Capitalgains.taxteam@hmrc.gsi.gov.uk

31 March 2014

Dear Sirs,

I commence by making two general comments:

1. If the scope of CGT is to be extended to tax non-residents on gains realised from the ownership of real property situated in the UK, I see no reason why the tax should be further complicated by boundaries between residential, on the one hand, and other categories of land and buildings, on the other.

2. The legislation will have to comply with Art. 63 TFEU and, accordingly, must treat non-residents no worse than residents.

Q	Comment
1	If a resident would be chargeable to CGT in relation to gains realised on disposals of communal property, government policy, as stated in para.2.6 maintains a distortion in the market place. Furthermore, if the property is used for the purpose of a trade, it will be subject to CGT under TCGA 1992, s.10. The exclusion would appear to apply only to such property not used for the purpose of a trade, which would invite structuring of ownership of such property.
2	The policy is unclear
3	With reference to general point 2, where one or more of the persons having an interest in relevant property has occupied the property as a principal private residence for part of the period of ownership, a way of granting s.223 relief will have to be devised.
4	Relief under, for instance, s.225 will have to be provided.
5	Rather than design bespoke tests, would not the objective be served by exempting only collective investment schemes subject to regulation? Umbrella funds would have to be accommodated if ownership is tested.

6	The onus of proof of qualification can be placed on the person claiming exemption.
7	In practice, it might be difficult for a genuine fund manager to certify that no groups of connected persons have invested in its fund.
8	I feel that the charge should be kept within CGT. If CT is applied, discriminatory rules, such as denying relief for loan relationship debits, could run foul of Art. 63 TFEU. Exemption should be considered for non-resident companies wholly owned by exempt funds. Non-resident companies conducting a trade in the UK may not be within the charge to CT in respect of gains realised on disposals of residential property unless such assets are used in the trade. The language of the question is a bit loose.
9	I can think of none at the present time.
10	It may not be common for a professional to have a family home and accommodation of some description in a place near his place of employment or business but it is not uncommon. The provider's family might join the provider during school holidays. As HMG encourages mobility of the workforce, withdrawal of the election might be counter-productive. The gain on such property might be a windfall but might also only offset the accumulated costs of ownership, such as loan interest.
11	The 2nd alternative in para.3.5 conflicts with the exemptions for absence. The requirement to provide evidence spanning what may be considerable periods of time would be onerous. I purchased my own house in 1977 – I don't have bank statements going back that far in time. My driving licence does but how would I prove that I did not have another property almost 40 years ago? Could you?
12	You have not pointed out any reason for the need to change the current system. This consultation is concerned with taxation of non-residents. There is no need to change this particular rule. If a 'non-resident' has been resident during his period of ownership and has resided in a dwelling as his principal private residence during that period, he should receive proportionate relief as provided currently in the TCGA.
13	I see no reason why the existing procedures for taxing the rental income of non-residents should not be adapted particularly when the non-resident has been within the system Any withholding tax should be calculated on the gain, not on the proceeds but it would be for the non-resident to provide the requisite evidence of deductible costs incurred. EU law would be infringed unless

	the non-resident had the opportunity to provide that evidence – see *Scorpio* below, for instance. EU law may not require the provision of an annual exemption. It may not require part of the gain to be taxed at 18%. To be eligible, the non-resident would have to provide details of his income and demonstrate that he would not be a higher rate taxpayer.
14	See above
15	No. CGT is a tax on gains. The tax should be calculated on the gain. The onus should be for the non-resident to supply the evidence of his cost. If he does not, then a withholding based on proceeds would be fair provided that the assessment remains open enabling him to provide the requisite information and claim a repayment of the excess tax withheld.
16	If the non-resident is registered for SA on his rental income, then – yes. If he not, so that withholding tax would be deducted from rental income by the agent (or tenant), then the conveyancing solicitor should be charged with accounting for tax on the basis of a calculation of the gain. If the non-resident fails to provide the solicitor with the information and evidence required to make that calculation, then the solicitor should withhold tax from the proceeds as said in 15. above.

Yours faithfully

Scorpio: CJEU 3 October 2006 C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* [2006] ECR I-9461para.49