Transfer or cash?

Q A client company of ours is looking to purchase its own shares by transferring a property to a retiring shareholder instead of paying cash.

At first sight, this would not appear to be legally possible as HMRC guidance in the *Company Taxation Manual* at CTM17505 states that a payment must be made in cash. However, this appears to contradict the decision in *BDG Roof-Bond Ltd v Douglas* [2000] 1 BCLC 401, where the court held that a transfer of assets is possible, being akin to a dividend in specie.

Companies Act 2006, s 691 merely requires that the shares must be paid for on purchase – there is no specific requirement for this to be in cash.

My questions are as follows.

- First, is the view of HMRC correct?
- Secondly, if it is valid, will the transaction be exempt from stamp duty land tax on the grounds that no consideration is given? This would be so if we were dealing with a dividend in specie (provided that the transfer is not in satisfaction for a declared dividend) or company liquidation.

Advice from *Taxation* readers on these points would be welcomed.

Query 17,523 – *X Man.*

A X Man raises an interesting question. As he points out, Companies Act 2006, s 691 requires only that, on a purchase of own shares, the shares must be paid for on purchase. There is no definition of what is meant by 'paid' and in fact the emphasis appears to fall more on the timing (i.e. 'on purchase') rather on the nature of the payment.

It appears that the interpretation of this section and its predecessor has always been that 'paid' means 'paid in cash' and certainly that has been HMRC's approach, which they confirmed in a tax bulletin in February 1996 and have not, to my knowledge, changed since.

The obiter dictum from the High Court judge in the company law case mentioned by X Man certainly is quite unequivocal on the point – payment can be made in specie and not just in cash; although in the case the purchase of own shares failed for other technical reasons.

It appears, therefore, that HMRC's view may not be correct in law and at the very least one might have expected the department to address the court's findings in their manuals.

However, this leaves a practical problem for X Man; is it safe to deviate from the stated HMRC practice even if it appears wrong? In most cases, taxpayers and their advisors would take the line of least resistance; after all, it would be possible to pay cash for the shares and then buy the asset separately. But in the case of property this creates a stamp duty land tax (SDLT) charge and, in any event, the shares could be issued over the correct market value.

There may be some comfort from the clearance process – TA 1988, s 225 states that TA 1988, s 219 will apply so that the payment is not treated as a distribution if the Board have notified the company that they are satisfied that s 219 will apply. To do this, HMRC need to be satisfied that all the necessary conditions are met including the Company Act requirements. If X Man makes it abundantly clear in the clearance application that the payment will be made in specie, and states his belief that this meets the provisions of the Company Act, then HMRC will be forced to take a view. If they grant the clearance then it would be difficult for an inspector to take a contrary view.

If the payment in specie is not treated as a distribution for corporation tax purposes by virtue of s 219, it nevertheless remains a distribution from the company and for SDLT purposes there would be no charge if it is not made in satisfaction of a declared dividend or pre-existing debt.

My advice to X Man is to apply for clearance from HMRC, making the position clear and referring to the company law case – at least he will then provoke the department's considered response. If the clearance is refused then at least there is still the option of reverting to a cash payment. – *D H Young, Associate Director, BKL Tax.*

A In my view HMRC are correct. A purchase of own shares by a company must be paid for in cash. Payment cannot be deferred.

This is the position taken in *Buckley on the Companies Acts* citing the decision of the House of Lords in *CIR v Littlewoods Mail Order Stores* [1965] AC 135 as authority for the proposition that the words 'sale' and 'purchase' in ordinary legislative usage require an exchange of property for cash and not for any other form of property.

Companies Act 2006, s 691 ('Payment for purchase of own shares') simply states as follows:

'(1) A limited company may not purchase its own shares unless they are fully paid.

'(2) Where a limited company purchases its own shares, the shares must be paid for on purchase.'

The remarks of Park J in the case of *BDG Roof-Bond Ltd v Douglas* that the word 'payment' in Companies Act 1985, s 159(3) (in effect, the predecessor to Companies Act 2006, s 691) was not limited to payment in money, but also included payment by transfer of assets, were obiter.

For the sake of completeness, I would add that, if HMRC were wrong and the transaction could be structured as X Man sets out, for stamp duty land tax purposes the transfer of the property would be in consideration of the shares given up by the retiring shareholder. As X Man says, a distribution in specie consisting of the transfer of an interest in land is only free of stamp duty land tax where there is no chargeable consideration. – *Marilyn Merlot.*