

Temporary non-residents and Capital Gains Tax

This Help Sheet explains the treatment of gains accruing during a period of temporary non-residence. But it is only an introduction. If you are in any doubt about your circumstances you should ask your tax adviser. We will also be pleased to help you and provide any forms you may require. You can also consult our Capital Gains Manual, which explains the rules in more detail, at www.hmrc.gov.uk

This Help Sheet will help you fill in the *Capital gains summary* pages of your Tax Return.

Introduction

For periods up to 16 March 1998, individuals were charged Capital Gains Tax on the gains on disposal of assets if they were resident or ordinarily resident in the UK in the year of disposal.

For detailed information on the terms 'resident' and 'ordinarily resident' please see Booklet *Residence, Domicile & the Remittance Basis* by going to www.hmrc.gov.uk

Individuals who were not resident and not ordinarily resident were only liable on gains accruing on the disposal of assets held for the purpose of a trade, profession or vocation, if they carried on that trade, profession or vocation through a permanent establishment in the UK.

Individuals who went to live abroad were not chargeable on gains made while not resident and not ordinarily resident, even though they may later have resumed tax residence in the UK.

The Finance Act 1998 introduced Section 10A Taxation of Chargeable Gains Act 1992 (TCGA 1992). Where an individual leaves the UK on or after 17 March 1998 and disposes of assets while resident outside the UK for fewer than five complete years of assessment (a year of assessment being from 6 April in one year to 5 April in the next - a year of assessment is referred to as a 'tax year' in this Help Sheet), the gains and losses accruing on those disposals are treated as accruing in the tax year of return to the UK, subject to a number of detailed conditions.

Remittance basis entitlement - if you are not domiciled in the UK, gains arising before 6 April 2008 on assets situated outside the UK were only charged to Capital Gains Tax when they were received in the UK: this treatment was automatic. After 5 April 2008 this 'remittance basis' treatment is no longer necessarily automatic. It may be necessary to make a claim if you wish the remittance basis to apply to you in a particular year. The *Residence, remittance basis etc. notes* explains this fully.

The extra-statutory concession (ESC D2) which allows the tax years of departure and arrival to be split in certain circumstances for Capital Gains Tax purposes, so that gains accruing after departure or before arrival are not charged to Capital Gains Tax, broadly matches the statutory rules.

What is temporary non-residence?

For a charge to Capital Gains Tax to accrue under Section 10A TCGA 1992 all four of the following conditions must be met:

- the individual is resident or ordinarily resident in the UK for at least some part of a tax year on their return to the UK (referred to as the 'year of return')
- throughout one or more of the tax years immediately before the year of return (known as the 'intervening years'), the individual was not resident and not ordinarily resident in the UK
- between the tax year when the individual was last resident or ordinarily resident (referred to as the 'year of departure') and the year of return there were fewer than five full tax years, and
- the individual was resident or ordinarily resident for at least part of each of four out of the seven tax years immediately prior to the year of departure.

Example 1

Mr Smith, who has lived all his life in the UK, left the UK on 25 March 2007 for a contract of employment abroad.

He returned to the UK and resumed residence in the UK on 2 February 2009.

He realised a chargeable gain (on an asset acquired before he left the UK) of £35,000 on 15 September 2007. Mr Smith fulfils all of the residence conditions in Section 10A TCGA 1992:

- he has resumed UK residence
- there is a period of one complete year immediately prior to the year of return where he was not resident in the UK
- the intervening years are fewer than five full tax years (in this example, one year - 2007-08)
- he was resident in the UK for at least four out of the seven tax years immediately prior to his year of departure (in this example, in fact, all seven).

Mr Smith will be chargeable under Section 10A TCGA 1992 in the tax year of return to UK residence (2008-09) on the gain of £35,000.

Treaty non-residence

The Finance (No 2) Act 2005 introduced provisions so that the temporary non-residence provisions in Section 10A TCGA 1992 apply to individuals who are resident or ordinarily resident in the UK but are temporarily Treaty non-resident. An individual is Treaty non-resident at any time if, at that time, he or she, falls to be regarded as resident in a territory outside the UK for the purposes of double taxation arrangements having effect at that time.

The provisions apply where the individual becomes Treaty non-resident after 16 March 2005.

What gains and losses are included?

If all of the conditions set out above are fulfilled, Section 10A provides that all gains that would have been chargeable, and all losses that would have been allowable, if the individual had been resident or ordinarily resident during those years, are to be treated as accruing in the tax year of return to the UK.

However, some gains and losses are excluded from the charge. An individual may acquire assets after leaving the UK for a period of temporary residence abroad. If such assets are disposed of in an intervening year, any gains or losses on such assets are excluded from the charge.

Example 2

Mr Jones, who has lived all his life in the UK, left the UK on 22 March 2007 for a contract of employment abroad. He returned to the UK and resumed residence on 12 January 2009.

On 6 June 2007 Mr Jones bought 20,000 shares in a UK company. He sold all of the shares on 15 March 2008, realising a gain of £12,000.

Mr Jones fulfils all of the conditions for Section 10A to apply, but because the shares were acquired after his departure from the UK the gain is not treated as chargeable in the year of return.

While gains and losses on assets acquired after leaving the UK are in general excluded from the charge, there are a number of important exceptions.

Some assets acquired by an individual after departure from the UK in either the tax year of departure or any of the intervening tax years, when they were not resident and not ordinarily resident, have a connection with the earlier period of residence. Gains accruing on the disposal of such assets during the intervening years are not excluded from the charge but are treated as chargeable in the tax year of return.

Gains accruing on the following assets remain within the charge:

- assets acquired from another person who acquired them when resident or ordinarily resident in the UK but did not pay tax on their disposal because of no gain/no loss treatment under the rules for
 - husband and wife or civil partner transfers (Section 58 TCGA 1992), or
 - the death of a life tenant (Section 73 TCGA 1992), or
 - works of art (Section 258(4) TCGA 1992)
- any interest in a settlement
- assets which have had their acquisition cost reduced by a capital gains roll-over relief being given on the disposal of another asset which had been acquired by the individual while resident or ordinarily resident in the UK. The roll-over reliefs to which this section refers are
 - compensation and insurance (Sections 23(4)(b) or (5)(b) TCGA 1992)
 - business assets roll-over relief (Sections 152(1)(b) or 153(1)(b) (in respect of disposals after 16 March 2005) TCGA 1992)
 - transfer of business to a company (Section 162(3)(b) TCGA 1992)
 - compulsory acquisition of land (Sections 247(2)(b) or (3)(b) TCGA 1992).

Example 3

Mr and Mrs Black, who have lived in the UK all of their lives, left the UK on 26 March 2007 for Mr Black to take up a contract of employment abroad.

They resumed tax residence in the UK on 1 December 2008.

Mr Black acquired a property in the UK on 14 September 2000. On 12 June 2007 he gave the property to Mrs Black.

Mrs Black sold the property on 5 February 2008 realising a gain of £100,000.

Section 58 TCGA 1992 applies to the gift by Mr Black, so that for Capital Gains Tax purposes at the time of transfer neither gain nor loss arises. On the sale by Mrs Black, the gain is treated as accruing in the year of return as she fulfils all of the conditions for Section 10A TCGA 1992 to apply, and the asset is not excluded from the charge.

Gains of non-resident companies and settlements

Where a gain on the disposal or notional disposal of an asset held before an individual left the UK is held over, under any of the deferral reliefs listed below, until the disposal of the whole or part of another asset is made while the individual is neither resident nor ordinarily resident in the UK, the gain will not be excluded from the charge under Section 10A. Instead, the gain is treated as accruing in the year of return to UK tax residence.

The capital gains deferral reliefs are:

- reorganisations, conversions and reconstructions where the new asset is a Qualifying Corporate Bond (Section 116(10) or (11) TCGA 1992)
- compensation stock (Section 134 TCGA 1992), and
- depreciating assets (Section 154(2) or (4) TCGA 1992).

Gains accruing to a closely controlled non-resident company (a company controlled by five or fewer participators) or a non-resident settlement may, in certain circumstances, be treated as gains accruing to individuals who are participators in the company or the settlor or beneficiary of the settlement. The statutory provisions are contained in:

- Section 13 TCGA 1992 which provides that gains accruing to a closely controlled non-resident company are attributed to UK resident participators in proportion to the extent of their participation
- Section 86 TCGA 1992 which taxes a UK resident and domiciled settlor for gains accruing to their non-resident settlements
- Section 87 TCGA 1992 which taxes a UK resident beneficiary who has received capital payments for gains accruing to a non-resident settlement.

Where a UK resident individual is temporarily non-resident and on their return to the UK comes within the charge under Section 10A TCGA 1992, the provisions of Section 10A also apply to chargeable gains arising in the intervening years which would have been attributable to the individual under Sections 13 or 86, TCGA 1992 if they had been resident or ordinarily resident throughout. Such gains accruing during a period of temporary non-residence are treated as gains accruing in the year of return.

Similarly, gains of non-resident settlements that would be charged under Section 87 TCGA 1992 on beneficiaries of the settlement who have received capital payments, if the beneficiaries were resident in the UK, are included in the gains treated as accruing to the beneficiary in the year of return.

Section 86A TCGA may reduce the charge under Section 86 on the temporarily non-resident settlor if gains have been charged under Section 87 TCGA on UK resident beneficiaries in the intervening years. Please ask your tax adviser or phone HMRC Residency on **0845 070 0040**.

Double taxation relief

Although Section 10A TCGA 1992 provides for gains accruing in the intervening years between UK departure and return to be charged to tax, where the departure was on or before 16 March 2005 it did not override the terms of any Double Taxation Agreement. This means that any exemption or relief specifically given under an agreement between the UK and another taxing state should be taken into account in arriving at any UK liability.

Under many agreements, if you are a resident of another country for the purposes of the agreement, you will often be liable to tax only in the other country on any gains you make from the disposal of assets. In that case, you will be exempt from Capital Gains Tax in the UK even though Section 10A TCGA 1992 treats gains as accruing in a year in which you are resident in the UK.

In considering whether the terms of a Double Taxation Agreement exempt a gain from Capital Gains Tax in the UK, or whether the agreement provides relief in the UK or the other state for tax paid, you will need to take account of the terms of the relevant agreement which are in force at the time of disposal or the date on which the gain actually accrues, not the year of return when the gain is treated as accruing in the UK.

The precise conditions of exemption or relief can be found in the relevant agreement. It is not possible to give full details here as they vary from agreement to agreement. Further information on double taxation and a list of agreements in force is at www.hmrc.gov.uk

Where the year of departure was 2004-05, but the date of departure was after 16 March 2005, or a later year, the Finance (No 2) Act 2005 introduced provisions so that nothing in any Double Taxation Agreement shall be read as preventing the individual from being chargeable to Capital Gains Tax under Section 10A.

Where there is no agreement or in cases where the new provisions in the previous paragraph apply, but tax is paid in another country, you may be able to claim relief for the double taxation subject to the rules in force in the year of return.

If you think that you may be entitled to make a claim to exemption or relief under the terms of a Double Taxation Agreement, or are otherwise entitled to claim relief for double taxation, give details of the territory in which the gain falls to be taxed, and the circumstances in which exemption is claimed, in the 'Any other information box', box 35, on page CG 2 of the *Capital gains summary* pages or in your supporting computations, as well as entering details of the gain in the relevant sections of those pages.

Split-year treatment for the years of arrival and departure: extra-statutory concession D2 (ESC D2)

The provisions of Section 10A TCGA 1992 apply only to gains accruing during the intervening years, the complete tax years between the years of departure and return. However, an individual may dispose of assets in the parts of the year of departure or year of return when not resident or ordinarily resident in the UK. Gains on such disposals are chargeable in the year that they arise under the normal rules. Extra-statutory concession D2 (ESC D2) allows the years of commencement and cessation of residence in the UK to be split for Capital Gains Tax purposes, its terms being broadly similar with the temporary non-residence rules, so that such gains will not be charged where the terms of the concession are satisfied.

Gains in the year of departure

Under paragraph 2 of ESC D2 split-year treatment is available only where the individual was not resident and not ordinarily resident in the UK for the whole of at least four out of the seven tax years immediately preceding the tax year in which they left the UK. If this condition is met then the individual is not charged to Capital Gains Tax on gains from disposals made after the date of departure.

Where the individual has been resident or ordinarily resident in any part of four out of the seven preceding years then gains from disposals made in the year of departure, after the date of departure, are charged to Capital Gains Tax, whether or not they ever return to the UK to become resident again. The amended concession applies, in relation to the year of departure, to departures from the UK on or after 17 March 1998.

Example 4

Mr Green has always been resident and ordinarily resident in the UK. On 12 August 2008 he left the UK and from then on he was neither resident nor ordinarily resident in the UK. He realised a gain from a disposal made on 14 October 2008.

The gain is chargeable to Capital Gains Tax. Split-year treatment does not apply because Mr Green was resident and ordinarily resident in the UK for at least four out of the seven years before the year of departure.

Example 5

Mrs White arrived in the UK for the first time in April 2007 and was resident and ordinarily resident in the UK for the remainder of the tax year 2007-08 and until her departure from the UK on 20 January 2009. She realised a gain from a disposal made on 28 February 2009.

The gain is not chargeable to Capital Gains Tax. Split-year treatment applies because Mrs White was neither resident nor ordinarily resident in the UK for at least four out of the seven years before the year of departure.

Gains in the year of arrival

Where an individual arriving in the UK has not been resident or ordinarily resident in the UK at any time during the five tax years immediately preceding the tax year in which they arrived in the UK, split-year treatment is available under paragraph 1 of ESC D2. In such cases chargeable gains from disposals made in the year of arrival, before the date of arrival, are not charged to Capital Gains Tax.

Where the individual was previously resident in the UK and there are fewer than five tax years between the year of return and the earlier year of departure then split-year treatment does not apply and chargeable gains from disposals made at any time in the year of arrival are charged to Capital Gains Tax. The amended concession applies, in relation to the year of return, to an individual resuming residence in the UK on or after 6 April 1998, irrespective of the date that they left the UK for residence abroad. Split-year treatment under ESC D2 is always available to an individual who arrives in the UK to take up residence for the first time and who has not been resident for tax purposes previously.

Example 6

Mr Brown was resident and ordinarily resident in the UK until July 2005. He then left the UK and was neither resident nor ordinarily resident until his return in November 2008. He realised a gain from a disposal in June 2008.

The gain is chargeable to Capital Gains Tax. Split-year treatment does not apply because Mr Brown was resident in the UK during some part of the five years before the year of his arrival in the UK.

Example 7

Miss Doe is a citizen of the USA where she has lived all of her life until she arrived to take up permanent residence in the UK on 24 November 2008. She realised a gain from a disposal in September 2008.

The gain is not chargeable to Capital Gains Tax. Split-year treatment applies because Miss Doe has not been resident or ordinarily resident in the UK at any time during the five tax years immediately preceding the year of her arrival in the UK.

These notes are for guidance only and reflect the position at the time of writing. They do not affect any rights of appeal.