

138. RECORDING THE TAX ROUTES NOT TAKEN

It has been said that "hindsight is wonderful". There are clear examples of this in the world of professional negligence claims. Circumstances change and events turn out differently, and the original tax advice (however robust) can cause problems as a result. It is important therefore to record the tax drivers around the original advice, eg that IHT was the key focus not CGT.

Important points to record in writing and copy to the client are:

- instructions from the client;
- clear notes of all meetings and conversations; and
- advice about risks.

One of the essential things to record is the "tax routes not taken".

As farming is a specialist industry, many advisers know what not to do or have a firm view of what they consider is an appropriate course of action. As a result they may overlook explaining alternative tax planning routes that are dismissed. At some point in the future this can backfire, with extra tax being charged and blame being apportioned.

Also, sometimes newly-appointed advisers can be aggressive in their new role and critical of advice given previously in regard to one set of circumstances, when other circumstances indicate another direction.

There are no better examples than the current tax problems facing farming, eg corporate partners/mixed partnership and the loan offset problem for IHT raised by the 2013 Budget.

In essence, the Budget change to the long-standing treatment that loans which were used to buy/improve farm property will only be allowed to be offset against assets eligible for BPR/APR will substantially

increase some farm IHT bills from the date of Royal Assent. Such loans were often secured against non-business assets; this was sometimes organised to obtain a simple IHT advantage and sometimes because that was the commercial arrangement driven by the bank to provide the finance. There have been no warnings for this and no consultation, and lobbying has begun. Farmers who die after Royal Assent could have large unplanned IHT bills which will adversely affect commercial succession.

The corporate partner/mixed allocation question is currently under consultation and it is fair to say that this has perhaps been a more tax-driven arrangement, although there are some very commercial operations currently using this structure who will be adversely affected.

The quantum of potential claims in farming is high, and the result could be that estates have to sell off part of the farm to pay the IHT. Protection is needed even (or perhaps most importantly) when the client has changed advisers. In IHT cases the best witness will be dead and files must therefore be robust, complete and provide good evidence.

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