

## AVAILABILITY OF IHT BUSINESS PROPERTY RELIEF FOR GROUP STRUCTURES

### 1 INTRODUCTION

1.1 HMRC have agreed that correspondence with the Chartered Institute of Taxation's Succession Taxes Sub-committee may be published. Sections 2 and 3 below set out the query made on 15 December 2010 and HMRC's response of 10 January 2011 is at Section 4.

### 2 THE ISSUE

2.1 We have received a number of queries about the availability of business property relief (**BPR**) for shareholdings in the holding company of a group of companies.

2.2 While we think that the answer to the question should clearly be that relief is available, we thought it sensible to ask for HMRC's views so that the matter can be put beyond doubt.

2.3 The exact facts of each case obviously differ, but a typical scenario would involve a holding company whose main activity is ostensibly holding shares in trading subsidiaries. [Note: we use 'trading' as a shorthand for the test in s.105(3), namely that the company in question's business does NOT consist wholly or mainly of dealing in securities, stocks or shares, land or buildings or making or holding investments. We appreciate that, in practice, there may be some distinctions between the two.]

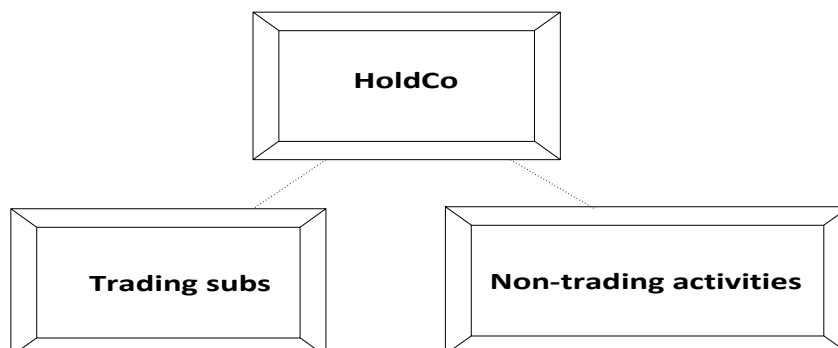
The holding company's business may also involve various other non-trading [this term is used in the same sense as in the note above] activities but where – subject to the following – the holding of shares in trading subsidiaries clearly predominates.

2.4 However, in addition to its shareholding in the trading subsidiaries, the holding company may also have made intra-group loans to the trading subsidiaries.

2.5 If this loan is – under s 105(4) IHTA - treated as part of the holding company's 'business of being a holding company of [s 105(3) qualifying] companies' then the trading side of the business will still predominate. However, if the loan is treated as being on the 'wrong side of the line' then it may tip the balance so that non-trading activities predominate, thus denying BPR entirely to the shareholdings in the holding company.

2.6 Diagrammatically this looks as follows:

*Trading subs owe £Xm to HoldCo*



### 3 LEGISLATIVE BACKGROUND

3.1 BPR is available where whole or part of the value transferred by a transfer of value is attributable to the value of the relevant business property. The relief operates by treating the whole or part of the value transferred as reduced by 100% (s.104 IHTA 1984).

3.2 Section 105(3) IHTA 1984 sets out a test whereby BPR is not available, and this test is framed in the negative. All shareholdings potentially qualify for BPR unless the business of the company consists wholly or mainly of certain excluded activities.

3.3 Section 105(3) IHTA 1984 would preclude most group structures, however, there is an exception at s 105(4) for holding companies.

3.4 This exception does not focus on the group as a whole, but on the business of each separate company in that group. The nature of each company's business is looked at, starting with the business carried on by the holding company.

#### Is there a business in this case?

3.5 In order to qualify for BPR it is necessary to establish that there is indeed a 'business' at all. In this example, it is assumed that HoldCo is carrying on a business.

3.6 It is also assumed in this case that there is a single business and that the business is carried on for gain (s 103(3) IHTA 1984).

#### What is the business of HoldCo?

3.7 The crucial test as to whether BPR applies is whether the business of HoldCo consists predominantly of being a holding company of one or more companies (s 105(4) IHTA 1984).

3.8 There is then a definition of 'holding company' which cross-refers to s.1159 and Schedule 6 Companies Act 2006. That definition refers simply to a company being a subsidiary of another company (its '**holding company**'), if the holding company:

(a) Holds a majority of votes in the subsidiary; or

(b) Is a member of the subsidiary and has the right to appoint and remove the majority of its board of directors; or

(c) Is a member of it and controls.....a majority of the voting rights in it.

3.9 Schedule 6 contains some further amplification of the above tests, but does not alter the substance of s.1159.

3.10 What is unclear is whether - when this definition is transposed into s 105(4) IHTA - it provides an exhaustive definition of 'a business consisting....of being a holding company'. Or, putting it another way, does the incorporation of s.1159 define 'holding company' or 'the business of being a holding company'? And, if the former, of what does the business of being a holding company consist?

3.11 The distinction is important because if the incorporation of s.1159 provides an exhaustive definition of the business of being a holding company then other activities (such as loans to subsidiaries) presumably do not form part of that business and therefore fall the wrong side of the s.105(4) line. Conversely, if the business of being a holding company is a wider concept then providing loan-finance to subsidiaries would, we suggest, be treated as an ordinary activity which many holding companies would undertake.

3.12 We think that it is generally accepted that the latter view is the right one, but we think that HMRC's confirmation of this would be sensible.

3.13 We would accept that the wider definition still lacks clarity as to what the business of being a holding company consists of. This is presumably a question of fact to be answered in each case. We would suggest that a tentative description of the business of a holding company could include one or more of the following activities:

- (a) Holding the shares in subsidiaries;
- (b) Co-ordinating the activities of those subsidiaries by means of voting control and the ability to control the subsidiary boards;
- (c) Provision of loan and other finance to those subsidiaries;
- (d) Providing strategic direction and oversight of the activities of subsidiaries and ensuring that the subsidiaries work together to achieve a common aim;
- (e) Monitoring the financial performance of subsidiaries; providing a 'treasury' function and co-ordinating guarantees and cross-group collateral;
- (f) Providing a structure to allow ring-fencing of the activities of subsidiaries; nurturing new higher-risk activities within the limited liability offered by subsidiaries; re-organising the businesses of subsidiaries as they change and grow; and
- (g) Managing relations with shareholders on behalf of all subsidiaries.

3.14 We would, however, welcome HMRC's views on this question to put the matter beyond doubt.

#### **4 HMRC'S REPLY OF 10 JANUARY 2011**

4.1 Section 1159 Companies Act 2006 defines the structural relationship between a holding company and a subsidiary in terms of control and voting rights. Reading this into IHTA 1984 tells us whether or not a company is (structurally) a holding company but does not provide any definition of what the business of that holding company may be. HMRC look at the activities undertaken by any particular company from first principles to determine what the main business of that company is and whether it falls within the provisions of section 105(4)(b) IHTA 1984. We apply the factors as set out in the Farmer case and look at the business 'in the round'.

4.2 All cases depend on their own facts, but we agree that the following activities are indicative of the business of a holding company:

- (a) Holding the shares in subsidiaries;
- (b) Co-ordinating the activities of those subsidiaries by means of voting control and the ability to control the subsidiary boards;
- (c) Provision of loan and other finance to those subsidiaries;
- (d) Providing strategic direction and oversight of the activities of subsidiaries and ensuring that the subsidiaries work together to achieve a common aim;
- (e) Monitoring the financial performance of subsidiaries; providing a 'treasury' function and co-ordinating guarantees and cross-group collateral;

(f) Providing a structure to allow ring-fencing of the activities of subsidiaries; nurturing new higher-risk activities within the limited liability offered by subsidiaries; re-organising the businesses of subsidiaries as they change and grow; and

(g) Managing relations with shareholders on behalf of all subsidiaries.

4.3 If these or similar activities predominate and the group subsidiaries are themselves non-investment companies, then business property relief would normally be available for the shares in the holding company.

4.4 In relation to intra group loans, these are regarded as non-investment where the loans are used by the subsidiaries for the purposes of their non-investment businesses and the amounts are reasonable in the context of the group business as a whole.

4.5 We will take account of your query and this response when we next come to update our published guidance on BPR. In the meantime, I hope your members find this message helpful.