Draft Provisions for Finance Bill 2019-20 22/08/2019
Changes to ancillary reliefs in Capital Gains Tax Private Residence Relief
Response from Association of Taxation Technicians (ATT)

Introduction

1. We welcome the opportunity to comment on the draft Finance Bill 2019-20 legislation 'Changes to ancillary reliefs in Capital Gains Tax Private Residence Relief' (the *draft legislation*) and accompanying documents released on 11 July 2019[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.

3. We have arranged our comments around specific topics and areas covered by the draft legislation, rather than considering it clause by clause. We have highlighted below not just areas where we believe the draft legislation could be improved, but also where issues will need to be specifically addressed in any accompanying guidance.

4. Unless otherwise stated, all paragraph references are to the draft legislation, and section references to TCGA 1992.

Lettings relief

5. We have two major concerns in respect of the restriction to lettings relief:

    i. The scope of the legislation is unclear and potentially operates more widely than anticipated. For example, it affects small B&B businesses and guest houses who may not have anticipated a loss of Private Residence Relief (PRR).

    ii. The changes operate on a cliff-edge basis. An individual selling on 6 April 2020 compared to 4 April 2020 could be worse off by up £11,200 (being the higher rate of tax on residential disposals of 28% multiplied by the maximum possible relief of £40,000). An individual disposing on 6 April 2020 will also have to pay that larger amount of tax within 30 days under new 30-day CGT reporting rules[2] for residential property which come into effect on 6 April 2020. By contrast, an individual selling on or prior to 5 April 2020 has until 31 January 2021 to report the disposal and pay any tax.

6. We also have concerns that the conditions setting out when PRR remains available to a homeowner in SP 14/80[3] (which mean that the homeowner can continue to benefit from PRR and does not need to rely on letting relief) look distinctly out of date and in need of modernisation. This statement of practice is nearly 40 years old and no longer reflects the

[1] https://www.gov.uk/government/publications/changes-to-ancillary-reliefs-in-capital-gains-tax-private-residence-relief
[2] https://www.gov.uk/government/publications/capital-gains-tax-and-corporation-tax-on-uk-property-gains/capital-gains-tax-payment-window-for-residential-property-gains
[3] https://www.gov.uk/government/publications/statement-of-practice-14-1980/statement-of-practice-14-1980

modern lodgings market. It would be an ideal time to update this helpful statement of practice at the same time that major changes to lettings relief are being made.

7. The above points are addressed in more detail below.

Lettings Relief - Scope of legislation

8. Under the new proposals, letting relief will be available only where the landlord and tenant are in occupation of the property at the same time - shared occupation.

9. We understood during the conclusion exercise that individuals moving out of their home entirely and then letting it would lose the benefit of letting relief, but the scope of the new legislation is unclear and there is also potential for those with letting rooms for B&B, AirBnB etc. (who would previously have been entitled to letting relief under old rules, and who are still in occupation at the same time as the tenant) to lose relief. The policy document makes no reference to this.

10. The policy document says (with our emphasis added) that:

    "Letting relief only applies in those circumstances where the owner of the property is in shared-occupancy with a tenant."

    *"The abolition of lettings relief will impact on those individuals who have chosen to **wholly** let out a former main residence to tenants, as relief will now be restricted to those individuals who share occupancy with their tenants."*

    The definition of 'tenants' in this case is unclear. Is it intended to mean only those occupying under a formal tenancy, those occupying under licence, or is it simply short-hand for any individual occupying the property who does not have any ownership of it?

11. Currently letting relief is available under s223(4) where the individual is providing *residential accommodation*. The Courts have defined residential accommodation as a broad term which includes B&B-style accommodation, guest houses and short stays as well as 'traditional' lodging where the lodger may reside for long periods of time. With this definition, it is not necessary to overthink the nature of the accommodation and all forms of stays from a single night to some weeks to a full time occupation as a lodger are covered. Essentially the term covers the provision of a bed for one or more nights.

12. Under the draft legislation, letting relief will only be available when the owner is in residence in one part and the other part "is let out as residential accommodation *otherwise than in the course of a trade or business*" [*our emphasis*].

13. Our concern is that the restriction to 'otherwise than in the course of a trade or business' introduces significant uncertainty. Its purpose is unclear. Is it intended to mean that letting relief can only apply where the accommodation is made available to lodgers (other than those within the SP14/80 criteria discussed below)? If so, this is potentially exceedingly restrictive and goes very significantly beyond the original policy intent. Determining when the letting of a room or rooms becomes a trade or business is a heavily fact-specific task

which will call for a large amount of guidance, create significant uncertainty for property owners and add to compliance concerns for HMRC. There is a wide range of ways in which people can let property –from the 'traditional' lodger occupying as their home, to a student occupying for a term, mid-week stays for workers who live some distance from their home, to short-term contract work to overnight B&B or, as is sometimes the case for AirBnB, bed but no breakfast.

14. We think that the policy intention would be met by making the letting relief available where property is 'let out as residential accommodation' without the added and confusing restriction of that letting being "otherwise than in the course of a trade or business".

Letting relief: Cliff edge aspects

15. As we have noted in our previous responses on this measure, we consider that those who have accrued letting relief up to 5 April 2020 should be able to retain the accrued relief to avoid the cliff edge effect where there is a sudden loss of relief at 6 April 2020.

16. We have been advised that those in a position to do so are considering planning to preserve their letting relief by placing properties into trust to trigger a disposal prior to 5 April 2020. Others may consider accelerating sales which might impact on existing tenants unless they are able to purchase the property.

Letting relief: Modernisation of private residence relief for lodgers

17. Individuals letting to a lodger do not have to consider letting relief and can remain eligible for PRR provided that they meet the (limited) conditions under SP14/80. We think that while letting relief is being reformed, it would be an ideal time to modernise SP14/80.

18. The availability of PRR when the owner has taken in a lodger is restricted to where "a lodger lives as a member of the owner's family, sharing their living accommodation and taking meals with them". HMRC's departmental guidance on SP14/80 (at CG64702) takes the reference to 'a lodger' to confine the application of SP14/80 to the situation of a single lodger.

19. That interpretation of SP14/80 means for example that (a) lodgers who share kitchen facilities rather than meals, (b) a couple sharing a room or (c) a single parent with a young child all take the lodging out of the more generous PRR permitted by SP14/80 and mean that the owner has to rely on letting relief. Under the current draft legislation they are then forced to consider if they are providing accommodation in the course of a trade or business, which is not always clear - see our comments in paragraphs 12 to 14 above. If the letting relief is not sufficient, then they also fall within the new 30-day reporting provisions for residential property, with the associated administration and cost implications.

20. Given the Government's previously expressed desire to encourage home owners to offer lodgings, we would like to see SP14/80 and the related departmental guidance updated to provide that lodgers do not have to share meals, (although a requirement for access to

cooking facilities might be reasonable) and that where a homeowner allows a second related person – child or partner – to lodge as well they do not as a consequence risk their PRR.

21. The provisions of SP14/80 could also helpfully be broadened to ensure that relief is not lost where, for example, an individual continues to offer accommodation to individuals who have previously shared the home under fostering or shared lives care but who are now occupying as paying lodgers. Individuals who have been fostering a child are not subject to restrictions in their PRR and we think that this should continue if they wish to continue to support the (now adult) individual after the age of 18 by letting them stay on as a lodger. In these circumstances it may also be reasonable to allow more than one lodger depending on how many of their foster placements are able to stay on.

22. Finally, as a wider policy point, consideration could be given to whether a strict interpretation of SP14/80 in departmental guidance to restrict the availability to PRR to a single lodger is reasonable and whether, in addition to extending the relief to situations where two related or connected individuals are occupying, PRR could be available where the individual provides lodgings to two unconnected individuals in separate rooms.

Putting ESC D21 on a legislative basis– Late nomination of main residence when occupying let property

23. In our response to the original policy consultation, the ATT supported putting ESC D21 onto a legislative basis. Individuals living in rented accommodation, as well as property that they own, frequently do not realise that an election to determine their main residence is necessary/beneficial to prevent the rented accommodation from being considered their main residence, resulting in the loss of PRR on the property they own. ESC D21 is a very useful concession.

24. We are pleased that the proposed legislation has removed the requirement for an individual to explain that they were unaware of the need for nomination and that a nomination can now be made based on objective criteria. However, we are disappointed that the concession now seems to be unavailable if, at any point in the past, the individual has *ever* made *any* nomination (see new 5A(a)), even if in respect of an entirely different set of properties for an entirely different period and for entirely different reasons. We consider this to be an unhelpful and unreasonable restriction. It appears to be a relic from the requirement for unawareness which has just been removed. It is also impractical to implement, as an individual may not recall whether or not they have *ever* made *any* nomination in the past on unrelated properties.

25. The point of ESC D21 is to allow individuals to make a nomination in a case when it is not immediately apparent than an election is required. Previously having made a nomination in unrelated circumstances would not lead an individual to appreciate that a nomination was required when they had access to rented accommodation. We are not clear why the scope of ESC D21 has been restricted in this way and would like to see this restriction removed so that the legislation more closely follows the original scope of the concession.

26. We have had sight of the response from the Chartered Institute of Taxation (CIOT) which raises a number of further concerns about how the new legislation will work for overseas assigners and we endorse their comments.

27. As a final point, the draft Explanatory Notes accompanying the draft legislation still refer to a "weekly rented flat" as an example of a residence with negligible capital value. We think that this language is dated since a standard Assured Shorthold Tenancy (AST) on a monthly let would also be a residence with negligible value. The accompanying terminology should be updated to reflect the modern letting market.

Putting ESC D49 on a legislative basis - Delay in taking up residency in property

28. The ATT supported this codification of ESC D49 in the original consultation in principle, while also asking for some improvements. We are pleased that the draft legislation has expanded the existing conditions in ESC D49 and will now allow an individual to acquire the property via inheritance and not simply by building or purchase and still have a period of renovation. However, we are disappointed that there remains a cliff edge effect.

29. If an individual moves into the property within 23 months of acquiring it, then they are entitled to full PRR for that period. But if it takes them 24 months plus one day, then all relief for the whole initial period of ownership is lost.

30. We would like to see relief allowed where the other conditions are met for a period of up to 24 months even if the individual is not able to move in until after 24 months have elapsed. An individual who moves in after 25 months for example, would then be entitled to 24 months of relief.

Reduction in final exemption period from 18 months to 9 months

31. As we stated in our response to the original consultation document, we consider that the proposed shorter period for the final exemption period will negatively impact on those who are unable to sell their main residence within nine months, which could be for a range of factors outside their control. In our view, the proposed period is too short to allow individuals time to sell their property in the face of potentially challenging conditions.

32. By increasing the probability of individuals having to pay tax, the measure also brings more people within the new 30-day reporting requirements for residential properties noted above, which adds to the costs and administration of disposing of a home.

33. We are disappointed that the Government are still justifying the change based on a report that, on average, properties sell within 4.5 months. We do not consider that a single average figure is sufficient justification for the proposed nine-month period. Such an average takes no consideration of a number of variables which may affect the time to sell, such as the property location, time of year, the price bracket etc. Without reference to the supporting evidence we do not know what period of time this statistic relates to and it may be out of

date. The time taken to sell a property may also be substantially affected by EU Exit in the coming months.

34. Accordingly, we ask that HMRC keeps the position under review so that situations where the new nine-month limit is creating hardship can be identified, with a view to amending the legislation in the future to avoid unintended consequences.

Contact details

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

22 August 2019

Note

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 more than 9,000 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or ‘Taxation Technician (Fellow)’ and the designatory letters 'ATT' and 'ATT (Fellow)' respectively