Finance Bill 2018-19: CGT non-UK residents (Clause 6 Schedule 1)

Large Corporate Personal tax

01 October 2018

The CIOT has submitted comments on the very significant changes proposed to bring gains on interests in UK land by non-UK residents into charge to capital gains tax and the draft provisions in FB 2018–19 and some aspects of the government's consultation response.

Implementation date

As the government recognises, implementing the very significant changes proposed for CGT by April 2019 will be challenging for taxpayers and for HMRC. The current published draft legislation includes the core provisions only. The proposals for the treatment of offshore collective investment vehicles are currently 'high level' and subject to further consultation with the industry. Further significant tranches of legislation will be required before April 2019.

These changes will be required alongside major IT changes for Making Tax Digital for VAT and the UK's exit from the EU. Delaying implementation until 6 April 2020 would have the benefits of a period of familiarisation, more time to implement the significant operational changes for taxpayers and HMRC and an effective period of further consultation with industry on the treatment of collective investment vehicles and exempt investors.

The CIOT suggested that the current implementation date of April 2019 is re-evaluated as part of the further consultation process noting that current projected tax revenues are low in the early years of the change and therefore the revenue foregone by delaying implementation is relatively less significant.

Re-write of Part 1 of the Taxation of Chargeable Gains Act 1992 (TCGA)

The draft legislation includes a re-write of Part 1 TCGA. The rewrite is intended to modernise and simplify the structure of the UK capital gains rules rather than change existing laws.

We are concerned that this re-write has introduced an ambiguity in respect of non-resident companies that become UK resident part way through a tax year and whether any gains arising as a result of such a company disposing of assets (which do not meet the conditions for substantial shareholdings exemption (SSE) to apply and is not UK land; for example, foreign real estate) in that tax year, but before they became UK resident, are brought within the charge to capital gains tax. The new legislation deals expressly with split years for individuals at new section 1G, but there are no explicit provisions for companies.

In addition, there is an opportunity to correct existing anomalies and remove current uncertainties, such as in the case of the temporary period of non-residence provisions in current TCGA section 10A, the exclusion from charge for an asset acquired by an individual in a temporary period of non-residence does not extend to attributed gains.

TCGA section 13 has been rewritten as new section 3. However, is not clear whether the new section 3 continues to charge pre-April 2019 gains as is understood to be the intent.

Schedule 1 inserting Schedule 1A (Assets deriving 75% of value from UK land etc.)

Exception for land used for trading purposes

The exception from the indirect charge for land used for trading purposes in part 2 paragraph 4 is narrowly drawn and appears to give rise to some inconsistencies. In order for the disposal of a right or interest in a company to be not regarded as a disposal deriving at least 75% of its value from UK land, it is necessary for all of the interests in UK land to be used for trading purposes, or at least all other than those of an insignificant value. This test is a much more stringent test than applies to the SSE in TCGA 1992 Sch 7AC. In order to meet the latter definition a company may have non-trading activities, provided they are not ‘substantial’; a far more generous test than the ‘insignificant value’ test in proposed new Schedule 1A para 4. This distinction will lead to a disparity in the way that companies and individuals are taxed when making a disposal of a company holding UK land. The disparity could, in turn, have a distortionary effect on taxpayers’ behaviour, for instance individuals may consider setting up foreign holding companies in order to benefit from the SSE exemption if it is perceived that this route might offer more relief than would be available on a direct disposal of UK property rich entities.

There is also a disparity in treatment between companies, depending on the nature of their trade. For example, a UK company with a trade of house building, that holds 80% of its UK land as trading stock, but 20% as an investment that is let out, would fail the trading exception test. By contrast, a company that trades in making widgets but 70% of its value is nevertheless represented by UK land that it holds as an investment would meet it and fall outside the charge.

We suggested an alternative formulation for the exception, that is, to exclude any land used for the purpose of trade when considering the value of UK land as part of the value of the company (the value of such land would be included in the value of other assets for this purpose).

Anti-avoidance

Part 4 of Schedule 1A sets out a widely drafted targeted anti-avoidance provision. We noted that one of the drivers for the Aaronson recommendation of a GAAR was for a long-term improvement in the UK’s tax system and simplification of current and future legislation. Although it is recognised that there will still be a need for specific anti-avoidance rules in new provisions the drafting seems to be out of step with that recommendation.

SDLT relief for ‘on-shoring’

The government says that it is not the intention of the new measure to encourage on-shoring (that is, moving property out of offshore structures and into the UK), rather it is to create a ‘level playing field’ for offshore and UK investors. Therefore, there are no plans to allow an SDLT relief for the initial transfer of a property to a UK company (referred to as ‘seeding relief’) as part of this measure.

The full CIOT response can be found on the CIOT website.