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Dear Sir/Madam

Consultation on non-residents

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

Introduction

We thank the Treasury for the opportunity to comment on the consultation document on the proposed implementation of a capital gains tax for non-resident investors in UK residential property.

Our comments below include both our own views and those that our clients and contacts have expressed to us.

Background

We note the government's intention with these proposals is to introduce a similar capital gains tax regime for both UK residents and non-UK residents, proposals which bring the UK tax system into line with many other jurisdictions.

However, we are concerned that this is done in a way which is both fair to all and does not prejudice investment in UK residential property at a time when all are agreed that it is critical to increase the supply of housing stock, including in the Private Rental Sector.

We would also flag that there have been a number of changes in recent years to the tax treatment of non UK investors in residential property with the introduction of and amendments to the ATED regime and now the proposed introduction of a CGT regime. The various changes in quick succession are likely to cause concerns with some overseas investors and we would urge caution in not taking action which could reduce overseas investment in UK property, particularly in the residential rented sector.

Key issues

- Tax collection – we see undue complications in a withholding tax system, which would place further burdens on professionals dealing with transactions in terms of clarifying sellers' tax position under the new rules, and further complications where the professional are, for example, required to use funds to pay down debt. We would therefore favour a self assessment system, perhaps akin to the current UK non-resident landlord scheme.

- ATED - the interaction between the new proposed CGT and the existing ATED CGT appears likely to be very complex. Properties could fall in and out of the ATED regime and it would then be necessary to consider the interaction of this with the new CGT. We would suggest that the existing ATED CGT should be abolished and replaced with the new CGT.

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- We are concerned that overseas investors who may in principle be exempt (e.g. overseas pension schemes) may use investment structures which cause them to fall within the ambit of the new tax. Furthermore, many of those investors rely on the tax exemption to make an acceptable commercial return and without that exemption may not invest in UK developments. Care will be required to ensure that the impact of the rules does not reduce overseas institutional investment into UK developments and that the structures used by such investors are exempted in line with the intentions behind the new regime.

- We believe that the tax rate for corporates should be equivalent to that for a UK resident corporate to ensure parity between the two.

- Given the objective of taxing UK and non-residents similarly, we note that a number of reliefs may be available to UK residents, including loss carry forward, offset of gains and losses for disposals occurring in the same tax period, and for corporate groups, the ability to effectively offset gains and losses between group members. We suggest that similar reliefs be introduced to ensure UK and non UK residents are treated similarly

- We would flag that if there is not similar treatment between UK and non UK residents, EU non-residents may be able to take discrimination issues.

Detailed responses to the questions raised in the consultation paper are set out below.

Q1: Would an exclusion of communal property from the scope of the new regime result in any unintended consequences?

Q2: Are there any other types of communal residential property that should be excluded from scope?

It is proposed that halls of residence attached to an institution are excluded from the new tax but other student accommodation would be included. There are an increasing number of groups providing purpose built student accommodation which is not necessarily specific to or attached to a university. We suggest that such developments should be afforded a similar exclusion from the new rules.

We also note the proposed exclusions set out in Box 2.A. We suggest that this should be clarified. In particular, are the exclusions aimed only state institutions (armed forces, nurses, police etc.) or could it include private employers also?

We also suggest that the position should be clarified as to whether and when serviced apartments would fall within the ambit of the new tax.

Q3: Are there any particular circumstances where including non-resident partners in scope of the charge might lead to unintended consequences?

It will be important that there is a clear distinction between gains subject to Sections 86, 87 et seq and those gains on which the trustees themselves are chargeable under the new provisions

Q4: Are there any particular circumstances where including non-resident trustees in scope of the charge might lead to unintended consequences?

Q5: 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 agree with the intention to exempt non-resident investors where comparable UK investors would be exempted and would agree in principle that a form of GDO would help achieve this.

We are, however, concerned that such overseas investors commonly invest into the UK through Special Purpose Vehicles (SPVs) which may not be exempt. We therefore suggest that the new rules look to find a way to extend the exemption to these SPVs. We are concerned that if this is not done it could result in otherwise exempt overseas institutions choosing not to invest in UK developments at a time when the UK is desperately in need of additional residential accommodation.

Q6: Are there any practical difficulties in implementing a GDO test?

We envisage practical difficulty in applying this test - e.g. two investors may be connected through other interests (e.g. both members of an LLP).

Q7: 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?

Q8: 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?

Q9: 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?

Q10: Are there any particular circumstances where changing the PRR election rules might lead to unintended consequences?

We suggest that the PPR election test be framed so as to avoid significant subjectivity on which of one or more properties should be the "main" one

It may be possible for the definition of main residence be changed so that it is one where a certain minimum numbers of days are spent per tax year (with exceptions for absent due to work etc.)?

Q11: 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?

Q12: Are there any other approaches that you would recommend?

Q13: 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.

We think this approach may be impractical as it would often be difficult for the advisers to verify the seller's status and would likely involve advisers needing to consider this for all transactions, including those for UK resident sellers.

Q14: Are there ways that the withholding tax can be introduced so that it fits easily with other property transactions processes?

In view of the practical difficulties that professional advisers may have if required to verify seller's tax residence and fact that, for example, the funds may need to be applied initially in repayment of debt, that a withholding tax would not be appropriate.

We would suggest instead that a return system similar to that used for the non-resident landlord regime be used.

Q15: 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?

As noted above, we suggest that a self-assessment regime be used. Many computations (particularly in the early years) will rely on April 2015 valuations to set the base cost which could lead to delays. Will HMRC offer pre-transaction valuation checking service to give non-resident vendors certainty?

Q16: 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 require submission of returns much earlier than would be required of UK residents and we believe it may be unrealistic. We suggest a longer period is allowed.

Please contact if you have any queries.

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