

# TAX AND NON-UK STRUCTURES FOR UK PROPERTY OWNERSHIP

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## Some Questions And Answers on Tax for Non-UK Structures for UK Property

### WHAT ARE THE TAX IMPLICATIONS OF HOLDING AN INVESTMENT PROPERTY IN AN OVERSEAS COMPANY?

This largely depends on whether the property is residential or non-residential / commercial.

The UK continues to encourage inward investment in UK property by providing a tax exemption for investment gains realised by an overseas investor on the sale of UK commercial property.

However, a tax charge potentially arises on gains derived from any sale of UK residential property from April 2015 (and possibly as early as April 2013 depending upon the value of the property and ownership structure) which is owned by a non-UK resident.

Rental profit (i.e. after finance costs and other deductions) is subject to a slightly lower rate of tax in the hands of a non-resident company, currently 20%. In contrast, individuals, whether resident in the UK or not, can be liable to income tax at rates of up to 45% on net rental income.

### WHAT IS THE POSITION WHERE THE COMPANY IS TRADING RATHER THAN INVESTING?

Profits from property trading - i.e. buying to re-sell or develop - are not exempt capital gains but trading income potentially subject to UK tax. Profits arising would be subject to either income tax (at up to 45% for individuals) or corporation tax at up to 20% (falling to 19% in April 2017) depending on the level of presence the business has in the UK.

Previously, if a developer or trader resided in a suitable tax treaty jurisdiction, no UK tax would have arisen as long as the entity did not have a "Permanent Establishment" (PE) in the UK through which it traded, but this has changed since the March 2016 Budget.

The detailed legislation to enact the change has not yet been finalised and specialist advice is essential in relation to the facts of any situation to consider what UK tax liability, if any, arises.

### WHAT ABOUT STAMP DUTY LAND TAX (SDLT)?

SDLT is levied on the purchases of UK property and applies to acquisitions by non resident companies as well as those that are UK resident.

For commercial property SDLT is charged in bands that rise to 5% on consideration of more than £250,000.

For residential property the rates rise to 12% on consideration of more than £1.5 million.

Properties worth more than £500,000 are subject to SDLT at 15% on the total consideration if acquired by a non-natural person (such as a company) and, again, it does not matter whether or not the company in question is tax resident in the UK.

In addition, the 2016 Budget introduced a 3% surcharge (in addition to the above) for individuals acquiring a second residential property and on all residential property acquired by a non-natural person. This means that from April 2016 total rates can now be as much as 18% on residential property acquired by a company.

Under current rules, transfers of property between members of a group will not attract SDLT as long as the transfer is for commercial reasons and, again, it does not matter whether or not the companies in question are tax resident in the UK.

### WHAT IS ATED AND WHO DOES IT AFFECT?

Additionally an annual charge (the Annual Tax on Enveloped Dwellings) now applies to residential properties worth more than £500,000 owned by certain companies. Although this is separate from SDLT, it is intended that the coverage of the annual charge will be similar to the 15/18% SDLT rate, with comparable definitions of non-natural persons. ATED applies equally to UK and non-UK entities.

Companies carrying on a commercial rental business are typically not subject to ATED. This means that buy to let investors are not usually subject to the charge, whereas buy to hold may well face this addition cost that ranges from £3,500 p.a. to £218,200 p.a. depending upon the property value.

Investors in commercial property are not subject to this charge.

### DOES IT MAKE A DIFFERENCE IF THE ULTIMATE OWNERS LIVE IN THE UK?

Generally speaking, a UK tax resident can be taxed on both income and gains arising to offshore entities under various anti-avoidance rules. In some cases, an individual who is tax resident but not domiciled in the UK may have a lower exposure to UK tax where properties are owned through a non-UK structure but specific advice should be taken in this regard.

## MANAGEMENT AND CONTROL - DOES IT MATTER WHO MAKES DECISIONS?

A company incorporated overseas also has to be managed and controlled outside the UK to be non-UK resident for tax purposes.

Normally, a company is run by its directors. An overseas company will usually have a board of directors consisting of a majority of individuals who live and work in that jurisdiction. HM Revenue and Customs may well wish to satisfy themselves that company decisions are made by these individuals outside the UK.

## WHAT UK TAX FILINGS DOES A NON-RESIDENT COMPANY NEED TO MAKE?

A non-resident company needs to submit a tax return annually if it owns UK property as trading stock or has an investment property which is generating rental income. This could be an income tax or corporation tax return depending on the company's circumstances.

A company renting property should be registered with HM Revenue and Customs under the non-resident landlord scheme to ensure that the tenant (or agent) can pay rent without having to withhold 20% income tax.

If a non-resident company is subject to ATED it must file a return annually by 30 April.

Finally, any non-resident disposing of UK residential property must file a return notifying HMRC of the property disposal within 30 days of completion. If the non-resident does not file any other return to HMRC this notification must include a computation of any taxable gain and payment of the tax must be made within the 30 day window.

## DOES AN OVERSEAS STRUCTURE STILL ATTRACT TAX RELIEF FOR FINANCE COSTS?

Finance costs incurred in relation to a property investment or trading business should normally be tax deductible providing the finance has been raised for the property business under commercial arm's length terms. The tax treatment will generally follow the accounting treatment.

The UK Government has announced plans to review the tax deductibility of finance costs in all businesses as part of the international BEPS initiative. It is a possibility that interest deductions will be restricted to a proportion of a business' earnings and, if this proposal is adopted, it is likely to have a significant impact on property investment, regardless of the ownership structure.

## DOES WITHHOLDING TAX APPLY TO INTEREST PAID BY A NON-RESIDENT COMPANY?

A non-resident company paying interest which is from a UK source can be required to withhold income tax at 20% from each payment and account for this to HM Revenue and Customs.

There are arrangements which can prevent this arising. However specialist advice is essential in relation to the facts of any situation to consider what UK tax liability, if any, will arise.

## WHAT HAPPENS WHEN YOU BRING AN OVERSEAS STRUCTURE ONSHORE?

Generally, where the management and control of a company is moved to the UK there is a change of tax residence. In some cases, this may be overridden by the terms of the tax treaty that the UK may have with the other jurisdiction.

A move of tax residence to the UK will not alter the tax base cost of an investment asset but may affect the tax cost of trading stock. Any future UK tax charge will be based on the historic cost of the property even though any growth up to the residence change would not have been taxable if it had been crystallised before acquiring UK residence status.

If property prices have increased since purchase, there can be an advantage in crystallising a capital gain before becoming UK tax resident. The tax position in the overseas territory would also have to be considered.

One point to note, is that a tax charge may arise if a company ceases to be UK resident (by moving its place of management offshore) whilst owning UK property (or other assets). This "exit charge" is based on the increase in the market value of the property during the time it was owned by the company (including any time when it was previously non-resident).

### FOR FURTHER INFORMATION OR ADVICE, PLEASE CONTACT:



**JOHN BRADLEY**  
Tax Director

BDO LIMITED,  
GUERNSEY

+44 (0)1481 741 609  
john.bradley@bdo.gg



**MARK SAVAGE**  
Tax Director

BDO LIMITED,  
GUERNSEY

+44 (0)1481 748 450  
mark.savage@bdo.gg



**ANDRÉ TREBERT**  
Tax Director

BDO LIMITED,  
GUERNSEY

+44 (0)1481 741 610  
andre.trebert@bdo.gg

### BDO Limited

PO Box 180, Place du Pré, Rue du Pré, St Peter Port, Guernsey GY1 3LL

+44 (0)1481 724 561 french.tax@bdo.gg

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