

CAPITAL GAINS TAX: PAYMENT WINDOW FOR RESIDENTIAL PROPERTY GAINS (PAYMENT ON ACCOUNT)

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 HMRC consultation document ('the consultation') issued on 11 April 2018¹.
- 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 We have set out our response to the consultation questions in the order that they have been asked. We have included some additional comments on section 3 'How the rules will work for UK residents' following our response to question 1. We have made some wider observations on the potential broader implications of this change at section 7.

2 Question 1: Are there areas where the proposed scheme for UK residents could be improved to make it easier for taxpayers to comply?

- 2.1 The ease with which taxpayers can comply will depend upon a number of factors, including:
 - Awareness of the new measure (paragraph 2.2)
 - Timescale for compliance (paragraph 2.7)
 - The complexity of calculating the payment on account (POA) (paragraph 2.12)
 - The ability to make amendments (paragraph 2.16)
 - The proposed reporting system and iForm (paragraph 2.23)

We expand on each of these points below.

2.2 *Awareness of the new measure*

- 2.3 We consider that for taxpayers to be compliant with this measure, the critical issue will be ensuring that those affected are aware of the change. A number of cases have been taken to the First Tier Tribunal (FTT) in recent months appealing late filing penalties for a similar in-year reporting scheme

¹ <https://www.gov.uk/government/consultations/capital-gains-tax-payment-window-for-residential-property-gains>

for non-residents capital gains tax. Some of these involved individuals who had intended to report the disposal as part of the usual self-assessment cycle but were caught out by the change to an in-year requirement.

- 2.4 The significance of this change should not be underestimated, especially since in-year reporting will not be required for all residential property disposals², nor for other similar asset disposals such as commercial property or land. Work to establish the position will need to be done at the time to confirm if a disposal is reportable or not.
- 2.5 Taxpayers do not always inform their tax adviser about disposals made until after the end of the tax year, when they bring in their records for preparation of their self-assessment return. This may be because the disposal is small, the gain is expected to be small, or the taxpayer has made an estimate of the liability themselves. It is crucial that HMRC publicises any change widely, and also makes sure that conveyancing solicitors, estate agents and other professionals outside of tax are aware of the change as these will likely be the first point of contact in a property disposal.
- 2.6 One approach to ensure awareness might be to factor in additional legal requirements on solicitors engaged in relation to the sale or gifting of the property to withhold funds for the payment of Capital Gains Tax (CGT) unless provided with evidence of a report to HMRC or applicable exception. We have made further comments on this below at paragraph 3.3.
- 2.7 *Timescale for compliance*
- 2.8 The proposed timescale is significantly shorter than the current reporting timescale of 10-22 months. It can take time to obtain all the necessary information to prepare a CGT computation, especially if one or more historic valuations is required, it is necessary to establish if hold-over relief has previously been claimed, or to establish the exact details of occupation leading to Private Residence Relief (PRR). For overseas residential properties in particular, it can be some time before the overseas tax position is known. In addition it will be necessary to determine the position under the relevant tax treaty.
- 2.9 CGT computations can be complex and many taxpayers will need professional advice, particularly trustees. While it may seem prudent to plan ahead, not all vendors wish to incur professional costs prior to a sale in order to establish a gain. Equally the vendor may be in the position of a forced or unexpected sale, with limited time to plan or instruct advisers.
- 2.10 We would suggest that a period of 60 days would be a more reasonable period to allow taxpayers to gather the necessary information together and settle any POA, with an extended period of 90 days for the disposal of overseas properties.
- 2.11 Alternatively, instead of extending the time limits, the individual could be given the opportunity to amend the report and have the POA adjusted as further information becomes available. This then puts less pressure on the taxpayer to obtain all the details within 30 days. While this generates extra work for both the taxpayer and HMRC, hopefully this could be managed by automating the

² Under the proposals, a report is not required if full Private Residence Relief (PRR) applies or the property is not disposed of for a gain (so presumably if sold at cost or probate value, gifted to charity etc), or realises a loss on disposal.

process of amendment as far as possible. We have commented further on this below at 2.16 onwards.

2.12 ***The complexity of calculating the payment on account***

2.13 At present, a taxpayer's final CGT bill is calculated at the end of the tax year, when all the transactions that have occurred in that year are known. The most beneficial allocation of losses and/or the annual exemption cannot be determined until that point. It is also the point at which the individual's income for the year is finally known, so the correct 18%, 28% or mix of rates can be determined (assuming that ER is not available). We would note that under the existing non-resident CGT reporting regime, non-residents who are within self-assessment can elect to defer payment until the full facts are known. Our concern with this new proposal is ensuring that the POA can be calculated in a fair and proportionate way when all the facts necessary for the full computation are not available.

2.14 In order to comply, individuals may need to make estimates of their income and make assumptions about how to apply losses and/or the annual exemption. Paragraph 3.8 of the consultation states that 'In calculating the gain... available reliefs and the annual exempt amount are applied in the *usual way*' [our emphasis]. We assume that, since chargeable gains that have been realised on the disposal of other assets are to be ignored, the intention is that the annual exempt amount is to be credited *in full* against the residential gain for POA purposes, although it may, at the end of year reconciliation, be shared over a number of other disposals. In effect, for POA purposes, our understanding is that the taxpayer will receive the full benefit of any losses and their annual exemption regardless of other disposals.

2.15 The precise mechanism for calculating a POA should be made clear, preferably in the legislation, and clear guidance will also be needed to ensure that POAs are calculated in a consistent manner.

2.16 ***The ability to make amendments***

2.17 We note at paragraph 3.18 of the consultation that the only corrections to the POA that will be permitted are those where the taxpayer has failed to take account of information 'available at the time the POA calculation was made'. This suggests that a taxpayer will not be able to correct any estimated figures until they complete their self-assessment return, potentially some months later. This could have negative cash-flow implications for some taxpayers.

2.18 The issues here feed into our comments on timescale and complexity above. The proposal at paragraph 3.7 is that the calculation will only take account of events up to the time of the disposal. While we can appreciate that HMRC would prefer the computation to be made on the facts known at the time, this provision could have unintended consequences. For example, the taxpayer may have planned to crystallise a loss on another disposal in the same year to offset the gain. If this happens before the residential disposal takes place, the loss can be taken into account and the POA is reduced or eliminated. If it takes place after completion, then the loss cannot be factored in, and a larger POA is made than is needed. The individual is then unable to recover the overpayment until completion of their self-assessment return.

- 2.19 In order to balance simplicity and fairness, it should be possible for the taxpayer to seek to reduce the POA in certain circumstances including where the computation is affected by factors such as:
- A change in valuation, or replacement of an estimated figure with a final figure.
 - A reduction in estimated income affecting the applicable tax rate.
 - Finalisation of overseas tax figures.
 - Realisation of further losses in the same tax year.
- 2.20 We are not proposing that amendments should be required if the POA is found to increase, as this will be resolved in the self-assessment end of year report when the final position is known. The issue is ensuring that the taxpayer's cashflow is not unduly impacted by having to make a POA with no potential to recover an overpayment until their self-assessment position is known. An individual's self-assessment may not be finalised for the tax year of disposal until some months after the payment has been made. The ability to reduce POA is consistent with the position for POA for income tax and Class 4 NIC under self-assessment. A taxpayer can apply to reduce their POA on form SA303 if they expect that their income will go down or entitlement to a relief will go up.
- 2.21 To reduce the number of amendments received, amendments could be permitted only if the POA is reduced by, say, more than 10% as a result. Amendments should be submitted electronically as far as possible to minimise administration.
- 2.22 We do not propose that taxpayers should be allowed to pick and choose amendments – for example claiming a refund of a POA if the overseas tax figure has increased, but failing to amend for a reduction in March 1982 valuation. All changes known at the time should be included to determine if a refund is applicable.
- 2.23 *Proposed reporting system and iForm*
- 2.24 The ATT and other professional bodies have raised concerns about HMRC iForms over recent years. It is crucial that these concerns are addressed prior to the creation of any new iForm. This measure is likely to affect many transactions and the form is likely to be used by a wide range of interested parties with varying degrees of tax knowledge and experience.
- 2.25 The main issues with iForms, many of which apply to the existing Non-resident CGT (NRCGT) iForm³, can be summarised as follows:
- It is not always possible to see all of the form prior to completion. The information required is often revealed in stages as the form is completed. This means that information is either sought piecemeal, or dummy data must be entered to progress through to the end of the form so that the individual completing the form can see what is needed. They can then return to the form when they have gathered all the necessary information. (This is not currently an issue for the NRCGT iForm, but we understand that this style of form is being phased out and the inability to see a complete form prior to submission has very much been an issue for more modern iForms, including the Trust Registration Service).
 - It is not always possible to save and return to HMRC forms, which makes it difficult when it is found part way through preparation that additional information is required. (It is not

³ https://www.tax.service.gov.uk/shortforms/form/NRCGT_Return

possible to save and return to the existing NRCGT iForm, which is sent as a structured email).

- It is not possible to see what has been submitted after the form has been sent, so it is necessary to remember to print the form, or save it in some manner, prior to submission.
- Some iForms have compulsory fields that have to be completed regardless of their relevance to what is being reported. The current NRCGT form has four compulsory fields which are not always relevant to the report in hand.

2.26 We would support the creation of a form which is as easy to use as possible. This would include the following features:

- Details of all the information required to complete the form should be available in one place. This could be as a clear list of information that has to be gathered together before completion, or as a dummy form (watermarked 'do not submit' or similar) in PDF format.
- It should be possible to save and return to a partially completed/completed form. We suggest that it should be possible to save a form for a period of up to 30 days so that it can be completed in stages and (for agents) so that it can be printed and sent for client approval prior to submission.
- The form should contain white space for additional comments – for example to explain the use of an estimate.
- The form should be made available to all relevant users (agents, individuals and trustees) at the same time.

2.27 If the intention is for the iForm to be accessed through the Personal Tax Account (PTA) for individuals, or the Agent Services Account (ASA) for agents, then we would ask that:

- The iForm is made available to agents and individuals at the same time.
- Provision is made for those who are digitally excluded to report disposals.
- Provision is made for trustees for whom there is no PTA equivalent.

2.28 We would welcome the opportunity to comment on any draft forms or ask our membership for volunteers to test any trial forms.

2.29 We also refer to iForms in sections 5.4 to 5.6 below in the context of NRCGT.

3 Other comments on section 3: How the rules will work for UK residents

3.1 Irish Approach

3.2 Our members report that, under Irish law where a residential property is sold for more than €1 million, the *buyer* is required to withhold 15% of the sale price and pay this across to the tax

authorities unless a certificate of clearance is produced to confirm that the individual is resident in Ireland, or has paid the tax⁴.

- 3.3 The Irish approach appears relatively straightforward and well targeted - limiting the withholding obligations to disposals above a certain value and upfront payment to disposals by non-residents who it would be more difficult to pursue. One approach which might assist with awareness of the new measure in the UK would be to impose similar obligations on the conveyancing solicitors to withhold proceeds from the sale unless or until either:
- confirmation is received from the vendor that PRR or some other relevant relief or exemption applies in full; or
 - evidence is provided to show that a report of the gain has been made to HMRC, together with the computation of the applicable POA which the solicitor can then settle from the proceeds of sale. The difficulty with this is that the vendor will not be able to receive funds until the report is completed and, as we have stated above, we already consider the 30 day post completion period may be too short in many cases to establish all the facts sufficient to make a reasonable estimate of the POA. Vendors may be forced to make a hasty estimate and report in order to access the funds from the sale quickly and then, if subsequent amendments are not permitted, not be able to recover any overpayment for some months. Great care will need to be taken with a measure of this nature, which should be proportionate to the risk of loss of tax to HMRC.
- 3.4 Consideration could be given to whether or not the measure would still be effective if restricted to higher value sales or gifts of property.
- 3.5 The disadvantage of any method that imposes additional obligations on solicitors is the likelihood that it will increase transaction costs for vendors of all residential property, not just those who need to pay the POA. It will also potentially delay access to funds which may be needed urgently if the funds are being used to purchase another property. Consideration would need to be given to the order of priority if there are other loans/mortgages to be repaid from sale proceeds. Provisions such as this could also make managing property chains more challenging. Finally, withholding is only effective for UK based properties.
- 3.6 ***Penalties and interest***
- 3.7 Given that in-year reporting will be such a significant change for all concerned, we would ask for there to be a 'soft-landing' for penalties in the early years of the regime.
- 3.8 Equally, where the individual has failed to make a POA in time, but has in fact reported the return correctly on their self-assessment return so that there was no loss of tax, it may be appropriate to give consideration to a lower penalty or suspension in the early years of the measure.
- 3.9 UK residents selling foreign property may not be dealing with UK based advisers and may not become aware of the requirement until they complete their tax returns or approach their tax

⁴ <https://www.revenue.ie/en/gains-gifts-and-inheritance/transferring-an-asset/cgt-clearance-certificate-cg50a.aspx>

agent. Consideration should also be given to a 'soft-landing' penalty approach in the early years for this group.

- 3.10 The consultation notes at paragraph 3.17 that interest will be charged if the POA is paid late. Is there an intention to charge interest if the POA is found to be insufficient? Paragraph 3.19 of the consultation suggests that interest will be charged if the POA is found to be insufficient following a correction to information available at the time. Since the POA is being calculated mid-year, taxpayers will need to make estimates to prepare a computation. An individual who expects to pay tax at 18% on some or all of the gain, but who subsequently receives an employment bonus which pushes the gain into higher rates, should not be penalised provided that their estimate of income was reasonable at the time.

3.11 ***Overseas Residential Property***

- 3.12 Paragraph 3.6 explains that, where a UK resident disposes of an overseas property, a POA will be required unless there is double taxation relief against 'some or all' of the UK CGT. Is *some or all* intended to mean that the payment of *any* overseas tax, regardless of whether or not it will cover the entire UK CGT liability, will be sufficient to remove the requirement for a POA? This could be beneficial for owners of overseas properties since, while it is known that overseas CGT is due, it often takes longer to quantify the amount of tax and/or determine the position under the double tax treaty.

3.13 ***End of Year Reconciliations***

- 3.14 We note at paragraph 3.23 that the Government is considering how to keep out of self-assessment those for whom the only interaction with HMRC will be in respect of the POA. Since it will not be possible in many cases to finalise the computation until after the year end that means that the individual has an obligation to return to the POA and revisit it at some later point - an end of year reconciliation.
- 3.15 Given that a property disposal can have a number of other repercussions, we would suggest that there *is* a benefit to bringing those affected into the self-assessment regime for the tax year of disposal. This could be done as part of the initial report. The individual, having reported their POA, is then placed in an existing system which will remind them of their obligations to review the position at the end of the year, prompt them to consider all sources of income (the proceeds of sale might have been invested and generated an income), with an existing penalty structure if they do not comply. This ensures that all of the implications of the transaction are caught. Otherwise, the reporting system for residential property has to be extended to cope with an end of year reconciliation. The self-assessment system already provides this, and so it might be the simpler solution.

3.16 ***Other matters***

- 3.17 We are not able to comment on the potential number of people affected by this new rule, or on the estimated amount of tax affected.
- 3.18 In respect of costs, we would anticipate that the additional filing requirement will increase the overall cost of disposal of affected properties. The computation will have to be prepared to

calculate an estimate of the tax for the POA, may need revising in the light of further information, and then must be finalised as part of self-assessment.

- 3.19 We note the consultation states on page 2 that it applies to individuals and trustees. We assume that the proposed POA requirements will also apply where the residential property is held by a partnership, and that each partner will need to make a report on their own position. Confirmation of this point would be appreciated. It would also be helpful to confirm if 'trustees' is intended to include executors or not.
- 3.20 The consultation states that no report or POA will be required if there is no gain or a loss. Will this mean that a settlor appointing property into a trust and claiming hold-over relief will not be required to report? Equally, if a residential property is appointed out of a trust to a beneficiary and hold-over is claimed we assume that no report will be required. This would be welcome as in these circumstances additional work is already carried out in preparing and recording hold-over elections.

4 **Question 2: Does the proposed treatment of losses on disposals of residential property and disposals of other assets strike the right balance between simplicity and fairness? If not, what alternative approach would you propose?**

- 4.1 The consultation's suggestions in respect of losses can be found at:
- Paragraph 3.8: In respect of calculating the gain, 'unused losses (either in relation to the disposal of residential property or other assets) are taken into account in the normal way' and 'Anticipated gains and losses on future disposals are not taken into account.'
 - Paragraph 3.13: In respect of subsequent residential disposals in the same tax year, 'all of the gains (or losses) on those disposals are taken into consideration; and any new losses that have arisen on disposals of other assets can also be used'.
 - Paragraphs 3.21 and 3.20: Again, this confirms that losses after the disposal will not be taken into account unless a further residential disposal is made. 'Outside of these circumstances [ie where a subsequent residential disposal has been made], and in order to avoid undue complexities, adjustments will not be given for losses that arise on disposals that are not of residential property assets. Instead an adjustment will be made in the end of year reconciliation.'
- 4.2 We take paragraph 3.8 to mean that, when the gain is calculated as at the date of exchange of contracts (or the date at which the contract becomes unconditional if relevant), any losses brought forward from the previous tax years can be deducted from the gain along with any current year losses made between the start of the tax year and the date of exchange. If further losses are realised in the current year, then they will not be taken into account unless there is a further residential property disposal. At that point it appears that the gains/losses on both residential disposals are aggregated and any losses known by that point are taken into consideration. The difference between the new and existing POA is then calculated and paid over/reclaimed.

- 4.3 We consider it reasonable in the circumstances that any known losses are considered to be available to reduce the gain on the residential disposal for which a POA is required. Equally we agree that, for subsequent disposals, any new losses that are known should be taken into account.
- 4.4 However, we think that consideration should be given to allowing amendments where further capital losses are realised in the same tax year. While this would introduce complexity, it would certainly seem to be fairer, particularly where there was a pre-existing intention to crystallise a loss later in the year in order to offset the gain on the residential property disposal. Without the ability to make amendments as proposed at 2.16 of this report, the taxpayer could suffer cash-flow consequences as it could be some months before they can recover an overpaid POA. To avoid those cash-flow consequences, the taxpayer might be obliged to realise the losses earlier – possibly suffering a larger loss in the process than if they were able to make that disposal when the market conditions were more favourable later in the same tax year. In this scenario, the POA mechanism would reduce the absolute tax receipt by the Exchequer.
- 4.5 Consideration could also be given to allowing for an election to reduce the POA where an extended trade loss relief claim under s261B TCGA 1992 is anticipated.

5 Question 3: Are there areas where the scheme for non-residents could be improved to make it easier for taxpayers to comply?

- 5.1 The crucial issue for overseas taxpayers is ensuring that they are aware of the rules in order that they can comply. While we understand that a recent FTT case⁵ on late filing penalties for NRCGT returns held that it is not reasonable to expect HMRC to specifically inform a group of individuals affected by a change, more work could be done to raise awareness with this group. For example, estate agents and solicitors need to be aware of the measure so that they can alert potential overseas clients who may instruct them to act.
- 5.2 The second possible area to increase compliance for this group is likely to be additional time, as it can be challenging dealing with tax obligations while living in another jurisdiction.
- 5.3 If the proposed measure is brought in for UK residents, then we would be supportive of the existing NRCGT regime being brought in line. It seems sensible that, if in-year reporting is extended to UK residents, the schemes are kept as similar as possible to minimise confusion and potential errors. No doubt many overseas owners of UK residential property will have been UK resident prior to sale, and therefore having the same regime regardless of residence should make matters simpler.
- 5.4 There are a number of practical issues with the existing NRCGT iForm which could make it easier to comply with the existing rules:
- When the form is submitted, is not always possible to match the acknowledgement reference received to the report made. One member reported submitting four related NRCGT returns on the same day for two jointly owned properties and receiving four

⁵Hesketh v Revenue & Customs <http://www.bailii.org/uk/cases/UKFTT/TC/2017/TC06266.html>

acknowledgements. When two of the returns required amendment, it was impossible to identify which acknowledgement reference related to which submission.

- There is no warning that, after pressing submit, the form will disappear and that it will no longer be possible to see the data entered on the form. A warning that the review page should be printed prior to submission would be helpful. Ideally, it should be possible to view data that has been submitted to HMRC even after submission.

5.5 The existing NRCGT iForm also contains a number of compulsory fields that are not applicable in all cases. These can be found in the following sections:

- *Elections* – the form instructs that this section can be ignored if the asset was acquired after 6 April 2015 but this is not possible as there is a compulsory field.
- *Reliefs* – even after answering ‘not applicable’ there are two further unnecessary compulsory fields.
- *Amended notification* – even if the section is not applicable, there is a further compulsory field for the additional amount of non-resident CGT.
- *Further notification* – again, even if not applicable there are further compulsory fields within this section.

5.6 We note that as at 4 May 2018 GOV.UK states that the NRCGT iForm is currently under review and we hope that some of the above issues will be addressed in any new iteration.

6 Question 4: Do you have comments on the provisional table of impacts?

6.1 We have not responded to this question.

7 Other observations

7.1 We presume that, in order to justify the imposition of additional reporting requirements and costs on taxpayers who were already intending to comply with their CGT obligations on property disposals, HMRC has evidence that this is an area in which a significant amount of tax is being lost or only recovered with difficulty.

7.2 We note that the original proposal in the Spending Review and Autumn Statement 2015 observed that CGT is out of step with PAYE. Our concern with this argument is that many items are dealt with under self-assessment could be said to ‘out of step with PAYE’, on the basis that self-assessment allows the final bill to be calculated and paid after the end of the tax year when all the facts are known.

7.3 If Government has a broader desire to accelerate the timing of tax payments to minimise loss to the Exchequer, we would want to see a wider debate on the timing of payment of tax rather than changes to payments on account being introduced in a piecemeal fashion over a number of different assets or income sources. A broader debate would enable HMRC to identify clearly the

specific areas of concern and the risks to tax collection, and thereby enable discussion of possible solutions.

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, Helen Thornley on 07773 087125 or hthornley@att.org.uk.

The Association of Taxation Technicians

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 8,500 members and Fellows together with over 6,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.