CAPITAL GAINS TAX ON RESIDENTIAL PROPERTY FOR NON-UK RESIDENTS

Updated: September 2016

Non-UK resident investors are now subject to UK tax on capital gains arising from the disposal of UK residential property. In most cases, this will be limited to the proportion of the gain that has accrued since April 2015 but nonetheless marks a significant shift in direction for tax on UK property.

BACKGROUND

In September 2013, the UK Government stated that it is unfair that UK resident investors are subject to UK capital gains tax (CGT) on their UK residential property while non-UK residents are generally not. The rules have therefore been changed to impose a charge to CGT, on gains arising on UK residential property owned by non-UK residents, with effect from 6 April 2015.

WHAT IS MEANT BY RESIDENTIAL PROPERTY?

The new charge focuses on property that is either: actually used as; or is suitable to be used as; or is being constructed or adapted for use as a dwelling. For this purpose, a 'dwelling' is generally a place of residence for the occupant or intended occupant. Unlike the annual tax on enveloped dwellings (ATED), the CGT charge applies to all properties used as a residence including properties that are let to third party tenants. The charge will not apply to communal accommodation such as:

- Boarding houses for school children and student halls of residence
- Accommodation to provide care, such as nursing homes for the elderly or disabled (although 'sheltered' homes will be within the charge)
- Other communal accommodation, ie used by the armed forces, prisons and similar establishments.

WHO WILL THE CHARGE AFFECT?

The following non-UK resident persons will be affected by the charge:

- **Individuals**
- **Partnerships** – partners will be taxed on the gains attributed to them.
- **Trusts** – non-UK resident trustees (of all types of trust) will be subject to CGT on the gains made on UK residential property disposals in priority to existing anti-avoidance provisions charging CGT to settlors and beneficiaries.
- **'Narrowly controlled' non-UK resident companies** – those that are effectively a vehicle for personal investments made by individuals and families or small groups of either.

EXEMPT ENTITIES

Provided a claim is made, the following non-UK resident entities will not be subject to the charge:

- **Companies not controlled by five or fewer persons** – although narrowly controlled companies that are controlled by qualifying institutional investors (including widely marketed unit trust and open ended investment schemes and pension schemes) that fall outside of the criteria for investment regulation will also be exempted.
- **Widely marketed unit trust and open-ended investment schemes.**

HOW IS THE GAIN CALCULATED?

Only gains arising from 6 April 2015 onwards will be taxed. This will be achieved by allowing the value of the property at 6 April 2015 to be used as the base cost. Alternatively, the owner can opt to calculate the gain based on the original purchase cost of the property and then time apportion it on a straight line basis between the periods of ownership before and after 6 April 2015. This would avoid potential disputes with HMRC over the property's value at April 2015 and the cost of obtaining an independent property valuation.

Losses on properties can only be used against residential property gains arising to the same person in the same or a later tax year. Corporate groups can make an irrevocable election to pool gains and losses on residential properties. Companies will also be able to claim an indexation allowance on the property cost.

PRIVATE RESIDENCE RELIEF

For individual owners, private residence relief (PRR) is intended to provide relief from CGT where an individual disposes of his or her main residence. A non-UK resident may genuinely have a UK property which has been his or her main residence, eg where a person emigrates from the UK and later sells his or her UK home.

Previously, where an individual had more than one residence, he or she could nominate one of them to be treated as his or her main residence. However, the UK Government considered that non-UK residents could use this mechanism for tax avoidance. Therefore, the rule has been changed with effect from 6 April 2015 and a home will now only be eligible for PRR for a tax year in which the individual selling the property is either:

- Tax resident in the same country as the property, or
- Not resident in the same country as the property but he or she (or his or her spouse or civil partner) has spent at least 90 midnights in that property (or in all their properties in that country).

Non-UK residents who already spend significant periods in a UK property may consider extending their annual visits to achieve the 90 day threshold but, under the UK's statutory residence test, such visits may make individuals tax resident in the UK and liable to UK taxes on their worldwide income and assets. Expert advice should be sought before any such action is undertaken.

INTERACTION WITH ATED

ATED applies only to residential properties held by companies, collective investment schemes or partnerships with a corporate partner. Certain reliefs are available (eg for commercially let property).

Disposing of a UK property that falls within the ATED rules triggers a CGT charge at a fixed rate of 28% in addition to the annual tax charge. The new CGT charge on non-UK residents applies in addition to the ATED rules but, where both CGT charges apply, the ATED CGT charge will take priority.

This is intended to ensure that, apart from institutional investors, or where property is held as trading stock, all non-UK companies will be liable to UK CGT when disposing of a UK residential property.

RATE OF TAX

In calculating the rate of tax, the annual exempt amount (£11,100 for 2016/17) will be available to non-UK resident individuals. The rates of tax above this threshold will be 18% or 28% depending on the level of the individual's total UK source income and gains in the year of the disposal. The rate of tax on gains made by non-UK resident companies will be 20% unless the ATED CGT charge (at 28%) applies.

TAX RETURNS AND PAYMENTS

All non-UK resident vendors, including exempt vendors, will have to submit returns to HMRC reporting disposals of UK residential property within 30 days of the date of sale completion. Non-UK residents that either submit annual income tax returns to HMRC or who submitted an ATED return for the previous period can self assess any tax due as part of their annual filing obligation and would be required to pay by 31 January following the end of the tax year of disposal. Those who do not have an annual filing obligation must self assess and pay the tax due, including making any claims for reliefs such as PRR, at the time that they report the disposal.

HOW THIS AFFECTS YOU

The new rules have significantly altered the way in which some non-UK resident owners of UK residential property are taxed on disposals. Reviewing how UK residential properties should be held in the future is clearly an important and urgent task for investors.

YOUR NEXT STEPS

If you would like to discuss how BDO could help you structure your cross border real estate activities, please contact our tax adviser team overleaf.

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