

Chapter 14

Guidance on home reversion and home purchase activities

14.5 The 'by-way-of-business' test

Q38. How do I know if I am carrying on regulated activities by way of business?

A *person* will only need to be an *authorised person* or *exempt person* if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the Act (Regulated activities)).

Whether or not any particular *person* will meet the requirement that he carries on a *regulated activity* by way of business and so needs to be an *authorised person* or *exempt person* will invariably depend on that person's individual circumstances. Generally speaking, a number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular regulated activity that is carried on.

However, there are in fact four different forms of business test that are applied to the *home finance transactions* (see Q38A). For example, the ordinary business test is significantly widened in scope in relation to *entering into a regulated sale and rent back agreement* (see Q38B).

Corporate plan providers and those who provide professional services to them or to home occupiers are likely to be carrying on their activities by way of business. Unpaid individuals who act as trustees for home occupiers are not likely to be.

Q38A. What are the four different forms of business test referred to in Q38?

They are:

- (1) the 'by way of business' test in section 22 of the Act applies unchanged in relation to the activity of *entering into a home finance transaction* other than *entering into a regulated sale and rent back agreement*;
- (1A) in the case of *entering into a regulated sale and rent back agreement*, the effect of article 5 of the Business Order is that an *SRB agreement provider* is to be regarded as acting 'by way of business' unless that *person* is a *related party* in relation to the *SRB agreement seller*;
- (2) the 'by way of business' test in section 22 of the Act applies unchanged in relation to the activity of *administering a home finance transaction*, but another 'by way of business' test arises in relation to *administering a home purchase plan* because the plan being administered by way of business must itself have been entered into by way of business (see Q28); and

- (3) in the case of arranging and advising, the effect of articles 3B to 3D of the *Business Order* is that a *person* is not to be regarded as acting 'by way of business' unless he is 'carrying on the business of engaging in one or more of those activities'.

Q38B. How does the business test in the Business Order differ from the business test in section 22 of the Act?

The 'by way of business' test in article 5 of the *Business Order* is wider than the 'by way of business' test in section 22 of the *Act* because, for example, it does not require any degree of continuity; entering into just one *regulated sale and rent back agreement* is enough.

On the other hand, the 'carrying on the business' test in articles 3B to 3D of the *Business Order* is a narrower test than that of carrying on *regulated activities* 'by way of business' in section 22 of the *Act* as it requires the *regulated activities* to represent the carrying on of a business in their own right.

Q38C. Can you give me some examples where the business test is unlikely to be satisfied?

Examples are:

- (1) when an individual enters into a *regulated sale and rent back agreement* as *SRB agreement provider* where that individual is a *related party* in relation to the *SRB agreement seller* whether at market interest rates or not; and
- (2) when a person provides a service without any expectation of reward or payment of any kind (but see ■ PERG 7.3.4 G for examples of when the giving of 'free' advice in relation to *home finance transactions* might still amount to a business).

Q38D. Will I meet the business test if I only enter into one home purchase plan or home reversion plan a year?

Yes, you might meet the business test. Whether or not you do will depend largely on the facts. The following issues may be helpful to bear in mind:

- the relevant business test here is not the narrower business test under the *Business Order* but the wider one under section 22 of the *Act*: that is whether the activity is being carried on by way of business (see Q38B);
- the expression "carrying on business" suggests the need for a degree of continuity in the activity. Hence, one-off or extremely infrequent acts would usually not be thought to be enough to satisfy the test. However, it is unlikely that a person could successfully claim that entering into a plan or agreement was a "one-off" or very infrequent act if, in all the circumstances, it cannot be shown that they intended this to be the case. This is because there is always a first time that any regular activity is carried on;
- some individuals are clearly in business as sole traders - they will represent themselves as running a business and be registered for VAT etc. Other individuals may not so clearly be in business. In the latter case, it is necessary to consider the scale of the potential regulated activity. Where a person expects to make a living, or a substantial part of their living, from entering into *home finance transactions* it is likely that they are carrying on such activities by way of business.

With this in mind, if you intend on entering into just one *home reversion plan* or *home purchase plan* each year this may be enough to meet the 'by

way of business' test if the scale of this activity is likely to be significant in relation to your other activities.

Q38E. Will I meet the business test if I only enter into one sale and rent back agreement?

Yes, provided you are an *SRB agreement provider* that is not a *related party* in relation to the *SRB agreement seller*.

This is because of an amendment to the *Business Order* made by the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2014 (SI 2014/3340) which came into force on 31 December 2014. This Order also provides that the amendment will cease to have effect on 1 January 2022. The Treasury is required to review the operation and effect of the amendment and to publish a report before the end of 2017. Following the review, the Treasury will decide whether the amendment should be allowed to expire, be revoked early, or be maintained in force with or without amendments. A further instrument would be needed to maintain the amendment in force or to revoke the amendment early.