From:
Sent: 19 June 2014 17:28
To: zzHMRC_TaxTeam, CapitalGains
Cc:
Subject: Consultation on non-residents

Dear Sirs

We are a long-established London firm with leading property and private client practices and we are responding to this consultation in view of its likely impact on both our international and domestic clients.

We have particular concerns regarding the proposed restriction on the ability to elect between properties for PPR and the practicalities and complexities of imposing a CGT charge on non-resident companies and trusts on top of existing anti-avoidance legislation. Further, whilst we understand the reasoning behind imposing a CGT charge on non-residents disposing of let residential property (so that they are taxed the same way as UK resident individuals), the mismatch between these new rules and the ATED/ATED related CGT rules (where full relief can be obtained in respect of residential investment property) is confusing and could create some difficulties in practice.

We shall, where relevant, address each of your specific questions in turn:

Question 1: Would an exclusion of communal property from the scope of the new regime result in any unintended consequences?
Question 2: Are there any other types of communal residential property that should be excluded from scope?

It is not clear why a distinction has been drawn between halls of residence (attached to a university), which are proposed to be outside the scope of these rules, and other student accommodation. A significant proportion of student accommodation is now provided by independent providers and there seems to be no clear reason why its treatment should be different.

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

At present an offshore trust is not subject to an immediate CGT charge on any gain arising on the disposal of any trust assets, save for those arising from assets used in a trade in the UK. Imposing an immediate CGT charge direct on trustees on a disposal of a particular asset will be a fundamental change to the way in which offshore trusts are taxed and so is not be undertaken lightly. Care will have to be taken as to how the new charge will interact with existing anti-avoidance provisions, as there is considerable scope for both double charging and over-complication. For instance, currently a UK resident and domiciled Settlor will be subject to CGT on the disposal of trust property as it arises. Going forward, would gains from the disposal of UK residential property simply be ignored, when calculating the Settlor's liability to CGT on trust gains in any given year (as the trust would already have been taxed on such gains) or will both the Settlor and the trust potentially be liable? If the latter, a mechanism would have to be put in place to avoid double taxation. Further, thought will need to be given as to how the new CGT charge would interact with the s87 beneficiary charge to prevent double charging and administrative difficulties. There may, for instance, need to be a two tier system, so that a gain on the disposal of UK residential property would not be included as a S2(2) gain and so would effectively be left completely out of account when calculating potential liabilities under s87 (much in the same way as any gains chargeable on the settlor under S86 are left out of account at the moment). If this were the case, the whole trust would suffer the tax on the disposal of the property, rather than the beneficiary receiving the benefit of the proceeds, which in some circumstances may be inequitable.

Further, many UK houses are owned through trust company structures. There is already some overlap between the anti avoidance measures that impose a CGT charge on certain shareholders, ATED related gains and the various anti-avoidance measures that impose a charge on the Settlor or beneficiaries at trust level- adding in another layer of immediate charge will only add to the complexity.

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?
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?

If it is intended that all non-resident owners of UK property including investors pay CGT on any gains (and we do not necessarily agree that this is the correct approach), the ATED related CGT charge would seem to be superfluous. Therefore in our view the ATED related CGT charge should be scrapped for non-resident companies and as UK resident companies are also already subject to corporation tax, then it would make sense to remove this particular charge completely. If it is desired that owner occupiers of residential property pay a higher rate of CGT (where PPR is not available) than property letting businesses, then some form of relief for the latter could be considered. Practically if the CGT rate for disposals by companies is lower than the CGT rate for direct disposals by trusts and individuals, this may encourage ownership through companies for investment properties, which are outside scope of ATED, which does seem to be contrary to the Government's objectives.

Generally, those non-UK companies that are within the ATED regime are already subject to CGT on ATED related gains. It therefore seems unnecessary to bring in a further CGT charge, particularly as the ATED regime will be extended to much lower value properties in the next few years. In addition owners of certain offshore companies also pay CGT on non-ATED related gains under S13 TCGA. Although, the new charge would primarily affect those companies that hold investment properties and so benefit from reliefs under the ATED regime, there will inevitably be some overlap for companies who are within the ATED regime for part of the time but not all, which could potentially result in a three tier charge (i.e the new charge, ATED related gain and s13 CGT charge).

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

We are strongly opposed to removing the right to make a PPR election. Firstly whilst we understand the reasoning behind raising this proposal in the context of extending the CGT charge to non-residents, we do not believe that a fundamental change to the PPR system should be entered into, just because of this not least because, as is noted in the consultation, there may be other knock-on consequences for other PPR conditions and reliefs which need to be properly considered. There is a real risk that in rushing this change through so that it is in place when the CGT charge is extended to non-residents it will adversely affect UK residents and the effectiveness of PPR relief generally.

Many individuals have two homes by necessity. For instance it is not uncommon for an individual to have a main home in the country where the main centre of their life and family is but also to either rent or own a city flat for work purposes. Individuals may in fact spend more time at the city property and find that depending on the precise test applied, factually it is classed as their main residence, whereas they very much regard it as a second home.In those circumstances, if that second property is rented (other than on a licence) rather than owned they could effectively lose PPR altogether, as it would not then be available on the only home they actually own.

The problems are particularly exacerbated for married couples, who can only claim PPR on one property between them. Factually, as in the circumstances described above,each spouse may not have the same main residence particularly if a time spent test is adopted. The right of election therefore gives spouses flexibility and without it, the removal of joint PPR elections may need to be considered.

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

The fixed rule based on time spent is not suitable as physical presence is not necessarily indicative of the "main residence" e.g if more time is spent in a London flat because of work commitments, even though the country property is actually their home. The factual test would therefore be more appropriate although the record keeping requirements could be very onerous for home owners.

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

We understand the potential difficulties in excluding EEA residents from the right to elect, although note in your summary of CGT regimes of other countries, other EU countries appear to apply different criteria for residents and non-residents (regardless of whether in the EU or not) and wonder whether this option could be further explored? if all non-residents could be excluded from the right to elect between a UK and a non-UK property in such a way so as not to breech EU law, this would be the easiest method of ensuring that non-residents cannot easily avoid the CGT charge. Alternatively restricting the right to elect between UK and non-UK properties for residents and non-residents alike could be explored, as this does not discriminate against the person as such, just differentiate between the location of the property.(This approach may, however, have adverse consequences for some UK residents who work abroad). If neither of those approaches are possible, non-residents outside the EEA could at least be excluded from the right to elect.

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.

Determining an individual's residence will not always be straightforward where an individual spends a lot of time in the UK as well as abroad even under the new Statutory Residence Test and in some cases an individual's residence status will not be capable of being determined until the end of the tax year. Expecting conveyancing solicitors to properly investigate and advise upon a seller's residence status, possibly by seeking advice from a specialist solicitor/accountant, would be too onerous and may even be unworkable. It would therefore need to be made clear that the advisor's only obligation would be to ask the seller their residence status and record the answer.

Question 14: Are there ways that the withholding tax can be introduced so that it fits easily with other property transactions processes?
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 understand that the proposal to introduce a withholding tax has been withdrawn.

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

This would give rise to a discrepancy between UK residents and non-residents (who have until 31 January after the end of the tax year to pay the tax). This does not seem fair and is possibly discriminatory.

Yours faithfully

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Please respond to

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