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CGT ON NONRESIDENTS AND ATED:

'LIFE IS GOING TO BE SERIOUSLY COMPLICATED'

The consultation document on the extension of capital gains tax to residential property owned by nonresidents has caused concern and bewilderment to many clients. The general theme is well understood

– that non-residents should be chargeable to capital gains tax on UK residential property to put them in the same position as UK residents. However, it may be rather more difficult than it sounds to bring this hope or aspiration into effect.

It is perhaps only reasonable that there is a degree of uncertainty over the finer details – it is only a consultation document after all, and some of the details have not been decided. However, there is clear overlap (indeed conflict) with the annual tax for enveloped dwellings (ATED) related capital gains tax rules which already apply to properties held by companies. The ATED related charge applies neither to residential property under a (decreasing) value threshold, nor to residential property which is commercially let or being developed. However, there will be no similar exclusions or reliefs from this new charge.

The rate of tax is also a little difficult. It could be 28% to correspond with the rate payable by UK residents and indeed with the ATED related charge on companies. But that would mean non-resident companies would pay 28%, whereas UK companies would pay only 20% or 21%. I do not know how they propose to reconcile that conflict.

The collection of tax is also interesting. It is suggested that there will be some kind of withholding tax mechanism. That would be a very blunt instrument though, because you need to have some idea what the gain would be before you can withhold the tax on the gain.

It could so easily happen that the amount withheld would leave insufficient to repay the mortgage on the property, which might scupper the sale completely. Presumably, it will be the lawyers that will have to withhold the tax, but that is going to be a little troublesome if the seller engages a foreign firm.

For a UK resident that has an offshore company owning UK residential property, life is going to be seriously complicated. The proportion of the gain up to 5 April 2008 will probably not be taxable on him if he is a non-dom. The gain from April 2008 to April 2013 will be taxable on the individual personally under TCGA 1992 s 13. The gain from April 2013 to April 2015 will be taxed on the company under the ATED rules. And the gain after April 2015 will be subject to the new CGT charge on the company. Or maybe not. One or more of these charges might not apply, in which case one of the others will probably apply instead. And, of course, we still have indexation relief in respect of gains made by companies which may have to be taken into account.

Try explaining this to a client. At least HMRC had the common sense not to refer to this as a simplification measure.

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