ICAEW LONDON SOCIETY OF CHARTERED ACCOUNTANTS

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Taxation Committee

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Dear

Implementing a capital gains tax charge on non-residents

I am writing as of the London Society of Chartered Accountants (LSCA); further details about the LSCA and the Committee are given at the end of this letter. We are pleased to have the opportunity to comment on the HM Treasury/HMRC consultation paper about the proposals to implement a capital gains tax charge on non-residents, although we are only submitting answers to question 11 onwards. We have however seen the comprehensive response submitted by the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) and are pleased to endorse their views.

A. General Comments/ Requests for Clarification

Like the Tax Faculty, we are very concerned about the proposed management of such a major change to the UK tax system as this proposal represents, although we agree that the fundamental principle of taxing foreign owned real estate is acceptable. However, care needs to be taken to avoid introducing unwelcome complexity into the CGT system and to ensure that the tax should be straightforward to compute and collect. We also believe that it is vital for there to be consistency in the way that all the property taxes apply and interact, including ATED.

We also have a number of questions of our own about the proposals on which we seek clarification, as well as a few additional comments, as follows.

1. Para 1.1 says that the new regime will apply from April 2015 and only to gains arising from that date. It is assumed therefore that there will be re-basing at market value at either 1 or 6 April 2015. However, there is no mention of re-basing – which would of course be a fairer system – so we would like clarification that this is the intention.

In addition, what if the cost before April 2015 was greater? Will a loss on disposal be computed against the lower figure? Equally, would a gain be based on the higher figure?

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2. The interaction with Sections 13, 86 and 87 TCGA 1992 will need to be clarified.

What if the property sold is an office block with a caretaker's flat? It is assumed that an apportionment will certainly be necessary on the sale of a farm, a stately home run as a business, a bed & breakfast establishment which is also a residence, shops and public houses with living accommodation over, etc.

3. Where a property is converted from or to residential during the seller's period of ownership (after April 2015), is there to be a chronological apportionment of any gain (or loss)?

4. The treatment of losses also has to be clarified.

4a. For example, will a non-resident's allowable loss that arose at an earlier time when he was resident be available to reduce a chargeable gain (not ATED-related) arising when he is non-resident?

4b. Would an allowable loss (not ATED-related) that arose to a person when non-resident be available to reduce subsequent chargeable gains arising when UK resident?

4c. Suppose a non-resident company is carrying on a trade through a branch in the UK as well as holding residential property in the UK as an investment (not within ATED). Could a loss on disposal of an asset used in the trade shelter a gain on the investment properties? Question 8 is germane.

B. Answers to Specific Questions

As stated above, we are not submitting answers to questions 1 – 10.

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?

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

Both the approaches suggested in the consultation are cumbersome, so we do not feel that either is suitable. Neither proposal would deal adequately with the situation where spouses/civil partners have different factual main residences. .Although a simpler change would of course be if the main residence election were only denied to non-residents; we assume that this would be unacceptable and are therefore not proposing it. If we had to choose one of the approaches set down in 3.5 we would on balance favour the first.

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.

Although often obvious, there will be many borderline cases where a solicitor, etc. will be uncertain about whether a seller is non resident. If a withholding system were to be adopted, an alternative would be to require that a seller confirms *resident* status, to avoid a withholding. Canada's approach, as described at Appendix A23, might be worth emulating.

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

No, we do not believe that there are. SDLT is, generally, based on actual consideration, which makes it simple to determine the liability. Capital gains tax would be based on comparing disposal consideration (which may differ from the actual consideration because of the substitute of open market value) with either open market value at 6 or 1 April 2015 or actual or deemed cost on subsequent acquisition, perhaps complicated by the inclusion of enhancement expenditure.

We therefore agree with the Tax Faculty that it would not be appropriate to introduce a withholding tax in the UK for both practical and technical reasons.

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?

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?

At first sight, accounting within 30 days for a percentage of the purchase consideration to be withheld by the buyer seems acceptable, provided that the actual consideration itself is to be paid by the buyer within that time scale.

However, a withholding, even of 10%, is manifestly unfair if the disposal is shortly after April 2015, or indeed any case where there is only a modest gain - or a loss - compared with market value at April 2015.

Furthermore a withholding system does not address disposals where open market value replaces actual consideration [gifts, appointments by trustees or liquidators, sales at more or less than open market value, etc.] or where there is not a buyer, as with liquidation distributions.

For the seller to have to account for the tax liability on the gain in excess of any withholding within 30 days is unreasonable. An individual resident has until 31 January following the tax year to pay CGT. A trust has the same timetable. A company typically has to pay its tax within 9 months of the end of the accounting period; only larger companies having to make payments earlier on account. Non-residents who or which have a tax liability on the new gains should be required to self-assess according to the same timing as residents.

Clearly the simplest approach is to self-assess, with no withholding. The 'policing' problem is much the same as for ATED.

If you would like us to expand on the points above or wish clarification of our views, please do not hesitate to contact me.

Yours sincerely,

About the LSCA and its Taxation Committee

The LSCA is by far the largest of the 22 district societies affiliated to the Institute of Chartered Accountants in England and Wales (ICAEW). It has a membership of over 30,000, representing nearly one quarter of all ICAEW members, and also provides services for other ICAEW members who live or work in London. London members, like those of the Institute as a whole, comprise a mixture of those working in all sizes of practice and those working in businesses both large and small, or otherwise not in practice. They include many members operating at the heart of industry and commerce in the City of London, as well as those working in the largest accountancy firms, with a wide range of specialisms and expertise. The Taxation Committee reflects this diversity and knowledge. Members give their services to the Committee on a voluntary basis and in addition to their normal full-time employment.

The Committee responds to consultation and other papers on taxation matters issued by HM Revenue & Customs, HM Treasury and other bodies. It also makes detailed representations on issues such as the Finance Bill proposals. It provides the opportunity for lively debate and selects certain topics for broader discussion and publication to LSCA members. In addition, the Committee organises an annual Breakfast event on the morning after the Budget to review the Chancellor's main proposals, as well as holding other events on topics of current interest and importance.