

Tax Law Rewrite.
Response to Paper
CC/SC(07)27

Group relief

This document is available on the internet at:

<http://www.hmrc.gov.uk/rewrite>

28 March 2008

INTRODUCTION

1. We published Committee Paper CC/SC(07)27 in September 2007 on the HMRC internet website www.hmrc.gov.uk/rewrite. The closing date for responses in both cases was 14 December 2007. The draft clauses rewrite the group relief provisions in Chapter 4 of Part 10 of and Schedules 18 and 18A to ICTA.

2. The purpose of this response document is to provide details of the substantive points made and to explain our analysis and proposals in respect of them. Minor points such as suggestions to improve punctuation are not covered, but all comments received have been carefully considered.

3. We received written responses from the following:

- The Confederation of British Industry
- The Institute of Chartered Accountants in England and Wales
- KPMG
- One individual

4. We are very grateful for all the comments made, many of which were detailed and we appreciate the time and effort that went into them. We have sent each respondent a copy of this response document.

5. The following abbreviations for tax legislation are used:

- CAA the Capital Allowances Act 2001
- FA Finance Act
- ICTA the Income and Corporation Taxes Act 1988
- ITA the Income Tax Act 2007
- ITTOIA the Income Tax (Trading and Other Income) Act 2005

Clause 1: Overview of Part

The reference to an accounting period in subsection (3) is too subtle a way of making the point that the subsection refers only to a company liable to corporation tax.

6. We agree that the point could be made more clearly. Chapter 2 of the Part applies only to companies resident in, or carrying on a trade through a permanent establishment in, the United Kingdom. Unless that point is grasped by the reader it is not clear that Chapters 2 and 3 are mutually exclusive.

7. ***We propose to amend the clause to make it clearer.***

In subsection (6)(a) the reference to the definition of “75% subsidiary” is confusing because the expression is not used in the section.

8. We feel that it is important that the overview contains an accurate summary of what is covered (in this case, by Chapter 5 of the Part). But we are considering the suggestion further.

9. ***We are considering amending the clause..***

Clause 5: Meaning of “capital allowance excess”

Subsection (4) would tie in better with section 260 of CAA if “of a particular description” and “of that description” were inserted after the two references to “income”.

10. ***We are considering this suggestion.***

Clause 10: Restriction on losses etc that may be surrendered by UK resident

Subsection (7) should be more specific than “as if it did not matter”.

11. We agree that it would be helpful to say that the law should be applied as if any restriction by reference to United Kingdom tax law did not exist.

The clause is more complicated than the source, and offers less certainty in its application. In particular, it does not work if, for example, foreign legislation says that an amount is not deductible unless it is also deductible in the United Kingdom.

12. We agree that this technical difficulty should be resolved. Paragraph 60 of the explanatory notes is wrong and will be corrected.

Subsection (8) is confusing because it short-circuits the logic of subsection (6).

Section 403E(3) of ICTA was repealed by FA 2007 So subsection (9) of the clause can be removed.

13. *We propose to amend the clause to meet these four points.*

Clause 11: Restriction on losses etc that may be surrendered by non-UK resident

14. The remarks in paragraph 11 of this document apply equally to subsection (9) of this clause.

15. *We are considering amending the clause to meet this point.*

Clause 13: Restriction on losses etc that may be surrendered by dual resident

The reference to “investments” in Activity 1 is an over-simplification.

16. We agree that the ejusdem generis principle arguably restricts the sort of investments to which section 404(6) of ICTA refers while the same aid to construction is not currently in the clause

17. *We propose to reinstate the reference to “shares, securities or investments of any other description”.*

In Activity 2 the words “in relation to which” are ambiguous. They may refer either to the payments or to the loan relationships.

Charges on income (in Activity 3) are a wholly statutory construct. So it is not necessary to have “by virtue of an enactment”.

18. *We will try to improve the clause.*

It cannot be right to refer in Activity 4 to a deduction in calculating total and net profits. Logically, one must include the other.

19. We agree but are not sure that the respondent is right to suggest that the reference should be to whichever represents the earlier stage in the computation.

20. *We are considering this further as our work on “total profits” develops.*

Chapter 3

In the Chapter heading “connected with” should be replaced by “resident or carrying on a trade in”.

21. It may be that the price of greater length is worth paying.

22. *We are considering changing the title of the Chapter.*

Clause 17: Surrendering of losses and other amounts

The clause should specify that it may be necessary to aggregate the results of the assumed accounting periods to arrive at the “recalculated EEA amount”.

23. The problem arises from the recalculation of the EEA amount in Step 3 in clause 16(2) of the clause. The recalculation is done by reference to assumed accounting periods (see clause 30, applied by clause 27). If, as a result, the EEA period is split between more than one assumed accounting period, the results must be aggregated to arrive at the “recalculated EEA amount”. But such aggregation is necessary.

24. *We are considering providing explicitly for this extra step in the determination.*

Clause 21: The qualifying loss condition: general

Uninformative descriptors such as “relevant EEA territory” and “other relevant territory” should be avoided.

25. *We are considering using different labels..*

Clause 22: The qualifying loss condition: relief for EEA accounting period and previous periods

Subsection (4) does not accurately reflect the source legislation because, in paragraph 5(2) of Schedule 18A to ICTA, the “current period” can be any period.

26. We do not agree. In context (“relief for any period (the current period) or any other period”) it is reasonably clear that the current period is the one in which the relief potentially arises. Any other interpretation would make little sense. So the clause makes clear that the reader should start from the period in which the loss arises (the EEA accounting period).

27. *We do not propose to amend the clause to meet this point.*

The conjunction in the first line of subsection (1) should be “or” rather than “and”. The same point arises in connection with clause 23(1).

28. We do not agree. As in paragraph 6(1) of Schedule 18A to ICTA, the conditions (here in subsections (2) and (3)) are expressed in the negative (“cannot be taken into account”; “cannot be relieved”). If the EEA amount is to meet the qualifying loss condition it must not be taken into account and it must not be relieved. So (as in the source legislation) it has to meet both conditions and “and” is the right conjunction.

29. *We do not propose to amend the clause to meet this point.*

Clause 23: The qualifying loss condition: relief for future periods

Subsection (4) should refer to the end of the period.

30. We would not be justified in changing the law on this point but “at the end of the EEA accounting period” can differ by no more than the smallest possible period of time from “at the time immediately after the EEA accounting period”. So the clause can be simplified in this way.

31. *We are considering amending the clause in the way suggested.*

Clause 24: The qualifying loss condition: other relief

Clause 25: The precedence condition

“Other relief” is unhelpful, if not positively misleading, in the heading. And “any territory” in clauses 24(2) and (3) and 25(1) (only later cut down so as to exclude the “relevant EEA territory”) is awkward.

32. *We are considering using alternative labels.*

Clause 29: Assumptions as to places in which activities carried on

“Domestic concepts of law” do not appear in subsection (2). And it is not completely clear whether “domestic” refers to the United Kingdom or the EEA territory.

33. We think there is scope for being more specific here. If the rule applies only to an estate interest or right in or over land, the clause should say so.

34. *We are considering amending the clause to meet this point..*

Clause 30: Assumed accounting periods

Subsection (3) does not quite work. After the first end of an accounting period imposed by subsection (2)(b), the next end is imposed by subsection (4).

35. We agree that subsection (3) could start with “if the accounting period ends before the end of the EEA period ...”.

36. *We are considering amending the clause to meet this point.*

Clause 34: Group relief claims in relation to surrenderable amounts under Chapter 2

Subsection (3) implies that relief can be given more than once for the same loss.

37. We do not wholly agree. But it may be that a reference to clause 41(7) would put the matter beyond doubt.

38. ***We are considering amending the clause to meet this point.***

Should it be made clearer in the drafting of Requirement 3 in clause 34(2) that (a) to (d) are alternatives?

39. We think that listing the conditions with the word “or” is enough to indicate that they are alternatives. This is the style of other rewrite Acts (see, as recent examples, sections 19(2), 56(3) and 67(3) of ITA).

40. ***We do not propose to amend the clause to meet this point.***

Clause 43: Usable part of the surrenderable amounts

Clause 44: Usable part of claimant company’s total profits of the claim period

The clauses are unsatisfactory because:

- *the method statements obscure the logic of the processes;*
- *the labels are unhelpful; and*
- *the clauses do not reflect all the options open to a company in section 403A of ICTA.*

It is unhelpful to have “total profits” temporarily re-defined (in clause 44(6)) to mean something special for this clause.

41. ***We will look at the clause again and try to improve it.***

Clause 45: Supplementary provision for the purposes of sections 43 and 44

Q1 Should the amount of a prior claim be determined when it is made, instead of when it becomes final?

The proposed Change does not achieve its objective. In some circumstances the clause produces a worse result than the present law.

42. This is the view of only one respondent but it raises issues to which we want to give further thought.

43. ***We are considering whether or not we should enact the practice in CTM80220.***

Clause 48: Consortium condition 1: limitation if claimant company owned by consortium

The labels “usable part” and “applicable proportion” are uninformative. “Ownership proportion” or “consortium proportion” would be better.

44. *We are considering amending the clause to meet these points.*

Clause 49: Consortium conditions 2 and 3: limitations in sections 47 and 48 to apply

It is not right to suggest (in paragraph 245 of the explanatory notes) that the accounting period of the claimant company rather than that of the link company should be used to determine the overlapping period.

Example

A company (C) owned by a consortium has a trading loss of £10,000 for its accounting period ended 31 December 2009 available for surrender. One member of the consortium (L) is entitled to 10% of C’s profits or losses and is in the same group as another company (P).

L’s accounting date is 30 June; P’s accounting date is 30 September.

ICTA

In accordance with section 406(2) of ICTA, P may make any consortium claim that could be made by L. The claims that could be made by L are for the period 1 January 2009 to 30 June 2009 (£500) and for the period 1 July 2009 to 31 December 2009 (£500).

The only logical conclusion (not explicitly stated in ICTA) is that, for P’s accounting period ended 30 September 2009, relief of £750 is available.

Clause 49

The “relevant proportion” (clause 43(2)) is based on the surrender period (12 months to 31 December 2009) and the overlapping period (nine months to 30 September 2009) and so is three-quarters. It follows that the usable part of the loss for the purpose of clause 47(2) is £7500. Unlike the reference to the claimant company in clause 47(3), this reference is not read as one to the link company. So P is entitled to relief on 10% of £7500.

45. *We accept that the explanatory notes are possibly misleading and will amend them. But we think that the result in the clause is right.*

Clause 50: Consortium conditions 2 and 3: overall limitation on relief for claims made by companies in the link company’s group

Subsection (7) of the clause does not accurately reflect section 406(8) of ICTA.

Example

A company (C) owned by a consortium has a trading profit of £100,000 for its accounting period ended 31 December 2009. One member of the consortium (L) is entitled to 10% of C's profits or losses and is in the same group as two other companies (G1 and G2).

G1, G2 and L have an accounting date of 30 September. G1 has losses of £12,000 for the year ended 30 September 2009. G2 has losses of £2000 for the year ended 30 September 2009.

ICTA

In accordance with section 406(5) of ICTA, C may make a consortium claim as if G1 were a member of the consortium. C's claim is for the period 1 January 2009 to 30 September 2009 (£9000).

Similarly, C may make a consortium claim as if G2 were a member of the consortium. C's claim is for the period 1 January 2009 to 30 September 2009 (£1500).

Each claim is limited by section 403C(3) of ICTA to the relevant fraction (one-tenth) of C's profits of the overlapping period (1 January 2009 to 30 September 2009). The limit is £7500. So the claim for G1's losses is restricted to £7500 and the aggregate relief potentially available is £9000.

The aggregate of the claims is limited by section 406(8) to the amount that C could have claimed from L if L's accounting period were the year ended 31 December. The limit is the relevant fraction of C's unrelieved profits, £10,000. So there is no further restriction.

Clause 50

For each claim (for the losses of G1 or G2) the relevant proportion (clause 44(2)) is based on the claim period (12 months to 30 December 2009) and the overlapping period (nine months to 30 September 2009). So the usable part of C's profits is £7500 and the claim for G1's losses is restricted to that amount.

The limit in clause 50(6) is the applicable proportion (10%) of C's profits. In accordance with clause 48(2), that proportion is applied to the claim period. So the answer is £10,000.

It is possible to infer that the overlapping period for the purpose of clause 48(2) is unaffected by clause 50(7) because it refers only to clause 48(4). This leaves the usable part of C's profits as those of the overlapping period (see clause 44(1)). So the clause 50(6) limit becomes £7500 and C's claim is restricted accordingly.

46. *We agree that clause 50(7) may not be quite right and will look at it again.*

If there is a change in the conditions that are met during the claim period, clause 50(7) does not provide for a shortening of the overlapping period.

47. *We propose to amend the clause so that the effect of section 403A(9) of ICTA is reproduced.*

Clause 51: Consortium conditions 1 and 2: limitation on relief if surrenderable amounts include trading loss

Subsections (1) and (2) should state explicitly that the surrendering company has profits against which the losses can be set under section 393A of ICTA.

48. *We propose to amend the clause to meet this point.*

Clause 52: Consortium conditions 1 and 2: limitation on relief if surrendering company is in a group of companies

Q2 Should the restriction in this clause be made by reference to the overlapping period?

49. All the respondents who commented on this proposal supported its aims. But one was concerned about its details.

Change 2 does not solve all the problems in section 405(2) of ICTA.

50. We agree. In the example in Change 2 if the surrendering company (C) has another subsidiary (S2) with losses, there is a possibility that S2 will surrender its losses to the subsidiary (S) in the example and that will be the result of a “claim within subsection (6)”. If S2’s accounting date is the same as C’s (and so different from S’s), step 3 in subsection (5) may not give the right answer.

51. *We propose to amend the clause to meet this point.*

Clause 53: Consortium conditions 1 and 3: limitation on relief if claimant company is in a group of companies

There is no need for the condition “made before the current claim” in subsection (5).

52. *We are considering amending the clause to meet this point.*

Clause 56: Groups of companies

The clause itself should mention the rule that a securitisation company cannot be a member of a group.

53. The same point now arises in connection with SI 2007/3402, which is the rule that an insurance securitisation company cannot be a member of a group.

54. *We are considering this suggestion.*

Clause 57: Companies owned by consortiums and members of consortiums

The meaning of “owned by a consortium” in this clause is substantially different from its normal meaning. This is potentially misleading.

55. We are not sure that this drafting approach is misleading. But it may be possible to use the expression to refer only to the ownership requirement, leaving the “trading/holding company” requirement to be dealt with elsewhere.

56. *We propose to amend the clause to meet this point.*

Clause 58: Arrangements for transfer of member of group of companies etc

Subsection (2) should apply only “for the purposes of this Part”.

57. *We are considering amending the clause to meet this point.*

Clause 59: Arrangements for transfer of company owned by consortium etc

The bracketed reference in subsection (5)(a) should be to Effect 4, rather than Effect 3.

58. *We propose to amend the clause to meet this point.*

It is dangerous, in Effect 4, to omit the words “at some time during or after the expiry of that accounting period” (see section 410(2)(b)(iv) of ICTA, twice).

59. The relevant third company has to be a “relevant successor” of the trading company. It can be a successor only if it carries on the trade which the trading company “used to carry on” (see clause 60(4)(a)). So there is no question of the arrangements “looking back” to a time before the current period. And it is an express requirement that the trade has been carried on by the trading company “at a time during the current period”.

60. *The quoted words are not necessary and we propose not to rewrite them.*

Clause 60: Supplementary provision for the purposes of sections 58 and 59

In section 410(6) of ICTA paragraphs (a) (section 343 of ICTA) and (b) (connected) are expressed as alternatives. If it is possible for section 343 of ICTA to apply without the control condition being met, the clause gives the wrong result.

61. *We propose to amend the clause to meet this point.*

Clause 63: Use of relevant company's assets

The explanatory notes suggest that subsection (4) wholly excludes banks from the operation of the clause. This is not what the clause says.

62. We will amend the explanatory notes to make it clearer that the exclusion for commercial loans by banks applies only to such loans made in the ordinary course of a banking business.

There is an ambiguity in subsection (4)(c). The assets "mentioned in subsection (1)(b)" are not restricted to those in relation to which an allowance within subsection (2) has been made.

63. *We propose to amend the clause to meet these points.*

Clause 64: Meaning of "ordinary shares"

Subsection (2) should have "is or" before "includes". The same point arises in clauses 65(1)(a) and 67(2)(a).

64. *We are considering this suggestion.*

Clause 66: Normal commercial loans: interest depending on company's results or value of assets

Stamp duty land tax counts as an incidental cost. The clause should make this explicit.

65. We do not offer this example of an "other incidental matter" in section 58 of ITTOIA, or in clause 130 of the draft corporation tax Bill (building societies).

66. *We do not propose to adopt this suggestion.*

Clause 67: Supplementary provision for the purposes of sections 64 and 65

If only some shares of each class are listed, the company concerned will meet the test in paragraph 1(5C) of ICTA but not the test in subsection (3)(c).

67. *We propose to amend the clause to meet this point and are considering some minor drafting points made by the same respondent.*

Clause 68: Proportion of profits available for distribution to which company is entitled

Subsections (5) and (6) follow too closely the difficult wording of the source.

68. *We are considering this point.*

Clause 69: Proportion of assets available for distribution to which company is entitled

Paragraph 3(4) of Schedule 18 to ICTA deals explicitly with the case where the returned amount is less than the new consideration. But subsection (6)(c) of the clause deals explicitly with case where the returned amount is greater than the new consideration.

69. *We propose to amend the clause to meet this point.*

Clause 72: Application of sections 73 to 85 etc

Do we need the whole of the expression “participating equity holders”?

70. The expression relies on the definition of “equity holder” in clause 62. The qualification “participating” identifies an equity holder:

- to whom a profit distribution would be made; or
- who would be entitled to participate in a notional winding up.

71. *We are considering amending the clause to meet this point.*

Clause 83: Determining company A’s proportion if non-UK resident involved

There is no need to refer to clauses 78 to 81 in subsection (1)(b) of this clause.

It is confusing to use “alternative proportion” in this clause to mean something different from the “alternative proportion” in each of clauses 73, 75 and 77.

72. *We are considering amending the clause to meet these points.*

Clause 84: Assumptions to be applied if non-UK resident company involved

The clause does not reproduce the £100 limit in paragraph 5F(7)(b) of Schedule 18 to ICTA.

73. We think that the current draft represents a useful minor simplification in the statute. The respondent accepts that such a change is unlikely to make any difference in practice. If we decide to omit the £100 limit we will acknowledge the change in the law.

74. *We are considering whether the £100 limit should be reproduced in the clause.*

Clause 88: Other definitions that apply for the purposes of the Part

Several cross-references need to be corrected.

75. *We will amend the clause to meet this point.*

Clause 89: Payments for group relief

In subsection (1)(c), the “total amount of the group relief given” could mean the value of the relief in terms of tax.

76. *We are considering clarifying the clause.*