

Preservation for the public

Harriet Atkinson examines HMRC's new guide to capital taxation and the national heritage



Harriet Atkinson is a solicitor in the private client team at Forsters LLP

On 14 September 2011 HMRC published their latest version of Capital Taxation and the National Heritage, a 239-page technical guide to the relevant legislation, which also provides guidance on HMRC's current approach to administering the provisions. The memorandum outlines the scope of the legislation as at 2011 and supersedes earlier editions of the publication (known in its last edition as IR67). It describes the exemptions and reliefs from capital taxation for national heritage property, the arrangements for dealing with claims for these reliefs, the procedures for private treaty sales to national collections, offers in lieu of IHT or estate duty, gifts to charities and arrangements relating to heritage maintenance funds. The guidance can be found at www.hmrc.gov.uk/inheritancetax/conditionalexemption.pdf and through the IHT manual.

IR67 was published by the Inland Revenue (in succession to HM Treasury) in 1986, with a supplement in 1987, so consolidation of the legislation and guidance on how HMRC operate the reliefs and exemptions has been long awaited. The latest edition is the result of a four-year consultation process involving professionals, representative bodies and other interested parties. The memorandum covers an overview of the legislation (chapter 2), the heritage reliefs available (chapter 3) and claims for conditional exemption (chapters 4-6), the capital tax consequences of failure to observe the undertakings (chapter 7), maintenance funds (chapter 8), gifts to qualifying charities (chapter 9), private treaty sales (chapter 10)

and acceptance of property in lieu of estate duty and IHT (chapter 11). The guidance is supplemented by 14 appendices, which include notes on the legislation and procedure, tax calculations and model documents. The memorandum provides clear, detailed and up-to-date guidance on the scope of the legislation and practical advice on the process of applications. Practitioners will be heartened that, despite its length, the publication is user-friendly. Those closely involved with national heritage property will also be encouraged by the memorandum's early statement that the government recognises the importance of national heritage and intends to continue with a policy of encouraging its preservation for the public in private ownership.

Conditional exemption

Conditional exemption from IHT (and formerly estate duty) may be claimed under ss30-31 of the Inheritance Tax Act 1984 (IHTA), on the transfer of land or an object that is important to the UK's national heritage conditional upon the recipient fulfilling undertakings, broadly to provide public access and preserve the item. If the conditions are satisfied, a corresponding relief from CGT is generally available. Loss of the exemption occurs on the death of the person treated as beneficially entitled to the property, on a disposal (by way of sale or gift) or on a breach of the undertaking. On the 'chargeable event' the deferred IHT and CGT becomes payable. Conditional exemption may be retained following a disposal by gift or on death if the new owner

'Those closely involved with national heritage property will also be encouraged by the memorandum's early statement that the government recognises the importance of national heritage and intends to continue with a policy of encouraging its preservation for the public in private ownership.'

renews the undertakings and the item still qualifies as heritage property.

Developments since IR67

The updated guidance is produced by the Heritage Team of HMRC who took over responsibility for capital tax reliefs for heritage property from the Treasury in 1985. HMRC now hold responsibility for assessing the suitability of the property for relief, obtaining and supervising the undertakings, approving the terms and monitoring the activities of maintenance funds and approving both public institutions as recipients of exempt heritage property and temporary export of exempt work of art.

The memorandum charts the evolution of the legislation in the context of national heritage from 1987 up to 2009. The most significant changes were those brought in by Finance Act 1998 to extend public access rights and to publish the terms of undertakings. As well as these, the memorandum covers the repeal of s26 IHTA (gifts for public benefit), the introduction of a two-year period within which to claim conditional exemption and directions for a maintenance fund (s30(3BA) and s78(1A) IHTA), and the changes introduced in 2006 to the way in which tax is charged following conditional exemption from a ten-yearly charge on settled property. In addition, three former extra-statutory concessions (ESCs) have been incorporated into the legislation. Former ESC F7 (now s5(1)(b) IHTA) confirms that foreign-owned works of art brought into the UK for the purposes of public display, cleaning and restoration enjoy excluded property relief, former ESC F19 (now s6(1B) and (1C) IHTA) provides that decorations awarded for valour are excluded property, and an unnumbered concession (now contained in s258 TCGA 1992) provides that CGT will not be charged on certain disposals of conditionally exempt property by private treaty to a Schedule 3 body or in lieu of IHT.

Public access

Public access is a basic requirement of conditional exemption (except in respect of confidential documents under s31(3) IHTA) and failure to

provide this will result in a breach of the undertaking and loss of the conditional exemption. The requirements of public access have evolved over time, most significantly following Finance Act 1998, which imposed requirements for open public access (rather than 'by appointment' access) and the publication of information about property for which conditional exemption is claimed. These two requirements apply to undertakings entered into after 30 July 1998 and are dealt with in Part I of appendix 1A.

pre-1998 undertakings may be published if it is just and reasonable to do so. Owners are required to provide HMRC with particulars of the exempt property and updated details of the access arrangements as part of their undertaking and failure to do so means they risk losing their tax exemption. The memorandum confirms that for items exhibited in museums, galleries or houses open to the public, the publicity for these attractions together with the publicity on HMRC's website is sufficient. For items displayed in houses that

Owners are required to provide HMRC with particulars of the exempt property and updated details of the access arrangements as part of their undertaking and failure to do so means they risk losing their tax exemption.

The precise requirements of the public access will depend on the terms of the undertaking and the item in question, however the memorandum confirms that access must be open, for a suitable period and during a suitable time of the year. Examples of HMRC's requirements provided in the memorandum include open access for at least one month for objects, at least 28 days per year in England and 25 days in Scotland, Northern Ireland and Wales during the spring and summer months for smaller buildings of historic or architectural interest (and essential amenity land and historically associated objects) rising to 156 days' internal access for larger buildings. In the case of objects, owners may satisfy the public access requirement by lending the item to a public institution, subject to HMRC's agreement to the loan.

Part II of appendix 1A sets out what HMRC require in respect of publication of undertakings and publicity, and model undertakings and website entries are contained in appendix 8. Post-1998, undertakings must be publicised on the heritage pages of HMRC's website and

are not normally open to the public, however, owners must provide additional publicity either in the local press or tourist office or in a national publication or guide. Part II of appendix IA also confirms what HMRC regard as acceptable practice for the display of sets of items, manuscripts, books and articles displayed by rotation between private and public areas in a house. The memorandum covers charges and visitors' identity particulars that were raised as issues during the consultation period by representatives of owners of historic houses. HMRC confirm that reasonable charges for access and images (if permitted under the terms of the undertaking) are acceptable, but that for open access arrangements owners should not seek identity particulars for visitors unless, for example, access to the private side of the owner's house is required for the viewing. For pre-1998 undertakings, where viewing is by appointment, HMRC recognise that the owner may ask for suitable identity such as a passport or driving licence to confirm identity and a

utility bill or bank statement confirming the individual's address. HMRC's advice in the memorandum brings it in line with the approach of the National Trust and English Heritage.

Part III of appendix 1A provides a guide to good practice for access by prior appointment (relevant for items with pre-1998 undertakings), provides examples of possible pitfalls for those providing access by appointment, and reminds us that HMRC's website invites both owners and the public to report any difficulty with the arrangements.

National heritage property may be offered to meet IHT or estate duty in kind, subject to certain conditions and acceptance by the culture minister (IHTA s230).

Appendix 1A closes with an addendum dealing with access to conditionally exempt archives and an example visitor information form for archives. The notes have been settled between HMRC and The National Archives. Access to archives, due to their nature, is permitted on a 'by appointment' basis at reasonable times of the year and details are published on HMRC's website and The National Archives' online directory.

Pre-eminence standard

The pre-eminence standard of objects has long been familiar in the context of offers in lieu of IHT and estate duty under IHTA s230. Since 17 March 1998, the pre-eminent requirement has applied to applications for conditional exemption too. Pre-eminence is not defined in the statute and is considered by Arts Council England, which obtains the opinion of expert advisers before their acceptance in Lieu Panel decides on whether the object meets the condition. The guidance confirms that designation on one occasion does not guarantee it on

another and, in a case where the attribution of an item changes, this will not affect the status of the conditional exemption in being but a new claim for conditional exemption would be assessed on its merits.

The asset must be 'designated' as pre-eminent under one of the six categories set out in s31(1) IHTA. These include objects, or a collection of objects, which HMRC consider to be pre-eminent for its national, scientific, historic or artistic interest, land of outstanding scenic, historic or scientific interest, buildings of

outstanding historic or architectural interest and objects associated with that building, and amenity land necessary for the preservation of a pre-eminent building. Claims may be made under more than one category, for example an application for a picture might be made on the grounds of its own national, scientific, historic or artistic interest and as an object associated with a pre-eminent building. There is no definition of collections and groups of items in the statute but the memorandum confirms that HMRC will take a 'practical' view of what constitutes a pre-eminent collection with, if necessary, guidance from the Acceptance in Lieu Panel.

Chapter 11 of the memorandum sets out in detail the different guidelines adopted by Arts Council England as a reference for offers in lieu of tax for each of land and buildings, objects associated with a building and pre-eminent objects in their own right. As the same pre-eminence standard now applies to applications for conditional exemption the information will be useful for practitioners dealing with both.

Loss of undertakings

Chapter 7 deals with loss of conditional exemption on a chargeable event resulting in a loss of the exemption to tax. A 'material' breach of an undertaking is a chargeable event under IHTA s32(2)/32A(3), but the guidance confirms that HMRC will offer the owner the opportunity to remedy the first breach within a reasonable time, however conditional exemption will be withdrawn on a subsequent or persistent breach. A chargeable event will also arise on the death of the person beneficially entitled to the conditionally exempt property or the disposal (by sale or gift) of the property unless new undertakings are given by the new owner (s32(3)/32A(4) IHTA). The memorandum sets out useful guidance on disposals by way of the grant of a lease or mortgage, disposals of part and associated properties. Chapter 7 and appendix 7 deal with theft, loss, destruction or damage to heritage property and confirm that this would not normally constitute a chargeable event for IHT (whether or not insurance monies are received) unless there is a clear breach of an undertaking (although it may give rise to a disposal for capital gains tax under one of ss22(1), 23, 24(1) and (2) TCGA 1992).

Private treaty sales

Private treaty sales of national heritage property, which is either currently exempt, or would meet the current standard of eligibility, to a body within Schedule 3 IHTA are free from capital taxes (and usually VAT). The tax advantage is designed to put the vendor in a better position than on a taxable sale at the same value in the open market and to enable the purchasing institution to acquire the item for public benefit at a lower cost than in the open market. The rules are dealt with in s32(4)(a)/32A(5)(a) IHTA (and the proviso to s40(2) Finance Act 1930 in respect of estate duty) and chapter 10 of the memorandum provides a useful summary of the tax incentive and the process. Broadly, the seller receives a 'special price', which is calculated as the sale price (as agreed between the buyer and

the seller) net of the notional tax which would have been payable on a public sale plus a *douceur* – sweetener – of 25% for an object or 10% for land or a building of the notional tax (although the percentage may be agreed between the parties). The guidance confirms that HMRC accept that a purchase by a Schedule 3 body on behalf of a non-Schedule 3 body will not be a chargeable occasion for IHT and CGT provided that they are happy with the other body's suitability and intent to preserve the property for public benefit and ownership passes, even briefly, to the Schedule 3 body.

Offers in lieu

National heritage property may be offered to meet IHT or estate duty in kind, subject to certain conditions and acceptance by the culture minister (IHTA s230). Chapter 11 provides detailed and clear advice on the tax incentive, the offer in lieu procedure, the information required to accompany an offer and a useful chronology of the process. Appendix 8 provides model documents. HMRC highlight that the offer must be made by the person liable to pay the tax, and that where an offer in lieu is made following a death, the personal representatives must obtain a grant of representation before making the offer. Land and buildings are not normally suitable unless they are 'outstanding' and two categories of object may be acceptable: both those that are pre-eminent and those of lesser quality, but which are kept in an important (and usually public) qualifying building. Arts Council England advises HMRC on the quality and value of the objects offered and the Department of Culture, Media and Sport and the Valuation Office Agency on land and buildings. In the case of land and buildings, the onus is on the offeror to nominate a suitable and willing recipient. This need not be a Schedule 3 body, but must be a suitable organisation such as the National Trust, national parks authorities, local authorities or local nature conservation trusts.

The maximum amount of tax and interest that the national

heritage property may, if accepted, satisfy is the 'special price' and is calculated in the same way as private treaty sales (see above) so that the benefit of the tax exemption is shared with the person making the offer. In the case of offers in lieu, the *douceur* is fixed at 25% (for objects) and 10% (for land and buildings) and provides a real incentive for owners of conditionally exempt property, particularly where the item was exempted at a high rate of tax.

HMRC are anxious to confirm that they do not 'give change' so where the 'special price' exceeds

appropriateness of the in situ condition and the offeror must themselves identify a suitable institution willing in principle to take ownership.

Heritage maintenance funds

Heritage maintenance funds (HMFs) may be established at HMRC's direction to support national heritage property. They are exempt from IHT but income tax and CGT apply. The memorandum provides a thorough review on the scope of maintenance funds and the conditions that must be observed (chapter 8), a summary of how they

HMRC are anxious to confirm that they do not 'give change' so where the 'special price' exceeds the tax liability, the difference cannot be reimbursed or offset against future tax.

the tax liability, the difference cannot be reimbursed or offset against future tax. If an institution is prepared to pay the excess of value over tax liability in exchange for the offer being conditional on the item being allocated to them, a conditional 'hybrid' offer in lieu may be made. Alternatively, the offeror may have to forego the excess or offer a different qualifying item. Chapter 11 closes with up-to-date guidance on the different offers that can be made. It covers precatory offers (where an offer is made with the wish that, if accepted, the item passes to a particular body), conditional offers (where an offer is made with a condition as to allocation), in situ offers (where an acceptance of the offer is conditional upon an object remaining in situ due to a particular association with its setting) and multiple offers (where a 'shopping basket' of objects are offered concurrently or serially). In the case of an in situ offer, HMRC emphasise that the in situ condition is not 'having one's cake and eating it' as they will take advice on the

are taxed (appendix 5) and what HMRC expect in terms of annual trust accounts (appendix 6). Commentators who have, however, long believed that HMFs are underused will be disappointed that the guidance does not address proposals raised by the Historic Houses Association in March 2010 to improve the taxation of HMFs.

Conclusion for practitioners

Practitioners will welcome the fully updated, clear and practical edition of *Capital Taxation and the National Heritage*. It is easy to use and provides helpful examples and, perhaps most valuably, guidance on HMRC's approach to administering the legislation in this area. The memorandum's continuing value depends on its being kept updated by HMRC when changes occur. It cannot – and does not pretend to – cover every situation or set of facts and there will still be circumstances in which practitioners would be advised to discuss proposed arrangements or applications with the Heritage Team before going ahead. ■