Institute of Financial Accountants

Corporate

Implementing a capital gains tax charge on non residents

Response to Consultation

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Introduction

1. The Institute of Financial Accountants (IFA) and the Federation of Tax Advisers (FTA) welcome the opportunity to comment on the consultation document in respect of implementing a capital gains tax charge on non-residents published by HM Treasury and HM Revenue & Customs (HMRC) respectively on 28 March 2014.

2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

3. Information about the IFA and the FTA is given below.

Who we are

4. The IFA is an internationally recognised professional accountancy membership body whose members work for small and medium-sized enterprises (SMEs) or who run or work in small and medium-sized accounting practices (SMPs) that advise SMEs.

5. At the IFA, we put small and medium enterprises (SMEs) first, recognizing their role as vital wealth-creators, as employers to more than half of the UK's private sector workforce and as the power behind vibrant urban and rural communities. We hold the interests of small and medium practices (SMPs) in the accounting profession in equal regard.

6. The FTA is the Tax Faculty of the IFA and is the modern membership body for agents who provide tax compliance and planning expertise to SMEs and entrepreneurs. It is the tax representative for IFA and FTA members.

7. We are proud of our unique relationship with our members, who predominantly come from a SME/SMP background. As a professional accountancy body, we aim to provide the very best support and guidance to our members who operate within this arena, frequently tailoring policies and recommendations to meet the unique challenges and trading relationships associated with smaller business.

8. Founded in 1916, the IFA supports over 10,000 members and students in more than 80 countries with a programme of professional qualifications and education. As well as resources, events, training and seminars. IFA members uphold high standards of conduct, confidentiality and ethics and undertake annual continuing professional development (CPD) activities.

9. The IFA is a full member of the International Federation of Accountants (IFAC), the global body for the accountancy profession. As such, the IFA takes it place alongside the UK and Ireland's six chartered accountancy bodies, as well as 135 national and regional accountancy organisations representing 125 countries and jurisdictions.

10. The IFA is formally recognised as an awarding organisation by Ofqual, the public body responsible for monitoring standards, exams and qualifications (other than degrees) in England, underlining the quality of the IFA's work and the integrity of its qualifications; and is authorised by HM Treasury for Anti Money Laundering supervision.

General Comments

11. Thank you for the opportunity to respond the consultation in respect of implementing a capital gains tax charge on residents in respect of UK residential properties. We agree that any change made in respect of the legislation must be made in order to improve the fairness of the tax regime for those holding UK residential property.

12. Our overriding comment in relation to the consultation is that tax regime that is introduced must be simple to understand and administer. Our main concern is that the implementation of this capital gains regime shortly after the introduction of the Annual Tax on Enveloped Dwellings ('ATED') capital gains regime has the potential to cause complex compliance for entities other than individuals holding UK residential property.

13. The consultation document clearly states that the legislation will only arise in respect of "gains arising from" April 2015. It is therefore implied that that there will effectively be a 'rebasing' to the market value as at April 2015 for capital gains purposes of any UK residential assets currently held by non-residents. It is assumed that this rebasing would be achieved on a similar basis to that implemented in respect of the ATED capital gains accruing before 6 April 2013. We would, however, be grateful if HMRC could confirm explicitly that in relation to pre-owned assets, it will only be the gains attributable to the period after April 2015 that will be brought into charge and that a rebasing based on a valuation, or another method (such as time apportionment) will apply.

Specific comments on the draft legislation

14. In addition to our general comments, our comments on specific questions set out in the consultation document are set out below.

Q1: Would an exclusion of communal property from the scope of the new regime result in any unintended consequences?

15. We do not consider that the exclusion of the communal property as proposed should result in any unintended consequences. However, we do note that the use of slightly different definition of communal property within VAT and under ATED regime and under this capital gains regime will lead to further confusion and complication, rather than simplification.

Q2: Are there any other types of communal residential property that should be excluded from scope?

16. We are not aware of any other types of communal residential property that should be excluded from the scope.

Q3: Are there any particular circumstances where including non-resident partners in scope of the charge might lead to unintended consequences?

17. We are not aware of any particular circumstances where including non-resident partners in the scope of the tax charge would lead to unintended consequences.

Q4: Are there any particular circumstances where including non-resident trustees in scope of the charge might lead to unintended consequences?

18. We are not aware of any particular circumstances where including non-resident trustees in the scope of the tax charge would lead to unintended consequences.

19. Based on existing legislation, we understand that it should be possible for non-UK resident trustees to claim Principal Private Residence, where the property is occupied by a UK beneficiary, we would however welcome HMRC's confirmation on this matter.

Q5: 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 charges?

20. Our members do not typically advice collective investment schemes directly so are unable to comment further on the suitability or otherwise of this test. However, in our view, it seems 'unfair' and discriminatory against smaller investors to provide an exemption from the charge to large funds, purely because of the scale and ownership structure of the holding entity.

Q6: Are there any practical difficulties in implementing a GDO test?

21. As noted above, our members do not typically advice collective investment schemes directly so are unable to comment further on the suitability or otherwise of this test.

Q7: 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?

22. As noted above, our members do not typically advice collective investment schemes directly so are unable to comment further on the suitability or otherwise of this test.

Q8: what are the likely impacts of charging gains (and allowing losses) incurred on disposal of residential property in non-residential property companies that are not already operating a trade in the UK?

23. As noted above, the combination of ATED CGT and a 'tailored' CGT charge for non-resident corporates is likely to lead to a messy and complex compliance process. Tracking across the two regimes will be difficult, particularly if the rates of tax and filing dates between the two regimes differ.

24. The rules seem unduly complicated and in the absence of any de-minimus rules place a disproportional administrative burden on less well-off taxpayers.

25. Clarification is sought from HMRC that on a similar basis to the ATED charge, there will be an exemption from s13 TCGA 1992 for UK residents, where the gain arising in the non-resident company has already been taxed in accordance with the new tailored tax charge.

Q9: Are there any 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?

26. We are not aware of any other approaches that we believe are more appropriate to ensure that non-resident and rental companies are subject to UK tax on the gains that they make on disposals of UK residential property.

Q10: Are there any particular circumstances where changing the PPR election rules might lead to unintended consequences?

27. We appreciate the concern that HMRC raise that if the current election regime is retained that it would be possible for non-residents to nominate their UK residence as their main residence and thereby not pay UK CGT on any gains arising on its disposal.

28. However, we also believe that this current election regime is also an important tool for UK tax-payers, who have more than property at their disposal, for instance due to work requirements, in allowing them to have certainty as to which property should be considered their PPR.

29. Any withdrawal of the PPR election will significantly affect UK resident taxpayers and should be considered under its own separate consultation, rather than being considered within the scope of this consultation, which is principally aimed at non-residents.

Q11: Which approach out of those set out in paragraph 3.5 do you believe is most suitable to ensure that PPR effectively provides tax relief on a person's main residence only?

30. In our view, both proposals are flawed. In respect of the first proposal the facts and circumstances are open to different interpretation and would remove a sense of certainty that a PPR election provides.

31. Although, the second proposal does have the attraction that it would provide clear certainty as a person's position, a fixed rule that looks at where a person is present most of any given year is not workable as time spent in a property is often not the best indicator of where a person's principal residence is and few people count the nights they spend in their home(s).

Q12: Are there any other approaches that you would recommend?

32. We would recommend that the PPR election is maintained, or if necessary a hybrid between the two proposals should be put in place, which sets out the key factors that will be taken into account in determining a person's principal residence and gives a points or weighting system to each factor (for instance a higher weighting may be given for electoral roll registration, residence of spouse, partner). This would then allow particular facts and circumstances to be taken into account but also would provide certainty as to a person's position.

Q13: 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.

33. We do not consider that it would be appropriate for accountants to be responsible for the identification and collection of the withholding tax, as often accountants are not involved in the selling process of residential property and are unlikely to be involved in handling the money associated with the sale.

34. It would therefore be more appropriate for the withholding tax obligation to be administered by the solicitors, who undertake the conveyancing.

35. We understand from the recent press in relation to the consultation that HMRC are not now considering a withholding tax, but a payment on account mechanism. We look forward to receiving further details on this revised proposal.

Q14: Are there ways that the withholding tax can be introduced so that it fits easily with other property transactions processes?

36. As the tax charge is distinct from any other property transaction processes, we do not consider that it is necessary that the withholding tax fits in with any other property transaction processes.

37. We would welcome the opportunity to comment further on the withholding tax mechanism, once further details are available. In particular, we would be interested to hear about the proposed level of the withholding tax, how this will be calculated (such as gross or net (after debt and/or costs) value of the property). However, as noted above, we understand HMRC are not now considering a withholding tax, but a payment on account mechanism. We look forward to receiving further details on this revised proposal.

Q15: 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?

38. As noted above, we understand that HMRC are now looking at a payment on account approach and we look forward to receiving further details on this proposal.

Q16: 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?

39. As noted above, we think that the timeframe of 30 days to use self-assessment forms or a variant of them is too tight to finalise computations. Given that a CGT calculation is more complex than say for example a CGT liability.

40. Adding another new filing date and payment date will not in our view simplify the administration of this tax. We therefore consider that it would be more appropriate to align the filing requirements of this tax with the ordinary self-assessment rules, on a similar basis to UK individuals and those within the ATED charge.

41. In addition, as it is rarely possible to determine an individual's residence status under the statutory residence test before the end of the tax year in question, care will need to be taken to ensure that any payments on accounts proposed are not due during the tax year of completion or earlier.

Should you wish to discuss our responses further, please contact AdamL@ifa.org.uk in the first instance.