BIRCHAM DYSON BELL

Consultation on non-residents
FAO Sarah Adams
HM Treasury
Enterprise and Property Tax
1 Horse Guards Road
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Your Ref

Our Ref
MRB/CJO/HLR

Date
20 June 2014

By email to: capitalgains.taxteam@hmrc.gsi.gov.uk

Dear Sirs

**Implementing a capital gains tax charge on non-residents: Consultation March 2014**
**Comments of Bircham Dyson Bell LLP**

This response has been prepared by members of the at Bircham Dyson Bell LLP.

Out of many possible points (some of which we are aware will be raised by other professionals or professional bodies) we intend to confine ourselves to those that are based on our practical experience. We set out our answers to certain of the government's specific questions further below, but commence our letter with some important general observations.

1 **Deferral of the changes**

We understand the government's rationale for the introduction of a capital gains tax (CGT) charge for non-residents both to address the current imbalance between the treatment of UK and non-UK residents disposing of UK residential property and to bring the UK into line with other countries that charge tax on gains relating to disposals of residential property located within their jurisdiction. However, as the government acknowledges in the consultation document, the charge will not be straightforward to introduce. Indeed it is clear having sent representatives from this firm to attend the HM Treasury/HM Revenue & Customs working group sessions, that the government will need to consider closely the existing taxes imposed on non-resident owners of UK property and impose wider ranging changes to the general CGT regime for UK resident taxpayers.

We suggest that, to improve the likelihood of these changes achieving their stated policy objective, the introduction of these changes should be deferred for one tax year, i.e. to take effect from April 2016. If, for policy or other reasons, the government did not consider deferral for a complete year to be possible then, for the reasons set out below, we consider that a

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fairer way of introducing the extended CGT changes (in particular, in relation to any changes to the existing principal residence relief (PRR) election rules) would at least be for the provisions not to come into effect until a period of time after the final form of the legislation is known, say, six months after the Finance Bill 2015 received Royal Assent.

## 2 Danger of creating an overly complex tax regime for corporate entities

We understand that widening the scope of taxation to all non-resident companies is necessary to create fairness as between resident and non-resident property owners and to prevent the use of corporate envelopes to avoid the extended CGT charge.

However we are concerned that the intention for the separate CGT regimes to co-exist (i.e. CGT on ATED related gains and the new extended CGT charge) may give rise to considerable complexity when calculating the tax due on any gains which arise on the disposal of a residential property by an offshore entity which is within the scope of ATED.

Having two different methods of taxing gains on non-resident entities arguably does not achieve the government's overarching objective of simplicity and in fact creates an additional layer of complexity to what is already an overly complex tax regime. We would suggest that a review of the new regime for ATED related gains should be factored into the current consultation.

## 3 Lack of clarity

The consultation document notes that the charge will apply from April 2015 and only to gains arising from that date. We understand from comments made by HM Revenue & Customs representatives at separate working groups that achieving this may either be dealt with by way of straight-line apportionment of any gain or rebasing, based on market value as at April 2015. We would suggest that rather than the legislation imposing one or the other, this should be a taxpayer option. If there is to be no lower limit (as there is for properties subject to ATED and ATED related gains which is currently £2 million but reducing to £500,000 in April 2016) non-residents owning lower value properties might welcome the ability to opt for straight-line apportionment rather than incur the costs of a professional valuation in April 2015.

We would respectfully suggest that further clarification as to what method will be adopted should be announced at the earliest opportunity. If no review of the ATED related gains regime is to take place then for the sake of consistency we suggest the government should adopt the same method of true rebasing as applies for ATED-related gains.

If the government is minded to adopt straight-line apportionment so that the new rules run in tandem with the existing PRR rules, they should give serious consideration to revisiting the ATED rules for non-resident companies rather than creating a separate sub-set of CGT rules which apply (with differing methods of rebasing) to non-resident companies.

## 4 Individuals who become non-resident

There are particularly complex issues to be addressed in respect of the tax position of UK resident individuals who leave the UK temporarily, for example, to work abroad, and how any new proposals would interact with the provisions of s10A TCGA 1992. We are aware from discussions at the working group on international rules that this area is to be the subject of a separate consultation. If the proposed changes are to take effect from April 2015 it is essential that there is plenty of time for a detailed review of the proposals and how they will fit in with existing legislation to ensure for example that no double charge to tax arises and that such individuals are able to use losses.

### Different forms of residential property ownership

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

We see considerable difficulties with the task of ensuring that the proposed CGT changes interact with the existing tax regime for offshore trusts. It will be important that there is detailed consultation on how this will dovetail with that highly complex part of the tax code. Given the lack of detail given on this topic in the current consultation, it is impossible to offer substantive comment at this stage.

### Ownership through other companies

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

We believe that the group relief which is enjoyed by UK resident companies (i.e. losses made by one company in a group available to offset against the profits made by another company in the group) should be available to non-resident companies owning UK residential property. This would ensure that losses made by other companies in the group could be offset against gains arising in the UK on the disposal of property and vice versa. Making group relief available for non-resident companies in this situation would also be consistent with the European Commission's stated objective of ensuring group relief is available for all EU group companies.

### Private Residence Relief

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

If a qualitative test is adopted, many UK tax payers could find themselves in a position where their main residence for the purposes of the PRR rules is a property that they rent or in which they otherwise have no capital value (e.g. perhaps they own a property in the country but rent a property in the city or town in which they work during the week). It may be that, applying the qualitative test, the rental property is their primary residence and the rules in this situation (which is not uncommon) would seem to create unintended consequences. We believe that if a qualitative test is adopted it will be necessary to redefine what constitutes an interest in a property in this context.

We would also be concerned to know how a qualitative test would affect married couples and civil partners where, for example, their main home might be in the country but one of the parties lives and works in the city during the week. Other instances might occur as a result of a couple not being able to find suitable jobs for each of them in the same town (for example, university academics who cannot secure posts at the same university) and the distance between the couple's respective places of work means that they are obliged to live apart during the week.

On the facts, the main residence of each individual might be different in such instances, but a married couple/those in a civil partnership can only have one main residence between them.

If the ability to elect is removed, we believe that there will have to be some detailed exemptions built into the new rules to cover these types of situations which are not uncommon, and are certainly not confined to the wealthy owning two separate properties.

We note the current consultation does not indicate how the new test will interact with existing PRR election. We would therefore suggest that this point is clarified at the earliest opportunity to give individuals scope to plan if they have to revisit their pre-existing elections and that any change should not to come into effect until a period of time after the final form of the legislation is known, say, six months after the Finance Bill 2015 received Royal Assent.

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

We believe the qualitative test is open to potential abuse where a person might go to great lengths to demonstrate their permanence at one property but in fact live at another.

We are also concerned as to how a quantitative test would operate in practice. We envisage a situation where all UK property owners, whether UK resident or non-resident, will feel compelled to day count where they spend their time between more than one property, regardless of whether that property is in the UK or abroad. For many non-residents the concept of day counting is not an alien one, but one they must carry out to ensure they retain their non-resident status. We do not feel it is appropriate to impose such an obligation on UK residents who simply choose to spend their time in their different properties, or are obliged to do so for reasons of work.

**Delivery mechanism**

**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 no, please set our alternative mechanisms for collection.*

We have learnt from attending the working group session on 'Withholding Tax' that rather than collecting the tax by imposing a withholding tax the current thought is to require non-residents to make a payment on account within 30 days. We are fully supportive of this decision as it removes the both the obligation to withhold the tax from conveyancers and property agents and any need for them to investigate their client's residence status.

To assist in collection and compliance one option might be to require vendors to purchase a bond (similar to a certificate of tax deposit) within 30 days of disposal. This would attract interest until it was used to satisfy the tax due at the same time as a UK resident would be required to pay their tax. A UK resident individual has until 31 January following the end of the tax year of any disposal to pay any CGT which arises. Non-residents will be placed at a disadvantage if they are to pay their tax within 30 days of disposal. We would suggest that such a mechanism would make it attractive for them to pay the tax due but without imposing unnecessary burdens on property professionals.

Yours faithfully

**Bircham Dyson Bell LLP**