Chargeable gains

Clauses 36 to 38 – Anti-avoidance rule for share exchanges and corporate reconstructions and reorganisations

Chartered Institute of Taxation.

Executive Summary

These clauses relate to the rules that apply to share for share exchanges and other corporate reorganisations (and collective investment scheme reconstructions) where shareholders are allowed to 'swap' shares (or assets) for shares without triggering a tax charge, provided the transaction meets certain conditions. The anti-avoidance condition is being changed for these rules.

While we understand the government's intentions, the wording of the new anti-avoidance rule is unclear. The uncertainty that has arisen has been exacerbated by the timing and manner of its introduction. It has created uncertainty that is disrupting live commercial transactions.

In this representation we make several proposals, including:

- Amend the legislation to specifically exclude deferral of tax relief from scope;
- Consider reinstatement of the exception for shareholders with 5% or less of the shares and/or put in place a clearance process for minority shareholders who need comfort on their tax position, but will have limited influence and/or visibility on the overall structure of the transaction; and
- HMRC needs to be resourced to deal with the increased number of clearances expected to be sought.

We also identify several areas where we believe the government could provide greater clarity or explain in more detail their intentions. For example, around interaction with self-assessment and the form of future clearances.

We are also concerned about inconsistencies with other areas of legislation – stamp duty, intangibles and the Enterprise Investment Scheme – which increases complexity.

Background and the new anti-avoidance rule

1.1 Clauses 36 to 38 affect a set of rules that apply in respect of share for share exchanges and other corporate reorganisations (and collective investment scheme reconstructions) that are intending to permit shareholders to 'swap' shares (or assets) for shares without triggering a tax charge, provided the transaction meets certain conditions. Companies undertake share exchanges and reconstructions for many legitimate commercial reasons. These include:

- removing a business or company (from a larger group or business) which the buyer does not wish to acquire before a third-party sale;
- separating business activities into separate companies;

- inserting a holding company to enter the Real Estate Investment Trust (REIT) regime; and
- in relation to management buyouts or private equity investments.

The main benefit is that shareholders can maintain the tax status of their original shareholding and their shares are not treated as disposed of.

1.2 The main rules are in Taxation of Chargeable Gains Act 1992 (TCGA): section 103G for collective investment scheme reconstructions, section 135 for share for share exchanges, section 136 for schemes of reconstruction and section 139 for reconstruction involving transfer of a business.

1.3 The rules include an anti-avoidance condition, which if not met, results in the shareholders being treated has having disposed of the shares given in the exchange, rather than benefiting from the 'no disposal' tax treatment. The condition currently in the legislation requires that the transaction has been carried out for 'bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of [tax].'

1.4 The changes that are being made by Finance Bill 2025-26 introduce a new anti-avoidance condition. The new condition that must be met to receive the tax benefits of the rules is that there are no 'arrangements relating to an [exchange/reconstruction] …. [where] the main purpose, or one of the main purposes, of the arrangements is to reduce or avoid liability to [tax].' Furthermore, under the new rules, HMRC will be able to counteract the tax advantage in a more targeted way, rather than denying the 'no disposal' treatment to all the shareholders (see paragraph 1.6, below).

1.5 We understand that the policy intention behind the changes in the Finance Bill is to refocus the anti-avoidance condition on specific aspects of avoidance within a transaction's arrangements, rather than considering the transaction as a whole, and considering whether that is, overall, for bona fide commercial purposes. The new rule is intended to apply where there are only some aspects of the transactions that are for avoidance purposes. The Courts[1] have confirmed that the existing wording focusses on the purposes of the exchange or reconstruction itself and requires the exchange or reconstruction to be part of a wider scheme or arrangements for the avoidance of tax. So, where the exchange or reconstruction is not part of a wider scheme or arrangements for the avoidance of tax, the insertion of elements that generate a tax advantage that are merely part of the exchange or reconstruction cannot trigger the anti-avoidance rule.

1.6 Furthermore, even where tax avoidance arrangements are present, they may not be sufficient to amount to a main purpose of the overall transaction, and so the existing anti-avoidance condition can be satisfied (i.e. the transaction is not treated as tax avoidance under the rules, so the tax benefits can be obtained). An example that is given in the interim guidance that has been issued by HMRC (discussed further below):

A Ltd was established by Mr X and Ms Y who originally held 50% of the shares each. Later, shares were issued to employees who then held 20% reducing the holdings of Mr X and Ms Y

[1] *Delinian Ltd (Formerly Euromoney Institutional Investor PLC) v HMRC* [2023] EWCA Civ 1281 (03 November 2023) and *Wilkinson* (TC8887)

to 40% each. A multinational group B Inc wished to take over A Ltd for cash. Mr X was planning to emigrate after receiving the proceeds and asked that instead of cash, he receive loan notes that would be redeemed after he had left the UK and so he would not be subject to UK CGT on the sale.

1.7 It is possible that the existing anti-avoidance rule would not be triggered because the overall transaction of B Inc taking over A Ltd is for bona fide commercial purposes, and, in the round, the additional arrangements – the inclusion of payment in loan notes – are part of the exchange, and the exchange is not part of a wider scheme or arrangements for the avoidance of tax. And, in any case, the inclusion of payment in loan notes is arguably not the main purpose, or one of the main purposes, of the transaction. However, the new rule is intended to ensure that these additional arrangements, which were added to a commercial transaction for Mr X to obtain a tax advantage, would mean that HMRC considers that the anti-avoidance condition is not met, and that HMRC can counteract the tax advantage obtained by Mr X.

1.8 The effect of the anti-avoidance condition not being met is also changed. Under the existing rule, the test applies to the transaction as a whole, such that if the transaction, overall, is bona fide commercial, relief is available for all shareholders, even where a particular shareholder or shareholders may have requested aspects of the transaction to be structured to avoid or reduce tax for them. The corollary to this was that relief was denied to all shareholders under the 'old' rules if the transaction was not for bona fide purposes, or with a main purpose of avoidance tax, even where some of the shareholders may not have had any tax avoidance motive. The new rule being introduced by the Finance Bill will instead allow HMRC to make adjustments on a just and reasonable basis to counteract the tax advantage sought. It is intended that this will operate so that only the shareholders seeking a tax advantage will be affected and in a proportionate way.

1.9 The changed outcome relates to another significant change being made by the Finance Bill, which is to remove the exception for shareholders with 5% or less of the shares. Previously, these shareholders did not have to worry about whether the anti-avoidance condition was met or not, and the tax relief was automatic for these minority shareholders if the mechanical conditions relating to the transaction were satisfied. The Finance Bill changes this and removes this exception for minority shareholders, so that under the new rule, if the anti-avoidance condition is not met, the outcome can be to remove tax benefits from minority shareholders. The rationale is that because the new rule can be applied on a shareholder-by-shareholder basis on a just and reasonable basis, and only if the anti-avoidance condition is not met in relation to arrangements affecting those shareholders, there is no reason for minority shareholders to be outside the scope of the rule.

1.10 We understand the policy intentions behind these changes, and support some of the ancillary aims around modernising the language which in the existing test does not reflect the more modern targeted anti-avoidance rules in the tax code. In particular, we welcome the new approach whereby the reliefs under these rules can still be given where it is just and reasonable to do so, and to the extent that it is just and reasonable, changing the blanket approach of denying relief to all shareholders. We also welcome the elimination of the commercial purpose test, which brings the rules for share exchanges and schemes of reconstruction into line with the transactions in securities legislation (Income Taxes Act

2007 sections 682 to 713) where the commercial purpose requirement was removed in 2010.

1.11 But the wording of the new anti-avoidance rule is unclear and on its own terms could apply to common transactions. The considerable uncertainty and concern about the potential impact of the new test was exacerbated by the timing and manner of its introduction. These concerns are discussed further in the following paragraphs.

1.12 In addition, an important aspect of the rules is that companies involved in the transactions can apply for an advance clearance from HMRC which, if given, confirms that HMRC is satisfied that the anti-avoidance condition is met and that, therefore, the beneficial tax treatment will apply for all shareholders. The clearance process, whilst not without its difficulties (discussed below), has provided a valuable mechanism for taxpayers to achieve certainty as to their tax position. It is our view that the changes to the rules have not fully considered the practical implications for taxpayers and what this will mean in respect of the attractiveness and practicability of clearances going forward. This is also discussed below.

1.13 Finally, while changes have been made to these rules in relation to capital gains tax and corporation tax on chargeable gains, there are other parts of the tax code that closely relate to these rules and are often relevant to the same transactions, in particular stamp duty and the intangible assets regime. That comparable changes have not been made to these rules as well means that as things stand the tax code overall is more complicated for businesses to navigate.

Timing of implementation and grandfathering

2.1 The changes in the Finance Bill were announced at the Budget with immediate effect from Budget Day, and without any prior consultation. This presented an immediate issue for commercial transactions that were underway on Budget Day. It is difficult to conclude that a change along these lines to an area of tax law that has generally been seen as settled for very many years was warranted. This is an unsatisfactory way to change the law and seems to be at odds with the stated pro-growth agenda of the government.

2.2 During discussions HMRC have said that the government does not consult on anti-avoidance provisions, and we accept that. However, while this rule is included in the provisions for share for share exchanges and other corporate reconstructions and reorganisations as an anti-avoidance provision, it also served an important function in setting the parameters of what was acceptable tax planning in this area. Moreover, it has been in place, unchanged for some thirty years, over which time, through clearances, and court judgments, a position of clarity and certainty has been reached.

2.3 We understand that the changes are being made in response to the cases of *Wilkinson* and *Euromoney*, which HMRC consider involve unacceptable tax planning, but could not be counteracted under the existing rule. However, these cases arose several years ago, so it is difficult to understand the urgency that prompted a Budget announcement with immediate effect. We understand that the expected yield of £20m of tax per year in the impact assessment in the Policy Paper published on Budget Day is not the whole picture. We understand that there is an expected loss of tax that could have arisen if stakeholders had been aware that the changes were coming, and that the new rule is intended to drive a behavioural change. Nonetheless, it is our view that consultation around these changes would have averted the immediate and current ongoing uncertainty caused for commercial transactions while the parameters of the new rule are properly explored through clearance applications and discussions with HMRC.

2.4 A consultation around these changes would have raised the issues that we are now raising (and possibly more), so that the appropriate changes to the tax code could all have been made at the same time, resulting in a better answer, more efficiently. Unfortunately, the position resulting from the changes currently in the Finance Bill is an unclear and inconsistent set of rules.

2.5 The resulting uncertainty since Budget Day has impacted live commercial transactions that were either relying on the well-established consensus as to what was a 'commercial' transaction under the 'old' rules or have clearances under the old rules but are unable to complete their transactions before 26 January 2026.

2.6 We recognise that the government has attempted to grandfather existing transactions, as the measures announced include a period of 60 days for transactions to be completed if clearances have been submitted prior to Budget Day under the old rules. However, 60 days will not be long enough for many transactions. This is particularly an issue given that the 60-day 'grace period' includes the Christmas and New Year period, when may offices are closed for all or most of the two-week festive season. We suggest that 90 days would have been fairer, given the time of year.

2.7 There remains considerable uncertainty as to how the new rule will operate in practice, and how effective clearances given by HMRC will be in ensuring shareholders and companies undertaking commercial transactions can achieve certainty about their tax position.

Scope of the new rule – lack of clarity

3.1 When the new rule was announced on Budget Day, with immediate effect, and without any prior consultation, there was considerable uncertainty and concern about the potential impact of the new test, particularly where a tax deferral is clearly envisaged but is not the main driver of a wider commercial transaction. It was not clear how the test would apply if a share-for-share exchange is done both for commercial purposes (now no longer relevant) and in a tax-efficient manner compared to alternative options. There was concern when the new anti-avoidance rule was published that it could apply to many common transactions, where share exchanges are used to achieve a deferral of tax in a manner that could, if considered in isolation, imply that achieving that deferral is the main purpose of each step in an overall commercial transaction.

3.2 Interim guidance was made available by HMRC on 12 December. This guidance addresses some of the concerns that had been raised by stakeholders with HMRC following the announcement at the Budget and the publication of the Finance Bill. However, it was unfortunate that there were over two weeks before this guidance was available when there was no indication of HMRC's view of the scope of the new rules, nor why they were being introduced, beyond the assumption that HMRC wished to ensure that in the future arrangements such as those in *Wilkinson* and *Euromoney* would not be able to avail themselves of TCGA 1992 sections 135 or 136.

3.3 The interim guidance sets out HMRC's view that 'the mere deferral of a liability, which is the intended effect of the share exchanges provisions' is not caught by the new rules, and this is explained by noting that the wording of the legislation refers to 'reducing' or 'avoiding' a liability.

3.4 This statement in the interim guidance is helpful. But the position is somewhat muddied by references to 'tax advantage' in the Explanatory Notes to the Finance Bill. HMRC's view of this concept, alongside 'arrangements' and 'main purpose' are well established. 'Tax advantage' is not a feature of the new test that will apply to these transactions, which, as noted above, is confined to 'reducing' or 'avoiding' a liability to tax. The use of this term is confusing because elsewhere in the tax code the concept 'tax advantage' can include a deferral of tax liability[2]. Unhelpfully the concept of 'tax advantage' is also used in HMRC's guidance.

3.5 In conclusion, while it is possible to argue that a deferral on its own does not fall within a "reduction" or "avoidance" test and, therefore, ought not be caught, there is a contrary argument on a plain reading of the legislation. We therefore recommend that if deferral of tax is not intended to be within scope of the anti-avoidance the legislation explicitly makes this clear, without having to rely on HMRC's guidance.

5% Threshold

4.1 As noted above, the 5% threshold, that provided an exemption for minority shareholders from the existing commercial purpose test, has been removed.

4.2 We understand that this is because the new rule makes an adjustment on a 'just and reasonable' basis that affects only those who have an avoidance motive, and we broadly accept that. However, the 5% threshold also served a more useful purpose of ensuring that certainty could be provided to minority shareholders without having to consider the anti-avoidance condition or related clearance requirements.

4.3 In the past, people who held relatively small proportions of the share capital of a company (public or otherwise) could take comfort from the exemption and know that they would get the capital gains tax treatment prescribed by sections 135 or 136 without having to take their own advice or obtain their own clearances. Under the new rule, any such shareholders will be required (or at least would be well advised) to take advice to support their filing positions under self-assessment. This will be an additional expense and worry for them.

4.4 We would also welcome clarification about how the new rule is intended to interact with self-assessment. Specifically, the new rule applies "in respect of arrangements relating to an exchange or scheme of reconstruction ", and then provides that, "if one of the main purposes of the arrangements is to reduce or avoid liability to" tax, that reduction or avoidance is to be counteracted by HMRC. That implies, however, that the correct self-assessment position is to self-assess on the basis that the relief under section 135 or 136 is

[2] For example, in Finance Act 2004 section 318 for the Disclosure of Tax Avoidance Schemes (DOTAS) rules.

available, even if the taxpayer considers that they are party to avoidance arrangements, and it is up to HMRC to counteract the capital gains tax advantage. This approach would be similar to the operation of the transactions in securities rules (in Income Taxes Act 2007 Part 13, Chapter 1), where taxpayers would be required to self-assess a capital gain and it is up to HMRC to counteract the income tax advantage if one arises. On a reading of new subsections (1) and (1A) in section 137 (and equivalent provisions in other sections), it is difficult to see how it would be correct to self-assess a chargeable gain in this situation. This seems an odd result, and it would be helpful if the Minister could confirm the way the new rules are intended to operate for self-assessment. This is of particular relevance to the position of minority shareholders who are more likely to have an uncertain tax position, as they are less likely to be privy to the detail and intention of the arrangements.

4.5 Removing the exemption threshold is likely to increase the circumstances in which a clearance will be sought, particularly in the short to medium term as agents and business seek to understand HMRC's views in this area and build a new consensus as to the scope. Further, minority shareholders may want to seek clearance in advance of a transaction, even in cases where the majority shareholders choose not to, or do not need to (for example, if they are not UK resident and hence outside the scope of UK capital gains tax). However, an issue that has always existed is that the legislation (TCGA 1992 section 138(1)) only permits one of the companies involved in an exchange or a scheme of reconstruction to request a pre-transaction clearance. We have made representations in the past suggesting that this is odd, given that neither company is subject to the tax charge that would arise if the reliefs were not available.

4.6 With the position exacerbated by the removal of the threshold, we recommend that the 5% exemption is retained or we suggest that, in the interest of fairness, the legislation should be amended to permit any shareholder that might be affected by the transaction to request a clearance.

4.7 However, this raises a further practical issue, as small minority shareholders may find it difficult to obtain sufficient relevant information for the purposes of applying for a clearance. This is an important issue that will have to be addressed. The way to deal with the issue from a filing perspective may be to include appropriate disclosure with the knowledge the shareholder has. The taxpayer should also consider HMRC's Guideline for Compliance 13[3] on filing returns with HMRC (without full knowledge of the transaction details, it might be difficult for a shareholder to determine how a court or tribunal would be most likely to decide the issue, but we suggest that this would then be classed as an uncertainty which was finely judged rather than a novel or improbable tax position). It would be welcome if the Minister could set out the government's intention on this point.

Clearances

5.1 As noted above, the rules allow for one of the companies involved in the transaction to apply for a clearance from HMRC that there is no capital gains tax for individual

[3] Help ensuring documents filed with HMRC are correct and complete — GfC13 - GOV.UK

shareholders nor corporation tax on chargeable gains for a corporate shareholder because of the share for share exchange, reconstruction or reorganisation.

5.2 We envisage that there will be a much greater number of clearances in the near to medium term, at least, as taxpayers and advisers seek to understand the parameters and practical application of the new test. Taxpayers are generally cautious and are required to file their self-assessment tax returns completed such that to the best of their knowledge the return is correct and complete. If there is any question or doubt the default position is to apply for a clearance. Due to the nature of the new test, this is likely to mean clearances will be sought in circumstances where taxpayers and advisers were previously comfortable under the old rules, and, therefore, certain of the tax outcome, but now there is an element of doubt. HMRC needs to be resourced to deal with this.

5.3 We are also aware that HMRC are receiving new clearance applications in respect of transactions that are unable to rely on clearances given under the old rules because they are unable to complete the transaction within the 60-day grandfathering window.

5.4 We suggest above (at paragraph 4.6) that the government considers introducing a mechanism for individual shareholders to seek their own clearance in respect of their own arrangements. As we mention above, the position for all shareholders is now relevant because of the removal of the 5% threshold.

5.5 If the government were to consider this change, we would also suggest that TCGA 1992, section 139(5) also be amended to permit a clearance application to be made by the transferor company in a scheme of reconstruction. Currently, only the transferee company can request clearance, which means that the company usually has to be formed to apply for the clearance. This is potentially a waste of time and resource as the company may not be needed if clearance is refused, such that the transaction does not go ahead. We also note that the transferee company is not immediately affected by the transaction, as it is the transferor company that would suffer a tax charge if the relief at TCGA 1992, section 139(1) did not apply. Thus, it seems odd that the potentially affected party is not technically permitted to apply for clearance in respect of its own tax position.

5.6 We have seen an inconsistent approach to this issue and note that the Clearance and Counteraction Team generally accepts applications from the transferor company, whereas their colleagues who have operational control of the corporate intangibles regime do not, and have routinely refused to consider a clearance application under the parallel rules in CTA 2009, section 831, as section 831(3)(a) states that the application must be made by the transferee company. Additionally, the tribunals are bound by the legislation, so that they cannot consider transmissions under TCGA 1992, section 138(4) or CTA 2009, section 833(2) unless the application is made by the transferee company.

5.7 More generally, we would welcome clarification around what form future clearances are going to take. If HMRC are completely happy with the transactions and all the relevant elements, we would expect a blanket clearance in the normal way. But if HMRC are concerned that there are elements that would generate a tax advantage for some shareholders that they may wish to counteract, will they highlight this but grant clearance to the other shareholders? This is relevant, because under the current rules HMRC can refuse a clearance on the basis that one shareholder is getting a tax advantage, and that, overall, the anti-avoidance condition is not met, and this then applies to the whole transaction. But presumably, the change of emphasis in the new anti-avoidance condition to a just and reasonable counteraction means that a clearance can be granted, highlighting the position of the shareholders that HMRC may wish to counteract. This would be helpful in giving the parties to the transaction the opportunity to consider how best to go ahead, and, in doing so, how or whether to address the concerns about specific shareholders. It would be helpful if the Minister could provide an indication as to how HMRC will deal with clearances going forward to reflect the proportionality of the new rule.

Other taxes – an incoherent tax system

Stamp duty

5.8 Provisions in the stamp duty code (Finance Act 1986 sections 75 and 77) that provide relief from stamp duty for share for share exchanges (and similar transactions) retain the bona fide commercial reasons test. It is unhelpful that there is now a divergence between these two tests, although we understand that this is something that will be considered as part of the modernisation of stamp taxes and the development of the new Securities Transfer Charge that will replace Stamp Duty and Stamp Duty Reserve Tax.

5.9 In the meantime, the implications for related clearance applications, such as those for stamp duty purposes, must be considered. It is the practice of the Stamp Taxes Team to rely on the clearance under TCGA section 138 to establish that the transaction has a commercial purpose. This will no longer be possible, because the test for direct tax purposes will no longer be the same as for stamp duty relief. This will have consequences for both HMRC and taxpayers. The Stamp Taxes Team will have to be resourced to determine the question of commercial purpose for stamp duty purposes, while taxpayers will have the cost of having to prepare two substantive clearance applications to determine the two different questions for capital gains and stamp duty purposes.

Intangibles

5.10 It is also unfortunate that changes have not been made to the parallel legislation that deals with corporate intangibles in CTA 2009 section 818(5) (company reconstruction involving transfer of business) and section 831(1) (genuine commercial transaction requirement and clearance). This means that where the transaction involves the transfer of chargeable intangible assets from one company to another it is still necessary to consider and apply the 'old' test: whether the transaction is being carried out for commercial purposes and does not form part of a scheme or arrangements of which the main purpose … is avoidance of [tax] (section 831(1)).

5.11 It would be helpful if the Minister could confirm that this will be addressed in the future to avoid further divergence of the two tax regimes - chargeable gains and corporate intangibles. When the corporate intangibles regime was introduced, it paralleled the chargeable gains rules in most respects, except for the obvious difference, that the intangibles rules were on income account, not capital account.

5.12 If the two regimes are allowed to diverge in this way, this creates yet another unnecessary inconsistency between tax rules that have the same object and introduces further complexity at a time when the focus could and should be on simplification. Since sections 818 and 831 are relevant to the same sorts of transactions as TCGA 1992 section 139(1), we cannot see any justification for such a fundamental difference between the two sets of rules.

Enterprise Investment Scheme

5.13 There is a similar point to be made regarding the Enterprise Investment Scheme (EIS) rules and specifically the mandatory clearance requirement in Income Taxes Act 2007 section 247. The test for the continuity of EIS relief in section 247(1)(f) is one based on 'genuine commercial reasons' and refers to a 'scheme or arrangements as are mentioned in section 137(1) of TCGA 1992 (schemes with avoidance purposes)'.

5.14 We suggest that this test should also be amended to remove the reference to commercial purpose and ensure that it is consistent with the new tests.

The Chartered Institute of Taxation

6.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

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The Chartered Institute of Taxation
19 January 2026