CHANCERY BAR

UK Tax Update for Jersey Practitioners

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Overview

CGT for non-residents

SDLT charges

DOTAS for inheritance tax advantages

Routier in the Supreme Court and *Panayi* in the FTT

CGT for non-residents

Historically, CGT only for UK residents

Then, ATED CGT

Then, NRCGT

Now, CGT on all disposals relating to UK situate land (contrary to HMRC's assurances!)

CGT for non-residents

New Ch 1, Part 1 TCGA 1992 introduced by Sch 1, Finance Act 2019. Effective from April 2019.

Key changes:

- disposals of interests in both residential and commercial property within UK charge to tax;
- persons previously able to elect out of charge (such as diversely-held companies and widely-marketed funds) liable on all disposals of UK land;
- charge for non-residents' gains on disposals of indirect interests in UK property

CGT for non-residents

Indirect interests e.g. shares in a company that derives 75% or more of its gross asset value from UK land.

Rate of CGT is 20%.

CGT for non-residents

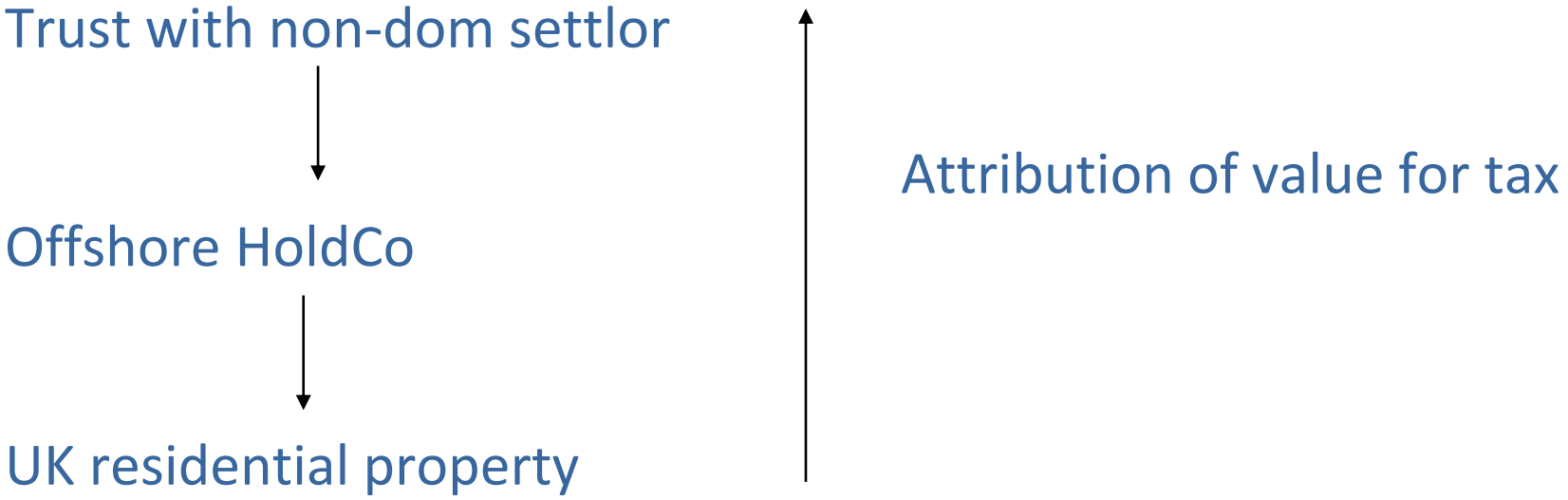
Non-resident CGT returns must be filed, and the tax paid, within 30 days of completion of the disposal.

All non-resident companies (including close companies) will now pay corporation tax on their gains, and should file a company tax return in the usual way.

The rules abolish the separate charge to CGT on ATED-related gains.

CGT for non-residents

Cf. the IHT transparency regime, which (so far?) applies only to residential properties:



IHT DOTAS

Disclosure of tax avoidance schemes

FA 2004, Part 7.

Does this require “tax avoidance”?
Hyrax FTT said no. The rules proscribe what must be disclosed.
(J.R. of that decision pending.)

Historically, the rules (hallmarks) were targeted at marketed avoidance and covered e.g. premium fees & confidentiality.

IHT DOTAS

IHT hallmark after much consultation is now very wide.

Applies to most types of IHT advantage if the advantage is obtained by means of **one or more contrived or abnormal steps**.

What does this mean?

Guidance is of limited assistance.

IHT DOTAS

Guidance example 16

"Might be notifiable…"

Arrangement to gift shares which qualify for business property relief into trust and subsequently sell the shares back to the transferor …

HMRC say this depends on all the facts.

IHT DOTAS

HMRC increasingly seeking orders as to notifiability from FTT.

Consequences of non-disclosure include penalties for 'scheme' users and promoters.

Advice on disclosure can offer a defence. See *Mercury Tax v HMRC* [2009] UKSPC (SPC00737)

IHT DOTAS

Mercury Tax v HMRC [2009] UKSPC (SPC00737):

"[13]…the more important point is that Mercury went to the trouble and expense of taking counsel's opinion. Counsel addresses his or her mind to the point and reaches a justifiable conclusion, with which I happen to agree... I consider that it would be wrong to penalise Mercury if (on the assumption I am now making that my decision is wrong) that opinion was also wrong. Other than to take advice there is nothing else they could do; they could hardly ask HMRC whether they agreed without disclosing the scheme in the process. In my view Mercury acted properly in relying on counsel's opinion…"

Routier v HMRC

[2019] UKSC 43

Application of section 23 IHTA 1984 exemption for gift to charity when the charity in question was not a UK charity but a Jersey law charity.

HMRC won on 'English law' on basis of *Camille & Henry Dreyfus Foundation Inc v Inland Revenue Comrs* [1956] AC 39.

This created an EU law issue.

Routier v HMRC

Clearly, s 23 with *Dreyfus* gloss results in restriction on movement of capital.

Free movement of capital is a key principle of EU law enshrined, now, in Art 63 TFEU.

This applies between member state & member state or between member state & “third country”.

HMRC argued that Jersey is not a “third country” for these purposes in respect of the UK.

Routier v HMRC

Held by S.C. that Jersey is part of the UK for those aspects of EU law which apply to Jersey. (Cf. Gibraltar's position.)

However, free movement of capital is not such an area.

Therefore, for capital movement purposes, Jersey is a "third country".

It follows that there is a restriction on movement between a member state (UK) and a third country (Jersey).

Routier v HMRC

Can this be justified?

CA (per Arden LJ as was) held that before mutual assistance agreement gave HMRC sufficient comfort, the restriction was justified.

(There is now an agreement in place that might have led to a different CA conclusion.)

Routier v HMRC

S.C. disagreed (Lord Reed and Lord Lloyd-Jones, with whom Lady Hale, Lord Carnwath and Lord Hodge agreed:

"[54] With great respect to the Court of Appeal, it should not have concerned itself with a hypothetical restriction concerned with the existence of mutual assistance agreements, even if it considered that such a restriction might have been justifiable under EU law and might have been imposed by Parliament. The fact was that there was no such restriction in existence. Neither section 23 of the Inheritance Tax Act nor section 989 of the Income Tax Act made relief for trusts in third countries conditional on there being a mutual assistance agreement in place. The fact that such a restriction, if it had existed, might have been in conformity with EU law did not mean that it could be imposed by the court, by means of a purported interpretation of the language used in section 23."

Routier v HMRC

Wider implications for Jersey charities beyond section 23 IHTA 1984?

Wider implications for Jersey entities beyond charities?

Almost certainly yes to the latter. See Panayi.

Panayi

Panayi CJEU (C-646/15) held that exit charges should not apply unless justified and proportionate between the UK and Jersey.

Remitted case to FTT which has held ([2019] UKFTT 622 (TC)) UK legislation can be read, however, to conform, viz.

Panayi

"[166] That conforming interpretation is that s 59B TMA, at a time before the legislation was actually amended to comply with EU law, should be read in cases where the taxpayer's right of freedom of establishment would otherwise be infringed, as including an option to defer payment of s 80 exit tax in 5 equal annual instalments, without liability to interest. (Interest would of course arise under the normal legislative provisions (s 86 TMA) to the extent that an instalment was unpaid after its due date). Early realisation would not precipitate liability nor could security be required."

Watch this space. Cf. comments of S.C. in *Routier.*

Disclaimer

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