

Clearances to HMRC (Lecture P1364 – 15.15 minutes)

There are many situations where it is possible to apply for clearance to HMRC that a particular piece of legislation does or does not apply. Of course, there are going to be a smaller number of situations where clearance is commonly sought and we will look at those in more detail.

It should be noted that HMRC will not give informal or formal clearance about the application of the General Anti-Abuse Rule (GAAR). However, HMRC have always been (and will continue to be) willing to discuss commercial arrangements with large businesses and high net worth individuals, as long as what is being done does not amount to tax avoidance. In reality, that general facility is only going to be available to a select few companies and individuals who have their affairs dealt with by a named individual (often a Customer Relationship Manager or equivalent).

Statutory clearances

The first category of clearances will be those which have a statutory basis – that is that the legislation specifies that a taxpayer can seek clearance from HMRC on the operation of a specific point. It is always important to identify what you are seeking clearance for. If you apply to HMRC for clearance relating to a share for share exchange, for example, you are seeking clearance that HMRC agree that the deal is being done for bona fide commercial reasons and not for avoidance of tax. HMRC are under no obligation to tell you if they believe the transaction has another flaw which they could attack. The Clearance Section are normally willing to tell you if they believe that the transaction is not one to which the legislation would apply but the wording of the clearance is such that it does leave the possibility of enquiry on other aspects.

The main statutory clearances are as follows:

- Share for share exchanges (s138 TCGA 1992);
- EIS shares subject to acquisition by new company (s247 ITA2007);
- Reconstructions involving transfer of business (s139 TCGA 1992);
- Company reorganisations involving intangible fixed assets (s831 CTA2009);
- Transfer of UK trade between EU member states (s140B and s140D TCGA 1992);
- Purchase of own shares by unquoted trading company (s1044 CTA2010);
- Demergers (s1091 CTA2010);
- Transactions in securities (s748 CTA2010 and s701 ITA2007); and
- Transactions in land (s831 CTA2010 and s770 ITA2007).

There are others but these are typically the ones which you might encounter.

From a practical perspective, you can request clearance by email (reconstructions@hmrc.gov.uk) as long as the attachments are no greater than 2Mb in size. HMRC will reply by email, but you do need to include a permission as part of the email submission.

It is also possible to write to HMRC (BAI Clearances, HMRC, BX9 1JL). If the application is market sensitive, the application should be sent by post and marked for the attention of the team leader. No correspondence on the case will be undertaken by email. An application is market sensitive if the information contained within it could affect the price of a stock market quoted company or there is information about the financial affairs of a well-known individual.

Clearance should be given within 30 days but if there are questions to be asked, then the 30-day time-limit is reset from the date of your response to the enquiries raised.

There is no standard form for completion of a clearance, but it is important to include as much detail as possible about the parties involved and the specific reasoning behind the clearance being sought. For example, if you are seeking clearance that a transaction is being undertaken for bona fide commercial reasons, you need to explain why you believe that is the case. It is not simply sufficient to state that this is the case.

Typically, you would want to include:

- Details of all parties involved including companies, shareholders;
- Copies of accounts;
- History of shareholdings;
- Details and reasons for transaction;
- Details of clearances sought;
- Confirmation that conditions are met.

This is particularly important under the current climate as we are seeing a much greater level of refusal of HMRC to grant clearance in specific circumstances. The main area of concern seems to involve the application of the transactions in securities provisions.

What if you do not seek clearance?

There is an interesting debate amongst some advisors about seeking clearance. There is nothing stopping someone undertaking a transaction without seeking clearance. Clearly there is a risk, but you do have the opportunity at that stage to make any technical arguments which relate to the case. You do not have the opportunity to engage in such discussions with the Clearance Section.

Which leads us on to the question as to what you do if you have clearance refused? The Clearance section is under no statutory obligation to tell you why clearance has been refused. Historically, they often declined to do so to stop people simply changing their plans solely to obtain clearance. However, this has changed now so they will 'where possible' give reasons but these are often not explicit.

For example, in a recent case involving an MBO-type transaction involving a NewCo acquiring a business for a combination of cash/loan notes/shares, clearance was refused under the transactions in securities provisions and this was the wording used:

'they are concerned that by receiving cash and redeemable loan notes, the shareholder ... will be able to realise almost the full value of the company in a capital form whilst retaining a significant indirect interest'.

This can be read in a number of ways.

So, what do you do? You can simply proceed with the transaction and make the technical arguments if it is challenged by HMRC. You can make additional arguments to HMRC, but the Clearance Section will not typically engage in discussion with you about the clearance that is given. There would be nothing to stop you tweaking the deal and then applying for clearance again but this is not a straightforward process.

Other clearances

There are other clearances that businesses may wish to seek.

Transfer pricing

It is possible to apply for an Advanced Pricing Agreement (APA). This is a written agreement between a business and HMRC which specifies the methodology to be used in determining the arm's length price for transactions affected by the transfer pricing provisions. It will mean that the business will not be challenged by HMRC for the period of the agreement (typically five years).

Due to the costs and time involved in agreeing APAs, HMRC set certain conditions. The transfer pricing issue must be complex rather than straightforward which is taken to mean that there must be some doubt as to what the correct transfer pricing methodology is. It is not just about the quantum of the tax at stake but this will be a factor. It is also unlikely that HMRC will enter into an APA relating to UK-to-UK transactions. The business also must acknowledge the time it can take to put this agreement in place.

The APA process is initiated by an informal discussion via an Expression of Interest.

EIS, SEIS and VCT

The Venture Capital Relief team deals with various aspects of the administration of the Enterprise Investment Scheme, Seed Enterprise Investment Scheme and Venture Capital Trust scheme. This includes enquiries from companies about the schemes, requests for informal clearance that a company will qualify under one of the schemes, statutory applications from companies who have issued shares and statutory approval of companies as VCTs. They do not deal with the personal tax issues arising from claims by investors.

They can be contacted by email (enterprise.centre@hmrc.gov.uk), mail (Venture Capital Relief Team, HMRC, WMBC, BX9 1BN) or phone (0300 123 3440).

The most common approach to the Venture Capital Relief team will be to obtain advance assurance about a company qualifying as many investors will seek this before they will agree to invest.

The type of information that HMRC will want to see is:

- How much money is to be raised;
- Business plans and financial forecasts;
- A copy of the latest accounts if available;
- How the company will use the money invested;

- Details of all trading and other activities and how much is to be spent on each;
- A copy of the articles and details of any changes that are to be made;
- A copy of register of members at the time of the application;
- The draft of any documents to be given to potential investors;
- Details of any other agreements between the company and its shareholders;
- Any other relevant documents; and
- A statement as to how the risk to capital condition is going to be including how the money is going to be used for the growth and development of the company.

If the team do not believe that the conditions are met, they will explain why they believe this is the case. No feedback is given on incomplete applications. It is very common for these applications to be returned as incomplete.

Research and development

HMRC will give advance assurance for companies that wish to claim R&D tax reliefs. It is not mandatory. However, it means that HMRC will allow the R&D claims without enquiry for the first three years that the relief is claimed.

This is only available where:

- The company has not claimed R&D relief before;
- The annual turnover is £2m or less; and
- It has less than 50 employees.

If the company is part of a group where another group company has claimed R&D relief before, this process cannot be used. You are also precluded from participating if the company has entered into any scheme notified to HMRC under DOTAS or if they are a serious defaulter.

There is a specific form called CT R&D (AA) which can be accessed via their website.

Non-statutory clearances

This is a process whereby HMRC may give clearance where something is not covered by a statutory or specific clearance. It can be quite difficult to get HMRC to give a non-statutory clearance as there are lots of caveats about when they will engage with this process.

Their guidance starts off by saying they will help if:

- You have fully read the relevant guidance or contacted the relevant helpline;
- You have not been able to find the information you need;
- You are uncertain about HMRC's interpretation of tax legislation.

HMRC will not process the application if you do not give them all of the information that is needed. There are checklists published by HMRC with details of what you need to send and it is important that these are followed.

HMRC will not give advice:

- unless there are genuine points of uncertainty. If they do not think that the question is uncertain, they will direct the taxpayer to the relevant guidance.
- on matters of fact. The example they give is whether or not an activity is a business which is particularly relevant when looking at incorporation relief for property businesses.
- if they consider that you are asking them to approve tax planning arrangements.
- the related return period is final.
- there is a statutory clearance process available.

The application should be submitted by email with all relevant information. HMRC say they will try to reply within 28 days, but this is definitely not happening currently when the response time is more likely to be three months.

It is important to note that you can only rely on this clearance if you have provided HMRC with the relevant information. If you disagree with the response given by HMRC you can still complete the return ignoring their view but you must make reference to this when completing the return so this can mean that some people would rather not seek the clearance.

Contributed by Ros Martin