Farm Development gains and “rollover” into AIM shares

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With the reform of the Town and Country Planning Act featuring as part of the Boris “build, build, build” statement there is no doubt that farmers will both benefit from the development proceeds and have to look for tax efficient mitigation strategies around the potential.

One such “alternative” is that the government are encouraging tax relief for investing in the “Alternative Investment Market” (AIM). Many would argue that investing in young businesses is very worthwhile in the current Covid-19 climate. Offering 100% inheritance tax (IHT) relief after two years by investing in shares that qualify for Business Property Relief (BPR) is a positive plus support exciting AIM companies and also protecting and passing on wealth after death is very attractive to farmers. AIM is much more volatile than FTSE. The companies that qualify for AIM do have to meet certain corporate governance rules which have recently been strengthened. These rules cannot prevent a company “going bust” and that is a reality of new business in a difficult business climate that must be understood by the investor.

With the reduction in the lifetime allowance for Business Assets Disposal Relief (BADR) down to £1m, Rollover Relief is becoming more and more important. This reduction of the lifetime allowance is regarded by some as simply a ‘development tax’ by another route. However, this reduction is not just affecting development gains but sales of farms in general as less of the gain can achieve the more favourable 10% rate, thus Rollover is becoming more attractive.

Farm development gains

Farm development gains can currently be ‘rolled over’ for Capital Gains Tax (CGT) using Rollover Relief. It is important to mention at this point the OTS Report on CGT which proposes to increase CGT rates – potentially aligned with income tax. However, Rollover Relief is understood not to be a target of change. The asset which the proceeds are used to purchase does not have to be farmland. The direction for part of total proceeds of the farm development project can be “AIM shares”. There had been speculation that the relief would be withdrawn but currently the advantage is still there. Gifts of the AIM shares can also be considered together with the transfer of the AIM shares into a discretionary trust to help protect against all the uncertainties facing farming.

Shares in trading companies listed on AIM (the London Stock Exchange junior market), benefit from 100% BPR for IHT once they have been owned for the minimum period of two years. BPR will not be available if the shares are also listed on a recognised stock exchange anywhere in the world. A lifetime transfer will be a disposal for CGT purposes and holdover relief will not be available if the trust is settlor-interested (settlor, spouse or civil partner and unmarried minor children are not excluded) – see TCGA 1992, s169B ('Gifts to settlor-interested settlements'). It must also be noted that the APPG (All Party Parliamentary Group) propose removing APR and BPR with a straight IHT charge of 20%.

Fundamentally, s113A IHTA 1984 requires the recipients (the donees in the case of an outright gift and the trustees if the transfer is to a relevant property trust) to have retained the shares for seven years or until the earlier death of the transferor. The company does not have to remain trading in nature for the relief to be preserved.

It could be that where there is a sizeable taxable gain from farm development and where there are also IHT worries the farmer can use Rollover Relief for the purchase of a mix of more farmland and some use of the AIM opportunities.

The interaction of a discretionary trust

Transferring qualifying AIM shares to a standard discretionary or interest in possession trust can be an effective way of removing them from the landowner's estate to crystallise BPR now. The following are some of the key points to note. On the plus side:

- Provided that the AIM shares have been held for a least two years and meet all other qualifying conditions (such as being shares in a qualifying trading company), they should be eligible for 100% BPR on a transfer to a trust.
- When the shares are in the trust, they will be outside the former owner's estate and will not be subject to IHT on death, even if BPR is no longer available for AIM shares at the time – subject to point (2) under the disadvantages listed below.
- For CGT purposes, the shares will be deemed to be transferred to the trust at market value, although a holdover claim should be possible (again Holdover Relief is not a target of the APPG report).

The disadvantages of the AIM shares and the transfer into a trust could be considered to be as follows:

1. If the transferor can benefit from the trust in any way, the shares will remain in their estate as a gift with reservation of benefit (GROB).
2. The settlor's claim to BPR could be clawed back if they die within seven years of creating the trust and the shares are no longer held by the trustees or no

longer qualify for BPR at the time. The impact of the APPG report should be considered.

3. The trust will be within the ‘relevant property regime’ for IHT purposes and potentially will be subject to ten-yearly principal charges and exit charges at rates of up to 6%, subject to the availability of BPR.
4. BPR is not taken into account when calculating the IHT rate that will apply on a distribution from the trust in the first ten years. This could increase the rate charged on any exit from the trust during this period.
5. The owner’s two-year holding period does not transfer to the trust, so the clock is reset and the shares will not qualify for BPR during the first two years of the trust’s ownership. Depending on the values and available nil rate band, an IHT exit charge could arise if the shares are distributed to beneficiaries during the first two years.
6. If the government withdraws the benefit of BPR from AIM shares, or indeed withdraws BPR completely, it is likely to mean serious tax bills including the fact that relief is not available when calculating future IHT charges on trust ten-year anniversaries or appointments of AIM shares from the trust. As mentioned, BPR can also be lost in other circumstances, such as if AIM shares become listed on a recognised stock exchange or the APPG have their way with BPR.

Many would argue that the rollover into farmland is much more secure, however the farmland can be difficult to find and there are worries over the uncertainties facing farming, particularly profitability. There are also some concerns that farms are currently overpriced and they involve a lot of work and management.

Investment and legal protection

Legal advice and assistance would be needed on the creation of the trust and the advice of an investment adviser would be an essential recommendation to ensure that any AIM acquisitions are appropriate to the investor. Most farm tax advisers are not authorised to provide investment advice and this should be made very clear to the client. The trust may also have other tax reporting and payment obligations, such as a need to file self-assessment tax returns each year.

Always seek protection

The main action point is for the tax adviser to be aware of the AIM opportunities and also to understand that for farmers rolling over gains into AIM investments there will be a serious need for financial, legal, tax and investment advice. Any AIM share investments need careful checking as to what stock exchange they stay on as this is important for tax efficiency. Reinvesting part of development gains to help growing businesses is a real positive but there must be a careful review of the positives and negatives by the appropriate professionals.

Where investment has already been made into AIM shares it will be key to check the period of existing ownership for tax planning and mitigation. Farming is facing a large number of uncertainties re the Agriculture Act, the detail around subsidy changes to ELMS and profitability, Covid challenges, and tenancy reform, and farm advisers will have to adjust to considerable changes and uncertainty.

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