The Fry Group

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Alan McGuinness
Specialist Personal Tax
Assets and Residence Policy
HM Revenue & Customs
100 Parliament Square
London
SW1A 2BQ

Email: capitalgains.taxteam@hmrc.gsi.gov.uk

Dear Mr McGuinness,

Implementing a capital gains tax charge on non-residents: Consultation

The Fry Group are pleased to have the opportunity to comment further on the introduction of a capital gains tax charge on non-residents disposing of UK residential property following the issue of the consultation document on 28 March 2014.

Who we are

The Fry Group have been assisting British expatriates and non-domiciled individuals for in excess of 115 years. We currently provide advice to over 4,000 clients in the UK and around the world on UK tax issues with a high percentage of our clients being non-resident.

General Comments

The consultation document outlines that the intention is to make the tax system fairer by charging non-residents capital gains tax on the disposal of UK residential property, as this charge applies to UK residents. Clearly a target of this legislation is to discourage properties being purchased by those living overseas, which are then left empty for large periods of time. However it must be borne in mind that these changes will also impact upon those who hold property for other reasons, such as family connections and more importantly investment.

Previous ATED developments have sought to discourage the 'enveloping' of property purchase, however potentially the proposals as they currently stand could lead to non-residents actually considering purchase of property through a non-resident company.

Private Residence Relief (PRR) Election – whilst the document mentions that non-residents will no longer be able to elect which property will be considered their PRR, the full impact of this must be considered as this must also apply to all taxpayers, irrespective of their residence status. Such a legislative change goes beyond the consultation on implementing a capital gains tax charge for non-residents. Any changes or introduction of a new definition of 'PRR' should be subject to it own consultation as this will have effect on a much wider body of taxpayers than this consultation.

Time Apportionment/Rebasing - clearly the March 2014 document was to outline the intention and latterly the technical implementation will be considered within a further consultation document and draft legislation. We would certainly support the fact that the intended change in legislation produces such a different outcome than before, that pre –April 2015 'gains' on property are not brought into charge.

As has been confirmed by your office, a form of time apportionment will apply to ensure that only gains arising from 6 April 2015 are chargeable. Careful consideration of how this is achieved; be it via straight time apportionment or taking an agreed market value as at 6 April 2015.

Clear intention also needs to be given as to how existing legislation relating to PRR relief interacts with the proposed changes.

Specific Questions in the consultation

Question 1: Would an exclusion of communal property from the scope of the new regime result in any unintended consequences?

No Comment.

Question 2: Are there any other types of communal residential property that should be excluded from scope?

No Comment.

Question 3: Are there any particular circumstances where including non-resident partners in scope of the charge might lead to unintended consequences?

No Comment.

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

If it is intended for PRR relief to remain as a deduction, it needs to be ensured that PRR relief can be claimed by non-resident trustees and not simply those who are UK resident trustees. It is pleasing to note that consideration will be given to existing anti-avoidance provisions when implementing this new charge.

Question 5: 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?

No Comment.

Question 6: Are there any practical difficulties in implementing a GDO test?

No Comment.

Question 7: 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?

No Comment.

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?

It is noted that the intention is not to introduce a relief for let property as exists with the previously introduced ATED rules. These allow an exemption from ATED related gains if the property has been let on a commercial basis. Potentially, the lack of a similar exemption could create additional complexity.

Whilst no indication of the proposed tax rate for companies is mentioned, as ATED related gains are charged at 28% surely the rate would have to be set at 28% to ensure fairness.

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?

The level of detail provided thus far makes it difficult to provide any suggested alternative approaches at this time.

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

As we have already stated we would urge the Government to consider the change to PRR election separately from this consultation. It would be recommended that the ability to elect a property as PRR is retained. Whilst clearer guidance on how this is determined is advisable taking away the ability for an individual taxpayer to elect which of their properties should qualify as their PRR simply cannot be right. The onus is always on the taxpayer to prove the claim in the event of any dispute, even with this intended change why should this ability be withdrawn?

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?

If the ability to elect a property is removed then the preferred method would be a factual based rule that then replaces this. The second option offers the identification as the property 'in which the person has been present at the most for any given year'. Counting days presence at property will be reliant on the taxpayer maintain an accurate record and would not be a straight forward method of enforcing. The physical use of a property may simply indicate how practical the property is to the individual, rather than the property that is considered the main residence.

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

It would be our preference to retain the election system currently in place, albeit with a more clearly outlined system of electing.

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.

It makes sense for the solicitor/estate agent to be responsible for the collection of any withholding tax. There would however need to be a clear system for them to identify the residence status of the client selling property.

Given that the determination would be made against the background of the Statutory Residence Test, this could result in confusion as at the time of the sale the seller may be considered non-resident under the test. Subsequent action in the year however could result in the seller being considered resident for the entire year which would mean the withholding tax was not relevant.

Part of the new system could potentially involve the seller obtaining a certificate of residence from HMRC, although systems would need to be in place to ensure that such requests were dealt with swiftly.

Question 14: Are there ways that the withholding tax can be introduced so that it fits easily with other property transactions processes?

No Comment.

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 would agree that there should be the option available for taxpayers to choose between either a withholding tax and the actual position then reported on the self-assessment return or for payment of tax to be based on the actual amount due.

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?

A 30 day period would in practical terms be too short. We would urge consideration of a longer period. It is likely that those non-residents disposing of property may not already be registered for self-assessment and therefore in such circumstances a 30 day period simply is not workable.

It should also be confirmed that any period should run from the date of completion, when funds will be readily available, rather than from the normal capital gains tax point of the exchange of contracts.

Questions about this response to the consultation document can be addressed to:

The Fry Group
Crescent House
Crescent Road
Worthing
West Sussex
BN11 1RN
Telephone: (01903) 231545
Fax: (01903) 200868