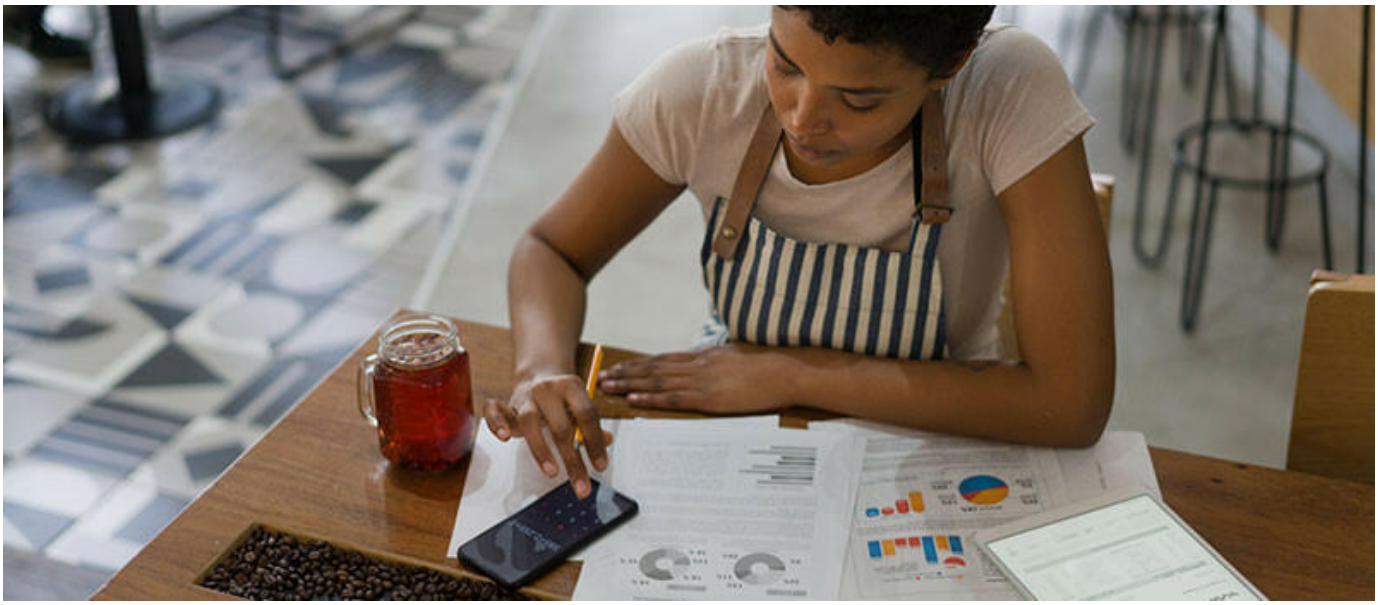
# Uncertainties when applying ESC D32

Personal tax OMB



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The CIOT has written to HMRC about uncertainties in the application of extra-statutory concession D32 on the incorporation of a business.

The CIOT has written to HMRC about uncertainties in the application of ESC D32 on the incorporation of a business, where an individual transfers the whole of the assets and liabilities to a company for consideration consisting wholly of the issue of shares by the company, relying on incorporation relief under TCGA 1992 s 162. HMRC's Spotlight 63 and recent articles have highlighted concerns in relation to some property incorporations. This activity seems, in part at least, to be driven by the uncertain application of the concession.

We therefore suggest that the guidance in HMRC's Capital Gains Manual dealing with ESC D32 needs updating and supplementing to reflect modern commercial practice by lenders to include:

- examples of 'business liabilities' for the purposes of ESC D32 and whether 'business liabilities' may include property mortgages where the property letting

activities are sufficient to amount to a business for incorporation relief purposes; and
- examples of scenarios where HMRC accepts that business liabilities have been ‘taken over’ by a company.

The wording of the concession suggests that ESC D32 only applies where business liabilities are ‘taken over’ by novating the existing debt liability from a sole trader or partnership to the company. However, while this may have been common practice some time ago, when a sole trader and their bank manager could agree to the transfer of business loans to the company, it does not align with current banking practices.

It is understood that banks and other lenders now rarely allow the novation of an existing loan from sole trader to company but usually require a new loan agreement with the company. The new borrowing is used to repay the old borrowing. It is not clear that ESC D32 applies in such cases. While the HMRC manual at CG65745 adds that ESC D32 is also met by the company giving the transferor an indemnity, we understand that this practice is not generally commercially acceptable to lenders.

We noted also that there are wider issues with TCGA 1992 s 162 relief that cause issues in practice and these will be raised via the HMRC stakeholder forum, the Capital Taxes Liaison Group, of which the CIOT is a member.

The full CIOT submission is available here: www.tax.org.uk/ref1269.

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