

Finance Bill 2017 draft legislation: Clause 13 Response by the Chartered Institute of Taxation

1 Introduction

1.1 The CIOT comments on clause 13 of the draft provisions for Finance Bill 2017.

1.2 Clause 13 follows HMRC's formal consultation in 2016. That consultation (and earlier informal consultation) took place against the background of a number of tribunal decisions where the tax regime governing partial surrender of life insurance policies was subject to severe judicial criticism because of its disproportionate and inequitable effect. The consultation therefore examined three possible alternatives to the current tax rules for part surrenders and part assignments of life insurance policies. The three alternatives were as summarised below :

- Option 1: to charge the economic gain whenever an amount in excess of 5% of the premium is withdrawn
- Option 2: replacing the current 5% tax deferred allowance with a 100% tax deferred allowance.
- Option 3: to retain the current method of taxing partial surrenders including the 5% deferral but if the gain exceeds a pre-determined amount, say 3%, the excess would not be immediately charged to tax but carried forward to the next chargeable event

1.3 The summary of responses¹ indicated that only Option 2 attracted support from respondees. Although there was widespread support for a change in the rules in principle, the point was made a number of times in responses that the number of cases giving rise to these disproportionate gains is now very small² and shrinking in number due to changes in UK industry practices and the UK regulatory environment.

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574348/Part_surrenders_and_part_assignments_of_life_insurance_policies_-_summary_of_responses.pdf

² The consultation document stated that about 600 policyholders are affected annually.

- 1.4 The government has decided not to legislate any of the options upon which it consulted formally. Instead clause 13 provides for an alternative remedy that will allow policy holders who have inadvertently triggered 'a wholly disproportionate gain' to apply to an officer of HMRC to have their gain recalculated on a 'just and reasonable' basis.
- 1.5 We understand that HMRC intend to produce detailed guidance setting out the basis and the process for applying the just and reasonable remedy.
- 1.6 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 1.7 In this instance our comments relate to a potential asymmetry between the rights of a taxpayer and the taxing authority leading to unfairness in the operation of the tax system.

2 Absence of a statutory right of appeal – our fundamental concern

- 2.1 Our fundamental concern with the 'just and reasonable' remedy provided for in clause 13 (inserting new sections 507A and 512A into ITTOIA 2005) is that there is no a statutory right of appeal to the First-tier Tribunal (FtT) on the officer's decision of what constitutes a 'just and reasonable' basis of recalculation, or indeed any other ground relevant to the operation of the provision including whether the chargeable event gain is 'wholly disproportionate' or whether an extension of time for making the application should be granted.
- 2.2 The absence of this essential safeguard could severely compromise fairness because the application of the remedy will depend wholly upon an individual officer's view, without recourse to appeal other than judicial review. A statutory right of appeal is a fundamental protection for taxpayers in the future who find themselves in the position of realising a disproportionate gain at a time when corporate memory of the current consultation has faded and individuals who have been involved in the process of settling existing cases may have moved on or retired.
- 2.3 Judicial review is likely to be prohibitively expensive for policyholders who have realised a disproportionate gain and been denied the discretionary remedy. Policyholders who find themselves in this position will also need to consider the risk of an adverse costs award in pursuing judicial review.
- 2.4 We see no barrier to making express legislative provision for a full right of appeal to the FtT in respect of this discretionary remedy. There is precedent elsewhere in the tax system for providing such a right of appeal from an officer's decision, see for example the apportionment of a Controlled Foreign Company's chargeable profits and creditable tax under TIOPA 2010 section 371QC(2) (determination on a just and reasonable basis) where an officer of HMRC has determined another basis for the apportionment, this basis can only be questioned on the grounds that it is not a just and reasonable basis for the apportionment. The process for questioning such a determination is by an appeal against an amendment of the company's tax return made under FA 1998 Schedule 18 paragraphs 30, 34. This course is set out at TIOPA 2010 section 371UC(3) and (4).

3 Criteria for applying the discretionary remedy

- 3.1 Although we understand that HMRC's promised guidance will set out the basis and the process for applying the just and reasonable remedy, the danger of guidance alone as a safeguard is that guidance can be changed or withdrawn with its rationale lost in the passage of time and inevitable changes in personnel. Our strong preference would be for the legislation to set out some non-exhaustive factors as to what was meant by 'wholly disproportionate' and 'just and reasonable'.

4 Acknowledgement of submission

- 4.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

5 The Chartered Institute of Taxation

- 5.1 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.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
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