Mishcon de Reya response to consultation: Implementing a capital gains tax charge on non-residents

19 June 2014

1. Abolishing ATED-related CGT

It is hard to see why the government would keep the ATED-related CGT charge beyond April 2015, especially in relation to post-April 2015 property acquisitions. There would arguably be no need for the ATED-related charge once a new CGT charge for non-residents was in place.

Under the proposals, all non-resident companies would be within the new CGT regime. This means that the ATED-related CGT charge would in our opinion be obsolete, unless it is intended to have a different CGT regime or a lower CGT rate for company-owned residential property not already within the ATED charge. This would lead to new, different CGT rules for companies holding owner-occupied residential property valued at under £2 million (£1 million from April 2015 and £500,000 from April 2016) or holding commercially-rented residential property of any value. This would create significant complexity and potential conflict between the two regimes and we argue strongly against introducing a two-tier system.

If there is a move towards making all disposals of UK residential property by non-resident companies subject to CGT, then it would be far simpler to abolish ATED-related CGT altogether.

2. Main residence relief election

Removing the ability to make a main residence election with HMRC for the purposes of the CGT main residence exemption affects UK residents as well as non-UK residents and so the title of the consultation paper is entirely misleading.

The consultation therefore affects UK residents with more than one property, or those who own one property but spend most of their time in a rented property elsewhere. This could potentially be a very large number of people. If they are no longer able to make a CGT main residence election then they will face an increased CGT liability even though they are not, apparently, the target of the proposed changes.

If the ability to make an election is ultimately removed (which we would nevertheless strongly argue against), an option could be to change the existing rules so that a rented property would never be treated as an individual's main residence. This would avoid adversely affecting an individual who, for example, rents a property during the week and spends weekends in another property which he owns.

For individuals with more than one property, there will need to be clear and transparent rules in place regarding the records required to demonstrate that a given property is an individual's main residence (however that is to be determined). A day (or midnight) count test may be easier to follow and administer than a more subjective test but will nevertheless impose a significant administrative burden on taxpayers.

We feel strongly that if the aim is to prevent non-residents from electing their UK property to be their main residence in order to avoid the proposed CGT charge then there are far better ways to do so without disturbing the existing and generally well-understood rules applicable to UK residents.

For example, the right to elect could be restricted to UK (or EU) residents. Alternatively, the right to elect could be restricted to those who spend at least a certain number of days in the elected property. Whilst this might adversely affect a small number of UK residents, it will in effect deter most non-residents from electing, especially if (depending on the selected threshold number of days) it would otherwise result in those non-residents becoming UK resident. In both cases the test may need to be measured on a year by year basis rather than solely in the year of disposal to prevent manipulation of the rules.

A further possibility is to provide that the election is only relevant when deciding between two (or more) UK (or EU) properties. In other words, a non-resident with a house in the UK and one in his (non-EU) home country could not make an election. And if he owned two UK properties, he could only elect between them. If the elected property is still not his factual main residence when compared to his non-UK property then the election will not help him.

All of these options achieve the aim of preventing or deterring non-residents from making an election in order to get round the proposed charge without materially affecting the existing right of UK residents to make an election.

3. **Main residence relief and trusts**

We assume there is no intention to prevent non-resident trustees from claiming the main residence relief where a beneficiary occupies the property under the terms of the trust as their main residence. In that case, the beneficiary (whether UK resident or non-resident) should be treated in the same way as any individual in determining whether the property is their main residence. In practice that would mean most non-resident beneficiaries would almost certainly not occupy the property as their actual main residence and so the relief would be denied. Moreover, and depending on what changes are made to the election rules (see our comments above), most non-resident beneficiaries would almost certainly be unable to elect for the UK property to be treated as their main residence for these purposes.

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