

## Company reconstructions without change of ownership

### Part 12-03-04

This document should be read in conjunction with section 400 of the Taxes Consolidation Act 1997

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## 1. Introduction

Section 400 of the Taxes Consolidation Act 1997 (“TCA 1997”) provides that the right to:

- capital allowances (and liability to balancing charges),
- relief for losses forward, and
- relief for deemed borrowing costs or total spare capacity under the Interest Limitation Rules in Part 35D,

are to be carried over from one company to another where a company ceases to carry on a trade and thereafter another company carries it on, provided that there is substantial identity in the ownership of the trade before and after the change. Where the conditions of the section are fulfilled, the successor company in effect “steps into the shoes” of the predecessor company for the purposes of capital allowances, balancing charges, losses forward and deemed borrowing costs or total spare capacity under the Interest Limitation Rules in Part 35D.

This treatment applies only for the specific purposes mentioned, i.e.,

- the allowances and charges (provided for by sections 307 and 308 TCA 1997),
- the carry forward of losses (under section 396(1) TCA 1997),
- the carry forward of deemed borrowing costs (under section 835AAD TCA 1997), and
- the carry forward of total spare capacity (under section 835AAE TCA 1997).

Thus, for example, section 400 TCA 1997 does not affect the application of section 91 TCA 1997, to debts which are recovered by, and for which an allowance has been given to, the predecessor.

Section 400 TCA 1997 does not apply to the transfer of a trade to an individual or to a partnership of individuals, who will accordingly be dealt with under the commencement provisions without the benefit of any unused losses of the company.

Where, in the case of a company which had accumulated losses or total spare capacity available for carry forward, the shares in the successor company are later sold, the provisions of section 401 TCA 1997 (Change in ownership of company: disallowance of trading losses) may come into effect.

## 2. Conditions

Section 400 TCA 1997 applies when a company ceases to carry on a trade and another company begins to carry on the trade and -

- a) an interest in the trade of at least 75% belongs to the same persons at sometime within one year before the change or at sometime within two years after the change; and
- b) during the period of time when the ownership test in (a) is satisfied, the trade is carried on only by a company or companies within the charge to corporation tax. (This condition would not be satisfied if, for example, at any time within the period the trade was carried on by an individual or a partnership of individuals.)

## 3. Ownership

The tests of ownership are set out in section 400(1) to (4) TCA 1997, which for the purposes of the section provides -

- (a) that -
  - (i) a trade carried on by two or more persons, for example by companies in partnership, is to be treated as belonging to them in the shares in which they are entitled to the profits;
  - (ii) a trade or interest therein belonging to a trustee (otherwise than for charitable or public purposes) is to be treated as belonging to the persons (see **(d) below**) for the time being entitled to the trust income;
  - (iii) a trade or interest therein belonging to a company is, where the result of so doing is that the 75% test is satisfied, to be treated in any of the ways permitted by section 400(2) TCA 1997 (**see (b) below**);
- (b) that the trade or interest therein may be regarded -
  - (i) as belonging to the persons owning the ordinary share capital of the company in proportion to their holdings of that capital; or
  - (ii) when a company is a subsidiary company (**see (c)(ii) below**), as belonging to its parent company or the persons owning the ordinary share capital of the parent company in proportion to their holding of that capital;

and that any ordinary share capital owned by a company may be regarded for the purposes of the 75% test as owned by a person or body of persons controlling the company;

- (c) that, for the purposes of (section 400(2) TCA 1997 (see (b) above) -
- (i) the ownership of shares has to be beneficial ownership. As regards companies in liquidation, see par. 7;
  - (ii) a company is a subsidiary of another if 75% or more of its ordinary share capital is owned by that other directly or through other companies;
- (d) that, in determining whether or to what extent a trade belongs at different times to the same persons, relatives (defined as meaning husband, wife, civil partner, ancestor, lineal descendant, brother or sister) and the persons from time to time entitled to the income under any trust are to be treated as a single person, i.e., in comparing the position before with that after a change.

Thus, if A and B are brothers and each owns a 50% interest in X Ltd. before its trade is transferred to Y Ltd. in which C and D who are sons of A each owns a 50% interest, A, C and D (but not B, C and D) will be treated for the purposes of the 75% test as a single person. The common interest will accordingly be 50% and section 400 TCA 1997 will not apply. If, however, the 50% interest in Y Ltd. after the transfer were owned by C and E (a son of B) respectively, section 400 TCA 1997 would apply, since A and C would be treated as a single person, as would B and E.

#### 4. Third company

If a trade is transferred from one company to another and the ownership test is not satisfied but, within two years, a third company takes over the trade and the ownership test in relation to the first and third companies is at that time satisfied, both changes are governed by section 400 TCA 1997 (see however section 6(c) of this manual regarding terminal losses). The same result follows if the ownership test in relation to the first and third companies is not satisfied until a date after the second change, provided that this date is within two years of the first change. In either case, the second change will be “within the period taken for the comparisons”.

##### **Example**

Mr. X owned all the shares in A Ltd. until 1 July 2013, when he sold them. On 1 January 2014, A Ltd. transfers its trade to B Ltd., in which it owns 50% of the ordinary share capital. On 1 September 2015, B Ltd. transfers the trade to a third company C Ltd. On 1 December 2015, Mr. X (who owned all the shares in A Ltd. up to 1 July 2013) acquires 75% of the ordinary shares in C Ltd.

In relation to the first change, Mr. X provides the link and “the period for the comparison” is 1 July 2013 to 1 December 2015. As the third company took over the trade within this period, both changes are within section 400 TCA 1997.

## 5. Transfer of a trade or part of a trade

Section 400 TCA 1997 extends to -

- (a) a trade which is carried on, after transfer from company to company, as part of another trade;
- (b) a part of a trade which is given up, transferred to another company and thereafter carried on as a trade or part of another trade.

Section 400 TCA 1997 may also apply where one company ceases to carry on a trade and another company thereafter carries on part of the trade as its trade or part of its trade. This will include the case where a company transfers its trade to a partnership some or all of the partners in which are companies. Each partner that is a company will then be regarded, for the purposes of section 400 TCA 1997, as carrying on part of the predecessor's trade as its trade, i.e., the "several" trade under section 1008 TCA 1997.

Where part of a trade is to be treated as a separate trade for section 400 TCA 1997 purposes, any necessary apportionments of receipts and expenses are to be made in accordance with section 400(12) TCA 1997. Section 400(13) TCA 1997 applies to any such apportionments. Where an apportionment is material to two or more companies, the effect of section 400(13) TCA 1997 is to ensure that the same basis of apportionment is applied to all the companies concerned. Where a company is aggrieved by a determination of such apportionment it can appeal the determination to the Appeal Commissioners within 30 days after the date of the notice of determination.

## 6. Computational adjustments

Where section 400 TCA 1997 applies, the following computation adjustments are to be made:-

- (a) Capital allowances (section 400(6) TCA 1997).** Allowances and charges provided for by section 307 and 308, which would have been made to or on the predecessor, are to be made to or on the successor, and computed as if the successor had been trading since the predecessor began to do so.

In situations where the whole of the predecessor trade transfers to the successor it triggers the end of an accounting period for the predecessor. In those scenarios the predecessor is entitled to capital allowances calculated by reference to the length of the last accounting period.

In situations where only part of the trade transfers and the transfer occurs during an accounting period rather than at the end of an accounting period, capital allowances cannot be split between the predecessor and successor by reference to the respective lengths of the accounting period in which they have held the trade.

Rather, in those cases and subject to the relevant conditions being satisfied, the successor is entitled to claim capital allowances by reference to the entire accounting period during which the transfer takes place.

- (b) Balancing allowances and balancing charges (section 400(6) TCA 1997).** Where, at the time of the transfer of the trade, assets used for the purposes of the trade are transferred to the successor, the transfer will not give rise to either balancing allowances or balancing charges.
- (c) Loss relief under sections 396/396A/396B TCA 1997 (section 400(7) 1997).** Subject to any claim by the predecessor under section 396(2) TCA 1997, section 396A(3) TCA 1997 or section 396B(2) TCA 1997, trading losses made by the predecessor may be claimed under section 396(1) TCA 1997 against trading income of the successor to the extent that the predecessor could have claimed them if it had continued to carry on the trade. If the trade taken over is amalgamated with an existing trade, relief under this provision is to be restricted to the income attributable to the trade taken over.
- (d) Terminal loss relief under section 397 TCA 1997 (section 400(9) TCA 1997).** If the successor ceases to carry on the trade within four years of the transfer and makes a claim under section 397 TCA 1997, any balance of relief which cannot be given to the successor may be given to the predecessor as if the predecessor had carried on trading and ceased when the successor did. The predecessor can also claim for any loss made before the transfer if the successor ceases within one year. Otherwise, the predecessor has no claim and if there are successive transfers only a cessation by the last owner of the trade gives rise to terminal loss relief.
- (e) Bond-washing (section 400(8) TCA 1997).** Securities held as trading stock are to be treated as if sold by the predecessor to the successor at market value for the purposes of section 748 TCA 1997.
- (f) Relief for deemed borrowing under section 835AA TCA 1997 or total spare capacity under section 835AAE TCA 1997 (section 400(7A) TCA 1997).** Where at the time of the transfer of a trade, the predecessor is entitled to carry forward an amount of deemed borrowing cost or spare capacity to future accounting periods, the successor will be entitled to carry forward that amount of deemed borrowing costs or total spare capacity and make the necessary claims for relief where appropriate. Further details on the operation of the Interest Limitation Rules, including deemed borrowing costs and total spare capacity, are available in [Tax and Duty Manual \(TDM\) Part 35D-01-01](#).

## 7. Liquidation

When a company goes into liquidation, it loses its beneficial ownership in shares owned in other companies (see *Ayerst v. C. E K. (Construction) Ltd.* 50 T.C. 651). Where in a liquidation case it is contended that succession occurred before the liquidator was appointed, the document under which the succession took place should be called for. If this document is dated after the winding-up order and it is claimed that succession took place at an earlier date, evidence of a **de facto** succession should be called for but in no case should this be accepted without first consulting Business Taxes Policy and Legislation Division of RLS via the Revenue Technical Service<sup>1</sup>.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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<sup>1</sup> Guidance on how to raise a query via the Revenue Technical Service is available in: TDM [Part 37-00-00a](#)