March 21 2022

HMRC
Residence & Valuation Policy Team

Dear

I refer to your letter dated 5th August 2019 which repeats and then answers the questions we posed in June 2018. I am sorry for the long delay in responding but STEP would like to publish your response given that it affects a number of quite common transactions and it has taken us time to regroup and agree a response. Before doing so, can I clarify some areas and possibly raise some new issues. Ideally STEP Technical would like to publish the correspondence and if we disagree say where we do so in guidance for members.

Deeds of variation

1. We would like some clarity on your answer on deeds of variation. The answer you gave in the published guidance was that the property is treated as never being comprised in the donor's estate so there is no reduction in the donor's estate. While in the real world there is a reduction in the donor's estate we assume that HMRC consider they are not notifiable because in the IHT world the donor's estate is not reduced.

2. We are puzzled then about the circumstances in which deeds of variation could ever be notifiable. You note: *In particular Example 6 does not consider situations where a deed of variation is only one step in arrangements which seek to gain one of the tax advantages set out in Condition 1 of the IHT DOTAS hallmark. Where that was the case Condition 1 would be met.*

3. However, please could you give an example of when a deed of variation would be notifiable on this basis, as we have been unable to think of one. For example, if a deed of variation is made into a trust rather than to someone outright, the trust and deed of variation are steps that are part of an arrangement but there seems no additional reason why either condition 1 or condition 2 should be satisfied. S142 already has the necessary anti-avoidance provisions on consideration etc.

Undivided shares.

4. This is perhaps the most critical point as co-ownership arrangements of all kinds are common and often organised by the families themselves without a promoter of the sort you suggest. STEP do not agree that it is artificial for a donor to have use of the property which is different to the level of their ownership. Ownership and occupation do not have to be equal and there is nothing in the section or in property law to suggest this. The nature of co-ownership is that they own a share in the whole; each of them is therefore entitled to occupy the whole as much or as little as they want. An informed observer would not find it odd that

occupation and ownership might differ: indeed occupation might vary significantly over time.

5. Your answer suggests that if the parent only occupies one or two rooms (because they are infirm) it would be acceptable to retain only a small share but if they have equal use of the whole house it would not be.

6. What if the donor gives 51%, or 60% or 80% - at what point is the disclosure requirement triggered? What if the donor intends not to live there much but then events change? All this is too vague for what are remarkably common arrangements. The better view is surely that condition 2 is not satisfied. The arrangements really involve only one “step”, which is a gift of property from a parent to her child. The argument that it is contrived and/or abnormal for parent to have a level of use of the property significantly different from their share of ownership is subject to an obvious *reductio*: it implies that the situation often in place before the gift, where child had half the use of a property that he owned 0% of, was even worse!

7. The problem with DOTAS is that it is not simply a disclosure requirement. It brings into view all sorts of other obligations: for example, failing to disclose an arrangement can incur significant penalties and result in accelerated payment notices. And many people will do the above arrangements without necessarily taking legal advice – just because it suits them especially on holiday homes.

8. **We request that HMRC confirm that co-ownership arrangements within s102(4) are not caught by DOTAS. If they cannot confirm this then it is helpful to at least have some marker beyond which HMRC say it may be disclosable.**

Question 3. BPR and sales

9. We find this a puzzling answer. It would be quite common just before the sale of a family company for the owner to take inheritance tax advice; indeed a client might consider their advisers negligent for not advising them on options. In these circumstances transferring shares into a trust for inheritance tax reasons knowing that a sale might arise shortly afterwards would not be unusual.

10. What precisely is the problem and how is condition 2 satisfied if the shares are being sold to a third party? The trust will be subject to ten year charges going forward. We can understand the position is different where the shares are simply being sold back to the same person or a connected person.

11. **Can the guidance limit this to a sale to a connected person?**

Question 4 – reversionary leases.

12. We note your view on the established practice exception but we question whether it is right such leases satisfy Condition 2 to the informed observer. The arrangements are not contrived as the economic consequences follow with property law i.e. the person has to move out of the property when the reversionary lease takes effect. If the property is sold, the donor receives only

a small value from the retained freehold. The Court of Appeal decision in *Buzzoni* and *Hood* carefully distinguished the requirements. STEP would suggest these are not disclosable.

13. **Would you accept that Condition 2 is not satisfied?**

Question 7 – multiple trusts

14. This concerns us as it is not uncommon for different trusts to hold different numbers of shares in the same company. This may be for a number of reasons. For example, one child may be working in a business and another may not and have a different long-term view and prefer a separate trust where the trustees to be able to diversify. We accept that the original question did not give different fact scenarios.

15. For example the company might be sold at a future date within the 7 years of the gift and some beneficiaries may prefer the trustees to have the option of replacing the sold property and others may not – if the shares are all in one trust this is not possible under s113B. Pilot trusts can no longer be set up to utilise multiple nil rate bands at the ten year anniversary.

16. Having shares held in several trusts reduces the value of each trust's shareholding in the real world as well as the IHT one and also follows the CGT treatment. That can be disadvantageous.

17. Would you therefore accept that there are some situations involving multiple trusts in which neither condition 1 nor condition 2 would be satisfied? We are not asking for detailed guidance here.

Gilts

18. Acquisition of gilts by terminally ill non-resident (i.e. excluded property under IHTA 1984 s.6(2)) followed by gift of gilts to children.

19. HMRC suggest it is disclosable. On reflection this is puzzling and we respectfully disagree. It naturally prompts the questions whether the age or health of the donor makes a difference, or whether it would make a difference whether he or she left the gilts to the children by will rather than making an inter vivos gift. What if the trustees purchased gilts for an elderly life tenant with a qualifying interest in possession who was non-resident?

20. The settled property is excluded property on his death. Does it make any material difference if the trustees wait until his death or terminate his interest in possession prior to death relying on the gilts exemption to avoid an entry charge? It is hard to see why. In the first case, his estate is not as such reduced by the purchase of gilts anyway so Condition 1 would not be satisfied.

21. **Please can you reconsider this answer.**

Grandfathering arrangements

22. There is a difficult question arising from the requirement that the arrangements in question "implement a proposal which has been implemented by related arrangements", which did not appear in the grandfathering provisions in the predecessor regulations. It is not enough that the arrangements in question are substantially the same as pre-April 2018 arrangements: it has to be the case that both arrangements implement the same "proposal". We remain unclear what this means. The term "proposal" is not defined in SI 2017/1172. Does "a proposal" means "a particular communication made by a particular person at a particular time" or simply "a plan or scheme". It is suggested the first meaning cannot be the correct one: this would deprive the grandfathering provision of any effect at all. On the second reading, the purpose of requiring both the arrangements in question and the pre-April 2018 arrangements to implement the same "proposal" might be to ensure that the way in which the arrangements are said to achieve the desired tax advantage as a matter of law is the same in both cases ("the wider view"). This analysis appears to be endorsed at one part of the DOTAS Guidance:

    "The proposal is the specific combination of elements or steps which are designed to achieve the intended tax advantage and which is being made available to a potential user.

    By way of example, Insurance Co have offered their clients a Discounted Gift Trust v1.0 since 2010. This proposal was first implemented in 2010 and continues to be offered in April 2018 in exactly the same way. The implementation of this proposal by arrangements entered into after 1 April 2018 would be the implementation of a proposal that has previously been implemented before 1 April 2018 and which, subject to satisfying the established practice requirements, would be within the exception…

    However, suppose Insurance Co decide that they want to make changes to the elements or steps which are required to achieve the intended tax advantage and after 1 April 2018 offer their clients what amounts to Discounted Gift Trust v.1.1 (notwithstanding that they may choose not to change the name or version number). This is a new proposal, even though it may be 'substantially the same' as Discounted Gift Trust v1.0."

    In the same part of the DOTAS Guidance, however, HMRC also say:

    "While there may be a number of very similar proposals in existence which are designed to achieve the same tax advantage, for example different companies offering their own versions of a tax saving scheme, each would be a separate proposal."

    The scope of this comment depends on how much work the words "their own versions of" are supposed to be doing. It is understood that, in practice, HMRC presently take the view that for two things to be the same "proposal" they must have been proposed by the same person or firm.

    EXAMPLE

Prior to 1 April 2018, Insurance Cos A and B offered clients a "flexible reversionary trust" ("FRT") inheritance tax scheme. The operation of FRTs was described, and their intended tax consequences accepted in principle, in the Inheritance Tax Manual at IHTM20561-20563. After 1 April 2018, Insurance Co C decides to offer its clients a FRT, which works in precisely the same way as Insurance Co A and B's.

HMRC consider that Insurance Co A and B's FRTs are not notifiable arrangements but Insurance Co C's is. Is this view really correct?

It is respectfully suggested that HMRC's view is wrong. It is very hard to see what rational legislative purpose might be served by creating a situation where, although given arrangements are generally exempt from being notifiable on the basis that they are already known to and accepted as legitimate tax planning by HMRC, they become notifiable when promoted by any person who happens not to have promoted them before 1 April 2018.

Please can you confirm you take the wider view of proposal.

With best wishes.

Yours sincerely,