IMPLEMENTING A CAPITAL GAINS TAX CHARGE ON NON-RESIDENTS: CONSULTATION

RESPONSE BY EMAIL TO: CAPITALGAINS.TAXTEAM@HMRC.GSI.GOV.UK and by AIR MAIL to Specialist Personal Tax Assets and Residence Policy, HMRC, 100 Parliament Street, London SW1A 2BQ, London.

11 JUNE 2014

Dear Sir/Madam

1...In this Response to the Consultation paper published 28 March 2014 on Implementing a Capital Gains Tax charge on Non-residents, unless otherwise stated abbreviations and expressions bear the same meaning as in the Consultation paper and covering letter with Foreword from the Treasury Minister, David Gauke MP.

2...Clarification is required on whether the ATED-related capital gains tax treatment regarding the accrual of gain will be applied to capital gains **on non**-ATED-related residential properties AND that it will not be so applied

2.1 COMMENT: There is concern with the approach to ATED-related capital gains tax currently (and presumably in future following the reduction in ATED bands to a threshold of GBP 500,000) which is applied on a straight-line apportionment basis with the fraction of the gain or loss which is ATED-related normally being the number of days for which ATED is charged as a fraction of the total period of ownership. If this approach is then applied to the new CGT charge on non-residents with the number of days of the new CGT charge post-April 2015 being taken as a fraction of the total period of ownership, it would appear misleading to state-see the Foreword and 1 Introduction, that the charge will "only apply from April 2015, and only to gains arising from that date". **Legacy gains pre-April 2015 will in effect fall to be charged** on a fraction of the total period of ownership if the ATED-related capital gains tax approach is adopted.

2.2 In a softening (as now) or falling property market, there may be little or no gain post April 2015-perhaps even an unrelieved loss, but the new CGT charge will, if applied consistently with the ATED-related capital gains tax, "bite" on pre-April 2015 gains arising over earlier year(s). This retroactive effect is contrary to the "primary aim" of fairness and the statements in the Consultation paper that only gains arising post April 2015 will be charged.

2.3 Example if the straight line apportionment basis applies: assume in the 6 years of ownership the inflationary increase in the asset has been 96% of which 2% accrued in the year post April 5th 2015. The taxpayer will be charged on 16% (1/6th) of the gain, not the actual gain post April 2015 ie 2% (1/50th).

2.4 Inconsistency however with the application of the ATED-related capital gains tax treatment will result in more or less CGT under the new non-resident charge being paid on the disposal of the same asset class ie residential property, compared with the ATED –related capital gains tax. This inconsistency seems without rationale. ATED claims to be aimed at SDLT avoidance.

2.5 Fairness requires values to be taken as at 6 April 2015 (or later acquisition date-usually determined by the purchase price in the open market) and for these to be used as the base cost for CGT. The ATED-related CGT should be similarly structured with consequential statutory amendment.

3...The Consultation paper repeatedly claims to put "**fairness**" and "sustainability" as the primary aim, the Overarching Objectives, and continues by stating "that the tax treatment of non-residents that own and make gains on UK residential properties [should be] comparable (sic) to that of UK residents, without unnecessary burdens". The Consultation paper then states (Foreword and 1 Introduction including 1.3 and Box 1A) that: "...it is not right that UK residents pay CGT when they sell their home that is not their primary residence while non-residents do not.....it is important for **the integrity** of our tax system that when gains are made from residential property, UK tax is paid".

3. 1 COMMENT: There is concern that the proposals in the Consultation paper do not manifest the stated standard of "integrity", are unfair and may prove to be unsustainable.

3.2 CGT was introduced in 1965 some 50 years ago. For 50 years and despite countless opportunities and countless statutory amendments in the interim to provide for exceptions, exceptions to exceptions and anti-avoidance (pertinently non-residence per se is not "avoidance"), no suggestion has been raised (until now, 50 years having passed) that there is an issue of "integrity" (in either sense of the word ie honesty or wholeness) on the part of the UK in charging CGT on disposals of residential property by persons residing overseas. Instead this appears to be an expedient political exercise, small-minded, to garner votes and comparatively-speaking an insignificant amount of tax from which the taxpayers ie the non-residents, are most unlikely to benefit.

3.3 Many in size and number of inward-investments by non-residents have brought benefits to the UK economy and it is a fact that non-residents made and make no (or generally insignificant) financial demands on the UK's fiscal reserves, state or municipal benefits including welfare. They do not generally benefit from the taxes collected by HMRC or local councils. Economic self-sufficiency and self-reliance are by-words of the non-resident community. The same may not be said of UK residents including immigrants who expect at some stages in life to be making, and in fact actually make, claims for benefits for themselves and/or their children and families. Taxation of non-residents in respect of the goods they purchase and the services they consume **in the UK** is already achieved by VAT; non-residents pay inheritance tax on property in the UK (and worldwide if UK domiciled), Council tax (unless tenanted), and income tax on rents from UK properties. ATED and ATED-related CGT are also charged whether or not there is a non-resident connection.

3.4 The proposed CGT charge on non-residents amounts for many if not most to Taxation without representation. Non-residents are often disenfranchised without a UK vote. In the short term this makes them a soft target politically, to which they are sensible and sensitive. Imposing on them a new tax such as CGT requires particular care and sensitivity on the part of Government, failing which the investment may well be withdrawn without prior notice and the various benefits to the economy sacrificed. The wealthier the investors and the more substantial the investments, the more spontaneous and unpredictable their decision to exit the UK economy is likely to be. Although the wealthy are very different it is common ground that they wish to feel supported and welcome. The UK's and in particular London's attraction as a safe-haven cannot be expected to remain unquestioned and unchallenged when investors are made subject to major new taxes, such as ATED AND also CGT, at high rates, such as (for CGT) 28%; when GBP is strong against other major currencies (and therefore expensive to buy and profitable to sell), and when a number of established Western European countries inside the EEZ/Euro-zone (as well as outside) are in manifest recovery (or have already successfully recovered) with property incentives and attractive tax regimes on offer. The euro-crisis is past.

3.5 IF a capital gains tax is to be introduced on nothing more than passive inflationary gains over a period of time on a number of assets in which non-residents have invested over a period of time, a number of clarifications, exceptions, reliefs and exemptions should be considered as appropriate as a minimum, thereby not "imposing unnecessary burdens on non-residents":

(A) The charge should (strictly speaking) only be on gains arising after 5 April 2015, with no legacy gains within the charge. No straight-line time apportionment should apply over the whole period of ownership as is currently the case with capital gains tax on ATED-related capital gains. This is "unfair" (see above) and penalizes investments made in the past without knowledge and acceptance of investments attracting CGT. In the absence of purchases in the open market post April 2015, the taxpayer could be required to provide a certified valuation by a qualified chartered surveyor or valuer as at April 2015 and this should be presumed to be accepted unless the DV can show otherwise. This also goes to the "Simplicity" requirement in the Consultation paper.

(B) The charge should be at significantly lower rates than applies to UK residents namely 18%/28%. For the reasons stated earlier including the importance of proceeding sensitively against those whose investments in the UK are valued, may not be represented politically and who by and large derive no benefit from the tax raised, a rate of 5%-8% would appear to be at the top end of reasonable expectations IF a new tax on capital gains by non-residents is to be imposed after 50 years of investment by non-residents free of CGT.

(C) Non-resident investors should not be penalized, but rewarded, for making investments and for long-term investments in the UK. This can be demonstrated by a form of taper relief or diminishing rates of tax. For example a competing economy such as France, with a currently socialist Government, only charges "plus-values" at an aggregate maximum of 34.5% (plus-value of 19% and tax sociale of 15.5%** on "maisons secondaires" owned for **less than 23 years** (recently reduced under the socialist government). [**There is also a "surtaxe" of between 2% and 6% on plus-values above Euro 50,000.00]. There is no plus-value, tax sociale or surtaxe after the 22nd year of ownership with the tax rate reducing progressively at 6% per annum after the 6th year of ownership until the 21st year and then at 4% for the 22nd year of ownership. There is a further 25% relief if the property is sold before 1 September 2014. Some successful jurisdictions (economically and socially) such as Hong Kong seek to attract foreign investment by not imposing any capital gains tax on inflationary gain recognizing that inflation is a sufficient drag on the accumulation of wealth. Curiously and extraordinarily the UK's approach appears to be to propose punishing and thereby disincentivising both short-term and long-term investment by non-residents with very high rates of capital gains tax at a flat-rate.

(D) Instead of having a flat-rate tax on capital gains, a progressively reducing tax on gains would reduce the CGT for the people who are trying to start accumulating wealth in the UK and also for people for whom holding the investment/wealth in the UK for a number of years may be advantageous to them and to the Government. For example in the first (say) 5 years of ownership the rate of reduction in CGT/inflationary gain might be at 7% per annum (this to encourage the investment), in the following (say) 7 years the rate of reduction could be at 3% per annum with the rate for the final 3 years at 13%, 14% and 17% per annum respectively in order to reward and encourage long-term investment (15 years maximum). [These percentage rates to be calculated to add up to 100% over the 10-(maximum) 15 year period].

(E) In addition and consistently with expressing appreciation of non-resident investment, the period of ownership before April 2015 could be included in the total period in earning relief. Periods of ownership ranging between 10 and (maximum) 15 years would seem to fit this bill and offer some competition to rival tax regimes. There is no objection to reliefs being given retrospectively. As a quid pro quo non-residence throughout the period would appear to be a requirement for this relief in toto.

(F) As a refinement on the foregoing, more generous deductions could be considered to include the additional expenditure suffered by non-resident investors in acquiring, holding and in some cases disposing of investments overseas.

(G) It is most unfortunate that investment businesses such as lettings are proposed to be punished with CGT particularly at a time when there is a shortage of residential accommodation. It is submitted that the legislation should not extend to dwellings let as a business (similarly to the SDLT anti-avoidance measures by ATED), and should permit occupation by the non-resident investor during genuine voids. (This to apply evenly to ATED properties with consequential statutory amendment). Rewards and incentives for investment and/or for remaining invested in the UK should assist in justifying this difference between the approach to residents and non-residents.

(H) The second property election should be applied honestly and evenly to non-residents as it is to residents. It is particularly unfortunate that the Consultation paper should advance the argument at 3.3 that the election if applied to non-residents "would (sic) undermine the extension of CGT to non-residents". This is presumed to follow from the notion that the election for UK residents will only defer the CGT charge until the non-elected dwelling is disposed of. The reality is that UK residents are entitled to and will usually elect for the dwelling which is the only one likely to attract CGT liability or significant liability, leaving the other-perhaps the student accommodation or the property without any or any significant capital appreciation or likelihood of capital appreciation or with strong rental covenants, to be gifted to a spouse or pass within the zero rate band for inheritance tax. (We understand that this may be raised to GBP 1 million pounds in the next Conservative Election manifesto). Disposals on inheritance attract a "free" uplift for CGT and therefore IHT must be considered in conjunction with any proposed CGT charges and reliefs. Residential properties greater in number than two are subject to CGT in the usual way in the case of lifetime disposals.

The Consultation paper then proposes to rotate the PRR relief by election through 180 degrees by removing it from UK residents unless a main residence in the UK can be demonstrated or identified (see 3.5 at 1 and 2), usually an almost impossible task for non-residents and in some cases a difficult one for residents. In other words the stated Overarching Objective of "fairness...to ensure that the tax treatment of non-residents ....is comparable to that of UK residents" is rotated to read: "to ensure that the tax treatment of UK residents....is comparable to that of non-residents". Both UK and non-UK residents will be punished with the proposal in the Consultation paper to amend the PPR election rules.

It should be the case that a non-resident can elect for one residential property free of CGT just as UK residents can at present in the expectation that they, the UK residents, are unlikely to pay CGT on the unelected dwelling (particularly if properly advised); similarly the non-resident should be relieved of the CGT liability on the elected dwelling. Of course the non-resident may well have a number of properties in the UK and will only be able to elect for one, the other(s) falling within the CGT net on lifetime disposals as well as any similar tax on disposals in their home jurisdiction. (Indonesia for example charges both buyer and seller a 5% sales tax on the value of the sold dwelling).

The alternative is to permit the non-resident to elect for one dwelling as his PRR irrespective of whether it is capable of being demonstrated or identified as the principal private residence (see Consultation paper at 3.5 at 1 and 2) as is the case now with residents. This would then respect and follow the principle of "fairness" in taxing to CGT non-residents as residents are so taxed.

4. QUESTION 5: Affirmative

5. QUESTION 6: Not to our knowledge

6. In 2.27 it is stated that "the Government will ensure that the ATED-related CGT charge only applies to those properties that are also subject to the ATED charges each year".

6.1 COMMENT: We assume that this should read "the legislation will ensure...".

6.2 We would also wish to see mirror-image treatment of the ATED-related CGT charge on non-trading companies that are not UK resident and the (general) CGT charge on non-residents (if any).

7. **Delivery mechanism and Questions 13-16 (inclusive):**

7.1 On QUESTIONS 13 and 14 it is NOT appropriate to require solicitors to be "responsible for identification of the seller as non-resident" for tax purposes. That is not the function of solicitors in England and Wales, nor an appropriate disclosure of client information (if known or

suspected). Mechanisms (including snooping) for paying tax such as CGT should not be analogous to mechanisms for money-laundering by terrorist and organized criminal activities.
7.2 If withholding tax is necessary, a realistic process needs to be in place based on self-assessment and the specific non-resident's calculations. In particular expecting the SDLT process which gives 30 days only to compute tax, withhold and pay the appropriate amount is fanciful, oppressive and hopelessly unrealistic. CGT is not an ad valorem tax determined from the consideration on the face of the Transfer or contract document.
7.2 In addition the CGT should ONLY be determined on the gain from 6 April 2015 ie a valuation on or after that date (and for this see above at 2.1-2.5 and 3.5(A)) OR from an acquisition date post April 2015. This should be comparatively fair and simple and facilitate delivery mechanisms. In other words NOT apportioned on a straight-line time-basis back over the period of ownership and/or by reference to figures and calculations based on an acquisition-price in some cases many, many years before the introduction of the CGT on non-residents after deducting capital expenditure on improvements when no thought was given to keeping records of acquisition or deductible expenditure (because irrelevant for UK tax purposes until April 2015).
7.3 QUESTION 14: consideration should be given to adopting and adapting (to the minimum extent) the system for the taxation of rental income in the hands of non-resident landlords (self-assessment with completed NRL-1 equivalent). Not 30 days as for SDLT
7.4 QUESTIONS 15 and 16: AFFIRMATIVE on self-assessment but NEGATIVE on any 30 day period for payment as per SDLT. And see 7.3 for Question 14-self assessment as for rental income of non-resident landlords if completed NRL-1 equivalent. The Consultation paper appears to have forgotten the mantra to tax non-residents to CGT as residents are taxed! CGT on residents is not paid as per the SDLT process.

Yours faithfully,

Hard copy signed and sent Air Mail

for and on behalf of investors in France, UK, Australia, Indonesia and Hong Kong.