

TAX



CORE TOPICS:

- Impact of rewilding on various tax regimes

KEY TAKEAWAYS:

- Rewilding may have a positive or negative effect on how property and income are taxed.
- Certain inheritance tax reliefs depend on land being considered farmland.
- Other inheritance tax reliefs depend on land being used for profit.
- Given the long-term nature of forestry, special rules apply to woodland which differ from farm and other types of land.

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1. INTRODUCTION

This note provides a high-level overview of some of the tax considerations that may be relevant for rewilding activities on land in Scotland¹ and is more relevant to land previously used for farming or crofting. It consists of a summary in Q&A format, followed by a more detailed briefing in which we explore some case studies and refer to legislation and case law.

2. SUMMARY

Is rewilding “farming” and does it matter?

For tax purposes, it can be beneficial for land to be considered “farmland” given the favourable inheritance tax treatment (where Agricultural Property Relief or Business Property Relief applies) and certain capital gains tax reliefs that are available (in the form of Business Asset Disposal Relief and rollover relief). Typically, case law and legislation have focused on “farming” as including some form of tillage of soil and use of land by livestock held for its produce or for food (e.g., cows, sheep, goats, and pigs). While “farming” has historically included more diverse activities such as bread-making, homespun cloth and home-brewed ale, whether rewilding will qualify for various farming tax reliefs will depend on the fact and degree of the activity. It is therefore advisable to seek tailored legal and accounting advice before embarking on a rewilding project.

Will I lose inheritance tax relief if I rewild my land?

Agricultural Property Relief is only available in respect of the agricultural value of agricultural property which has been used for agricultural purposes throughout the required period (and where certain ownership conditions are met). Where an entitlement to Agricultural Property Relief exists, a rewilding project will have to be considered carefully as it could result in the loss of such relief (e.g., where land previously used to grow crops is left to allow natural tree growth and so is no longer considered to be used for agricultural purposes, this may result in it no longer being eligible for Agricultural Property Relief). On the other hand,

where no previous entitlement to Agricultural Property Relief exists, rewilding could attract such relief (e.g., where land previously only used to generate income by selling rights to shoot game is rewilded by introducing low intensity grazing by cattle and pigs that are also sold for meat production).

Business Property Relief may be available where Agricultural Property Relief does not apply. For example, where rewilding involves a trading business carried on for the purposes of gain such as conducting eco-tourism, corporate and education retreats alongside rewilding.

What if I only rewild some of my land, will that still impact inheritance tax?

Often tax reliefs operate on parts of land and per farm buildings so that a combination of reliefs can be used. It may be that rewilding is undertaken on a small portion of land in respect of which Agricultural Property Relief is lost because traditional farming or crofting is replaced by eco-tourism, but Business Property Relief is available in connection with the eco-tourism business. Or it could be that Agricultural Property Relief is given up to a certain value of an asset, with Business Property Relief available on the rest. It is important to note that Business Property Relief is not available where the business consists of “making or holding investments”. So pure holiday lettings will not benefit from this relief. However, where the business consists of a mix of trading and investment activities, full relief from inheritance tax may be available provided that overall, the business is predominantly a trading business.

Is rewilding a “trade” for tax purposes?

This will again be a question of fact, considering whether there are any ‘badges’ of trade present, i.e., whether the activity of rewilding displays the characteristics that case law has considered over time to be indicative of a trading business. For example: Is there an activity undertaken with a view to generating profit? What is the number of transactions and how has the sale been carried out? Income taxed as farm trading income, rather than as investment income (e.g., from holiday cottage rentals) can be advantageous because it benefits from various capital

gains tax reliefs and averaging relief, and will support a claim for Business Property Relief for inheritance tax purposes.

How is woodland taxed?

As a general principle, the commercial use of woodland is outside the scope of income tax and corporation tax, provided the woodlands are managed on a ‘commercial basis’ and with a view to the realisation of profits. This will need to be supported by evidence, e.g., maintaining a woodland management plan and keeping accounts and records showing historic details of any profits and losses made. The exemption from income and corporation tax does not cover income/profits received from the sale of Christmas trees or short rotation coppice such as willow and poplar, or receipts from felled timber (where the land is predominantly occupied for farming). Similarly, rental income from letting woodlands (e.g., for picnics or camp sites) is taxable.

Like other forms of land, woodland is subject to inheritance tax. However, various reliefs from inheritance tax may be available, including Woodlands Relief, Business Property Relief and Heritage Relief (see Sections 3 (*Inheritance Tax: Agricultural Property Relief*), 4 (*Inheritance Tax: Business Property Relief*), and 8 (*Taxation of Woodland*) respectively below).

Does rewilding impact the tax treatment of my woodland?

The aim of rewilding is to push woodlands in a more natural, wilder direction without being focused on any particular end points (for example, which percentage of canopy cover should be native broadleaves). Rather, nature is left to unfold in its own way. Where a rewilding project stops any ‘commercial’ activity, the associated exemptions from income, corporation, and capital gains tax will also likely fall away. To the extent the woodland is used for other purposes (e.g., for commercial shooting or fishing where there is a river or lake or it is rented out), income or corporation tax may be chargeable on the profits.

However, certain inheritance tax reliefs are likely to be available where woodland is rewilded. For example, small areas of woodland such as shelter belts which are “ancillary”

to the farming business can qualify for Agricultural Property Relief, and Heritage Relief may be available for woodlands considered to be of outstanding scenic, historic or scientific interest (see Section 8 *Taxation of Woodland* below).

What should I consider?

Those considering rewilding will need to analyse their current tax position (from both an income/capital perspective and for estate planning purposes) and seek to understand the potential impact of rewilding on that status. The various relationships between the tax reliefs available is complex, and accounting will be key for evidential purposes. Detailed advice should be taken prior to undertaking rewilding to ensure the tax implications are understood.

These issues are considered in more detail below, including some practical examples in the inset boxes in Sections 3 (*Inheritance Tax: Agricultural Property Relief*), 4 (*Inheritance Tax: Business Property Relief*) and 5 (*Income and Corporation Tax*) below.

3. INHERITANCE TAX: AGRICULTURAL PROPERTY RELIEF

Inheritance tax (“IHT”) is a charge levied on the estate (the property, money and possessions) of an individual on their death. IHT can also apply to any gift or sale (at less than market value) of property that belonged to the deceased, which the deceased gave or sold within seven years of their death. The present tax rate is at 40% of the value of the deceased’s estate, typically above a nil rate band of £325,000 (depending on certain circumstances).

Agricultural Property Relief (“APR”) is a key form of IHT relief in the context of farming or crofting². For the purposes of calculating IHT, APR reduces the “*agricultural value*” of transfers of “*agricultural property*” which has been occupied or owned by the transferor (i.e., the deceased person) for the required period for “*purposes of agriculture*”³.

So long as the agricultural value of the relevant property is not exceeded by its open market value, APR will generally allow agricultural property to be passed on free of IHT if 100% relief is given (in certain circumstances, broadly where the property is subject to a tenancy that commenced before 1 September 1995, only 50% relief will be given). Some company shares are eligible for APR if their value (i) gave the deceased control of the company at the time of death; and (ii) comes from agricultural property that forms part of the company’s assets.⁴

Even when it comes to traditional farming or crofting, the availability of APR is not straightforward and HMRC will readily challenge claims to rely on it. Working out if it would apply in the context of rewilding farmland or a croft is even more complex, given certain rewilding activities (such as reintroducing plants without any associated “tillage” of the soil) are unlikely to qualify as “agriculture” for tax purposes, whereas others (such as removing internal fencing and introducing low-intensity grazing animals) likely would.

So, what is “agricultural property”?

Under the Inheritance Tax Act 1984 (the “IHTA 1984”), “*agricultural property*” is broadly defined as “*agricultural land or pasture*” which includes⁵:

- woodland and any building used in connection with the intensive rearing of livestock or fish⁶ provided that the woodland or building is occupied with (but ancillary to) the “*agricultural*” land or pasture; and
- cottages, farmhouses or any other farm buildings (and the land occupied with them) of a “*character appropriate*” to agricultural land or pasture.

First you have to establish that the property being transferred (or inherited) contains agricultural land or pasture that is occupied for agricultural purposes. Only once that is done can you then consider whether any farmhouses, farm cottages or buildings qualify for APR⁷. While “agriculture” is not defined in the IHTA 1984 (though s.115(4) provides that the breeding and rearing of horses on a stud farm and the grazing of horses in connection with those

activities is taken to be agriculture and any buildings used in connection with those activities to be farm buildings), guidance on what does and does not constitute “*agricultural*” land and pasture can be taken from other legislation (see the Agricultural Holdings (Scotland) Act 1991, relevant case law and HMRC’s manual. It is generally accepted that “agriculture” for these purposes includes:

*horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes*⁸.

To benefit from APR, agricultural property either needs to have been occupied for agricultural purposes by the transferor (i.e., the deceased) for the two years preceding the date of the transfer (i.e., the gift or inheritance)⁹; or owned by the transferor but occupied by any person for continuous agricultural purposes throughout the preceding seven years¹⁰. In certain circumstances, the seven-year ownership rule may be relaxed (where there has been a replacement of agricultural property, an acquisition on death, or where there have been successive transfers).

So, what is “agricultural value”?

Relief is only given based on the “*agricultural value*” of agricultural property. Section 115(3) IHTA 1984 provides that the value of the agricultural property is the value that it would have if it were subject to a perpetual covenant (a sort of permanent agreement) prohibiting its use otherwise than as agricultural property. In some cases, the agricultural value of the property may be less than the open market value. This might be because of development value or mineral value, or because the farm is in a desirable part of the country and suitable for commuters such that wealthy non-farmers would be prepared to pay a premium for it.

This fictitious, perpetual covenant provides some indication of how value may be impacted by conservation burdens¹¹, to the extent the property subject to the conservation covenant may benefit from APR. For example, a property might only be given APR on 70% of its open market value,

on the basis that a “lifestyle” purchaser would be deterred from buying the property because it could only be used for agricultural purposes.¹² This could become less of a concern where the agricultural property is subject to a conservation burden, because a burden might in practice reduce the open market value of a property (e.g., where it prevents a purchaser from developing the land and using it in ways that would breach the burden). This may bring the agricultural value of the property more in line with its open market value, such that APR is available on a higher percentage of the open market value.

So, when is a farmhouse of a “character appropriate” to agricultural land or pasture?

As noted above, farmhouses may benefit from APR provided they meet the required conditions of having been “occupied for the purposes of agriculture” and are of a “character appropriate” to agricultural land or pasture. There is no statutory definition of a “farmhouse”, but case law provides that this is the place from which the farming operations are conducted by the farmer.¹³ When considering whether the farmhouse is of a “character appropriate”, a key factor is that the agricultural land or pasture to which the farmhouse relates is the dominant feature, and the farmhouse must be occupied “with” that land. There is currently some doubt as to whether this requires both (i) common ownership of the farmhouse and the agricultural land and (ii) common occupation, or whether just one or the other is sufficient. If common occupation is a requirement, then land let out to a third party (e.g., to a neighbouring farmer or conservation group for rewilding) would not count. To the extent rewilding activities impact the classification of the land to which the farmhouse relates (e.g., such that it is no longer considered to be ancillary to “agricultural land”), this could also impact whether the farmhouse is considered to be both occupied for the purposes of agriculture and of a character appropriate to agricultural land or pasture.

APR may be available to tenanted land (including land under a crofting tenancy), provided that the tenant occupied the land for the purposes of agriculture and the ownership period criteria has been met. However, allowing a tenant to “rewild” the land may impact IHT planning, depending on whether the rewilding activity would be categorised as “agricultural”.

However, business property relief from IHT may be available on certain assets where the tenant and landowner enter into a business or partnership together (e.g., for eco-tourism purposes), provided the partnership is predominantly a “trading” business (i.e., not a property investment business) (see further below).

Whether rewilding land is considered agricultural property which has been used for agricultural purposes will be fact specific.

EXAMPLE 1: FARMER A

Farmer A is a farmer-landowner seeking to rewild a large part of his property currently used for grazing and crop growing, which is near a local river prone to flooding as part of a habitat restoration project relating to historic woodlands in the area. Farmer A lives in the farmhouse on his land, which has three broiler houses used for the intensive rearing of chickens, and farm buildings for the cattle he keeps in order to sell the calves.

Farmer A materially reduces his herd of cattle and stops using most of his land previously designated for grazing and crop growing in order to allow natural tree growth, supported where necessary by native tree planting. The impact of his rewilding activity on the APR available when Farmer A passes away may be material. Farm buildings only qualify for APR where they are ancillary to the larger agricultural operation carried out on the land.

The nature of the rewilding undertaken by Farmer A is likely to mean that a substantial part of the property will no longer be classed as “agricultural land”. The result may be that the broiler houses do not qualify for APR as they are no longer *ancillary* to land being farmed for agricultural purposes (e.g., if the land on which the cattle now graze is small and the broiler houses dominate the part of the land they occupy)¹⁴.

Similarly, the farmhouse may cease to qualify for APR.

APR would likely be available on the land on which the cattle continue to graze¹⁵, and any farm buildings on that land (to the extent they have continued to be “character appropriate”). The non-agricultural woodland might not be considered “ancillary” to the minor portion of agricultural land for the small herd of cattle, even if part of it forms a shelter belt for the agricultural land from flooding risks related to the local river.

However, the woodland may qualify for woodland relief (providing certain conditions are met, e.g., Farmer A has been beneficially entitled to the woodland for at least five years prior to death). Prior to undertaking the rewilding project, Farmer A might wish to consider the impact on APR as well as the availability of Business Property Relief (see further below).

EXAMPLE 2: FARMER B

Farmer B is a farmer-landowner seeking to rewild farming land by promoting natural regeneration and habitat restoration whilst maintaining its active use as grazing land. She might do so by eliminating her use of high-density, high-intensity grazing by sheep in favour of using fewer, large, low-intensity grazing cattle.

She might additionally fence the perimeter of her farming property while removing all interior fencing to allow low intensity grazing to occur over a larger land area, thereby encouraging the natural regeneration of previously heavily grazed land. Such rewilding activity will complement the use of her farming property as grazing land, as the changes merely make that grazing more sustainable, and such use is likely to fall under the IHTA 1984 definition of agricultural property, with the farmer in occupation of the land for a clear agricultural purpose so that on her death, an inheritor is likely to be able to benefit from APR.

Land which was not previously being used for “*agricultural purposes*” and so did not benefit from APR might start to qualify for APR as a result of rewilding activities. For example, an estate which has been predominantly used for game shooting and fishing, with cottages rented out for leisure holidays. It is unlikely the land on this estate would have qualified for APR, including the cottages on it. However, the landowner decides to undertake a rewilding project including wildflower seeding in selected areas to restore a diversity of habitats to the landscape and introducing low numbers of grazing animals, including cattle, to mimic natural grazing which the landowner combines with meat production from the cattle and pigs. It may be that these activities make the land eligible for APR on the basis of it now being “*agricultural land*”. While agriculture is accepted as including the use of land as grazing land, it seems that this would still require some form of agricultural activity to be linked to the grazing – i.e., food production from cattle. While cattle are more obviously considered as farming livestock, arguably this should also apply to animals such as deer, pigs and wild boar to the extent they are also kept primarily for food production, given the statutory definition of “*livestock*” includes “*any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land*”¹⁶.

4. INHERITANCE TAX: BUSINESS PROPERTY RELIEF

In circumstances where APR does not apply, or where it is not sufficient to relieve the IHT burden on the full open market value of farmland property, an alternative form of IHT relief which may apply is Business Property Relief (“**BPR**”). Unlike APR, BPR is applicable in respect of the full value of any asset which qualifies as “*relevant business property*” and will reduce the full value of such an asset by 100% or 50% for the purposes of calculating IHT¹⁷. The amount of relief applicable will depend on the category of relevant business property into which the asset falls.

Typically, a farmer operating their farming business as a sole trader will be able to claim 100% BPR on assets / property relating to that farming business (or at least the remaining value following any applicable APR relief). Where the business is carried on by a partnership in which the transferor was a partner or by a company that the transferor controlled, 50% relief applies to land, buildings, machinery, or plant owned by the transferor and used “*wholly or mainly*” for the purpose of that business. The property must have been owned by the transferor for more than two years (subject to certain relaxations to these rules for transfers between spouses on death, quick succession, and replacement property).

The business must be carried on for gain¹⁸ and be a trading business. It must not be wholly or mainly an investment¹⁹ or a dealing business and so cannot be a business dealing in land or buildings or making or holding investments (e.g., BPR may not be available in respect of furnished holiday lets or residential let properties held as investment property within an agricultural estate). BPR will usually be available for farming business property such as the business banking accounts, farm machinery/plant, farmland, woodland (see Section 8 (*Taxation of Woodland*) below), farm buildings and stock as these are clearly used in the trade of farming. Certain assets within a qualifying business may be deemed to be an “*excepted asset*”²⁰ if they are not used in the business and not required for future business use.

The questions in this context are therefore whether “*rewilding*” can be categorised as “*farming*” trade and thereby qualify for BPR, or if not, whether it can still qualify as a “*trade*” not prohibited from benefitting from BPR. The answers depend on the factual circumstances. See Section 5 (*Income and Corporation Tax*) below for discussion on whether rewilding activities can be considered farming trade for income tax purposes. If so, they are likely to be eligible for BPR for IHT purposes.

EXAMPLE 3: FARMER A

Farmer A’s rewilding land is unlikely to qualify for BPR as it is likely to be viewed by HMRC as no longer used “wholly or mainly” for the purposes of the farming business as the use of the land is not connected with his farming “trade”, being the cattle and chickens.

In addition, Farmer A is not undertaking any activities in respect of the rewilding land with a view to profit (he has not sought to generate an income from the rewilding land in respect of eco-tourism, for example) and so the rewilding land is unlikely to be viewed by HMRC as having been used for a business at all.

However, Farmer A may be able to claim BPR for his three broiler houses in which he rears the chickens, as well as the farm buildings for cattle, to the extent that APR was not available. However, Farmer A is unlikely to be able to claim BPR in respect of the farmhouse as his home because it’s unlikely to be viewed as having been used wholly or mainly for the purposes of the business (although BPR may be available for any specific rooms used as an office to run the farm).

As mentioned above, for property to qualify for BPR the underlying business must not be wholly or mainly an investment or dealing business. This point was considered in *HMRC v Brander*²¹ (known as the Balfour case), where the application of BPR was assessed in the context of a farming business which consisted of a mix of both trading and investment activities, and which is a helpful reference for rewilding activities, in particular where traditional farming income is supplemented by income from eco-tourism in connection with rewilding land.

In that case Lord Balfour owned the estate in a partnership with his nephew and the estate comprised a mixture of trading and investment activities: two in-hand farms, three let farms, 26 let cottages, two let commercial units and various woodlands, parks and sporting rights.

The Executors claimed that the estate was managed as one composite business, but HMRC disagreed, contending that (among other things), as the estate included a large number of rental properties, the partnership was not undertaking a business activity and was instead “*making or holding investments*”. However, the Upper Tax Tribunal determined that the estate was run as one whole composite business, with Lord Balfour’s involvement across the estate as a whole being an important factor in supporting that conclusion with the result that BPR was available in full against the value of the estate.

The case was helpful in clarifying that where a landowner has diversified their sources of income, various factors are considered when determining if BPR is available across an estate as a whole and not just the property involved in trading activities. Consideration needs to be given to the turnover, profit, time spent on elements within the business and the capital value of the elements and how the accounts are drawn up. This is now known as the “Balfour Principle” and when successfully applied, would mean a whole business benefits from BPR and not only the property involved in the trading activities.²²

A key element of this and other cases is the landowner’s active performance of some activity on the land, in particular where land is let under a grazing agreement. Following the decision in *McCall and Keenan v HMRC*²³, where grazing agreements are in place, it is important to show that the profit from the land is not simply the rent from letting the land to a third party, but that the owner is still actively farming the land (e.g., by being permitted to graze their own animals alongside the licensee’s animals, or by growing grass as a crop which the licensee’s animals are permitted to graze on).

EXAMPLE 4: FARMER B

Farmer B carries out rewilding activities to reduce the impact of historic heavy-grazing and encourage natural regeneration. She may also do this as part of a general push to diversify her use of her farming property.

To compensate for lower farming profits or even initial losses following the elimination of her large sheep herd as part of rewilding efforts, she may decide to engage in various investment activities to generate non-agricultural profits, e.g., letting out an agricultural cottage as a rental property.

She also lets out a portion of her land on a grazing licence to a conservation group, with her only responsibility being the maintenance of the boundary of the let land.

Farmer B will need to ensure that a balance is maintained between farming activity and other more diverse means of creating profit from farmland, to prevent inadvertently tipping the balance from farming trade profits to a focus on investment income generated from renting property. Unless Farmer B undertakes some activity on the land leased to the conservation group, it will likely be excluded from BPR on the basis of generating investment income from the rent. In such circumstances, the availability of APR could be at risk if the diversification results in the land no longer being occupied for “*agricultural purposes*”. Finally, BPR may not be available if her business is viewed as investment activity rather than trading.

5. INCOME AND CORPORATION TAX

For the purposes of both income tax and corporation tax, farming is treated as a trade²⁴ whether or not the land is managed on a commercial basis and with a view to making a profit (although, if a trade is not carried out with a view to being commercially profitable, this may restrict the availability of loss relief – see further below). Farming is defined in both the Income Tax Act 2007 (“**ITA 07**”) and the Corporation Tax Act 2010 (“**CTA 10**”) as being “*the occupation of land wholly or mainly for the purposes of husbandry but excluding any market gardening*”²⁵. Although for the purposes of defining farming for tax purposes no restriction is put on where the land is situated, the automatic treatment of farming as a trade is restricted to land farmed within the United Kingdom.

There are certain advantages of income being categorised as farming trade income (e.g., in respect of reliefs from capital gains tax (which are outside the scope of this note) and BPR for IHT purposes as explained above). There is therefore a tax advantage where land in the process of rewilding can be categorised as an asset occupied and used for the purposes of the farming business.

In connection with rewilding, it is important for farmers to prove the “badges” (i.e., the features) of trade and ensure business plans support this. According to case law, badges of trade include, for example: whether there is a profit seeking motive; the nature of the asset (i.e., is the asset of such a type or amount that it can only be turned to advantage by a sale); and the number of transactions (because evidence of repeated transactions will often support “trade”). It may be that rewilding complements farming in constituting part of a “trade”, for example, where rewilding encourages grazing of moors, managing and expanding wetland and retaining winter stubble and is accompanied by an on-farm butchery, and an outdoor rare breed pig and beef business.

As set out above, to be a farmer, a person must satisfy two tests: the person must be in occupation of land (other than market garden land) and the purpose of the occupation must be mainly for husbandry. Case law provides that “farming” for Income Tax purposes generally means “*the carrying*”

on of activities appropriate to land recognisable as farmland²⁶, so that it will generally need to consist of the kinds of agricultural activities that we have discussed above, certainly including “the raising of [livestock], the cultivation of land and the growing of crops”.²⁷ The ITA 07 does not include a complete definition of husbandry but provides that it includes hop growing, breeding and rearing horses, and grazing horses in connection with those activities and the cultivation of short rotation coppice, which is defined as “a perennial crop of tree species planted at high density, the stems of which are harvested above ground level at intervals of less than 10 years”.²⁸

The ordinary language definition of “husbandry”, i.e., the cultivation of crops and breeding of animals, has been extended by the courts, which may be helpful when considering the treatment of rewilding for income tax purposes. In *CIR v Cavan Central Co-operative Agricultural and Dairy Society Ltd*²⁹ diverse activities such as bread-making, homespun cloth and home-brewed ale were considered examples of husbandry, if carried out by a “husbandman” (i.e., the farmer who tills the soil). The court thought that the origin of husbandry suggested a liberal interpretation that would include some activity on the land whose manifest object was the benefit of mankind and the support of life. When planning a rewilding project then, you might like to consider selling traditional farming produce such as milk, meat and wool for human consumption and use, as part of the project. Where rewilding plants and grasses are consumed by the animals used for human consumption, this will also be helpful, and may support an argument that income from land let to a third party to operate a rewilding project through a grazing agreement does not fall within the investment exception explained above.

EXAMPLE 5: FARMER C

Farmer C has two plots of farmland. They let one plot to a rewilding organisation on a short-term basis, so that it can operate rewilding activities on this land.

The rewilding organisation undertakes non-agricultural rewilding activities such as peat and wetland restoration, which are unlikely to constitute farming (or any kind of trade at all) for income tax purposes. Any rental payments which Farmer C receives from this rewilding tenancy will likely be chargeable as property income instead of farming income. However, if Farmer C continues to directly work on the other plot of land wholly or mainly for crop farming, they will both be in occupation of that plot of land and their income in respect of that trade will likely be chargeable as farming income.

As can be seen with BPR, for certain tax relief purposes, it is important that a farmer’s income generated from the land is specifically recognised as “trading” income and not as “property” income. Income generated from rewilding activities (e.g., in connection with nature tourism) will not necessarily count as farming trade income. This may impact on certain reliefs bespoke to farming trade, such as the one-trade rule which generally allows all farming activities by a particular person in the UK to be treated as one trade, allowing profits and losses from multiple farms to be aggregated for tax purposes.

In addition, farmers’ profit averaging relief allows a farmer to choose to average farming income profits over either two consecutive tax years³⁰ or five consecutive tax years³¹. Averaging is not just available to farmers. Other qualifying trades include the intensive rearing (in the UK) of livestock or fish on a commercial basis for the production of food for human consumption.³² Averaging can also be applied to trades of market gardening³³. Averaging only applies to profits chargeable to income tax, so companies liable to corporation tax cannot use these provisions³⁴.

Trade loss relief against general income is usually not available where a farmer incurred losses before capital

allowances in each of the five preceding tax years³⁵ (often referred to as the “hobby farming” restriction). However, relief is not denied where the farmer can show that during the period when loss was sustained, the trade was being carried on, on a commercial basis and with a view to the realisation of profit. So, for example, initial farming trade losses due to rewilding efforts will not necessarily act as a barrier to the availability of trade loss relief to a farmer minded to rewild, nor will they definitively cause rewilding or sustainable farming activity to be considered “hobby farming”.³⁶

Equally, the “hobby farming” restriction does not apply where the loss-making farm is part of, and ancillary to, a larger trading undertaking.³⁷ For example, a farmer previously used her substantial high-intensity grazing herd of sheep for meat and accounted for them as trading stock. She decides to undertake a major rewilding project by: reducing the size of the sheep herd and using them instead for wool; offering craft classes in spinning, weaving and rug-making using the wool; and building a thriving eco-tourism business including camping and luxury glamping. It may be that if the business of keeping the sheep for their wool is loss-making, trade loss relief is still available on the basis that keeping the sheep for wool is ancillary to the eco-tourism business. The farmer may also account for the retained sheep on the “herd basis”, enabling the farmer to treat the herd in most circumstances as a capital asset in accordance with the herd basis rules, such that the cost of maintaining the herd can be charged against tax and any profit on disposal of the herd will be tax-free.³⁸

6. CONSERVATION BURDENS

Conservation burdens are a specific type of real burden granted by a landowner over their land in favour of a “conservation body” (e.g., a conservation or rewilding charity as approved by Scottish Ministers) or the Scottish Ministers for the purpose of preserving, amongst other things, the special characteristics of land derived from the flora, fauna or general appearance of the land. They set out

obligations in respect of the land which will be legally binding both on the landowner and on any subsequent owner of the land. Other than as mentioned above, this note does not cover tax considerations relating to the grant by a donor of conservation burdens.

See briefing note titled *Rewilding in Scotland: Conservation Burdens and Legal Protections* for more detailed information on conservation covenants.

7. TAXATION OF GRANTS AND SUBSIDIES

The purpose for which a grant or subsidy is paid will usually determine whether it is a trading receipt or a capital receipt. For example, in the case of *Clyde Higgs v Wrightson (Inspector of Taxes)*³⁹ receipt of a ploughing grant was held to be a trading receipt, whereas in *Watson v Samson Brothers*⁴⁰, payments for rehabilitation of flood-damaged land were held to be capital receipts. Payments under the basic payment scheme⁴¹, for example, will be assessed as income.

8. TAXATION OF WOODLAND

What is 'commercial woodland' for income and corporation tax purposes?

The 'commercial occupation' of woodlands in the United Kingdom is not a trade or part of a trade for any income tax purpose and is exempt from income tax⁴² and the same is true of corporation tax⁴³. Profits or losses from the commercial occupation of woodlands in the United Kingdom are therefore ignored for both income tax and corporation tax purposes⁴⁴. Woodlands are treated as 'commercial' if they are: (a) managed on a commercial basis; and (b) with a view to the realisation of profits. It is not necessary to show profits immediately, given the long-term nature of forestry can make

that difficult, but it is important to be able to demonstrate to HMRC the commerciality of the occupation of the woodland in other ways, for example through a woodland management plan, accounts and records. Where the woodland is part of a farm, separate accounts and records should be kept demonstrating the commerciality of the woodland independent from other estate or farm activities (to avoid the activities on the woodland being taxable as farming trade or other income).

There is no clear definition of what constitutes 'commercial occupation' for this purpose and so how HMRC will view an activity depends on the facts and it is easier to identify what is not covered, than what is covered. The exemption of commercial woodland from income tax and corporation tax does not cover: (a) the sale of short rotation coppice such as willow and poplar; (b) receipts from felled timber where the land is predominantly occupied for farming; and (c) specialist Christmas tree farms, which are nurseries within the statutory definition of market gardening⁴⁵ and treated as a trade. Although where Christmas trees are a crop on an ordinary farm, the income from their sale may be included in the farm profits⁴⁶.

What about capital gains tax?

Broadly, the sale of timber or standing timber from commercial woodlands is exempt from income tax, corporation tax and capital gains tax⁴⁷. The sale of the land, however, is not exempt from capital gains tax. Where the woodland is sold as a whole, an apportionment is made between the value of the standing trees, timber and underwood and the value of the land (note that this apportionment is not applicable to agricultural or amenity⁴⁸ woodland).

Rollover Relief⁴⁹ may be available to woodlands where these are managed by the occupier on a commercial basis and with a view to the realisation of profits. Such relief enables any capital gains tax due on a disposal of the woodland to be deferred when new assets are acquired costing the same as, or more than, the amount realised on disposal of the woodland. Any tax is then postponed until disposal of the new asset. Holdover Relief⁵⁰ may also be available in respect of woodlands and applies to gifts.

Such relief defers any capital gains tax payable so that none is due when the woodland is gifted to another person, although the recipient will then be liable to meet the cost of any capital gains tax due, when they sell or dispose of the woodland.

What Inheritance Tax Reliefs are available for woodland?

As discussed in Section 3 (*Inheritance Tax: Agricultural Property Relief*), the IHTA 1984 provides for woodland to be eligible for APR where it is "ancillary" to the agricultural land subject to the relief. Ancillary uses include tree nurseries, shelter belts or, for example, short rotation coppice carried out for woodchips, firewood, and fencing.

Commercial woodland can also qualify for BPR, provided the conditions discussed in Section 4 (*Inheritance Tax: Business Property Relief*) above are met (as regards being a business carried on for gain and being owned and occupied for at least two years prior to the transfer). Woods managed as a business could include, for example, those used for commercial shooting, fishing, residential letting or commercial timber harvesting. As discussed in Section 5 (*Income and Corporation Tax*), the badges of trade will be useful in demonstrating there is a trading business in respect of the woodland. It is also helpful to be able to demonstrate profitability, and given it is not always possible to make a profit in years where, for example, regeneration and planting take place, regular budget reviews and business/management plans are invaluable (for example using the Forestry Commission's Woodland Management Plan template).

Woodland Relief

Woodlands relief⁵¹ provides deferral relief so that a charge does not arise until the trees or underwood growing on the land is sold in the future (provided the woodlands are not occupied or ancillary to agricultural land). This form of relief is therefore less valuable than APR and BPR as the tax is deferred and not exempt, in addition to which the relief only applies to the trees and not the land.

Heritage Relief

If the woodland is in an area of “*outstanding scenic, historic or scientific interest*”, then it may qualify for conditional exemption from IHT⁵² (available to both ancient woodland and new plantations). On a transfer of value, it may be exempted on the condition that the new owner agrees to certain ‘undertakings’ to maintain the woodland and grant access to the public.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of November 2022.

ENDNOTES

1. The tax laws referred to in this note apply to Scotland.
2. The Agricultural Property Relief provisions in IHTA 1984 will apply to property held under the Crofting Acts.
3. The Inheritance Tax Act 1984, Part V, Chapter II, s.116 - 117
4. The Inheritance Tax Act 1984, Part V, Chapter II, s.269
5. The Inheritance Tax Act 1984, Part V, Chapter II, s.115(2)
6. Given its ordinary meaning, “intensive rearing of livestock” involves keeping livestock at high stocking densities on a large scale designed to maximise production while minimising costs.
7. *Starke v IRC* [1995] STC 689
8. The Agricultural Holdings (Scotland) Act 1991, Part IX, s.85(1). In *Assessor for Tayside Region v Reedways Ltd* (1982, unreported), emphasis was placed on the importance of “*tilling, sowing or cultivation*” of the soil for land; as the reeds were a natural growth, and all the taxpayer did was cut the reeds down for thatching, this meant the reed beds could not be agricultural due to the absence of any tillage of the soil. In *Hemens (Valuation Officer) v Whitsbury Farm and Stud Ltd* [1988] A.C. 601, buildings used for the purposes of a stud farm for racehorses were not “*agricultural buildings*” (which were exempt from rating under the Rating Act 1971 s.1(3)) as animals were not considered “*livestock*” unless they were kept for the production of food, wool or for use in farming the land. *Assessor for Lothian Region v Rolawn Ltd* [1989] RVR 146 found that the growing and selling of high-quality turf was an agricultural purpose and the lands were entitled to be derated (note that the land used to grow the turf in this case was cultivated in the same way as that used for many edible crops and most of the machinery involved was also commonly used for agricultural purposes).
9. The Inheritance Tax Act 1984, Part V, Chapter II, s.117(a).
10. As above, s.117(b).
11. See briefing note *Rewilding in Scotland: Conservation Burdens and Legal Protection* for discussion on conservation burdens.
12. See *Lloyds TSB Banking v IRC* [2005] W.T.L.R. 1535.
13. *CIR v John Whiteford and Son* [1962] TR 157, *Rosser v IRC* [2003] WTLR 1057.
14. See Richard Williams (personal representative of Mary Philomena Williams (deceased)) v HMRC [2005] (SpC500) where a claim for APR failed in respect of three broiler houses used for the intensive rearing of chickens because the broiler houses dominated that part of the land they occupied, and there was no evidence of wider agricultural activities on the remainder of the land.
15. Note that the test is whether the land is “*agricultural land*” and there is no obvious answer as to how many cattle or other livestock would need to be grazing on the land for it to qualify as such.
16. Section 85(1), the Agricultural Holdings (Scotland) Act 1991.
17. The Inheritance Tax Act 1984, Part V, Chapter I, s.103 - 114
18. The Inheritance Tax Act 1984, Part V, Chapter I, s.103(3)
19. As above, s.105(3).
20. The Inheritance Tax Act 1984, Part V, Chapter I, s.112
21. [2010] UKUT 300 (TCC)

22. See also *Vigne (HMRC v The Personal Representative of Maureen Vigne (Deceased))* [2018] UKUT 0357, *Graham (The Personal Representatives of Grace Joyce Graham (deceased) v HMRC* [2018] UKFTT 306 (TC))
23. [2009] NICA 12
24. Income Tax (Trading and Other Income) Act 2005, s.9, the Income Tax Act 2007, s.996(1), Corporation Tax Act 2009, s.36, and Corporation Tax Act 2010 s.1125
25. The Income Tax Act 2007, Part 16, Chapter I, s.996(1), Corporation Tax Act 2010, Part 24, Chapter I, s1125
26. *Lowe (Inspector of Taxes) v J. W. Ashmore Ltd* [1970] 3 W.L.R. 998 [553]
27. As above
28. The Income Tax Act 2007, s.996
29. (1917) 12 TC 1
30. The Income Tax (Trading and Other Income) Act 2005, Part 2, Chapter 16, s.222(1).
31. As above, s.222A(1).
32. Income Tax (Trading and Other Income) Act 2005, s221(2)(b)
33. Income Tax (Trading and Other Income) Act 2005, s221(2)(a)
34. Income Tax (Trading and Other Income) Act 2005, s221(1))
35. The Income Tax Act 2007, s.67.
36. See BIM85615 – Farming losses: test of commerciality
37. The Income Tax Act 2007, s.67(3)(a)
38. Income Tax (Trading and Other Income) Act 2005, Chapter 8 of Part 2. Note that although the herd basis rules are expressed in terms of farmers, they apply to any person who keeps or has kept a production herd for the purposes of a trade, whether or not the trade is farming (section 111(3))
39. [1944] 1 All ER 488
40. [1959] 38 TC 346
41. See *Rewilding in Scotland: Subsidies* for more information on the Basic Payment Scheme
42. Income Tax (Trading and Other Income) Act 2005, Section 11, Part 2
43. Corporation Tax Act 2009, section 37, Part 3
44. Corporation Tax Act 2009, Sections 208 and 980 and Income Tax (Trading and Other Income) Act 2005, section 687 and 768
45. Income and Taxes Act 2007, section 996(5), *Jagers v Ellis* [1997] 71 TC 164
46. BIM55205
47. BIM55205, Income Tax (Trading and Other Income) Act 2005, Section 25, Corporation Tax Act 2009, Section 46 and the Taxation of Chargeable Gains Act 1992, Section 250
48. There is no set definition of amenity woodland but broadly speaking it means woodland not used for commercial timber but for other purposes e.g., leisure and recreational activities.
49. Taxation of Chargeable Gains Act 1992, section 152
50. Taxation of Chargeable Gains Act 1992, section 165
51. Inheritance Tax Act 1984, section 125
52. Inheritance Tax Act 1984, section 31

WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers and local groups in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain can explore these issues further with others in the same boat.



The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.



JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

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