CHAPTER 12

SOCIETAS EUROPAEA

12.1 Introduction

The Statute for a European company was adopted on 8 October 2004 allowing the formation of a special type of European company - a Societas Europaea (SE).

An SE is a company which is an entity for residents of EU Member States with a presence in more than one EU Member State. The SE will be taxed according to the law of the Member State in which it is resident. Each SE has to be registered in one Member State and the Regulations are structured so that the rules applying to an SE are in many cases identical to the law applicable to public companies in the Member State of registration, therefore an SE registered in Great Britain will operate under broadly the same legal framework as a plc.

The idea is that companies operating in more than one member State now have the chance to be established as a single company under Community law. This will mean they are able to operate throughout the EU with one set of rules and a unified management and reporting system, rather than all the different national laws of each Member State where they have subsidiaries.

An SE can be formed:

- by a merger of public companies with registered offices and head offices in the EC;
- by formation of an SE as a holding company to acquire public or private limited companies with registered offices and head offices in the EC;
- by formation of an SE as a subsidiary, whose share capital is subscribed for by public or private limited companies with registered offices and head offices in the EC; and
- by the transformation of an existing public company with a registered office and head office in the EC, provided that it has had a subsidiary company in another Member State for at least two years.

In each case, at least two of the existing companies involved must be governed by the laws of different Member States. In the case of transformation, the SE must register in the same Member State as the original public company.

The rules we will look at in this chapter apply to formation of an SE on or after 1 April 2005.

12.2 Residence

CTA 2009, s.16(2)&(3)

If a Societas Europaea transfers its registered office to the UK it is treated as UK resident for tax purposes, and remains so even if it subsequently transfers its registered office outside the UK.

FA 1998, Sch 18 para 87A

If a company ceases to be UK resident following the formation of an SE by merger, the corporation tax self-assessment provisions continue to apply in relation to returns, liabilities, etc before that time as if the company was still UK resident or, if the company has ceased to exist, as if the SE were the company. The same applies if an SE transfers its registered office from the UK and ceases to be UK resident

12.3 Capital gains tax

TCGA 1992, s.140E

As an SE can be formed by merger we need special rules to deal with the capital gains tax position

S.140 E TCGA 1992 applies if an SE is formed by the merger of EU companies not all of which are resident in the same member state, where s.139 TCGA 1992 does not apply.

Qualifying transferred assets are transferred a 'no gain, no loss' basis.

A 'qualifying transferred asset' is an asset transferred to the SE as part of the merger, subject to the following conditions:

(i) the transferor must be UK resident at the time of transfer, or be carrying on a trade in the UK through a permanent establishment in the UK, such that gains on asset disposals immediately before the transfer would form part of profits chargeable to corporation tax;

(ii) the SE must be UK resident on formation, or carry on a trade in the UK through a permanent establishment in the UK such that gains on asset disposals immediately before the transfer would form part of profits chargeable to corporation tax.

This treatment is only allowed if the formation is for bona fide commercial reasons and not part of a scheme or arrangement to avoid corporation tax, capital gains tax or income tax.

Clearance can be applied for under s.138 TCGA 1992

Where two other conditions are met s.140F TCGA 1992 provides for allowable losses arising in the UK resident company on the transfer to be deducted from the gain arising; in addition the transfer is treated as giving rise to a single gain.

The conditions are that:

(i) a UK resident company transfers to a company resident in another member state all assets and liabilities relating to a business which the UK company carried on through a permanent establishment in a member state other than the UK.

(ii) the UK company chargeable gains on the transfer exceed any allowable losses.

Relief from capital gains tax is also given at shareholder level by following the rules of s.136 TCGA 1992.

TCGA 1992, s.140G

Again the bona fide commercial reason test applies.

12.4 IFAs

CTA 2009, s.821 -823

Where an SE is formed by the merger of EU companies not all of which are resident in the same member state, where s.818 CTA 2009 (company reconstructions) does not apply, transfers of qualifying IFAs are treated as being tax neutral.

An asset is a qualifying transferred asset if:

(a) it is transferred as part of the process of the merger,
(b) it is a chargeable intangible asset in relation to the transferor immediately before the transfer, and
(c) it is a chargeable intangible asset in relation to the transferee immediately after the transfer.

The formation of the SE must be for bona fide commercial reasons and not part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.

CTA 2009, s.831

12.5 Loan Relationships and Derivatives

CTA 2009, s.431

Where an SE is formed by the merger of EU companies not all of which are resident in the same member state and either:

(i) immediately after formation the SE is resident in the UK and within the charge to corporation tax; or
(ii) immediately after formation the SE is not resident in the UK but is within the charge to corporation tax in accordance with section 5 of CTA 2009.

the transfer, in the course of the merger, of an asset or liability which represents a loan relationship shall be disregarded except:

(*a*) for the purpose of determining the debits or credits to be brought into account in respect of exchange gains or losses and identifying the company which is to bring them into account; and

(*b*) for the purpose of identifying the company in whose case a debit or credit, which does not relate to the transfer, is to be brought into account.

The transferor and the transferee companies of an asset or liability which represents a loan relationship are deemed to be the same company thus allowing the transfer to be treated in the same way as that between two UK companies.

If the transferor company uses fair value accounting for the loan relationship, the transfer is not disregarded. Both the transferor and transferee companies must apply a fair value basis.

These rules only apply if the formation of an SE by merger is effected for bona fide commercial reasons, and it does not form part of a scheme or arrangement the main purpose or one of the main purposes of which is avoiding liability to corporation tax, capital gains tax or income tax.

Advance clearance can be applied for.

Similar rules apply to derivatives.

CTA 2009, s.682

12.6 Capital Allowances

CAA 2001, s.561A

The rules apply to circumstances in which s.140E TCGA 1992 as set out above is in point. It also applies to mergers forming an SE that fall within s 139.

The transfer of a qualifying asset does not give rise to an allowance or charge under CAA 2001.

An asset is a 'qualifying asset' if it is transferred to the SE in the merger. In addition, the transferor and transferee SE must be UK resident, or the asset must be an asset of their permanent UK establishment.

The effect is that the transferee 'stands in the shoes' of the transferor in relation to the assets, and the company reconstructions without change of ownership rules s.940 CTA 2010 don't apply.

12.7 Groups

For CGT purposes if the principal company of a group becomes an SE then that group plus any group of which the SE is a member on formation is regarded as the same for the purposes of the group provisions.

TCGA 1992, s.170(10A)

Similar provisions apply for IFA purposes.

CTA 2009, s.770

S.116 TCGA 1992 (reorganisations) is extended to take account of mergers falling within s.140E set out above.

The rules we looked at in an earlier chapter relating to the postponement of gains on transfer of assets to a non UK company have been amended to take account of SEs.

TCGA 1992, s.140(6B)

The transfer of securities to the SE is disregarded for the purposes of s.140(4) (under which deferred gains are brought into charge on a disposal of securities). The SE is treated as the transferor company, firstly on any subsequent disposal of the securities, and secondly on a disposal by the transferee company of assets to which s.140(5) applies (i.e. the six year rule for bringing deferred gains back into charge on relevant asset disposals).

Amendments have been made to holdover rules for depreciating assets, for mergers forming an SE within s.140E.

The transfer to an SE of the replacement asset or shares in a company holding that asset are disregarded for the purposes of s.154(2) TCGA 1992 (which determines the earliest time at which the held over gain on the original asset accrues), and an SE holding asset No 2 is treated as the claimant for those purposes.

TCGA 1992, s.154(2A)

If the SE holds shares in the company holding asset No 2, s.175 TCGA 1992 (Replacement of business assets by group members) applies as if the SE's group is the same as any group of which the claimant was a member before the SE's formation.

In a merger forming an SE within s.140E if a member of a group (Group 1) ceases to exist and assets or group member shares are transferred to the SE the company which has ceased to exist or the group member shares transferred are not treated as having left Group 1.

TCGA 1992, s.179(1B)

The SE and the company that has ceased to exist are treated as the same company and if the SE is a member of a group (Group 2) following its formation, a company that was a member of Group 1 and became a member of Group 2 due to the SE's formation will be treated as if both groups were the same.

TCGA 1992, s.179(1C)

The rules on pre entry capital losses have been extended to include SEs.

TCGA 1992,Sch 7A Para 1 (3A)(aa)