

169. Conditional sale of farmland

Once the shock of the news that CGT rates were not increased in the 2021 Budget has fully sunk in, much immediate CGT planning needs focus. Likewise, the news that there wasn't any proposed consultation to increase CGT rates in the Tax Day announcements on 23 March 2021 has to be a priority for farmland and a lot of CGT planning will possibly have to be revisited, as there were expectations of increases to CGT rates.

Deferred consideration

Of particular interest will be deferred consideration of farmland development deals. For example, the deferred consideration could be the balance payable provided planning permission is obtained to develop the land. For the vendor, 'juggling' between maximising sale proceeds and the tax-efficient split between the deposit and the balancing payment has been a key point of negotiations over the decades. The fundamental tax position is that it is necessary to examine the precise form of the contract. The date of disposal (under a contract) is given by s28, Taxation of Chargeable Gains Act 1992 (TCGA 1992).

In the case of a standard conveyance, s28(1) is clear that this is the time when the contract is made (in other words, at exchange of contracts as long as the contract goes on to complete). However, s28(2) then says that if a contract is conditional the time of disposal is when the condition is satisfied. As a result, there could be a dilemma about the time of achieving payment of the balance and payment of the deferred consideration.

It has been held that the rule of s28(2) applies only to 'conditions precedent', and not 'conditions subsequent'. In essence, in law the parties are not bound under a contract until conditions precedent are met, whereas a condition subsequent simply means that there are circumstances in which it has been

agreed subsequently that one of the parties will not be expected to perform their side of the contract. A claim to defer payment of some of the tax may then be possible under s280, TCGA 1992 if completion will be more than 18 months after exchange (see also the *Capital Gains Manual* at CG14910).

Condition precedent

However, if the contingency is a condition precedent, the deposit would fall to be treated, by virtue of s144(7), TCGA 1992, as if it is a payment for the granting of an option treated initially as a disposal of its own in the tax year of the grant, but subsequently treated as part of the proceeds for the ultimate later sale.

The deposit is consideration for a 'chose in action' – an option or right to purchase property at a future date. Where the contract for the purchase of the farmland is subject to a condition precedent – a condition (the grant of permission) that must be satisfied before the contract becomes binding – then the tax will be payable for the year in which such permission is obtained, in accordance with s28(2), TCGA 1992. See HMRC's *Capital Gains Manual* at CG14270 for commentary on conditions precedent and conditions subsequent.

The balance of the consideration and the payment for the option are then treated as a single transaction under s144(2), TCGA 1992, and the original assessment on the option is cancelled – see HMRC's *Capital Gains Manual* at CG12317. Note that the disposal will be when permission is granted, not (if later) when the balance is payable. For example, see *Hatt v Newman* [2000] STC 113, where planning permission was granted on 29 March 1995 and the contract was completed on the 6 April 1995.

Tax planners are worried that CGT rates will increase in the future and many do not want to 'push gains' into tax years that will result in a higher rate of CGT. All farm development arrangements will have to be reviewed on a case-by-case basis in order to maximise proceeds and potentially

minimise the tax liability. The timing and structure of all development deals needs to be reviewed and contemplated in the round moving forward.

Contributed by Julie Butler FCA, Joint Managing Partner, Butler & Co

Practical points

July 2021 **TAXline**