



CGT

108. ER: THE IMPORTANCE OF TIMING

It is a condition of entrepreneurs' relief (ER) for capital gains tax (CGT) that directors and employees must stay in that position for the whole year up to the date of disposal of their shares (s169I(6)(b), Taxation of Chargeable Gains Act 1992 (TCGA 1992)). It is also a requirement of ss 693 and 694, Companies Act 2006 for a company buy-back of shares (ie, purchase of its own shares) to be approved by special resolution. Under s28, TCGA 1992 the time of disposal for shares is considered to

be when the unconditional contract for disposal is made - for a buy-back of company shares the date of disposal is the date of the special resolution. It is important to note that the termination of any directors' or employees' contracts must not be before the date of the special resolution to buy their shares, if they want to qualify for ER on the disposal.

This scenario was fully reviewed in the recent First-tier Tribunal (FTT) case of *John Moore v HMRC*, TCO4903. The director of a company who was also a founding shareholder in 1995 was found not to be eligible for ER on the buy-back of his shares by the company. The timeline set out at the FTT was that Mr Moore left the company during 2008. In January 2009 the settlement for the company to buy back 2,700 of the 3,000 shares Mr Moore held was agreed. On 28 February 2009 Mr Moore formally resigned as a director and terminated his employment and received an *ex gratia* payment. However, the special resolution for the buy-back was not signed until 29 May 2009.

The tribunal therefore denied the claim for ER on the basis that Mr Moore was not a director or employee throughout the full year leading to the disposal of his shares on 29 May 2009.

While many might consider that Mr Moore was treated with a harsh interpretation of the legislation by both HMRC and the FTT, this case is a timely reminder of the onerous conditions of ER and the need to plan before any future transaction with a careful consideration of all the details of the legislation.

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