



## **Incorporating your business? New issues to consider when claiming retirement relief and revised entrepreneur relief**

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Many business people find themselves in situations where they either have been operating as a sole trader and now wish to incorporate, or they have been trading through a company and they now wish to place their business interests in a holding company.

Normally when a business person is incorporating or restructuring a business, he or she must pay a lot of attention to his or her capital gains tax (CGT) position as the transfer of the assets of a business or the shares in a company may be treated as if that transfer was actually a sale giving rise to a taxable gain.

Usually the tax payer can take advantage of such reliefs as retirement relief or revised entrepreneur relief. Retirement relief, where the relevant conditions are met, can allow a person to extract up to €750,000 from a business without having to pay capital gains tax. Revised entrepreneur relief allows a business person to pay CGT at a lower rate of 10% on the first €1 million in chargeable gains, i.e. the actual “profit” realised by the sale rather than the proceeds of the sale.

While these reliefs are very frequently used an important amendment introduced by Finance Act 2017, makes significant changes to the operation of these reliefs and the changes apply from **2nd November 2017**.

In the context of the incorporation of a business or the transfer of shares in a holding company, these changes are particularly relevant.

The main point of the changes is to deny the revised entrepreneur relief and/or retirement relief in situations **where goodwill of a business or shares in a company are disposed of to another company which is connected to the person making the disposal immediately after the disposal, unless the transaction is undertaken for bona fide commercial reasons and does not have as its main purpose (or one of its main purposes) the avoidance of a liability to tax.**

In other words, if a business person transfers either the goodwill of his or her trade or shares in a trading company to another company which he or she controls, then this could mean that the business person may not be able to claim retirement relief or revised entrepreneur relief in respect of that transfer.

In addition, where a person incorporates a business in exchange for shares in a company, no upfront charge to capital gains tax arises to the extent that the consideration is shares in the relevant company. However, where the consideration also includes other elements (e.g. the company pays cash or takes over certain debts) the gain is not relieved from capital gains tax unless it can be shown that the transaction is undertaken for bona fide commercial reasons **and** does not have as its main purpose (or one of its main purposes) the avoidance of a liability to tax. It used to be the case that entrepreneur relief and/or retirement relief could apply to the unrelieved portion of the gain.

Revenue has updated its manuals to reflect these legislative changes. However Revenue has not yet issued detailed guidance on how these provisions are to be interpreted or applied, and it is unclear what will be accepted as constituting bona fide commercial reasons. Generally speaking and by way of example, if one undertakes an incorporation to take advantage of limited liability or takes part in a restructuring transaction to segregate different business interests for risk management purposes, we would expect that the bona fide commercial test has been met. The key point is that the tax payer must be in a position to articulate a credible commercial reason for undertaking the transaction.

Where there is any doubt as to whether or not a proposed transaction may fall within the scope of the new provisions, it is best to seek expert tax advice so that a judgement can be made based on the facts of the case. In addition, a qualified tax advisor is often in a position to liaise with Revenue in order to seek advanced confirmation that the new provisions do not apply to a transaction.

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