



Budget Representation 2020
Request to amend s248A TCGA 1992 so that Scottish
taxpayers are not unfairly excluded from relief

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CA House 21 Haymarket Yards Edinburgh EH12 5BH
tax@icas.com +44 (0)131 347 0100

Direct: +44 (0) 777 5741870 Email: scattell@icas.com

About ICAS

1. This representation has been prepared by the ICAS Tax Board. The Board, with its five technical committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants working across the UK and beyond. It does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants; we represent over 22,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.
2. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to work in a positive and constructive manner to advise policy makers on legislation and to raise issues of importance to our members, individual taxpayers and business alike.

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Proposed amendment to s248A

3. ICAS requests that s248A TCGA 1992 should be amended to remove the disadvantageous treatment of Scottish partnerships outlined below. The obvious way to achieve this would be to insert an additional clause into s248A to provide that, for the purposes of that section, property owned by a Scottish partnership should be treated as jointly held. Alternatively, a clause could be inserted to state that the provisions of s59/59A TCGA 1992 should be applied to s248A for Scottish partnerships (ie the partnership should be looked through, so that the property would be treated as jointly held by the partners).

Explanation of the problem addressed by the representation

Section 248A TCGA 1992

4. S248A TCGA 1992 (previously ESC D26) allows a roll-over style relief for CGT where joint owners of land exchange their interests so that each owner is left owning one or more parcels of land individually. For the exchange of joint interests to apply, the land must initially be jointly held. HMRC has rejected a non-statutory clearance application relating to the availability of relief under s248A, where the land was held in a Scottish partnership. Clearance was apparently refused on the grounds that a Scottish partnership is a legal person and therefore the land was not 'held jointly' under the conditions of s248A.

The principle that Scottish taxpayers should not be prejudiced

5. It was unclear why HMRC had not applied the principle derived from the Saltoun case ([Lord Saltoun v Her Majesty's Advocate-General for Scotland](#)) that the position of Scottish taxpayers under tax legislation applying to the whole of the UK, should not be prejudiced by differences between Scottish and English Law.
6. In the context of Scottish partnerships, HMRC's Business Income Manual (BIM 82035 – now moved to the [Partnership Manual](#)) appears to confirm that HMRC does adopt this approach to interpreting legislation, with a reference to another case (Rex v General Commissioners of Income Tax for the City of London (ex parte Gibbs and others)).
7. HMRC was asked to clarify whether it continued to accept the principle that Scottish taxpayers should not be prejudiced – and if not, why it had changed its policy.

HMRC's interpretation of s248A

8. HMRC's reply noted that the Gibbs case, quoted in its guidance, highlighted the desirability of avoiding a technical construction which produces inequalities in taxation as between citizens of the two countries. HMRC would therefore consider this principle where such a technical interpretation of legislation could be avoided.

9. However, the reply went on to say that where the difference in Scottish and English law is substantive it may mean that this is not possible. In HMRC's view the application of s248A TCGA 1992 is an example of this. As a Scottish partnership is a separate legal person, and there is nothing in the legislation which treats it as anything else for the purposes of s248A, HMRC does not consider there to be a technical construction of s248A which would enable the relief to be claimed on land held by a Scottish partnership.

Unfairness: Scottish taxpayers are disadvantaged

10. The current wording of s248A is flawed; it appears that when the legislation was drafted no consideration was given to Scottish law. This, combined with HMRC's view that the Saltoun principle cannot be applied in s248A cases, causes practical problems, additional costs and unfairness. Scottish partnerships have to try to work round the flawed legislation to obtain the relief they should be entitled to under s248A. We assume that there was no policy intention to disadvantage Scottish taxpayers and to treat Scottish partnerships less favourably than English ones.