

CHAPTER 4

ENTREPRENEURS' RELIEF

4.1 General conditions

Entrepreneurs' relief is a CGT relief available to taxpayers who sell or give away their businesses.

The relief is available where there is either:

- 1) A "material disposal" of "business assets"; or TCGA 1992,
s.169I
- 2) A disposal which is "associated" with a material disposal; or TCGA 1992,
S.169K
- 3) A disposal of trust business assets (not covered in this chapter). TCGA 1992,
S.169J

In most instances entrepreneurs' relief will be available to:

- a) **Sole traders and partners** selling the whole or part of their businesses. This will include **furnished holiday lettings**; and
- b) Company **directors and employees** who sell a "**material stake**" in a qualifying company. A "material stake" means that the shareholder **works for the company** and is able to exercise **at least 5%** of the voting rights.

We will look at the detailed conditions later.

Entrepreneurs' relief must be claimed **within four years of the end of the tax year of the disposal**, i.e. no later than 5 April 2015 for disposals in 2010/11.

TCGA 1992,
S.169M

4.2 Operation of the relief

The aim of entrepreneurs' relief is to **reduce the rate of capital gains tax paid by taxpayers on qualifying disposals to 10%**. Gains are eligible for entrepreneurs' relief up to a maximum lifetime limit which is currently £5 million (discussed later).

As a result of the changes to the rate at which capital gains tax is paid following the second Budget of 2010, the manner in which the relief is given changed for disposals occurring on or after 23 June 2010.

Disposals before 23 June 2010

For disposals taking place before 23 June 2010, relief is given by **reducing qualifying gains by 4/9ths**.

TCGA 1992,
S.169N

The remaining 5/9ths of the gain is treated as a normal gain and (ignoring any available annual exemption) will be taxed at the flat rate of 18%. This gives an effective rate of 10%.

Illustration 1

Ian Robinson is the managing director and sole shareholder of Ganymede Ltd, a small printing company. On 1 June 2010 he sold his shares in the company making a gain of £720,000. He also sold a painting on 15 June making a gain of £36,000. He had not previously made any disposals qualifying for entrepreneurs' relief.

Ian's taxable income for 2010/11 was £25,000.

The gain on the sale of the shares qualifies for entrepreneurs' relief. As the disposal occurred before 23 June 2010, relief is obtained by reducing the gain by 4/9ths.

His CGT due for 2010/11 is therefore as follows:

	£
Gain on sale of shares	720,000
Less: Entrepreneurs' relief (4/9 × £720,000)	<u>(320,000)</u>
	400,000
Gain on sale of painting	<u>36,000</u>
Chargeable gains	436,000
Less: Annual Exemption	<u>(10,100)</u>
Taxable gains	<u>425,900</u>
 CGT @ 18%	 <u>£76,662</u>

The entrepreneurs' relief leaves the taxpayer with an effective CGT rate of 10% (5/9 × 18% = 10%) on the sale of his business.

Disposals on or after 23 June 2010

For disposals on or after 23 June 2010, relief is given by taxing gains qualifying for entrepreneurs' relief **at a flat rate of 10%**, regardless of whether the taxpayer has any unused basic rate band.

TCGA 1992,
S.169N

When determining the rate of tax payable in respect of other gains, gains eligible for entrepreneurs' relief which are subject to tax at 10% are treated as using up any unused basic rate band in priority to other gains.

TCGA 1992,
S.4(6)

Illustration 2

Returning to Illustration 1, but this time we will assume that the disposals take place after 22 June 2010.

Ian Robinson is the managing director and sole shareholder of Ganymede Ltd, a small printing company. On 1 July 2010 he sold his shares in the company making a gain of £720,000. He also sold a painting on 15 July 2010 making a gain of £36,000.

He had not previously made any disposals qualifying for entrepreneurs' relief.

Ian's taxable income for 2010/11 was £25,000.

His CGT due for 2010/11 is now calculated as follows:

	Gains eligible for ER £	Gains not eligible for ER £
Gain on sale of shares	720,000	
Gain on sale of painting		36,000
Less: Annual Exemption		<u>(10,100)</u>
Taxable gains	<u>720,000</u>	<u>25,900</u>
<i>CGT:</i>		£
£720,000 @ 10%		72,000
£25,900 @ 28%		<u>7,252</u>
CGT payable		<u>79,252</u>

Although the level of Ian's taxable income means that some of the basic rate band is unused, this is allocated first to gains eligible for entrepreneurs' relief. Therefore, the gain on the painting is fully taxable at 28%. Note that the annual exemption is set against the gain taxable at 28% in order to minimise the tax liability.

4.3 Lifetime limit

Relief can only be claimed in respect of capital gains up to a lifetime limit. Individuals can claim relief for gains on **multiple occasions** until this limit is reached. Gains which exceed the lifetime limit are taxed as normal gains.

Any gains made before 6 April 2008 do not affect the lifetime limit.

The situation is made more complicated due to the fact that we have had 3 different lifetime limits since 2008, with 2 limit changes taking place in 2010/11.

For disposals **prior to 6 April 2010**, the lifetime limit on qualifying gains was **£1 million**. For disposals between **6 April 2010 and 22 June 2010**, the limit was increased to **£2 million**. For disposals occurring **on or after 23 June 2010**, the limit is **£5 million**.

Date of disposal:	Limit £
6 April 2008 to 5 April 2010	1 million
6 April 2010 and 22 June 2010	2 million
On or after 23 June 2010	5 million

In order to calculate the amount of qualifying gains eligible for relief in respect of each disposal, the **cumulative total of gains** which have obtained relief must be deducted from the lifetime limit at the date of disposal to see if any of the lifetime limit remains.

If an individual has made a gain which exceeded the lifetime limit at the date of the disposal, no additional relief will be available for the excess gain when the lifetime limit increases.

However, if further qualifying gains are made after the lifetime has increased, further relief will be available in respect of the later gains.

Illustration 3

Ellen Richardson owns and runs Chalice Ltd, a manufacturing company.

On 1 August 2010 she sold her shares in the company making a gain of £4,380,000 which qualifies for entrepreneurs' relief. She also sold a vase on 15 August 2010, making a chargeable gain of £9,600.

Ellen had claimed entrepreneurs' relief in 2008/09 in respect of an earlier gain of £1,240,000.

Ellen's taxable income for 2010/11 was £67,000.

The lifetime limit on gains eligible for entrepreneurs' relief was £1 million in 2008/09. Therefore £240,000 of the 2008/09 gain would not have obtained relief. The relief available in respect of the 2008/09 disposal is not increased as a result of the increase in the lifetime limit in 2010/11.

When calculating the amount of qualifying gain eligible for relief in 2010/11, the earlier gain which obtained relief of £1 million is deducted from the current lifetime limit of £5 million. This means that a further £4 million of gain is eligible for entrepreneurs' relief in 2010/11.

Her CGT due for 2010/11 is therefore calculated as follows:

	Gains eligible for ER £	Gains not eligible for ER £
Gain on sale of shares (W)	4,000,000	380,000
Gain on sale of vase		9,600
Less: Annual Exemption		<u>(10,100)</u>
Taxable gains	<u>4,000,000</u>	<u>379,500</u>
<i>CGT:</i>		£
£4,000,000 @ 10%		400,000
£379,500 @ 28%		<u>106,260</u>
CGT payable		<u>£506,260</u>
<i>Working:</i>		
Lifetime limit applicable @ 1.8.10		5,000,000
Less: used in 2008/09 (max £1 million)		<u>(1,000,000)</u>
Lifetime limit remaining 2010/11		<u>4,000,000</u>

4.4 "Material disposals" of "business assets"

TCGA 1992,
S.169I

Entrepreneurs' relief is essentially available to taxpayers who make a "material disposal" of "business assets".

A "business asset" means:

- a) The whole or part of a **sole trade or partnership business**; or
- b) A disposal of an **asset used in a business at the time the business ceases** to be carried on; or
- c) A **disposal of shares** (or securities, loan stock etc) in a company.

In the case of a) above, the individual must be disposing of the whole or part of his business. Therefore the **disposal of a single asset used in that business will not qualify** for entrepreneurs' relief.

A "material disposal" is defined as follows:

- a) In the case of the disposal of a sole trade or partnership business, "material" means that the business must have been **owned by the taxpayer for at least 1 year** prior to the disposal.

TCGA 1992,
S.169I(3)

Entrepreneurs' relief is only given in respect of "relevant business assets" (ie, **assets used for the purpose of the business** at the time the business is disposed of).

This will generally mean business premises, goodwill, plant etc, but not shares or other assets held for investment purposes. Gains and losses on relevant business assets must be aggregated in order to find the net gain eligible for relief.

TCGA 1992,
S.169L

- b) In the case of the disposal of an asset used in a business at the time of cessation, "material" means that the business must have been owned by the taxpayer for at least 1 year prior to cessation, and the **asset must be sold within 3 years of the cessation**.
- c) In the case of the disposal of shares or securities in a company, "material" means that for at least 1 year prior to the disposal:
- i. the company is the taxpayer's "**personal trading company**" (ie, the company must be "trading" and the taxpayer must have **at least 5%** of the ordinary shares & voting rights of the company); &
 - ii. the taxpayer must **work for the company** (or for another company in the same group). There is no minimum hour stipulation, so full or part-time employees or directors will be eligible.

TCGA 1992,
S.169I(4)

TCGA 1992,
S.169I(6)

Note therefore, that the sale of securities (loan stock etc) in a company will be eligible for relief, but this will only be the case where the loan stock is in a company for which the taxpayer is employee or director and also has at least 5% of the ordinary shares.

A disposal of **furnished holiday lettings will be eligible** for entrepreneurs' relief. However a disposal of general let properties (residential dwellings, commercial investment property etc) will not qualify.

TCGA 1992,
S.241(3A)

4.5 Definition of a trading company

Entrepreneurs' relief is only available to taxpayers who sell shares in a **trading company** (or the **holding company of a trading group**).

A "trading company" is "a company carrying on trading activities whose **activities do not include to a substantial extent activities other than trading activities**".

TCGA 1992,
S.165A

The key word in the definition is the word "substantial" which is clearly a subjective phrase and open to differing interpretations. HMRC consider "substantial" to mean "**more than 20%**". The question is "**more than 20% of what?**"

The "20% test" is applied to a number of different criteria depending on the facts and circumstances of each case. For example:

Turnover

If **more than 20% of the turnover** of a company is typically made up of **investment income** (i.e. not trading income), the **non-trading activities could be said to be substantial** and the company would **fail** to satisfy the definition of a "trading" company.

HMRC has said that it will not seek to apply the test if the company had a particularly poor trading year, such that in an **isolated period**, investment income made up an unusually large percentage of total income. Here HMRC would look at the **history** of the company and take a more balanced view.

Asset base / Balance Sheet

If non-trading assets (investment properties, shares, etc) make up **more than 20% of the value of the total assets** of the company, again this could be taken to mean that non-trading activities are "substantial". Current market value and amounts given by way of consideration for assets may both be appropriate measures. Which measure is appropriate will depend on the facts in each case.

Again this begs several questions such as "what is an investment property?". For example, if surplus business premises are being temporarily sub-let, does this constitute an investment asset for the purposes of the "20% test"? The answer to this question is probably "no" although each case should be looked at on its own merit.

HMRC also recognise that **intangible assets** (most notably goodwill), which are not always reflected on the Balance Sheet, may have to be taken into account when applying the 20% rule.

Director's time

If a substantial part of a director's **time**, or a substantial proportion of **expenses** are incurred on non-trading activities, this could again lead to HMRC concluding that the company is not trading.

If a shareholder is uncertain as to whether the company in which he or she holds shares is or is not a "trading company", HMRC advice is for the shareholder to contact the company in the first instance and ask. If no answer is obtained (i.e. the company simply does not know), the shareholders "should submit their tax returns using their own judgement".

4.6 "Associated" disposals

TCGA 1992,
S.169K

"Associated" disposals will also qualify for entrepreneurs' relief.

An "associated" disposal is where:

- a) A taxpayer makes a **material disposal** of a business or shares /securities in a company; and

- b) As part of the withdrawal of the individual from the business, he makes a **disposal of an asset which had been used in that business**; and
- c) The asset disposed of had been **used in that business for at least 1 year**.

For example, if a company director owns at least 5% of the shares of a company and also owns the premises from which the company trades, if he sells the building **at the same time** as he sells the shares, this will be an "associated disposal" and will be eligible for relief.

An associated disposal will also include a situation where a partner sells his interest in a partnership, **and also sells an asset he owns personally** but which is used in the partnership's trade.

Note here that the **associated disposal rules cannot apply to sole traders**. If a sole trader sells his business but still retains an asset (eg a building) which was being used in the trade, entrepreneurs' relief will be available if the trader disposes of the asset within 3 years of cessation (see 4.4b above).

Also the "associated disposal" rules cannot apply to isolated disposals of assets. The disposal must be "associated with something - ie, the disposal of the business in which the asset is/was being used.

4.7 Associated disposals - partial business use

TCGA 1992,
S.169P(4)

Entrepreneurs' relief on an "associated" disposal is **restricted if the asset had not been used in the business throughout its period of ownership** or if only part of the asset had been used in the business.

Illustration 4

Marcus Hollis is a full-time director and 20% shareholder of Talk Talk Ltd, a mobile phone company. On 15 March 2011 he retired and sold his shares in the company, making a gain of £420,000.

Marcus also owned the shop from which the company has been trading. He had originally bought the shop in April 2001 for £100,000 as an investment. Talk Talk Ltd started trading on 1 April 2004 and from that date onwards has traded from Marcus's shop. The shop was sold by Marcus for £400,000 on 31 March 2011. Marcus's taxable income for 2010/11 was £120,000.

His CGT due is calculated as follows:

		Shop £	
Proceeds		400,000	
Less: cost		<u>(100,000)</u>	
Gain		<u>300,000</u>	
		Eligible for ER £	Not eligible for ER £
Shares		420,000	
Shop (7/10 × £300,000) (Note 1)		210,000	
Shop (3/10 × £300,000)			90,000
Less : Annual exemption (Note 2)			<u>(10,100)</u>
Taxable gains		<u>630,000</u>	<u>79,900</u>
<i>CGT:</i>			£
£630,000 @ 10%			63,000
£79,900 @ 28%			<u>22,372</u>
Total CGT due for 2010/11			<u>85,372</u>

Note 1: The shop was only used in the business for 7 out of the 10 years of Marcus's ownership, therefore only 7/10 of the gain on this associated disposal will qualify for entrepreneurs' relief.

Note 2: The annual exemption is set against gains chargeable at 28% rather than 10%.

4.8 Associated disposals - rent for use of assets

TCGA 1992,
S.169P(4)

In the case of an associated disposal, if rent has been charged by the individual to the business for the use of the asset now being sold, this **receipt of rent will restrict the availability of entrepreneurs' relief**.

Gains eligible for entrepreneurs' relief are restricted on a "just & reasonable" basis. This essentially means that:

- if **no rent** is charged, **full** entrepreneurs' relief is available;
- if a **full commercial rent** is charged, **no entrepreneurs' relief** is available;
- if rent is charged at **below commercial rates**, **some** entrepreneurs' relief is available.

However, the **rent restriction only applies for periods after 5 April 2008**. Therefore receiving rental income before April 2008 will not impact on the availability of entrepreneurs' relief.

TCGA 1992,
S.169P (4)(d)

Illustration 5

Returning to Illustration 4 above (Marcus Hollis).

Assume Marcus charged rent of £1,000 per month to Talk Talk Ltd for the use of the shop. A full commercial rent would have been £2,500 per month. Therefore the rent charged is 40% of the market rent for the asset.

		Shop £	
Proceeds		400,000	
Less: cost		<u>(100,000)</u>	
		<u>300,000</u>	
	Eligible for ER £	Not eligible for ER £	
Shares	420,000		
Shop (7/10 x 300,000) (Note)	210,000		
Shop (3/10 x 300,000)		90,000	
Less: rent restriction (£210,000 x 40% x 3/7)	(36,000)	36,000	
Less : Annual exemption		<u>(10,100)</u>	
Taxable gains	<u>594,000</u>	<u>115,900</u>	
<i>CGT:</i>		£	
£594,000 @ 10%		59,400	
£115,900 @ 28%		<u>32,452</u>	
Total CGT due for 2010/11		<u>91,852</u>	

Note:

Shop used in business from 1 April 2004 to 31 March 2011 = 7 years. Period falling after 6 April 2008 is 3 years.

4.9 Some practical points*Spouses' shares*

There is no "spousal aggregation" for the purposes of the 5% holding of shares in a trading company. This means, for example, that if a husband holds 4% of a company and his wife owns 2%, and both work for the company, neither of them will be entitled to entrepreneurs' relief on a disposal of their shares.

In this instance, the wife (say) can transfer her 2% holding to her husband (CGT free). However, the husband would then need to wait 12 months before disposing of his new 6% holding, as otherwise he would not have had shares in a "personal company" for 1 year.

Jointly owned assets

Assume a husband and wife jointly own an asset (eg, a building) which is used in their partnership. The partnership is dissolved and the building is sold. The gains made by husband and wife on the disposal of the building will qualify for entrepreneurs' relief.

However, assume instead that a husband and wife jointly own an asset (eg, a building) which is used in the husband's sole trade. The trade ceases and the building is sold. In this case, only the husband's proportion of the gain will qualify for entrepreneurs' relief as he is the only one carrying on a business which uses the asset. The wife's gain will not qualify.

In this case the couple should either consider a transfer of the wife's half of the asset to the husband to obtain relief, or the wife could be made a partner of the business (as long as this is more than 12 months before the business ceases and the asset is sold).

Where applicable, both spouses will be entitled to claim the relief separately and this offers an opportunity to double the £5 million ceiling.

Consideration should therefore be given by, say, a sole trader to take his wife into partnership by transferring to her a proportion of the business in return for the wife performing a limited function in the business. Gains on the eventual disposal of the partnership business would then be spread between the spouses, thereby maximising entrepreneurs' relief.

In the case of a company, the husband could transfer a 5%+ shareholding to the wife who would then work part-time for the business. Again this would have the effect of enabling both spouses to claim the relief on the disposal of the shares.

Assets disposed of within 3 years of cessation

Entrepreneurs' relief is available if a business ceases and within 3 years of cessation, an individual disposes of an asset which was used in the business at the time of cessation.

For example, assume a trader (Jack) sells his sole trade business to Jill in December 2010, but Jack retains the building from which the trade was run (Jill has her own business premises and did not want to buy Jack's). Jack can claim entrepreneurs' relief on the gain on the sale of the business and on the gain on the sale of the old building (as long as this is before December 2013).

In this case it does not matter what Jack does with the building in the 3 year period. He could let it out to another unconnected business and still receive full entrepreneurs' relief. Jack just needed to have been using the building in his business at the date of cessation.

Also in this scenario, Jack could let out the building and charge at a full commercial rent for the use of the building, and this will not prejudice his entrepreneurs' relief. This is because the "rent restriction" rule only applies to "associated disposals" and the sale of assets in the 3 years post cessation is not an "associated disposal".

Associated disposals - rent for use of assets

As discussed above, if an individual owns a building which is being used in the trade of his personal company, the gain on the disposal of the building can qualify for entrepreneurs' relief as an "associated disposal" (providing that the building is sold as part of the taxpayer's withdrawal from the business as a whole). A "stand alone" sale would not be eligible for relief.

The receipt of rent from the company will restrict entrepreneurs' relief. Commercially many taxpayers will have taken the decision to charge rents for the use of the asset as such income is free of PAYE and NIC and the payment of rent is tax deductible for the company.

Where rents have only been charged for a proportion of the period of ownership, gains will need to be split into "eligible" and "non eligible" elements on a "just & reasonable" basis. Gains are only apportioned based on rents charged after 5 April 2008. Therefore a waiver of rent from 6 April 2008 will have the effect of maximising entitlement to entrepreneurs' relief.

Shares acquired from share option schemes

Many employees hold shares in their employer company, often acquired as a result of participating in a share option or share incentive scheme.

Remember one of the requirements for the individual to claim entrepreneurs' relief on a disposal of shares is that he must have at least 5% of the ordinary shares and voting rights. In most instances this will not be the case and so they will not be eligible for entrepreneurs' relief when they sell their shares.

The lifetime limit

Don't forget the ceiling placed on a taxpayer's lifetime gains which will qualify for entrepreneurs' relief, so the "high-rollers" of this world will only see a relatively small reduction in their total liability.

In addition, with a monetary limit placed on the relief, taxpayers who dispose of their businesses in the future will see deterioration in the benefit of the relief as inflation bites.

Example 1

Georgina sold the following assets in May 2010:

	Gains £
Shares in Barclays Bank plc	50,000
Shares in Pampered Pooches Ltd	585,000
Vintage car	<u>10,000</u>
Total	<u>645,000</u>

Georgina owned 50% of the shares of Pampered Pooches Ltd and ran the company with her friend, Jean. They sold their respective shares to a major pet-store chain in May 2010. Georgina made no other disposals in 2010/11. Her taxable income in 2010/11 was £30,000.

Calculate the CGT payable by Georgina for 2010/11.

Example 2

Emma Barker is a professional photographer. In June 1990, Emma set up her company, Barker Photography Ltd, by subscribing £1,000 for her shares.

In December 1992 she bought a small office for £130,000. The office was let out to a local mortgage adviser for use in his trade. The mortgage adviser moved out in November 1998 and in December 1998 Emma turned the office into a photographic studio. The studio was thereafter used by Barker Photography Ltd in its trade. No rent was charged for the use of the studio.

Emma decided to give up photography in December 2010. She sold her shares for £100,000 and the office building for £400,000. She had no other disposals in 2010/11. Her taxable income in 2010/11 was £35,000.

- a) Calculate the CGT payable by Emma for 2009/10.
- b) Emma is thinking of setting up another business. Assuming that rates remain unchanged, how much of the lifetime limit for entrepreneurs' relief will remain for Emma to use against a qualifying gain on the disposal of any future business?

Example 3

Danny owns 25% of the shares of Alexander Cables Ltd, an unlisted trading company. He has owned the shares for 5 years.

Danny sold the following assets in 2010/11:

- A 2% holding in Alexander Cables Ltd on 28 August at a gain of £18,000;
- Some shares in Marks & Spencer plc on 31 January 2011 giving rise to a gain of £37,500.

Danny works part-time for Alexander Cables Ltd on a salary £20,000.

Calculate the CGT payable by Danny for 2010/11.

Answer 1

	£
Gains:	
Barclays Bank plc	50,000
Pampered Pooches Ltd	585,000
Vintage car	<u>Exempt</u>
Total gains	635,000
Less: Entrepreneurs' relief (4/9 x £585,000)	<u>(260,000)</u>
Chargeable gains	375,000
Less: AE	<u>(10,100)</u>
Taxable gains	<u>364,900</u>
CGT @ 18%	<u>£65,682</u>

Note: The level of Georgina's taxable income is irrelevant. The gains arose prior to 23 June 2010 and are therefore taxable at 18%.

Answer 2

a)

	Shares £	Office £
Gains:		
Proceeds	100,000	400,000
Less: cost	<u>(1,000)</u>	<u>(130,000)</u>
	<u>99,000</u>	<u>270,000</u>
	Eligible for ER £	Not eligible for ER £
Shares	99,000	
Office £(270,000 x 12/18)	180,000	90,000
Less : Annual exemption	<u> </u>	<u>(10,100)</u>
Taxable gains	<u>279,000</u>	<u>79,900</u>
CGT:		£
£279,000 @ 10%		27,900
£79,900 @ 28%		<u>22,372</u>
Total CGT due for 2010/11		<u>50,272</u>

Note

Office building:

Years held (Dec 1992 - Dec 2010)	<u>18</u>
Years used by company (Dec 1998 - Dec 2010)	<u>12</u>

b)

Lifetime limit	5,000,000
Less: gains already relieved	<u>(279,000)</u>
Lifetime limit remaining	<u>£4,721,000</u>

Answer 3

CGT payable by Danny:

	Gains eligible for ER £	Non-ER gains £
Alexander Cables Ltd shares	18,000	
Marks & Spencer plc shares		37,500
Less: AE		<u>(10,100)</u>
Taxable gains	<u>18,000</u>	<u>27,400</u>

<i>CGT:</i>	£
£18,000 @ 10% (W1)	1,800
£5,875 @ 18% (W2)	1,057
£21,525 @ 28%	<u>6,027</u>
Total	<u>8,884</u>

W1:	£
Salary	20,000
Less: PA	<u>(6,475)</u>
	13,525
Less: basic rate band	<u>(37,400)</u>
Unused basic rate band	<u>23,875</u>

W2:	£
Unused basic rate band	23,875
Less: gain eligible for ER	<u>(18,000)</u>
Unused basic rate band remaining	<u>£5,875</u>