery for use in designated assisted areas (enhanced capital allowances for enterprise zones));

- creative tax reliefs (film tax relief, television tax relief, theatre tax relief and orchestra tax relief);
- research and development reliefs (relief for SMEs: cost of research and development incurred by SME and vaccine research relief).

HMRC may also issue an information notice requiring information in respect of specified tax advantages (as follows):

- reduced rate of climate change levy payable in respect of a reduced rate supply (for supplies covered by climate change agreement);
- relief granted to investors in a company under the enterprise investment scheme;
- relief granted to investors in a venture capital trust under the venture capital trust scheme.

HMRC also have the power to publish and disclose information on certain state aids.

Legislation: FA 2016, s. 180, 181, 182 and Sch. 24

In-Depth: ¶187-797ff.

Penalties

530 Tax penalties – overview

Within the context of an enquiry, a liability to penalties can arise in various circumstances. The main provisions relate to:

- incorrect returns and documents (see 550ff.);
- failure to notify liability (see 700ff.); and
- late filing and payment (see 800ff.).

In addition, a penalty can arise in relation to record-keeping obligations (see 985).

The same 'behaviour-based' principles of calculation apply to most taxes. The current rules apply standard percentages of the potential lost revenue to determine the penalty for three distinct categories of behaviour and then provide specific reductions to reflect the extent of disclosure during the enquiry. The former rules left much more discretion to HMRC, although the department tried to work to a standard practice.

As the current provisions only apply from their relevant introduction dates, the former provisions continue to apply up to the cut-off dates. If a

client has possibly incurred penalties in relation to years that straddle the cut-off dates, the practitioner needs to be familiar with the mechanics of calculation under both regimes. As the current penalties focus heavily on the behaviour that caused the under-declaration of tax liability, the penalty loadings can vary between 0% (innocent error) to 100% (deliberate and concealed error with no reduction for disclosure) of the under-declared tax. In situations involving offshore matters, penalties under the current regime can be as high as 200%. Under the former regime, penalty loadings tended to bunch in a narrower and lower banding.

In certain circumstances, the names of 'deliberate defaulters' can be published by HMRC. Lists are published quarterly.

From 1 April 2017, the naming provisions have changed, so that where there is an inaccuracy in a taxpayer's document, or failure to notify which relates to offshore matters or offshore transfers, only full, unprompted disclosures will be outside the scope of the provisions. The provisions are also amended to allow the naming of certain people who have benefited from the inaccuracy or failure.

HMRC will also monitor the tax affairs of people who deliberately get them wrong, known as serious defaulters. These include people who have been charged a penalty because of their deliberate behaviour.

Consultation

The Government has consulted on:

- proposals for new late submission penalties;
- plans to penalise late payment by penalty interest; and
- the idea of a new penalty regime for dealing with inaccuracies.

The consultation *Making Tax Digital – sanctions for late submission and late payment* ran from 20 March 2017 to 11 June 2017. The Government published a summary of responses on 1 December 2017 and said it intended to take forward the suggested points based late submission penalties for further consultation on draft legislation. Also on 1 December 2017, the Government launched a consultation on *Making Tax Digital: interest harmonisation and sanctions for late payment.* This consultation closed on 2 March 2018 and the responses are currently being analysed.

Legislation: FA 2007, Sch. 24; FA 2008, Sch. 41; FA 2009, s. 94 and Sch. 55, 56

HMRC Manuals: CH60000, CH70000, CH80000, CH150000, CH190000

6505 Charge on foreign income from trade, profession or vocation

Income of a UK resident derived from a trade, profession or vocation (see 5200ff.) which is carried on wholly abroad is liable to tax only if it was remitted to the UK where he is:

- not domiciled in the UK (see 3600); or
- a Commonwealth (including a British) citizen or a citizen of the Republic of Ireland and is not (until 5 April 2013) 'ordinarily resident' (see 3560) in the UK.

For whether income is remitted, see 3655.

In all other cases, the income of a resident is liable to tax whether or not the income is remitted. Income arising in the Republic of Ireland is treated as if it arose in the UK but is nevertheless entitled to the same deductions (and subject to the same limitation of reliefs) as apply to trades, etc. carried on abroad.

The income of a non-resident derived from a trade carried on wholly abroad is not liable to tax. However, a non-resident trading in the UK through a branch or agency is liable to tax on consequent profits (see 6510).

For double tax relief, see 61000ff.

Legislation: ITTOIA 2005, s. 7(4); *Income Tax (Removal of Ordinary Residence) Order* 2014 (SI 2014/3062)

In-Depth: ¶293-000

6510 Trading in the UK

A 'non-UK resident' (see 3500) trading in the UK is only liable to UK tax where he is trading through a branch or agency.

What constitutes a trade is dealt with at 5300ff. Whether a person is trading in the UK through a branch or agency is a question of fact, but the distinction has to be made between trading with the UK and trading in the UK: soliciting orders in the UK will not by itself constitute trading in the UK. An important factor is whether the contract for sale or supply of services was made abroad, but the contract may not be conclusive.

Cases: *Grainger & Son v Gough* [1896] AC 325; *FL Smidth & Co v Greenwood* (1922) 8 TC 193; *Firestone Tyre and Rubber Co Ltd v Lewellin (HMIT)* [1957] 1 WLR 464

In-Depth: ¶293-350

6515 Business investment relief

Finance Act 2012 introduced a new business investment relief for individuals who are eligible to be taxed on the remittance basis. The relief allows such individuals to bring foreign income and gains to the UK tax free for the purposes of making a qualifying investment. If the investment subsequently ceases to qualify for the relief, the foreign income and gains will become taxable unless the investor takes certain mitigation steps within a specified period known as the grace period. In certain circumstances, HMRC may extend that grace period.

Legislation: FA 2012, Sch. 12; *Business Investment Relief Regulations* 2012 (SI 2012/1898)

6520 UK resident trading wholly abroad

An individual who is resident in the UK and carries on a trade, profession or vocation wholly abroad, either alone or in partnership, is liable to tax on all his income from such a trade. The income is assessed on a current year basis. Losses, etc. can only be set off against the income of that or another overseas source, foreign emoluments, other overseas income and certain pensions (see 10800 and 10805).

However, a person who is not domiciled in the UK or else is a Commonwealth (including a British) citizen (or a citizen of the Republic of Ireland) who is not ordinarily resident in the UK is liable only on a remittance basis (see 3080).

Legislation: ITTOIA 2005, s. 7, 19, 227

In-Depth: ¶293-150

6525 Expenses connected with foreign trades

Special rules apply to travel expenses and board and lodging expenses incurred by an individual taxpayer whose trade, profession or vocation is carried on wholly outside the UK, and who has failed to satisfy HMRC that he is not domiciled here or else, being a Commonwealth (including a British) citizen (or a citizen of the Republic of Ireland) here.

Where the rules apply, the travel and board and lodging expenses are to be treated as deductible provided that the taxpayer's absence from the UK is wholly and exclusively for the purpose of performing the function of the foreign trade.

In certain conditions, travel expenses of the taxpayer's spouse or civil partner and any child of his are deductible.

Travel between foreign trades is also deductible, subject to conditions.

Legislation: ITTOIA 2005, s. 92–94

In-Depth: ¶293-400

6530 Non-resident entertainers and sportsmen

There is a system of withholding basic rate income tax from payments made to visiting, non-resident entertainers and sports personalities (see 1605). Except where the activity in point is performed in the course of an office or employment, it is treated as if it were a trade, profession or vocation exercised in the UK and the income from it plus payments connected with it are chargeable on a current year basis; it is stated that regulations dealing with the system generally can provide specifically for losses and reliefs.

The Treasury can make regulations to provide for exemption from income tax and corporation tax where a major sporting event is to be held in the United Kingdom.

Legislation: ITTOIA 2005, s. 13, 14; FA 2014, s. 48; *Income Tax (Entertainers and Sportsmen) Regulations* 1987 (SI 1987/530); *Major Sporting Events (Income Tax Exemption) Regulations* 2016 (SI 2016/771); *Major Sporting Events (Income Tax Exemption) Regulations* 2017 (SI 2017/614)

Case: *Agassi v Robinson (HMIT)* [2004] BTC 467

HMRC Manuals: COG904740

In-Depth: ¶281-047

Income tax – property income

KEY POINTS

- Income tax is charged on any business which exploits rights over land in the UK to produce rents or other receipts.
- Profits of a property business are either calculated on the accruals basis or the statutory 'cash basis' from 2017–18 (see 7012).
- A £1,000 property income allowance applies from 2017–18 onwards (see 7013).
- Where a person carries on a UK property business and an overseas property business, the two businesses are treated separately for tax purposes.
- The profits of a property business are generally calculated in the same way as the profits of a trade, subject to certain exceptions.
- Special rules apply to the taxation of lease premiums (see 7200).
- Rent-a-room relief applies to people letting furnished rooms in their own home (see 7300).
- Special treatment applies to the letting of furnished holiday accommodation (see 7350).

Income from land and buildings

7000 Property businesses

Income tax and corporation tax are charged on any business which exploits rights over land in the UK to produce rents or other receipts. Moreover, to the extent that any transaction is entered into for exploiting, as a source of rents or other receipts, any such estate, etc. the transaction is deemed to have been entered into in the course of such a business. Thus, a 'receipt' (see below) from a one-off or casual letting which may lack the degree of organisation usually associated with a business may be chargeable.

Corporation tax currently applies to UK resident companies that carry on a property business (see 22000). Non-resident companies are currently within the income tax regime. At the Autumn Budget 2017, the Government confirmed its plans to charge non-UK resident companies to corporation

tax rather than income tax on their UK property income. These changes are not expected to apply until after 6 April 2020 and a consultation will take place in the summer of 2018.

Receipts, in relation to any land, include:

- any payment for a licence to occupy or otherwise to use any land or in respect of exercising any other right over the land; and
- rental charges, ground annuals and (in Scotland) feu duties, and any other annual payments reserved in respect of, or charged on or issuing out of, the land.

Income received in non-monetary form is also fully brought into account in calculating taxable property income.

Excluded from the charge are profits:

- charged to tax by virtue of the provisions relating to farming and market gardening, or mines, quarries and similar concerns;
- from letting tied premises, the rent from which is deemed to be a trading receipt.

Rents for 'caravans' confined to use at a single UK location and for permanently moored houseboats come within the property business income tax charge. 'Caravan', for this purpose, broadly means any structure designed or adapted for human habitation which is capable of being moved or a motor vehicle designed and adapted for human habitation. However, where a person carries on material activities connected with the operation of a caravan site (e.g. provision of a site shop, sales of gas, electricity, etc.), this may amount to a trading operation.

Sums payable, or valuable consideration provided, by a tenant or licensee for the use of furniture also come within the rules, unless they constitute receipts of a trade which consists in, or involves, the making available of furniture for use in premises (including caravans and houseboats).

'Land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.

For rent a room relief, see 7300.

Legislation: *Interpretation Act* 1978, Sch. 1; ITTOIA 2005, s. 28A, 875 and Pt. 3

Case: *Nott* [2016] TC 04897

HMRC Manuals: *Property Income Manual*

In-Depth: ¶300-000ff.

7005 Chargeable persons

It is the person who is receiving or entitled to the income from the property who is charged to tax. It is important to note that beneficial entitlement may be unnecessary as far as, for example, an estate agent or other agent in receipt of such property is concerned.

Legislation: ITTOIA 2005, s. 271

Case: *Bobat* [2017] TC 05715

HMRC Manuals: PIM1020

In-Depth: ¶300-025

7010 Computational rules

For the 2017–18 and subsequent tax years, the profits of an unincorporated property business will either fall to be calculated on the accruals (or GAAP) basis, or the statutory 'cash basis' (see 7012).

On the GAAP basis, income tax is computed on the full amount of the profits arising in the tax year.

Subject to any express contrary rules, such profits are computed as if the trading income deductions rules were, in general, applicable.

A deduction is available for capital expenditure incurred by a lessor on replacing furnishings, appliances and kitchenware provided for the use of a lessee in a dwelling house.

Where, on disposal, a rental payment is apportioned between the vendor and purchaser, the income is split between the parties, and the party with no interest in the land at the time the amount was due is deemed to have received his share at the date by reference to which the apportionment is made.

Legislation: ITTOIA 2005, s. 270, 272, 275, 320

HMRC Manuals: PIM1101, PIM1104, PIM2005, PIM2230

In-Depth: ¶300-050ff.

7012 The cash basis for property businesses

From 2017–18 onwards, the cash basis is the default method for a property business to calculate its taxable profits unless one of the following conditions applies:

- payments by an employer;
- payments by a connected partnership;
- payments by a close company.

In addition, rent-a-room property businesses, distributions from a PAIF (*property authorised investment fund*) or REIT (*real estate investment trust*) do not qualify for this relief.

Legislation: ITTOIA 2005, Pt. 6A, Ch. 2

In-Depth: ¶300-075ff.

7015 Rent from properties outside the UK

Rent and other receipts from properties outside the UK are charged to tax. The profits or losses are normally calculated in the same way as those of a property income business (see 7000ff.). However, the property income business approach does not apply where the taxpayer is entitled to the benefit of the remittance basis (see 3650).

All businesses and transactions carried on or entered into by a person or partnership are treated as a single business (an 'overseas property business'). However, separate computations may be necessary for tax credit relief purposes where there are properties in different countries (see 61000ff.).

Where a person carries on a business of letting property situated in the UK and an overseas property business, the two businesses are treated separately. The special provisions relating to furnished holiday lettings (see 7350) are disregarded in computing the profit or loss of an overseas property business unless the property is in the European Economic Area (EEA).

As all overseas lettings are treated as a single business (see above), excess expenditure on one such letting is automatically set against surplus receipts from other such lettings. Any overall loss can generally only be carried forward and set against future foreign rental business profits. See further 7150.

Legislation: ITTOIA 2005, s. 261, 265

HMRC Manuals: PIM4703

In-Depth: ¶300-025

Property income deductions

7100 Property business deductions

The profits of a property business are calculated in the same way as the profits of a trade, but are subject to certain limits.

From the 2017–18 tax year onwards, restrictions apply on the amount to be deducted for dwelling-related loans (see 7120).

It is possible that a conflict may arise between the correct application of rules permitting a deduction and rules that prohibit a deduction where there is overlap in the nature or type of deduction being claimed. To avoid such conflict, it is specified that any rule that permits a deduction in calculating the profits of a property business shall have priority over any rule prohibiting or restricting the deduction.

This is subject to the following exceptions where a prohibitive rule has priority over a permissive rule:

- car or motor cycle hire;
- unpaid remuneration;
- employee benefit contributions (see 5828); and
- crime-related payments.

The priority rule is also reversed for amounts arising in consequence of tax avoidance arrangements.

Legislation: ITTOIA 2005, s. 272, 272A, 274

HMRC Manuals: PIM1103, PIM1104, PIM2000ff., PIM2100ff.

Other Material: Recording of HMRC talking points meeting on property income from 8 December 2017 – https://attendee.gotowebinar.com/recording/5573501794274944002

In-Depth: ¶300-050ff; ¶300-350

7110 Fixed allowances for business mileage

Unincorporated property businesses can choose to claim fixed allowance for business mileage with effect from 6 April 2017. This is subject to transitional provisions for property businesses that claimed capital allowances for a vehicle from 2013–14 to 2016–17 and who wish to claim mileage rates for the same vehicle from 6 April 2017.

Legislation: CAA 2001, s. 59(9A) and (9B); ITTOIA 2005, s. 94C, 94D, 94E, 94F, 94G, 272, 272ZA

an individual or partner in a tax year, is automatically carried forward to be set against the first available profits of that business. If those profits suffice to cover the loss, the taxpayer cannot opt to set off only part of the loss. If the business ceases with unrelieved losses, these cannot be carried forward to any new property income business subsequently set up.

Legislation: ITA 2007, s. 118, 119

HMRC Manuals: PIM4210

In-Depth: ¶303-210

7160 Deduction of property losses from general income

Where a taxpayer incurs a property income business loss, and:

- the capital allowances treated as expenses in computing the loss exceed the amount of any balancing charges treated as receipts in computing the loss; and/or
- the property income business has been carried on in relation to land which consists of or includes an agricultural estate to which allowable agricultural expenses, deducted in computing the loss, are attributable;

then the taxpayer may claim, in relation to the tax year of the loss or the following year, to have some or all of the capital allowances, or agricultural part of the loss, set against his *general* income.

The above claim must be accompanied by all such amendments as may be needed of any self-assessment previously made by the claimant. The claim cannot be made after the end of 12 months from 31 January following the end of the year to which it relates.

Legislation: ITA 2007, s. 120, 121, 122, 123, 124

HMRC Manuals: PIM4220

In-Depth: ¶303-220

Premiums and related rules on receipts

7200 Treatment of lease premiums as rent

Premiums in respect of leases of more than 50 years' duration are charged to CGT. Grants, variations, surrenders and other lump sum payments in respect of leases which do not exceed 50 years are charged partly to CGT and partly to income tax under the property income provisions (see 7210, 7215 and 7220); such 'short leases' are also potentially subject to income tax in the case of a sale with a right to reconveyance or leaseback (see 7225 and 7230) or of a profit on sale (see 7235). The duration of a lease is determined by reference to certain specific principles (see 7205).

A 'lease' includes an agreement for a lease as well as any tenancy, but does not include a mortgage. A 'premium' includes:

> 'any similar sum payable to the immediate or a superior landlord or to a person connected [see below] with such a person.'

'Connected persons' in relation to an individual are his spouse or relative (i.e. brother, sister, ancestor or lineal descendant), or his relatives' spouses, or trustees of a settlement of which he (or an individual connected with him) is the settlor, or a partner or a partner's spouse or relative, or a company of which he, or he and persons connected with him, have control.

Legislation: ITTOIA 2005, s. 306, 307, 364

HMRC Manuals: PIM1200

In-Depth: ¶300-100ff.

7205 The duration of a lease

There are rules for determining the duration of a 'lease' (see 7200), as follows.

- Where the terms of the lease or any other circumstances render it unlikely that the lease will continue beyond a date falling before the expiry of the term of the lease and the premium was not substantially greater than it would have been (on certain specified assumptions) had the term been one expiring on that date, the duration of the lease is calculated to that earlier date.
- Where there is provision for the extension of the lease beyond a given date by notice given by the tenant, account may be taken of any circumstances making it likely that the lease will be so extended.
- Where the tenant, or a person connected with him, is, or may become, entitled to a further lease or the grant of a further lease (whenever commencing) on the same premises, or on premises including the whole or part of the same premises, the term of the lease may be treated as not expiring before the term of the further lease.

In applying the above, it is assumed that all parties concerned act as they would act if they were at arm's length and that, where an unusual benefit is conferred by the lease, the benefit would not have been conferred had

Example

A landlord grants a lease of 31 years. The lease provides that the landlord can demand a lump sum after ten years of £40,000 in lieu of rent for the remainder of the lease. The £40,000 is deemed to be a premium payable for a lease of 21 years (31 – 10).

Where, under the terms subject to which a lease is granted, a sum becomes payable by the tenant as consideration for the surrender of the lease (brought to an end by an agreement between landlord and tenant), that sum is deemed to be a premium and a notional rent arises when it becomes payable by the tenant. The premium is taken to be paid in consideration of the for the effective lease duration. The sum may thus be taxable to the extent which applies in relation to premiums generally under short leases (see 7210).

Example

The landlord grants a lease for 31 years with a surrender clause and the tenant surrenders in accordance with the clause after ten years for the stipulated figure of £20,000. The £20,000 is treated as a premium applicable to the duration of the lease from commencement to surrender (i.e. ten years).

Legislation: ITTOIA 2005, s. 279, 280

HMRC Manuals: PIM1206, PIM1214

In-Depth: ¶300-120; ¶300-130

7220 Short leases: payments to waive or vary the terms of the lease as income

Where a sum becomes payable by the tenant, otherwise than by way of rent, in consideration for a variation of any term of the 'lease' (see 7200), that sum is deemed to be a premium in the year when the contract providing for the variation or waiver was entered into. The sum may thus be taxable to the extent which applies in relation to premiums generally under short leases (see 7210). The premium is treated as attributable to the period during which the waiver or variation is to have effect, i.e. the duration of the lease to which the variation or waiver applied. Payments made to a person other than the landlord are assessable only if paid to a person who in relation to the landlord is a 'connected person'.

Example

The landlord grants a lease of 31 years. Under the provisions in the lease, the tenant has an option to take a further term provided he observes all the conditions of the lease. If the tenant fails to do so after ten years have elapsed

but then pays the landlord £10,000 to waive his (the landlord's) right to object to a further term being taken, that £10,000 would be treated as a premium attributable to that period of the lease over which the variation or waiver occurred, i.e. 21 years.

Legislation: ITTOIA 2005, s. 281

Case: *Banning v Wright (HMIT)* (1972) 48 TC 421

HMRC Manuals: PIM1216

In-Depth: ¶300-140

7225 Short leases: sale proceeds as income where right of reconveyance

In addition to the anti-avoidance provisions relating to the duration of the lease (the lease term for tax purposes being determined in a specific way: see 7205), there are also provisions designed to prevent specific avoidance schemes in connection with leasebacks (see 7230) or reconveyances (see below).

Where the terms subject to which an estate or interest in land is sold provide that it shall be, or may be required to be, reconveyed at a future date to the vendor or a person 'connected' with him, the sum may be treated as received as income of a UK or overseas property income business. The charge is on the proportion of any amount by which the price at which the estate or interest is sold exceeds the price at which it is to be reconveyed and the period begins with the sale and ends with the earliest date for reconveyance.

Where the terms of the sale do not stipulate a date for reconveyance and the price varies with the date of reconveyance, the price of the reconveyance is taken to be the lowest possible under the terms of the sale.

Legislation: ITTOIA 2005, s. 284, 286, 301

HMRC Manuals: PIM1224

In-Depth: ¶300-160

7230 Short leases: sale and leaseback income charges

In addition to the anti-avoidance provisions which deal with the duration of the lease (the lease term for tax purposes being determined in a specific way: see 7205) and those which deal with the sale of land with the right

Other Material: www.gov.uk/rent-room-in-your-home/the-rent-a-room-scheme; www.gov.uk/government/publications/hmrc-property-rental-toolkit

In-Depth: ¶303-000ff.

Furnished holiday lettings

7350 Furnished holiday letting income – overview

The letting of furnished holiday accommodation constitutes a property income business and the basis period rules, as well as most of the business income rules for calculating profits (see 5800ff.), accordingly apply. However, the letting of furnished holiday accommodation is treated in an especially beneficial way, i.e. as a trade.

All the commercial lettings of furnished holiday accommodation made by a particular person or partnership are treated as one trade. The profit or loss has to be calculated, in practice, separately from other property income business profits and losses in order to see whether advantage can be taken of the above benefits. However, any overall profit is included in the general property income business result, as is any loss.

Although the special regime applies to furnished holiday lettings in both the UK and the EEA (excluding the UK), they are to be treated as two separate property businesses. The legislation contains parallel provisions for each type of business and the results of each need to be separately calculated.

The main benefits for the taxpayer of treatment as a trader are as follows:

- capital allowances are available for expenditure on plant and machinery acquired for purposes of the letting;
- CGT rollover reliefs are available, where applicable and subject to the usual rules; likewise, relief for gifts of business assets, entrepreneurs' relief and in respect of loans to traders (see 15120);
- the income qualifies as earned income for pension contribution purposes.

It should nevertheless be noted that the 'rent-a-room' exemption (see 7300) may prove more advantageous to the taxpayer.

The above treatment applies only where there is a 'commercial letting' (see 7360) of 'furnished holiday accommodation' (see 7370) in the UK or in the European Economic Area, excluding the UK.

Legislation: TCGA 1992, s. 241, 241A; CAA 2001, s. 249, 250A; FA 2004, s. 189(2); ITTOIA 2005, s. 322, 327, 328, 328A, 328B; ITA 2007; s. 127, 127ZA

Cases: *Pawson (dec'd)* [2012] TC 01748; *Nott* [2016] TC 04897

HMRC Manuals: PIM4113

Other Material: www.gov.uk/government/publications/furnished-holiday-lettings-hs253-self-assessment-helpsheet/hs253-furnished-holiday-lettings-2017; Property Rental toolkit

In-Depth: ¶303-100

7360 Furnished holiday letting income – 'commercial letting' condition

'Commercial letting' requires that the property be let:

(1) on a commercial basis; and

(2) with a view to the realisation of 'profits'.

'Profits' here means the 'commercial', not the 'tax adjusted', profit.

It should be noted that HMRC take the view that the required income profit motive may be displaced where the taxpayer's motive is the acquisition of a second, or retirement, home, or securing a long-term capital profit on disposing of the property. Claimants may also fail the above requirements where the size of the mortgage used to purchase the property is so large that the projected profitability is jeopardised or the commercial credibility of the scheme as a whole is, consequently, questionable even though individual lettings are on a commercial basis. In such cases, HMRC expect a written business plan to be prepared, with credible figures.

Legislation: ITTOIA 2005, s. 323(2)

Cases: *Walls v Livesey (HMIT)* (1995) Sp C 4; *Brown v Richardson (HMIT)* (1997) Sp C 129

HMRC Manuals: PIM4113

Other Material: www.gov.uk/government/publications/furnished-holiday-lettings-hs253-self-assessment-helpsheet/hs253-furnished-holiday-lettings-2017; Tax bulletin: Tax Bulletin, Issue 31, September 1997, p. 472

In-Depth: ¶303-140

Anti-avoidance measures

7400 Disposals of UK land: anti-avoidance from 5 July 2016

Where these rules apply, income is taxed as profits from a trade. If the chargeable person is non-UK resident, that trade is the person's trade of dealing in or developing UK land. The profits are treated as arising in the tax year in which the profit or gain (including gains that are capital in nature) is realised.

The rules do not apply to:

- a profit or gain so far as it would already be brought into account as income in calculating profits (of any person) for income tax or corporation tax purposes;
- gains attributable to periods before an intention to develop the land is formed; and
- private residences.

The rules can apply where any of the following persons realises a profit or gain from a disposal of any UK land:

(a) the person acquiring, holding or developing the land;

(b) a person who is associated with the person in paragraph (a) during the project and up to six months following the disposal; and

(c) a person who is a party to, or concerned in, an arrangement:
  (i) that is effected with respect to all or part of the land; and
  (ii) that enables a profit or gain to be realised by any indirect method, or by any series of transactions.

For the rules to apply, any one of the following four conditions A to D must be met.

Condition A is that the main purpose, or one of the main purposes, of acquiring the land was to realise a profit or gain from disposing of the land.

Condition B is that the main purpose, or one of the main purposes, of acquiring any property deriving its value from the land was to realise a profit or gain from disposing of the land.

Condition C is that the land is held as trading stock.

Condition D is that (in a case where the land has been developed) the main purpose, or one of the main purposes, of developing the land was to realise a profit or gain from disposing of the land when developed.

The rules are extended to disposals of property deriving its value from land in the United Kingdom. This applies where:

- a person realises a profit or gain from a disposal of any property which (at the time of the disposal) derives at least 50% of its value from land in the United Kingdom;
- the person is a party to, or concerned in, an arrangement concerning some or all of the land; and
- the main purpose, or one of the main purposes, of the arrangement is to deal in or develop the project land and realise a profit or gain from a disposal of property deriving the whole or part of its value from that land.

The rule has effect in relation to disposals on or after 5 July 2016, but subject to two supplemental rules:

(a) an 'arrangement' does not include an arrangement entered into before 16 March 2016;

(b) if a person disposes of a relevant asset to a relevant associated person on or after 16 March 2016 and before 5 July 2016, and a person obtains a relevant tax advantage as a result of the disposal, the tax advantage is to be counteracted. A 'tax advantage' here includes one in relation to tax to which the person is charged or chargeable (or would, if the tax advantage were not obtained, be charged or chargeable) in respect of amounts treated as profits of a trade.

At Spring Budget 2017, the Government announced a measure amending this legislation, to bring all profits recognised in the accounts on or after 8 March 2017 into the charge to corporation tax or income tax, regardless of the date the contract was entered into.

Legislation: ITA 2007, s. 517A, 517B, 517C, 517D, 517E, 517F, 517G, 517L, 517M; FA 2016, s. 82

HMRC Manuals: BIM60510ff.

In-Depth: ¶304-300ff.

7401 Transactions in land: anti-avoidance to 4 July 2016

Transactions designed to avoid tax on the sale of land by direct or indirect means were taxed as income ITTOIA 2005. Some of the transactions caught were normal developments of land.

The provisions were nevertheless very wide in scope, applying to all persons (including companies and unincorporated bodies), whether or

- other income directed to be charged under the charge on employment income, e.g. certain social security benefits, certain contributions by employers to retirement benefit schemes (see 10005ff.) and certain termination payments (see 10035ff.).

Income tax is generally charged on a receipts basis rather than on earnings.

It is generally accepted that liability falls on the holder of the office or employment and that it is not possible to assign the right to income to avoid that liability. Although distinction perhaps needs to be drawn between the income and any underlying right, a taxpayer's instructions, say, for payment of his state retirement pension into his wife's bank account does not amount to a disclaimer of the pension, which remains taxable on him.

Legislation: ITEPA 2003, s. 6(1), 7(2), (3), 10(2)

Cases: *Dewar v IR Commrs* [1935] 2 KB 351; *Meredith-Hardy v McLellan* (1995) Sp C 42

HMRC Manuals: EIM00511

In-Depth: ¶405-000

9005 The meaning of 'office'

An 'office' (see 9000) has been judicially described as:

> 'a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders …'

Company directors are the most numerous examples of office holders.

However, a rigid requirement that the office be permanent is no longer appropriate, nor is it vouched by any decided case, and continuity need not be regarded as an absolute qualification. Although an office is often associated with some constituent instrument (creating and defining it but more than a job description), or some degree of public relevance and formality of appointment, none of these is essential.

The question whether a person is the holder of an office is a mixed question of fact and law, involving the application of the facts as found to the proper legal meaning of the word 'office' in the charge on employment income (see 9000).

Legislation: ITEPA 2003, s. 5(1), (3)

Cases: *Great Western Railway Co v Bater* [1922] 2 AC 1; *Edwards (HMIT) v Clinch* [1982] BTC 109; *McMenamin (HMIT) v Diggles* [1991] BTC 218; *McManus v Griffiths* (HMIT) [1997] BTC 412

HMRC Manuals: EIM00515

In-Depth: ¶400-020

9020 Employed or self-employed?

Employees are taxed under entirely different provisions from those which tax the self-employed. It is therefore necessary to distinguish an employment from a trade, profession or vocation.

In deciding whether a contract of service exists, all the relevant facts are looked at and weighed in the balance. Some of the more obvious facts are as follows.

For employment	Against employment
Control by another over the manner in which the work is performed.	No control by another over the manner in which the work is done.
The person performing the work is restricted from delegating his work to another.	The person performing the work is free to delegate his duties to another.
The person performing the work does not bear the losses nor keep the profits.	The person performing the work bears the losses and keeps the profits.
Tax and National Insurance contributions are withheld by the person for whom the work is done.	No tax or National Insurance contributions are withheld from payments.
The parties agree employment.	The parties agree self-employment.
The person for whom the work is done provides the tools and equipment.	The person performing the work provides his own tools.
The person for whom the work is done lays down regular and defined hours of work.	The person performing the work is free to decide when he wishes to work.
The person for whom the work is done cannot withhold payment.	The person for whom the work is done is free to withhold payment until the work is performed as agreed.
The person for whom the work is done can dismiss.	The person for whom the work is done cannot dismiss the worker or cancel the work once the work is agreed, without compensation.

Impact of the rules

Broadly, the 'IR35' rules provide that:

(1) where an individual ('the worker') personally performs, or has an obligation personally to perform, services for the purposes of a business carried on by another person ('the client');

(2) the performance of those services by the worker is referable to arrangements involving a third party, rather than referable to a contract between the client and the worker; and

(3) the circumstances are such that, where the services to be performed by the worker under a contract between him and the client, he would be regarded as employed in the employed earner's employment by the client,

then the relevant payments and benefits are treated as emoluments paid to the worker in respect of his or her employment. These rules apply irrespective of whether the client is a person with whom the worker holds any office or employment. Under the rules, a deemed salary payment, subject to tax under PAYE, may fall to be made to the worker on 5 April at the end of the tax year. The tax and NICs due on this deemed payment must be accounted for by 19 April.

To determine whether such a payment is deemed to be made and tax and National Insurance contributions are due, the following procedure should be followed at the end of the tax year.

Step 1

Find the total amount of all payments and other benefits received by the intermediary in the year in respect of the relevant engagements and reduce that figure by 5%.

Step 2

Add to the result of Step 1 the amount of any 'payments and benefits' received by the worker (or the worker's family: ITEPA 2003, s. 61(3)(b)) in respect of 'relevant engagements' during the tax year, from any person other than the intermediary, where such amounts are not chargeable to income tax as employment income and would be so chargeable if the worker were employed by the client.

This rule ensures that any amounts paid directly to the worker as part of an arrangement to avoid the application of these provisions is caught.

Step 3

Deduct the amount of any expenses met in the year by the intermediary, or met by the worker and reimbursed by the intermediary that would have been deductible from the emoluments of the employment if the client had employed the worker and the expenses had been met by the worker out of those emoluments. Where the intermediary provides a vehicle for the worker, deduct any mileage allowance that would have been available had the worker been directly employed and provided their own vehicle.

If the result of applying Step 3, or at any later point, is nil or a negative amount, there is no deemed employment payment. Neither, by implication, is there a deductible deemed amount.

Step 4

Deduct the amount of any capital allowances in respect of expenditure incurred by the intermediary that could have been claimed by the worker had he been employed by the client and had incurred the expenditure.

Step 5

Deduct any contributions made in that year for the benefit of the worker by the intermediary to an approved retirement benefit scheme or personal pension plan that if made by an employer for the benefit of an employee would not be chargeable to income tax as income of the employee.

Step 6

Deduct the amount of any employer's NIC paid by the intermediary for the year in respect of the worker.

Step 7

Deduct the amount of any payments and benefits received in the year by the worker from the intermediary:

(a) in respect of which the worker is chargeable to income tax as employment income; and

(b) which do not represent items in respect of which a deduction was made under step 3.

If the result at this point is nil or a negative amount, there is no deemed charge on employment income.

(e) The amount of employer's NIC calculated by this process is payable by the intermediary along with other PAYE liabilities by 19 April 2018.

(f) The amount of the deemed payment (£10,586) is treated for income tax purposes including PAYE as if paid on 5 April 2018; the company must calculate the amount of income due on such a payment and account for it along with the company's other PAYE obligations (including the calculated employer's NIC) by 19 April 2018.

The calculation of the deemed employment payment is made for each tax year in isolation. It follows that if income is taxed as an element in the deemed employment payment in one tax year, and is paid out as taxable earnings in a later tax year, no credit will be given for the tax previously charged under IR35, and the income will be taxed twice. To escape this trap, income which has been taxed under IR35 should be paid out by way of dividend rather than earnings, and relief should be claimed under ITEPA 2003, s. 58.

An IR35 calculator is available on HMRC website.

Legislation: FA 2000, s. 60 and Sch. 12; ITEPA 2003, Pt. 2, Ch. 8

Cases: *Island Consultants Ltd v R & C Commrs* (2007) Sp C 618; *Jones v Garnett (HMIT)* [2007] BTC 476; *Dragonfly Consulting Ltd v R & C Commrs* [2008] EWHC 2113 (Ch); *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046; *Primary Path Ltd v R & C Commrs* [2011] TC 01306; *Slush Puppies Ltd* [2012] TC 02042; *EMS (Independent Accident Management Services) Ltd* [2014] TC 04006; *Christa Ackroyd Media Ltd* [2018] TC 06334

HMRC Manuals: ESM8000ff.

Other Material: IR35: find out if it applies: www.gov.uk/ir35-find-out-if-it-applies; www.gov.uk/guidance/hmrc-tools-and-calculators#ir35-working-through-an-intermediary

In-Depth: ¶407-600

9030 Services provided to public sector through an intermediary

Finance Act 2017 introduced a change to the IR 35 provisions where the end user is a public sector body. These provisions apply for income earned after 5 April 2017.

The definition of a public sector body or 'public authority' is widely drawn and is defined in the *Freedom of Information Act* 2000. It is not limited to simply government institutions but includes such bodies as healthcare providers, police authorities, Ministry of Defence, etc.

Where the rules apply, the onus of responsibility to establish the status of the contractor moves from the intermediary to the end user. Where it is

found that the intermediary would fall within the IR 35 provisions, then it is the end user that must operate PAYE on payments to the intermediary. In effect, the intermediary is treated as if they were an employee of the public sector body. There is no 5% 'expenses allowance' in these circumstances.

HMRC provide a digital tool to help identify whether engagements for services within public sector bodies fall within the 'off-payroll' rules. See www.gov.uk/government/publications/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note.

Legislation: ITEPA 2003, s. 61K– 61X

HMRC Manuals: ESM9000ff.

In-Depth: ¶407-650

General earnings

9050 Taxable earnings

Under the provisions of ITEPA 2003, the charge to tax on employment income is a charge to tax on general earnings and specific employment income. 'Taxable earnings' and 'taxable specific income' are two labels used to identify income at various stages from which it arises to when it becomes chargeable to tax in a particular tax year.

Legislation: ITEPA 2003, s. 10(2)

Cases: *Hochstrasser (HMIT) v Mayes* [1960] AC 376; *Pritchard (HMIT) v Arundale* [1972] Ch 229; *Hamblett v Godfrey (HMIT)* [1987] BTC 83; *Shilton v Wilmshurst (HMIT)* [1991] BTC 66; *Mairs (HMIT) v Haughey* [1993] BTC 339; *Wilcock (HMIT) v Eve* [1994] BTC 490

HMRC Manuals: EIM00501ff.

In-Depth: ¶416-000

9055 Earnings

'Earnings' means:

- any salary, wages or fee;
- any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth; or
- anything else that constitutes an emolument of the employment.

in return for payment or reimbursement under ITEPA 2003, Pt. 5, Ch. 2 or 5, then such payments no longer attract tax relief.

Prior to the introduction of these provisions, it was possible to implement a scheme whereby a voluntary reduction in an employee's gross taxable salary would be matched by a tax-free payment or reimbursement. This would typically apply in the case of mobile employees who would be eligible for tax-free day-rate payments.

These provisions were made largely redundant with the introduction of the optional remuneration arrangements legislation from 6 April 2017 (see 9066).

Legislation: ITEPA 2003, s. 289A–289E

Cases: *Heaton (HMIT) v Bell* [1970] AC 728; *Reed Employment plc v R & C Commrs* [2014] BTC 511

HMRC Manuals: EIM42750

In-Depth: ¶412-900

9066 Salary sacrifice from 6 April 2017 (optional remuneration arrangements)

The ability to remunerate employees tax efficiently by way of a salary sacrifice arrangements was severely restricted by *Finance Act* 2017 with effect from 6 April 2017, subject to certain limited transitional arrangements.

The legislation refers to 'optional remuneration arrangements'. In essence, where an employee is able to choose between receiving a benefit in kind and cash remuneration then, with the exception of the benefits listed below, the employee will be taxed on the higher of the value of the benefit and the salary foregone. This applies even if the benefit would otherwise be tax-free, such as the provision of a mobile phone.

Certain limited benefits are specifically excluded from the new provisions and these are listed in ITEPA 2003, s. 228A. The principal ones are:

- employer pension contributions;
- qualifying childcare vouchers and employer provided care;
- cycle to work scheme.

Optional remuneration arrangements are not limited purely to traditional salary sacrifice arrangements. They will arise wherever an employee is provided with the option of additional remuneration or a benefit in kind. It will therefore be necessary to review historic employment contracts

which may include explicit salary/benefit options, e.g. the provision of a company car or payment of a car allowance.

For the majority of benefits, these provisions apply from 6 April 2017 for arrangements entered into from that date. Where the arrangement is already in place at 6 April 2017, then the provision will be effective from 6 April 2018. This date is extended to 6 April 2021 for certain benefits such as accommodation, beneficial loans and company cars but only where there are no substantive changes or renewal of the arrangements before that date.

Legislation: ITEPA 2003, s. 69A

HMRC Manuals: EIM44000

In-Depth: ¶412-900

9070 Restrictive covenants

The provisions relating to the taxation of payments for entering into restrictive covenants currently apply where an individual holds, has held or is about to hold an office or employment, and he gives in connection with his holding of the employment an undertaking the tenor or effect of which is to restrict him in the conduct of his activities. It is immaterial that the undertaking may be qualified, or even unenforceable.

In the situations above, any payment made in respect of the undertaking, or its total or partial fulfilment, either to the individual or to any other person, which would not otherwise be treated as an emolument of the office or employment (see 9050), is so treated, and tax under the charge on employment income is chargeable for the tax year in which it is paid.

The circumstances in which HMRC do not charge tax under the above provisions in respect of certain undertakings made by individuals under a financial settlement when their employment is terminated are set out in a statement of practice. The statement makes it clear that where sums are paid in settlement of financial claims relating to the employment which the employee could have pursued in law, and the employee accepts that the sums payable satisfy claims and legal rights to which he may be entitled under the terms of his employment or statutory provisions, then a charge does not arise. However, a charge under that provision may arise where an agreement contains specific provisions as to the employee's conduct or activities which involve an undertaking going beyond the settlement of existing claims and rights which he may have against the employer.

Legislation: ITEPA 2003, s. 225, 226

Case: *Vaughan-Neil v IR Commrs* [1979] 1 WLR 1283

factors of relevance in deciding whether a voluntary payment, benefit or perquisite may escape tax are as follows.

- Whether, from the recipient's standpoint, it accrues to him as a reward for services.
- If his contract of employment entitles him to receive the payment, there is a strong ground for holding that it accrues by virtue of the employment and is therefore remuneration.
- The fact that a voluntary payment is of a periodic or recurrent character affords a further, though less cogent, ground for the same conclusion.
- If it is made in circumstances which show it is given by way of a present or testimonial on grounds personal to the recipient (e.g. a collection made for a vicar of a given parish because he is so poor), then the proper conclusion is likely to be that it is not a reward for services and is therefore not taxable (but see 9085 and 9325 re sporting testimonials).

Awards made under most staff suggestion schemes are tax free (ITEPA 2003, s. 321 and 322).

Long service awards

Tax is not charged in respect of certain awards made to directors and employees as testimonials to mark long service. Such awards must take the form of tangible articles or shares in an employing company (or another group company), costing the company up to £50 per year of service; the recipient must have completed at least 20 years' service and have had no similar award within the previous ten years.

Taxed award schemes

Employers who provide non-cash incentive awards and prizes (e.g. cameras or holidays), and most of those who provide such prizes for employees of third parties, can operate HMRC's 'taxed award scheme'. Such schemes:

- allow the provider of the incentive to pay the tax due on the award, so that the incentive for the recipient is not blunted by having to pay tax on it; and
- provide an economical means of collecting the tax due (in bulk, instead of from individual recipients).

Before an incentive campaign begins, the provider enters into a contract with HMRC's *Incentive Award Unit* (for the address and contact details, see HMRC *Employment Income Manual* at EIM11240) to pay the tax on

the total value of the awards to be made. The provider can pay tax at different rates: there are separate contracts for different rate schemes.

The amount of the tax payable is worked out on the grossed-up value (see 230) of the award to the recipient. Providers must give recipients details of the tax paid so that they can complete their tax returns, or claim repayment if appropriate. Providers give HMRC details of recipients so that any higher-rate tax can be collected.

An information pack on the scheme can be obtained from the Incentive Award Unit.

Gifts provided by third parties

Gifts made by a third party to any employee are not taxable provided the cost does not exceed £250 in any tax year: if the cost is, say, £251, all of the £251 is assessable.

Tips and service charges

Tips are generally part of an employee's taxable income in the same way as his other earnings (see 9075). However, not all employees return full details of the tips they receive. Therefore, HMRC may estimate the tips earned on the basis of the facts available to ensure that the correct amount of tax is paid. Before doing this, HMRC establish first who is in a position to receive them. Wherever possible they negotiate agreed figures with the employees concerned or with their representative where large numbers are employed at any one establishment.

For the PAYE position in relation to tips, see 9700.

Legislation: ITEPA 2003, s. 270 and 324 (small gifts from third parties), 323 (long service awards)

Cases: *Reed (HMIT) v Seymour* (1927) 11 TC 625; *Calvert (HMIT) v Wainwright* (1947) 27 TC 475; *Moorhouse (HMIT) v Dooland* (1954) 36 TC 1; *Ball (HMIT) v Johnson* (1971) 47 TC 155; *Moore v Griffiths (HMIT)* (1972) 48 TC 338; *Wicks v Firth (HMIT)* [1982] BTC 402

HMRC Manuals: EIM21690, EIM21715, EIM21750

In-Depth: ¶412-600

9085 Sporting testimonials

Some professional sportsmen, such as footballers and cricketers, receive money from testimonial matches.

The money usually comes from a public collection at that particular match, the player concerned usually receiving the gate money less expenses.

From 6 April 2017, all income from sporting testimonials is subject to income tax. A one-off exemption from income tax of £100,000 applies for income which is neither contractual nor customary.

The charge to income tax and limited exemption apply with effect in relation to a sporting testimonial payment made out of money raised by a sporting testimonial where the sporting testimonial was made public on or after 25 November 2015, and the payment is made out of money raised by one or more relevant events or activities which take place on or after 6 April 2017. This means that for a testimonial year announced on or after 25 November 2015 with events taking place, say, between September 2016 and September 2017, only the payments from events taking place after 5 April 2017 can be taken into account for the exemption to apply. The payments for events taking place before 6 April 2017 will not be subject to the charge to tax under s. 226E.

For payments prior to 6 April 2017, where there was either a contractual right or a customary expectation that an employee who is or has been a sportsperson receives a sporting testimonial, the income fell within the charge to tax as earnings under ITEPA 2003, s. 62 and liable to Class 1 NICs no matter who arranged the testimonial. However, by concession (within HMRC guidance), where there was no entitlement to the testimonial match, and no custom existed in respect of it, then the proceeds were not earnings within ITEPA 2003, s. 62 and the guidance suggested that this would usually be the case where the match was organised by a testimonial committee independent of the club.

Legislation: ITEPA 2003, s. 226E, 306B

Cases: *Reed (HMIT) v Seymour* (1927) 11 TC 625; *Moorhouse (HMIT) v Dooland* (1954) 36 TC 1

HMRC Manuals: EIM64121

In-Depth: ¶488-800

9090 Non-cash benefits

Most non-cash benefits are charged to tax under the benefits code as set out in ITEPA 2003, Pt. 3, Ch. 2–11. From 2016–17, the benefits code applies equally to all employees irrespective of their level of earnings (previously, only certain chapters applied to employees earning less than £8,500 p.a., see 9400).

However, to the extent that any benefit in kind is not chargeable under the benefits code (where for tax years up to 2015–16, an employee was a lower paid employee), a charge could still arise under the general charge on employment income provisions as earnings in money or money's worth (see 9055).

'Money's worth' means those things that can be converted into money by the employee.

The taxable amount is the amount of money into which the employee can lawfully convert the benefit, whether or not he actually does so. It follows that if a restriction is placed upon the use of the benefit by the employer so that the employee cannot convert it into money without being in breach of the condition, he is not taxed on it, provided the restriction is not a sham, e.g. the gift to the employee could only be sold to a scrap merchant. Speaking of the position of employees earning at a rate of less than £8,500 p.a., Lord Reid declared in a House of Lords case:

> 'In my judgment the recipient of a perquisite other than a sum of money can be assessed and can only be assessed, on the amount of money which he could have obtained by some lawful means by the use or in place of the perquisite.
>
> I say by lawful means because I see no ground for HMRC being entitled to disregard a genuine condition restricting the recipient's right to use or dispose of the perquisite. But of course if any restrictive condition is a sham or inserted simply to defeat the claims of HMRC it can be disregarded.'

Payment in the form of a tradable asset is a payment by the employer for the purposes of PAYE (see 9700).

Interaction between earnings charge and benefits code

As a general rule, where a benefit may be taxed both as earnings and as an amount treated as earnings under the benefits code, it is taxed first as earnings on the basis of its realisable value and then, if the cost to the provider exceeds this amount, the excess is taxable under the benefits code , subject to special rules if the benefit is living accommodation.

Concept of a 'fair bargain'

Something which is a 'fair bargain' between the employer and the employee is not a 'benefit'. Fair bargain applies where an employee has received goods or services from their employer at exactly the same cost, terms and conditions as a member of the public or other independent third party dealing with the employer on an arms-length basis. When this occurs, there is no benefit in kind. However, Government's policy intention is that the principle of 'fair bargain' does not apply to benefits chargeable to income tax within ITEPA 2003, Pt. 3, Ch. 3–9 (this includes benefits

16470 Waiver of remuneration

The waiver or repayment of remuneration will not be a transfer of value (see 16450) if it would have been assessable to income tax under the charge on employment income provisions (see 9000) but for the waiver or repayment.

If the amount of remuneration would have been allowed as a deduction in computing profits or gains or losses of the person by whom it is payable or paid, it will not be a transfer of value merely because the waiver or repayment means that it is not then allowed as a deduction or is otherwise brought into charge in computing profits or gains or losses.

Legislation: IHTA 1984, s. 14

HMRC Manuals: IHTM04210

In-Depth: ¶610-850

16475 Waiver of dividends

A person who waives any dividend on shares of a company within 12 months before any right to the dividend has accrued is not treated as having made a transfer of value (see 16450) merely because of the waiver. Accordingly, best practice would be to have a separate waiver on each occasion a dividend is proposed executed before payment is due.

Legislation: IHTA 1984, s. 15

HMRC Manuals: IHTM04220

In-Depth: ¶610-900

16480 Dispositions conferring retirement benefits

A disposition made by any person is not a transfer of value (see 16450) if it is a contribution under a registered pension scheme, a qualifying non-UK pension scheme or ICTA 1988, s. 615(3) in respect of an employee of the person making the disposition.

Where the condition is satisfied only to a limited extent, the payment is treated as two separate dispositions: one of which is not a transfer of value, and the other that is.

From 6 April 2011, where a person who is a member of a registered pension scheme, a qualifying non-UK pension scheme or a s. 615(3) scheme omits to exercise pension rights under the pension scheme, there is no transfer of value under IHTA 1984, s. 3(3). Also from 6 April 2011, (or

6 April 2015 in the case of the new categories of flexible access drawdown fund introduced in the *Taxation of Pensions Act* 2014) any omission that results in a drawdown fund not being used up in a person's lifetime is not treated as a transfer of value for those purposes.

Legislation: IHTA 1984, s. 12(2)–(5), 12A; FA 2011, s. 65 and Sch. 16

HMRC Manuals: IHTM04191

In-Depth: ¶610-800

16485 Dispositions allowable for income tax

A disposition made by any person will not be a transfer of value (see 16450) if it is allowable as a deduction in computing that person's profits or gains for income tax or corporation tax (see 9230ff.).

Legislation: IHTA 1984, s. 12(1), (5)

HMRC Manuals: IHTM04192

In-Depth: ¶610-600.

16490 Grant of tenancies of agricultural property

Where it is not specifically provided otherwise, the grant of an agricultural tenancy would result in a transfer of value because of the ensuing reduction in the value of the freehold. Accordingly, it is provided that the grant of a tenancy of agricultural property in the UK, the Channel Islands or the Isle of Man for use for agricultural purposes is not a transfer of value by the grantor (see 16450) if he makes it for full consideration in money or money's worth.

Legislation: IHTA 1984, s. 16

HMRC Manuals: IHTM04230

In-Depth: ¶610-950

16495 Changes in distribution of deceased's estate

Certain changes in the distribution of a deceased's estate are not transfers of value (see 16450):

- a variation or disclaimer made within two years of death (see 16345);
- the renunciation (in Scotland) to a claim to legitim within a specified period (see 16345);

There will be no IHT to pay on the lifetime gift as two nil-rate bands of £325,000 are allocated against it. The £500,000 left in her estate at death is fully chargeable at 40%.

Example 5

If following the above example, Mrs X instead settled property worth £600,000 on her daughter instead of making an outright gift, this would have been an immediately chargeable transfer. Her nil-rate band of £325,000 would have been allocated against the £600,000 gift to the settlement which would have left tax a tax charge of £275,000 @ 20% = £55,000.

On her death within seven years of making the settlement, additional IHT is potentially payable. However, Mr X's unused nil-rate band is then available to allocate against it and no additional IHT is charged. It should also be noted that there is no refund of the tax charged when the settlement was created.

Example 6

Eric died on 5 April 1973 and left his entire estate valued at £25,000 to his wife Julia. On Julia's death on or after 9 October 2007, her executors will have one-third of Eric's (then) nil-rate band available. The transfer on 5 April 1973 firstly used up the spouse exemption of £15,000 and then £10,000 of the nil-rate band of £15,000.

The amount of additional nil-rate band that can be accumulated by any one surviving spouse or civil partner is limited to the value of the nil-rate band in force at the time of their death. This may be relevant where a person dies having survived more than one spouse or civil partner, and therefore more than one unused nil-rate band could otherwise be transferred to them. This may also be relevant where a person dies having been married to, or the registered civil partner of, someone who had themselves survived one or more spouses or civil partners. Divorced couples cannot claim the nil-rate band when an ex-spouse dies. Where the first spouse died before 21 March 1972 (when a restricted spouse exemption was initially introduced), strong evidence will be required to confirm any transferable NRB because before that date the NRB was low and transfers to spouses could have used all or part of any NRB. Before 15 April 1969, the nil rate band was £5,000 which was not much more than the price of a relatively modest property.

Where the rules have effect, personal representatives will not have to claim for unused nil-rate band to be transferred at the time of the first death. Any claims for transfer of unused nil-rate band amounts will be made by the personal representatives of the estate of the second spouse or civil partner to die. The personal representatives will need to fill in a claim form that will show how much of the nil-rate band is available for

transfer. They will also need to provide certain documents to support their claim including:

- a copy of the grant of representation (Confirmation in Scotland), or a copy of the death certificate if no grant has been taken out;
- if the spouse or civil partner left a Will, a copy of it; and
- if there is a Deed of Variation or similar document, a copy of it.

The personal representatives should send the claim form and the supporting documents to HMRC when they send in the form IHT400 on the death of the surviving spouse or civil partner. The claim must be made within 24 months from the end of the month in which the surviving spouse or civil partner dies.

The transfer of the unused nil-rate band would appear to negate in some case the need for nil-rate band-planning debt or charge type trusts. However, these may still be good planning for some couples who:

- are not married;
- have more complex situations such as second marriages and stepchildren;
- have assets expected to grow faster than the likely increase in the nil-rate band (currently frozen until 5 April 2021); or
- have assets that are eligible for business property relief (see 16800) or agricultural property relief (see 16730) so that the relief is claimed before it is lost.

For those who have died in the last two years, the nil-rate band trust can be dismantled by an appointment by the trustees in favour of the spouse if it is thought no longer necessary under IHTA 1984, s. 144. However, if someone died more than two years ago leaving assets into a nil-rate band trust, nothing can be done to take advantage of the new relief.

Note that HMRC will impose a significant penalty if a claim for excess transferable nil-rate band is made (see 2000).

Any transferable nil-rate band can only be used for the purposes of the charge to tax on the death of the survivor. It cannot be used to claim a repayment of lifetime tax paid on a chargeable lifetime transfer, even if the transfer occurred after the first spouse's death.

Legislation: IHTA 1984, s. 8A–8C

HMRC Manuals: IHTM43000ff.

In-Depth: ¶633-000ff.

16557 Residence nil rate band

The Summer 2015 Budget announced the long awaited increase in nil-rate band to help those who wish to pass on to their children their home tax free. The introduction of a residential nil-rate band (RNRB) is included in F(No. 2)A 2015, s. 9 and FA 2016, Sch. 15 covers the consequences of downsizing or ceasing to own any residential property on or after 8 July 2015.

The RNRB is available if:

- a person dies on or after 6 April 2017;
- the person owns a home (or share of a home) so that it is included in his or her estate; and
- his or her direct descendants inherit the home or a share in it.

There may also be an entitlement to the RNRB if an individual has downsized to a less valuable home or sold or given away his or her home on or after 8 July 2015 (the 'downsizing addition').

In non-downsizing cases, the amount of the RNRB is equal to the lower of the value of the person's home that passes to a direct descendant or the amount of the 'default allowance' or 'adjusted allowance'. If the value of the home is less than the appropriate allowance, there will be 'carry-forward' allowance equal to the difference. If there is no home included in the estate or if none of it passes to a direct descendant, the carry-forward allowance is equal to the default or adjusted allowance, whichever is applicable.

The 'default allowance' is the amount of the residential enhancement (which will initially amount to £100,000 in 2017–18, increase to £125,000 in 2018–19, to £150,000 in 2019–20 and reach £175,000 in 2020–21) plus any 'brought forward allowance'.

The 'adjusted allowance' applies if the value of the person's estate immediately before death exceeds £2m and is equal to the default allowance reduced (but not below nil) by £1 for every £2 by which the limit is exceeded.

The brought forward allowance applies if the individual's spouse or civil partner has predeceased him or her and had carry-forward allowance. The carry-forward allowance is expressed as a percentage of the residential enhancement at the date of the earlier death and is applied to the amount of the residential enhancement at the date of the later death to give the brought forward amount.

Example 1

Alma died on 8 April 2017, when she was entitled to a half-share in the family home worth £200,000. As she left all of her property (worth less than £2m) to her husband, Brian, her RNRB will be nil (as 0% of the home is left to direct descendants), therefore, her carry-forward allowance is £100,000 (the residential enhancement in 2017–18) which is equal to 100% of the residential enhancement. If Brian dies in 2018–19, he will be entitled to brought forward allowance of £125,000 (being 100% of the then residential enhancement).

Brought forward allowance may still be available if the first death occurred before 6 April 2017, and in this case both the carry forward allowance and the residential enhancement are taken to be £100,000, so that entitlement on the later death is to 100% of the residential enhancement then applicable.

Example 2

Robert died on 1 November 2016 when his estate was worth £1.7m. His wife, Maria, died on 1 June 2018 leaving her estate worth £2.1m (and including the family home worth £500,000) to their son, Jeremy.

As Maria's estate is worth more than £2m, the adjusted allowance applies. This is equal to the default allowance (2018–19 residential enhancement of £125,000 plus brought forward allowance of £125,000 = £250,000) less £50,000 ((£2.1m – £2m)/2) = £200,000.

As the adjusted allowance is less than the value of the home that passes to direct descendants (£500,000), the RNRB is £200,000 and there is no carry-forward allowance.

The residence nil-rate band does not have to be claimed, but both the brought forward allowance and the downsizing addition require a claim.

Legislation: IHTA 1984, s. 8D–8M

Other Material: www.gov.uk/guidance/inheritance-tax-residence-nil-rate-band

In-Depth: ¶629-540

16558 The downsizing addition

An estate may also qualify for the RNRB when an individual downsizes from a higher value residence to a lower value one or ceases to own a residence on or after 8 July 2015 and leaves some of his or her estate to direct descendants.

- any university or university college in the UK; and
- a health service body.

Legislation: IHTA 1984, s. 25, 26A and Sch. 3

HMRC Manuals: IHTM11221ff.

In-Depth: ¶646-050

Transfers exempt only during lifetime

16600 Potentially exempt transfers as exempt transfers

Any PET made seven or more years before the death of the transferor is an exempt transfer. Any other PET is chargeable. During the period between the date of the PET and either seven years from that date or, if it is earlier, the date of the transferor's death the PET is assumed to be an exempt transfer (see 16105).

The nature of a PET is discussed at 16105.

Legislation: IHTA 1984, s. 3A

HMRC Manuals: IHTM04057

In-Depth: ¶643-200

16605 Annual exemption

Transfers of value made by a transferor in any one year are exempt up to the value of £3,000. If the value transferred in any one year falls short of £3,000, the shortfall may be added to the £3,000 in the next following year. If the value transferred exceeds £3,000, the excess will be attributed to a later, rather than an earlier, transfer and, if the transfers are made in the same day, the excess will be attributed to them in proportion to the values transferred by them. A 'year' means any period of 12 months ending with 5 April.

Example 1

Margaret gives Lucy £2,800 in year 1 and £3,100 in year 2. The shortfall of £200 in year 1 may be carried forward to be used in year 2. There will be no chargeable (or potentially exempt) transfer in year 2, since £3,200 is then available as an exemption, but the £100 left over from year one, because the current year's £3,000 is used first, cannot be carried forward any further. Since the gift in year 2 is over £3,000, there is no shortfall available for any gifts that may be made in year 3 that are over £3,000.

Example 2

Duncan gives Paul £2,000 in year 1 and £2,500 in year 2 and £3,750 in year 3. The gifts in years 1 and 2 are covered by the exemption since they are under £3,000, but the gift in year 3 will be treated as a chargeable (or potentially exempt) transfer of £250 since only £500 was available as a carry forward from year 2.

The legislation states that, in a tax year where there are both PETs and chargeable transfers, when allocating the annual exemption the PETs are left out of account in the first instance. However, HMRC hold the view that this is inconsistent with other parts of the legislation and that the annual exemption should instead always be allocated in chronological order, regardless of whether the transfer remaining after the exemption is a chargeable transfer or a PET. This is the more logical view since the question of whether a transfer is a PET or a chargeable lifetime transfer is determined after exemptions been taken into account. In practice the point is unlikely to be often encountered.

Legislation: IHTA 1984, s. 19

HMRC Manuals: IHTM14141ff.

In-Depth: ¶643-200

16610 Small gifts

Transfers of value made by a transferor in any one year by outright gifts to any one person are exempt if the values transferred by them do not exceed £250 but the £3,000 exemption and the £250 small gifts relief cannot be aggregated to exempt a gift of £3,250.

Legislation: IHTA 1984, s. 20

HMRC Manuals: IHTM14180ff.

In-Depth: ¶643-700

16615 Normal expenditure out of income

If the transfer of value is part of the 'normal expenditure' of the transferor and it came out of their income so that it left them with sufficient income to maintain their usual standard of living, then the transfer will be exempt from IHT. Potentially, there is no monetary limit to the amount that might be regarded as 'normal expenditure out of income' provided the donor can maintain their required standard of living out of the retained income.

allocated in accordance with HMRC's view (see 16605).) Both PETs became chargeable as a result of Henry's death in December 2018.

Legislation: IHTA 1984, s. 22

HMRC Manuals: IHTM14220ff.

In-Depth: ¶644-450

Transfers exempt only on death

16650 Death on active service

Inheritance tax will not be charged if it is certified by the Defence Council or the Secretary of State that the deceased died from a wound inflicted, or an accident occurring when on active service against the enemy, or when on other service of a warlike nature. This will also apply if a disease was contracted at some previous time, the death being due to, or hastened by, the aggravation of the disease while on active service or on other service of a warlike nature.

The deceased must have been a member of any of the armed forces of the Crown (including women's services) or, by concession, a member of the Royal Ulster Constabulary.

The exemption can only be claimed post death because the circumstances of the individual's death may not be a consequence of their service.

This exemption for armed service personnel is extended, in respect of deaths on or after 19 March 2014 to Emergency Service Personnel and Humanitarian Aid Workers by FA 2015, s. 75 which inserts new sections, IHTA 1984, s. 153A (emergency services) and 155A (constables and service personnel).

The relevant individual has to be an 'emergency responder' and includes anybody employed in connection with the provision of fire services, rescue services, medical, ambulance or paramedic services, police services, anybody employed for the purposes of providing or engaged in providing the transportation of organs, blood, medical equipment and medical personnel or anyone employed by a government or international organisation, or charity in connection with the provision of humanitarian assistance.

In respect of constables and services personnel, there is a further exemption, again applying from 19 March 2014, if such individuals die from an injury incurred when subject to violence as a consequence of their status as a constable or service person. In this instance, when so targeted, it does not matter whether the constable or service personnel was acting in the course of their duty. The exemption will include PETs but not any additional charge that will arise on chargeable lifetime transfers. According to HMRC, 'people making immediately chargeable transfers are doing so at a time when they are alive and fully aware of what they are doing and the consequences. The exemption is given because the tax liability arises as a result of an unplanned for event: no one plans to die when responding to an emergency'.

HMRC Trusts and Estates Newsletter (December 2014) includes an indication that they will take a pragmatic view as to who comes within the 'emergency services personnel' definition but emergency circumstances does not include death whilst undertaking training presumably on the basis health and safety should determine that there was no risk.

Legislation: IHTA 1984, s. 153A, 154, 155A

HMRC Manuals: IHTM11281ff.

Other Material: ESC F5

In-Depth: ¶646-950

16655 Wartime compensation

The part of a person's estate represented by qualifying compensation received by victims of persecution during the Second World War is exempt from IHT for deaths that occur on or after 1 January 2015. The exemption previously operated by concession principally to Far East Prisoners of War but is now extended to a range of schemes from European funds.

Example

Eric received qualifying compensation of £15,000 and at his death, a full nil-rate band is available. It follows that a total of £340,000 would not be subject to IHT on Eric's death.

The compensation is deemed to be subsumed into the assets at death. Accordingly, if Eric had made a £15,000 gift when the compensation was received six years before death, that gift would now be a failed PET but the original receipt would be exempt.

Legislation: IHTA 1984, s. 153ZA

HMRC Manuals: IHTM04421

16660 Partial exemption where further transfer by exempt beneficiary

Where a transfer made on the death of any person is an exempt transfer to a spouse, civil partner, charity, political party, housing association, public body, maintenance fund or employee trust, and the exempt beneficiary, in whole or partial settlement of any claim against the deceased's estate, makes a disposition of property not derived from the transfer on death, the exemption on death is lost to the extent of the value transferred by the exempt beneficiary, i.e. there is a partial exemption.

Note that any order made by the court in recognition of a claim against the deceased's estate under the *Inheritance (Provision for Family and Dependants) Act* 1975 is treated as a disposition effected by the deceased (see 16345). That means that any transfer to give such an order effect is not taxable again but it does not necessarily enjoy exemption. The present provision seems to be an anti-avoidance measure aimed at the following situation.

Example

Thomas agrees with charity X (or any other exempt beneficiary) that he will leave charity X a bequest of £500,000 provided charity X transfers £200,000 of its own property to his daughter (or any other non-exempt beneficiary who may have a claim against the deceased's estate). The effect is that £200,000 passes to a non-exempt beneficiary free of tax. The exemption to the charity is abated to the extent of the charity's transfer, i.e. only £300,000 would enjoy exemption from IHT.

The 1984 Act already contains an 'associated operations' rule (see 16140) so it is arguable that the arrangement above would not have avoided IHT anyway. The provision enables HMRC more easily to charge such an arrangement.

Legislation: IHTA 1984, s. 29A

HMRC Manuals: IHTM11025ff.

In-Depth: ¶646-950

Excluded property

16670 Introduction to excluded property

No account is to be taken of the value of 'excluded property' (see 16675) which ceases to form part of a person's estate as a result of a disposition. A person's estate is the aggregate of all the property to which he is

beneficially entitled, except that the estate of a person immediately before his death does not include excluded property.

However, an 'excluded' asset is not always completely irrelevant for IHT purposes. Thus:

- an excluded asset in a person's estate may still affect the valuation of another asset in the estate (e.g. an 'excluded' holding of shares in an unquoted company (see 17010) may affect the value of a similar holding in the estate which is not 'excluded'); or
- the value of an 'excluded' asset at the time the asset becomes comprised in a settlement may be relevant in determining the rate of any tax charge arising in respect of the settlement under the IHT rules concerning trusts without interests in possession (see 62520 to 62530).

From 17 July 2013, anti-avoidance rules apply where a loan secured on UK property is used to purchase excluded property. (In the absence of the anti-avoidance rules, the consequence would be a reduction in the taxable value of the UK estate.) In these circumstances, the debt is deducted, not from the asset on which it is secured, but from the value of the asset whose purchase was effected. Thus, the taxable value of UK situs property is preserved. The rule applies whenever the loan was taken out, so a loan taken out before 17 July 2013 will still be disregarded at an IHT event on or after that date in the envisaged circumstances. Many will have undertaken what was regarded as mainstream planning now to find their planning has been negated. There are complex provisions for tracing debt from one asset to another to prevent debt being recycled back to the UK situs assets.

Further, a UK debt secured on UK property which is then deposited in a UK situs foreign currency bank account (which is not subject to IHT) is also not deductible from the UK asset for IHT events on or after 17 July 2014 if there is a tax-avoidance motive. (This rule is not limited to debts secured on UK property but is more generally applied wherever there is an avoidance motive.)

Legislation: IHTA 1984, s. 3(2), 5(1), 162A, 162AA

HMRC Manuals: IHTM04251

In-Depth: ¶602-150

16675 Meaning of 'excluded property'

'Excluded property' (see 16670) is determined in accordance with the following rules.

$$\frac{(A + B)}{A} \times C$$

Where:

A is the amount of IHT;

B is the overseas tax (or aggregate overseas tax); and

C is the aggregate of all amounts included in A or B, except the largest.

Legislation: IHTA 1984, s. 158, 159

HMRC Manuals: IHTM27161ff.

In-Depth: ¶687-000

Agricultural property relief

16730 Introduction to agricultural property relief

The value of agricultural property in the UK or a qualifying EEA member state which is transferred will be reduced by 100% (50% for transfers or deaths before 10 March 1992) provided certain conditions are satisfied; there must be a right to vacant possession, or vacant possession must be obtainable within 12 months, otherwise the relief will be limited to 50% (30%). The condition as to vacant possession being obtained or obtainable within 12 months is regarded as satisfied where the transferor's interest in the property either:

- carries a right to vacant possession within 24 months of the transfer; or
- is, notwithstanding the terms of the tenancy, valued at an amount broadly equivalent to the vacant possession value of the property.

Example

Robert has owned and occupied a farm comprising agricultural land and buildings occupied for farming for ten years. He transfers the farm to his son in June 2011. There is a right to vacant possession of the farm. Since Robert is transferring agricultural property and has occupied it for at least two years before the transfer (see 16745) and since there is a right to vacant possession, the value of the property transferred will be reduced by 100%, thereby effectively exempting it from IHT.

Where agricultural property is disposed of by way of gift with reservation, the availability of relief where the reservation is released, or when the donor dies, is determined by reference to the donee (see 16270).

If the property is subject to a contract for its ultimate sale at the time of the transfer, relief may be denied in certain circumstances.

Relief is given to those shareholders who control farming companies (see 16735).

The 100% rate of relief is also available if the interest of the transferor in the property immediately before the transfer does not carry the rights referred to above where the property is let on a tenancy beginning after 31 August 1995 (or, in Scotland, a tenancy acquired after that date by right of succession). In HMRC's view, the 1995 amendments to the agricultural property relief regime applied to all tenancies commencing after 31 August 1995, provided other necessary conditions were satisfied, irrespective of whether the tenancy in question fell within the provisions of the *Agricultural Tenancies Act* 1995.

The availability of agricultural property relief at 100% has been extended to circumstances where farmland subject to an agricultural tenancy is acquired as a result of the death of the previous tenant. This applies where the tenant's death or, in a case involving retirement, the landowner's death occurs after 31 August 1995.

Agricultural property relief has been extended to include land assets taken out of farming and dedicated under a habitat scheme (see 16755).

Legislation: IHTA 1984, s. 115(1), (5), 116, 124; FA 2009, s. 122

HMRC Manuals: IHTM24000ff.

Other Material: ESC F17; Revenue interpretation, *Relief for tenanted agricultural land*

In-Depth: ¶658-000

16735 Agricultural property and its value for relief

Agricultural property relief (see 16730) applies to agricultural property, which means agricultural land or pasture, including woodland and buildings occupied for farming. The value of such agricultural property is determined by treating the property as agricultural property for all time. A stud farm operation constitutes agriculture. Land used for short rotation coppice is also treated as agricultural land.

The Court of Appeal has held that the phrase 'agricultural land or pasture' means bare land or pasture and does not include buildings on the land. The inclusion of a reference to certain types of buildings later in the provision was intended to expand the availability of the relief to the categories of

The taxpayer owned a property which was accepted as being an eligible farmhouse except that the amount of land owned by the farmhouse owner was considered insufficient to support a claim for APR on the value of the farmhouse. However, in addition to the owned land, there was further land rented by the taxpayer from other family interests.

The case turned upon the correct interpretation of IHTA 1984, s. 115(2) which is set out below.

> 'In this Chapter "agricultural property" means (1) agricultural land or pasture and includes (2) woodland and any building used in connection with the intensive rearing of livestock or fish if the woodland or building is occupied with agricultural land or pasture and the occupation is ancillary to that of the agricultural land or pasture; and also includes (3) such cottages, farm buildings and farmhouses, together with the land occupied with them, as are of a character appropriate to the property.'

The judgment splits s. 115(2) into three limbs as indicated, and the issue was the relationship between limb (1) and limb (3). HMRC said there must be common ownership of all property within limb (1) to which the qualification within limb (3) then applied. The judgment refers to *Rosser* but in that case there was a farmhouse, a barn but only three acres owned and occupied by the owner where the farmhouse was not of a character appropriate to the exploited land and therefore no APR was due.

The judgment includes discussion as to what is a farmhouse. It was common ground between HMRC and the taxpayer that the relevant property was a farmhouse. The *Hanson* judgment includes the following phrase:

> 'For a house to be a "farmhouse" there had to be some functional connection between the house and the farm. If that connection ceases to exist, we consider that the house ceases to be a farmhouse. Thus, suppose that the farmer sells the house to a third party who has nothing at all to do with farming and who moves into the house as his family home. The house might well remain of a character appropriate to the farm so that if the farm and the house were again to fall into common ownership with the new owner both farming the land and residing in the house, operating the farming business from it, the house might once again become a farmhouse.'

That view seems to point towards commonality of occupation although, in the example, commonality of ownership could also exist. The judgment also refers to the situation where a tenant farmer occupied property for many years but then acquires the freehold but dies within two years of acquiring the freehold. In that situation, the previous occupation is taken into account in determining whether APR can be due on the freehold now owned by the taxpayer. In that instance, relief is not precluded by IHTA 1984, s. 117(a).

Hanson seems a common sense conclusion. There will be many farmers who own some land and rent other land. That is often the natural farming unit. As such the owner/occupier of the whole farm would on any natural construction of the word 'farmer' consider themselves to be so.

Is it possible APR can be available on the full value of the farmhouse? The starting point, above, is that APR is only available on the agricultural value of the property so, for 100% relief to be available, agricultural value and open market value would have to be the same. Many advisors adopt 70% of open market value as a standard discount but this is a lazy approach which derives from a particular decided case. The correct approach is to assess open market value and agricultural value and that then determines whether any discount is applicable. It is understood that factors which are taken into account in, effectively, bringing open market value down to agricultural value include; the remoteness of the farmhouse, its state of repair (a modernised farmhouse is more attractive to non-farming purchasers) and the overall demand for properties in the particular locality. Thus, farmhouses within easy reach of metropolitan centres, London, Belfast and Edinburgh should attract a premium above agricultural value so a discount will apply. Conversely, where the farm is more remote, and less likely to be used as a 'weekend cottage', within the remote parts of the Scottish Highlands and mid Wales, then it is possible that agricultural value and open market value will be similar.

Legislation: IHTA 1984, s. 115, 117

Cases: *Harrold's Executors v IR Commrs* (1996) Sp C 71; *Higginson's executors' v IR Commrs* (2002) Sp C 337; *Lloyds TSB (personal representative of Antrobus dec'd) v IR Commrs* (2002) Sp C 336; *Rosser v IR Commrs* (2003) Sp C 368; *Arnander (Executors of McKenna dec'd) v R & C Commrs* (2006) Sp C 565; *R & C Commrs v Atkinson (Executors of Atkinson dec'd)* [2011] BTC 1,917; *R & C Commrs v Hanson (as Trustee of the William Hanson 1957 Settlement)* [2013] BTC 1,900

HMRC Manuals: IHTM24030ff.

16745 Minimum period of occupation or ownership for agricultural property relief

Except as noted below, to obtain agricultural property relief (see 16730), the agricultural property must have been occupied by the transferor (or by a company he controls or by a Scottish partnership of which he is a partner) for two years immediately before the transfer, or owned by him for seven years and, during that time, must have been occupied by someone for the purposes of agriculture (which does not include the grazing of horses used for leisure purposes).

If the transferor became entitled to any property on the death of another person, he will be deemed to have owned it from that death and, if the deceased is his spouse, then he will be deemed to have owned it for any periods that the spouse owned it; this also extends to occupation by the other person but there are additional provisions determining the rate of relief in such cases.

Relief also will be granted, even though the property has not been owned for two years, if there have been two transfers of value, at least one being made as a transfer on death, and all or part of the earlier transfer qualified for relief; the property that qualified for relief must have become, on that earlier transfer, the property of the person making the later transfer or their spouse. If only part of the earlier transfer was eligible for relief, then only a like part of the later transfer will be eligible for relief, and if the property is replacement property, the relief is not to exceed what it would have been had the property not been replaced.

If the agricultural property replaced other agricultural property, relief may similarly be available, but together they must have been occupied for two out of five years or been owned for seven out of the ten years before the transfer. Changes resulting from the formation, alteration or dissolution of a partnership will be disregarded.

See also 16810 regarding HMRC's view where agricultural property is replaced by business property (or vice versa) shortly before the owner's death.

Legislation: IHTA 1984, s. 117–121

Case: *Wheatly's Executors v IR Commrs* (1998) Sp C 149

HMRC Manuals: IHTM24070, IHTM24071, IHTM24100

In-Depth: ¶658-500

16750 Transfers within seven years before death and agricultural property relief

Where a PET becomes chargeable or extra tax becomes payable in respect of a chargeable transfer other than a PET, by reason of the transferor's death within seven years (see 16320), and agricultural property relief (see 16730) is claimed, the following additional conditions must be met:

- the original transferee must retain ownership of the original property throughout the period from the original chargeable transfer to the death of the transferor ('the relevant period');

- the original property must still be agricultural property when the transferor dies and must have been occupied for the purposes of agriculture by the transferee or another, throughout the relevant period; and
- where relief is claimed in respect of a controlling interest in a farming company, the property owned by the company must have been so owned by the company and occupied for the purposes of agriculture, whether by the company or another, throughout the relevant period.

Agricultural property relief is ignored in determining whether there has been a PET or a chargeable lifetime transfer. See further 16815.

Where the transferee has died within the period between the original transfer and the transferor's death, the conditions set out above will be treated as satisfied, and the tax or additional tax payable on the transferor's death reduced accordingly, to the extent that the conditions were so satisfied at the death of the transferee.

Agricultural relief remains available where, during the relevant period, the original property is replaced by other agricultural property, a farming business is incorporated or there is a reorganisation or reconstruction of shares.

Replacement property

If the original property has been replaced by other property, then the following further conditions must be met before the relief is available:

- the whole consideration received for any original property disposed of must be applied in acquiring the replacement property;
- not more than 36 months must elapse between the conclusion of a contract for the disposal and the conclusion of a contract for the acquisition (HMRC may permit a longer period);
- both transactions must be at arm's length;
- either the original property or the replacement property must have been owned by the transferee throughout the relevant period;
- the replacement property must be 'agricultural property' immediately before the transferor's death; and
- throughout the respective periods of ownership, the properties must have been occupied by the transferee or someone else for the purposes of agriculture.

Legislation: IHTA 1984, s. 124A, 124B

HMRC Manuals: IHTM24172ff.

In-Depth: ¶658-850

16755 Land in habitat schemes

Agricultural property relief (see 16730ff.) has been extended to include land in habitat schemes. All land in such schemes is treated as agricultural land, the management of such land to be agriculture and buildings used in carrying out that management to be farm buildings thus qualifying for relief. Land is treated as being in a habitat scheme for the purposes of relief if an application for aid under one of the enactments listed below has been made and is still in force.

The relevant statutory regulations (as long as the relevant undertaking has been given), which cover the habitat schemes that require land to be taken out of farming for 20 years and therefore come under the extended relief, are:

- *Habitat (Former Set-Aside Land) Regulations* 1994 (SI 1994/1292);
- *Habitat (Salt-Marsh) Regulations* 1994 (SI 1994/1293);
- *Habitats (Scotland) Regulations* 1994 (SI 1994/2710); and
- *Habitat Improvement Regulations (Northern Ireland)* 1995 (SI 1995/134).

The above has effect in relation to any transfer of value made after 25 November 1996 and in relation to transfers on which IHT becomes chargeable due to events occurring after that date. This covers situations where a gift made before 26 November 1996 becomes chargeable to tax on or after that date due to the donor's death occurring within seven years of making that gift.

Legislation: IHTA 1984, s. 124C

HMRC Manuals: IHTM24065

In-Depth: ¶658-200

16760 Business assets of a farmer

Because APR only applies to land, and interests in land, it follows that a working farmer has to claim BPR on other assets, such as live and dead stock and plant and machinery, used in the farming business as well as any 'development premium' on the land value (provided the underlying land is used for agricultural purposes).

Legislation: IHTA 1984, s. 104

HMRC Manuals: IHTM24151

In-Depth: ¶666-200

Business property relief

16800 Introduction to business property relief

Where the value transferred in a transfer of value includes relevant business property, the value transferred may, in certain circumstances, be treated as reduced by:

(1) 100% (50% for transfers or as a result of death before 10 March 1992) if the property consists of a business or interest in a business, or securities of an 'unquoted' company (see 17005) which, together with other securities owned by the transferor and any unquoted shares so owned, gave the transferor control of the company immediately before the transfer (before 6 April 1996, shares giving the transferor control of the company immediately before the transfer were also in this category);

(2) 100% for any unquoted shares in a company (before 6 April 1996, 100% relief is only available where the transferor held shares yielding more than 25% of exercisable votes and had maintained such a holding during the preceding two years; where the transfer was made or death occurred before 10 March 1992, only 50% relief was available in such circumstances);

(3) 50% (30% for transfers or as a result of death before 10 March 1992) if the property consisted of any land or building, machinery or plant which immediately before the transfer was used wholly or mainly for the purposes of a business carried on by a company which the transferor controlled, or by a partnership of which he was then a partner, or by the transferor, and was settled property in which he was then beneficially entitled to an interest in possession; and

(4) 50% for a controlling shareholding in a quoted company.

Where BPR is claimed in relation to a business or an interest in a business, the High Court has held that all that is required is that the value transferred by the transfer of value is attributable to the net value of the business. It is not necessary for the transfer to be of a business or a part of a business capable of being a separate business. This had been HMRC's previous position.

BPR is available in relation to shares so long as the company is trading and the shares are not quoted on a recognised Stock Exchange. HMRC, from time to time, produce lists of institutions they regard as a recognised Stock Exchange. Such lists are not fixed. HMRC can recognise, at any time, particular organisations as a recognised Stock Exchange. That may have the effect of causing BPR to be lost where, for example, shares were traded through an institution which was not previously a recognised Stock Exchange but which subsequently becomes a recognised Stock Exchange. It is important to continually review the position. The issue will be that any decision to categorise a particular institution as a 'recognised Stock Exchange' is likely to be retrospective so BPR will have been lost before the change has been announced by HMRC.

There is a minimum period of ownership for relief to apply (see 16810) and additional conditions for transfers within seven years before death (see 16815). Certain property is excepted from relief (see 16825). If the property is subject to a contract for its ultimate sale at the time of the transfer, relief may be denied in certain circumstances; HMRC's view is that 'buy and sell agreements' whereby, on death, a person's interest must be acquired by his fellow partners or director shareholders, are sufficient to deny relief.

Where business property is disposed of by way of a gift with reservation, the availability of relief where the reservation is released, or when the donor dies, is determined by treating the shares or securities as having been owned by the donor since the disposal by way of gift, but otherwise determining entitlement to business property relief by reference to the donee (see 16270).

The Court of Appeal has held that settled property (settled land) used for the purposes of the life tenant's business qualified for relief under (1) above. HMRC accept that the higher rate relief is available provided the settled property is transferred along with the business; if the settled property is transferred alone, the lower rate applies.

Where there is a gift of cash which on the construction of a will can only be satisfied by resort to an asset which qualifies for business relief, the gift itself qualifies for business relief.

The owner of the assets must do enough work to be classified as a trader, otherwise the assets may be classified as investments rather than a trade (see 16805 below) resulting in no relief being due.

Legislation: IHTA 1984, s. 103–105, 109A, 113; *Inheritance Tax (Market Makers) Regulations* 1992 (SI 1992/3181)

Cases: *Fetherstonhaugh v IR Commrs* [1984] BTC 8,046; *Russell v IR Commrs* [1988] BTC 8,041; *McCall (personal representatives of*

McClean, dec'd) v R & C Commrs [2009] BTC 8,059; *Executors of Piercy (deceased) v R & C Commrs* (2008) Sp C 687; *Trustees of Nelson Dance Family Settlement v R & C Commrs* [2009] BTC 8,003; *Atkinson (Executors of the will of William Mashiter Atkinson (Dec'd))* [2010] TC 00420

HMRC Manuals: IHTM25001

Other Material: SP 12/80

In-Depth: ¶664-000

16805 Excluded businesses

If the business concerned consists wholly or mainly of securities, stocks, shares, land, buildings, making investments, or holding investments, then relief will be denied unless the business is that of a market maker on the Stock Exchange (or a discount house) and is carried on in the UK, or unless that business is to act as a holding company for a company or companies whose business is not one of the above. Market makers on the London International Financial Futures and Options Exchange (LIFFE) are also excluded from the above restrictions.

By contrast, *ICAEW Tax Guide 1/14* sets out HMRC's views in relation to trading companies owned through an LLP (Limited Liability Partnership) responding to questions posed by ICAEW (and others), indicates that where the trade of the LLP consists of the holding of shares in unquoted trading companies, BPR will not be available notwithstanding that if the same structure existed but with a limited liability company (or even a standard partnership) as the holding entity, then in that instance BPR would be available. Relief might still be available to an LLP if the LLP can demonstrate that the shareholdings are an integral part of its commercial activity; for example controlling a company to secure supplies of raw material and to deny such supplies to competitors.

In one case, the High Court denied relief where the business of a caravan park was predominantly receiving rents (the caravans were the year-round homes of those paying rent) and was therefore mainly the making or holding of investments, although other caravan parks offering holiday accommodation (where those paying the rent were resident for only a week or two), where the overall commercial arrangements are similar to a holiday camp, may qualify.

The relief is also unavailable where the property is shares or securities of a company that is being wound up, unless the business of the company is to be continued after reconstruction or amalgamation, which must take place no later than one year after the transfer of value.