Tax Representation

TAX FACULTY

TAXREP 44/08

Finance Bill 2008: Committee Stage Briefing on Clause 22, Periods of residence and Clause 23 and Schedule 7, Remittance basis

Parliamentary Briefing submitted by the ICAEW on 10 June 2008 setting out our comments and concerns on the proposed changes to the residence and domicile changes, together with a Supplementary Briefing dated 12 June 2008 including preliminary comments by the ICAEW on the Government's tabled amendments to Schedule 7.

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Committee Stage Briefing, Clause 22, Periods of residence, Clause 23 and Schedule 7, Remittance basis

1 Key ICAEW issues

Clause 22, Periods of residence
In the interests of certainty and competitiveness, the UK now needs a statutory residence test.

Clause 23 and Schedule 7, Remittance basis
We have a number of major concerns with these provisions:

- there should be a detailed economic justification for change;
- the £2,000 de minimis should be increased to ease the compliance burden;
- much of the legislation is incomprehensible, unworkable and likely to be undermined by poor compliance; and
- a significant part of the legislation remained unfinished even as it came into effect on 6 April 2008.

We remain of the view that the detailed remittance rules should be deferred by a year or that they should apply only to remittances on or after Royal Assent.

2 Full comments

Clause 22, Periods of residence
The clause amends the legislation relating to the taxation of foreign income where the individual is in the UK for a temporary purpose. It amends the way in which days of presence are counted for determining the amount of time spent in the UK.

The need for a statutory residence test
This is a very narrow amendment but the issues it raises are of considerable importance to UK plc. Given the fundamental importance of establishing whether a person is resident in the UK for tax purposes, this change highlights the fact that the existing residence test, which is based primarily on old case law and HMRC practice, no longer provides a satisfactory basis for establishing liability to UK tax.

As the Explanatory Notes acknowledge, the issue of whether one is or is not resident in the UK is fundamental to the application of the rest of the UK tax system. Current HMRC practice in this area is unclear, frequently ambiguous and highly uncertain in application. The result is that individuals can be present in the UK without knowing whether they are or are not tax resident. The lack of certainty puts the UK at a disadvantage as compared to our competitors.
The Explanatory Notes indicate that HMRC practice will be amended to reflect the new legislation. The amendment will therefore perpetuate an existing unsatisfactory situation that needs to be addressed properly, not least to ensure that the UK maintains an internationally competitive tax system. Further, the Explanatory Notes state that the Finance Bill change was introduced because ‘the UK was out of step with … its international partners.’ However, the more important reason the UK is out of step is because it is one of very few developed countries that does not have a

statutory test. In our view, this absence of a statutory test is the issue that needs to be addressed.

We believe that there are suitable models of statutory residence tests that the UK could use to develop its own rule. A suitable example is the Irish statutory residence rule, which was first introduced in 1994 (subsequently consolidated in 1997) and which we understand works well although we recognise that it is (by UK standards) quite generous. An alternative less generous model is the US residence test. It would be for ministers to decide where they wished to draw the boundary but we would be happy to assist in the drafting of a suitable residence rule.

It is a particular concern that the existing guidance in HMRC's booklet IR20 was withdrawn and that it was not intended to republish it until autumn 2008. However, we note that an electronic version of IR20 was posted to HMRC's website on 6 May 2008. Whilst we welcome in principle its publication, the guidance is misleading as it does not appear to reflect the proposed Finance Bill changes (both in respect of clause 22 and 23), although an Appendix has been added which sets out HMRC's interpretation of the *Gaines-Cooper* case (SpC 568). We request that IR20 is updated to reflect the Finance Bill changes as a matter of urgency and if this is not possible then it needs to have a prominent 'health warning'.

So far as the clause as drafted is concerned there are no references to the present concessions relating to days on which the individual is detained in the UK by circumstances out of his control – such as illness or terrorism. We should be grateful for confirmation that the existing practices will continue.

The examples in the Explanatory Notes go some way towards explaining the thinking behind the transit rules but we would suggest that examples referring to the use of electronic media for business purposes (laptops, mobile phones etc) would be useful. The existing rules for incidental duties in the UK are different from the proposals in the Bill which may lead to confusion and uncertainty. We believe this reinforces our call for a statutory test.

Clause 23 and Schedule 7, Remittance basis

General comments

The drafting of the legislation

We welcome the changes that have been made in the Finance Bill to the draft legislation that was published on 18 January 2008. We are however concerned that a significant part of the legislation remained unfinished even as it came into effect on 6 April 2008. We understand that this is to enable the final legislation to be comprehensive and workable but are surprised that it was thought appropriate to lay before Parliament legislation that is admitted to be 'incomplete'.

HM Treasury confirmed to us in a meeting in February 2008 that the overwhelming message from the representations that they had received had recommended deferring the more complex measures to enable workable legislation to be drafted. There can have been little doubt that there was simply not enough time to complete satisfactorily that task. We were surprised to learn, given there are more than 50 pages of legislation, in addition to 160 pages of explanatory notes, that there are only 12 lines in the Lobby Notes briefing MPs on the measures and the delays in drafting the legislation. ***We remain strongly of the view that that it is unfair to the***

taxpayer not to have deferred the implementation of these aspects of the legislation until 5 April 2009.

The rules when they are finally determined will apply from 6 April 2008 but no-one knows at this juncture what they are as they are subject to further changes. This is unreasonable and damaging to investment in the UK. It is likely to result in widespread confusion and non-compliance. Many taxpayers will be making remittances not knowing their effect and this could turn out to be expensive if they have made the wrong choice. If the Government is not willing to postpone the remittance rules until 6 April 2009, we think that at the very least these new rules should only apply from the date of Royal Assent, and remittances before then would be ignored.

We appreciate the complexity of the legislation, the extreme time pressures imposed on HMRC and HM Treasury staff and the efforts that they have made. We will continue to work with HMRC to try and improve the legislation but we fear there is insufficient time to make the necessary amendments so the legislation is fit for purpose. You will see from our detailed comments, however, that as regards the legislation that we do have there are a number of areas where we continue to have concerns.

In particular on the source ceasing provisions and the lack of a time limit we are of the view that not only is the legislation retrospective but that it may be impossible for a taxpayer to submit a correct Tax Return. If that is the case the culture of good tax compliance that is fundamental to the UK system is undermined. Furthermore some of the legislation, for example on mixed funds (new s 809P) and on the order of remittances (new s 809I), is so complicated that we fear it will be incomprehensible and unworkable, particularly to the unrepresented taxpayer. To guard against the institutionalisation of non-compliance, HMRC should publish a clear statement on how they plan to support taxpayer compliance.

The legislation is far from simple. We found it difficult to correlate the background notes with the legislation and would ask that in future statutory references be included. In our representation on the draft legislation (TAXREP 19/08, see http://www.icaew.com/index.cfm?route=155094) we noted at paragraph 9 that the commencement provisions for many of the sections were unclear. We found it particularly unhelpful for the commencement provisions to be sited at the end of the legislation in Schedule 7 Part 1. We would suggest that the general commencement provisions should be at the beginning of the Schedule and the ‘transitional provisions’ after the relevant paragraphs. We are also concerned that a number of the FAQs on the HMRC website relating to this legislation are incorrect, and/or incomplete, and/or confusing.

The economic justification for change
Whilst we appreciate the Government’s need to make changes to the rules, we remain concerned that the changes will result in a net loss of revenue to the UK rather than the predicted increase in revenue. We remain concerned that no economic and sensitivity analyses have been prepared to support the claimed revenue increase. We remain of the view that there needs to be a detailed economic justification of the changes.

The £30,000 levy
The £30,000 levy to access the remittance basis has no international precedent and there remain concerns about whether the levy will be creditable in other jurisdictions

for double tax relief purposes. The Budget Notes included a helpful opinion from a firm of US lawyers that the levy would be creditable for US tax purposes but we would welcome clarification about the position of any negotiations on this issue with the tax authorities of other treaty countries.

The impact of the changes on 'ordinary' non-domiciles
While there is a perception that the changes will ensure that the 'super rich' pay more tax, the likelihood is that they will pay their £30,000 annual fee and continue largely as before. The people most affected by the changes will be the far larger number of people who have been here for over seven years and cannot afford to pay the £30,000 and those who have been here less than seven years and who are expected to grapple with the new, impractical rules on what constitutes a remittance. Many of these are unlikely to be able to afford professional advice, such as migrant workers. Further, many will not know that they face an increased tax bill in the UK.

The increased administration burdens
In addition to the increased tax charges, the changes will also impose significantly higher administrative burdens and associated costs on many non-domiciles. This is because they will now need to take advice on their UK tax position and they may now need to complete a UK tax return whereas currently many non-domiciles do not need to do so. The raising of the de minimis limit from £1,000 to £2,000 announced in the Budget was a welcome announcement and this will help to alleviate some of the compliance burdens that this change introduces, but we remain of the view that the de minimis should be set at a higher level.

We remain concerned that HMRC will also need extra resources to implement and monitor these changes and that the strains that will be imposed could be considerable at a time when HMRC's budget is being cut in real terms over a three-year period.

The letter dated 12 February 2008 from the Acting Chairman of HMRC
Given the many concerns and confusion about the scope of the new rules, we welcomed the publication by HMRC of a letter dated 12 February 2008 from the Acting Chairman (see http://www.hmrc.gov.uk/news/residence-domicile.pdf) which at least sought to address some of the key concerns about the proposals. The need to publish the letter reflected the widespread concerns and confusion about the proposed changes to the rules and demonstrates the need to improve tax policy formulation in conjunction with stakeholders, an issue which we have mentioned earlier.

Whilst we appreciate the unequivocal reassurances in the letter, we are not convinced that they are fully reflected in the Finance Bill, as follows:

a) *'Those using the remittance basis will not be required to make any additional disclosures about their income and gains arising abroad'.* HMRC have subsequently said that such individuals will be required to make additional disclosures if HMRC enquire into their return. Furthermore, they will be required to make additional disclosures in relation to their first £68,000 of income or £167,000 of chargeable gains even if they do not get an enquiry. They will also be required to make a disclosure of the source of payment of the £30,000, as this will only be disregarded if it comes direct from a disclosed overseas source.

b) *'There will be no retrospection in the treatment of trusts and the tax charges will not apply to gains accrued or realised prior to the changes coming into effect'.* Accrued gains will be excluded from tax only if the trustees, over whom the taxpayer has no control and who may well not wish to have any involvement with a foreign tax authority, so elect and they are prepared to forego future tax relief on accrued losses (which the trustees may feel is not for the benefit of the beneficiaries as a whole). The tax changes will also apply to gains accrued prior to the changes coming into effect if the gains arise in an overseas company and the shares in that company are held by an individual.

c) *'Money brought into the UK to pay the £30,000 charge will not itself be taxable'.* A remittance to pay the charge only ceases to be a remittance if it is paid directly to HMRC from an overseas account, which appears in breach of the assurance given in a) above. The additional disclosure assurance is further breached by the requirement that long-term residents paying the charge are required to 'nominate' income or chargeable gains upon which the charge is paid, despite the letter clearly stating '[S]o long as they [those using the remittance basis] declare their remittances to the UK and pay UK tax on them, they will not be required to disclose information on the source of the remittances'.

d) *'It will continue to be possible to bring art works into the UK for public display without incurring a charge to tax'.* The exemption only applies where the public display is at an 'approved museum, gallery or other institution. Therefore, a non-domiciliary cannot bring his work of art into the UK and arrange his own public exhibition without triggering a possible charge.

We trust that the assurances given in the letter of 12 February 2008 will be honoured in full in the amendments that are to be made to the legislation.

Detailed comments on Schedule 7

1. Sections 809C and 809D Application of remittance basis without claim (page 151 of the Bill)

1. Whilst we welcome the increase of the de minimis limit to £2,000 from the £1,000 that was proposed in the original announcement, we remain of the view that £2,000 is still inadequate to avoid inadvertent non-compliance and is too low to justify the additional costs to both HMRC and taxpayers of making additional tax returns that are presently not required. We have seen no evidence that this threshold has been introduced on any statistical basis. We propose that the threshold should be set at the level of personal allowances. This should help to reduce the administrative burdens on both taxpayers and HMRC.

Proposed amendments

Page 151:

Line 36, leave out "£2,000" and insert" an amount equal to the allowance under section 35 (personal allowance)"

Or, as an alternative,

Line 36, leave out "£2,000" and insert "£6,035"

Page 174:

Line 45, at end add "23A In section 57(1) add "(g) section 809C (application of remittance basis without claim)"

Associated issues

i) It is not clear how the £2,000 limit operates in a split year of arrival or departure. An employee from abroad may derive overseas earnings substantially in excess of £2,000 in the non-resident part of the year. The definitions in s 809Z suggest that only income which is UK chargeable if remitted (e.g. relevant foreign earnings and relevant foreign income) will count towards the £2,000 limit.

ii) The position needs to be clarified where the employee is treaty resident abroad during the non-resident part of the year. Both the Explanatory Notes and the FAQs fail to mention the assurance given by HMRC on 28 February 2008 at the Joint Forum on Expatriates Tax and NICs where the minutes on HMRC's website read: 'HMRC confirmed that Treaty residence should be regarded as integral to the yearly accounting test for the purposes of determining whether or not the £30,000 charge is appropriate.'

iii) Similarly, clarification is needed if the employee is resident for the whole year because he or she exceeds 183 days but comes from, or returns to, a non-treaty country. The same concerns arise in relation to s 809D where an individual arrives in the UK part way through the tax year and has made transfers prior to becoming UK resident subsequently.

2. We welcome the introduction of s 809D but query whether the requirement at (1)(c) that the individual has no UK income or gains for that year may limit its usefulness. It is probable that a non-working, non-domiciled spouse or civil partner, the individual most likely to fall within the ambit of this section, will have a modest level of UK income, say from a joint bank account. We would suggest that a de minimis provision be included in this section.

Proposed amendment

Page 152:

On line 8, add at the end "or such income and gains do not exceed the amount referred to in paragraph 1(c) of section 809C"

3. We suggest also that there should be a provision to allow a foreign domiciliary to opt out of the remittance basis of taxation under s 809C and 809D. A foreign domiciliary who just has a foreign dividend which has been paid straight into a UK account would want to be taxed on the arising basis to benefit from the 32.5% tax rate. We recognise that in some cases it is possible to remit the dividend income but this is not always the case.

We understand that legal opinion advises that the denial of the dividend rate to those who claim the remittance basis is discriminatory. We assume that the Government will seek their own advice on this matter, but if the Government accept this to be the case and amends as appropriate then our comments in the previous paragraph will no longer apply.

Proposed amendment

Page 152:

On line 27, add at the end

"809DA Election for section 809C or 809D not to apply

(1) A taxpayer who comes within section 809C or 809D shall be entitled to elect that the section should not apply for a year of assessment.
(2) Such an election must be made by notice in writing to HMRC given by 31 January following the end of the tax year following that to which it relates"

2. Section 809F Claim for remittance basis: effect on allowances etc (page 153 of the Bill)

We remain unclear as to why it is considered necessary, or justifiable, to remove personal allowances for those claiming the remittance basis. It is our understanding that the personal allowance exists to recognise that until a taxpayer has a certain amount of income they have no taxable capacity, whether this basic level of income is satisfied by UK or foreign sources is irrelevant to the underlying principle.

As regards capital gains tax (CGT), the reporting requirements for CGT are currently linked to the annual exempt amount (AEA). If this is reduced to zero there will be a disproportionate increase in the administrative burden on both HMRC and the taxpayer. As an example, if a relevant taxpayer with £2,001 of overseas income realises a currency gain of £5 on their return to the UK they would – strictly – be required to complete the CGT pages of the tax return and pay CGT of 90p (£5 x 18%).

Continuing with CGT, we consider it unfair that a resident, UK domiciled individual who is not ordinarily resident and who pays tax on their world-wide gains can be refused the annual exempt amount (AEA). An example of such a taxpayer would be an UK domiciled employee working abroad in a permanent overseas employment but who is seconded to work in the UK for a limited period. This individual may be resident but not ordinarily resident, and entitled to claim the remittance basis on their foreign income. If they do so, and their non-UK income exceeds £2,000, it is difficult to see why they should also forfeit the capital gains tax annual exempt amount. Accordingly, the clause should be revised to exclude this unfairness.

Proposed amendments

On page 153:

Line 1, leave out lines 1 to12

Line 4, after "entitled to" insert "set against the amount of any income that is taxable in the UK on a remittance basis"

Page 179:

Line 8, after "that year" insert "except to the extent of the amount, if any, of the individual's chargeable gains for that year that is taxable other than by virtue of section 12 below".

* Note: The first amendment omits section 809F completely. That is our preferred approach. If this amendment is not accepted, then the following amendments are our proposed fall back position. They retain the personal allowances and CGT annual allowance only to the extent that they can be used against UK source income or gains.

3. Section 809L Section 809K: relevant persons (page 157 of the Bill)

Background

As well as introducing the £30,000 charge for non-domiciled individuals who have been in the UK for at least seven out of the last 10 tax years, the Finance Bill also makes radical changes to the way in which the remittance basis will operate. This allows individuals who are resident for tax purposes in the UK but not domiciled here to be taxed on income and gains from outside the UK only to the extent that such income and gains are received or enjoyed in the UK.

The Government's aim is to remove various loopholes and anomalies which they consider allow such remittance users to bring funds to the UK without paying UK tax on their overseas income and gains. In particular the Government wants to change the law to prevent an individual giving away overseas taxable income and gains to a third party such as a relative who can then arrange for the individual to use or enjoy those funds in the UK without a tax liability arising.

In order to counter this, the Finance Bill proposes wide ranging changes so that where such funds are brought to the UK by a "relevant person," which is defined to include many of an individual's relatives as well as trusts and companies with which the individual has a connection, this will be treated as a remittance by the individual of income or gains and be taxable.

The problem

As the legislation is currently drafted it not only brings within the charge to tax the situation set out above, but also many other situations where there is no intention to achieve a tax advantage. This is, at least in part, because the current definition of relevant person is too wide and will result in a number of problems. Some examples of likely problem areas are set out below.

Grandchildren under 18

For example, a relevant person does not include a child over the age of 18 but it does include a grandchild under the age of 18 (see 809L(2)(d)). This could impose impossible burdens of compliance since an individual will be taxed by reference to the actions of others of which he will be unaware. As an example, it would require an individual who had given funds to his adult child outside the UK to report a remittance if that adult child provided a benefit to their own minor child in the UK out of those funds, such as purchasing a railway ticket for them. The taxpayer will not be able to monitor this and such onerous provisions undermine the whole system.

Charitable trusts

Sub-section (2)(g) added a further new category of relevant person, the trustees of a settlement of which a person falling within the other categories of relevant person is a settlor or beneficiary. This provision will cause a number of problems (see further below) but will create particular problems for charitable trusts established by non-domiciled but UK resident settlors. It will deter the trustees of such a charity from investing in UK assets so as not to give rise to a remittance for the settlor. From a practical point of view, the settlor is in an invidious position. He could never be in a position to complete his self assessment return without having detailed information as regards the investment activities of any trusts that he has established since 5 April 2008 and where he has used foreign unremitted income or gains to do so.

Broader effect on UK investment
The inclusion of trustees and overseas close companies in the definition of relevant persons also has a broader impact upon UK investment and business activity. It is common for individuals with assets in a number of countries to set up trusts which are shareholders in companies that own the assets. This is to simplify succession issues for their families. Some such trusts and companies are significant investors in the UK. As a result, if trustees of an overseas trust, of which an individual is either a settlor or a beneficiary, make an investment in the UK perhaps by buying shares listed on a UK stock exchange, this could be sufficient to trigger a tax liability for that individual. A similar situation would arise if an overseas company with which the individual had the necessary connection (see s 809L(f)) made an investment in the UK.

There may also be a remittance if trustees of an overseas trust pay fees to investment advisers in the UK or paid for UK legal, accounting or other professional advice provided in the UK. In all these cases the individual has not benefited and these are not the circumstances the Government had in mind.

The consequence of this treatment is not that the tax take for the Exchequer will rise, but rather that overseas trustees will instead make their investments in jurisdictions other than the UK and, wherever possible, will obtain any professional advice from firms based outside the UK. This will reduce UK tax receipts and discourage investment in the UK.

The proposed solution
The above examples are by no means exhaustive and underline the need for this definition to be more closely targeted. We believe that the Government's aim of blocking loopholes can be achieved without widening the definition of remittance to such an extent that innocent commercial transactions will become subject to UK tax. The Government seeks to prevent individuals giving away income/capital gains from which, they or their immediate family later benefit in the UK. This can be achieved by amending the legislation such that a tax liability will only arise in circumstances in which that individual, his spouse or his minor children receive a benefit, other than an incidental or otherwise minor benefit.

The payment by trustees of fees to UK advisers can very easily be prevented from being a taxable remittance by changing the focus from where the service is provided (ie. where the work is done) to where the service is enjoyed (ie. the place where the person takes the benefit of the advice).

Proposed amendments

On page 156:

Line 35, replace everything after "is" by "enjoyed in the United Kingdom by a relevant person".

On page 157:

Line 38, after (3)(a) insert ", (11)."

Line 41, after existing subsection (10) insert

"(11) For the purpose of Condition A, property brought to, or received or used in the United Kingdom by or for the benefit of a relevant person is to be disregarded in any of these cases –

(a) if the property or service is enjoyed virtually to the entire exclusion of the individual, his spouse or civil partner and his dependent children;

(b) if full consideration in money or money's worth is given by the individual, his spouse or civil partner or his dependent children for the enjoyment; or

(c) the property or service is enjoyed by the individual, his spouse or civil partner or his dependent children in the same way and on the same terms as it may be enjoyed by the general public or by a section of the general public.

(12) The references in subsection (11) above to spouse or civil partner of the individual do not include –

(a) a person to whom the individual is not for the time being married but may later marry, or a person of whom the individual is not for the time being the civil partner but of whom he may later be a civil partner, or

(b) a spouse or civil partner from whom the individual is separated under an order of a court or under a separation agreement or in such circumstances that the separation is likely to be permanent, or

(c) the widow or widower or surviving civil partner of the individual.

(13) In this section –

(a) "dependent child" means a child who –

(i) is under the age of 18 years,

(ii) is unmarried, and

(iii) does not have a civil partner, and

(b) "child" includes a stepchild."

On page 159:

Line 33, *leave out "all relevant persons" and insert "the individual, his spouse or civil partner and his dependent children"*

Line 35, leave out "a relevant person" and insert "the individual, his spouse or civil partner and his dependent children"

Line 36, leave out "relevant persons" and insert "the individual, his spouse or civil partner and his dependent children"

Line 39, insert after existing subsection (10):

"(11) The references in subsection (9) above to spouse or civil partner of the individual do not include –

(a) a person to whom the individual is not for the time being married but may later marry, or a person of whom the individual is not for the time being the civil partner but of whom he may later be a civil partner, or

(b) a spouse or civil partner from whom the individual is separated under an order of a court or under a separation agreement or in such circumstances that the separation is likely to be permanent, or

(c) the widow or widower or surviving civil partner of the individual.

(12) In this section –

(a) "dependent child" means a child who –

(i) is under the age of 18 years,

(ii) is unmarried, and

(iii) does not have a civil partner, and
(b) "child" includes a stepchild."

On page 160:

Line 23, leave out "all relevant persons" and insert "the individual, his spouse or civil partner and his dependent children"

Line 25, leave out "a relevant person" and insert "the individual, his spouse or civil partner and his dependent children"

Line 26, leave out "relevant person" and insert "the individual, his spouse or civil partner and his dependent children"

Line 29, insert after existing subsection (7)

"(7) The references in subsection (6) above to spouse or civil partner of the individual do not include –
(a) a person to whom the individual is not for the time being married but may later marry, or a person of whom the individual is not for the time being the civil partner but of whom he may later be a civil partner, or
(b) a spouse or civil partner from whom the individual is separated under an order of a court or under a separation agreement or in such circumstances that the separation is likely to be permanent, or
(c) the widow or widower or surviving civil partner of the individual.

(8) In this section –
(a) "dependent child" means a child who –
(i) is under the age of 18 years,
(ii) is unmarried, and
(iii) does not have a civil partner, and
(b) "child" includes a stepchild."

4. Section 809P Sections 809K and 809O: transfers from mixed funds (page 161 of the Bill)

Background
Mixed funds are derived from various sources such as:

- funds from before the individual became UK resident;
- gifted funds;
- funds derived from UK income and gains; and
- funds derived from foreign income and gains.

For tax years prior to 2008/09 there were no statutory rules on the treatment of remittances from mixed funds and one followed the prevailing non statutory practice. The statutory provisions in Finance Bill 2008 apply to transfers from mixed fund accounts where the foreign income or foreign gains have arisen after 6 April 2008.

A remittance is to be matched to funds added to the account in the period from the start of the tax year to the date of the remittance in the following specified order:

1) employment income subject to UK tax;
2) relevant foreign earnings where there is no foreign tax credit;
3) foreign specific employment income where there is no foreign tax credit;

4) relevant foreign income where there is no foreign tax credit;
5) foreign chargeable gains where there is no foreign tax credit;
6) employment income subject to a foreign tax;
7) relevant foreign income subject to a foreign tax;
8) foreign chargeable gains subject to a foreign tax;
9) income or capital not falling into any of the categories above.

If the remittance is in excess of the funds added since the start of the current tax year one matches to funds added in the preceding tax year in the same order and so on, until the remittance has been matched in full. Tax years are taken on a last in, first out basis and matching to funds in the specified order.

The problem

The proposals for dealing with remittances from mixed accounts remain essentially unchanged compared with the draft legislative proposals released in January 2008. The new rules overturn the previous practice as set out in SP5/84. The practice set down in SP5/84 is more favourable to the taxpayer. We feel that the unfavourable change to be brought in by new s 809P(4) has been inadequately highlighted in the Explanatory notes. We think that it is counter-intuitive and penal to tax previously untaxed income before income that has already suffered tax and there is a risk that taxpayers will not understand the rules. Well advised tax payers will not operate mixed accounts so it will be unrepresented taxpayers and those who make mistakes whose tax liability is increased under these provisions.

Leaving aside the problems with the order of identification in new s 809P (4) the proposals are overly complex and the record keeping required to identify all sources of funds so as to categorise them correctly will present a particular problem for the unrepresented taxpayer. Identifying remittances from mixed funds has always been extremely difficult but codifying a rigid set of matching rules takes away the flexibility and ability to be pragmatic that existed previously. There is a significant danger of inadvertent non-compliance which is heightened by the fact that the rules apply from 6 April 2008 and so there is no time to educate affected taxpayers in advance. We think that the Minister needs to publish a statement on how HMRC plans to assist taxpayers with the additional compliance burden.

The Finance Bill provisions fail to explicitly address how overseas expenditure, transfers between overseas accounts or gifts made overseas from the mixed account are to be treated. We know that Government amendments will be introduced in this area and reserve the right to comment on these in a Report Stage Briefing. We would, however, welcome Ministerial clarification that the interaction of s 809Q (2) and s 809P means that the amount of income or capital of the individual for the relevant tax year in the mixed account immediately before a transfer does not include funds that have been removed from the account by earlier transfers or payments either to the UK or overseas.

The proposed solution

The matching rules should be changed so that matching is undertaken in an order favourable to the taxpayer and a provision should be inserted, where the taxpayer has insufficient information to support a claim that foreign tax has been suffered, to allow for allocation against the foreign income or foreign gains paragraph which has not been subject to foreign tax.

Proposed amendments

On page 162:

Omit lines 42 to 50

After line 41 insert:

"(4) The kinds of income and capital are-

(a) income and gains subject to a UK tax,
(b) employment income subject to a foreign tax,
(c) relevant foreign income subject to a foreign tax,
(d) foreign chargeable gains subject to a foreign tax,
(e) relevant foreign earnings (other than income within paragraph (b)),
(f) foreign specific employment income (other than income within paragraph (b)),
(g) relevant foreign income (other than income within paragraph (c)),
(h) foreign chargeable gains (other than chargeable gains within paragraph (d)), and
(i) income or capital not within another paragraph of this subsection.

Notwithstanding the above where an individual has insufficient information to be able to determine whether foreign income or foreign gains has suffered foreign tax he shall not be deemed to have made an incorrect return if he treats the funds as relating to the appropriate income or gains paragraph with respect to which foreign tax has not been suffered."

On page 163:

Omit lines 1 to 7.

5 Section 809R Sections 809K to 809Q: foreign chargeable gains accruing on disposal other than for full consideration (page 163 of the Bill)

Background
The accepted position prior to 6 April 2008 where a foreign domiciled individual gifted foreign sited assets was that whilst a deemed gain was realised it could not be remitted as the gain was not represented by any money or money's worth in the hands of the individual making the gift. Accordingly, provided there was a genuine gift, with the donee (who could be the trustee of an offshore settler-interested trust) assuming full and unfettered control of the property gifted, the gain arising on the making of the gift could never become assessable.

The position is covered in the HMRC CGT manual at CG25331 as follows:

> *"Where an individual assessable on the remittance basis has gifted foreign assets to another person and has not received any disposal proceeds he or she may still be deemed to have realised a gain on the disposal. As that gain is not represented by any money or moneys worth in the hands of the individual making the gift, it is not possible for the individual to remit the gain. The gain arising on the making of the gift can therefore never become assessable."*

New section 809R changes the position.

The problem
The opinion of the profession is split over the meaning of new s 809R. The better view is that it does not apply in relation to gains which arose prior to 6 April 2008. It is understood that it is the view of HMRC that new s 809R will not apply to gains which

arose prior to 6 April 2008. Accordingly, one looks to the old legislation and, provided there was a genuine gift there will be no tax liability with respect to the gain that arose when the gift was made.

Whilst is helpful for HMRC to make their view on the issue known the doubt and concern still remains. The potential sums in point will often be significant and it is likely that inadequate records will have been kept to establish the position since at the time the law was clear that there could never be a tax charge as a result of the gift. Accordingly, taxpayers who made gifts of foreign assets offshore prior to 6 April 2008 will be concerned by the split of opinion. Taxpayers who made absolute unfettered gifts of foreign assets offshore, prior to 6 April 2008, had a legitimate expectation that the gain deemed to have been realised on the making of the gift would never come into charge and the new legislation should be absolutely clear on this point.

The proposed solution

To provide clarity and put the matter beyond doubt an amendment should be introduced that provides that s 809R(1)(a) cannot apply in relation to gains which arose prior to 6 April 2008.

Proposed amendment

On page 164:

After line 2 insert:

"(3) This section will not have effect with respect to gains accruing to an individual on the disposal of an asset if the disposal took place prior to 6 April 2008."

6. Sections 809T to 809Y: Exempt property (page 164 of the Bill)

i) These sections broadly exempt certain property from the remittance provisions. We have a number of concerns on the interaction of these sections, particularly in the case of property brought into the UK for personal use. Our overriding concern, however, is that, other than for property brought in for public display, the exemptions only apply if the property derives from relevant foreign income (ie. excluding foreign earnings, employment income and gains).

We are unable to understand the logic of such a restriction that, in our view, complicates the law unnecessarily, particularly for the unrepresented taxpayer who may well not appreciate the distinction. In order that a long and detailed calculation need not be undertaken every time, for example, a Polish builder flies into the UK with a newspaper bought at Warsaw airport, we suggest that the exemptions at s 809T(4) and (5) be extended to apply to property derived from all foreign income and gains.

Proposed amendments

Page 164:

Line 21, leave out "that derive from relevant foreign income"

Line 24, leave out "that derives from relevant foreign income"

ii) As currently drafted the provisions on exempt property are far too complicated, difficult to understand and likely to be unworkable in practice. The next two paragraphs illustrate just some of the anomalies that arise in respect of an item of ‘personal use’ property.

An item of ‘personal use’ property (defined as clothing, footwear, jewellery and watches) that costs under £1,000 is exempted under both s 809T(4) and s 809T(5)(a). As such, if the item is sold whilst in the UK there is a remittance of the original cost at the time of sale, even if the item is sold at a car boot sale for £1 (s 809U(3)). Yet if the item is taken overseas and sold in the UK, whilst still physically overseas, there is no remittance. If the item is scrapped or gifted in the UK there is no remittance, neither is there a remittance if the item is stolen. This remains the case even if the item is insured and monies are received in settlement of a policy claim.

An item of ‘personal use’ property that costs over £1,000 is only exempt under s 809T(4). As such if it is gifted whilst in the UK to anyone other than a relevant individual, even to a charity shop, the cost of the item becomes a remittance at that date under s 809U(4), although there is no remittance if the item is gifted to an overseas charity shop whilst abroad. The same provisions mean that if such an item is scrapped or stolen whilst in the UK there is a remittance of the cost of the item, although this is not the case if the item is scrapped or stolen overseas. If, however, the item has been in the UK for less than 275 days and the non-domiciled individual could show that the item was taken overseas after it was stolen (admittedly unlikely), then there will not be a remittance. If a gift is made of the item by the non-domiciled individual to their infant child there is no remittance as the property continues to meet the personal use rule (s 809W(2)). When that child reaches their 18th birthday, however, a remittance will arise if the property is in the UK, although not if the property is overseas on that day even if it is brought back to the UK the following day.

We would suggest that these provisions be redrafted to make them comprehensible and accessible to the taxpayer.

Proposed amendments

On page 165:

Line 4, add at end

“(6) For the purpose of subsection (4) above property is to be treated as not ceasing to meet a relevant rule if it is lost, stolen, destroyed, scrapped or otherwise ceases to exist or it is disposed of by way of gift other than to a relevant person and property gifted to a relevant person that is exempt property in the hands of that person immediately after the gift shall not be treated as ceasing to be exempt property solely by reason of that person subsequently ceasing to be a relevant person.

(7) If exempt property ceases to meet one of the relevant rules because it is sold to someone other than a connected person the amount chargeable to tax shall be the sale proceeds received and not the amount referred to in section 809O above.”

iii) We are unable to understand the need for the restriction in s 809V(3)(a) and why it is necessary to mirror the VAT provisions in this respect.

Proposed amendments

On page 165:

Line 10, leave out from "article 5(1) to the end of line 20 and insert "is for the purpose of public display at a museum, gallery or other premises within sub-paragraph (8) below".

On page 166:

Line 1, leave out from "an approved "to the end of line 4 and insert "any museum, gallery or other premises at which it is usual to display items for access to the public and where the item will be on display to the public throughout the normal opening hours of that place or where throughout such times it will be available for public access"

7. Paragraph 49 (page 177 of the Bill)

Background
The paragraph substitutes a revised s 832 (and ss 832A and 832B) into ITTOIA 2005 to disapply the previous rule that an amount of income could not be taxed in the UK if the source of that income did not exist in the year of remittance. This is simple anti-avoidance legislation with which there is little dispute.

The problem
There is, however, a significant practical problem with the clause as currently drafted. HMRC had long recognised and accepted the previous position which means it was used by a large number of taxpayers on many occasions over many years. The problem is therefore one of identification. As drafted any sum which was, for example, income when it arose will be taxed as income in the year it is remitted. It will be difficult, if not impossible, to correctly and accurately identify these sums as they have been treated as capitalised and assimilated into other funds or reinvested in other assets.

The proposed solution
There was no requirement to keep records at the time of the transaction and it will not be possible for many taxpayers to comply with the provision as drafted and correctly complete a self assessment return. The legislation needs to contain some delimitation.

Proposed amendment

On page 178:

Line 2, after "when the income is remitted" insert "where the source ceased after 5 April 2007".

8. Section 832B Section 832: deductions from remitted income (page 178 of the Bill)

Background
The position prior to 6 April 2008 was that deductions were not generally allowed from relevant foreign income charged to tax on the remittance basis. The one exception to that rule was where the income in question was from a trade, profession or vocation carried on outside the UK. The restriction and exemption are currently found at ITTOIA 2005 s 832 (4). This provision has been carried forward into new section 832B.

The problem

It appears to us illogical and unfair that deductions are not allowed from overseas property income for legitimate expenses which would be allowed if the taxpayer were taxed on the arising basis.

We do not feel that an unrepresented taxpayer could be expected to realise that he or she would be taxed on the income received without benefit for deductions and it does not seem fair that this should be so. Consider the following example:

Mr X is UK resident and domiciled in Switzerland. He has a cottage in France which in the year to 5 April 2009 he rents out for €600 a month. He does not have a French bank account and income is paid straight to his UK account. When legitimate income deductions are taken into account (mainly interest on a loan to purchase the property and agent's fees) he would have a taxable profit of €3,600 if taxed on the arising basis. It is not, however, in his interest to be taxed on the arising basis as he has significant Swiss investment income and trust income which he does not remit. Accordingly, he makes a remittance claim. The consequences of this are that he will be taxed on €7,200.

It appears from the following FAQ on the HMRC website that the Government agree that the position set down above, at least with respect to interest on a loan to acquire a foreign property, requires amendment.

> *"Can you confirm new section 832B ITA includes people letting a foreign property so they can have a deduction for interest paid on a loan to acquire the foreign property?*
> Yes. So long as the letting of the foreign property is being carried on a commercial basis."
> We are not sure of any logical reason why interest should be allowed as a deduction but not any other legitimate income expense. More importantly we do not feel that the current wording of section 832B allows for such a deduction.

The proposed solution
Given the complexity of the Schedule 7 legislation and the timescale imposed, we understand how amending the legislation to allow for the deduction of income expenses from foreign letting income taxed on the remittance basis could have been overlooked. ***We feel that the necessary amendment is simple and should be uncontroversial.***

The legislation needs to be amended such that there are two exemptions to the general rule that deductions are not allowed from relevant foreign income, that is:

- the existing provision allowing deductions for expenses where the relevant foreign income comes from a trade, profession or vocation carried on outside the UK; and
- a new provision allowing deductions for expenses where the relevant foreign income comes from letting a foreign property.

Proposed amendments

On page 178,

Omit lines 40 to 45 and insert:

(1) Deductions are allowed from the income mentioned in section 832 (2) where:

a) *the income is from a trade, profession or vocation carried on outside the United Kingdom; and*
b) *the income is overseas property income.*

(2) In the case of section 832B (1)(a) the same deductions are allowed as are allowed under the Income Taxes Acts where the trade, profession or vocation is carried on in the United Kingdom."

(3) In the case of section 832B (1)(b) the same deductions are allowed as are allowed under the Income Taxes Acts where the property business is carried on overseas and taxed on the arising basis.

9. Paragraph 86 (page 186), grandfathering of interest payments for offshore mortgages

Background
Prior to 6 April 2008 repaying, out of foreign income or foreign gains, the capital element of an offshore UK linked debt constituted a remittance. For this purpose UK linked debt meant a debt for money lent or for interest on money so lent:

- to the individual in the UK;
- outside the UK and received in the UK; or
- to repay a debt lent initially to the individual in the UK or subsequently received in the UK (if the funds were brought to the UK after the loan was paid off that would also constitute a remittance).

The settlement offshore from foreign income or foreign gains of the interest as it fell due did not, however, constitute a remittance. The Government has made it clear that from 6 April 2008 Finance Bill 2008 is to extend the debt provisions such that as well as catching the repayment of UK linked debt the payment offshore of the interest on a UK linked debt will constitute a remittance (this was not the case pre 6 April 2008).

The legislation provides for limited transitional provisions. Currently to fall within these provisions:

- the loan must be a qualifying loan, that is:
  - the loan funds must have been lent prior to 12 March 2008;
  - the loan must have been made for the sole purpose of enabling the individual to acquire an interest in UK residential property;
  - before 6 April 2008 loan funds must have been received in the UK, applied to acquire an interest in UK residential property and the loan itself secured on that property.

- the interest on the offshore loan must be paid offshore from relevant foreign income – this does not include funds representing the proceeds from offshore income gains (note that whilst prior to 6 April 2008 the interest could have been paid offshore from any foreign income or foreign gains without there being a remittance the Finance Bill transitional provisions do NOT apply where the interest is paid from foreign employment income or foreign gains);

Provided all these conditions are met the payment of the loan interest will not constitute a remittance. Unless entitlement to relief is forfeited, the transitional period will last until the repayment of the loan or 5 April 2028, if earlier. Paragraph 86 (3) provides that ALL entitlement to relief will be lost should the following occur after 11 March 2008:

- any term upon which the loan was made is varied or waived;
- the debt ceases to be secured on the residential property or
- any other debt is secured on the residential property.

The last bullet point (which corresponds to paragraph 86 (3)(c) goes further than the Budget Day material in that taking out an entirely new loan would mean that entitlement to the transitional provisions is forfeited.

The problem

Foreign domiciliaries will have taken out offshore UK linked loans with the legitimate expectation that they could service the interest costs from foreign income and gains without this constituting a remittance. As can be seen from the background details provided above the transitional provisions are very restrictive.

We fail to understand why relief is not allowed under the transitional provisions for interest paid overseas from foreign earnings and capital gains. Under the old rules, both could be used to pay interest on an offshore mortgage secured on UK property without that resulting in a remittance.

Whilst we can understand that a special economic case can be made for allowing relief with respect to residential property this seems harsh as individuals who took out loans, say to fund UK businesses, may also have borrowed more than they would normally be able to afford as they could pay the interest from untaxed foreign income or gains.

Even just considering residential property the provisions appear unduly narrow as they deny relief where there has been a remortgaging exercise or part of the loan funds have been used to repair, renovate, decorate or furnish the property.

Furthermore, there is a significant problem with paragraph 86 (1)(c)(iii) which specifies that there will only be relief where the debt is secured on the UK property. This is very restrictive as in practice many offshore lenders prefer to have security over assets under management with them. Nevertheless, the loan can be demonstrated as being for the purpose of purchasing the interest in the land that was acquired.

The provisions in paragraph 86 (3) seem unnecessary and will result in foreign domiciliaries accidentally breaching the conditions to qualify for relief. This seems to us unfair as again it will be taxpayers who have the knowledge and wealth to obtain specialist advice who will be warned of the traps and unrepresented taxpayers who will be the losers. Paragraph 86(3)(c) seems particularly harsh as this restriction was not announced on Budget Day.

The proposed solution

The restrictive provisions should be deleted such that all offshore loans taken out prior to 12 March 2008 are qualifying loans and interest on the debt can be paid offshore out of foreign income or foreign gains without it being treated as a remittance.

Proposed amendments

Set of amendments 1 - to remove all restrictions

On page 187:

Omit lines 1 to 9 and replace with:

"(b) before 6 April 2008 the money was received in the United Kingdom."

Line 10, delete "Relevant foreign income" and replace with "Foreign income and gains."

Omit lines 13 to 21.

Set of amendments 2 - to only allow relief for residential property If set 1 is felt to be too wide.

On page 187:

Omit lines 1 to 3 and replace with:

"(b) the loan was made for the purpose of enabling the individual to:

(i) acquire an interest in residential property in the United Kingdom;
(ii) carry out a remortgaging exercise with respect to residential property in the United Kingdom;
(iii) furnish, decorate, repair or enhance a residential property in the United Kingdom"

On line 6 delete "to acquire an interest in" and delete line 7 insert "for any of the purposes referred to in subsection (1)(b)."

On line 10 delete "Relevant foreign income" and replace with "Foreign income and gains."

Omit lines 13 to 19.

10. Paragraph 93 entitled "14A Section 13: non-UK domiciled individuals" (page 189 of the Bill)

Background
Offshore companies who do not have a UK branch or agency are not subject to UK capital gains tax (CGT).
From the time that CGT was introduced there have been anti-avoidance provisions designed to prevent UK domiciled and UK resident and/or ordinarily resident individuals from avoiding CGT by exploiting the fact that an offshore company is outside the territorial scope of CGT by holding assets within offshore companies they controlled. Schedule 7 paragraph 93 introduces new s 14A which extends the anti-avoidance provisions to UK resident or ordinarily resident foreign domiciliaries. The provisions before 6 April 2008 and the changes that will be made by the Finance Bill 2008 provisions are summarised in the table below.

Summary of current effect of the anti-avoidance provisions (s 13 TCGA 1992)	**Summary of Finance Bill changes effective from 6 April 2008**
Attributes gains arising to an offshore company (which would be a close company if it were resident in the UK) to: • UK resident / ordinarily resident and UK domiciled qualifying	The provisions are extended such that gains will be attributed to foreign domiciliaries who are UK resident or ordinarily resident. Where the foreign domiciliary is a remittance basis user they will be taxed

participators who are chargeable to tax on the gain attributed in the tax year of attribution; and • offshore trusts which meet the qualifying participator conditions (the gain attributed is included within the s 87 TCGA 1992 pool)	on the gains attributed on the following basis: • UK gains – subject to tax with respect to the tax year in which they arise • foreign gains – the remittance basis will apply such that they will only suffer UK tax if they are deemed to remit the gain attributed.

The problem
The Finance Bill legislation contains no transitional provisions. This means that foreign domiciliaries will be subject to tax on gains that relate to the period prior to 6 April 2008. As has been recognised by government where trust structures are concerned foreign domiciliaries had a legitimate expectation that they would not be subject to a UK CGT charge with respect to gains on the disposal of chargeable assets held within offshore structures. There should, accordingly, be transitional provisions for offshore companies held directly by individuals in the same way as is provided in the Finance Bill legislation for assets held within trust structures immediately before 6 April 2008.

Furthermore, providing that gains attributed to individuals with respect to UK assets disposed of, will be taxed on the arising basis will act as a major disincentive to investment in the UK. It is particularly surprising that the legislation for offshore companies has been amended in this way as the Finance Bill legislation for offshore trust structures provides that foreign domiciliaries are only taxed if attributed gains are remitted to the UK. The contrast can best be shown by way of an example:

Example

X is foreign domiciled and UK resident.

Position where Mr X owns the offshore company
Mr X is foreign domiciled and UK resident. He owns the entire share capital of N Ltd a Jersey company. In the year to 5 April 2009 the company realises a gain of £1 million on the disposal of a UK trading company. A significant amount of the gain related to the period before 6 April 2008. X will be taxed on the whole £1 million gain in 2008/09 even if he does not receive any funds from the company or any funds are kept outside the UK. This is because no rebasing election is available with respect to companies not within a trust structure and UK gains are taxed on the arising basis.

Position where an offshore trust of which X is the beneficiary owns the offshore company
If N Ltd had been held by the XYZ Trust of which X was the life tenant there would be no tax charge whatsoever unless X received a capital payment. If did receive such a payment and was a remittance basis user in the tax year there would only be a charge on a remittance to the UK. Furthermore, provided the trustees made the rebasing election by the due date the £1 million gain would not be subject to CGT. Rather the amount subject to tax is the proportion of the overall gains element for all trust disposals in the year that is calculated to have arisen after 5 April 2008.

It was never expected that foreign domiciled individuals would receive a rebasing to 6 April 2008 value in relation to their direct holdings in offshore companies with respect to which they were qualifying participators. It is, however, hard to follow the logic of allowing a wholesale rebasing of assets within an offshore trust structure (including assets owned by an underlying company) where there are no general provisions to allow for a rebasing with respect to assets owned by an offshore company. The transitional provisions with respect to the s 87 TCGA 1992 charge are very welcome but it makes no sense to allow transitional provisions where there is a trust structure but not where an offshore company is held directly.

The proposed solution
The legislation should be amended so that as with gains attributed from offshore trust structures:

- gains attributed from offshore companies should only be taxed if there is a remittance to the UK; and
- a rebasing election can be made by the directors of offshore companies.

Proposed amendments

On page 189:

Omit lines 15 to 18 and insert:

"(2) The part of the chargeable gain treated as accruing to the individual ("the deemed chargeable gain") is a foreign chargeable gain within the meaning of section 12 (non UK domiciled individuals to whom remittance basis applies)."

After line 36 insert new paragraph 94 as follows:

(1) The following provisions apply to a company if—
(a) section 13 applies to the company for the tax year 2008-09, and
(b) the directors of the company have not opted out from the provisions within this paragraph.
(2) An election to opt out from the provisions within this paragraph may only be made on or before the anniversary of the first 31 January to occur after the end of the first tax year (beginning with the tax year 2008-09) in which chargeable gains are attributed under TCGA 1992 s 13 to a participant in the offshore company.
(3) An election under sub-paragraph (2) is irrevocable and must be made in the way and form specified by the Commissioners for Her Majesty's Revenue and Customs.
(4) The only information that need be provided in the course of making the election is the name of the offshore company and the name of the director making the election.
(5) Sub-paragraph (7) applies if—
(a) chargeable gains are treated under section 13 of TCGA 1992 as accruing to an individual in a tax year, and
(b) the individual is resident, but not domiciled, in the United Kingdom in that year.
(6) The individual is not charged to capital gains tax on so much of the aggregate chargeable gains attributed to him in the tax year as exceeds the relevant proportion of the gains.
(7) The relevant proportion is A/B where—

A is the portion of the gain that would what have been treated as accruing to the participator, if immediately before 6 April 2008 every relevant asset had been sold by the directors and *immediately re-acquired by them at the market value at that time; and*

B is the actual gain attributed to the individual.

(8) For the purposes of sub-paragraph (7) an asset is a "relevant asset" if—
(a) by reason of the asset, a chargeable gain or allowable loss accrues to the trustees in the relevant tax year, and

(b) the asset has been comprised in the company from the beginning of 6 April 2008 until the time of the event giving rise to the chargeable gain or allowable loss.

11. Paragraph 112 Rebasing election (page 196 of the Bill)

Background

The two main CGT anti-avoidance provisions with respect to offshore trusts are:

- the beneficiary charge (as set down in s 87 TCGA 1992); and
- the settlor charge (as set down in s 86 TCGA 1992 with supplementary provisions in Sch 5 of the TCGA).

Prior to 6 April 2008 neither provision subjected foreign domiciliaries to a CGT charge even where capital payments from offshore trusts were remitted to the UK.

The Finance Bill 2008 provisions are complex. Broadly they can be summarised as follows:

- only the beneficiary charge will be extended to foreign domiciliaries and, if they are remittance basis users, they will only be subject to a CGT charge if they remit the capital payment to the UK (this is regardless of whether the gain has arisen as a result of a disposal of UK or foreign chargeable assets and accordingly is an extended version of the standard remittance basis);

- there are automatic transitional provisions aimed at ensuring that, provided their domicile status does not change, foreign domiciliaries will not be subject to a tax charge with respect to capital payments paid and gains realised before 6 April 2008; and

- there are elective transitional provisions (explained in more depth below) aimed at ensuring that, provided their domicile status does not change, foreign domiciliaries will only be subject to CGT on the post 6 April 2008 portion of the gains realised on post 6 April 2008 disposals which are matched to capital payments made to them after 6 April 2008.

The transitional provisions will apply to foreign domiciliaries regardless of whether they are remittance basis users provided that their domicile status does not change.

Elective transitional provisions
Trustees of any settlement that is non-resident as at 6 April 2008 can make what is loosely described as a "6 April 2008 rebasing election". The election is only relevant where the trust has foreign domiciled beneficiaries. The rebasing election is

irrevocable. It is an all or nothing provision applying to every asset within the trust structure immediately before 6 April 2008 (the assets are referred to within the legislation as "relevant assets". Included within the rebasing election definition of relevant assets are assets held by underlying companies where the anti-avoidance legislation apportions company gains to the trustees. Relief for assets held within underlying companies is lost if the trustees decrease their share in the company.

The Finance Bill legislation states that the rebasing election "must be made in the way and form specified by Her Majesty's Revenue and Customs". There will be a prescribed form on which to make the rebasing election and certain (as yet unspecified) disclosures will have to be made.

The deadline for making the election is 31 January following the end of the tax year in which the first of the following takes place:

- a capital payment is received, or treated as received, by a beneficiary (regardless of their domicile) of the settlement, and the beneficiary is resident in the UK in the tax year in which it is received; or

- the trustees transfer part (but not all), of the trust property to a new settlement.

A cash payment is not necessary to trigger the time limit. Where a UK resident beneficiary has free use of a UK property owned by the trust or an interest free loan from the trust this will trigger the start date.
If such a rebasing election is made validly (regardless of whether he or she is a remittance basis user):

- net trust gains will be allocated to capital payments made to the foreign domiciliary in the tax year in the normal manner; but

- the foreign domiciliary is only taxed on the gains element that is calculated to have arisen after 5 April 2008.

This is achieved by applying a mathematical formula to the actual net gain per tax year matched to the capital payment made to the foreign domiciled beneficiary. The formula is A/B, where:

- **A** is the deemed net gain that would have arisen in the tax year if the base cost of every chargeable asset within the trust as at 6 April 2008 was equal to its market value as at 6 April 2008; and

- **B** is the actual s 87 deemed gains added to the gains pool in the tax year.

It should be remembered that all of the above is academic if the foreign domiciliary is a remittance basis user and does not remit the capital payment (as a UK tax charge will only arise if there is a remittance).

The problem
We welcome the transitional provisions contained within the legislation for offshore trust structures. However, this area of legislation is highly complex and we feel that the timescale to draft legislation has been too short. We know, from the Finance Bill 2008 Explanatory Notes on Schedule 7 (page 51), that there will be Government amendments to deal with various technical issues with the legislation such as amendments:

- to the offshore income gains provisions to ensure that the order of matching offshore income gains before other chargeable gains under ss 87 and 87A of TCGA applies across all years. Chargeable gains accruing in a later year are to be matched with capital payments of that year or later years only where there are no offshore income gains that accrued in an earlier year available for matching;

- to paragraphs 95 to 130 for some of the changes to the non-resident trusts legislation, in particular, changes to 87 of and Schedule 4C to TCGA. These further changes will ensure the legislation works as intended in relation to non-UK domiciled beneficiaries;

- to paragraphs 136 to 142 for some elements of the operation of the transfer of assets abroad provisions which will ensure that offshore income gains which are taxable under the transfer of assets code are treated as relevant foreign income for the purposes of applying the remittance basis to that income.

We confine ourselves here to key concerns that we do not think will be addressed by Government amendments. We do, however, feel that given the complexity serious consideration should be given to postponing the start date of the legislation until 6 April 2009 so that Finance Act 2009 could correct any technical errors that will inevitably be found to exist . If this is not possible we would welcome a Ministerial statement that any technical errors uncovered with respect to this legislation, and Schedule 7 in general, that disadvantage taxpayers will be corrected with retrospective effect by Finance Act 2009. We would like to make clear that in saying this we are in no way disparaging the efforts by civil servants working on Schedule 7. We just believe that it is not possible in the time scale imposed to produce legislation of this complexity that will not contain errors.

The need to make an election
Our overriding concern is that not all taxpayers may benefit from the rebasing election as trustees may not make the election in time. Prior to 6 April 2008 offshore trustees did not necessarily need much knowledge of the UK tax system. Provided income was segregated from capital and cleared out of the structure through offshore payments to foreign domiciled beneficiaries on an annual basis the trustees had no need to further concern themselves with UK tax. It will take time for the extent of these changes to be digested. The period during which an election can be made is quite limited and could easily be missed where trustees have not sought specialist advice in time. Events that took place prior to 6 April 2008 (such as an interest free loan provided by the trust or allowing free use of UK accommodation owned by the trust) can, if they continue after 5 April 2008, give rise to deemed capital payments in 2008/09 and the need for an election to be made by 31 January 2010. Since the trustees will have done nothing active in 2008/09 they may not realise they have made a capital payment and not appreciate the need for advice and action. Beneficiaries cannot compel the trustees to seek specialist advice or to complete the election (which means having contact with an overseas tax authority when there is no need to and may be something the trustees have no interest in doing). This means that foreign domiciled beneficiaries through no fault of their own may forfeit entitlement to the rebasing provisions.

Where an election must be made the extent of the disclosure necessary
The current legislation is silent as to the extent of disclosure required for a rebasing election to be made. The prospect of having to complete a detailed form requiring significant disclosure with respect to trust assets is a key concern and will deter trustees from making the election even though to do so would reduce the beneficiaries' tax liabilities.

The rebasing election itself does not trigger any tax charge and so we do not see that anything but the most minimal information is required to make the election. The name of the trust, the trustee signing the election, the fact the election is being made and the date would seem to us sufficient.

Paragraph 112(9)(c)
We understand that this provision acts to deny all relief under the rebasing provisions, for assets held by an underlying company, where trustees reduce their holding in the company in the relevant period (from 6 April 2008 to immediately before the event giving rise to the chargeable gain).

We have two issues with the legislation. Firstly, we find the wording difficult to follow and are aware that there are concerns over its interpretation. Secondly, we are unclear as to why it is necessary. We believe there are some concerns that the rebasing election could be manipulated by a reduction in the trustees holding in the company. We would welcome illustrations of the exact avoidance envisaged. We fear that the provision could result in an unfair loss of relief for beneficiaries where the trustees' holding in the company is reduced through no fault of their own. For example, the company may have a rights issue and the trustees do not have the funds to purchase additional shares so their proportion of the company falls in relation to other shareholders.

The proposed solution

The need to make an election
The rebasing provisions of paragraph 112 should be automatic with the trustees having a timeframe in which they can opt out.

Time limit and disclosure
If our proposal to make the rebasing election automatic is not accepted:

- the time limit for the election should be extended by a year; and

- disclosure should be limited to the name of the trust and the trustee signing the election.

Paragraph 112 (9)(c)
The provision should be deleted. If Government wants to prevent a specific type of behaviour targeted anti-avoidance provisions should be inserted.

Proposed amendments

To make the rebasing election automatic

On page 196:

Line 28 delete "made an election under this subparagraph" and insert "have not opted out from the provisions within this paragraph".

Line 30 delete "An election under sub-paragraph (1)" and insert "An election to opt out from the provisions within this paragraph".

Line 30 after "on or before the" insert "anniversary of the"

Line 40, delete (1) and replace with (2).

Line 42 insert:

"(5) The only information that need be provided in the course of making the election is the name of the trust and the name of the trustee making the election."

Time limit and disclosure

If the above amendments to make the rebasing election automatic are not accepted:

On page 196:

Line 30 after "on or before the" insert "anniversary of the"

After line 42 insert:

"(5) The only information that need be provided in the course of making the election is the name of the trust and the name of the trustee making the election."

Paragraph 112(9)(c)

On page 197:

Line 27, delete "and" and replace the comma after "gains" with a full stop.

Omit lines 28 to 34.

12. Paragraph 14 (page 170 of the Bill)

Background

It is unclear what happens if overseas earnings (ie employment income) are used to pay the £30,000 by means of a cheque payable to HMRC drawn on the overseas account. On the face of it, this is not a remittance under new s 809S ITA 2007 (see page 164 of the Bill). However, whilst the amendments to ITEPA 2003 made by paragraph 14 specifically import ITA 2007, ss 809K to 809Q into ITEPA (see page 170, paragraph 14(6)),, they make no mention of new s 809S. This suggests that as ITEPA is a separate Act to ITA, s 809S does not apply for the purpose of determining whether relevant foreign earnings have been remitted. However if that is right it would have been highly misleading of HMRC not to have made that clear when they said that the direct payment of the £30,000 would not create a remittance. It may be that s 809S is for reassurance only and that the direct payment would not in any event create a remittance under ss 809K to 809Q. The payment is not a remittance of cash by the taxpayer, HMRC is not a relevant person and the payment is certainly not a gift to the UK Government. We also doubt that it is a relevant debt, as it will be brought into the UK by HMRC for the benefit of the UK Exchequer, not for the benefit of the taxpayer, and HMRC is not providing service to the taxpayer. Nevertheless the position looks unclear.

Proposed amendment

On page 170:

Line 14, after "809Q" insert "and 809S"

Further information

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Supplementary Committee Stage Briefing, Clause 23 and Schedule 7, Remittance basis

WHAT THIS BRIEFING COVERS

This briefing is divided into two parts.

Part one sets down our preliminary comments with respect to the Government amendments, as at the 12th June, (though it excludes the amendments relating to ITEPA 2003 and the employment related securities changes, as at this stage we do not have a full compliment of amendments).

Part 2 sets out some examples which illustrate the different tax treatment where underlying gains are made by trustees and a rebasing election is made, as compared to gains made directly by an offshore company. The examples reinforce our recommendation that the rebasing election should be extended to offshore companies. We have also set out a final example which demonstrates that the new rules could disadvantage investment into the UK.

All references below are to Schedule 7 of the Finance Bill 2008 unless otherwise stated.

1. PART 1

PRELIMINARY COMMENTS ON THE GOVERNMENT AMENDMENTS (APART FROM RELATING TO ITEPA 2003 AND THE EMPLOYMENT RELATED SECURITIES CHANGES)

Remittance basis charge (RBC) amendments (339 to 347 and 349 to 350)

The remittance basis charge

The remittance basis charge is modified somewhat so that it will always be £30,000 (amendment 339) and it will always be deemed to be charged on nominated foreign income and/or foreign gains (amendment 342). This is achieved by:

- stating that the foreign income and or foreign chargeable gains nominated must not result in a relevant tax increase of more than £30,000 (the existing Finance Bill legislation at s 809G(4) provides that where the relevant tax increase is less than £30,000 an additional amount will be added so that the charge is £30,000 so the two interaction of the two provisions mean that the remittance basis charge must be £30,000); and
- where insufficient foreign income and/or foreign gains are nominated the s 8009G provision in the current Finance Bill is amended so that rather than a top up increase to make a £30,000 charge the legislation deems sufficient foreign income (to have been nominated so that the relevant tax increase does equate to £30,000). Note this foreign income deeming provision applies even where the foreign domiciliary does not actually have such foreign income (for example where the individual has little foreign income but significant foreign gains).

Amendment 343 specifies that the rules with respect to remitting nominated foreign income and/or foreign gains only apply to such income or gains as are actually nominated by the individual under s 809BA and not to any income deemed to be nominated as a result of revised s 809G(4). Accordingly income deemed to be nominated under s 809G(4) does not come within the penal provisions of ss 809H and 809I (explained below).

The reason for amendment 342 (replacing the top up additional tax in current new s 809G(4) with a tax on deemed foreign income) appears to be to strengthen the argument that the remittance basis charge clearly comes within the definition of a tax (rather than a stand alone charge) and thereby ensure the availability of foreign tax credit for the £30,000 paid.

Amendments 349 and 350 delete paragraphs 70 and 73 of Sch 7. These paragraphs specified that the additional top up remittance basis charge under s 809G(4) would be eligible to frank gift aid payments. A corollary to the changes to s 809G(4) is that these paragraphs are not necessary as the additional tope up charge is replaced by an actual tax charge (albeit on deemed rather than actual foreign income).

Time limits
Amendment 339 makes it clear that the time limit to make the remittance basis claim is the standard limit set down in TMA 1970 (currently five years from 31 January following the relevant tax year but to be reduced, as a result of Finance Bill 2008 Schedule 39, to four years).

Remittance basis charge: income and gains treated as remitted
Amendment 346 inserts wording into s 809I to provide for the interaction of new s 809BA with s 809I (the penal order of remittances that is deemed to occur if the individual falls into s 809H).

Background to sections 809H and 809I
An individual will be within s 809H if they have not remitted ALL remittance basis foreign income or gains with respect to the relevant tax year or prior years (apart from those nominated) and they make the mistake of remitting any nominated foreign income and/or nominated foreign chargeable gains.

The objective behind sections 809H and 809I is to ensure that, unless and until he or she has remitted all other (that is excluding the nominated foreign income and/or nominated foreign chargeable gains) foreign income and foreign chargeable gains taxed on the remittance basis for all years of residence in the UK from 2008/09 onwards, an individual cannot obtain credit for the annual £30,000 remittance basis charges paid. The legislation does this in a complex and penal manner. Where the individual is unfortunate enough to be caught by s 809H and remittances of foreign income or foreign chargeable gains are made the legislation provides that where the funds were actually remitted from is ignored. Rather, the quantum of remittances in the year is found and to establish what is deemed to have been remitted for UK tax purposes the amount is matched to foreign income and foreign chargeable gains arising in the tax year (and previous years if there is insufficient income and gains in the relevant tax year) in the following specified unfavourable order:

- relevant foreign earnings (other than those subject to a foreign tax);
- foreign specific employment income (other than income subject to a foreign tax);
- relevant foreign income (other than income subject to a foreign tax);

- foreign chargeable gains (other than gains subject to a foreign tax);
- relevant foreign earnings subject to a foreign tax;
- foreign specific employment income subject to a foreign tax;
- relevant foreign income subject to a foreign tax; and
- foreign chargeable gains subject to a foreign tax.

The categories above are referred to below as paragraphs.

Amendment 346 clarifies the operation of s 809I. It does this by tightening the wording so that it cannot be argued that, when matching, if nominated foreign income and/or foreign chargeable gains falls into one of the paragraphs one matches to the nominated foreign income and/or foreign chargeable gains rather than moving on to match to foreign income and foreign chargeable gains in a different paragraph.

Once an individual falls within s 809H they are caught by the deemed matching provisions for that and future tax years.

General comments

In general the Government amendments tabled to date do not address the Tax Faculty's concerns as set out in the initial Committee Briefing and elsewhere.

In principle we welcome putting a £30,000 cap on the remittance basis charge. However, we are concerned with the drafting of amendment 339. This inserts new s 809BA. It is s 809BA(4) which concerns us as it states "the income or chargeable gains nominated must be such that the relevant tax increase does not exceed £30,000". We are concerned with what will happen if the relevant increase does exceed £30,000. This could happen in two ways:

- the individual simply makes a mistake and nominates too great an amount of foreign income or foreign chargeable gains; or
- a future alternation results in the denial of some relief meaning that the tax charge on the nominated income or chargeable gains is greater than £30,000.

On a literal reading of the legislation it would seem that if the relevant tax increase exceeds £30,000 the individual's remittance basis claim will be rejected. We are sure this was not the intention but are concerned that the legislation could be construed in this manner.

If we assume that the claim will not be rejected if the relevant increase exceeds £30,000 but that the tax charge will be capped at £30,000, we are not sure which element of the nominated foreign income and gains will be deemed to be ignored and how this will interact with s 809H and s 809I (which are complicated enough already). Potentially the issue of what nominated income is deemed to be ignored could be important where double tax relief is in point and the individual is only subject to tax in the foreign country on income from that territory. In this case establishing the nominated income that must be deemed to be ignored could be relevant so as to establish how much of the £30,000 can be claimed as a foreign tax credit.

Amendment 342

This deals with the situation where the individual nominates insufficient income and gains. Where the relevant increase is less than £30,000 the provision deems that sufficient foreign income to give rise to a relevant increase of £30,000 has been nominated. It should be noted that this will have an impact on the payments on account situation. We have stated elsewhere that we do not think payments on account should have to be made with respect to the remittance basis charge.

We do not understand why, if they so wish, it is not possible for an individual to just make the remittance basis election without a nomination of foreign income and/or foreign chargeable gains and pay the £30,000 charge. If there can be a deeming provision if they do not nominate sufficient foreign income and foreign chargeable gains we do not see why it is not possible for this deeming provision to be extended to a situation where they make no nomination whatsoever.

Amendment 343
This is welcome in that it provides that the foreign income that is deemed to have been remitted as a result of amendment 342 will not be within s 809H or s 809I. Extending s 809H and s 809I to foreign income deemed to have been nominated would have made the situation for the taxpayer intolerably complicated.

Amendment 345
This is a welcome tidying amendment that improves the drafting.

Amendment 346
We appreciate that a policy decision has been made that individuals should not receive credit for the £30,000, unless and until they have remitted all other (that is excluding the nominated foreign income and/or nominated foreign chargeable gains) foreign income and foreign chargeable gains taxed on the remittance basis for all years of residence in the UK from 2008/09 onwards. We do, however, think that the current legislation is too complicated and penal for taxpayers unfortunate enough to make the mistake of remitting nominated foreign income and/or foreign chargeable gains.

Amendment 348: Time limit for the s 16ZA TCGA 1992 election

Analysis of the amendment
This amendment makes it clear that the time limit to make the s 16ZA election is the standard limit set down in TMA 1970 (currently five years from 31 January following the tax year but to be reduced as a result of Schedule 39 of the Finance Bill to four years).

Comment
We welcome the amendment as it clarifies the matter. We would, however, prefer for the provisions of new TCGA 1992 section 16ZA to 16ZD to be automatic with the individual having the option to elect out.

Amendment 354: Consideration for certain services

Analysis of the amendment
The general rule in s 809K is that a payment for services performed in the UK that is made from foreign income or chargeable gains is a remittance. This amendment disapplies the section and treats the foreign income or chargeable gains as not being remitted where:

- the relevant UK service relates wholly or mainly to the property situated outside the United Kingdom (referred to as condition A); and

- the whole of the relevant consideration is given by way of one or more payments to one or more bank accounts held outside the United Kingdom by or on behalf of the person who provides the relevant UK service (referred to as condition B).

The ss 275 to 275C TCGA 1992 location of assets rules are imported.

Comment
The principle behind the amendment is welcome but the amendment itself is going to cause practical problems with respect to interpretation. If further clarifying amendments are not to be made we would appreciate Ministerial clarification with respect to the points set down below.

Why does the payment have to be made outside the UK?

Prior to 6 April 2008 the payment offshore for services was not a remittance and now under the general charging provisions it is. Accordingly, it is clear that s 809SA is providing a specific targeted exemption. Given that the amendment is establishing a specific exemption why must the payment be made outside the UK? Conceptually there is no great difference between the relevant consideration being "given by way of one or more payments to one or more bank accounts" outside the UK or inside the UK. What is important is that the payment is made direct to the service provider in consideration for services provided which fall within s 809SA (3). Under the new rules the only reason why there is no remittance is because of the s 809SA(2) clause providing that the income or chargeable gains should be treated as not remitted, so why must the payment be made to the service provider outside the UK?

On a practical level the stipulation that the payment must be to an overseas account seems strange to us as it will force UK service providers to have overseas bank accounts whether they would otherwise wish to or not.. It adds a complexity and administrative burden which we feel is unwarranted. International money laundering requirements make opening a bank account in a foreign country especially burdensome. It seems especially odd in the context that HMRC are currently engaged in a major exercise to identify UK residents with overseas bank accounts, so encouraging the growth of such accounts will put an extra burden not only onto taxpayers but also onto HMRC

Would payment by cheque meet the conditions?

The use of the phrase "one or more payments to one or more bank accounts" is of concern. By referring to a payment to a bank account it could be interpreted as meaning that the payment must be made by an electronic transfer rather than a cheque. The wording in s 809S referred just to a "payment to the Commissioners" which seems to suggest cheque or electronic transfer as the payment is specified as to the Commissioners not the relevant Bank of England account. If in this case the exemption will only be available where an electronic transfer is made this needs to be made clear in the guidance.

What is a service?

A general issue is that no-where within the legislation is there a definition of exactly what a service is let alone a service provided in the UK. This has been an area of difficulty in VAT for many years but there at least there is a definition and now a body of case law.

Travel services are a case in point, though we are not certain that they come within the exemption as it would seem difficult to connect them to overseas property. Would travelling to an overseas property come within condition A?

On a general issue we would appreciate clarity as to whether travel into or out of the UK constitutes a service provided in the UK. Certainly part of the service is performed in the UK and, if we are talking about a flight, landing or taking off, time in UK airspace, checking in/out etc are more than just incidental activities but not the whole or even possibly the greater part of the service (depending on where one is travelling to or from. We need to know whether it is felt that the whole cost of the travel would be deemed a UK service and a remittance or just a proportionate part. If the exemption applies this might be said to be a moot point as if the whole cost would otherwise be a remittance under s 809K it will be exempted by s 809SA. However, it seems to us that there will be cases where the exemption cannot apply as there is no link to overseas property and in such cases the point is of great relevance.

Generally we are concerned that if the scope of s 809K extends to travel into and outside of the UK it could have a severe impact on the UK as a world renowned transport hub with foreign domiciiliaries taking short haul trips out of the UK (to say Dublin or Paris) and going on from there. Accordingly we feel there needs to be a specific clear exemption for travel into and outside of the UK.

What comes within the scope of condition A?

It is clear that investment management fees paid, offshore from foreign income or foreign chargeable gains, by a remittance basis user would be within the exemption provided the portfolio contains wholly or mainly foreign securities. At what stage is the wholly or mainly test applied? Does one look at the period as a whole or would a breach say for one day in the quarter (due to timing issues of sales and purchase transactions) mean that the condition is not met for that period. We would welcome clarification of this point.

We are not clear as to the extent that the provision is to apply to professional fees. Our concerns can best be explained by examples:

- A US citizen who is UK resident engages a UK specialist firm of US tax advisers based in the UK (there are a number of specialist firms that offer this service, particularly in London) to prepare their annual US tax return and provide US tax advice.
- The fees are paid offshore out of foreign income or foreign gains.

Clearly services are provided in the UK but can they be said to relate to property situated outside the UK? The investments with respect to which income and gains arise will generally be situated largely outside the UK as will any foreign property that might be let out. Earned income (employment and self-employment), however, cannot be linked to any property. Is it just advice and compliance work with respect to income from foreign assets and any foreign gains work that will qualify and should this be invoiced on a separate fee note to ensure there are no difficulties with the wholly or mainly test. There is also an issue with respect to UK tax advice. UK tax advice and compliance work with respect to foreign investment income and foreign gains would appear to be within the exemption provided it is not included in a fee note such that overall the fee is for wholly or mainly UK services.

Amendments 355 to 356: exempt property amendments

Analysis of the amendments

Amendment 355 contains a number of changes with respect to the public access rule.

There are also some minor amendments to the repair rule and changes with respect to the temporary importation rule and its interaction with other rules.

For the purposes of the temporary importation rule a "countable day" is not a day if the property meets the conditions for the:

- personal use rule;
- repair rule; or
- the notional remitted amount in relation to the property is less than £1,000.

There are also somewhat more restricted rules under which a day will not be counted if the public access rule applies (the day of public access will count if the temporary period is after the public access availability but not if it is before then).

Comment

We do not object to the amendments but they do not deal with our key concerns.

The amendments with respect to the public access rule are still too restrictive and will deter foreign domiciliaries who otherwise would have brought works of art into the UK to be made available for public access. In particular the definition of works of art (which is taken from the VAT legislation) is too narrow and subjective (in certain instances). We feel that consultation with the main stakeholders should continue with a view to introducing further amendments at Report Stage so as to achieve the Government's objective of encouraging the import of important works of art.

We are not entirely sure of the trigger point for a tax charge. When an asset is brought into the UK it is possible that the temporary importation rule could apply. Is the trigger date for the charge where the 275 day test is breached? This will be important where the day the asset is imported and the breaching of the 275 day test are in different tax years.

Amendment 357

Summary
The amendment adds a definition of "The Commissioners" for the purposes of the interpretation chapter.

Comment
This is a minor tidying amendment.

2. PART 2: REBASING AND REINVESTMENT PROBLEMS

Rebasing only for trust structures

To provide transitional relief for gains accruing prior to 6 April 2008 for foreign domiciliaries who after 6 April 2008 have offshore trust gains attributed to them (under s 87 TCGA 1992) the Finance Bill contains legislation (paragraph 112) to allow for trustees to make a rebasing election. There is no similar provision to provide transitional relief for foreign domiciliaries who after 6 April 2008 will have offshore gains attributed to them under the s 13 TCGA 1992 provisions (broadly this provision only apply where the individual has an interest in 10% or more of the offshore company).

As set down in our briefing note we think that the legislation should be amended so that the directors of offshore companies established prior to 6 April 2008 can elect for rebasing in a similar manner to trustees, as explained in the example below.

Examples

1. Trustees owning underlying offshore company which owns assets

The Bee Settlement was established by Mrs Queen on 17 May 2000. Mrs Queen was and remains foreign domiciled.

Honey BVI Ltd was wholly owned by the Bee Settlement (and had been owned by the settlement immediately before 6 April 2008). The company disposed of its holding in a UK resident company in 2010/11 realising a gain of £2 million of which £1 million represented post 6 April 2008 gains.

In the same tax year a capital payment of £2 million was made to Miss Keeper who is UK resident, foreign domiciled and a remittance basis user.

The trust made no chargeable disposals in the year and Honey BVI Ltd was the only company the trust had a holding of over 10% in. There were no unmatched gains or excess capital payments brought forward at 6 April 2010.

The trustees make a valid rebasing election.

	Actual	**Gain if base cost was equal to 6 April 2008 Market Value**
Trust gains	£NIL	£NIL
Offshore company gains attributed to the trust	£2,000,000	£1,000,000
	£2,000,000	£1,000,000

The £2 million capital payment is matched to the £2 million gain in the year. Should Miss Keeper remit the capital payment she would be taxed on £2,000,000 x 1/2 = £1,000,000.

2. *Taxpayer owning offshore company which owns assets*

Consider a similar fact pattern to the first example except that Honey BVI Ltd is wholly owned directly by Miss Keeper. In this situation the whole £2,000,000 gain would be attributed to Miss Keeper who would be taxed on the gain on the arising basis whether or not the company distributed the funds to her. Unlike the trustees in the above example, the directors of the company are not able to make a rebasing election.

3. Disincentive to investment in the UK

Historically the offshore trust CGT beneficiary charge (s 87 TCGA 1992) and the company anti-avoidance provisions (s 13 TCGA 1992) have worked differently.

Since the s 86 TCGA 1992 provision has not been extended to foreign domiciliaries (we welcome the fact this has not happened) a foreign domiciliary will only have gains attributed if there is a capital payment.

In contrast gains are attributed from offshore companies as they arise with remittance basis users only be taxed on foreign gains if the proceeds are remitted. There is a problem here as the extended definition of relevant person in new s 809L means that if the offshore company uses funds derived from the sale of foreign assets to invest on the UK this will be deemed to be a remittance by the individual. This is best explained by an example.

Example

If we change the facts in the second example such that the £2 million gain was with respect to a foreign company and assume Honey BVI Ltd retained the funds. There would be no tax charge on Miss Keeper as she is a remittance basis user and the funds are not remitted. However, if in the next tax year the company used the £2 million to make an investment in a UK company and the funds were brought into the UK to effect this investment this would be deemed to be a remittance by Miss Keeper and she would be taxed on the £2 million gain.

Further information

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