Your Reference

Our Reference
NAP01

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Dear Sir

We are writing in response to the consultation, "Implementing a capital gains tax charge on non-residents".

We take the questions in the consultation on which we have substantive comments in turn following the numbering of the consultation, and include two additional points at the end of our response.

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

The consultation indicates that the Government will consider interactions with existing anti-avoidance provisions in relation to trustees. Presumably, provisions along the lines of those introduced for the ATED-related CGT in relation to prioritising one provision over the other will also be introduced for the new tax charge. Clearly, care will be needed to ensure that double charging is avoided.

We assume that in situations where UK-resident trustees would be entitled to principal private residence relief under s225 TCGA 1992, the intention is that this relief will also apply to non-UK resident trustees, provided that they otherwise fall within its scope and that the property in question qualifies as the main residence of a person entitled to occupy it under the terms of the settlement.

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?

In many cases, non-resident companies that hold property in the UK will already be within the scope of the ATED-related CGT charge, or if they are not already within its scope, may be so by 1 April 2015/2016. As such, the principal impact will be that the new legislation will catch any of their gains which are not covered by the existing charge, for example, gains in relation to periods when the property was exempt as a property rental business under the ATED-related CGT charge. This will be quite complex in terms of calculation and administration, as a company caught by both charges will need to report and pay the relevant tax for the different periods separately following a disposal of a single property. An example would be. a property worth over the ATED-related CGT threshold which is rented out for periods of time punctuated by empty periods when members of the family use it as their UK base.

It also seems to be illogical .for the two regimes to both apply in this way, so that a company is effectively claiming a relief from ATED-related CGT as a property rental business only to become subject to the "tailored charge" to CGT for any gains which are excluded from ATED-related CGT due to the relief.

However, if both types of charge are to be retained, it will clearly be vital to ensure that there is no element of double taxation and to determine which tax will take precedence in circumstances where both potentially arise.

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 the new CGT charge on non-residents is introduced as proposed, the ATED-related CGT charge would seem to be redundant. UK companies are already subject to corporation tax on gains other than ATED-related gains. As the proposal is that the new tax will apply to any gains of offshore companies which are not caught by the ATED-related CGT charge – gains for periods during which the property is rented, for example, as discussed above - it would seem to be more straightforward to repeal ATED-related CGT in order to avoid the anomalous results mentioned above and, generally, the need in many cases to report, pay and for HMRC to administer two different regimes on gains arising on essentially the same property.

It may be that the introduction of the new CGT charge on non-residents gives rise to potential EU issues in relation to discrimination between UK and non-UK (but EU based) companies if UK corporation tax is at a lower rate than the proposed new CGT rate. This could be avoided by setting the new tax rate for non-UK companies at the same rate as corporation tax. Arguably, if there is then a differential between the CGT rate for companies and that for individuals and other entities it might encourage enveloping. However, for most structures which do not fall within one of the applicable reliefs (e.g. property rental businesses) and which are therefore the types of structures which the Government was seeking to discourage with the introduction of ATED and higher rate SDLT, the punitive rate of SDLT for such structures and the ATED charge should act as a sufficient deterrent. If not, then the Treasury will have been compensated upfront by the higher rate of SDLT applicable in the case of corporate purchasers.

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

Principal private residence relief (PPR) is an important part of the capital gains tax regime as it applies to residential property. The changes proposed to the way the election rules work for UK residents as well as non-residents should not be introduced as part of a consultation relating to the taxation of non-residents on disposals of UK residential property. If there is a perception that the rules are not working as intended, any proposed changes should be looked at as part of a separate consultation.

As to unintended consequences, both of the proposed alternative methods of determining an individual's main residence would require detailed evidence of the person's circumstances and, particularly in the second case, effectively a daily record of their movements. Given that many people will either be unaware of the need to maintain such records or may not do so consistently, it is very likely that there will be many situations in which the relief will not be applied in the way and to the property it should. We discuss one possible example in our response to Question 11.

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?

Of the two approaches set out in paragraph 3.5, the first is preferable. The second approach will not only require detailed records to be kept by people with more than one property as to where they spend their time but may give rise to unfairness for people whose family home is in one part of the UK but who perhaps may maintain a pied a terre in a different part for work purposes. They might choose to elect their family home for PPR purposes but on a strict day count PPR might only be available on the property which they themselves would regard as a secondary property. There may also be cases in which it is genuinely very difficult to determine which of two personally occupied UK homes is the taxpayer's main residence, particularly where spouses are only permitted a single main residence between them.

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

It would be preferable to continue to allow UK residents (and non-UK residents – see next paragraph) who have more than one UK property to elect which of those properties should attract PPR under the existing rules. If these are not considered to be working as intended, any proposed changes should be considered as part of a separate consultation, as suggested above.

If there are EU-related concerns in relation to differences in treatment between UK and non-UK resident taxpayers, it may be possible to introduce an option for non-residents with more than one UK residential property to be able to elect that one of them is treated as their "main" UK residence for the purposes of PPR. In this situation, safeguards could also be introduced to ensure that they do pay CGT on the other property. Perhaps a consultation on PPR could look at possible options for both UK and non-UK residents.

Withholding tax

We understand that, since the consultation was published, proposals for the introduction of a withholding tax have been replaced with a "payment on account". We also understand that there is no longer an intention to place a legal obligation on any agent to withhold tax. As such, we will not comment on the questions dealing with delivery in the consultation. We assume that there will be a opportunity to respond to the new proposals for payment of tax once the detail is available.

Rebasing

The consultation states that: "The charge will come into effect in April 2015 and apply only to gains arising from that date". There has been some debate as to what is meant by gains "arising from that date", and early clarification on this point would be helpful.

It is our view that the same approach should be taken as for the ATED-related CGT charge, i.e. that taxpayers should have the option either to rebase as at 6 April 2015 or, to elect to be taxed on the entire gain on the property for their period of ownership where this is preferable for them, such as in a situation where the gain post-6 April 2015 is greater than that since the date of acquisition.

Yours faithfully

WRAGGE LAWRENCE GRAHAM & CO LLP