

PASSING FARMLAND AND POTENTIAL DEVELOPMENT LAND DOWN TO THE NEXT GENERATION

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- PROTECTION WITH THE "PRE-NUPTIAL AGREEMENT"?

Where there is development land which is tainted with problems which would make it difficult for CGT purposes to claim entrepreneurs' relief and difficult to claim rollover relief, there are distinct considerations in using holdover relief to pass it to the next generation.

An example is where potential development land forms part of a farming enterprise but any disposal by the donor would be essentially a "mere asset". Passing land to the next generation in this way provides a 'clean' product that can then be sold by the donees who are able to use rollover relief and entrepreneurs' relief (ER). This has the advantage of having the gain taxed at the lower 10% rate without the problems of a non-qualifying past use or treatment as a mere asset.

Once the land is in the hands of the next generation, being under new ownership, the land is automatically wiped clean of those problems of non-qualifying use for the CGT reliefs i.e. periods when the land was let or periods when it was used for private use. Then in the hands of the next generation it is possible to ensure that it is used purely for qualifying purposes, until it has met the minimum required period – which is now only one year of business use. Once that point has been reached the land can be sold, and because it has been used purely for business purposes (whilst under current ownership), ER with its attractive 10% rate of capital gains tax can be available. When this is compared to the much more onerous 28% full rate of capital gains tax, this is very attractive.

APR and BPR

Agricultural Property Relief (APR) is at number 679 on the Office of Tax Simplification's (OTS) list of tax reliefs to consider. It is considered that APR might be lost as it meets some of the terms of reference OTS want to achieve and the benefits of this relief in future are in question.

APR primarily aids (1) residential owner-occupied property and (2) let land. The first represents a way of life that may be regarded as an historic advantage. The second is under attack. In the Tenant Farmers Association Vision for Agriculture 2020, it calls for the abolition of APR on 'short-term' lettings, and contract/share farming arrangements. The latter can sometimes qualify under BPR and this may be a more appropriate way to 'police' the relief. APR can be expensive to administer both for HMRC and the taxpayer because of the subjective judgments which have to be made on whether residential owner-occupied property meets the "character appropriate" test and what is the 'agricultural value' without any comparable evidence.

BPR is at number 685 on the OTS list but it is a more widespread relief and less likely to be lost altogether under proposed changes.

The problem of gifting

The above gives strong examples of why land should be passed to the next generation e.g. to protect land to qualify for ER and to ensure that Agricultural land is passed down to the next generation before APR disappears but what of the worry of divorce? – can a pre-nuptial agreement give the protection that is needed?

Some may say the current environment is not conducive to encouraging tax advisers to be proactive in advising their clients on succession planning, not least because of potential litigation claims. However, advisers still have to present a full synopsis to their clients of what might and might not happen on passing down wealth to the next generation, either through lifetime or death transfers. Advisers must have a strong understanding of what the client really needs, and their advice may well have to include some 'crystal ball-gazing' as well as careful explanations of potential downsides and safeguards.

It can be argued that we must not let the "tax tail wag the dog". The landowner has to want to pass down the land but there can be tax planning advantages and protection with agreements such as the "pre-nuptial agreement" which has featured so much in the press of late.

This whole area of planning is subject to uncertainty but where parents or even grandparents are worried that the family farm or the family share of development land will be lost then the pre-nuptial agreement may present some protection.



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