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The transferable nil rate band - the fundamentals

Synopsis: How the transferable nil rate band works and how to claim it.

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For deaths occurring on or after 9 October 2007, it is possible for the executors of the deceased person to make a claim for any unused portion of a former spouse's or civil partner's nil rate band, irrespective of when that person died.

The amount of nil rate band available for transfer will be based on the proportion of unused nil rate band at the time of death of the first spouse or civil partner, but at the rate applicable at the time of death of the survivor.

A maximum 100% of the nil rate band will be available, although it can be accumulated on more than one occasion, for example if a person dies having survived more than one spouse or civil partner.

Example 1

Brian died in October 1992 when the nil rate band was £150,000. His Will left £75,000 to his children with the balance of his estate to his wife Katherine. Brian thus used 50% of his nil rate band leaving 50% unused.

If Katherine dies in July 2022 (assuming she has made no lifetime transfers in the preceding seven years) her personal representatives will be able to claim an additional £162,500 (£325,000 @ 50%) in respect of Brian's unused nil rate band, bringing the total nil rate band available in respect of Katherine's estate to £487,500.

Example 2

Greg died in June 1992 when the nil rate band was £150,000. His Will left £60,000 to a discretionary will trust with the balance passing to his wife Alison. Greg thus used 40% of his nil rate band leaving 60% unused.

Alison later married Derek, who died in June 2007 also leaving 60% of his nil rate band unused. If Alison dies in July 2022 (assuming she made no lifetime transfers in the preceding seven years) then, although a combined total of 120% of Greg and Derek's nil rate bands are unused, her personal representatives will only be able to claim an additional £325,000 (100% of the nil rate band in 2022/23) in respect of both Greg and Derek's unused nil rate bands (limited to a maximum of the nil rate band) bringing the total nil rate band available to £650,000.

The claim must be made using form IHT402. This form must be sent to HMRC no later than 24 months after the end of the month in which the deceased died. For example, if the deceased died on 10 September 2020, the form would need to be sent no later than 30 September 2022.

There are various documents that need to accompany the IHT402. These are broadly as follows...

- A copy of the first spouse's or civil partner's Will.
- His or her death certificate.
- Marriage certificate or civil partnership certificate.
- A copy of the grant of representation regarding the spouse's or civil partner's estate (confirmation in Scotland).
- A copy of the deed of variation or any similar document which was executed to change the people who inherited under the spouse's or civil partner's Will.

HMRC has made it clear that the original documents or official copies do not have to be provided. Certified copies are acceptable. HMRC is looking at all claims submitted and will reject them if the information is incomplete.

Copies of certificates can be obtained from the General Register Office, and wills and grants from the Court Service. It may well be that, in the case of deaths many years ago, such records may not be available. HMRC has said that it will be understanding in such circumstances.

Since 6 April 2017, it has also been possible to claim transferable residence nil rate band (TRNRB) in respect of second deaths occurring on or after that date where the first spouse or civil partner to die (regardless of when the first spouse or civil partner died) has not (or is deemed to have not) used his or her residence nil rate band (RNRB).

Where the first to die died prior to 6 April 2017, he or she is deemed to have used no part of his or her RNRB regardless of the actual circumstances at the time of first death (although they may of course have used part of their standard nil rate band if a first death gift to children or to a trust was made).

This means that in most cases, the executors of a surviving spouse or civil partner who was widowed prior to 6 April 2017 and who leaves a qualifying residence to direct descendants, will be able to claim two RNRBs to offset against the estate on second death. The only exception to this will be where the estate on either first or second death exceeded the £2 million taper threshold.

The TRNRB must be claimed within two years of second death using form IHT436.

Claiming the transferable nil rate band

When transferable nil rate band is claimed, what is transferred is a proportion of the nil rate band unused – from 0 to 100%, regardless of the value of the estate and the amount transferred. Indeed, the first spouse or civil partner to die may have owned nothing at all at their death – in such a case the whole nil rate band is still transferable.

In a straightforward situation, when one spouse or civil partner died before 9 October 2007 and the survivor dies subsequently without having remarried, the calculation will be relatively straightforward. The survivor's nil rate band available on death will be increased by the proportion of the unused nil rate band from the first spouse or civil partner.

In other circumstances, especially when individuals remarry (or form another civil partnership), or there is a history of lifetime gifts, or the first spouse or civil partner used some or all of the nil rate band by creating a discretionary trust which has since been dismantled, things may be a little more complicated.

What is clear is that regardless of the circumstances, those families who wish to rely on the transferable nil rate band in their planning will need to keep detailed documentation, perhaps for many years, and be alert to the necessity for their personal representatives to make a formal claim for the RNRB within the correct time frame.

As mentioned above, the claim must be made within 24 months from the end of the month in which the survivor dies and will be made by the personal representatives (or somebody who suffers an inheritance tax (IHT) liability on that estate). Certain documents will need to be provided in support of the claim which, according to the latest guidance issued by HMRC, will include the death certificate for the first person to die, a copy of any Will and any grant of probate, together with the marriage or civil partnership certificate for the couple.

Other evidence may also be required by the survivor's personal representatives and HMRC, including...

- Any documents submitted in support of the application for the grant on the first death and the return to HMRC (form IHT205 or IHT400).

- Details of any other assets that were chargeable and which did not pass under the grant. This could include assets jointly owned with another person or held in trust.

For example, assets owned in joint tenancy will pass directly to the surviving joint owner.

Furthermore, an individual who has a life interest under a trust which is an immediate post death interest (IPDI) or a pre-22 March 2006 interest in possession will be regarded as owning the trust assets for IHT purposes. (An IPDI is an interest in possession that is created under a Will or intestacy.) If entitlement to these assets passed on the first death to somebody other than a surviving spouse or civil partner (or charity), that transfer would use up a part of the deceased's nil rate band.

A copy of any deed of variation which varied the terms of any relevant Will or the intestacy provisions will also be required, as will details of any lifetime gifts to persons other than the spouse or civil partner which were made by the first to die

in the seven years before their death. Evidence of the valuation of these gifts may also be required.

Further, any gifts that are caught by the gift with reservation of benefit rules will use all or part of the nil rate band which would otherwise be potentially transferable. Details of these will also be required.

As will be apparent, the survivor's personal representatives will need to know full details of the assets which are likely to affect the transferable nil rate band available along with supporting valuations, in addition to details of any exemptions or reliefs taken into account in arriving at the chargeable values on the first death.

In light of this, it would seem sensible that such information and documents are held by the surviving spouse or civil partner with their Will. This will usually be kept by the family's lawyers and, as such information may not be required for many years, it seems sensible that in any case where a future claim for the transferable nil rate band might need to be made, then lawyers are instructed to compile and retain that information following the first death. This could potentially save considerable expense and delay on the survivor's death.

For deaths occurring on or after 6 April 2017, similar information will be required in order to complete form IHT436 if a claim for TRNRB is to be made. Transferring RNRB can be slightly more complicated than transferring standard nil rate band – particularly where one or both estates is over £2 million or where downsizing or disposal has occurred before death.

Transferable nil rate band and domicile

When an individual is UK domiciled, their worldwide assets will be subject to IHT on their death. If they are non-UK domiciled, only such of their assets as are situated in the UK come into the IHT net (the exception to this rule, for deaths on or after 6 April 2017, is where the offshore asset derives its value from UK residential property)

When people emigrate, they will often wish to acquire a new domicile of choice and, if they do so, this may well result in a UK IHT saving on their subsequent death. However, the downside to having a foreign domicile is that the spouse/civil partner exemption for IHT on transfers to a non-UK domiciled spouse or civil partner is limited.

Prior to the introduction of the Finance Act 2013, if a UK domiciled spouse or civil partner died leaving their entire estate to a non-UK domiciled spouse or civil partner, the IHT threshold was limited to the available nil rate band and an additional £55,000.

This meant that the maximum tax-free amount a non-UK domiciled spouse or civil partner could receive was £380,000, with the balance subject to IHT at the rate of 40%. However, Finance Act 2013 increased the IHT threshold for assets to be received by a non-UK domiciled spouse or civil partner to £650,000 (i.e. the nil rate band plus an additional £325,000).

The question then arises as to how non-UK domiciled spouses or civil partner are treated with regard to the transferable nil rate band. The answer is that each individual, UK domiciled or not, is entitled to the full nil rate band to be set against such part of their estate that is subject to IHT.

This means that...

- A UK domiciled spouse or civil partner is entitled to receive the unused nil rate band of a non-UK domiciled spouse or civil partner.

- A non-UK domiciled spouse or civil partner is entitled to receive the unused nil rate band of a UK domiciled spouse or civil partner.

- A non-UK domiciled spouse or civil partner is entitled to receive the unused nil rate band of a similarly non-UK domiciled spouse or civil partner.

For example

(a) First death non-UK domiciled - second death UK domiciled

There are no restrictions on the spouse/civil partner exemption when the recipient is UK domiciled. Where a non-domiciled individual dies the availability of the transferable nil rate band on their estate is calculated only by reference to property that is potentially subject to UK IHT – this means their estate in the UK. Any property outside the UK does not count against the nil rate band as it is an "excepted asset".

Take Ahmed (non-UK domiciled) and Tracy (UK domiciled)...

Ahmed died in 2007 leaving an estate of £2 million. The family home was in the name of his wife, Tracy. He had £100,000 in a UK bank account that he left to Tracy. The other £1.9 million of assets situated abroad were split equally between Tracy and their two sons.

In this example, Ahmed has not used any of his nil rate band. As the £100,000 in the UK bank given to Tracy and £633,334 are exempt transfers and the £1,266,666 given to the sons was not within the scope of UK IHT, on Tracy's death in July 2022 her estate is entitled to a 100% increase in the then current nil rate band.

(b) First death UK domiciled – second death non-UK domiciled

When the first to die is UK-domiciled and the survivor is non-UK domiciled, transfers to the survivor of more than £325,000 in the seven years before death and on death will be chargeable transfers and so use part or all of the nil rate band.

Consider Alexander (UK domiciled) and Henning (non-UK domiciled)...

Alexander and Henning were registered civil partners. Unfortunately, Alexander died in a car crash in May 2022 leaving an estate of £700,000. £300,000 of his estate was his half-share of a house he owned with Henning, which passed to

Henning by survivorship. The other £400,000 was in cash – of which one half Alexander left to three registered charities and the other half to Henning.

The total transfer to Henning is £500,000. Of this, £325,000 is exempt. The £200,000 bequest to the charities is also exempt. Therefore £175,000 (being the balance of transfers to Henning) of Alexander's nil rate band has been used. This represents 53.85% of Alexander's nil rate band. Therefore, on Henning's death, his executors will be able to claim the unused 46.15% to set against Henning's estate subject to UK IHT (whether or not he is still non-UK domiciled at the time).

(c) Both non-UK domiciled

There are no restrictions on the spouse/civil partner exemption where both are non-UK domiciled. The calculation basis is therefore the same as for Ahmed and Tracy.

It is important to remember that just because someone has left everything to the surviving spouse or civil partner, it does not mean that all the transfer would have been exempt from IHT. It is important always to establish the domicile, for IHT purposes, of both the donor and the donee.

Finally, it should be noted that, since 6 April 2013, it has also been possible for a spouse or civil partner who is domiciled outside the UK to make an election to be treated as domiciled in the UK for IHT purposes, so enabling them to benefit from an unlimited IHT spouse/civil partner exemption in respect of gifts and bequests received from the UK-domiciled spouse or civil partner. If such an election has been made, the spouses or civil partner should be treated for IHT purposes in exactly the same way as if they were both UK domiciled.