hillierhopkins LLP

Chartered Accountants and Tax Advisers

PRIVATE
Mr A McGuinness
Specialist Personal Tax
Assets & Residence Policy
H M Revenue & Customs
100 Parliament Street
London
SW1A 2BQ

Our Ref **(please quote in your correspondence)**
IA1/SUNDRYIA/SM-3533161

Your Ref

Date
19 June 2014

Direct Dial

Dear Mr McGuinness

Implementing a Capital Gains Tax Charge on Non Residents

We are writing as requested to comment on the questions contained in your consultation document dated March 2014.

Before commenting on the specific questions asked, we would like to make a general comment concerning the scope of the consultation document. Box 1A states that one of the overarching objectives is fairness. Why is the focus of the consultation document purely residential property rather than property in general? Is it fair that a non-resident landlord faces capital gains tax if his property happens to be residential but does not if this property happens to be commercial?

We also believe that paragraph 1.2 of the Introduction is rather misleading. In your comparison of the position of a non-resident investing in the UK with a UK resident investing in the UK, to state that generally the latter pays capital gains tax is fundamentally misleading. An overseas resident individual investing abroad will generally pay tax in their home country on their capital gains in exactly the same way as a UK resident individual would in the UK when investing abroad. In addition, it is also a simplification to suggest that UK persons are always subject to taxation on capital gains made on residential property abroad as it is possible that structures may be in place which prevent such a charge.

We would also suggest that paragraph 1.3 is misleading as non residents will not be subject to UK CGT "in a comparable way to UK residents." A UK resident individual who owns a single property in the UK and rents a property abroad will be entitled to PRR on the sale of his UK property. The consultation document suggest that a non resident who owns a UK property but rents property in his own country (a not unknown situation) will find that he is not entitled to the exemption. Similarly a UK resident trust with a resident beneficiary is entitled to a PRR if the beneficiary occupies the property under the terms of the settlement. Again the consultation suggests a non-resident trust with a UK resident beneficiary occupying a UK property would not benefit in a similar way. Aside from lacking in fairness we would also question whether this is entirely consistent with the UK's obligations under EU law.

Hillier Hopkins LLP
Radius House
51 Clarendon Road
Watford
Herts WD17 1HP

Tel: 01923 232938
Fax: 01923 817159

Other offices in Aylesbury, London and Milton Keynes

www.hillierhopkins.co.uk

In all, we would respectfully suggest that the very underlying premise of this consultation is flawed. The proposals do not promote fairness, but instead introduce a cross-border anti-competition environment against which the UK has traditionally argued. The proposals are, in our submission, merely popularist. There is no evidence that they will address the high property pricing in the South East, and the suggestion that investors in UK property from abroad do not pay tax on the property gains is disingenuous; they do not pay UK tax on those gains.

Questions 1 & 2

We would question whether the proposed exclusions in box 2.A sit within the over arching objective of fairness. A UK owner of such properties would be subject to capital gains tax and it is difficult to understand the rationale for excluding these types of property from a charge levied on non residents. We would also suggest the exclusion may be largely illusory as many such properties, particularly in relation to care accommodation, may fall within the scope of Section 10 TCGA 1992 in relation to trades carried on in the UK.

No rationale is given for the need to exclude communal accommodation when other residential letting businesses are within the scope of the changes.

Questions 3 & 4

Paragraph 2.10 states that "to ensure comparable treatment between trustees that are regarded as UK resident and those that are not, the Government believes that trustees that are not regarded as UK resident should be subject to CGT on the gains that they make on disposals of UK residential properties." As noted above UK resident trusts have an exemption available where the property is occupied by a beneficiary. The proposals in their current form make no allowance for this for overseas trustees so we are not convinced that the statement is entirely correct.

We understand the concern that the exemption be available where the property is being used occasionally but this could easily be overcome by restricting the exemption to cases where the beneficiary is UK resident.

Questions 5, 6 & 7

The introduction of any GDO will lead to planning at the margins with structures being incorporated specifically to meet any tests introduced. This will be the case whatever level it is set at and is unavoidable.

In addition the inclusion of a GDO in relation to collective investment schemes may lead to unfairness where individuals invest in a fund which meets the GDO at the outset but, through acquisitions of shares in the fund by a limited number of other individuals, fails the GDO in the future. Through no fault of their own and without any action on their part, non-residents may face capital gains charges under such circumstances.

We would also question why investment in UK residential properties through a collective investment scheme or REIT is conceptually different to direct investment? Investors are still deriving profits from UK real estate and so should face the same tax charge as direct investors.

To avoid a plethora of new definitions if such a test is to be introduced it would make sense for the GDO in this context to be set along the same lines as the REIT legislation.

Questions 8 & 9

The extension of the ATED-related CGT charge to properties worth £500,000 suggests that it is disingenuous to claim that this charge and the ATED-related CGT charge are in any way supporting the SDLT legislation introduced recently. As the SDLT charge only applies to properties in excess of £2m including properties below this threshold in the other charges can only be regarded as a money raising exercise.

If a general capital gains tax charge is to be introduced covering all non resident investors in UK residential property there seems little point in maintaining the ATED-related CGT charge which merely adds complexity to an already over-complex area.

It is disappointing, in the extreme, to have two new capital gains tax charges introduced in the same area within two years of each other. This suggests a lack of forethought and planning within HMRC policy division.

Questions 10, 11 & 12

We believe it is inappropriate to bring general changes to the PRR regime – arguably the most important tax relief for most UK property owners – within the consultation document purportedly targeting the perceived avoidance of UK tax by non residents.

The overall policy objective of the PRR election is to provide certainty, both for the taxpayer and HMRC, and either of the two proposed approaches will lead to complexity and uncertainty well beyond the target of this consultation document. The expectation following the introduction of ATED and the ATED-related CGT charge was that properties would be de-enveloped. We believe that this has not, by and large, happened and consequently a large number of properties which will fall within either the ATED-related CGT charge or the new proposed charge will not be eligible for the PRR. Consequently, we believe the concerns expressed in the consultation document about the application of the PRR are exaggerated.

As noted above the proposals fail to distinguish between the owner and the occupier. A UK resident trust is entitled to the PRR if a beneficiary (of whatever residence status) lives in the property, whereas the consultation document will prevent relief being available to a non resident trust which has a UK resident beneficiary occupying the property.

We would also point out that the PRR election is only available for properties which are occupied as individual's residence. Where the occupation is occasional and sporadic it is arguable that an election will be ineffective as the property is not the individual's residence within the meaning of Statute and Case Law.

If a withholding tax is introduced then any claim for PRR can be reviewed prior to the refund of tax and so control is maintained over the availability of relief.

Questions 13, 14, 15 & 16

We note that, while the consultation document contains proposals for an individual rate of tax, no proposals have been made as to an appropriate rate of tax for other taxpayers. In the light of this any comments concerning a collection mechanism must be restricted to individuals.

We note that the majority of countries which you have chosen to use for comparative purposes apply a flat rate of tax to non residents – only two apply progressive rates. It is inappropriate and burdensome to require individuals to submit details of worldwide income and gains in order to enable capital gains tax on UK property to be calculated, particularly as the UK persists in using a tax year which is out of step with the rest of the world. We would suggest a flat rate, even though this will lead to both winners and losers, is a more appropriate way of collecting tax in this situation.

A withholding tax will be necessary if the Government proceed with introducing this tax charge as it would otherwise become voluntary, particularly for individuals who do not intend to return to the UK after selling the property. As purchase and sale monies typically pass through the hands of UK solicitors when dealing with UK property, they would seem to be the appropriate person to collect taxation, in the same way they do for SDLT.

However, in pragmatic terms, we suspect that even this may fail. Deregulation of the conveyancing sector some years ago will make it feasible for overseas persons to deal with both sides of the conveyance. This will mean that they will not be subject to UK regulation themselves and render the tax unenforceable when transactions take place between two overseas persons with overseas professional advisors. The only control would be at the point of registration with the Land Registry, and this will create a whole layer of new administration the cost of which will doubtless eat into the revenues earned.

Based on your proposals, there does need to be a mechanism for "correcting" the tax collected through a withholding mechanism, although if a flat rate of tax is to be used the occasions on which this is necessary will be reduced. In such circumstances it is likely that the only reason for a correction will be the availability of losses on other UK residential property transactions or the availability of reliefs. However, we would suggest a 30 day period is unnecessarily restrictive and, providing refunds of tax can be made, there is no need to restrict amendments to this period. In theory, self assessing within the 30 day period would allow the withholding tax to be corrected before being paid across to HMRC. However, this could be subject to abuse unless the self assessment is confirmed by HMRC to the withholding agent and we do not believe HMRC is resourced to respond sufficiently quickly to allow such a mechanism to operate in practice. If after consultation you decide to retain a tiered rate of tax we would suggest corrections are dealt with through self assessment within the normal timescales.

We would be happy to take part in any working group to discuss the proposals.

Yours faithfully

For and on behalf of Hillier Hopkins LLP

e-mail