

Clause 9

Briefing Note from the Chartered Institute of Taxation for Finance Bill 2017-19

Life insurance policies: recalculating gains on part surrender etc

1	Key concern – lack of key safeguard in the exercise of a discretionary remedy by HMRC
1.1	This measure provides a mechanism to remove the disproportionate tax charges that can arise from partial surrenders of life insurance investment policies. Clause 9 makes provision for a policyholder who has inadvertently triggered ‘a wholly disproportionate gain’ to apply to an officer of HMRC to have their gain recalculated on a ‘just and reasonable’ basis.
1.2	Our key concern is that the measure is not backed by the fundamental safeguard of a statutory right of appeal to the First-tier Tribunal on the officer’s decision of what constitutes a just and reasonable basis of recalculation.
1.3	Although it is helpful that the clause includes non-exhaustive factors that the officer may take into account in considering whether the gain is wholly disproportionate, the application of the remedy depends upon an individual HMRC officer’s view, without recourse to appeal other than via (often prohibitively expensive) judicial review.
1.4	We see no reason why express legislative provision for the right of appeal to the First- tier Tribunal for this discretionary remedy should not be made. Indeed there is precedent elsewhere in the tax system for doing so where an officer exercises a discretion (for example ¹ the apportionment of a Controlled Foreign Company’s chargeable profits and creditable tax under TIOPA 2010 section 371QC(2) (determination on a just and reasonable basis)). We would not anticipate that making statutory provision for an appeal would put additional demands on the tribunal because the numbers are likely to be so low. ² The provision of HMRC guidance to support the exercise of the discretion will be helpful but is no substitute for the right to appeal to the tribunal. Given that many taxpayers who have incurred disproportionate gains in the past have been older people on low incomes, often misled by negligent or rogue advisers, judicial review would be inaccessible and unaffordable for them so that if a right of appeal were denied them, their only realistic remedy would be an order for rectification in the Upper Tribunal, in similar manner to <i>Joost Lobler</i> (see 2.1 below).

¹ Other examples are Regulation 12(4) of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 and FA 2004 section 209 (unauthorised payments surcharge).

² The number of individuals expected by HMRC to apply for a recalculation is less than 10 a year. Therefore the number who apply but are refused and therefore may wish to appeal, if that right were to be available, should be very small in number.

1.5	It would be helpful if the Government could explain the reasoning for not making express legislative provision for a right of appeal - a fundamental safeguard in the exercise of a discretionary remedy.
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2	Further background
2.1	The present taxation regime can crystallise crippling tax liabilities in the case of partial surrender of life insurance investment policies. In the case of <i>Joost Lobler</i> in 2015, the taxpayer faced an effective tax rate of more than 700 per cent on a partial surrender. A relatively small number of taxpayers are potentially affected. However elderly or retired taxpayers are affected particularly harshly. These individuals may have invested life savings or proceeds on downsizing their house under the (wrong) impression that these products are suitable for low-risk, short-term investment.
2.2	The Finance Bill measure follows formal consultation in 2016 that set out various options for reform. None of these options were finally adopted by the government on the grounds that there are now a small and shrinking number of cases of disproportionate gains due to changes in UK industry practices and the UK regulatory environment. Instead the government chose to legislate a discretionary remedy.

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