

Tax DOs and DON'Ts for Property Companies

By

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Contents

| | |
|--|-----------|
| About Lee Sharpe | 7 |
| About This Guide | 8 |
| 1. Choosing the Right Structure..... | 9 |
| 1.1. Sole Trader..... | 9 |
| 1.2. Partnership..... | 9 |
| 1.3. Limited Company | 9 |
| 1.4. Types of Partnerships | 9 |
| 1.4.1. A “Limited Partnership” | 10 |
| 1.4.2. A Limited Liability Partnership (known as an LLP)..... | 11 |
| 2. Getting to Grips with Limited Companies | 12 |
| 2.1. The Different Types of Limited Company..... | 12 |
| 2.2. The Basic Rules for a Company | 12 |
| 3. Understanding Corporation Tax..... | 15 |
| 3.1. The Rates of Corporation Tax..... | 15 |
| 3.2. Key Dates for the Company..... | 15 |
| 3.3. Benefiting from the Favourable Company Taxes..... | 16 |
| 3.4. Extracting the Cash from the Company | 16 |
| 3.4.1. Paying a Salary | 17 |
| 3.4.2. Paying Dividends | 18 |
| 3.4.3. Paying Dividends and a Salary..... | 20 |
| 4. Building Up a Property Portfolio Using a Company | 23 |
| 4.1. Using a Company to Grow Your Property Portfolio | 23 |
| 5. Disallowance of Mortgage Interest on Residential Properties..... | 24 |
| 6. Everything You Need to Know About Dividend Payments..... | 26 |
| 6.1. Working with “Distributable Profits” | 26 |
| 6.2. Who Gets the Dividends? | 27 |
| 6.3. The Two Types of Dividend | 27 |
| 6.3.1. A “Final” Dividend. | 28 |
| 6.3.2. An “Interim” Dividend. | 28 |
| 6.4. Getting the Paperwork Right | 28 |
| 6.4.1. Sample – Meeting Minute | 28 |
| 6.4.2. Sample – Dividend Confirmation | 30 |
| 6.5. Two Pitfalls to Avoid when Making Dividend Payments | 31 |
| 6.5.1. Illegal Dividends. | 31 |
| 6.5.2. Timing of Dividends | 31 |
| 6.6. Using Dividend Waivers – An Effective Tax Planning Tool..... | 31 |
| 6.7. Watch out for the “Settlements” Legislation | 32 |

| | | |
|------------|---|-----------|
| 7. | The Property Development Company..... | 34 |
| 7.1. | <i>The Property Developer.....</i> | 34 |
| 7.2. | <i>Companies and Property Developers.....</i> | 34 |
| 7.3. | <i>The Construction Industry Scheme (“CIS”).....</i> | 36 |
| 8. | Incorporation Relief..... | 37 |
| 8.1. | <i>Transferring Assets into Your Company.....</i> | 37 |
| 8.1.1. | <i>Holdover Relief for Gifts of Business Assets.....</i> | 37 |
| 8.1.2. | <i>Incorporation in Exchange for Shares.....</i> | 38 |
| 8.2. | <i>Watch Out for Three Pitfalls.....</i> | 40 |
| 8.2.1. | <i>“Preordained Series of Transactions”.....</i> | 40 |
| 8.2.2. | <i>Stamp Duty Land Tax.....</i> | 40 |
| 8.2.3. | <i>What is a “Business”?.....</i> | 40 |
| 8.3. | <i>Incorporating an Existing Property Investment Portfolio.....</i> | 41 |
| 9. | Entrepreneur’s Relief (“ER”) from CGT..... | 42 |
| 10. | Reinvestment Relief..... | 43 |
| 10.1. | <i>Property Investors and Reinvestment Relief.....</i> | 43 |
| 10.1.1. | <i>Business Assets.....</i> | 43 |
| 10.1.2. | <i>Furnished Holiday Lettings.....</i> | 43 |
| 10.2. | <i>Deferring Capital Gains by Reinvesting.....</i> | 45 |
| 10.2.1. | <i>Enterprise Investment Scheme (EIS).....</i> | 45 |
| 11. | Two Property Tax Pitfalls..... | 48 |
| 11.1. | <i>When is a Partnership Not a Partnership?.....</i> | 48 |
| 11.1.1. | <i>Why Does it Matter?.....</i> | 48 |
| 11.2. | <i>How Limited is Your Liability?.....</i> | 50 |
| 12. | Close Companies..... | 53 |
| 12.1. | <i>What is a Close Company?.....</i> | 53 |
| 12.2. | <i>Special Rules for Close Companies.....</i> | 53 |
| 12.3. | <i>The Meaning of a “Distribution” From a Close Company.....</i> | 54 |
| 12.4. | <i>Loan to a Participator.....</i> | 54 |
| 13. | The Directors’ Tax Liabilities..... | 58 |
| 13.1. | <i>Tax on Non-Cash Benefits.....</i> | 58 |
| 13.2. | <i>Expenses.....</i> | 58 |
| 13.2.1. | <i>Travelling expenses.....</i> | 58 |
| 13.2.2. | <i>Cars.....</i> | 59 |
| 13.2.3. | <i>Using Your Own Car for Business.....</i> | 59 |
| 13.2.4. | <i>Using Cars for Sole Traders and Partnerships.....</i> | 59 |
| 13.2.5. | <i>Three Important Differences to Remember.....</i> | 59 |
| 13.3. | <i>Other Expenses.....</i> | 60 |
| 13.4. | <i>Shares as Rewards.....</i> | 60 |
| 13.5. | <i>FOUR Tax Free Benefits.....</i> | 62 |

| | |
|--|-----------|
| 14. Companies and Tax Investigations..... | 64 |
| 14.1. “Aspect” Enquiries..... | 64 |
| 14.2. “Compliance” Enquiries..... | 64 |
| 14.3. Full Enquiry..... | 65 |
| 14.4. “Grossing up”..... | 65 |
| 14.5. Company Investigation Settlements..... | 66 |
| 14.6. Watch Out for the Contractual Disclosure Facility (CDF) and COP 9..... | 68 |
| 14.7. Four Golden Rules of Tax Investigations..... | 69 |
| 15. Getting Your Exit Strategy Right..... | 70 |
| 15.1. Everybody Has an Exit Strategy..... | 70 |
| 15.2. The THREE Most Common Exit Strategies..... | 70 |
| 15.3. Selling the Business..... | 70 |
| 15.3.1. Benefits of Buying the Shares in the Company..... | 70 |
| 15.3.2. Drawbacks of Buying the Shares in the Company..... | 71 |
| 15.3.3. Benefits of Selling the Shares in the Company..... | 71 |
| 15.3.4. Benefits of Selling the Company’s Assets and then Liquidating..... | 72 |
| 15.4. Selling the Company’s Shares..... | 72 |
| 15.4.1. “Earn-outs”..... | 72 |
| 15.4.2. “Employment-Related Shares or Securities”..... | 74 |
| 15.4.3. Payments Under Warranties and Indemnities..... | 74 |
| 15.4.4. “Compensation for Loss of Office”..... | 74 |
| 15.4.5. Pre-Sale Tax Planning..... | 74 |
| 15.4.6. Company Purchase of Own Shares..... | 74 |
| 15.4.7. Timing..... | 75 |
| 15.4.8. Gifts to Spouse..... | 75 |
| 15.4.9. Substantial Shareholding Exemption..... | 76 |
| 15.4.10. Post Sale Tax Planning..... | 76 |
| 15.4.11. Tax Shelters..... | 76 |
| 15.4.12. Losses..... | 76 |
| 15.5. Sales of Assets and Liquidation of Company..... | 77 |
| 15.6. How to Liquidate a Company..... | 77 |
| 15.6.1. A Formal Liquidation..... | 77 |
| 15.6.2. An Informal Liquidation..... | 77 |
| 15.7. Dying in Harness..... | 78 |
| 16. Inheritance Tax and Companies..... | 79 |
| 16.1. IHT – the Basics..... | 79 |
| 16.2. PETs..... | 79 |
| 16.3. Gift With Reservation of Benefit..... | 80 |
| 16.4. Spouse Exemption..... | 81 |
| 16.5. Business Property Relief..... | 81 |
| 16.6. Close Companies and IHT..... | 82 |
| 17. Finding an Accountant..... | 85 |
| 17.1. Accountants Qualifications..... | 85 |

| | | |
|------------|--|------------|
| 17.2. | <i>General Advisor or Tax Specialist?</i> | 86 |
| 17.3. | <i>How to Choose Your Adviser</i> | 86 |
| 17.3.1. | Will I Need a Tax Adviser or an Accountant?..... | 86 |
| 17.3.2. | What Qualifications?..... | 86 |
| 17.3.3. | How Much Experience do they Have? | 87 |
| 17.3.4. | How Much Will it Cost?..... | 87 |
| 17.3.5. | Professional Bodies..... | 87 |
| 17.3.6. | What About Indemnity Cover?..... | 87 |
| 17.3.7. | How do I Contact My Tax Adviser / Accountant?..... | 88 |
| 17.3.8. | Keep up to Date with Tax Legislation Changes | 88 |
| 17.3.9. | What if I Have an Emergency?..... | 88 |
| 17.3.10. | Does the Adviser Sell 'Off the Shelf' Packages?..... | 89 |
| 18. | The Importance of Tax Planning | 90 |
| 18.1. | <i>Knowing When to Consider Planning</i> | 90 |
| 18.1.1. | Buying..... | 90 |
| 18.1.2. | Repairs and Refurbishment..... | 91 |
| 18.1.3. | Selling | 91 |
| 18.1.4. | Life changes | 92 |
| 18.1.5. | Politics | 92 |
| 18.1.6. | End and Start of Tax Year | 92 |
| 18.2. | <i>The Real Benefits of Tax Planning</i> | 93 |
| 18.2.1. | Paying Less Tax | 93 |
| 18.2.2. | Clear 'Entrance' and 'Exit' Strategies | 93 |
| 18.2.3. | Staying Focused..... | 93 |
| 18.2.4. | Improving Cash Flow..... | 93 |
| 18.2.5. | Avoiding Common Tax Traps..... | 94 |
| 18.3. | <i>The Golden Tax Rules</i> | 94 |
| 18.3.1. | Education...Education...Education | 94 |
| 18.3.2. | Prevention is Better Than Cure | 94 |
| 19. | International and Offshore Companies by Daniel Feingold | 98 |
| 19.1. | <i>About Daniel Feingold</i> | 98 |
| 19.2. | <i>Watch Out for the Single Solution Approach</i> | 98 |
| 19.3. | <i>Using an Offshore Company</i> | 99 |
| 19.4. | <i>The SEVEN pitfalls of using an Offshore Company</i> | 99 |
| 19.5. | <i>Using Local Companies</i> | 103 |
| 19.6. | <i>Using a Double Tax Treaty to Your Advantage</i> | 103 |
| 19.7. | <i>CM&C and Local Companies</i> | 104 |
| 19.8. | <i>Using a UK Company to Buy Overseas Property</i> | 104 |
| 19.9. | <i>Foreign Branch Tax Rules</i> | 104 |
| 19.10. | <i>Understanding Foreign Tax Rates</i> | 105 |
| 19.11. | <i>Extracting Money from Your UK Company</i> | 105 |
| 19.12. | <i>Using Two Companies</i> | 106 |
| 19.13. | <i>Using a Nominee Company</i> | 107 |
| 19.14. | <i>EFURBS</i> | 107 |
| 19.15. | <i>A Final Word</i> | 108 |
| 20. | Appendix A – Template Documents | 109 |

About Lee Sharpe

Lee is a Chartered Tax Adviser and tax consultant with over twenty years' experience in helping individuals, families, businesses and advisers with their tax affairs.

Lee writes extensively on tax matters for taxpayers and their advisers, including through the Tax Insider publications, Bloomsbury Professional and the TaxationWeb website. He also lectures taxpayers, accountants and other financial advisers on tax issues.

While he has appeared on TV to comment on tax matters, it was only long enough to establish that he really has a face for radio, and to give fellow members of his local CIOT branch sufficient ammunition with which to embarrass him at committee meetings.

When he is not giving tax advice or writing about tax matters, he is busy looking after his two small children – not because he likes them, but because he wants to make sure that his office is not used exclusively for business purposes...

About This Guide

One of the most common questions tax advisers often get asked is “should I use a limited company or not?”

There is no simple answer to this question, and there is a great deal of myth and misunderstanding about limited companies.

The purpose of this guide is to set out the benefits and drawbacks of using a limited company as a vehicle for a property business, and to compare them with other possible business structures.

Over the last few years, there has been a rush to incorporate (to transfer their business into a limited company) by many small businesses, egged on by the tax breaks introduced by the Chancellor of the Exchequer in 2000 and in 2002. These tax breaks were withdrawn with effect from April 2006, and as a result, the decision whether to incorporate or not has become more difficult.

Most notably, the Chancellor’s 2015 Summer Budget announced a significant increase in dividend taxation, such that company dividends have lost some of their shine. But the Chancellor also announced tax relief restrictions for individuals that leave companies largely unaffected. Simply put, the race is very much back on.

This guide assumes you have no previous knowledge or experience of limited companies. By the time you finish it, we hope you will have a much clearer idea of the way a company works, and whether it is the right vehicle for your business.

1. Choosing the Right Structure

Anyone wishing to run a business in the UK has a wide choice of ways to organise it. Each possible structure has its own advantages and disadvantages.

This chapter gives an overview of the three basic types of business structures that are commonly used.

1.1. Sole Trader

This is the simplest form of business.

A sole trader owns and runs his business directly – he is “self-employed”. All the risks and rewards are his directly, and all the decisions about the business are his.

If things go well he owns all the profits he has made (after he has paid tax on them!).

If things go badly, he is liable for all the debts of the business. He has “unlimited liability” – if his business fails, his private property can be taken to pay off the debts of the business.

1.2. Partnership

Where two or more people own and run a business together, they are known as a partnership.

Like a sole trader, all the risks and rewards belong to the partners – but the crucial point is that EACH partner is JOINTLY liable for the partnership’s debts.

If things go wrong, any money owed by the business can be recovered from the partners – and if one of them has no money to pay, the other partners will have to pay his share of the debts as well. Like the sole trader, a partner’s liability is “unlimited”.

1.3. Limited Company

A Limited Company is a “legal person”. This means that it exists independently of its shareholders, and it can make contracts, and be sued for its debts.

The word “Limited” means that the shareholders’ liability is limited to the money they have invested in their shares. If things go wrong, the worst that can happen to the shareholders is that they will not get their money back - though as we shall see, this is not in fact always the case.

1.4. Types of Partnerships

There is really only one kind of sole trader, but there are different kinds of partnership.

The basic type of partnership is defined by the Partnership Act 1890, and involves “persons carrying on a business in common with a view to profit”.

A partnership is not a separate legal person from its members, and for tax purposes it is “transparent”. In other words, the partnership itself does not pay tax – each partner pays tax on his share of the profits.

In Scotland, a partnership is a legal person, but for tax purposes, it is treated in the same way as an English partnership, and is “transparent” like them.

In some cases, although two people may agree to share the income from a project, they are not strictly a partnership because they are not carrying on “a business in common”.

In such a case, the activity is known as a “joint venture”.

HM Revenue and Customs (HMRC) will sometimes claim that this is the case where a jointly owned property is rented out, and this can have significant tax consequences, as we shall see later.

We have seen how the partners in a partnership are jointly liable for the business debts.

There are some varieties of partnership where this is not entirely the case and these are detailed in the following sections.

1.4.1. *A “Limited Partnership”*

A “Limited Partnership” is one where one or more of the partners has his liability limited to the capital he contributes to the partnership when he joins – like a shareholder, the worst that can happen to him is that he loses the money he invested, unlike an ordinary partner who might lose everything.

There are special rules for such partnerships:

- At least one of the partners must be a “general partner” who has unlimited liability, as in an ordinary partnership, and is responsible for running the business.
- A limited partner is not allowed to withdraw any of his capital from the partnership until he leaves the firm.
- A limited partner is not allowed to take part in running the partnership’s business, or to make contracts, etc., on behalf of the firm – if he does, he loses his limited liability and becomes an ordinary partner.
- There are restrictions on how much relief such partners can have for any losses made by the partnership, and they cannot get tax relief for the interest on any money they borrow to invest in the partnership.

Such partnerships are rather specialised entities, but they can have their uses.

Case Study - 1 A “Limited Partnership”

Mary wants to set up a new business, and her Aunt Sally is prepared to invest 60% of the capital needed to help her, in exchange for a fair share of the profits.

She doesn't want to have “unlimited liability” so the obvious solution seems to be a company, but Mary would rather not incur the expense of setting up and running one.

Instead, the new business is set up as a limited partnership, with Mary as the General Partner and Sally as the Limited Partner.

This way, Sally has limited liability, as she would have had with a company.

In other words, a limited partner must be a “sleeping partner” – that is, a partner who does not get involved in running the partnership.

1.4.2. *A Limited Liability Partnership (known as an LLP)*

This is a fairly new sort of business entity, which was made possible by the Limited Liability Partnership Act 2000.

Unlike a normal partnership, it is a separate legal person from its members, but for tax purposes it is “transparent” like an ordinary partnership.

As the name implies, the partners in an LLP have limited liability, like shareholders in a company.

LLPs have proved popular with large professional firms such as accountants and solicitors, but as a general rule they are not appropriate for the smaller property investor or trader, being rather cumbersome to administer.

The idea of LLPs was that they would combine the advantages of a company (limited liability) with those of a partnership (informality and flexibility).

Some would say, however, that they also combine the disadvantages!

Except for unusual situations like Case Study - 1, the most suitable form of partnership for the property investor is likely to be the traditional Partnership Act type, as described above.

2. Getting to Grips with Limited Companies

In this chapter we will start to understand the structure of Limited Companies.

2.1. The Different Types of Limited Company

There are several types of Limited Company:

A Private Limited Company is the type we shall be concentrating on in this guide. It is the basic type of limited company, used by hundreds of thousands of businesses.

A Public Limited Company (“plc.”) is allowed to raise funds by selling shares to the public, but it is also subject to much stricter legal controls than a Private Limited Company.

A Listed Company is a plc. whose shares can be traded on the Stock Exchange.

There are some other types of company, such as a **company limited by guarantee** – this is normally used by charities, and because it is not allowed to distribute its profits to its shareholders, it is ideal for that purpose – and useless for a property investor!

For the rest of this guide, when we use the word “company” we shall be referring to a **private limited company**.

2.2. The Basic Rules for a Company

The basic rules for a company are:

- It must have at least one shareholder. The shareholders own the company, and their ownership is evidenced by the number of **shares** they own. If, for example, a company has a total of 100 shares issued to its shareholders, someone who owns 51 of those shares owns 51% of the company.

He also **“controls”** the company, because in normal circumstances he will have 51 out of 100 votes if decisions are to be made about the company’s policies.

- It must have at least one director. Directors are responsible for running the company’s business affairs. The shareholders own the company, but the directors run it on a day to day basis. In the case of the typical smaller property business company, the directors are often the shareholders as well.
- A company must prepare and file accounts each year with Companies House (the government agency that regulates UK companies). These must be filed within 9 months of the end of the period covered by the accounts.
- A company must also file various returns of other information with Companies House, notifying such things as the appointment of new directors, and so on.

- A Company must have a **Memorandum and Articles of Association**. This is a formal document which sets out the basic structure of the company – the number of shares it can issue, the rules for transferring shares from one person to another, and the purposes for which the company has been formed.

Although these “Mem & Arts” are available as standard format documents, it is important to be sure that they are appropriate for your particular company.

If necessary, the “Mem & Arts” can be altered, but there is a formal process for doing this.

- Decisions made by the directors or shareholders of a company should be recorded in the company’s **Minutes** – which are a formal record of such things as appointing new directors, issuing shares, or paying dividends.

There is an example of a company **minute** in section 6.4.1 of this guide.

If this sounds a daunting list of tasks, do not despair – there are a number of specialist companies that offer help with these tasks, and your accountant will be able to advise you on compliance with the routine requirements.

It is important to realise, however, that a company is a more formal structure than a sole trader or a partnership, and that there are penalties for failing to comply with the rules.

The accounts of a company must be prepared according to certain rules and in a certain format. **You will need an accountant to prepare these for you.**

Companies over two out of the three following thresholds are also required to have their accounts “audited” – that is, checked for accuracy by an independent accountant:

- a turnover of over £6.5 million,
- assets of more than £3.26million,
- an average of over 50 employees

Even if your company falls below these limits, you should include the cost of having company accounts prepared by an accountant when you look at the figures for your company.

All the above requirements for companies mean that you should budget for at least £1,000 in “compliance” costs for each year – to cover preparation of accounts, submission of the various statutory returns, and working out the tax payable by the company.

This is a minimum figure – but it will be the one we shall use in the case studies that compare companies with other business entities.

Once a company has filed its accounts, they become **public information**.

Anyone (including your employees or your competitors) can pay a small fee to Companies House and get a copy of the accounts, together with information on the shareholders and directors of the company.

For companies that are excused from being audited, only “abbreviated” accounts need be filed and made public – “abbreviated” accounts do not show as much detail as full accounts (for example there is no profit and loss account) but nevertheless, they give quite a lot of information about the company.