

# write news

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# Entrepreneurs' Relief - an increased incentive to grow your business

In the Emergency Budget George Osborne announced major tax changes which the new coalition Government hopes will incentivise entrepreneurs and companies to grow and develop their businesses.

## Entrepreneurs' Relief

Although the normal rate of capital gains tax (CGT) increased from 18% to 28%, the Government retained and improved entrepreneurs' relief. If an entrepreneur sells a trading business, subject to satisfying the conditions required to claim entrepreneurs' relief, the first £5 million of capital gains he makes in his lifetime will only be taxed at 10%! Prior to the budget the relief only applied to the first £2 million of lifetime capital gains.

The conditions you must satisfy are as follows:

1. The sale must relate to a trading business or company.
2. In the case of a company the entrepreneur must hold at least 5% of the voting shares.
3. The business interest must have been held for at least a year.
4. The entrepreneur must have been an employee or director for at least one year prior to the sale.

## Reductions to Corporation Tax

There was also a welcome reduction to the main and small companies' rate for corporation tax (CT): the main rate being reduced by 1% per annum (eventually taking it down to 24%) and the small companies' rate being reduced to 20% from April 2011.

## Income Tax

Despite the changes to CGT and CT, no changes were made to income tax (IT) and the Government stated it does not have any current plans to reduce the new 50% higher rate of IT payable on income over £150,000 per annum.

Given the increase in entrepreneurs' relief, the reduction in CT but the retention of 50% higher-rate IT, the Government hopes entrepreneurs will be incentivised to retain profits in their companies to grow the capital of their business.

## Entrepreneurs' Relief Planning

Entrepreneurs should be aware that each member of their family has a £5 million lifetime entrepreneurs' relief allowance. Given this, it is often possible to structure family shareholdings in such a way that gains well in excess of £5 million will only attract 10% CGT.

You should note that there are some "traps" that can result in you being unable to claim entrepreneurs' relief on all the proceeds of a company or business sale. In particular, in certain circumstances, deferred or earn-out consideration may not attract entrepreneurs' relief unless it is structured in the right way.

## Planning your exit

Ask any serial entrepreneur for a "top tip" and they will surely tell you that one of the main rules to abide by is to plan your exit properly and early. In the same manner that you would plan to start your business, you should also plan for your exit - the overall aim being to grow the capital value of your business. Planning will also mean that there will be less of the distracting "grooming your business for sale" at the relevant time.

Some of ways to enhance value in your business will be second nature to you: being agile in your business sector and taking advantage of opportunities as and when they arise. In addition, there are some general and perhaps more long-term/"helicopter view" strategies which may be employed, for example:

- Bear in mind that your business will always be harder to sell if you fail to build in any inherent value in it or if the bulk of the value rests with you, the entrepreneur. You should therefore try to build your business so that it is or becomes self-sufficient or is in a position to manage itself profitably whether or not you are there.
- Always be realistic in planning your exit goals (that is not to say you cannot be aspirational, but the goals must be achievable).
- An important factor to obtaining the best price for

your business is exiting at the right time. The right time is not only the general economic climate but also the right time for the business itself. Many sellers wait until the business stops growing before they exit or have an exit forced upon them due to business or personal circumstances (for example, retirement). A buyer paying a high multiple will want to see that there is further growth potential in the business.

### Having the right team

In order to allow you as business entrepreneurs to concentrate on your strengths (maximising growth and developing opportunities), you need to ensure that you have the right team and professionals working with you from day one. They can give you guidance and support where needed and alleviate some of the pressures that day-to-day management may bring, especially to owner-managed businesses. By this, we mean having the right management team, accountants and (obviously) solicitors. They will ultimately bring value to your business on a sale: the management team should provide proper management structure and operational benefits; the accountants should be able to guide you and the management team with regard to the performance and tax position of the business; the lawyers should be able to guide you on all contractual, legal and HR matters. Having all these in place early and using them properly will mean that your business will be better placed at the time of sale.

### The Budget in hindsight

In conclusion, despite the "tough but fair" characteristics of the Budget, we feel that now is an opportune time for entrepreneurs to look at opportunities and grow their business (or, if this is not possible, streamline their business, making it more profitable); the ultimate goal being to take as much advantage as possible from the current generous entrepreneurs' relief lifetime allowance.



## Cross Border Litigation

In this age of increasing globalisation and with cross border trade being more accessible due to the internet, it is becoming increasingly common for commercial litigation disputes to have a foreign element. The process of pursuing an individual or company out of the jurisdiction is different to pursuing an individual or company in England and it is necessary to take extra care to ensure that the correct processes and procedures are followed.

### Prior to Issuing Proceedings

The first stage is to consider whether the English Courts have jurisdiction to deal with the dispute and whether English law is the correct law to apply. A written agreement or terms and conditions should contain a choice of law and jurisdiction clause stating which Courts will deal with any dispute and which country's law will apply. In nearly all cases we would advise that the English Courts and English law should govern the contract.

If there is no such clause the parties have to rely on the rules of international law to determine the correct forum for the dispute and the applicable law. There are different rules depending upon whether the Defendant is based in the European Union ("EU") or elsewhere in the world. Fortunately, there are conventions that harmonise rules across the EU member states but case law governs what happens elsewhere in the world.

Assuming the English Courts have jurisdiction and English law governs the dispute, if the Defendant is outside of the jurisdiction and not domiciled in the EU then the Claimant must seek the Court's permission to serve Court

proceedings on the Defendant. To obtain the Court's permission it will be necessary for the Claimant to show (1) that the claim falls within one of a number of categories, (2) that the claim has reasonable prospects of success and (3) that England is the proper place to bring the claim.

Even though permission may be granted the Defendant may still dispute that the English Courts have jurisdiction to hear the dispute.

### Serving Proceedings

It is important to ensure that the proceedings are validly served because at the enforcement stage if the foreign Court does not consider that service has been effected properly it will refuse to recognise the English judgment. Recognition of the judgment is vital if the judgment is to be enforced against assets based abroad. In certain countries it is mandatory to have the proceedings translated into the country's official language. It is strongly advisable not to post the Court documentation to the Defendant. Instead, it is advisable to consider the rules for the relevant country and in many cases papers should be served through the Foreign Process Section of the High Court in London who contact the equivalent agency in the country who will take receipt of the papers and serve them according to local rules. This process often takes 3 months or more. Other methods of service include using local government agencies or consulates.

### Enforcement

Once a judgment has been obtained it can be enforced against a Defendant's assets. If the Defendant has no assets within the jurisdiction of England and Wales the judgment will need to be enforced in the jurisdiction where the Defendant's assets are located. There are rules that govern EU states which simplify the procedure for recognition and enforcement of English judgments abroad. The UK also has reciprocal recognition and enforcement of judgment arrangements with all commonwealth countries. There are many countries that the UK does not have reciprocal enforcement arrangements with in which case the law of that country will apply. The USA is by far the biggest trading partner with no formal arrangements and although US case law does support some recognition and enforcement of English judgments it is currently necessary to commence fresh litigation in the US to sue upon an English judgment. Encouragingly, the USA has showed political willingness to enter into a convention that provides a framework for not only recognition and enforcement of foreign judgments but also jurisdictional issues and choice of law.

If you regularly contract with individuals or companies abroad or have a cross border dispute then it is necessary to consider all of these factors very carefully. Neil Myerson LLP are able to advise on all types of cross border litigation and have substantial experience in dealing with these matters. Please contact Tim Norman or Adam Maher for further information.



# Bribery

The Bribery Act (the “Act”) was enacted on 8 April 2010 and has significant implications for businesses in the UK. The Act will come into force in April 2011. Prior to its implication, the Ministry of Justice (“MOJ”) will publish guidance on procedures that will need to be put in place to comply with it. Whilst the provisions of the forthcoming MOJ guidance have not yet been published, it is still important to prepare now for the Act coming into force.

The Act will replace the current offences under UK bribery laws with two general offences of paying or receiving bribes and will create two specific offences: the bribery of foreign officials and the failure of commercial organisations to prevent bribery.

The offence of commercial organisations failing to prevent bribery occurring within the organisation represents the biggest shift from the old law on bribery. Commercial organisations must familiarize themselves with this new offence in order to ensure that their internal procedures for preventing bribery are robust enough for when the Act comes into force.

The Act provides that a “relevant commercial organisation” (which includes both companies and partnerships carrying on a business) will be guilty of this offence if a person associated with the organisation bribes another person, intending to obtain or retain business or a business advantage for the organisation. A person “associated with the business” is defined as someone who performs services for or on behalf of the commercial organisation, and so can include an employee, agent or subsidiary. The penalty for a commercial organisation committing this offence is an unlimited fine.

The defence to this offence is to show that the commercial organisation had “adequate procedures” in place to prevent bribery. The Act does not define “adequate procedures” but the MOJ propose to issue guidance on this prior to the implementation of the Act.

Until the MOJ guidance is published, commercial organisations may wish to consider taking the following steps:

- Ensure that senior managers and directors understand the bribery offences, particularly that of failing to prevent bribery within the organisation. Senior managers and directors also need to make sure that employees and third party partners are aware of the consequences of breaching the Act. Moreover, organisations could consider introducing compulsory training programmes for employees. It may be appropriate to tailor training needs to particular job roles.
- Consider undertaking a risk assessment of the business. Directors should consider the nature and extent of the risk to which the organisation is exposed. This will depend largely on the sector and territories in which the organisation operates. Sectors such as construction, energy, oil, defence and IT are traditionally thought to be exposed to a greater risk.
- Review how they entertain potential customers. Whilst routine or inexpensive corporate hospitalitys are not likely to fall foul of the Act, organisations should consider reviewing their entertainment policy.
- Those organisations operating in particularly high risk sectors may also want to consider specifically incorporating prohibitions on bribery or accepting bribes into contracts of employment and contracts with third parties.

We will provide further information on the guidance which is published by the MOJ as and when it is available. In the meantime, if you have any queries, please do not hesitate to contact us.



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