



Response from ICAS

Taxing gains made by non-residents on UK immovable property

16 February 2018

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General Comments

2. ICAS welcomes the opportunity to comment on the HMRC and HMT consultation 'Taxing gains made by non-residents on UK immovable property' published on 22 November 2017.
3. The intention of the proposals is to align the tax treatment of UK and non-UK investors in property. We agree with the comments in paragraph 1.6 that it is important to ensure that legislation to achieve this is effectively targeted and does not place unnecessary burdens on those affected.
4. We support rationalising the existing regimes into a unified approach and harmonising ATED-related gains with the wider regime. The piecemeal development of the existing regimes has caused complexity and a lack of consistency. Whilst there may be some complications arising from transition, it is important to seize the opportunity to introduce a single unified regime which will provide long term benefits.
5. Significant concerns have been raised by our members about the proposed third-party reporting requirements. These need to be considerably refined to reduce the number of advisers who need to consider reporting – and to reduce the number of multiple reports which will be filed under the proposals as they stand. If this cannot be achieved, we do not believe that any reporting requirement should be placed on third parties.
6. In its response to the consultation on bringing non-resident companies chargeable to income tax into the corporation tax regime, the government has said that it will implement that change from April 2020 – to allow affected companies sufficient time to familiarise themselves with the CT regime. However, the present consultation suggests that these companies will be brought into the CT regime for capital gains in April 2019 ie a year earlier. The need for familiarisation is surely equally applicable to capital gains as to rental income? Implementation at two different dates is also likely to cause issues which may require complex transitional rules. It would make more sense to move non-resident companies into the CT regime for all purposes from April 2020.

Scope of the Measure: Rebasing

7. In many cases rebasing to the commencement date of April 2019 (or April 2020 as suggested above) is likely to be the preferred option for vendors and should produce a fair result. However, historically, alternatives to rebasing have been offered because there may be situations where rebasing does not produce a fair result, or where the costs and uncertainty arising from the need for a valuation mean that the vendor would prefer a different approach. We therefore welcome the option (for direct disposals) to compute the gain or loss on disposal using the acquisition cost of the property as the base cost.
8. There is a third option available in NRCGT, ie calculating the gain at the time of disposal and apportioning, but we note that this is not proposed to be available for commercial property (paragraph 2.12 of the consultation document). This seems unfortunate from the perspective of creating a unified regime; why should residential and commercial property be treated differently? It is also undesirable from a cost/administrative burden perspective for sellers, some of whom might wish to use this approach. This should be reconsidered.
9. For indirect disposals it is proposed that rebasing to April 2019 will be the only option. We have concerns about this. As noted above there are good reasons for providing the options of using the original acquisition cost or apportionment as an alternative. Mandatory rebasing could produce an unfair result; it will also cause difficulties for some vendors and will certainly mean vendors have no choice about incurring valuation costs. Determining the value of the company in 2019 could be

difficult in some circumstances, for example where the company was not property rich in 2019 but becomes so later. Again, this should be reconsidered.

10. We understand from HMRC that where a non-resident company is brought into the UK after April 2019 the base cost will be historic cost rather than value at April 2019. This might act as a disincentive for some UK companies to acquire offshore companies. It could also deter groups from rationalising their structures.

Direct disposals by non-residents

11. We agree with the basic principle that gains on direct disposals should be computed using the same rules as other chargeable gains. It also seems sensible that disposals of residential and commercial property should be subject to the same regime. As noted above it is important to take the opportunity to introduce a single unified approach.

Indirect disposals: the property richness test

12. The consultation document states that the rules will be modelled on s356OR CTA 2010 and, where it is necessary to trace value through layers of ownership, on s356OM CTA 2010 (both introduced by FA 2016). The FA 2016 rules were primarily anti-avoidance provisions, so it is not entirely clear how they will be adapted to apply here. Until draft legislation is available we have no detailed comments.
13. A number of issues requiring clarification have been raised by our members:
 - What exactly will be included in 'gross assets'? We understand that some derivatives may be excluded.
 - Trading companies with valuable properties, could potentially be caught, for example, hotels, care homes or retailers (subject to the availability of SSE). There will also be valuation issues in determining the value attributable to goodwill rather than the property.
 - Where the non-resident has a minority interest how would they be able to obtain valuations of any UK property held by the company?
 - What about fixtures such as land turbines, windmills etc which are attached to the land. Do they constitute 'property'?
 - Will forestry be included in the regime?
 - Are there likely to be any reliefs for de-enveloping properties?
14. HMRC confirmed at a meeting that the intention is that if the property richness test is met, 100% of the gain will be chargeable, on the grounds that this is simpler than some form of just and reasonable apportionment. As the example in paragraph 4.27 of the consultation document illustrates, where there is some non-UK property in the company, this would mean that some of the value of non-UK property is taken into account in arriving at the disposal value of the shares. In some cases this could lead to unfairness.

Indirect disposals: the 25% Ownership Test

15. The 25% ownership test will require the non-resident making the disposal to look back five years prior to the disposal to see if the test was met at any point in that five year period. As the new charge will apply from April 2019 this potentially means a look back period to April 2014. As non-residents could not have been aware of the proposed changes in April 2014 this is unfair and is likely to cause difficulties because relevant information may not be available. In theory non-residents could have become aware of the proposals on Budget day 2017 (although it is unlikely that many did) so the look back requirement should not extend beyond that date (22 November 2017).
16. Paragraph 4.16 of the consultation document notes that the intention of the 25% ownership test is to exclude from scope smaller investors, who may not always be aware of the assets and investments involved in the entity concerned and are unlikely to have control or influence over the entity's activities.
17. We agree that rules on aggregating the interests of related parties and taking into account past holdings will be necessary to prevent fragmentation. However, as the proposals stand the rules on aggregation of interests would apparently result in certain minority investors being treated as holding a 25% stake. For example, in a real estate investment fund structured as a partnership, partners will

be treated as connected with each other simply because they are partners. This is not in line with the intention set out in paragraph 4.16, so the rules needed to be adjusted to prevent this result.

18. There will also be issues where the initial investors in a fund have a stake of 25% or more – but only for a very brief period of time before other investors join and their holdings are diluted. The five year look back period would mean that what are essentially minority investors would be caught, solely because they joined the fund first.

Disposals of residential property

19. We strongly support harmonisation of ATED-related CGT. The objective should be one unified regime. We therefore agree that ATED-related CGT should be abolished from April 2019 – with gains from April 2019 onwards falling within the non-resident immovable property regime.

Ownership by and through collective investment vehicles (CIVs)

20. We have no comments on the questions in Chapter 6 of the consultation document.

Reporting and compliance

Direct disposals

21. The 30 day notification requirement for those within CGT is unrealistic. Experience with the NRCGT regime and recent tribunal decisions in NRCGT cases reveal a lack of awareness and understanding of the 30 day requirement – particularly where those making disposals are within self assessment. Where the person making the disposal is within the self assessment regime the normal self assessment requirements for reporting should apply. Information about the charge should be included with the notice to file a return. If this approach is not adopted, then a period of at least three months should be allowed for notification.
22. For those not within the self assessment regime there will need to be a requirement to register for self assessment. This should be similar to the proposed approach for those within the CT regime ie register with HMRC and then make the return and payment within the normal timeframe for self assessment. As above, if this approach is not adopted then at least three months should be allowed for notification. A 30 day payment requirement is also unrealistic; in some cases the funds to pay the tax might not be available at that point.
23. The CT proposals seem broadly reasonable. However, for those not already within CTSA the requirement to submit an electronic form at date of disposal is unrealistic. As for CGT at least three months should be allowed.

Indirect disposals

24. A longer period needs to be allowed for reporting indirect disposals than direct disposals, to recognise that many of these transactions will be complex, so that calculations may not be completed for several months. At least 6 months should be allowed for reporting indirect disposals. This is discussed further below, in the context of third party reporting.

Indirect disposals: third party reporting

25. Significant concerns have been raised by our members about the proposed requirements for third party reporting. This is likely to impose an administrative burden on UK advisers but also on HMRC because it is hard to see how multiple reports of the same transaction can be avoided.
26. The definition of an 'adviser' for reporting purposes needs to be clarified. Is this intended to relate to lawyers and tax advisers - or also to other advisers who might be involved in the transaction? The conditions set out in paragraph 7.13 could potentially cover a wide range of advisers.
27. It would make sense to restrict the definition to those most likely to be in a position to assess whether the transaction fell within the rules. Subject to clarification of the meaning of 'based in the UK' (does this relate to a firm or an individual, or both?) this would be lawyers and tax advisers based in the UK and meeting the criteria set out in 7.13.2 to 7.13.4. This would still mean that in some transactions there could be multiple advisers who will need to consider reporting. There may also be legal

professional privilege issues; if so it will exacerbate issues which already arise from the lack of a level playing field between lawyers and other advisers.

28. It should be made clear that the only advisers who would fall within any reporting requirement would be those acting for the seller. Advisers to the buyer would be highly unlikely to have (or be able to obtain) the necessary information to decide whether a report was required (or to find out whether the seller had filed a report themselves).
29. Advisers are likely to find it difficult, and in many cases impossible, to satisfy themselves that a transaction has been reported to HMRC (paragraph 7.13.4). Paragraph 7.14 refers to the non-resident obtaining proof of reporting which they can provide to the adviser. It is not clear what this 'proof' would look like. Does HMRC intend to issue formal confirmations to non-residents that they have reported a transaction – with sufficient detail provided in the confirmation to allow an adviser to be sure that it is 'their' transaction which has been reported?
30. Even if HMRC intends to provide the non-resident with proof, an adviser involved in the transaction may not be acting directly for the non-resident and will therefore still be highly unlikely to be able to 'reasonably satisfy' themselves that the transaction has been reported to HMRC.
31. The condition in paragraph 7.13.3 is also likely to be challenging. In a large and complex transaction some advisers may only be involved with one aspect of the deal – or one tax (SDLT, for example). They would not have the information necessary to be able to determine with certainty whether the transaction fell within the rules but would apparently be within 7.13.3 on the basis that it could do so.
32. This is a particular concern for advisers in Scotland, who are often asked to advise on Scottish property law aspects of a transaction but would have insufficient information to determine whether the overall deal fell within the rules; for example, they would be unlikely to know whether the 75% richness test was met. It is common for lawyers in these circumstances to have undertakings with the lead solicitors, excusing them from reporting requirements. Would HMRC accept that this removed any responsibility for reporting from the Scottish lawyer?
33. The issues outlined above are likely to mean that HMRC receives multiple reports of the same transaction. The non-resident reports the transaction but so do all the UK advisers involved, however peripherally, because they do not want to take the risk of failing to report and may not want to spend time assessing whether they are actually required to report.
34. Clarification is needed on the form of report which will be required from third party advisers – and how much detail they would be required to provide. There will be limits on the information some advisers will be able to provide; it will depend on their role in the transaction.
35. The proposed 60 day reporting deadline is too short; indirect transactions will usually be complex and in many cases it could take months for accurate calculations to be produced, due to post transaction adjustments. Either the reporting deadline needs to be considerably longer – 6 months might be appropriate – or the adviser should only be required to report a bare minimum of information (little more than the names of the parties and the date the transaction concluded).
36. As noted above, unless the reporting requirements can be refined to reduce the number of advisers who need to consider reporting and to reduce the likelihood of multiple reports, we do not believe that any reporting requirement should be placed on third parties.
37. One option for refining the rules is suggested by paragraph 7.12, which states that the measure will impose a reporting requirement on certain advisers who are "aware of the conclusion of the transaction". This could be treated as the first test; if an adviser's involvement is such that they do not know when (or potentially whether) the transaction concludes they should not have any obligation to report, regardless of the other conditions. This could apply, for example, to an adviser asked to advise solely on a Scottish property law aspect, who gives their advice but has no other involvement and might not even know whether the transaction went ahead, let alone when it concluded.
38. Another possibility would be that for a large transaction, involving multiple advisers, the main UK adviser could offer an undertaking to any other advisers it invited to work on the transaction, that it would make a report (if required). HMRC would have to accept that only the adviser giving the undertakings could be held accountable (and subject to a penalty) for any failure to report. This

would not be effective where no main adviser in the UK existed ie all the UK advisers were only involved in aspects of the transaction, at the invitation of a non-resident seller or a non-UK adviser.

Raising awareness amongst non-residents

39. There will need to be a major HMRC campaign to raise awareness of the new regime amongst non-residents. This should include targeted communications to those most likely to be affected.
40. An obvious starting point would be for HMRC to inform all non-resident landlords of the introduction of the new regime. The Trusts Registration service should also allow HMRC to publicise the new regime to trustees.
41. HMRC might also consider communications to overseas tax and accounting professional bodies whose members are likely to be involved in advising on disposals which might fall within the new regime.