



# **CAPITAL GAINS TAX AND ENTREPRENEURS' RELIEF:**

**A LECTURE DELIVERED TO  
THE CHARTERED INSTITUTE OF TAXATION**

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**INDEX**

<b>SECTION NO.</b>	<b>SECTION</b>
<b>I</b>	Introduction
<b>II</b>	Qualifying Business Disposals
<b>III</b>	Material Disposal of Business Assets
<b>IV</b>	Qualifying Business Disposals: Disposals of Trust Business Assets
<b>V</b>	Qualifying Business Disposals: Associated Disposals
<b>VI</b>	Re-Organisation and Qualifying Corporate Bonds
<b>VII</b>	The Amount of the Relief
<b>VIII</b>	The Claim

**SECTION I**

**INTRODUCTION**

- 1.1.1 So much has happened this year fiscally that the storm of protest which followed the Pre-Budget Statement at the end of last year seems only a distant memory. There have been so many u-turns since then that the Government seems to have been permanently revolving on the spot ever since. The first of those u-turns gave us a modest but useful Capital Gains Tax relief, Entrepreneurs' Relief. On the basis of current tax legislation, its maximum value is £80,000 per taxpayer so that, compared to taper relief which it partly replaces, it is a very modest relief indeed. But even in these days of revived inflation, £80,000 remains a significant sum to most private clients.
- 1.1.2 In this lecture I attempt to summarise the main provisions of the relief and to pick up one or two of the planning points and pitfalls which have become apparent since the draft legislation was first published on the 29<sup>th</sup> January this year.
- 1.1.3 In spite of the fact that the relief was meant to provide a minor compensation to those who had suffered from the abolition of taper relief, the new relief did not utilise the previous taper relief legislation but perversely chose to model itself on the retirement relief legislation which was repealed with effect from the 6<sup>th</sup> April 2003.

**SECTION II**

**QUALIFYING BUSINESS DISPOSALS**

2.1.1 The new relief is given in respect of “qualifying business disposals”.

2.1.2 The following are qualifying business disposals:-

- (a) A material disposal of business assets;
- (b) A disposal of trust business assets;
- (c) A disposal associated with a relevant material disposal.

2.1.3 We shall look at each of these three categories in turn.

2.1.4 We shall then consider the provisions relating to relevant business assets and those dealing with re-organisations and qualifying corporate bonds.

2.1.5 Finally, we shall look at the calculation of the relief and of how it is claimed.

**SECTION III**

**QUALIFYING BUSINESS DISPOSALS:  
A MATERIAL DISPOSAL OF BUSINESS ASSETS**

3.1.1 For this purpose a disposal of business assets is:-

- (a) A disposal of the whole or part of a business;
- (b) A disposal of (or interests in) one or more assets in use at the time at which a business ceases to be carried on, for the purpose of the business; or
- (c) A disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

3.1.2 These provisions are closely based on the Retirement Relief provisions.

3.1.3 It is not clear why the reference to disposals of “interests in” assets, which was not found in the equivalent Retirement Relief provisions, is included here.

3.1.4 The basic concept of English property law is that there is no absolute property in a thing but only rights which the law recognises and enforces. Rights of sufficient substance are interests. So, for example, the highest form of property known to English law, real property, is an unencumbered interest in freehold land. Tax is of course charged on disposals of assets. For Capital Gains Tax purposes “all forms of property, are assets.”<sup>1</sup>  
In what sense can there be the disposal of an asset consisting of an interest in another

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<sup>1</sup> Section 21

asset which is used in a business? For example, an undivided share in land used in the business is a disposal of the land not of a separate asset consisting of the interest in the land. Perhaps, this phrase is included to deal with disposals of part of an asset or of a share in an asset. For example, a farmer who has an absolute interest in land who a fifty percent interest as tenant in common in the land. If so, it is surely unnecessary. The explanatory notes issued with the Finance Bill do not cast any light on the matter.

- 3.1.5 The relief does not apply to shares and securities or to other assets held as an investment which form part of the assets of an unincorporated business or a limited liability partnership.

## **THE FIRST CATEGORY: WHOLE OR PART OF A BUSINESS**

### **The Meaning of a Business**

- 3.2.1 Generally, a business, of course, includes but is not restricted to, trades.<sup>2</sup>

- 3.2.2 A business for the purposes of Entrepreneurs' Relief, however, has a restricted meaning.

It is anything which is:-

- (a) a trade, profession or vocation; and
- (b) conducted on a commercial basis with a view to the realisation of profits.

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<sup>2</sup> *American Leaf Blending Company v Director General of Inland Revenue* PC [1978] STC 561

3.2.3 A business, of course, is an activity. One cannot dispose of an activity. Strictly, one disposes of rights in respect of that activity and property used in its conduct.

3.2.4 So one of the difficulties with Entrepreneurs' Relief, just as it was with Retirement Relief, is identifying where, when disposals are made of a group of assets, that group of assets may be said to be a "business".

3.2.5 Under retirement relief a large number of cases concerned whether a disposal was a disposal of the part or whole of a business or whether it was merely a disposal of an asset used in the business.<sup>3</sup> Just as difficult, however, is determining in relation to a business the assets which are comprised in the business.

### **Business Ownership Period**

3.2.6 A disposal of business assets within this category will be a material disposal if the business is owned by the individual throughout the period of one year ending with the date of the disposal. Note, that it is the business which has to be owned for one year not the assets comprised in the business.

#### **Example I**

Mr Tremlett had, for many years, farmed Blackacre, which belonged to his wife. On

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<sup>3</sup> *M<sup>c</sup>Gregor v Adcock* ChD [1977] STC 206; *Atkinson v Dancer* ChD [1988] STC 758; *Mannion v Johnstone* ChD [1988] STC 750; *Pepper v Duffurn* ChD [1993] STC 466; *Jarmin v Rawlings* ChD [1994] STC 1005; *Wase v Bourke* ChD [1996] STC 18; *Parrett v Powell* ChD [1998] STC 283

the 1<sup>st</sup> January 2008 his wife transferred the land to him by way of gift. He sold the farm with its standing crops, farm machinery and other equipment to a farmer on the 30<sup>th</sup> January 2008. A gain of £1m arose on the land. He had sold a business which he had owned throughout the period of one year ending with the date of disposal and so Entrepreneurs' Relief applied.

3.2.7 It should be noted from Example I that the period of one year can begin before the introduction of Entrepreneurs' Relief; indeed, before its introduction was announced by the Chancellor on the 29<sup>th</sup> January 2008.

### **THE SECOND CATEGORY: ASSETS**

3.3.1 The second category of disposals of business assets is:-

“A disposal of (or of interests in) one or more assets in use at the time at which a business ceases to be carried on, for the purposes of the business.”

3.3.2 A disposal within this second category is a material disposal if:-

- (a) The business is owned by the individual throughout the period of one year ending with the date on which the business ceases to be carried on; and
- (b) That date is within the period of three years ending with the date of the disposal.



3.3.3 So provided the business has been owned by an individual for the period of one year ending with the date on which the business ceases, the asset is in use on that date and the disposal takes place within three years of the cessation of business, relief will be available.

**Example II**

Mr Dabinett has a cider making business. The assets of the business include a barn which he has owned for many years and in which the cider is made. He sells the business on the 30<sup>th</sup> June 2008 to a large Irish company who have no need of the barn as they have their own manufacturing premises. He starts up a new trading business and uses the premises in that business. By the 30<sup>th</sup> June 2010 the new business has outgrown the barn and so he moves it to larger premises and sells the barn, making a gain of £1m. That gain will not qualify for Entrepreneurs' Relief by reference to the new business. It does not fall within s.169I(2)(a) because the new business has not ceased. It does qualify for Entrepreneurs' Relief in respect of the cider making business. It was in use at the time that the cider making business ceased, he had owned that business for more than one year and the barn was sold within three years of the cessation of the business.

## *In use at the time at which the business ceases*

3.3.4 What is meant by being “in use at the time at which a business ceases to be carried on”?

It surely cannot mean the moment of cessation. There must be a margin of appreciation. There will be many circumstances in which an asset which continues to be owned after the cessation of the business will have ceased to be used for the purposes of the trader before the absolute moment of cessation. If we take the facts in Example II it is highly unlikely that production in Mr Dabinett’s barn would not have ceased before completion of the agreement.

## **THE THIRD CATEGORY: SHARES AND SECURITIES**

3.4.1 The third category of material disposals of business assets is:-

“A disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.”

3.4.2 It should be noted that the relief is available for disposals of preference shares and of loan stock provided the loan stock constitutes a security and is not a qualifying corporate bond.<sup>4</sup> Special provisions, however, are made for suspended gains which are brought into charge in respect of a qualifying corporate bond under s.116(10).<sup>5</sup>

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<sup>4</sup> See in particular s.169S(5) which deems certain company debentures to be a security

<sup>5</sup> See s.169R and Section VI below

3.4.3 A disposal of business assets within this third category is a material disposal if one of two conditions is met.

## **Condition A**

3.4.4 The first condition, Condition A, is that throughout the period of one year ending with the date of disposal:-

- (a) The company is the individual's personal company and is either a trading company or the holding company of a trading group; and
- (b) The individual is an officer or employee of the company or, if the company is a member of a trading group, of one or more companies which are members of the trading group.

## ***Personal Company***

3.4.5 A personal company in relation to an individual means a company:-

- (a) At least five percent of the ordinary share capital of which is held by the individual; and
- (b) At least five percent of the voting rights in which are exercisable by the individual by virtue of that holding.<sup>6</sup>

The holding referred to in (b) above must be a holding of at least five percent of the ordinary share capital referred to in (a).

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<sup>6</sup> Section 169S(3)

3.4.6 This is a more restrictive definition than the definition which applied for retirement relief and which continues to apply for the purposes of Roll-over Relief on Business Assets (TCGA 1992 s.157). Creating small differences in the definition of the same phrase in this way makes our tax system unnecessarily complex. Why should Entrepreneurs' Relief require a different definition of a personal company from the Roll-over Relief on Business Assets rules?

***Officers and Employees***

3.4.7 There is no requirement for the individual to spend a minimum amount of time in the exercise of his duties as an officer or employee of the company. HMRC have published a series of answers to "frequently asked questions" in which they say:-

"There are no rules about the working hours of officers and employees. The condition is only that the individual is an officer or employee of the company throughout the one year qualifying period."

3.4.8 They accept that:-

"Non-Executive Directors and the Company Secretary are all officers of a company and will be able to qualify for the relief provided that all the other qualifying conditions are also met."

3.4.9 Indeed, even if a person fails to perform the minimum duties of a Director of a company that will not, in my view, prevent him satisfying the condition of being an officer of the company. Company law imposes onerous duties on those who allow themselves to be appointed a Director of a company which they cannot escape by asserting that their appointment was a sham if it complies with the formalities for appointment.

3.4.10 On the other hand, because an employment is a species of contract, consideration must flow in both directions for a person to be an employee. So, a purported contract under which the purported employee had no duties whatsoever or under which the employer gave no consideration for the employees' undertakings would be no contract at all.

### ***Trading Company***

3.4.11 A trading company for these purposes is as defined, for the purposes of Business Asset Hold-Over Relief, in s.165A. Those definitions are complex. A trading company means "a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities." Trading activities are then extensively defined. A trade for this purpose includes a letting of furnished holiday accommodation.

### ***Trading Group***

3.4.12 A trading group is a group of companies:-

- “(a) one or more of whose members carrying on trading activities; and
- (b) the activities of whose members taken together, do not include to a substantial extent activities other than trading activities.”

3.4.13 There is then an extended definition of trading activities for this purpose.

*An Example*

3.4.14 The following is an example of material disposals of business assets consisting of shares and securities satisfying Condition A.

**Example III**

Broad’s of Somersetshire Limited has been a trading company for many years. Its share capital and loan capital has been held as follows for many years.

	Ordinary Voting Shares £1	12% Cumulative Preferences Shares £1	12% Loan Stock £
Captain Broad	501	2,000	
Mrs Broad	400	2,000	
Jane Broad		2,000	
Algernon Broad	50	2,000	10,000
Alice Broad	49	2,000	10,000
<b>TOTAL</b>	<b>1,000</b>	<b>10,000</b>	<b>20,000</b>

On the 30<sup>th</sup> June 2008 Fizz Plc acquired the entire share capital and loan stock of the company for the following amounts:-

Ordinary Share	£2,000 per share
Preference Share	£2 per share
Loan Stock	£2 per £1

None of the family had previously claimed Entrepreneurs' Relief.

**Captain Broad** had acquired his shares on the 1<sup>st</sup> January 2004 at par. Throughout his period of ownership of the shares he had been a director of the company actively involved in its business throughout this period of ownership of the shares.

He had disposed of shares in the company which he had owned throughout the period of one year ending with the date of disposal. That company was his personal company throughout that period of one year, because he held at least five percent of the ordinary share capital of the company and at least five percent of the voting rights in the company were exercisable by reason of that holding. His gain of £1,001,499 (£501 x £2,000 (minus £501)) therefore qualified for Entrepreneurs' Relief in respect of £1,000,000.

**Mrs Broad** had been given her shareholdings by her husband on the 31<sup>st</sup> March 2007. As this was an inter-spouse transfer she was deemed to acquire the shares for such

consideration as would lead to her realising neither a gain nor a loss.

Mrs Broad was the company secretary. Her “work” involved signing the forms which her husband prepared and placed before her. Nonetheless she had been an officer of the company for the period of one year ending with the date of her disposal and the company had been her personal company throughout that period so her gains of £799,600  $((400 \times £2,000) - £400)$  on her holding of ordinary voting shares and of £2,000  $((2,000 \times £2) - £2,000)$  on her holding of preference shares receive Entrepreneurs’ Relief.

**June Broad**, Captain and Mrs Broad’s elder daughter, had been employed by the company for the last three years. She received no Entrepreneurs’ Relief, however, because, holding no ordinary shares, the company was not her personal company.

**Algernon Broad**, Captain and Mrs Broad’s son, was given his ordinary voting shares by his father on the 1<sup>st</sup> January 2007. He was given his preference shares on the 1<sup>st</sup> January 2008. On the same day his father gave him £10,000 which he used to subscribe for his loan stock.

Algernon had never done any work for the company but he was a director of it having been appointed on the 1<sup>st</sup> January 2007. He therefore satisfied the conditions for relief. Throughout the period of one year ending with the date of his disposal, the company has been his personal company because he held five percent of the share capital and,



by virtue of that holding, had five percent of the voting rights of the company. Throughout that period he has been an officer of the company. He therefore received Entrepreneurs' Relief not only on his gain of £99,950 ((50 x £2,000) - £50) on his ordinary shareholding but also on his gains of £2,000 ((2,000 x £2) - £2,000) on his preference shareholding and of £10,000 (£2 x £10,000) - £10,000) on his loan stock.

**Alice Broad**, Captain and Mrs Broad's second daughter, had owned her ordinary shares since the 1<sup>st</sup> January 2004 when she was appointed a director of the company and had worked full time for the company since her appointment. She, however, received no Entrepreneurs' Relief because the company had never been her personal company as her holding of ordinary shares was only 4.9%.

**Condition B**

3.4.15 Condition B is satisfied if the same conditions which are set out above in relation to Condition A are met throughout the period of one year ending with the date on which the company:-

- (a) Ceases to be a trading company without continuing to be or becoming a member of a trading group; or
- (b) Ceases to be a member of a trading group without continuing to be or becoming a trading company; and

That date is within the period of three years ending with the date of the disposal.

**Example IV**

Mr Masters-Jersey had owned the entire share capital and had been a director of the companies listed below for many years. On the 30<sup>th</sup> June 2008 he sold the share capital of all of the companies, realising substantial gains.

Balls Bittersweet Limited was a trading company until the 1<sup>st</sup> January 2008 when it acquired the entire share capital of Brown Snout Limited. At that point it transferred its trade and trading assets to Brown Snout Limited which began to carry on its trade as well as continuing to carry on the trade which it had previously carried on. The share capital of Brown Snout Limited had also been wholly owned by Mr Masters-Jersey.

Golden Bittersweet Limited had been a trading company until the 1<sup>st</sup> January 2006 when it ceased to trade and invested its assets in a portfolio of quoted shares.

Paignton Marigold Limited had been the holding company of three trading companies. On the 1<sup>st</sup> January 2006 it had liquidated the three companies and begun to carry on the trades which they had previously carried on.

The disposal of the **Balls Bittersweet Limited** shares did not satisfy Condition B because it ceased trading but continued to be a member of a trading group. It did, however, satisfy Condition A because it was a trading company or a holding company

or a trading group throughout the year ending with the disposal.

The disposal of **Golden Bittersweet Limited** satisfied Condition B because it ceased to trade without becoming or continuing to be a member of a trading group, the cessation was within three years before the disposal and during the whole of the year before that disposal, the company was Mr Masters-Jersey's personal company and he was an officer of it.

The disposal of **Paignton Marigold Limited** did not satisfy Condition B. It had ceased to be a member of a trading group but had become a trading company. It did, however, satisfy Condition A.

### PARTNERSHIPS

3.5.1 Each of the three categories of qualifying business disposals includes special rules for partnerships. In respect of material disposals of business assets:-

“an individual who disposes of (or of interests in) assets used for the purposes of a business carried on by the individual on entering into a partnership which is to carry on the business, is to be treated as disposing of a part of the business.”

3.5.2 The disposal by an individual:-

“... of the whole or part of an individual’s interest in the assets of a partnership is to be treated as a disposal by the individual of the whole or part of the business carried on by the partnership.”

3.5.3 At any time when a business is carried on by a partnership, the business is to be treated as owned by each individual who is at that time a member of the partnership.

**SECTION IV**

**QUALIFYING BUSINESS DISPOSALS: DISPOSALS OF TRUST BUSINESS ASSETS**

**THE THREE ELEMENTS OF A DISPOSAL OF TRUST BUSINESS ASSETS**

4.1.1 There is a disposal of trust business assets where:-

- (a) The trustees of a settlement make a disposal of settlement business assets;
- (b) There is an individual who is a qualifying beneficiary;
- (c) The relevant condition is met.

**SETTLEMENT BUSINESS ASSETS**

4.2.1 Settlement business assets are:-

- (a) Assets consisting of (or of interests in) shares in or securities of a company;  
or
- (b) Assets (or interests in assets) used or previously used for the purposes of a business, which are part of the settled property.

**QUALIFYING BENEFICIARY**

4.3.1 An individual is a qualifying beneficiary if the individual has an interest in possession (otherwise than for a fixed term) in the whole of the settled property or a part of it which consists of or includes the settlement business assets.

4.3.2 HMRC has an idée fixé about interests in possession for a fixed term. They seem unable to see that there is little practical difference between the common situation where an interest in possession for a term of years is combined with a power to defeat or extend that interest and an interest in possession for life coupled with a power to defeat.

**THE RELEVANT CONDITION**

4.4.1 The relevant condition differs according to the class of settlement business asset concerned.

**Shares or Securities**

4.4.2 In relation to disposals of shares or securities the relevant condition is that throughout a period of one year ending not earlier than three years before the date of the disposal:-

- (a) the company is the qualifying beneficiary's personal company and is either a trading company or the holding company of a trading group; and

- (b) the qualifying beneficiary is an officer or employee of the company (or, if the company is a member of a group of companies) of one or more companies which are members of the trading group.

## 4.4.3

### **Example V**

Mr Longstem settled moneys on trusts under which his son, Neville, had an interest in possession. The trustees acquired fifty percent of the shares in Longstem Limited on the 1<sup>st</sup> January 2004. Neville acquired five percent of the company share capital on the same date and became the company's Director. On the 1<sup>st</sup> January 2006 he sold his personal holding and resigned as a Director. On the 30<sup>th</sup> June 2008 the trustees sold their shares realising a gain.

That gain qualified for Entrepreneurs' Relief because there was a disposal of settlement business assets, being shares in Longstem Limited. Neville had an interest in possession in the settled property and was therefore a qualifying beneficiary. In the period of one year ending not earlier than a date within the previous three years (in this case 2<sup>nd</sup> January 2005 – 1<sup>st</sup> January 2006) the company was Neville's personal company by reason of his five percent holding and he was an officer of the company.

## **Assets used for the purposes of a business**

4.4.4 In relation to business assets used for the purpose of the business the relevant condition is satisfied if:-

- (a) The settlement business assets are used for the purposes of the business carried on by the qualifying beneficiary throughout the period of one year ending not earlier than three years before the date of disposal; and
- (b) The qualifying beneficiary ceases to carry on the business on the date of the disposal or within the period of three years before that date.

## **PARTNERSHIPS**

4.5.1 Once again, there are special rules for partnerships. In relation to disposals of settlement business assets used for the purpose of a business, a business carried on by a partnership of which the qualifying beneficiary is a member is treated as carried on by the qualifying beneficiary.

4.5.2 Where a qualifying beneficiary ceases to be a member of the partnership or the partnership ceases to carry on the business, the qualifying beneficiary is treated as ceasing to carry on the business.



**Example VI**

Mr Sercombe has a life interest in the Sercombe Settlement. The Sercombe Settlement owns a building which it allows a partnership, known as the Sercombe Partnership, to occupy for the purposes of the Sercombe Partnership's trade. Mr Sercombe was a member of the Sercombe Partnership. On the 1<sup>st</sup> January 2006 Mr Sercombe retired from the partnership. He is treated as ceasing to carry on the business of the partnership at that time. On the 30<sup>th</sup> June 2008 the trustees disposed of the building, realising a gain. That gain qualified for Entrepreneurs' Relief because the building was part of the settled property of the Sercombe Settlement and has been used for the purposes of a business. The building satisfied the condition that it had been used for the purposes of a business carried on by the qualifying beneficiary throughout the period of one year ending not earlier than three years before the date of the disposal and the qualifying beneficiary had, by reason of his retirement from the partnership, been treated as ceasing to carry on the business within three years before the date of that disposal.

**SECTION V**

**QUALIFYING BUSINESS DISPOSALS: ASSOCIATED DISPOSALS**

**THREE ELEMENTS OF AN ASSOCIATED DISPOSAL**

5.1.1 There is a disposal associated with a relevant material disposal if three conditions, Conditions A, B and C, are met.

**CONDITION A**

5.2.1 Condition A is that an individual makes a material disposal of business assets which consists of:-

- (a) The disposal of the whole or part of the individual's interest in the assets of a partnership; or
- (b) The disposal of (or of interests in) shares in or securities of a company.

5.2.2 It should be noted that there cannot be an associated disposal by reference to a material disposal of the whole or part of a business carried on as a sole trader or of an asset in use at the time of the cessation of a business for the purpose of that business.

**CONDITION B**

5.3.1 Condition B is that the individual makes the disposal as part of his withdrawal from participation in the business carried on by the partnership or company or, if the company is a member of a trading group, of a member of that group.

**CONDITION C**

5.4.1 The third condition, Condition C, is that throughout the period of one year ending with the earlier of:-

- (a) The date of the material disposal of business assets; and
- (b) The cessation of the business of the partnership or company

the assets which are the subject of the associated disposal are in use for the purpose of the business. It should be noted that there is no limit to the length of time before the disposal that the cessation may take place.

5.4.2

**Example VII**

Mr Stembridge was a member of the Stembridge Clusters Partnership which carried on a trade. Mr Stembridge owned a property which he made available to the partnership

in which the partnership carried on its trade. On the 1<sup>st</sup> January 2007 the partnership ceased to trade. The partners then spent the following year realising the assets of the partnership and making a disposal of the partnership's goodwill so that the partnership was dissolved on the 1<sup>st</sup> January 2008. On the cessation of trade, Mr Stembridge began work on the property to remove the partnership's machinery and to make it suitable for sale as a bare industrial building. The building was put on the market on the 1<sup>st</sup> January 2008 and sold on the 30<sup>th</sup> January 2008 giving rise to a gain of £500,000. That gain qualified for Entrepreneurs' Relief.

The disposal of the partnership goodwill was a material disposal. This disposal was deemed to be a disposal by Mr Stembridge because the business partnership was treated as owned by each individual who was at that time a member of the partnership.

Condition B was satisfied because Mr Stembridge made his disposal of the building as part of his withdrawal from participation in the business<sup>7</sup> carried on by the partnership.

Condition C is satisfied because in the period of one year ending with the cessation of the business of the partnership, the building was in use for the purposes of the partnership's business.

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<sup>7</sup> The business of the partnership was, because of the special definition of business in s.169S(i) the trade and not the activities subsequent to the trade

**SPECIAL PROVISIONS: SECTION 169P**

5.5.1 The relief on associated disposals is restricted by s.169P to such amount as is “just and reasonable” where any of the following conditions apply:-

- (a) the assets which were the subject of the disposal are in use for the purposes of the business for only part of the period in which they are in the ownership of the individual;
- (b) only part of the assets which are the subject of the disposal are used for the purpose of the business for that period;
- (c) the individual is concerned in the carrying on of the business for only part of the period in which the assets which are subject to the disposal are in use for the purposes of the business; and
- (d) for the whole or any part of the period for which the assets which are the subject of a disposal are in use for the purposes of the business, their availability is dependent upon the payment of rent;

Where the period for which the assets were in use for the purposes of the business began before 6<sup>th</sup> April 2008, s.169P applies as if the period referred to in (d) began on 6<sup>th</sup> April 2008.

5.5.2 Although the restriction of relief is to an amount which is ‘just and reasonable’ in deciding what amount is just and reasonable regard is to be had to:-

- (a) In respect of (a), the length of period for which the assets are in use for the purpose of the business;
- (b) In respect of (b), the part of the assets that are in use for the purpose of the business;
- (c) In respect of (c), the length of period for which the individual concerned is concerned in carrying on the business; and
- (d) In respect of (d), the extent to which any rent paid is less than the amount which would be payable in the open market for the use of the assets.

5.5.3 Rent for this purpose is very widely defined as including “any form of consideration given for the use of the assets.”

5.5.4 The following is an example of the application of s.169P.

**Example VIII**

Mr Tan-Harvey purchased a building on the 1<sup>st</sup> January 2003 which he sold on the 13<sup>th</sup> June 2008 realising a gain of £2m. From the 1<sup>st</sup> January 2003 – 31<sup>st</sup> December 2005 the property had been let. From the 1<sup>st</sup> January 2006 to the 31<sup>st</sup> December 2007 he had allowed a partnership, of which he and his son were the two equal members, to use the building for the purposes of its trade. The partnership had occupied one half of the building and the rest had remained empty. The partners had paid rent of £12,500 per

annum for the use of the building when a market rent would have been £50,000 per annum. On the 31<sup>st</sup> December 2007 the partners had disposed of the partnership trade and assets. Mr Tan-Harvey having no further use for the building, put it on the market and sold it on the 30<sup>th</sup> June 2008 realising a gain of £1,000,000.

The partnership's disposal of its trade and assets was a disposal of the whole or part of the business by Mr Tan-Harvey and he was treated as having owned the business throughout the period that it was owned by the partnership. It was therefore a material disposal of business assets by him.

The disposal of the property was a disposal associated with that relevant material disposal because Mr Tan-Harvey had made the disposal as part of his withdrawal from participation in the business carried on by the partnership and, throughout the period of one year ending with the cessation of the business of the partnership, the building was in use for the business of the partnership.

Were it not for s.169B, Mr A would have received Entrepreneurs' Relief in respect of £1m of the gain less any previous amounts of relief. That relief is to be restricted, however, to an amount which is just and reasonable because the following conditions were satisfied.

First, the building was only in use for the purposes of the business for two of his five and a half years of ownership.

Secondly, only half of the building was in use for the purpose of the business for that period.

Although during the whole of the period for which the assets were in use for the purpose of the business, its availability was dependent upon the payment of rent, the transitional rule has the result that in considering this factor one looks only at the period of use from the 6<sup>th</sup> April 2008 onwards. During the period, the building's availability was not dependent upon the payment of rent.

In determining how much Entrepreneurs' Relief should be given on Mr Tan-Harvey's gain, regard is to be had to the period during which the building was in use for the purposes of the business in the partnership and the proportion of the building which was used for the purposes of that business. Calculating what is just and reasonable may not necessarily lead to a simple arithmetic calculation by reference to the proportion of the time during which the building was not in business use or the physical proportion not used for the business but undoubtedly the Courts will be heavily influenced by a calculation of that sort.



**SECTION VI**

**RE-ORGANISATION AND QUALIFYING CORPORATE BONDS**

**SECURITY EXCHANGES**

6.1.1 An exchange of securities within s.135 is subject to the re-organisation provisions of s.127. Those provisions have the result that the exchange is treated as not involving a disposal but rather the shares which are the subject of the disposal are identified with the shares acquired. In some cases, were it not for that provision, that exchange would be a disposal qualifying for Entrepreneurs' Relief. When there is a subsequent disposal of the acquired shares, because they are deemed to have been acquired for the base cost of the old holding, the gain arising on the disposal will normally have accrued, in part, before the exchange. It will often be the case that that gain will not qualify for Entrepreneurs' Relief.

***An Election***

6.1.2 In such a situation, the result of the application of s.127 to the exchange is that the gain accrued up to the time of the exchange bears Capital Gains Tax at an effective rate of eighteen per cent rather than ten per cent.

6.1.3 An election is provided, therefore, allowing a disponent on an exchange which would otherwise be within the re-organisation provisions of s.127, to elect for that section not to apply. The result of that is that a gain would accrue on the exchange but that gain would benefit from Entrepreneurs' Relief.

6.1.4 Of course, the election brings the gain into charge at an earlier date than if s.127 applied as normal. There is no ability to make a partial election so if the gains exceed the limit for Entrepreneurs' Relief it will be necessary to bring gains into charge at an effective rate of eighteen percent in order to achieve the effective rate of ten percent on gains up to the limit.

### **QUALIFYING CORPORATE BONDS**

6.2.1 A much more generous relief is provided in respect of exchanges where the new holding is a qualifying corporate bond.

6.2.2 Where a gain arising on the exchange of securities for qualifying corporate bonds has been suspended under s.116, on a subsequent disposal of the qualifying corporate bond the suspended gain will be brought into charge under s.116(10). That suspended gain will receive Entrepreneurs' Relief to the extent that it would have done had the exchange been a chargeable disposal.

**SECTION VII**

**THE AMOUNT OF THE RELIEF**

7.1.1 Where Entrepreneurs’ Relief is claimed in respect of a qualifying business disposal, the relevant gains and losses are to be aggregated (the “Current Amount”) and reduced by four ninths. If that aggregate and the total of all of the previous such aggregates (the “Prior Amount”) in respect of the claimant exceeds £1m, the reduction is to be made only in respect of so much of the Current Amount as when added, to the Prior Amount does not exceed £1m.

7.1.2

**Example IX**

Mr Tremlett disposes of a business qualifying for Entrepreneurs’ Relief. He has previously received Entrepreneurs’ Relief in respect of gains of £600,000. On the current disposal he realises the following gains and (losses):-

	<b>£</b>
On a building	(£200,000)
On plant	£100,000
On goodwill	£800,000
<b>TOTAL</b>	<b>£700,000</b>

Adding the current aggregate gains to the prior aggregate gains in respect of which

Entrepreneurs' Relief has been given gives a total of £1,300,000 (£1,300,000 + £700,000). The relief on the current disposal is therefore restricted to so much of the Current Amount as, when added to the Prior Amount, does not exceed £1m. That gives an amount in respect of which relief is to be given of £400,000 (£1m - £600,000). Those gains are therefore reduced by four ninths.

### **TRUST DISPOSALS**

7.2.1 In relation to qualifying business disposals of trust business assets, the Prior Amount taken into account are the amounts of the qualifying beneficiary. Where, on the same day there is both a disposal of trust business assets in respect of which an individual is a qualifying beneficiary and a qualifying business disposal by that individual, the disposal of trust business assets is deemed to take place later for calculating the restriction of relief.

#### ***Multiple Interests in Possession***

7.2.2 Where, within the material time, there is a disposal of trust business assets and there is at least one other beneficiary, other than the qualifying beneficiary, who has an interest in possession in those assets, the gain subject to the relief is restricted to that proportion which the qualifying beneficiary's interest in the income of the property which is the subject of the disposal bears to the interest in that income of all the beneficiaries who have an interest in possession in it.

7.2.3 The material time is the end of the latest period of one year which ends not earlier than three years before the date of disposal in respect of which the conditions for the disposal of trust business assets are satisfied.

**SECTION VIII**

**THE CLAIM**

- 8.1.1 Entrepreneurs' Relief is given only on the making of a claim.
  
- 8.1.2 A claim in relation to trust business assets must be made jointly by the trustees and a qualifying beneficiary. Otherwise, it is to be made by the individual disponer.
  
- 8.1.3 A claim for Entrepreneurs' Relief in respect of a qualifying business disposal must be made on or before the first anniversary of the 31<sup>st</sup> January following the tax year in which the disposal is made.