The Law Society

Implementing a capital gains tax charge on non-residents:

The Law Society's Response

June 2014

This response has been prepared by the Tax Committee of The Law Society of England and Wales ("the Society"), with input from the Conveyancing and Land Law Committee. The Society is the professional body for the solicitors profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and the regulatory bodies and has a public interest in the reform of the law.

Introduction

1. The Law Society of England and Wales welcomes this opportunity to comment on HMRC's consultation on implementing a capital gains tax charge on non-residents.[1]

2. We address the specific questions below but would like to make some general observations.

3. The consultation states that the new rules will apply only to gains arising from April 2015 but it is not clear how this is to be achieved. Will this be a true rebasing to 6 April 2015 which will require a proper valuation or a straight line apportionment? Given that the new rules will apply to properties of all values, a valuation might be a disproportionate expense for some taxpayers. Accordingly, we would favour (a true) rebasing to 6 April 2015 values, subject to an option to elect for a straight line apportionment if the taxpayer wishes.

4. The fact that pre-April 2015 gains are to be excluded is also relevant to the level of charge. Those jurisdictions considered by HMRC in the consultation document who operate a withholding system tend to require the withholding to be a percentage of the proceeds of sale.

5. Given that the current proposal is to have a payment on account system, we consider that the payment on account should be linked to the *gain or assumed gain* rather than *proceeds*. If it is decided to apply the rate of payment on account to *proceeds*, there should, at least, be a "phasing in" or graduated rate for, say, 5 to 10 years from April 2015 to reflect the fact that initially very little of the proceeds will constitute taxable gains. Indeed, if the rate is applied to the proceeds, there is an argument for a sliding scale to reflect the fact that the longer a property is held, the greater the proportion of the proceeds which will represent gain. This does, of course, increase the complexity and it would be preferable if the payment on account was linked to the gain element.

6. The consultation states that the overarching objectives are fairness, sustainability and simplicity. The proposals in the consultation document raise doubts as to how far these objectives will be achieved. The regime which will apply to UK real estate will be far from simple:

    - Different rules will apply to companies and other non-residents
    - Different rules may apply to UK and non-UK companies

[1] HM Treasury and HM Revenue & Customs, 'Implementing a Capital Gains Tax Charge on Non-Residents,' March 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298759/CGT_non-residents_condoc.pdf.

- Different rules will apply to commercial and residential property
- Different rules will apply to let residential property depending on whether the owner operates a "genuine business" or not
- Some corporate owners will be paying corporation tax, some will be paying capital gains tax and some will be paying capital gains tax at a different rate from the normal rate
- Some non-residents will pay an annual tax and some will not.

7. Much of this arises from the overlap between the proposed new regime and the existing ATED related CGT regime. We comment on this further below, but it will inevitably create a great deal of complexity leading to increased administrative burdens and costs on businesses and property owners, and potentially uncertainty as to the tax position of a taxpayer. Whilst it is a stated aim is that the tax treatment of non-residents and UK residents who make gains on UK properties should be comparable, there seem to be a number of differences which could be discriminatory. In our view, the simplest option is to abolish ATED related CGT charge as part of the introduction of these proposals.

8. The rapid and repeated changes to the tax regime relating to residential property (including the IHT debt disallowance rules introduced in Finance Act 2013) undermine confidence in the stability of the UK tax system.

9. The overarching objectives would seem to be better achieved by an integrated regime for residents and non-residents, based on stated policy with consistent rules rather than having two different regimes running in parallel.

10. It is also undesirable that the same concept should have different meanings for the different regimes. For example, the definition of residential accommodation is to be different for the ATED/SDLT regime and the new CGT regime.

11. We now turn to the specific questions.

<u>**Definition of Residential Property**</u>

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

12. We suspect that inclusion within (or exclusion from) the scope of the tax as regards particular types of communal property is unlikely to lead to a tax distortion i.e. the attractiveness of the property and gross returns therefrom is likely, except at the margins, to drive investment decisions as regards particular types of communal property, rather than whether it is excluded or within the charge. In particular, we do not see any *unintended consequences arising* from student accommodation attached to an institution – provided that the nature of the "attachment" is clear – being outside the regime whereas other forms of student accommodation are within the regime. However on policy grounds (see 16 below) we do not discern a distinction between the *use* of such differently owned types of building.

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

13. Residential properties owned by charities should be excluded from the scope of the new provisions. We also suggest that any hotels or other buildings put to use to house homeless people for which local authorities were responsible, and so could be perceived to be "communal", should be excluded.

14. We suggest that convents and monasteries and equivalent buildings for other religions together with accommodation provided by other organisations for their members should also be specifically excluded.

15. The consultation document mentions accommodation provided for members of the armed forces and we further suggest that accommodation for the police and other public servants should be excluded.

16. A hall of residence attached to an institution is proposed to be excluded from CGT, but other residential accommodation for students is proposed to be, potentially, subject to CGT. Why should there be a difference between those examples when the latter in terms of the nature of its use could be identical to the former? Student accommodation of that type can be contrasted with student houses bought by an overseas investor for their child, a situation that more readily falls within scope of CGT.

17. The different definitions of "dwelling" and "residential property" in SDLT, VAT, ATED and capital allowances legislation cause confusion and there needs to be greater consistency. It does seem strange that CGT related to ATED could have different definitions from those for the CGT for non-residents.

18. It appears to be very difficult to capture through legislation the aspects of, for example, residential accommodation for students that would bring it within the scope of CGT. Is it to do with the design of the building; its use; its communal nature; whether taking the form of cluster flats; what happens to the building outside term time?

19. A potentially interesting angle is the legislation (for example, Leasehold Reform Act 1967) and multifarious cases (some at House of Lords/Supreme Court level) relating to whether tenants of buildings, used entirely for commercial (offices and hotel) purposes, but which were originally designed and used as a house, have the right to buy the freehold to the properties pursuant to the enfranchisement right under the Leasehold Reform Act 1967 which applies to a "house". This goes to the meaning of what is a "house" and it is suggested that the Supreme Court decision in Day v Hosebay and Howard de Walden v Lexgorge [2012] UKSC 41 be considered as it may provide some useful insight for HM Treasury.

<u>**Forms of Residential Property Ownership**</u>

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

20. There will be some difficulties if the charge is extended to residential property held through partnerships that are treated as transparent for tax purposes. However, for the most part, we would not expect these to be any different from those faced in the context of the capital gains legislation more generally. For example, as a starting point, although the treatment of partnerships established

under English or Scottish law will be relatively clear, there will be the familiar difficulty in determining the correct characterisation of entities established under foreign laws the characteristics of which may not fit neatly into concepts of UK tax law. Furthermore, the usual issues of ascertaining the proportion of any gain or loss that will be treated as accruing to any partner will arise. We have assumed that the usual rules, in particular Statement of Practice D12, will apply for this purpose.

21. One particular concern will be the application of the new charge to investment funds which are structured as partnerships. In the case of such funds, there is no charge to tax at the fund level. The investors are taxed on their shares of income and gains accruing to the fund. It will therefore be important that any exemption that might apply to the proposed fund level charge (see our responses to questions 5, 6 and 7 below) should also extend to the investors in the fund.

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

22. We note that paragraph 2.10 of the Consultation states that the Government will consider interactions with existing anti-avoidance provisions. It is essential that double charges are avoided.

23. Under the ATED regime, if a corporate property owner is subject to ATED related capital gains tax then that gain is not attributable to its shareholders (whether individuals or trustees) under Section 13 Taxation of Chargeable Gains Act 1992 ("TCGA"). We suggest that similar principles apply to trusts so that if the trustees themselves are subject to capital gains tax under the new rules, that gain should not be a "Section 2(2) amount" for the purposes of Section 87 TCGA nor should it be attributable to the Settlor under Section 86 TCGA.

24. Similarly, gains which are taxed on a non-resident individual should not be taxed again under section 10A TCGA if the individual returns to the UK and would otherwise be taxable on the gain as a temporary non-resident.

25. Where there is a deemed gain under schedule 4B TCGA the trustees will not actually have disposed of the property. We submit that there should be no tax charge until an actual disposal when the schedule 4B gain and any further gain would become taxable on the trustees.

26. Alternatively, if the deemed gain is attributed under section 86 or section 87 (whether or not taxed e.g. if the remittance basis applies) then, on an actual disposal of the asset, the attributed deemed gain should be credited against the actual gain in determining the trustees' liability. Any such credit mechanism (which is why we favour exclusion – see paragraphs 23 and 24) would need to ensure the correct amount of previously charged gain was excluded to avoid a second charge arising simply because of different tax rates applying in later years.

27. Some considerable thought will need to be given to transitional provisions.

28. As there will be a rebasing of some description, whether a true rebasing or a straight line apportionment, it will be possible to identify the post April 2015 gains

which come within the new rules. So, where a gain is realised after April 2015 on a residential property which was acquired before that date, the post April 2015 gains would be taxable on the individual, trustees or company under the new rules. The element of the gain accruing before April 2015 should then be taxable in accordance with the normal rules i.e.:

- in the case of companies, part of the gain may be an ATED related capital gain which would be taxable on the company. To the extent that it is not an ATED related capital gain then it would be dealt with under the normal provisions of section 13. The gain may or may not be attributable to the participators. For example, where, as will often be the case, the company has been acquired for inheritance tax mitigation purposes, there may be no capital gains tax avoidance motive and so no section 13 apportionment;

- in the case of trusts, the pre-April 2015 gain could be attributed to the Settlor under section 86 TCGA or enter the "section 2(2) amount" pool for the purposes of section 87 TCGA;

- in the case of an individual, if the individual remains non-resident for more than five tax years, the pre-April 2015 gains would not be taxable. If the individual becomes a "temporary non-resident" the gains will be taxable on return under section 10A TCGA;

- where there a is deemed gain under schedule 4B, the pre-April 2015 element could be dealt with under the current rules i.e. it would be dealt with under section 86 or section 87 TCGA as appropriate;

29. It is submitted that losses made by trustees on residential property which are not capable of being relieved against gains chargeable under the new rules should be capable of being set off against other trust gains (or carried forward against other trust gains). This is in accordance with the existing provisions whereby Section 86/section 87 gains are calculated in the same way as would have been the case had the trustees been UK resident and, in this event, losses on residential property would be capable of offset against gains generally.

30. It will also be important that private residence relief ("PPR") continues to apply in the trust context.

31. There may, for example, be cases where single trust owns several properties, each of which is the main residence of a different UK resident beneficiary. PRR should be available on all the properties.

32. In the context of ownership through fund structures, paragraph 2.18 of the consultation states that pension funds will be excluded from the scope of the regime. Pension funds (at least in the UK and other common law jurisdictions) are normally constituted as irrevocable trusts. Since the proposals are aimed at non-residents and a non-resident pension fund cannot, by definition, be a registered pension scheme, what does the Government have in mind here? Will the exclusion be limited to pension schemes which have some sort of regulatory recognition in the country where they are located (whether trusts or not)? How will pension schemes be dealt with where they are established in countries with no regulatory/registration system? Will QROPS and QNUPS be excluded? Will

Employer Financed Retirement Benefit Schemes (EFRBS) be excluded? Many global companies operate international pension schemes for their internationally mobile employees which are genuine retirement arrangements but, in UK terms, are merely EFRBS.

33. As noted above, it should also be clear that charities are excluded from the regime. Similar exclusions should perhaps also be made for entities (e.g. foreign endowment funds) which would be capable of being charities if established in the UK.

Ownership through fund structures

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?

34. We believe that a genuine diversity of ownership test which focuses on the marketing of the interests in the fund to a suitably diverse group of potential investors (such as that which is contained in the Authorised Investment Funds (Tax) Regulations 2006 (SI 2006/964)) provides an appropriate means of ensuring that funds are not used by small groups of connected investors to circumvent the charge. Given that HMRC has satisfied itself that the authorised funds legislation is adequately protected by the GDO test, we would suggest that it can be adopted in this case, subject to any amendments which are necessary or desirable in the context of real estate funds (see below).

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

35. Most real estate funds are closed ended. After an initial fundraising period, the fund will close; no new investors will be admitted and existing investors will not be allowed to redeem their interests. The GDO test in Part 1A of the Authorised Investment Funds (Tax) Regulations 2006 is designed for open ended funds and assumes that marketing will continue throughout the life of the fund. If a GDO test is adopted for the purpose of then new charge on non-residents, the test should be amended so that its requirements can be met by a closed ended fund provided that the fund has been widely marketed throughout the fundraising period.

36. The GDO test should also be adapted to permit existing funds that have not had an opportunity to meet the requirements to qualify even though they are not open for further investment. It would not be appropriate to subject such funds to the full rigour of a GDO test in circumstances where the promoters could not have been aware that such conditions would be required to be met. This applies particularly to the documentary conditions in the GDO test. However, we can understand that the Government may take the view that grandfathering all existing funds is equally inappropriate and that properties held by existing "private" funds should still fall within the charge. For these reasons, in our view, any final legislation should contain a broader based exclusion for properties held through funds which first opened for investment at a time before a specified date where the promoter sought to raise investment from a genuine spread of investors. The specified date should be no earlier than the date on which detailed draft legislation is published in draft Finance Bill clauses.

37. It is critically important in the marketing of investment funds that there is clarity as to the tax treatment of the fund and its investors. For this reason, the legislation should contain a clearance procedure similar to that in Part 1A of the Authorised Investment Funds (Tax) Regulations 2006.

38. We are aware that there has been some discussion in the working groups as to whether it might be more appropriate to adopt a variation of a close company test (perhaps adapted in a manner similar to that in the UK REIT legislation) for the purpose of deciding which closed ended funds would be excluded from the fund based charge. On reflection, in our view, it would be inconsistent to have one test for closed ended funds which focuses on the ownership of interests in the fund (following marketing) and another for open ended funds which focuses on marketing efforts being made to achieve genuinely diverse ownership. In our view, the test should be the same for both closed ended and open ended funds and the most appropriate test is a GDO test adapted to take into account the characteristics of closed ended funds.

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?

39. [In our view, a GDO test, amended in the manner described above, should be sufficient to identify those funds which should benefit from an exemption. A second exclusion based on the balance of assets in the fund is unlikely to be capable of being designed so as to exclude "private" funds established by high net worth individuals and connected persons without the introduction of other criteria. The most appropriate other criterion is genuine diversity of ownership.]

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?

40. We suspect that existing non-resident owners of residential property that is currently not within ATED related CGT will continue to evaluate the attractiveness of the return expected from holding such property but are unlikely to realise such assets because of the proposed introduction of a wider scope CGT.

41. Would-be investors after 2015 will factor in the application of the tax in making a decision whether to invest in residential real estate versus commercial real estate, real estate versus other asset classes, and assets subject to tax in the UK or in other jurisdictions.

42. As noted above, to the extent that non-resident companies not operating through a UK permanent establishment are to be subject to a CGT charge in respect of residential property, we believe that there should be a simple regime and the ATED related CGT charge should be abolished. We recognize that this will require, for chargeable gains purposes, a single approach to exemptions i.e. potentially breaking the link with ATED exemptions.

43. The effects of the extension of UK tax to gains accruing on the disposal of UK residential property by non-resident companies needs to be carefully considered. The Government and HMRC should take into account the following issues, some of which are discussed further elsewhere in this submission:

- In order to avoid discrimination issues, non-resident companies should not be charged to tax on gains at a higher rate (28%) than UK resident companies.

- Non-resident companies that are within the charge should be entitled to set the losses arising on the disposal of other residential properties in the UK against gains accruing to them in a manner similar to UK companies. This should include allowing the carry forward of losses arising in one period against future gains.

- Non-resident companies within groups should be able to set losses of other companies within the group against gains in a manner similar to UK group companies (for example, by making the equivalent of an election under section 171A TCGA 1992).

- The transfer of UK residential property between members of a non-resident group should be capable of being made on a no gain no loss basis in a manner similar to a transfer under section 171 TCGA 1992. It may be that the legislation in section 14 TCGA 1992 (which applies to non-resident close companies for the purposes of section 13) could be adapted for this purpose.

- If the purpose of the proposals is to create a level playing field, we assume that any legislation should not discourage investment in UK real estate by non-resident companies which are equivalent to UK companies where those UK resident are not subject to tax on capital gains. On this basis, there should be an exclusion for foreign REIT equivalents and foreign insurance companies with significant pension business.

- Non-resident companies established or controlled by entities that would themselves qualify for exemption should be excluded from the charge. This exclusion would extend to special purpose vehicles created by REITs, foreign REIT-equivalents, qualifying investment funds (see above), charities and their foreign equivalents, pension funds (and their foreign equivalents), sovereign wealth funds, and some insurance companies.

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?

44. We wonder whether HMRC and HMT have fully evaluated whether the introduction of chargeable gains dependent on the direct disposal of residential real estate (as opposed to disposals of interests that derive their value principally from residential real estate) will influence behavior and/or reduce expected tax revenue yields.

<u>Private Residence Relief</u>

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

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?

45. It would seem from the consultation document that the proposed changes to PRR relief will apply across the board to UK residents as well as those within the new non-residents' capital gains tax regime.

46. We consider that existing elections as to which of two or more residences is the taxpayer's main residence should stand until the relevant property is disposed of, irrespective of whether that property is, *in fact*, the individual's main residence.

47. Of the two options proposed, we consider that option 1, the "balance of all the evidence" test is preferable.

48. The second suggestion for fixed rule based on days of presence would give rise to difficulties in that the main residence may change from year to year depending on how many days were spent in particular properties during that year. Given many people own properties for many years, it would also mean that individuals must keep records of days of presence in their various properties for an indefinite period of time. In practice, it is inevitable that records will be unreliable or lost and there is likely to be much evidential difficulty in administering this kind of test.

49. We recognise that a facts and circumstances based test creates some degree of uncertainty in some cases but we consider that greater uncertainty and anomalies are likely to arise under option 2.

50. There will be many cases where it will be difficult, if not impossible, to establish which of several residences is the individual's "real" main home.

51. For example, it is common among high net worth international individuals to have homes in several different countries. Their occupation of all of them would have the quality and permanence necessary to constitute a "residence" for the purposes of the main residence test. Such individuals may spend substantial periods of time at all their homes and they are likely to be of a similar size and quality. The tests mentioned in paragraph 3.5 of the consultation will not necessarily be helpful in this international context.

52. A second specific area of difficulty is that of the couple who own a country residence and a residence in, say, London. One spouse may work in London and spend most of their time there while the other spouse spends most of their time in the country home. The London property might be one spouse's main residence on a facts and circumstances test and the country property may be the other spouse's main residence on that test but spouses and civil partners are allowed only one main residence between them.

53. We suggest that where there are two or more properties which could qualify as an individual's main home, the individual should be able to make a conclusive

election as to the position. This might be subject to a condition such that the individual must have been present at the UK property for a certain number of days in each tax year (say 30) or a certain number of days on average over a number of tax years. Any day count test should only be relevant in relation to periods from April 2015.

Delivery mechanism

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.

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

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?

54. We now understand that tax under the new regime will be collected by way of Payment on Account (POA) rather than by a withholding tax. We strongly support the choice of a POA mechanism, i.e. the move away from a withholding tax, which could adversely impact on disposals, for example, to UK residents where there are insufficient sale proceeds both to pay any withholding tax and redeem the seller's mortgage. If such disposals could not take place as a result, HMRC will lose the stamp duty land tax that would otherwise have been payable. This could have been up to a rate of 15%. (For the sake of completeness, and in case there are any Ministerial concerns or doubts about adoption of a POA mechanism, as an appendix to our response we identify the very real issues that a withholding mechanism could have given rise to.)

55. We understand that HMRC have in mind that there would be three options for making the POA:

- Those individuals or entities who are already in the self-assessment or corporation tax system would, if they wished, pay tax via those methods in the normal way. We consider that property owners should be able to opt into the self-assessment/ CT system if they wish, purely for the purposes of the new regime. This would, for example, be helpful in enabling property owners to make proper computations of the tax due. Perhaps such owners would be able to submit an application to be taxed under self-assessment/CT within the proposed 30 day time limit.

- Vendors could make a POA. We understand that this would **not** require a proper capital gains tax computation and would be the default position. We assume that those who opt for this method would not have to submit a subsequent computation but would have the option of doing so. We suggest that the time lines for the subsequent computation (if submitted) should be aligned with the normal self-assessment/CT dates.

- Submission of a full CGT computation within the 30 day time limit.

56. At the meeting of the Withholding Tax Working Party, HMRC suggested that where a vendor makes a POA there should be a one year period from the POA to submit an accurate capital gains tax computation and further year to amend it.

57. As discussed at the meeting, these timings could be problematic because of difficulties in establishing a person's residence status for a particular tax year during the year and the possibility that residence status for the current tax year could change because of events happening in the following tax year. It was therefore suggested that the time limits for submission and amendments of the computation should, as suggested above, be aligned with the self-assessment/CT timings.

58. We understand that it is intended to allow losses on other UK residential property to be deducted against gains under the new regime and that unused losses can be carried forward. It would be helpful if HMRC could confirm that a non-resident who had realised losses on UK residential property and who subsequently became UK resident would be able to carry forward those unrelieved residential property losses against chargeable gains generally.

59. It would also be helpful to have confirmation that where principal private residence relief is claimed or where there has been a loss, it will not be necessary to pay any tax on account: the relief can be claimed or the loss declared on the relevant form within the 30 day time limit.

60. We suggest that where a person has a number of properties and makes multiple disposals during the tax year, it should be possible to operate a running account as regards gains and losses. So, if a gain is realised early in the tax year and a loss is subsequently made, the property owner should be able to offset the loss against the previous gain and reclaim the tax paid on account. Similarly, if the loss is realised first, it should be possible to offset that against a subsequent gain made in the same tax year so reducing the POA required.
61. We have made comments in the introduction about how the POA might operate and we are strongly in favour of a POA applied to the actual or a deemed gain rather than a flat percentage applied to the sale proceeds.

62. As also mentioned in the introduction, if a percentage of the proceeds of sale is used, there should be some adjustment to allow for the smaller gains in the earlier years of operation and possibly in the longer term to allow for the fact that gains are likely to increase over the person's period of ownership.

63. Possibilities for the calculation of a deemed gain include:

- A simple calculation of sale proceeds minus base cost. While this has the merit of superficial simplicity, it can be difficult to ascertain the base cost in some cases where multiple interests in the property have been acquired at different times.

- Another alternative would be to apply an index of property price increases derived from data supplied by the Land Registry to calculate a deemed gain. This could vary by region/area to provide greater accuracy.

64. The rate of POA should then be applied to the deemed gain so computed.

65. We understand that, as a practical matter, it is anticipated that the vendor would submit their capital gains tax form and would then be issued with a payment number. The vendor would only make the POA once he had received the payment number, so facilitating the tracking of payments.

66. We consider that this is a helpful and sensible suggestion, provided that there are the resources to ensure that payment numbers can be issued within the relevant time limits.

Contact Information

For further information relating to this response, please contact

Appendix

1. We consider that one of the possible methods originally considered for collecting the CGT, the withholding tax, would cause major problems for real estate transactions and, potentially, impact adversely on sellers, buyers and lenders.

2. The Government's preference in the consultation document was to introduce a form of withholding tax that operates alongside an option to self-report the tax due. According to the original proposal, the non-resident may have an option to pay a withholding tax or to pay the actual tax due. There would then need to be some transfer of monies and reporting of the tax paid, to allow for any differences to be settled with HMRC. The Government believes that it may be possible to do this in a similar way to the existing stamp duty land tax process, with agents transferring monies due within 30 days.

3. However, we have considerable concern at this possible withholding tax. If tax was to be withheld, say at 28%, there may be insufficient proceeds to redeem any mortgage of the seller, which clearly has very serious implications for the transaction and for lenders. Any such withholding tax must not adversely impact on the conveyancing and it is important that the Government, as it is doing, discusses the implications with all relevant stakeholders.

4. The consultation proposals also left it unclear which solicitors (if any) should be responsible for identifying the seller as non-resident and collecting the tax. If it is the buyer's solicitors, they are unlikely to have sufficient information in relation to the non-resident seller to enable them to determine how much tax should be withheld from the seller. Even if it is the seller's solicitors' responsibility, they may not have sufficient information to calculate the amount of withholding tax, which could put the solicitors in a very difficult position.

5. At a recent meeting on 22 May 2014 between HMRC, HM Treasury and stakeholders, the meeting was informed that, since the consultation, the thinking has moved away from a withholding tax to a payment on account. We understand that this payment on account is not intended to interfere with the conveyancing process and that, to minimise the effect on the conveyancing process, there will be no obligation on the seller's conveyancer or buyer's conveyancer to pay any withholding tax to HMRC. We understand that the current thinking is that the seller, and only the seller, has the CGT liability, towards which it may need to make a payment possibly within a short period (depending on further consideration by HMRC), but that is a matter for the seller, not for the seller's conveyancer or the buyer's conveyancer.

6. Again, to minimise the effect on the conveyancing process, we understand that there will be no legal duty on either the seller's conveyancer or buyer's conveyancer to file any forms or make any payments or send any money in relation to a withholding tax or other CGT related payment in relation to non-residents disposing of UK residential property. It was suggested at the meeting that while there will be no specific duty on the seller's conveyancer, the conveyancer may choose to mention generally to their client that there are possible CGT implications when a non-resident disposes of UK residential property. HMRC helpfully agreed to produce some guidance that can be passed to non-residents explaining the process.