**Response to Consultation re CGT for Non residents –residential property**

**These notes cover certain general points and relate to Box I re fairness and simplicity in taxation and the CGT position generally but include comments on questions 6,9 10,12 and 13 in particular.**

1. As a preliminary note, I consider that the decision to introduce capital gains Tax (CGT) in this way for non residents is wrong and cuts across the exemption which has been expressly provided for for many years The first incursion into this was for ATED related gains and this has been grossly unfair particularly for structures which were already in place based on existing exemptions and which are not straightforward to unscramble The addition of CGT related gains in these circumstances therefore was unfair as it applied only to ATED related properties and was really a new tax, unrelated to any attempted SDLT avoidance. In one sense however, the proposal to extend CGT liability to other non resident ownership of UK residential property at least balances this out but there would still be unacceptable anomalies unless the tax is a uniform capital gains tax and not two separate tax liabilities and provisions, simply based on how the property is owned by a non resident

2. Accordingly if you are going to introduce a CGT liability on Non Residents for UK residential property, with effect from 5th April 2015 then, in the first place , as what has until now been an express exemption from CGT for all non residents, then you should include a full rebasing provision for all residential properties held by a non resident owner as at that date so

that they are only caught for CGT on Gains as from 5th April 2015 value, except where ATED related gains applied, where this rebasing would be as at April 2013. This rebasing would then operate for all NR owners holding such property as at those dates

3. This will ensure that the exemptions are absorbed in this rebasing revaluation and therefore operate, without possible anomalies and exceptions, up to that date and for fully values and gains up to that date without requiring any additional saving provisions to be grafted in to secure the prior exemption This will also then ensure that only gains after that date from that rebased value are subject to CGT

4. The only exception to this therefore would be properties within the ATED related gains regime where the rebasing there would be as at 5th April 2013 (or later acquisition date prior to 5th April 2015). There is no reason however to keep the ATED related gains tax as a separate charge so that all gains made after 5th April 2015, including ATED liable entities from April 2013, would all be picked up within the CGT charge

5. I would suggest, therefore, that there is no need for two CGT regimes and that, subject to the above rebasing, the CGT provisions can and should apply to all taxable residential property, whether owed by a company envelope or personally, through a trust or a partnership or otherwise. It is surely unnecessary to retain a separate ATED related tax. ATED itself would then merely be the annual tax for enveloped ownership and CGT would then be payable on sale, including of any enveloped property, but with the gain being taxed in those cases from the April 2013 rebased value

6. Clearly the corporation tax regime would continue for UK resident companies so that company gains would be liable to corporation tax. That alternative would therefore be available to offshore companies if they became UK resident i. e. coming under management and control in UK. That could cause a lower tax bill for the company, just as it would for UK resident company , and, in either case, with any gain on the shares themselves remaining exempt if the shares are held by non residents, but there would also be ATED each year payable in such a case. It is a separate question as to whether non trading UK residential property investment companies, whether UK resident or not, are to be liable to CGT rather than Corporation tax but that would need special provisions and, if this were introduced, it should apply to all such companies However if such a tax is imposed then, in fairness, there should be some relief (possibly inherent) against corresponding gains reflected in the shares held to avoid an excessive 'double' tax such which would be at, effectively, twice the rate of CGT

7. I agree that any exceptions to CGT for e. g .communal property, should extend to both CGT and ATED related gains. In fact, whether combined into one tax or kept as two separate taxes, both charges should attract the same exceptions, as otherwise there will be scope for tax avoidance. Indeed, assuming that there are no exceptions as between the 2 taxes, then there is every reason why the taxes should be merged and there should not be two separate taxes serving the same purpose which would only further unnecessarily complicate matters. If the rates of taxes or circumstances in which tax is chargeable re to be different then again, there is no logic for this it offers scope for tax avoidance

8. In the same way, if CGT is to apply to properties below £500,000 in value then, even if ATED is not charged until later, the CGT position should also be the same for ATED cases and if CGT applied in all cases, this

would be the position, leaving ATED as a separate annual tax possibly with the £500,000 ceiling, as that would not then exempt enveloped properties, not liable to ATED, from CGT

9. Changes on the above basis would secure a consistent approach across the board and the tax would be payable in relation to non resident owned residential properties, with the same exceptions, however owned

10. As to collection/payment of the tax, there would be considerable practical problems in seeking to make professional advisers liable to deduct and withhold tax in the first place. On what basis and evidence are they to determine the tax residence status of the owner especially one who uses a UK address in any event? Any obligation to withhold and pay should only apply in strictly defined cases where the liability to pay is clear. This would be difficult to identify and apply however and there should be no circumstances whereby a lawyer, agent or accountant involved should have to unilaterally determine whether or not he is obliged to withhold, particularly as, in many cases, the property will be subject to a mortgage, which will have to be repaid on completion, in order for the purchaser to get good title and complete

11. It would be less difficult with a company owner, as this will either be a UK registered company, which is now automatically UK resident, or an offshore registered company, which could be assumed to be non resident, unless the client establishes that it is or has become UK resident by or through its management and control. HMRC confirmation could therefore be obtained for this prior to completion if there is to be no withholding in such a case.

12. However the position in relation to any other ownership is packed with potential issues and problems and unless there was –or indeed could be- clear and identifiable circumstances then the professional adviser would be potentially exposed and should not be placed in that invidious position

13. Included in this mix of uncertainties, , might be the availability of PPR if this is the individual's main residence or it is held through a trust and if the tests for this are to be subjective then again the professional adviser will not know whether relief is or will be available or even the period for which the relief applied

14. All in all therefore, HMRC should find some means to ensure that the property owner is liable to pay and pays the tax and that his professional advisers acting on the sale should not be subject to having to withhold or pay

15. In relation to Private Residence relief (PPR), it is noted that HMRC is considering removal the right of election, where there is more than one residence . In most cases, there will have been no election anyway, but this right has been 'abused', so that , if this is to be removed, the better alternative test is the factual position under the current provisions, which apply where there has not been any election, rather than adopting ,say, periods of actual occupation, which may not be directly relevant in many cases e g where a person works and has to reside elsewhere, but has his home in another part of the country. However I consider that everyone (or couples) should be entitled to one main residence relief, subject only to the normal period exceptions, e.g if the property is let etc, so that, if, for example, they occupy rented property only, or someone else's property, as well as owning another property

used as a residence e g one for work and the other as a residence, they should be able to elect for the owned property to qualify, even if the rented property might otherwise, on the facts, constitute the 'main residence.' This ensures that the owned property will qualify. That is a different position from electing between 2 or more owned properties, where such an election would not be available if HMRC effect the changes proposed.

Dated 8th June 2014