Finance Bill 2025-26

Representation from the Association of Taxation Technicians (ATT)

Clauses 37 - 38: Anti-avoidance: company reconstructions and reconstructions involving transfer of business

Executive Summary

The 'share reorganisation rules' contained in the Taxation of Chargeable Gains Act (TCGA) 1992 allow companies to restructure their share ownership for genuine commercial reasons without triggering an immediate capital gain. Clauses 37 and 38 of the Finance Bill 2025–26 make significant changes to the anti-avoidance rules that apply to these transactions. We are concerned that these changes create uncertainty for companies and investors, and could affect genuine, non-tax motivated transactions.

We are concerned that the 60-day transitional period is insufficient, particularly as it spans the Christmas and New Year period. Transactions unable to complete within this window may need to reapply for clearance under the new rules, creating additional work for both taxpayers and HMRC and delaying the completion of commercial transactions. We strongly recommend extending the period to at least 90 days.

The removal of the 5% threshold, which previously provided an exemption from the application of the anti-avoidance rules for small shareholdings, creates uncertainty, particularly for listed companies, and is likely to lead to increases in clearance applications, delays to transactions and increased administrative burdens.

The legislation took effect immediately on 26 November 2025, without prior consultation, despite being described as a minor change with limited Exchequer impact. Many of the technical and practical issues now arising could have been identified and addressed through consultation. The combination of immediate commencement and limited guidance has created significant uncertainty.

1. Background

1.1. Companies undertake share exchanges and reconstructions for a wide range of legitimate commercial reasons. These include, for example;

- Re-organisations in advance of a third-party sale or takeover, such as removing a business or company which the purchaser does not wish to acquire.
- Management buyouts or reorganisations involving external investment.
- To separate distinct business activities into separate companies.

1.2. Such transactions can have significant tax implications for both the company and its shareholders and debenture holders (for ease of reference we will simply refer to 'shareholders' in this briefing). The key provisions governing the capital gain treatment of a share exchange or a reconstruction for shareholders are:

- Section 135 TCGA 1992, which applies to 'share for share' exchanges; and
- Section 136 TCGA 1992, together with Schedule 5AA TCGA 1992, which apply to schemes of reconstruction.

1.3. Where these provisions apply, the transaction is treated as a share reorganisation. No capital gain arises; there is deemed to be no disposal of the original securities and no acquisition of the new securities. Therefore, no immediate tax charge arises. Any gain is deferred and rolled into the new shares received. This treatment is important as the shareholders are not actually receiving any proceeds from the transaction, so would, in the absence of these provisions, suffer a 'dry' tax charge. The provisions are therefore fundamental to allowing businesses to reorganise efficiently.

1.4. This treatment is subject to an anti-avoidance rule, intended to ensure that relief is available only where the share exchange or scheme of reconstruction in question is:

- undertaken for bona fide commercial reasons; and
- does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to Capital Gains Tax or Corporation Tax.

The anti-avoidance rule does not apply if a shareholder, together with persons connected with them, hold 5% or less of any class of the original securities in the target company. This provides certainty to minority shareholders.

1.5. It is possible to apply to HMRC for advance clearance under section 138 TCGA 1992, broadly confirming that HMRC is satisfied that the proposed reconstruction meets these conditions and that the anti-avoidance rule does not apply.

1.6. Where a company reconstruction involves the transfer of a business from one company to another, section 139 TCGA 1992 may apply. This provision treats the transfer of assets as taking place on a 'no gain no loss' basis for capital gains purposes, such that the acquiring company effectively stands in the shoes of the transferor company. This treatment is also broadly subject to the same anti-avoidance rule described above. It is possible to apply to HMRC for advance clearance under section 139 (5) TCGA 1992 that the anti-avoidance rule does not apply.

2. **Practical impact of Clauses 37 – 38**

2.1. Clause 37 makes changes to the existing anti-avoidance rule for share for share exchanges and reconstructions, mentioned at 1.4. Clause 38 makes changes to the equivalent anti-avoidance rule for reconstructions involving the transfer of a business, mentioned at 1.6.

2.2. The requirement for a bona fide commercial purpose has been removed, and the provisions now apply where the main, or one of the main purposes, of any of the arrangements relating to an exchange or reconstruction is to reduce or avoid liability to Capital Gains Tax or Corporation Tax and, in the case of section 139 TCGA 1992, Income Tax. Where the rule applies, HMRC is empowered to make 'just and reasonable' adjustments to counteract any such reduction or avoidance.

2.3. The ATT understands that these changes are intended to address recent case law where commercially driven transactions included specific tax-motivated steps that fell outside the anti-avoidance rule. Under the previous legislation, the anti-avoidance rule was triggered where the exchange or reconstruction itself formed part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of a liability to Capital Gains Tax or Corporation Tax and, in the case of section 139 TCGA 1992, Income Tax. It applied to the transaction as a whole, and where the conditions were met, relief was available to all shareholders, even where, for example, an individual shareholder had made additional arrangements to avoid tax.

2.4. The changes to the anti-avoidance rule mean that arrangements added to reduce or avoid tax are now within scope and HMRC can counteract the tax advantage obtained by making 'just and reasonable' adjustments. It is intended that this will operate so that only the shareholders seeking to reduce or avoid tax will be affected.

2.5. However, the changes create significant uncertainty as to how the rules will operate in practice. For example, where a share for share exchange takes place for commercial reasons and is structured in a tax efficient manner compared to alternative options, it is now unclear how the new anti-avoidance rules will be applied. This uncertainty is likely to result in an increase in advance clearance applications, as transactions that would previously have been understood not to trigger the anti-avoidance rules may now require clearance. This will cause delays to transactions and increase administrative burdens for both HMRC and taxpayers.

<u>Transitional rule</u>

2.6. Clauses 37 and 38 introduce transitional provisions which apply where:

- An application for clearance under section 138(1) TCGA 1992 or section 139(5) was made before 26 November 2025; and
- HMRC or the First-tier Tribunal has notified the company that the clearance has been approved;
- The transaction (for which clearance was sought) is completed before 26 January 2026 or, if later, before the end of the 60-day period beginning with the date on which notification of approval is given.

2.7. Where the conditions are met, the transitional provisions apply and the amendments introduced by Clauses 37 and 38 do not apply to the relevant transaction.

2.8. The ATT is concerned that this window is too short, particularly as it spans the Christmas and New Year period when many businesses operate with reduced capacity. Where transactions cannot complete in time, parties may be forced to reapply for clearance under the new rules, potentially after contracts have been entered into. This creates a real risk of delay, transactions 'falling through', renegotiation, and additional administrative cost for both taxpayers and HMRC.

2.9. The ATT strongly recommends extending the completion window to at least 90 days.

<u>5% threshold</u>

2.10. Under the previous legislation, the anti-avoidance rule did not apply to shareholders who, together with persons connected with them, held 5% or less of any class of the original securities in the target company. This exemption provided an important safe harbour for minority shareholders, reflecting the reality that such shareholders are unlikely to have control over, or influence on, the structure of a transaction. The exemption played a valuable role in providing certainty for minority shareholders.

2.11. Clause 37 removes this exemption entirely, bringing minority shareholders within the scope of the anti-avoidance rule.

2.12. Under the previous anti-avoidance rule, where it applied, the share exchange rules were simply disapplied for all parties to the transaction, potentially affecting shareholders who had not benefited from the arrangements in question. The amended rule instead allows HMRC to make adjustments on a just and reasonable basis to counteract the tax reduction or avoidance. This should ensure that only those shareholders seeking to reduce or avoid tax are affected.

2.13. Whilst this change to the anti-avoidance rule is helpful, the removal of the 5% threshold (which brings minority shareholders into the scope of the anti-avoidance rule) remains problematic, particularly for listed companies. Listed companies often have thousands of minority shareholders. It is difficult to identify a clear policy rationale for requiring such companies to consider the application of the anti-avoidance rule in relation to large numbers of small shareholders.

2.14. In practice, the change is likely to create uncertainty and increase the number of clearance applications sought, in turn increasing demands on HMRC resources. The ATT is also concerned that the removal of the 5% threshold will slow down commercial transactions without delivering a corresponding increase in tax revenue.

2.15. It is disappointing that the changes introduced were implemented with immediate effect from Budget Day, without prior consultation with stakeholders. It is likely that this issue would have been identified and discussed as part of any consultation process. Further comments on the lack of prior consultation and immediate commencement are set out at paragraph 2.33.

<u>Self-Assessment</u>

2.16. The amended anti-avoidance rule states that "any such reduction or avoidance that would (in the absence of this section) arise from such arrangements is to be counteracted by the making of such adjustments as are just and reasonable". The wording suggests that taxpayers must self-assess on the basis that the 'reorganisation rules' apply and that relief is available, with it then being for HMRC to counteract any tax reduction or avoidance. This would be similar to the operation of the transactions in securities rules (in Chapter 1, Part 13, Income Taxes Act 2007), under which taxpayers are required to self-assess a capital gain and it is up to HMRC to counteract any income tax advantage that arises.

2.17. The position is currently unclear and is not addressed in HMRC's interim guidance. This creates uncertainty for taxpayers, particularly minority shareholders, who are unlikely to have full information about the transaction. Clarification is therefore required to ensure that taxpayers understand their obligations under the amended anti-avoidance rule.

<u>Removal of the commercial purpose requirement</u>

2.18. A key feature of the amendments introduced by Clauses 37 and 38 is the removal of the requirement that a share exchange or reconstruction is carried out for bona fide commercial reasons.

2.19. While this commercial purpose test has been removed from section 137 and section 139 TCGA 1992, it continues to apply in closely related regimes, including:

- Section 818(5) and 831, Corporation Tax Act 2009, which applies to reconstructions and acquisitions involving chargeable intangible assets; and
- Sections 75 and 77, Finance Act 1986, which provide relief from stamp duty on certain reconstructions and share transfers.

2.20. In practice, clearance under the share reorganisation rules is relied upon to establish eligibility for stamp duty relief. However, the amended capital gains anti-avoidance provisions no longer include a commercial purpose requirement, while such a requirement remains for stamp duty relief.

2.21. This creates uncertainty for taxpayers and is likely to require them to continue providing evidence of commercial rationale, with HMRC continuing to assess commercial purpose for stamp duty purposes.

2.22. The ATT considers that greater alignment between the capital gains provisions and the related stamp duty and corporate intangibles regimes would improve certainty and reduce administrative burdens for both taxpayers and HMRC.

<u>Advance clearance</u>

2.23. Advance clearance under section 138 TCGA 1992 may only be sought by the companies involved. Advance clearance under section 139(5) TCGA 1992 may only be sought by the acquiring company. Individual shareholders cannot apply in their own right. Where companies choose not to seek clearance, this could leave shareholders exposed to uncertainty with no mechanism to protect their position. For example, there may be instances where majority shareholders choose not to, or do not need to, apply for advance clearance. This is particularly important for minority shareholders because of the changes to the anti-avoidance rules and the removal of the 5% threshold (noted above).

2.24. The ATT recommends that any taxpayer who may be affected by the transaction is able to seek statutory clearance in their own right.

2.25. It should be noted that minority shareholders would not usually have access to all the information required to make an advance clearance application. This issue will need to be addressed to ensure that minority shareholders can understand whether the anti-avoidance rule applies. The removal of the 5% threshold creates significant uncertainty and it is disappointing that the changes introduced were implemented with immediate effect from Budget Day, without prior consultation with stakeholders. It is likely that this issue would have been identified and discussed as part of any consultation process.

<u>Reconstruction involving the transfer of a business</u>

2.26. Where a company reconstruction involves the transfer of a business from one company to another, section 139 TCGA 1992 may apply. This provision treats the transfer of assets as taking place on a ‘no gain no loss’ basis for chargeable gains purposes, such that the acquiring company effectively stands in the shoes of the transferor. The relief provided by section 139 TCGA 1992 is therefore a deferral, rather than an outright exemption from tax.

2.27. This treatment is subject to an anti-avoidance rule. Clause 38 makes changes to the anti-avoidance rule which are described briefly at 2.1 – 2.5 above.

2.28. Under the amended anti-avoidance rule, the requirement for a bona fide commercial purpose has been removed. The rule now applies where the main, or one of the main purposes, of any of the arrangements relating to an exchange or reconstruction is to reduce or avoid liability to Capital Gains Tax, Corporation Tax or Income Tax. Where the rule applies, HMRC is empowered to make “just and reasonable” adjustments to counteract any such reduction or avoidance.

2.29. However, as stated above, the relief given by section 139 TCGA 1992 is a deferral. It is unclear how the amended anti-avoidance rule is intended to apply in practice. In particular, how will ‘just and reasonable’ adjustments be made to counteract a reduction or avoidance of tax where disapplying section 139 TCGA 1992 would create an immediate corporation tax charge in the transferring company?

2.30. HMRC’s interim guidance, ‘CG-APP19 - Changes to the share exchanges and company reconstructions anti-avoidance rule’, focuses on the changes made to section 137 TCGA 1992. The guidance notes that the changes are largely replicated in the other provisions, which include section 139 TCGA 1992. The interim guidance states that “the revised wording refers to reducing or avoiding a liability to tax on capital gains. It does not apply where the advantage is the mere deferral of a liability, which is the intended effect of the share exchange provisions”. This statement adds to the uncertainty of how the amended anti-avoidance rule is intended to apply in the context of section 139 TCGA 1992, given that the relief is a deferral of a liability.

2.31. The Explanatory Notes to the Finance Bill refer to ‘tax advantage’. In addition, HMRC’s interim guidance states “HMRC’s view of the concepts of “arrangements”, “tax advantage” and “main purpose” are well established and are set out in the guidance”. The new anti-avoidance rule refers to “reduce or avoid liability” rather than tax advantage. Elsewhere in the tax code the concept of ‘tax advantage’ can include a deferral of a tax liability. This adds further confusion and uncertainty.

2.32. It is disappointing that the changes introduced were implemented with immediate effect from Budget Day, without any prior consultation with stakeholders. It is likely that this issue would have been identified and discussed as part of any consultation process. Further comments on the lack of prior consultation and immediate commencement are set out at paragraph 2.33.

<u>Lack of prior consultation and immediate commencement</u>

2.33. The ATT is concerned that the changes introduced by Clauses 37 to 38 were implemented with immediate effect from Budget Day, without any prior consultation with stakeholders.

2.34. This is particularly notable given that the Exchequer impact is relatively small and the change is being described as minor. In the ATT’s view, these factors would normally point towards a consultative approach, allowing technical and practical issues to be identified and addressed before legislation takes effect.

2.35. The absence of consultation has resulted in a number of practical and technical uncertainties, including those set out above, which could have been identified and mitigated in advance. This has resulted in uncertainty for companies and shareholders involved in live transactions, many of which were planned on the basis of the previous legislation and long-established HMRC practice.

2.36. The immediate commencement of the measures resulted in a period during which taxpayers had no guidance on the changes introduced by these clauses. HMRC guidance was subsequently published after the legislation had already taken effect, limiting its usefulness for transactions that were already in progress.

2.37. While the guidance provides some reassurance, it does not address many of the more complex scenarios that arise in practice. There remains considerable uncertainty as to how the changes in the legislation will impact how it operates in practice, and how effective clearances given by HMRC will be in ensuring shareholders and companies undertaking commercial transactions can achieve certainty about their tax position.

Association of Taxation Technicians
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Note:

The Association of Taxation Technicians

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Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

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