TAXING GAINS MADE BY NON-RESIDENTS ON UK IMMOVABLE PROPERTY

Response by the Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the consultation document *Taxing gains made by non-residents on UK immovable property* ('the Consultation') which was published by HMRC and HM Treasury on 22 November 2017.[1]

1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.

1.3 In sections 2 to 7 below we respond to the specific questions in the Consultation in Chapter order.

2 Chapter 2: Scope of the measure

Question 1) Are there any issues specific to non-residents when considering how they fit into the UK definitions of persons chargeable to UK tax (CGT or CT)?

2.1 One area of difficulty could be in determining whether a gain arising on a disposal by an overseas entity should be subject to corporation tax (CT) or to capital gains tax (CGT).

2.2 Certain overseas entities (such as US LLCs and French SNCs) may be treated as *opaque* for tax purposes in one jurisdiction (i.e. a company) but as *transparent* in another jurisdiction (i.e. a partnership). This classification will affect which tax regime applies – a disposal by a non-resident entity which is *opaque* for UK tax purposes would be chargeable to CT, but a disposal by a transparent *entity* would be taxable in the hands of its members, who may be subject to CGT or CT depending on their status.

2.3 There is existing guidance on entity classification in HMRC's International Tax Manual (including a list of foreign entity classifications for UK tax purposes at INTM180030) which could be referred to in such cases. However, this decision on classification is often subjective and any list can never be

[1] The consultation document is at https://www.gov.uk/government/consultations/taxing-gains-made-by-non-residents-on-uk-immovable-property

comprehensive. HMRC may therefore see an increase in queries and requests for non-statutory clearances as to the status of overseas entities if the proposals are implemented.

Question 2) Do you see any issues or complications arising with respect to rebasing which need to be addressed?

2.4 Paragraphs 2.8 and 2.9 of the Consultation state that rebasing will be to April 2019 for non-residential property, widely held non-resident companies disposing of any property and all indirect disposals. However, the Consultation goes on to propose different methods for calculating gains on residential vs non-residential property, and indirect vs direct disposals.

2.5 Paragraph 2.10 proposes that, for direct disposals, there will be the option, as with the current non-resident CGT (NRCGT) regime for residential property, to calculate the gain or loss on a disposal using the acquisition cost, rather than rebasing to April 2019. This is helpful where a property has suffered a loss during the overall period of ownership, but has increased in value since the rebasing date. However, Paragraph 2.11 indicates that this method will not be available for indirect disposals, where rebasing to April 2019 will be the only acceptable computation method. We note that, as property prices are currently falling in some areas of the country the requirement to use April 2019 values when computing the gain on an indirect disposal could put non-residents at a disadvantage. The option to use actual cost in computing such gains would remove this disadvantage and any concerns over the subjective nature of valuations, as well as sparing non-residents the costs associated with valuing property at April 2019 (see section 3.5).

2.6 Paragraph 2.12 also proposes that the third calculation methodology currently available for residential property under NRCGT of apportioning the total gain or loss between the pre- and post-commencement period will not be available for commercial properties, but will remain available for residential properties.

2.7 It is not clear what the rationale is for allowing different calculation methods for residential vs non-residential property and direct vs indirect disposals. We believe that this introduces unnecessary complexity for non-residents, who may already find understanding and complying with the proposals challenging. This could increase the risk of errors being made by non-residents in calculating their tax liabilities under the new rules and may also result in increased disputes between HMRC and non-residents as to whether property is residential or non-residential in nature.

2.8 In the interests of simplicity, it would be preferable for the existing three methods of calculating gains under NRCGT to be applied to all disposals falling within the new rules.

3 Chapter 3: Direct disposals by non-residents

Question 3) Do you agree with the basic principle that gains on direct disposals within these new rules, should be computed using the same rules as other chargeable gains?

3.1 We agree that this approach is sensible.

Question 4) Further to the specific modifications identified, are any other changes needed to recognise differences in how the tax system applies to non-residents?

3.2 We have not identified any further specific modifications beyond those set out in the Consultation, but note that significant publicity will be needed to raise awareness of the new charge amongst non-residents and their advisers and encourage compliance.

3.3 We note that, for individuals, residency is determined by the Statutory Residency Test. The tests determine residency based on counting the days in and out of the UK. An individual cannot know with certainty the days that they have been in the UK until the end of a given tax year. An individual cannot always be sure of their residency position during the year at the point of disposal. This could impact on an individual's ability to determine if they sit within the non-resident reporting regime at the time of disposal. This is already an issue for the existing regime applying to disposals of UK residential property.

Question 5) For businesses: Will the proposals for direct disposals mean that your company will now be required to register for UK CT?

3.4 We are replying to this question although the ATT is not a business. We note that if a company realises a gain that is within the scope of the proposals but has no other UK sourced income or assets it would be extremely burdensome to require them to register for CT and then, presumably, de-register immediately after. Instead it would be preferable to allow a standalone return of the gain to be made without having to register for CT, as is currently the case for NRCGT.

Question 6) For businesses: Will the proposals for direct disposals lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

3.5 We are replying to this question although the ATT is not a business. We note that the proposals are likely to result in increased professional fees for businesses to cover April 2019 property valuations, calculation of the gain and assistance with registering and filing returns.

Question 7) For individuals: Will the proposals for direct disposals mean that you will be required to pay Capital Gains tax for the first time?

3.6 We are replying to this question although the ATT is not an individual. We would envisage that more individuals will be required to pay Capital Gains tax for the first time under the proposals. Our members report they can envisage a number of their individual non-resident clients being brought in to UK CGT by this measure.

3.7 Non-resident investors may hold commercial property in preference to residential property as they see it as lower risk and easier to manage, with typically longer leases and less interaction required with tenants. These individuals may be brought within CGT for the first time under the proposals.

4 Chapter 4: Indirect disposals

Question 8) Do you consider that the rules for indirect transactions are fair and effective?

4.1 We have a number of general observations on the proposed conditions for indirect transfers, which are set out in Sections 4.2 to 4.4 below. There are also particular complications regarding the treatment of groups and investments in shares which we discuss in Sections 4.5 to 4.6 below.

4.2 It is proposed that non-residents will have to look back five years when applying the 25% ownership condition. This period appears to be relatively long and there is no indication as to why this length of time has been chosen. We presume that it will also require non-residents to look back to the interests which they held before commencement of the new rules.

4.3 The *property rich* test requires the market value of all assets held by the company to be determined. Whilst it may be fairly straightforward to determine the market value of a property (though there may still be questions about valuation methodology, for example where there is a sitting tenant) it will be much more problematic to determine the market value of hard to value assets such as intangibles.

4.4 As mentioned in Section 2.5 above, rebasing to April 2019 will be the only calculation method for indirect disposals. The Consultation indicates that this is for simplicity and to ensure information is reliable. However, we note that this means that if the company disposed of had become property rich just before disposal then the full gain on the shares since April 2019 would be taxable. We think that it would be more appropriate to allow rebasing to April 2019 or the date the entity becomes property rich (if this can be shown to be later).

4.5 The Consultation states that if a non-resident disposes of a holding company which is itself not property rich, but owns companies that are, this would be in scope if taken together the entities being disposed of meet the 75% *property rich* test.

4.6 We have a number of questions as to how this will operate in practice:

- Which definition of group will be applied here – the group relief definition at s152 CTA 2010 (which requires an effective 75% holding of sub-subsidiaries) or the chargeable gains definition at s170 TCGA 1992 (which only requires an effective 51% holding)?
- If a company holds an investment that is not part of its group, we presume that the market value of the investment is treated as a non-property asset for the purposes of applying the property rich test. This appears to be indicated in section 4.22 of the Consultation, but that section then goes on to state that the test will look through the interests which the entity holds to the underlying assets. We consider that such a look through treatment would not be appropriate where a non-controlling interest is held.
- We assume that, if a holding company owns less than 100% of a group company, only the relevant proportion of that company's assets is taken into account for the property rich test. For example, if a holding company holds 80% of a subsidiary only 80% of that subsidiary's asset values are included in the calculation. It would be helpful for this understanding to be explicitly confirmed.
- How will the 25% ownership requirement apply to holdings of below 100% in a group? Is owning 25% of a holding company sufficient to meet this requirement, even if this results in effectively owning less than 25% of that company's property holding subsidiaries?

Question 9) Are any other conditions necessary to ensure the policy is robust in meeting the objective of taxing non-residents on gains on indirect disposals?

4.7 We have not identified any other conditions.

Question 10) For businesses: Will the proposals for indirect disposals mean that your company will now be required to register for UK CT?

4.8 We are replying to this question although the ATT is not a business. We refer back to our response to Question 5 regarding the fact that requiring non-resident companies to register and de-register for corporation tax could be extremely burdensome.

Question 11) For businesses: Will the proposals for indirect disposals lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

4.9 We are replying to this question although the ATT is not a business. We anticipate there will be professional fees to pay for advice in understanding obligations under the new rules, valuing property and other assets, calculating the gain and registering / filing the return.

Question 12) For individuals: Will the proposals for indirect disposals mean that you will be required to pay Capital Gains tax for the first time?

4.10 We are replying to this question although the ATT is not an individual. We would envisage that more individuals will be required to pay Capital Gains tax for the first time under the proposals.

5 Chapter 5: Disposals of residential property

Question 13) Do you consider that it is right to harmonise ATED-related CGT given the changes proposed in this document?

5.1 We agree it is right to harmonise ATED-related CGT with the current proposals. Members have previously reported that the interaction of ATED-related CGT with NRCGT was often confusing and difficult to explain to clients. We believe it is sensible to try, as far as possible, to have a single regime which applies to gains of non-residents. This is likely to result in higher levels of compliance and fewer errors.

Question 14) Are there any issues, risks, or complexities created by harmonising the ATED-related CGT rules in the manner proposed, and how can these be addressed?

5.2 Where the ATED-related gains calculation would result in a lower overall tax charge there should be the option for non-residents to apply this to calculate any gain arising up to April 2019, with rebasing from that date.

Question 15) For businesses: Will the proposals for disposals of residential property mean that your company will now be required to register for UK CT?

5.3 We are replying to this question although the ATT is not a business. We refer back to our response to Question 5 regarding the fact that requiring non-resident companies to register and de-register for corporation tax could be extremely burdensome.

Question 16) For businesses: Will the proposals for disposals of residential property lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

5.4 We are replying to this question although the ATT is not a business. We anticipate that there will be professional fees to pay for valuing property, calculating the gain and registering / filing the return.

Question 17) For individuals: Will the proposals for disposals of residential property mean that you will be required to pay Capital Gains tax for the first time?

5.5 We are replying to this question although the ATT is not an individual. We would envisage that more individuals will be required to pay Capital Gains tax for the first time under the proposals.

6 Chapter 6: Ownership by and through collective investment vehicles (CIVs)

6.1 The ATT has no comments to make on this Chapter.

7 Chapter 7: Reporting and compliance

Question 24) Do you foresee any difficulties with the reporting requirements for the seller?

7.1 We believe the main problem will be awareness of the reporting requirements. HMRC need to ensure that non-residents are aware of any changes. This may be particularly difficult for unrepresented non-residents, where consideration may need to be given to producing guidance in different languages.

7.2 We note that applying the CT time limits to all non-resident disposals by companies is effectively a payment and filing extension for disposals of residential property by companies (whose current deadline under NRCGT is 30 days).

7.3 By contrast, individuals will remain subject to the NRCGT reporting requirements and 30 day deadline for filing (and payment if they are not registered for self-assessment). This creates a large timing difference between companies and individuals, with individuals at a distinct disadvantage.

7.4 We further note that the introduction of the NRCGT return increased costs for non-resident individuals, as those already registered for UK self-assessment were effectively required to report the gain twice – once within the 30-day window and then again when the disposal had to be included on the self-assessment return. This administrative burden will be extended to disposals of commercial property and indirect disposals by individuals (but not companies) under the proposals.

7.5 To avoid individuals being put at a disadvantage compared with companies, we consider it would be appropriate for the filing and payment deadlines for non-residents to be the same as those under self-assessment.

7.6 The difficulties of compliance with the 30 day limit for individuals – where those within self-assessment have naturally assumed that the normal self-assessment deadlines for reporting will

apply – are illustrated by the number of penalty cases in 2017. While different conclusions have been reached on whether or not the taxpayer had reasonable excuse (contrast *McGreevy v HMRC*[2] with *David and Jennifer Hesketh v HMRC*[3]) the cases illustrate that non-residents have found it difficult to identify and comply with filing obligations outside the usual self-assessment window. As set out in Section 7.5 above, we consider it would be appropriate for the filing and payment deadlines for non-residents to be the same as those under self-assessment. If this approach is not taken, then extending the filing and reporting deadline for individual non-residents to at least 90 days would help to address some of the difficulties currently seen in the NRCGT regime.

Question 25) Do you foresee any difficulties with the charge on the UK group company?

7.7 We do not foresee any difficulties and note that similar provisions already exist elsewhere in the regime, for example the ability under s973 CTA 2010 to recover unpaid corporation tax due from a non-resident company from a related company.

Question 26) Do you agree with the proposal to use the normal CT Self Assessment framework?

7.8 We refer back to our response to Question 5 regarding the fact that requiring non-resident companies to register and de-register for corporation tax could be extremely burdensome. Instead there should be the facility for companies to file a one off return where they have no other UK source income or assets.

Question 27) Will the proposed information and reporting requirements lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

7.9 We are replying to this question although the ATT is not a business. We would anticipate extra professional fees becoming payable as a result of these changes. This is based on our members' experience of additional fees applying to the NRCGT regulations.

Question 28) For third-party advisors: what is the best way to ensure the proposed information and reporting requirements do not lead to an undue increase in your administrative burdens or costs? Please provide details of likely one-off and ongoing costs in respect of any options or proposals.

7.10 The Consultation states at 7.12:

"In order to ensure that HMRC is aware of *indirect* disposals by non-residents, the measure will impose a reporting requirement on certain advisors who are aware of the conclusion of the transaction." *[Our emphasis]*

We assume therefore that *direct* disposals by a non-resident individual, trust or partnership are out of scope, presumably because these transactions can be more readily identified from information that HMRC already hold - for example by reference to a change of ownership recorded on the Land Registry. We would be grateful for confirmation of the position for direct disposals.

[2] http://www.bailii.org/uk/cases/UKFTT/TC/2017/TC06109.pdf
[3] http://www.bailii.org/uk/cases/UKFTT/TC/2017/TC06266.pdf

While excluding direct disposals reduces the obligations on advisers - which is usually welcome - recent penalty cases suggest non-residents making direct disposals are not aware of their existing reporting requirements.

7.11 We are unclear how the requirement for advisers to report within 60 days will operate for transactions within Corporation Tax. Transactions subject to NRCGT are required to be reported within 30 days which means evidence should in theory be available within 60 days (although see our comments under 7.2). The proposed reporting deadline for Corporation Tax is based on either any existing return periods or a short period of one day beginning and ending on the date of disposal. Even if the intention of the disposing company is to report, the company may not have been obliged to report within 60 days of the transaction so evidence may well not be available to relieve *the adviser* of their obligation.

7.12 There is a potentially large pool of advisers who are aware of the conclusion of the transaction, which means there is a risk of duplicated reports. This will make more work for HMRC and advisers alike. One approach could be to restrict the obligation to report to the adviser handling the actual conveyancing or completion of the share transfer form. They will be the first to be aware that the transaction has concluded. This should reduce the risk of duplicated reports.

7.13 If reporting is not restricted, then all of the following advisers could potentially be aware of the conclusion of a transaction:

- Estate agent/marketing agent
- Valuation agent
- Banks/providers of finance
- Conveyancing solicitor/commercial solicitor (for share transfer)
- Accountants and tax advisers
- Insurance agent

Not all of them will necessarily have familiarity with tax rules sufficient to establish if an indirect transfer has occurred. The new rules would place an unnecessary burden on them.

7.14 If the obligation to report is not restricted to the conveyancing solicitor then guidance will be needed to establish the obligations, if any, for an adviser to establish if a transaction has concluded. A surveyor could be asked to value land, or a tax adviser asked to draft a computation of a potential gain, but neither may then be made aware of the final outcome. As this is a niche area, smaller firms may outsource such queries to more specialist taxation firms who are themselves not then necessarily made aware of the final outcome. It may be no action is taken and the advice was provided purely to explore options which were not then followed through.

Confirmation that advisers who have given advice at initial or exploratory stages are not required to make further enquiries would be welcome. If they are expected to make enquiries, this would be a considerable and unwelcome additional administrative burden.

7.15 Under the proposed rules, advisers would be required to reasonably satisfy themselves that the transaction has been reported. At present, the acknowledgements of returns made under the existing NRCGT regime for residential property do not indicate which return they relate to. It is

impossible to match the acknowledgement to the corresponding property or taxpayer without further prolonged contact with HMRC. Unless the form of acknowledgement is amended to make it clear which taxpayer has reported which transaction, advisers will not easily be able to satisfy themselves that the transaction has been reported.

As an example, a member reported making four NRCGT submissions on a single day relating to two jointly held residential properties. The acknowledgements received did not contain sufficient information to match them either to the properties or the taxpayers and it was necessary to seek clarification from HMRC which took additional time.

7.16 A possible alternative to the proposed third party advisor reporting requirements could be for the solicitor dealing with the disposal of the property to be required to retain the tax due out of the proceeds received on completion, in a similar way to Stamp Duty Land Tax (SDLT). Such solicitors will be in a position to know when a transaction completes, should be aware of whether there is a non-resident vendor through their usual money laundering checks and will have access to funds passing through their client account. This relatively simple approach could increase compliance and remove the requirement for multiple advisers to consider reporting requirements.

Question 29) What channels and methods should HMRC use to raise awareness of this change in the law, to ensure that affected non-residents will know that they are impacted?

7.17 HMRC should use as many channels as possible to raise awareness of the changes.

7.18 We note that these should not just be restricted to social media or internet publication, but should ensure they reach non-residents and their advisers who are not digitally engaged. This could be through the traditional print media and trade magazines.

7.19 One obvious group to consider contacting is the non-registered landlord population. If possible, HMRC could consider targeted communications with this group to ensure that they are aware of their obligations under new legislation, as well as existing NRCGT rules for residential properties.

7.20 HMRC might also consider working with overseas tax authorities where appropriate with a view to using their existing communication channels.

7.21 As advisers will be key to ensuring compliance with the new measures, and may also themselves have reporting requirements, it will be important to publicise the changes and work with relevant professional bodies. This will include solicitors and conveyancers who are the individuals most likely to know that a transaction has concluded.

7.22 One simple approach which could potentially assist in identifying some (although not all) relevant transactions could be to include an additional question on the SDLT return to confirm that the rules apply and that the vendor intends to comply with them.

8 Contact details

8.1 We would be pleased to join in any discussion relating to this consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Emma Rawson, on 07773 087111 or at erawson@att.org.uk

Yours sincerely

Yvette Nunn

Co-Chair of ATT Technical Steering Group

9 Note

9.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has over 8,000 members and Fellows together with over 5,700 students. Members and Fellows use the practising title of 'Taxation Technician' or ‘Taxation Technician (Fellow)’ and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.