

Transfer of Relevant Interest by way of Long Lease

Part 09-01-02

This document should be read in conjunction with section 279 of the Taxes Consolidation Act 1997

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Introduction

Capital allowances are available in respect of capital expenditure incurred on the construction or refurbishment of certain industrial buildings or structures as defined in Section 268 TCA 1997. In general, allowances can only be claimed by the person who has incurred the capital expenditure. That person is said to hold the relevant interest (as defined in section 269 TCA 1997) in relation to the expenditure incurred by him or her on the particular building or structure. There is an exception to this general rule in section 279 TCA 1997 where a newly constructed building is sold unused or within a year of first being used, or where the sale takes place on or after 14 October 2008, within two years of first being used¹. The purchaser (even though not having actually incurred the construction expenditure) is entitled to capital allowances and, in effect, is deemed to have incurred capital expenditure on the construction of the building or structure when the purchase price is payable and not when the actual construction expenditure was incurred.

1. Revenue practice

Notwithstanding the general position that the relevant interest for capital allowances purposes can only be transferred when the conditions in section 279 TCA 1997 apply, Revenue allows the relevant interest in an industrial building or structure to be transferred by way of a long lease of at least 999 years for Industrial Buildings Allowance purposes in the case of qualifying premises provided the following conditions are met:

- All parties to the transaction are identified to Revenue,
- Revenue is satisfied that the interest acquired by “the purchaser” is substantially the whole of the interest enjoyed by “the vendor” prior to the sale,
- Revenue is satisfied that the interest retained by the “vendor” is negligible,
- Revenue receives the written consent of both parties that the relevant interest has been transferred for all purposes relating to capital allowances and balancing allowances/charges and such consent is in an agreed format (please see text below), and
- All other conditions of the legislation are met.

Format of written consent

“it is hereby agreed by [lessor] that, by virtue of the lease entered into on [date], the relevant interest in the property which is the subject of the lease by [lessor] to [lessee] is deemed to have been transferred for all the purposes relating to industrial buildings allowances and balancing allowance/charges.”

¹ Section 19 Finance Act (no 2) 2008

2. Intention of practice

The references to “vendor” and “purchaser” indicate that a long lease is considered to be akin to the transfer of a freehold interest in so far as the outcome of the transaction is concerned. The practice is intended to provide for a situation where a long lease puts the lessor and the lessee in effectively the same position as they would be if the freehold interest had been fully transferred. The lessee should be in substantially the same position in relation to the leased building after the lease has been created as the lessor was before the lease was created. The only interest retained by the lessor should be the reversionary interest after the term of the lease has expired.

It is intended that the practice should apply to genuine long leases and not to leases which, while drawn up as a long lease are structured in such a way as to provide the option of terminating the lease once the transferred capital allowances have been claimed by the lessee. Such options to terminate the lease prematurely, or other restrictive conditions, do not accord with the terms of the practice whether they are formally part of the lease or a ‘side agreement’.

Revenue has given opinions that conditions attached to a transaction such as a put and call option confer a substantial interest in the building on the lessor and place a substantial restriction on the lessee’s interest in the building. In the case of a put and call option, the exercise of either, or both, of those options can cause the building to be transferred back to the lessor before the expiry of the lease term. In such a situation, the interest acquired by the “purchaser” cannot be said to be substantially the whole of the interest enjoyed by the “vendor” prior to the creation of the lease or that the interest retained by the “vendor” is negligible. In such circumstances, the conditions of the practice are not met and the relevant interest is not transferred to the lessee.

3. Agreement for lease

The practice applies only to actual 999 year leases and not to ‘agreements for a lease’.