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Capital Gains Tax Team
HM Revenue & Customs
BY EMAIL

23 June 2014

Dear Sir

Consultation on implementing a capital gains tax charge on non-residents

Please find attached our response to the proposals and various questions posed in the above consultation document. We welcome this opportunity to comment on this important issue for our clients.

In summary, we have concerns that the exclusions for communal property are too narrow to encompass all communal property, particularly with regard to property occupied by students and used as a care home. We also have concerns that a Genuine Diversity Of Ownership ("GDO") test, as proposed, may leave many collective investment vehicles within the new capital gains tax charge and have suggested some alternative tests which may help to exclude them

With regard to principle Private Residence Relief ("PPR"), we have concerns in respect of both the proposed alternatives regarding certainty and complexity and suggest that the PPR election is maintained for EU nationals in order to minimise the impact of the change on UK resident individuals.

Finally, we welcome the proposed change from a withholding tax to a payment on account, but consider that even a payment on account could give rise to difficulties in some circumstances – for example: where there are complex calculations, where there are multiple disposals within the tax year, and when an individual's residence status is unclear.

We would be happy to discuss the contents of this letter with you in more detail if that would be helpful. Please contact me or my colleague .

Yours faithfully

For and on behalf of Ernst & Young LLP
United Kingdom
Enc.

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Appendix 1

Question 1: Would an exclusion of communal property from the scope of the new regime result in any unintended consequences?

While the exclusion of communal residential housing is welcome, we remain concerned that the current definition is not broad enough to include all forms of communal housing. We are concerned that the current narrow definition could lead to a withdrawal of foreign investment from these sectors at a time when such investment is critical for rebuilding the British economy. The definitions of the excluded categories of residential property for communal use need to be clear and consistent with each other, and also congruent with housing and other government policies.

Student accommodation

We have particular concern with regard to the current suggested exclusion for accommodation for 'students,' which suggests that the intention is only to exclude residential accommodation "attached to an institution". Traditional models for accommodating students – communal halls situated on a university campus – have progressed out of necessity in terms of space, to cope with large numbers of foreign students, and to house the large number of students in Britain who attend universities away from their home towns in order to access the best courses and opportunities.

Student accommodation is provided both on and off site, by universities directly, and by third party providers, and covers accommodation which follows the traditional mode of a hall of residence with communal cooking/bathroom facilities, to smaller apartments which may house small groups of students (and their dependents).

Many universities have had to resort to the private sector to fund student accommodation and private sector operators often make use of such accommodation outside of term time for short term lets, for example for conferences.

We recommend a definition that excludes all forms of housing for students, perhaps with a targeted anti-avoidance provision to prevent abuse by letting to small numbers of connected students, if this is thought appropriate. Alternatively, the exclusion could be drafted in such a way as only to exclude provision of student accommodation via a university or other third party provider. For example, it could exclude accommodation which:

- Is for use solely by students during term-time (and any dependents). The actual use of the property should be the relevant factor.

- Is used by students under a lease or licence from a third party who is unconnected. It should not be relevant whether the lease is directly from the university, or from a private housing provider.

- Includes housing providers which are not directly affiliated with a university or institution.

While we would not welcome complex computational measures, we note that, as for Annual Tax on Enveloped Dwellings, it would be possible to tax a proportion of the gain where the property has been used for a non-excluded purpose for any significant period of time.

Care homes

We recommend that the definition of care home should be drafted very widely, to capture the whole spectrum of care, to encourage and sustain investment in this sector. In our experience, there are a multitude of different operating models adopted by care homes offering varying degrees of care from almost independent living to fulltime nursing care. Many care homes will expect to increase their care for their residents over time and will have facilities to cover this increase in care needs during the course of the residents' life. The definition of care home should therefore be broad enough to ensure that it includes all forms of care home and retirement community.

Question 2: Are there any other types of communal residential property that should be excluded from scope?

Charitable, social and cultural purposes

In our view, communal property should also be excluded from scope where it is used for charitable purposes (but not owned by charities that would be exempt from tax on capital gains). This would include accommodation for vulnerable groups such as the homeless, victims of domestic abuse or violence as well as key worker accommodation (e.g. for doctors/nurses and others delivering front line services).

In addition, it would be appropriate to have an exclusion for heritage property (for example stately homes) that is open to the public, would meet the definition of residential property, but may not be used as such.

Other exemptions for the private rental sector

We are concerned that the proposed changes may have a negative impact on the private rented sector (PRS) and may deter overseas institutional investment in housing. The Government commissioned the Montague Report (August 2012) which made a number of recommendations to boost large scale, professional investment in good quality private rented homes to meet housing demand. In response to the Montague Report, the Government noted that increased investment from large financial institutions and pension funds could make a significant contribution to the building of new homes in both the private and social rented sector (CLG Report on The Private Rented Sector 18 July 2013) and set up the PRS investment task force to promote and broker investment in build to let development.

While some of the concerns may be addressed by ensuring that the GDO definition is wide to cover a wide range of institutions (see our responses to questions 5 to 7 below), consideration should be given to additional exclusions for large scale investment in the PRS. From a policy perspective, it is difficult to understand the rationale for allowing an exemption for offshore investors in student housing, when offshore investors in the PRS are subject to tax. Whilst there might be a need for student housing, there is also an acknowledged severe shortage of housing in the UK and government policy (hitherto) has been to promote institutional investment in the private or social rented sectors.

Exclusion for commercial transactions

The consultation document focuses on the use of the property itself by the individual user and whether it is used as a private home or for commercial purposes. However, there would be merit in an additional exclusion focused on the nature of the transaction itself – is the transaction essentially the acquisition and disposal of a private dwelling, or is it a transaction which is part of a larger scale business operated on a commercial basis?

The notion that large scale dealings in property are by their nature commercial transactions, rather than private residential transactions, is recognised by the Stamp Duty Land Tax (SDLT) legislation, where the acquisition of six or more dwellings is treated as a commercial transaction and taxed as such. The policy recognises that such a transaction is not about accumulating personal wealth, but about businesses (however they are formed) operating on a commercial basis, which are likely to be making a significant contribution to the British economy (through labour, employment, development and ongoing maintenance of properties) and therefore should not be treated as a "residential transaction", albeit that the property itself is occupied as a dwelling. While the consultation document makes it clear that the "six property" rule will not be adopted, we consider that adopting this or a similar form of exemption would be advantageous in encouraging the types of large scale investment in the housing market which the Montague report suggests is required.

Adopting a rule along similar lines to the SDLT legislation would be a clear and simple measure to ensure that investment on a large scale by international institutional investors will be excluded from scope and would be a very welcome exemption for the PRS sector, where property transactions necessarily involve transactions for large numbers of properties. This could be combined with a requirement that the properties are made available for letting to third parties on an arm's length basis.

We are also concerned that the consultation document does not at present mention the treatment of "ground rents" and that, without an exclusion, this type of asset could be included within the charge.

Reversionary interests in properties are often held as part of extremely large portfolios, as income is small for each individual property, but collectively have significant value. Property management services are often provided by the owner, but by no means necessarily. Ground rents are seen as secure and reliable investments and are invested in by all kinds of institutions, charities, pension funds and large institutions as a way of securing a steady income (the right to receive rent ranking ahead of any mortgagor's interest).

We consider that these transactions should also be treated as commercial transactions and outside the scope of the capital gains tax charge.

Question 3: Are there any particular circumstances where including non-resident partners in scope of the charge might lead to unintended consequences?

It is pleasing to note that pension funds, REITs and PAIFs will be excluded from the scope of the new rules – we assume that exclusion will apply to UK and overseas pension funds in the same way as for REITs and PAIFs and their overseas equivalents.

However, many private equity funds are structured as limited partnerships. The inclusion of overseas partners could therefore bring this collective investment structure within the new charge, thus discouraging large scale investment in the UK housing market through these structures. In order to give consistency of approach between private equity investments structured as partnerships and other vehicles, we suggest some form of exclusion for any partner in a limited partnership which invests directly or indirectly in residential property for letting to unconnected parties, provided the partners are not "a small group of connected individuals".

Question 4: Are there any particular circumstances where including non-resident trustees in scope of the charge might lead to unintended consequences?

There is a risk that including non-resident trustees in the scope of the charge may extend the capital gains tax charge to trusts established for charitable purposes. Where those trusts are situated in a non-EU state (eg. the US), they would not qualify for tax exemption as a charity, even if the purpose of the trust would meet the "charitable purposes" definition for a charity under UK law. This could perhaps be prevented by including an exemption for trusts which are, say, charities registered with or regulated by a recognised body (equivalent to the UK charities commission) in their place of residence.

Capital gains in most offshore trusts with a UK connection are already subject to tax, either on UK settlors when they arise or on UK beneficiaries when they receive a benefit from the trust. Any new legislation to tax gains on residential property directly on the trustees will need to take account of existing anti-avoidance legislation to prevent double taxation. The simplest way of achieving this would be to exclude any gains taxed directly on offshore trustees from the charge on the settlor (under s.86) and from the pool of gains available to be matched with payments to beneficiaries (under s.87). However, in view of the planned rebasing, even this is likely to give rise to extremely complex calculations. The anti-avoidance legislation which applies to offshore trusts is already some of the most complex legislation in UK tax law, particularly when applied to non-UK domiciled individuals. Any additional complication will add to the cost of compliance for offshore trusts and their UK beneficiaries and is likely to lead to mistakes and accidental non-compliance in some cases.

For trustees holding UK residential property through a non-UK company, there could potentially be several layers of taxation and complexity. Depending when the property was acquired and how it has been used, the disposal may potentially be subject to ATED related capital gains, with rebasing to April 2013, the proposed new charge at a tailored rate, with rebasing to April 2015 and also to s.13, which would apportion the gain to the trustees. If the trustees are also non-UK resident, any s.13 gains will enter the pool of s.87 gains which are available to be apportioned to UK resident beneficiaries. If the trustees were to liquidate the company at the time the property was sold, this would potentially result in a further addition to the s.87 pool of gains (and potential double tax). Assuming that the trustees have non-UK domiciled, UK resident beneficiaries, they will also have to calculate the s.87 gains based on rebased values to April 2008. Even in this relatively straightforward case, where there has been no transfer between trusts, the compliance for the trustees will be extremely complex. The position can become even more complex in circumstances where there has been a transfer between trusts. The trustees in this example would need to obtain three different valuations for the property just in order to be able to calculate their gains. This level of complexity is likely to increase the number of unintentionally incorrect tax returns which are submitted.

There is a risk that there could be double taxation of gains where the anti-avoidance rules in schedule 4B have been applied to residential property held by trustees. In these circumstances there may have been a valuation gain on the property added to the s.87 pool of trust gains and, potentially, matched to a capital payment on a beneficiary. The beneficiary would have paid tax on this gain. There could then, potentially, be an actual gain under the new CGT charge arising directly on the trustees. One solution to prevent double taxation in these circumstances would be to remove assets which would be subject to tax under the new charge from the charge to tax under schedule 4B – so such assets would not give rise to a valuation gain if there is a schedule 4B event.

Many UK and international institutions structure their investment in real estate indirectly through private equity funds and co-investment structures which incorporate corporate vehicles and/or trust structures. This can often be because direct investment is not practical commercially or for regulatory reasons. These commercial collective investment would be caught by the proposals for non-resident trusts and companies if not excluded Careful consideration therefore needs to be given to the exclusions for funds to ensure that finds structured as trusts will not be subject to the new charge.

Question 5: Is a genuine diversity of ownership (GDO) test an appropriate way to identify funds that should be excluded from the extended CGT regime, and to ensure that small groups of connected people cannot use offshore fund structures to avoid the charge?

We appreciate the Governments concern about the potential abuse of fund structures. However, if the objective is to deal with perceived avoidance by individuals and "small groups of connected people" who might use offshore fund structures to avoid the charge, we are concerned a GDO based test would not exclude small numbers of large institutions who come together via an offshore structure. Some form of second tier test would be needed to exclude these investors.

A better approach might be to exclude all funds from the charge and then include a targeted anti-avoidance rule for non-resident companies (and unit trusts) that would be close companies if UK resident, where one or more of the ultimate controlling investors is a non-resident individual. This would appear to meet that policy objective, while avoiding the more complex GDO test. It is envisaged that there could be an apportionment of the gain to such an individual on similar lines as there would be to UK residents with a qualifying interest in the company or where the property is occupied by connected persons. The same exclusions would apply to companies controlled by non-close companies.

Question 6: Are there any practical difficulties in implementing a GDO test?

It can be difficult to design a diversity of ownership test in such a way that structures that have ultimately have genuinely diverse ownership, in fact, meet the test at all levels of the structure. This is especially difficult with property owning structures, since it is common for each separate property to be owned by a special purpose vehicle (commonly a company) for commercial reasons. These companies may be owned and controlled by a single company or by only a small number of companies, but the ultimate ownership at the top of the structure may be diverse.

To illustrate the difficulty, the close company provisions in part 10 of CTA 2010 can often apply to structures which ultimately have genuine diverse ownership, especially where those structures have a partnership interposed between the holding company and its shareholders. This is because the rules governing associates treat partners as associated with one another, even where this may be the individuals' only connection.

Question 7: Is there a need for a further test in addition to a GDO? If so, what would this look like and how would it be policed?

If the proposed GDO test is preferred, a second stage test should exclude from scope funds and co-investment structures (whether in company or trust form) where the investors are institutional (UK or international).

Whilst the second stage test example for international funds where the vast majority of the underlying portfolio is not residential property would be welcome, in our view it does not go far enough. It is unusual for a fund whose strategy is to invest in commercial property to own residential property unless it is incidental to a commercial investment and therefore this test would be of limited benefit. If Government policy is to encourage institutional investment in the PRS, then any exclusion should be wide enough to include all funds and co-investment structures investing in residential property except funds/structures which are closely held by small groups of connected individuals.

However, a well drafted GDO test would not require a second exempting test as it would be wide enough to remove structures where the ultimate ownership is diverse regardless of the choice of structure. Given the difficulties with drafting such a test we would prefer all funds to be excluded and a targeted anti-avoidance rule – see the response to question 7 above.

We are concerned that there are some limitations to the existing institutional investor exception to the close company condition under the REIT rules. Institutions often hold assets within corporate or trust structures and this exception does not apply to these kinds of structure. If the same definition of institutional investor is used in the new non-resident capital gains tax provisions, this limitation will be carried across to the new regime. Instead, in our view, the new exception should consider effective ownership by the excluded categories of investor.

Question 8: What are the likely impacts of charging gains (and allowing losses) incurred on disposals of residential property by non-residential property companies that are not already operating a trade in the UK?

As set out above many institutional investors and fund structures use companies to hold their property investments for commercial and regulatory reasons. Unless the exclusions extend to effective ownership by institutions or diversely held funds, we consider this approach would act as a disincentive to investment in private and social housing. We have outlined in our response to question 2 the detrimental impact we consider that this would have.

We note the proposals suggest a fourth system of charging capital gains in addition to the existing UK CGT regime which applies to individuals and trusts, UK corporation tax on capital gains and the ATED related capital gains charge. Adding a fourth set of rules which apply to non-residents who are not already caught by the ATED related charge, would seem to be undermining the steps the Government has made to simplify the tax system.

Introducing a new regime in addition to the ATED related charge for properties worth £500,000 or more would seem to add unnecessary complexity. In practice, the proposed charge would only apply to residential properties worth less than £500,000 not caught by ATED and residential property investors (unless covered by the exclusions). We therefore consider that, if the proposals are introduced in this manner, ATED should be abolished, or the provisions should be amalgamated and aligned so that taxpayers have one, clear, simple code.

Whilst we consider relief for property losses of non-resident investors should be allowed, losses may not have been agreed at the time the proposed withholding tax has to be collected, required an unfair process of paying over the tax, filing a return to reclaim it and then HMRC processing the repayment of tax. This would not be a fair process compared to UK residents and may even be contrary to EU law where the non-residents are residents of a European state.

We would also expect the extension of CGT to include provisions for corporates to avail themselves of the various grouping and other relieving provisions which are available to a UK group if fairness is at the heart of the changes.

Question 9: Are there other approaches that you believe would be more appropriate to ensure that non-resident property investment and rental companies are subject to UK tax on the gains that they make on disposals of UK residential property?

The policy driver behind the proposals is understood to be the unfairness of a tax system which taxes UK resident individuals on capital gains on the disposal of residential property (other than their PPR) but not non-resident individuals (para 1.2). Whilst there would be opportunities for abuse by restricting the changes to individuals only, the government proposals go much wider by seeking to tax all companies and trusts with limited exclusions.

As noted above, we consider the proposals are too broad in scope and must be restricted further if they are not to have an adverse impact on institutional and private equity investment in the private and social rented sectors. We consider that, there should be an exclusion from scope for any companies, trusts or partnerships that invest in residential property on a large scale that is let to or occupied by unconnected individuals. As mentioned above, restricting the charge to companies (or trusts) that would be close companies if UK resident, where one or more of the ultimate controlling investors is a non-resident individual, would be a more targeted approach and would appear to meet the policy objective.

Question 10: Are there any particular circumstances where changing the PRR election rules might lead to unintended consequences?

At present there are some difficulties with claiming PPR for those who spend time away from their property to work full-time abroad. Although there is an exemption in s.223(3)(a) TCGA 1992 for absences during which the individual is employed overseas, there are some limitations to this exemption as currently drafted. First, the exemption requires that individual to have no UK duties, while in practice many individuals employed abroad retain some level of UK duties. This is recognised in the statutory residence test, which allows for 30 UK workdays while still classing an individual as working full-time abroad and thus automatically not resident in the UK. Second, the exemption requires that the individual has no other property or interest in a property eligible for relief as a principal private residence.

Most individuals will have some interest in another property while working full-time abroad, even if their interest is only a short-term tenancy. The impact of both these difficulties can be minimised where the individual elects that their UK property (which is often the only property they own outright) be treated as their PPR. The withdrawal of the election will therefore severely limit the cases to which the employment abroad exemption can apply.

This second difficulty is likely to apply not just to those who are absent from their property for full-time work abroad but to those who are absent for other reasons (e.g. for employment elsewhere in the UK), where the exemptions in s223(3)(b)-(d). Again, such individuals are likely to have an interest in another property to some extent and so may be prevented from continuing to qualify during the absence by the definition of a period of absence in s223(7) TCGA 1992.

If the election is to be removed, the position could be improved in these cases by either removing the restriction on holding other interests eligible for PPR altogether or by limiting the types of interest in a property which must be considered – for example perhaps removing leaseholds of less than, say, 10 years. It would also be desirable to remove the restriction on UK workdays in the exemption for employment abroad – perhaps replacing it with a 30 UK workday limit, to harmonise with the statutory residence test.

If the PPR election is removed, there are also likely to be complications for married couples. At present, married couples may only have one PPR between them. In some cases, however, employment in a different location may mean that each member of the couple can spend significant amounts of time in a different property. For example, a couple may have a family home in, say, Surrey, and a flat or smaller house in London. One member of the couple may spend the whole week based in the Surrey property with the couple's children, while the other member of the couple spends the majority of the week in the London property. In these circumstances, absent the rule regarding one PPR per couple, each member of the couple might be able to claim that a different property is their PPR. At present the couple would solve the dilemma by making an election to treat one of the properties as their PPR. Without the election, there is likely to be some level of uncertainty with regard to which property would qualify for the relief.

Question 11: Which approach out of those set out in paragraph 3.5 do you believe is most suitable to ensure that PRR effectively provides tax relief on a person's main residence only?

Both of the alternatives suggested in 3.5 have severe limitations. It seems likely that it was to prevent the possible complications of a prescriptive approach of the kinds outlined that an election was originally introduced.

The main limitation of approach one is that there will be a lack of certainty for individuals with an interest in more than one property. There are many examples in case law where HMRC and the taxpayer have disagreed with regard whether a particular property should qualify for principle private residence relief. The judgement is a difficult one and (as is demonstrated by the body of case law) it will be appropriate to give different weight to each of the many factors in each individual case, dependent on individual circumstances. The removal of the election facility is likely to significantly increase the number of disputes between HMRC and the taxpayer in this area.

This uncertainty will be particularly significant in the case of property for a number of reasons. First, the quantum of the tax involved: for most people the most valuable asset they will ever own will be their property and the trend for increases in property prices will add to the significance of the tax payable should the property fail to qualify for PPR. Second, the need for most people, in most cases, to re-invest all of the proceeds of their property sale into the acquisition of a new or replacement property. If the individual cannot have certainty about the tax payable, he cannot, with certainty, invest all of the proceeds from the disposal of his property into his new acquisition. Finally, there is an emotional dimension in the case of principal private residence, since for most people the asset under consideration is not simply a capital gains tax asset, but the taxpayer's home. In a case of dispute, a taxpayer may be placed in the position of having to sell his home to meet a tax liability he did not consider was due.

The uncertainty inherent in approach one could be reduced by the introduction of a pre-sale clearance facility, so that a taxpayer can have confidence with regard to their tax position at the time of purchasing a new property. There will inevitably still be cases where HMRC and the taxpayer disagree and the taxpayer would need a right of appeal in such cases. However, this would reduce the number of cases where there was uncertainty and, at least in those cases where there was dispute, the taxpayer would be aware of the need to earmark funds in the event that they were unsuccessful in their appeal.

Approach number two is likely to prove impractical in a number of ways. Many individuals will own a property for decades and will need to maintain records of the occupation of that property perhaps going back twenty years or longer. It is extremely unlikely that the majority of taxpayers would even be aware of this need for records until they came to sell the property. In addition, other than, perhaps, keeping a diary, it is not clear what records a taxpayer would be able to keep that would prove his residence at a property on a given night many years prior to the sale of that property. In the case of a dispute, a taxpayer may find himself trying to prove to the court that he slept in a particular property on a particular night twenty or more years before the date of the hearing. This seems to place an unreasonable record keeping burden upon the taxpayer.

In addition, approach 2 does not seem to give a clear answer in circumstances where two parties to a marriage spend the majority of their time in different properties. This will be particularly relevant where one party works away during the week – either elsewhere in the UK or overseas – see the comments under question 10 above.

There is an additional problem with approach two: it is likely to lead to complexity in a number of cases where a property will move in and out of the PPR exemption on an annual basis over the life of the property. As set out above, in many cases the ownership of a property may span a number of decades and the individual will need to maintain records to support their occupation for each of the tax years. Where the property moves in and out of the PPR exemption a number of times, this is likely to lead to extremely complex capital gains tax computations.

Question 12: Are there any other approaches that you would recommend?

The possibility which seems most attractive, as discussed at the working party meeting of 19 May, is to continue to allow election for PPR but limit it to EU Nationals and UK residents only. This would allow the rules which apply to UK resident individuals to continue unaltered and would take the majority of individuals who genuinely use their UK property as one of their main residences out of the complications of alternative rules – for example, those who have a property in the UK because of employment and UK nationals who retain a UK property while working overseas. It would meet with the UK's obligations with regard to EU law, as it would not prejudice any EU citizens, but it would leave those from outside the EU unable to take advantage of the election to remove UK investment properties from CGT.

According to research by Knight Frank LLP published in October 2013, only 28% of investors in prime central London property were not UK resident, including 6.4% from Europe. A rule which allowed an election for EU Nationals would therefore leave the majority of foreign investors in the UK property market unable to claim PPR relief and therefore subject to capital gains tax on a disposal of their UK property – in line with the Government's stated objectives.

An alternative suggestion would be to allow some form of PPR election, but only in respect of properties which have passed some form of hurdle – for example, occupation for, say, 45 or 90 days. Any day count used in such a test should be in line with the day counts in the statutory residence test to prevent individuals from having to keep numerous different day counts for different purposes.

Question 13: Do you believe that solicitors, accountants or others should be responsible for the identification of the seller as non-resident, and the collection of the withholding tax? If not, please set out alternative mechanisms for collection.

Discussions in working party meetings suggest that there is currently no intention to require either accountants or solicitors to withhold tax in respect of disposal of residential property by non-UK resident taxpayers. This seems to be a sensible approach for a number of reasons.

The determination of an individual's residence status for UK tax purposes can be extremely complex and require the involvement of specialist advisers. UK residence cannot be determined by a simple measure, like having a UK postal address or holding a UK passport. In view of this it is not clear precisely how a conveyancing solicitor would be able to identify the fact that the seller of a property is non-UK resident. Conversely, while an accountant or specialist tax adviser may be able to advise his or her client as to their residence position, they would not be aware of the sale of a UK residential property unless their client chose to inform them. Furthermore, an accountant would not have access to the client's funds to enable him or her to collect the withholding tax.

Requiring taxpayers to self-assess their residence position appears to be a far more workable approach, although there remain some potential pitfalls, even here. Individual taxpayers, in particular, may consider themselves to be UK resident or non-UK resident in accordance with the facts as they understand them at the time they make a disposal but, due to a change of circumstances, their residence position may alter later in the tax year or even the following tax year (in a way that affects their position at the time of the disposal). Any system of withholding tax or payment on account which is ultimately devised will need to take account of the possibility that an individual's residence status may alter from that expected.

Question 14: Are there ways that the withholding tax can be introduced so that it fits easily with other property transactions processes?

Working group discussions suggest that a withholding tax approach is no longer favoured and instead a payment on account system will be adopted. This seems preferable in many ways as there are many potential problems with a withholding tax, for example individuals having to prove their residence status (which as set out above can be complex to determine) as well as difficulties when there is highly leveraged property – since in these circumstances a lender may well have first call on the proceeds of sale and there would be no funds available to pay the withholding tax.

The proposal discussed in the working group - for a payment on account or full calculation appears to avoid many of the difficult issues with an individual proving residence, and with conflicts arising where properties are highly leveraged.

If ATED related capital gains tax is to be retained (which we would strongly discourage) then it would seem appropriate to have only one form to allow taxpayers to pay both ATED related CGT and the new non-resident CGT charge. The alternative is that some taxpayers will find themselves in the position of having to complete two compliance forms for the one transaction. This would increase the cost of compliance for these taxpayers, as well as risking non-compliance – since taxpayers will consider that they have completed a form and paid tax and therefore have no further obligations. The need to complete numerous different forms would also risk damaging the reputation of the UK tax system with those overseas, since it may be perceived as a tax system with a high level of bureaucracy.

Question 15: Do you think that the government should offer the option of paying a withholding tax alongside an option to calculate the actual tax due on any gain made from disposal, within the same time scales as SDLT?

We favour the suggestion put forward in working group discussions of allowing non-residents to opt either to pay a withholding tax, or payment on account, or to accurately calculate their gain. However, as discussed in more detail below, there may be significant issues for some taxpayers with calculating the actual gain within 30 days of the sale. Any payment on account should therefore not be the full and final payment, but should either act as an initial payment which must always be followed by a detailed calculation, or as a payment which can be reviewed following the submission of a calculation.

Question 16: Is it reasonable to ask non-residents to use self assessment or a variant form to submit final computations within 30 days? If not, what processes would be preferable?

It appears from the consultation document that the intention is for the rate at which non-UK resident individuals are to be charged CGT to be dependent upon the level of their UK income (3.10). This does not seem to be compatible with a system which would require individuals to submit calculations within 30 days. If, for example, an individual were to dispose of a property in May, then, unless he had no UK investments he would be unlikely to be in position to quantify his UK income until the following April. Such individuals could perhaps submit a computation of the gain on the property. However, in order for them to calculate the tax due in respect of the gain, any form would need to include an assumption to allow them to calculate the rate of tax due – for example, the form could initially assume no income and then any additional tax could be collected via the self-assessment tax return due the following January. An alternative would be to follow the approach proposed for non-UK resident companies by introducing a tailored rate for non-resident individuals (perhaps falling somewhere between the two existing bands of 18 and 28%).

It is likely to be possible for many taxpayers to calculate the level of the actual gain on the disposal of a property within 30 days. However, there will inevitably be some more difficult cases where, either the calculation itself is complex, or there is a need to gather information from a third party, where this deadline cannot be met. In our experience, in the most complex cases, taxpayers can be struggling to obtain all the necessary information in time to meet the self-assessment deadline. In these circumstances, assuming that some form of withholding tax has been applied, such individuals should have an opportunity to reclaim any tax withheld prior to the self-assessment deadline the following year. If the deadline for payment of tax by the taxpayer is 30 days, then there should be a similar 30 day deadline for repayment of tax following the submission of an amended calculation.

In view of the difficulties with ascertaining the gain accurately within the timescale, there needs to be some provision to allow taxpayers to submit returns based on their "best guess" – perhaps ticking a box to show that they have used provisional figures. Where every effort has been made to obtain information and a tax return has nevertheless had to be submitted based on an estimate, there should not be penalties for underpayments of tax. This could potentially be dependent on a complete calculation being provided in line with self-assessment deadlines.

There may also be potential difficulties when taxpayers have multiple disposals in the same tax year and later disposals result in a loss. In these circumstances, there needs to be some mechanism to allow taxpayers to reclaim tax paid in respect of an earlier gain. This could be achieved by allowing a reclaim of tax at the time that the calculation of the loss on the later disposal is calculated.