Date: 6 June 2014

Re: CGT and main residence relief

1.

2.

a. if someone owns a residence, i.e. has a substantial interest (which would have to be defined), even if they actually spend more time somewhere else (in rented property), the one in which they have a substantial interest would be treated as their main residence without the need to make an election. Presumably given the recent case law they would still need to occupy the property as a residence and therefore with some element of continuity. See *Iles v HMRC TC 3565*; *Goodwin v Curtis*, *Susan Bradley* and *David Morgan* are in conflict and it can be difficult to decide whether a property is "a residence" or not. This needs consideration as there was some confusion in the meeting.

b. For example there was some suggestion that where someone owned only one property it could be deemed a main residence even if rented out but this seems an unwarranted extension of the relief and would lead to bizarre results.

c. Where someone owns more than one residence, they can but do not have to make an election. If they do elect, then as discussed in the meeting a person would need to spend a minimum number of midnights there each tax year (unless the EEA option is adopted). I think this would need to be a midnight test rather than a day of presence test for obvious reasons – days of presence are not counted at all for arrivers if they do not spend a midnight here, and would lead to greater evidential problems.

d. There was some debate about whether someone should be required to spend 90 midnights or more than 120 midnights. Presumably the argument to make all people occupy only for 90 midnights is that even though it would not make many arrivers UK resident at all, it would at least put them to the inconvenience of having to spend some time in their property before they could claim main residence relief on it . I could see no basis for saying that people can only elect if they have two UK homes as opposed to one UK home and one non-UK home. Even if the election was limited so that people can only elect on UK homes, this would surely be discriminatory and not proportionate.

e. I also saw no basis for saying that someone who had made an election could automatically get a rebasing advantage in 2015. Many people have elected on a property for only a few months and then switched it back again. Are they to get rebasing on what are essentially holiday homes? Surely the way to deal with transitional provisions is to provide that anyone who has made an election does not have to make another election but the election will cease to be valid if they do not spend the required minimum period of time in the property each year going forward from 2015 and that they have to evidence this. Representatives did not seem to think that keeping records over long periods of time once a client had made the election was necessarily an issue because people would know that was the price of making the election.

f. Generally people did not seem to think that non-residents would be happy to spend 121 days in the UK and become UK resident albeit treaty non-resident for all the reasons enumerated then: treaty relief may not protect them on remittances as the treaty relief will protect the gain realised from a disposal in the relevant tax year not a gain realised earlier but taxed later; it will not protect them in respect of ss86 and 87 issues, they will still have to pay the remittance basis charge unless all their income and gains is protected by the treaty and they will still have to worry about 17 years' deemed domiciled etc for foreign domiciliaries. It was acknowledged however that treaty non-residence would be a solution for some foreign domiciliaries.

g. The issues surrounding UK persons working fulltime abroad particularly where they leave families in the UK home need to be considered. In most cases, it was felt that periods of absence set out in s223 will be sufficient to protect them and there was general resistance to changing those periods of absence. They would be limited to 90 days in the UK anyway so could not make the election although often it will be their only home and their family will be living there.

h. Other non-residents not working full time abroad would be able to take advantage of these reliefs and perhaps never become UK resident even under general law. E.g. if an arriver elected, spent 121 days here in one tax year, had a period of absence for three years and then made another election for 121 days, he would have the inconvenience of having to spend that length of time in the UK but not become UK resident under general law. These issues were largely left unresolved at the meeting.

3. The question of whether spouses' occupation should be imputed to the owner was not really considered properly at the meeting. It was suggested that the relief should be extended to cohabitees but this makes no sense as there is not a no gain no loss rule on transfers between cohabitees; indeed it would make the relief much more complicated as more cohabitees are likely to own their own homes. Should occupation by the spouse be imputed to the owner for the purposes of main residence relief? That does not happen at the moment although there are some anomalies on transfers between spouses where a property which has previously qualified as the main residence is transferred between them on death or during their lifetime. This can lead to avoidance opportunities. See s222(7). For example it is suggested that one easy way round the rules is for H to own the property for 10 years making no main residence election. Then he gives it to his wife W 18 months years before sale who makes an election, occupies it for 121 days and then sells claiming full main residence relief on the entire gain. (See article in taxation of 15 May 2014 page 9).

4. It was suggested that there should be an averaging of days spent in the property, so provided a person spent a minimum number of days over the whole period of ownership, the election should be valid for the entirety of that period. I suggest this is too open to manipulation and tax avoidance. It would be easy to avoid ever becoming UK resident then and would not reflect the use of the property fairly which should surely be judged on use over the entire period of ownership.

5. My view remains that one should do the minimum necessary to change s222 even if this means that not all non-residents are stopped from claiming main residence relief; some will be able to elect; you may want to consider the rules on transfers between H and W. The new rule imposing capital gains tax on non-residents will still catch disposals of investment property where there is no possibility of main residence relief.

6. As the EEA option seems doubtful now, it may be better simply to impose a minimum period of 121 days use of the home by the owner (not spouse) each year but preserve all existing periods of absence etc although possibly modify s222(7). This day count test would at the very least be inconvenient for non-residents.