IMPLEMENTING A CAPITAL GAINS TAX CHARGE ON NON-RESIDENTS: CONSULTATION

SAFFERY CHAMPNESS COMMENTS ON THE CONSULTATION DOCUMENT RELEASED ON 28 MARCH 2014

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Saffery Champness

CHARTERED ACCOUNTANTS

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1. INTRODUCTION – SAFFERY CHAMPNESS

1.1 Saffery Champness is a top 20 firm of chartered accountants and one of the UK's leading private client advisers. The firm has nine offices in the UK, plus offices in Geneva, Guernsey and Zurich. We have 70 partners and directors, and around 600 people in total.

1.2 Our clients include both UK and non-UK resident individuals and their families. Their commercial interests embrace entrepreneurial businesses, residential and commercial property, the sports and entertainment sectors, and landed estates.

1.3 We advise clients on a broad spectrum of tax and financial matters, including international and cross border issues.

2. GENERAL COMMENT

2.1 We welcome this opportunity to respond to the Government's consultation document 'Implementing a Capital Gains Tax Charge on Non-Residents', published on 28 March 2014 ("the Consultation").

2.2 We note the Government does not believe it right that UK residents pay capital gains tax (CGT) when they sell a home which is not their main residence, whilst non-residents suffer no tax charge. In proposing an extension of CGT to non-residents disposing of UK residential property, the Government's stated objectives are fairness, sustainability and simplicity.

2.2 Whilst we understand the Government's desire to achieve consistency between the tax treatment of residents and non-residents, we do not believe that this should be done by changing the existing CGT regime in a way which penalises UK tax residents or leads to onerous record keeping requirements. It is also important that any changes to existing legislation do not increase uncertainty and complexity for taxpayers.

2.3 We would summarise our views, which are explained in more detail below, as follows:

(a) There should be no change to the ability of UK resident taxpayers to make an election for determining which of two or more residences is to be regarded as their principal residence for the purposes of CGT private residence relief (PRR).

(b) If EU rules prevent the amendment of existing legislation in order to permit the making of PRR elections by UK residents, whilst denying that right to non-residents, the Government could continue with the current rules for making elections, but impose a requirement that for an election to be valid the other property must be within the charge to CGT, either by virtue of the person making the election being UK resident or the other property being a UK property.

3. COMMENTS ON SPECIFIC QUESTIONS

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

3.2 Non-UK resident trustees are not generally liable to CGT on the disposal of chargeable assets. However, the gains of non-UK resident trustees may be attributed to UK resident settlors or beneficiaries under Sections 86 and 87 TCGA 1992 respectively.

3.3 If CGT is extended to non-UK resident trustees as proposed in the Consultation, and there are no amendments to the operation of Sections 86 and 87, gains on the disposal of UK residential property may be taxed twice, once in the hands of the trustees and again in the hands of a settlor or beneficiaries, depending on which of Section 86 or Section 87 applies.

3.4 Section 225 TCGA 1992 provides that PRR can extend to the disposal of a property occupied under the terms of a settlement. If non-UK resident trustees dispose of a UK residential property occupied by a beneficiary, additional record keeping will be required by the trustees and/or beneficiary in order to demonstrate that the property was in fact occupied as the beneficiary's main residence, should the trustees wish to claim PRR.

3.5 A further complication arises where UK resident trustees own UK residential property which is occupied by a non-resident individual. It is not clear from the Consultation how this situation would be addressed, but it appears that the trustee and/or beneficiaries would be subject to onerous record keeping requirements in order to demonstrate entitlement to PRR on a disposal of the property by the trustees.

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

3.7 The Consultation proposes withdrawing a taxpayer's right to elect which of two or more residences is to be treated as their main residence for the purposes of claiming PRR.

3.8 We believe that the suggested options for determining which property is to be regarded as the taxpayer's main residence, whether on the basis of balancing various factors or by applying a fixed rule such as days of presence, will have a detrimental impact on some taxpayers, by imposing onerous record keeping requirements, increasing the level of uncertainty and potentially denying PRR relief entirely.

3.9 The proposal to withdraw the right to elect will result in an especially harsh outcome for individuals who own one property, which they occupy when they can, but who live elsewhere in rented accommodation for work or other non-tax reasons. It may mean that such individuals lose the benefit of PRR entirely, and in our view does not meet one of the stated objectives of the Consultation, namely fairness.

3.10 Currently, an individual can only have one main residence at a time, and this applies also to an individual and a spouse or civil partner, so long as they are living together. If spouses or civil partners occupy different properties, whether jointly owned or otherwise, it may

not be immediately apparent which of these will be the main residence for the purposes of PRR. In particular, if it is the Government's intention that the availability of PRR should be determined by the underlying facts, it is not clear what will happen if those facts differ as between one spouse or civil partner and the other. This is particularly important given that modern working practices and lifestyles can result in couples separately residing in different properties for different periods.

3.11 We are also concerned that the proposals will lead to onerous record keeping obligations, given the requirement to demonstrate entitlement to PRR. This will be an added burden for taxpayers and as explained above, we believe it inappropriate to remove the ability to make an election and to replace this with rules which will create uncertainty over whether or not PRR is available.

3.12 We further note that although the intention of the proposed legislation is to remove the existing imbalance between the tax treatment of UK residents and non-residents, the proposals in the Consultation will leave a significant disparity in relation to properties acquired before April 2015. This is because non-UK residents will only be taxed on gains arising after April 2015, whilst UK residents may be taxed on gains arising since the acquisition of a property (or 31 March 1982 if later). To address this unfairness, it may be desirable to give UK resident owners of properties acquired before 31 March 2015 the option to elect for a property in respect of which they wish to claim PRR to be re-based for CGT purposes to its market value at this date.

3.13 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?

3.14 Neither. Both proposed approaches will have a detrimental impact on taxpayers.

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

3.16 We note that the stated overarching objectives of the Government are fairness, sustainability and simplicity.

3.17 It would seem that a simpler and fairer way to achieve the objective of removing the imbalance between the treatment of UK-resident and non-resident property owners would be to deny PRR in respect of gains arising from the disposal of a UK residential property for any periods during which the taxpayer claiming the relief was non-resident.

3.18 If EU rules prevent amending the existing legislation so that UK residents can make PRR elections whilst non-residents cannot, the Government could instead continue with the current rules for making elections but impose a requirement that for the election to be valid the person making it must be UK resident or the other property be a UK residential property.