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Uncertainties in relation to Structures and Buildings Allowances

Submission by the Chartered Institute of Taxation

1 Introduction

- 1.1 Capital Allowances Act (CAA) 2001 Sections 270AA – 270IH provide for the availability of Structures and Buildings Allowances (SBAs) on eligible construction costs for buildings and structures in non-residential use where construction begins on or after 29 October 2018. The annual rate is 3%, on a straight-line basis. A higher annual rate applies for freeport qualifying expenditure (10%).
- 1.2 As detailed below, there are some uncertainties in the application of the relief. Clarification of HMRC's approach is requested in guidance.
- 1.3 Our stated objectives for the tax system include greater certainty, so businesses can plan ahead with confidence.

2 Pre- 29 October 2018 site clearance/preparation

- 2.1 Section 270AB provides that the construction of a building or structure is treated as beginning before 29 October 2018, and therefore SBAs are not available, *'if any contract for works to be carried out in the course of the construction of that particular building or structure (whether or not the contract also relates to the construction of other buildings or structures) is entered into before that date'*. (Our underlining.)
- 2.2 Section 270BK treats capital expenditure *'for the purposes of preparing land as a site for the construction of a building or structure'* as *'capital expenditure on the construction of the building or structure'*. (Our underlining.)
- 2.3 HMRC's guidance at CA93250 considers site preparation and the effect of section 270BK.

CA93250 - Structures and buildings allowance (SBA): qualifying expenditure: expenditure on construction or acquisition: site preparation

CAA01/S270BK

It may be necessary to carry out work to prepare the site before construction work on the building can commence. Without specific provision, such expenditure would not be expenditure on the construction of a building.

Capital expenditure incurred on preparing land as a site for construction of a building is treated as if it were expenditure on the construction of the building that is then built upon that site. Site preparation includes cutting, tunnelling or levelling land.

The site preparation costs are added to construction costs for the building, and SBA is available on those costs. Any SBA on site preparation costs will therefore be claimable only when the building is first brought into qualifying use CA92100.

- 2.4 The uncertainty is how site preparation works undertaken under a contract entered into before 29 October 2018 but which do not relate to a particular building or structure are treated.
- 2.5 Assume a multi-site development that will consist of a business park and/or industrial warehouses for letting. Under a contract entered into before 29 October 2018 site-wide clearance and preparation works are undertaken. The first phase of construction begins some time later within the eligible SBA period. Detailed planning would typically be secured on the first phase which would then trigger the funding for the enabling works necessary to bring the primary infrastructure onto the site. Future phases may require further site preparation for roads / services when those phases secure planning and funding approval.

Is the availability of SBAs on the qualifying construction of the buildings in the first phase and beyond precluded by any pre-29 October 2018 contract for site-wide clearance/preparation works such that no SBAs are available for buildings or structures constructed in the first phase or any future phases? Or is HMRC's view that site preparation work undertaken under a contract entered into before 29 October 2018 only precludes subsequently constructed structures and building from qualifying for SBA if the site preparation works relate to a particular building or structure? In the latter case there would no relief for the site preparation works but nor would they disqualify a claim for SBA in relation to later phases of construction.

If the latter, how is the test of linkage to a particular building or structure operated in practice?

- 2.6 We note that paragraph 57 of the Technical Note¹ published on 29 October 2018 as part of the 2018 Budget indicated that works must be 'linked explicitly to the actual structure or building intended for relief'. The draft legislation issued for consultation on 13 March 2019² included the concept of 'a connected preparatory contract' entered into before 29 October 2018. A connected preparatory contract was defined in the draft as a contract which— (a) is for any works carried out in preparation for the construction of that particular building or structure, and (b) is entered into only because there is an expectation that the construction contract will subsequently be entered into.

The final legislation does not include the 'connected preparatory contract' provision. Paragraph 4.2 of the summary of responses³ to the draft legislation consultation indicated that uncertainties were raised during

¹ <https://www.gov.uk/government/publications/capital-allowances-for-structures-and-buildings-technical-note>

² <https://www.gov.uk/government/consultations/draft-legislation-detailing-a-new-capital-allowance-for-new-non-residential-structures-and-buildings>

³ <https://www.gov.uk/government/consultations/draft-legislation-detailing-a-new-capital-allowance-for-new-non-residential-structures-and-buildings>

the consultation about the date on which construction begins, especially when a project involved multiple stages of construction and preparatory contracts (see paragraph 4.2). Uncertainties remain.

- 2.7 As noted in the example at 2.5, at the time the site-wide preparatory work is undertaken, planning permission may not have been granted for any specific buildings. Typically a developer may undertake some site preparation works and sell on to the investor before any contracts are entered into for construction of the buildings. Would it make a difference if a developer undertakes the site preparation work before selling to an investor as the developer would incur the site preparation as revenue expenditure?
- 2.8 It would be helpful to remove uncertainty to confirm the position in guidance with clear examples covering a number of scenarios. We suggest consideration may need to be given to amending the CAA 2001 legislation, as may be appropriate.

3 Framework agreements – commencement provisions

- 3.1 An example is as follows: A framework agreement is entered into before 29 October 2018 for a large scale strategic development. Typically the framework agreement is an overarching high level agreement to complete the full phased development. At each phase the development agreement is amended or varied according to the relevant requirements and budget at the time. Each phase development is undertaken by a separate company in the group but is covered by the original framework agreement and varied as appropriate. Does the entering into of the overarching framework agreement before 29 October 2018 preclude SBA on all subsequent phases post 29 October 2018?

Paragraph 58 of the Technical Note states:

Where framework or call-off contract arrangements are agreed, the test will be whether the written contract requires particular works to be undertaken within the period of the framework, that relate to the construction of a specific building. In practice, this means that any 'master' contract, to which other contracts operate subserviently, must refer to a specific structure or building not merely a construction project or an overall scheme.

- 3.2 Paragraph 58 is not re-stated in the manual guidance . Does HMRC apply the test in paragraph 58? Examples in guidance of HMRC's approach to phased developments under a framework contract entered into pre-29 October 2018 would be helpful to remove uncertainty.

4 Qualifying use

- 4.1 It would also be helpful to remove a further uncertainty if the guidance could confirm the date of first use of infrastructure or 'Structures' (as opposed to 'Buildings').
- 4.2 Under section 270CG a building or structure is treated as used, for the purposes of a property business, during any period when the person with the relevant interest is entitled to rents or other receipts. However, structures such as road, sewers, pavements, bridges do not have a recognisable use date in the same way of buildings. It is difficult to demonstrate direct rental income in respect of such structures. CA92100 (Structures and buildings allowance (SBA): use: qualifying use) refers only to first use of a building not a structure.

4.3 By way of example, assume that (after 29 October 2018) a developer has constructed the road and utility infrastructure serving a site with planning consent for a new logistics warehouse. The developer has subsequently agreed a pre-let with a business that will occupy. The site, with the benefit of the completed infrastructure and the agreement to lease, is sold to a property investor (section 270BD). The property investor funds the construction of the warehouse. On the assumption that all conditions are met for SBAs is the first use of the infrastructure for the property investor is the infrastructure treated as used:

- the same day as the first use of the warehouse, that is the date the property investor is entitled to receipt of rental income for the warehouse for a property business (section 270CG), or
- the date of completion of the acquisition by the property investor on the basis that the roads are operable for vehicles for the property investor's investment business (section 270CD), or
- another date?

Please could HMRC confirm with an example in guidance?

4.4 Assume the same facts as the example at 3.2 but in this example, there are multiple warehouses. A developer has constructed the road and utility infrastructure serving a site with planning consent for four new logistics warehouses. The developer has subsequently agreed a pre-let with a business who will occupy one warehouse. The site with benefit of the completed infrastructure and the agreement to lease has then subsequently been sold to our property investor client, who will fund the construction of the warehouse. The sites of the other warehouses may be developed at a later date by the same property investor or other property investors.

4.5 On the assumption that all SBA compliance requirements are met, is the date of first use of the infrastructure:

- the same day as the first use of the warehouse that is, the date the property investor is entitled to receipt of rental income for the warehouse, or is that the date of first use of only part of the infrastructure? It is noted however that it may be the case that all (or nearly) the infrastructure is in use from the date of first use of the first warehouse to be constructed, as a matter of fact, or
- the date of completion of the acquisition by the property investor on the basis that all the roads are fully operable for vehicles as part of the property investor's investment business, or -
- another date?

4.6 In either case, would HMRC consider that some form of apportionment is required if only part of the infrastructure is referable to the first warehouse? If so, how should that be determined if the other warehouses are not to be built for several years, or at all.

4.7 Would it make any difference in either example if the roads have in the meantime been adopted by the highways authority, or some of the qualifying expenditure incurred by the developer or the property investor relate to assets not within the boundary of the land owned by the property investor?

5 About us

5.1 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. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

- 5.2** 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.
- 5.3** 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.
- 5.4** Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

6 Acknowledgement of submission

- 6.1 We would be grateful if you could acknowledge safe receipt of this submission.

The Chartered Institute of Taxation

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