SCHEDULES

SCHEDULE 5

Section 35

CHARGEABLE GAINS: OPTIONS

PART 1

APPLICATION OF MARKET VALUE RULE IN CASE OF EXERCISE OF OPTION

Application of market value rule in case of exercise of option

1 (1) Section 144ZA of TCGA 1992 is amended as follows.

(2) In subsection (1) (cases in which the section applies) at the beginning insert "Subject to section 144ZB,".

(3) In subsection (4) (where market value rule is set aside by the section, amount or value to be taken into account is, subject to section 120, to be actual amount or value) for "(subject to section 120) the actual amount or value" substitute "(subject to section 119A) the exercise price".

(4) After that subsection insert—

"(4A) In subsection (4) above "exercise price", in relation to an option, means the amount or value of the consideration which, under the terms of the option, is—

(a) receivable (if the option binds the grantor to buy), or

(b) payable (if the option binds the grantor to sell),

as a result of the exercise of the option (and does not include the amount or value of any consideration for the acquisition of the option (whether directly from the grantor or not)).".

(5) For subsection (5) substitute—

"(5) Subsections (5) and (6) of section 144 shall apply for the purposes of this section and sections 144ZB to 144ZD as they apply for the purposes of that section.".

Application of market value rule in case of exercise of option: exception

2 After section 144ZA of TCGA 1992 insert—

"**144ZB Exception to rule in section 144ZA**

(1) This section applies where—

(a) section 144ZA would apply but for this section in relation to an option, and

(b) the exercise of the option is non-commercial (see section 144ZC).

(2) But this section does not apply if—

(a) the option is a securities option within the meaning of Chapter 5 of Part 7 of ITEPA 2003 (see section 420(8) of that Act) to which that Chapter applies or would, apart from section 474 of that Act, apply (see section 471 of that Act), or

(b) section 144ZD of this Act (value of underlying subject matter of option altered with a view to obtaining a tax advantage) applies in relation to the option.

(3) Where this section applies, neither section 144ZA nor the following provisions of section 144 shall apply in relation to the option—

(a) in subsection (2), the words from "and accordingly" to the end of that subsection, and

(b) in subsection (3), the words from "and accordingly" to the end of that subsection;

but subsection (4) or (5) below shall instead have effect (subject to subsection (6) below).

(4) If the option binds the grantor to buy—

(a) the cost of acquisition incurred by the grantor in buying in pursuance of his obligations under the option, and

(b) the consideration for the disposal of what is bought by the grantor,

shall be deemed for the purposes of tax in respect of chargeable gains to be the market value, at the time the option is exercised, of what is bought.

(5) If the option binds the grantor to sell—

(a) the consideration for the sale, and

(b) the cost to the person exercising the option of acquiring what is sold,

shall be deemed for the purposes of tax in respect of chargeable gains to be the market value, at the time the option is exercised, of what is sold.

(6) But if the whole or any part of the underlying subject matter of the option (see subsection (7)) is subject to any right or restriction which is enforceable by the person disposing of the underlying subject matter or a person connected with him—

(a) the market value of the underlying subject matter shall be determined for the purposes of subsection (4) or (5) above as if the right or restriction did not exist, and

(b) to the extent that subsection (6) or (7) of section 18 would apply apart from this paragraph, it shall be disregarded.

(7) In this section "underlying subject matter", in relation to an option, means—

(a) if the option binds the grantor to sell, what falls to be sold on exercise of the option;

(b) if the option binds the grantor to buy, what falls to be bought on exercise of the option.

144ZC Section 144ZB: non-commercial exercise of option

(1) For the purposes of section 144ZB, the exercise of an option which binds the grantor to buy is non-commercial if the exercise price for the option (see subsection (3)) is less than the open market price (see subsection (4)) of what is bought.

(2) For the purposes of section 144ZB, the exercise of an option which binds the grantor to sell is non-commercial if the exercise price for the option is greater than the open market price of what is sold.

(3) In this section "exercise price", in relation to an option, means the amount or value of the consideration which, under the terms of the option, is—

(a) receivable (if the option binds the grantor to buy), or

(b) payable (if the option binds the grantor to sell),

as a result of the exercise of the option (and does not include the amount or value of any consideration for the acquisition of the option (whether directly from the grantor or not)).

(4) In this section "open market price", in relation to the underlying subject matter of an option (see section 144ZB(7)), means the price which the underlying subject matter might reasonably be expected to fetch on a sale in the open market at the time the option is exercised; and subsections (5) to (7) below apply for the purposes of this subsection.

(5) If the whole or any part of the underlying subject matter of the option is subject to any right or restriction which is enforceable by—

(a) the person disposing of the underlying subject matter, or

(b) a person connected with him,

the open market price of the underlying subject matter shall be determined as if the right or restriction did not exist.

(6) Section 272(2) (no reduction in estimated market value on account of assumption that whole of assets are placed on market at one time) shall apply in estimating the open market price of the underlying subject matter of an option as it applies in estimating the market value of any assets.

(7) Where the underlying subject matter of an option comprises or includes assets to which section 273 applies (unquoted shares and securities), subsection (3) of that section (assumption that relevant information is available) shall apply in determining the open market price of those assets as it applies for the purposes of a determination falling within subsection (1) of that section.

(8) This section is to be construed as one with section 144ZB.

144ZD Section 144ZB: alteration of value to obtain tax advantage

(1) This section applies in relation to an option if each of the following conditions is satisfied (as to the effect of this section applying, see section 144ZB(2)(b)).

(2) Condition 1 is that section 144ZB would, apart from subsection (2)(b) of that section, apply in relation to the option.

(3) Condition 2 is that, at the time the option is exercised, the open market price (see section 144ZC(4)) of the underlying subject matter of the option (see section 144ZB(7)) differs from the open market price of the underlying subject matter of the option at the time the option was granted.

(4) Condition 3 is that some or all of that change in the open market price of the underlying subject matter of the option results to any extent, directly or indirectly, from arrangements (see subsection (8)) ("the relevant arrangements")—

(a) to which a relevant person is or has been a party, or

(b) which include one or more transactions to which a relevant person is or has been a party.

(5) In subsection (4) above "relevant person" means any of the following—

(a) the grantor of the option;

(b) any person who at any time holds the option;

(c) a person connected with one or more of the persons mentioned in paragraph (a) or (b) above.

(6) Condition 4 is that, if there were to be disregarded so much of that change in the open market price of the underlying subject matter of the option as results to any extent, directly or indirectly, from the relevant arrangements, the exercise of the option would not be non-commercial (see section 144ZC).

(7) Condition 5 is that (apart from this section) as a result, directly or indirectly, of the relevant arrangements—

(a) the grantor of the option, or

(b) the person exercising the option,

would obtain or might be expected to obtain an advantage (see subsection (9)) in relation to capital gains tax or corporation tax in respect of chargeable gains directly or indirectly in consequence of, or otherwise in connection with, the exercise of the option.

(8) In this section "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

(9) In this section "advantage", in relation to capital gains tax or corporation tax in respect of chargeable gains, means—

(a) relief or increased relief from, or repayment or increased repayment of, that tax, or the avoidance or reduction of a charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax, or

(b) the deferral of any payment of that tax or the advancement of any repayment of that tax.

(10) This section is to be construed as one with sections 144ZB and 144ZC."

PART 2

MISCELLANEOUS AMENDMENTS RELATING TO SHARE OPTIONS ETC

Shares acquired on same day: election for alternative treatment

3 (1) Section 105A of TCGA 1992 is amended as follows.

(2) In subsection (1) (cases in which subsection (2) applies) in paragraph (b) (some of the acquired shares to be approved-scheme shares) for sub-paragraphs (i) and (ii) substitute—

"(i) the exercise of a qualifying option within the meaning given by section 527(4) of ITEPA 2003 (enterprise management incentives) in circumstances where section 530 or 531 of that Act (exercise of option to acquire shares) applies, or

(ii) the exercise of an option to which Chapter 7 or 8 of Part 7 of that Act (approved share option schemes) applies in circumstances where section 519(1) or 524(1) of that Act applies.".

Employment-related securities options

4 (1) Section 149A of TCGA 1992 is amended as follows.

(2) In subsection (1) (cases in which the section applies) for paragraph (b) (option to consist of right to acquire shares in body corporate and to be obtained by individual by reason of his office or employment) substitute—

"(b) the option is a securities option within the meaning of Chapter 5 of Part 7 of ITEPA 2003 (see section 420(8) of that Act) to which that Chapter applies or would, apart from section 474 of that Act, apply (see section 471 of that Act), and".

(3) In that subsection, in paragraph (c) (section 17(1) to apply for calculating consideration for grant of option) after "section 17(1)" insert "of this Act".

(4) The heading of the section accordingly becomes "Employment-related securities options".

Interpretation of TCGA 1992

5 (1) Section 288 of TCGA 1992 is amended as follows.

(2) In subsection (1A) (employment-related securities options) for the second sentence substitute—

"In this subsection "employment-related securities option" means a securities option within the meaning of Chapter 5 of Part 7 of ITEPA 2003 (see section 420(8) of that Act) to which that Chapter applies or would, apart from section 474 of that Act, apply (see section 471 of that Act); and other expressions used in this subsection and that Chapter have the same meaning in this subsection as in that Chapter.".

PART 3

COMMENCEMENT

Commencement

6 (1) The amendments made by paragraphs 1 to 3 have effect in relation to cases where the option in question is exercised on or after 2nd December 2004 (whenever the option was acquired).

(2) The amendments made by paragraphs 4 and 5 have effect in relation to options granted on or after 2nd December 2004.