

Entrepreneurs Relief Run Off
July 15, 2009

My client has a furnished holiday letting property which he has owned for several years and which is currently standing at a substantial gain.

He has no intention of selling it in the near future, but is aware that the favourable capital gains tax treatment – the availability of entrepreneurs' relief (ER), giving an effective tax rate of 10% – is being taken away on 6 April 2010.

There is no time apportionment with ER; if you don't qualify for it at the point of sale, you don't qualify at all. My client might consider selling, but it's possible that there will be a tax-driven glut in the market for holiday properties at that time, because everyone will be thinking the same thing.

Presumably it is possible to transfer the property into a trust or a company in order to trigger the gain at the lower rate of tax, but both of those options create other legal and tax complications that the client would rather avoid.

It occurs to me that ER is available for the disposal of the assets of a trade within three years of the cessation of the trade.

By law, the renting of furnished holiday letting (FHL) property ceases to be a trade on 5 April 2010. Does this mean that ER is available on sales of the property up to 5 April 2013?

The rental business is likely to continue into the future (although it will no longer be necessary to count the days available and the days actually let), so the 'business' will not have ceased, but the 'trade' will.

This seems to be quite an important issue for the many people who own FHL property in the UK and, as we now know, elsewhere in the EEA. Does anyone know the answer?

Query 17,432 – Weymouth

Reply by Stephen Parnham

Weymouth is proposing that the repeal of the furnished holiday letting legislation will allow his client to defer a sale of his property until a date between 6 April 2010 and 5 April 2013 while still being entitled to claim entrepreneurs' relief on the ultimate disposal. It is a forlorn hope.

ITA 2007, s 127(3) serves to treat a holiday letting business as defined in ITTOIA 2005, Part 3, Ch 6 as if it were a trade.

TCGA 1992, s 241 draws on the same definition in ITTOIA to achieve a comparable effect for capital gains tax purposes.

The material disposal of a business asset used in a sole trader's business at the time of its cessation is a qualifying disposal within s 169I(2)(b) and s 169I(4)(a) and (b) enables that disposal to take place up to three years after cessation while retaining the advantage of any available entrepreneurs' relief.

The problem Weymouth faces is that there will have been no cessation or sale of the business prior to 6 April 2010 if letting continues as we are advised.

After 5 April 2010 his client will still have a rental business, but one which will no longer be regarded as a trade following the repeal of TCGA 1992, s 241(3)(a).

There can be no qualifying disposal where an asset is sold without the sale or cessation of 'the business', the constantly recurring term in TCGA 1992, s 169I.

Rather, on 6 April 2010 the property will cease to constitute a relevant business asset, i.e. one which could attract entrepreneurs' relief, and will instead be an excluded asset within TCGA 1992, s 169L(4)(b) and any subsequent sale will therefore be unable to access the relief.

Prior to 6 April 2010, s 169L(4)(b) would have had no application.

If a third party sale in the current tax year is unpalatable to Weymouth's client, he could consider a sale within the wider family to crystallise entrepreneurs' relief at 10% and simultaneously uplift the capital gains tax base cost of the property in the hands of the purchaser.

The purchaser could dispose of the property at any time in the future and it might be that the consideration could be left outstanding until the ultimate sale, if the client's circumstances permit.

If Weymouth's client were more interested in longer term estate planning and had little need of the property's income stream, he could also consider a tax-free gift to family members using holdover relief under TCGA 1992, s 165.

From 6 April 2010, the only way to gift his property free of capital gains tax will be to transfer it to a relevant property trust – an immediately chargeable transfer for inheritance tax purposes subject to the available nil rate band. Gifts to individuals absolutely will be chargeable to capital gains tax, subject to the available annual exemption.