Winds of change

The new Labour government has lifted the ban on new onshore windfarms. Julie Butler discusses the tax considerations this change raises.

The chancellor Rachel Reeves has stated that she will revise planning policy and move towards decisions being taken nationally, not locally. The 'ban' on new onshore windfarms has been dropped by the Labour government, to the delight of environmentalists and energy experts. The ban was apparently caused by two footnotes to the National Planning Policy Framework (NPPF), the rules that govern the building of homes and infrastructure. These footnotes applied only to onshore wind, and no other type of infrastructure, and required such strong proof that there was no opposition locally that they made building turbines virtually impossible, given there is generally some local resistance to any building proposal.

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The future looks positive for onshore wind. Thanks to new technologies and increasing demand, solar and wind power are potentially much more cost effective than fossil-fuel power. By 2030, the aim is to have 11-13 GW (gigawatts) of onshore wind, solar and storage capacity. There are one billion watts to a GW to show the measure of power which measures the rate at which energy is generated, used or transferred. The vision of many is a world that runs entirely on green energy, however sadly that is not supported by tax advice on all the changes.

Key points

- The 'ban' on new onshore windfarms has been dropped by the Labour government.
- With the proposed increased number of 'windfarms' and the increased income arising from wind turbines, questions have to be asked as to the income tax, inheritance tax and capital gains tax position relating to them.
- The case of *Dance* has possibly helped with the business property relief claim for non-business assets.
- HMRC will often accept that actively managed commercial woodlands will qualify for business relief as going beyond being mere investments.

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Good news for farmers and landowners

This news of planning permission advantages could mean that farmers and landowners have strong opportunities for increased income streams but there is a worry over the tax planning while we still await guidance.

In Labour's new draft NPPF, these footnotes have been deleted in their entirety, meaning onshore wind projects are now on the same level with all other forms of infrastructure. The change comes into force immediately. Labour also announced that it would go a step further and consult on whether to designate large windfarms as nationally significant infrastructure projects, meaning that the energy secretary, Ed Miliband, would sign them off and local councils would potentially not have a say. Rachel Reeves announced that she would end the 'absurd' restriction on new windfarms and said decisions should be taken nationally, not locally. It is generally considered that windfarms help deliver on the clean power mission which will boost Britain's energy independence, save money on energy bills, support high-skilled jobs and tackle the climate crisis.

The end of the ban was promised in Labour's election manifesto and trailed by Ed Miliband when he was shadow energy secretary, but campaigners were surprised by the speed at which it has been implemented. By ending the onshore wind ban in England, it is considered that the government is making an important stride towards delivering on our climate goals while also paving the way for lower bills, as renewables produce some of the cheapest and cleanest energy available. By harnessing the country's vast renewable power potential, the new government is seen to be staking its claim as a global leader in the green energy transition. There is no doubt that the new government have acted promptly and it hoped this speed is matched by tax guidance.

Current tax considerations

With the proposed increased number of 'windfarms' and the increased income arising from wind turbines, questions have to be asked as to what the income tax, inheritance tax (IHT)

and capital gains tax (CGT) position relating to them is. The first action point is to ensure that the business plans, cashflow forecasts together with management accounts are in place ready for overall tax planning.

For IHT purposes, the positives can be that the wind turbines are placed with large distances between each turbine and a lot of business/farming activity can take place around them. An integral IHT point is therefore what the turbine is standing on – is the land part of an agricultural activity or a business? Let's consider alternatives. Assuming that the landowner has leased the site to the operator, the value of the future income from the turbines themselves and their site may qualify for business property relief (BPR). This shows the complexity of the probate valuation under IHTA 1984, s 160 as set out below.

Where there is just one small turbine providing the farm and the grid with electricity, this should also qualify for BPR. Direction is given from the cases of *Eva Mary Butler* (TC8949), *Farmer* (*Farmer v CIR* [1999] STC (SCD) 321) and *CRC v Andrew Michael Brander (as executor of the will of the late Earl of Balfour)* [2010] UKUT 300 (TCC). We considered the *Butler* case in the article 'Wedding plans' (*Taxation,* 30 November 2023). Concerns would be raised with regard to IHTA 1984, s 105(3) (business consisting wholly or mainly of making or holding investments) if the farm or mixed estate's investment business assets, for example, let property (see 'The future of farm cottages', *Taxation*, 14 September 2023) which may include the wind farm, was greater than its trading activity.

The criteria when looking at an investment business are the division of turnover, asset value, profit, hours worked, etc between trading activities and the investment business activities. If the turbines enjoyed high income, profit and value they could 'tip the balance' with regard to s 105(3), ie the mixed estate could have greater investment business than trading business caused by the wind turbines and their high value and high rental income. For the established farmer, while the turbines may generate large amounts of income he may carry on his farming business much as before, spending just as much time on it. If the autumn Budget changes the criteria of s 105(3) to, say, 80% this could cause real problems for maintaining BPR. It could be some turbines are part of the farm operation per the OTS suggestion and others are part of another legal entity. It must be considered if the wind turbines will be owned in a separate capacity or land transferred prior to planning permission being obtained.

Valuation of the windfarm

On the death of the landowner, how will the land agent value the wind turbines for IHT purposes and how might the district valuer (DV) challenge this? The land with the turbines must be valued at market value (IHTA 1984, s 160). So, what is the market value of land with a windfarm on it – willing buyer and willing seller? Will there be comparable history of values and sale proceeds? The potential buyer would inspect the lease and so must the valuer – what are the income terms, the liability clauses and risks? A potential buyer would no doubt consider the likelihood of a lease being renewed, and the terms of renewal, an exercise which may require consideration of political as well as technological and meteorological risks. Any farmer/landowner who is about to consider the windfarm venture must look at not just the income stream aspect thereof but the impact on value and the possible IHT consequences of s 103(3) as above. The potential value will indicate the future IHT liability that needs to be sheltered.

If the income and profits from the turbines did tip the '*Balfour* balance' then consideration would have to be given to exploring moving surplus non-trading assets into another legal entity. Would it be easier to transfer, say, the let cottages struggling with compliance issues rather than the wind turbines? Would the turbines be that easy to transfer? The transfer could include the land they stand on and the land that surrounds them – consideration would have to be given to such matters as access. To review the tax planning, there would have to be reasonable forecasts of income and profits from the various sources of the assets on the mixed estate and considerations around lifetime gifting. The case of *CRC v Trustees of Nelson Dance Family Settlement* [2008] SpC 682 has possibly helped with the BPR claim for non-business assets. The *Dance* case was further agreed in favour of the taxpayer in the Court of Appeal CA/2008/APP/0434. *Dance* looks at transfers made by the settlor and how they qualify for BPR even if they are a non-business asset leaving the settlor's estate. The potential for wind turbines on a farm would need to be part of full succession, and review of lifetime gifting of business and non-business assets.

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The IHT impact of wind turbines on a traditional farm would be no different to the increase in the number of rental activities on the farm/estate. The turbines may, of course, be less in terms of management time and cost and amount of land used. The income from turbines will be property income and BPR can be claimed without the risk of an attack under s 105(3) provided the income, etc from the investment in the windfarm does not overshadow the farm trading activity in terms of share of income, profit, value etc. Again, projections of future cash flow from both the farm and windfarm activity should be prepared at the point the windfarms are proposed. It can be argued that farm commodity prices and farm production costs have been so variable in recent years that it is difficult to predict for the farming years ahead and without full taxation advice on farming for the environment. Income from the wind turbines must be incorporated into the farm accounts and the ethos of the farm activity must be integrating the wind turbine activity with the main farm account in order to protect BPR.

One of the big concerns of s 105(3) is the farm tenancies. It is very easy to see, when reviewing the '*Balfour* matrix' (s 105(3)), the negatives that farm tenancies play on the calculations. This is especially so of AHA (Agricultural Holdings Act) tenancies with only 50% agricultural property relief (APR) and explains why so many landlords of such tenancies want to take them back in hand (see 'Focus on tenancies', *Taxation,* 29 February 2024). It also highlights why areas of farm diversification such as wedding barns become so critical in the need to qualify as trading and for BPR in their own right.

If the mixed farming estate already contains a number of investment business assets (eg assets that would not qualify for BPR in their own right as they are not trading business assets) then the introduction of these turbines could tip the balance and invoke IHTA 1984, s 105(3) with the whole farm operation considered as 'mainly holding investments'. The main reason for this would be because the income and value of the turbines is greater than other farm values. The value issue is also very critical for tax and succession planning and should be understood. The demand, and thus, value for farms has been high but there are definitely more farms coming on to the market.

Woodland and turbines

With the increase in the 'woodland investor', ie bare farmland with new planting, this will have an impact on tax planning as these could be an ideal location for wind farms. Some may consider constructing turbines on areas of cleared commercial woodland on the assumption that the income from occupying the woodland is 'exempt' and the turbine may qualify for BPR. The simple fact is that the turbines are being 'planted' in the middle of property that may not be a business but an investment activity and therefore not eligible for BPR. HMRC will often accept that actively managed commercial woodlands will qualify for BPR as going beyond being mere investments, but the addition of a valuable investment activity may make the entirety 'mainly' an investment business as commercial woodland may not match a commercial farm for the various s 105(3) criteria.

> "It could be that entrepreneurs, will be looking to buy cost effective land to plant wind turbines."

Action should be taken to try and ensure the turbines could qualify for BPR. Changing the long-term woodland into a business with trading income and profit greater than the income from the turbines could be a positive step to help BPR on both the woodland and the turbines. If the owner can afford to forego the rental income from the turbines, then the answer may be to gift the land on which they will be erected before it is leased and they are constructed.

As the occupation of commercial woodlands is not a 'trade' for income tax purposes, holdover relief will not be available under TCGA 1992, s 165 but the woodlands may nevertheless qualify for BPR so that a gift into settlement, as a chargeable transfer of IHT purposes would secure a CGT holdover relief under TCGA 1992, s 260 without an immediate IHT liability (see *CRC v Nelson Dance Family Trustees*). The full facts will have to be analysed in detail. It could be that entrepreneurs, rather like those buying up cost effective bare land to plant trees and obtain the grants, will be looking to buy cost effective land to plant wind turbines.

Income tax considerations

It is assumed that the landowner will grant a lease to the turbine operator, who will sell the electricity generated after some power for the farm subject to contract. The income will be taxed as property income rather than trading income. Even if the landowner enters into a partnership or other arrangements so as to be treated as carrying on a trade of electricity generation, this will be separate from the farming trade.

With regard to income tax it will be important for the landowner to allocate the correct amount of overheads and direct expenses against the turbine income. If the correct amount of the farm expenses are (based on fact) allocated against turbine income then there could be greater protection against the landowner falling foul of the hobby farming rules. Greater commerciality can have huge benefits for farm survival. We have looked at the tax position of owning in different trading vehicles and the income tax must be considered as well as BPR.

Action plan

The clear message with any wind turbine proposal is it is essential to look at the tax planning and 'business bag' (the business into which the turbines arrive). It is essential to plant the turbines into the correct business operation to protect potential IHT and to plan ahead.

The main points are:

1) Landowner and adviser to fully review the wind turbine lease agreement prior to accepting the proposal to consider the impact on the claim for BPR and business reliefs.
2) Consider how the lease agreement interacts with the status of the land on which it is placed.
3) Consider the future business plans for the farm, the farming activities and the interaction of the wind turbines in relation to turnover, profit and asset value in the context of succession.
4) Consider gifting the land prior to the planning permission of the turbines when it is a business asset to use tax reliefs, such as holdover relief to pass to the next generation.
5) If the wind turbines are used as a valid income stream of the farm or mixed estate then ensure correct expenses allocated against the rental income stream and the rental activity is part of the farming operation to take advantage of the BPR potential of *Farmer* and *Balfour* and not fall foul of problems such as in *Butler*.

Author details

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