Dissertation
F2200
2 September 2013

DOES THE UK REMAIN A TAX HAVEN?

TAX PLANNING FOR UK RESIDENT NON-DOMICILES OWNING UK RESIDENTIAL PROPERTY

Table of Contents

Word count: 14,997

1. INTRODUCTION

This dissertation examines the UK tax legislation as it applies to non-domiciled individuals residing in the UK (**RND**) and their UK property. The focus is on the acquisition of UK residential property[1] (both ordinary and high value) by RNDs for personal use on or after 6 April 2013. The main aim is to analyse tax-efficient options available to RNDs and assess the most common pitfalls. The legal analysis, therefore, comprises the practical examination of how the laws affect and apply to RNDs, which is supplemented by critical observations of the Government's tax policy in relation to high value residential properties.

Chapter 2 provides a study of the laws that apply to UK residential property owned by RNDs and looks closer at tax implications of direct ownership and the use of offshore structures. The new legislation in relation to high value residential properties (the **New Legislation**)[2] is examined in detail. The relevant anti-avoidance provisions are also analysed, followed by an outline of the remittance basis rules and their impact on funding of UK property by a RND.

Chapter 3 evaluates the options available to RNDs, scrutinises the Government's policy objectives with respect to high value residential properties and, with reference to UK residential property, concludes whether RNDs can still treat the UK as a tax haven.

Assumptions

For the purposes of this dissertation and unless stated otherwise, the following is assumed.

(i) A RND is a UK resident (including for treaty purposes) non-domicile who has elected to be taxed on the remittance basis.

(ii) Trusts are discretionary trusts resident outside the UK, such as private trust companies, formed after 6 April 2013, under which the RND settlor has the right to benefit.

(iii) Companies are legal persons (excluding certain corporate trusts) incorporated outside the UK after 6 April 2013 and are not managed and controlled in the UK.

(iv) UK property is the only asset held by a company and/or trust.

[1] As defined in FA 2003, s 116(1) and, for purposes of ATED, defined as "dwelling" in FB 2013, s 111.

[2] This broadly includes ATED and extended CGT and SDLT regimes, which are described below.

The law stated in this dissertation is as it stands on the date Finance Bill 2013 (as amended in Public Bill Committee on 24 June 2013) (**FB 2013**) was published[3]. As a result references to section numbers may change after FB 2013 receives Royal Assent.

References to spouses throughout this dissertation include civil partners registered under the Civil Partnership Act 2004, as amended.

2. OWNERSHIP OF UK RESIDENTIAL PROPERTY

2.1. BACKGROUND

Prior to the 2012 Budget[4], most RNDs were using offshore companies and trusts to hold UK property. Apart from offering significant tax advantages, these structures helped maintain confidentiality and offered a wide range of wealth management opportunities. Each holding structure was often established with one property in mind and, given the value of most properties, the annual management costs were justified.

However, in its 2012 Budget the Government proposed to introduce the new legislation that would affect high value properties worth over £2 million. Shortly afterwards the Government issued a consultative document clarifying that the purpose of the new legislation was "to ensure that individuals and companies pay a fair share of tax on residential property transactions and to tackle avoidance, including the wrapping of property in corporate and other "envelopes""[5]. The focus was on stamp duty land tax avoidance but there are other taxes that taxpayers can mitigate using "envelopes", which was touched upon by the Government[6] and recognised by professional bodies[7] and practitioners[8]. The consultative document received a number of responses from businesses and individuals, which the

[3] FB 2013 <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0018/14018.pdf> accessed 5 July 2013.

[4] HM Treasury, Budget 2012, HC 1853 (March 2012) <http://webarchive.nationalarchives.gov.uk/20120403104631/http://cdn.hm-treasury.gov.uk/budget2012_complete.pdf> accessed 11 July 2013.

[5] "Ensuring the Fair Taxation of Residential Property Transactions", HM Treasury (31 May 2012), at 1.1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81334/consult_ensuring_fair_taxation_residential_property_transactions.pdf> accessed 26 June 2013.

[6] Ibid, at 2.9.

[7] Response by the STEP Technical Committee to 31 May 2012 Consultation (22 August 2012), at 2.4 <http://www.step.org/pdf/HMT%20Residential%20Property%20Letterhead%20FINAL.pdf> accessed 31 May 2013.

[8] James Kessler QC, *Taxation of Non-residents & Foreign Domiciliaries* (11th edn, Key Haven Publications Plc, UK 2012), at 70.5.3.

Government published[9] along with the first draft legislation in December 2012. Subsequently, in early 2013 the first draft FB 2013 was published.

This chapter analyses the rules that apply to UK properties falling under both ends of the £2 million bracket and examines different UK property holding structures available to RNDs today.

2.2. TAX PLANNING FOR NON-DOMICILES

RNDs can own their UK properties directly or via corporate vehicles and/or trusts. This is analysed below in light of inheritance tax (**IHT**), capital gains tax (**CGT**), stamp duty land tax (**SDLT**), income tax (**IT**) and annual tax on enveloped dwellings (**ATED**) legislation.

2.2.1. Direct Ownership

Direct ownership of UK property has a distinct advantage over other options: it keeps things simple and is easier to administer. However, this simplicity leads to a lack of privacy for the owner (title documents are available for inspection through UK Land Registry) and may trigger substantial IHT liability. Going through a UK probate may be another concern for RNDs.

Inheritance Tax

IHT is a tax on chargeable transfers of value (gifts for no consideration) and is levied at two different stages of a taxpayer's life:

(i) On certain non-exempt lifetime transfers of value, which are not potentially exempt transfers (**PETs**)[10], such as certain transfers of assets into trusts (chargeable lifetime transfers, or **CLTs**), at the rate of 20%[11] at the time of the transfer, subject to a nil rate band[12]. If the transferor dies within 7 years of making the CLT, then IHT must be recalculated at the rate of 40%, taking into account the nil rate band and tax already

[9] "Ensuring the Fair Taxation of Residential Property Transactions: Summary of Responses", HM Treasury (1 December 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190256/summary_of_responses_ensuring_fair_taxation_of_residential_property_transactions.pdf> accessed 1 July 2013.

[10] Most gifts to individuals are PETs. If the individual lives for 7 years or more after making a PET, the gift becomes exempt from IHT. Otherwise IHT is payable, subject to taper relief.

[11] IHTA 1984, s 7(2). 25% if paid by transferor/settlor.

[12] Fixed at £325,000 until 2017/2018. The threshold only applies to UK-sited assets and is reduced if the transferor made any transfers within the 7-year period of the last transfer.

paid. If UK property is transferred into trust on death (e.g. by will), full IHT liability will be due.

(ii) On the net value of a taxpayer's estate on death at the rate of 40%, taking into account the nil rate band. The net value is calculated by aggregating (a) the value of all taxable estate (except excluded property) beneficially owned by the individual immediately before death, less liabilities[13], (b) the assets subject to gift with reservation rules, (c) any available reliefs and exemptions, and (d) any PETs made within 7 years of the death of the taxpayer.

It follows that a gift of the UK property to an individual is a PET, and a gift into a trust is a CLT.

Territorial scope of IHT is determined by the taxpayer's domicile. Non-domiciled individuals (irrespective of their residence status, but subject to deemed domicile rules) are liable to IHT only on UK-sited assets to which they are *beneficially* entitled[14]. Situs of UK property is where it is located.

The UK property has a UK situs, which means that irrespective of an individual's domicile, direct ownership falls under IHT, subject to the nil rate band. If, during his lifetime, the taxpayer transfers the property to another person, but continues to live in it, the gift with reservation or pre-owned assets rules may apply (see 2.2.3 below).

IHT on death is, of course, of greater concern if the RND has health issues or is of an older age. Likewise, IHT should not be an issue if the property is being acquired for an onwards sale. Nevertheless, depending on the facts, there are a number of ways to mitigate the IHT liability:

(i) Commercial borrowing from a financial institution secured by mortgage on the property.

IHTA 1984, s 5(3) contains a general rule that the deceased's liabilities outstanding at his death can be taken into account when determining the value of his estate. Specifically IHTA 1984, s 162(4) provides that liability which is an incumbrance can be taken into account to reduce the net value of the property. If the value of the non-domicile's UK property, after taking into account any debt on the property, is lower than the nil rate band (provided nil rate has not been used before), no IHT will be due. It is therefore advisable to ensure that if a financial institution requires additional collateral to secure the loan, the taxpayer should make sure the agreement is in place whereby the rights of security over the UK property in question are exercised first. This is to counter any arguments that the incumbrance was not genuine[15].

[13] IHTA 1984, ss 4(1) and 5(3).

[14] Accordingly, nominee arrangements are look-through for IHT purposes.

[15] See also Giles Clarke, Dominic Lawrence and John Roberts, *Clarke's Offshore Tax Planning* (19th edn, LexisNexis Butterworths, UK 2012), at 20.4.

Without much consultation in 2013 the Government introduced amendments to s 5(3). The new rules provide that debt may only reduce the net value of taxpayer's estate if it is "discharged on or after death, out of estate, in money or money's worth", unless there is a real commercial reason for the debt not to be discharged (e.g. the lender is not willing to enforce the debt), and it is not left undischarged due to tax avoidance motives[16]. Commercial reasons include arm's length loans, so the new rules should not affect straightforward commercial borrowings.

One may question the Government's drafting of the new rules. For example, it is not clear how soon after death the liability should be discharged, how the rules will apply to properties subject to gift with reservation or whether taking out a private loan to repay the liability on death will be allowed[17]. Importantly, the amendments are not likely to meet the legislature's intention to prevent avoidance of IHT using loans. This is because, in all probability, repaying a nominal amount to discharge the debt and having the principal debt transferred offshore would not trigger IHT liability under the new rules.

Another disadvantage of using commercial loans to mitigate IHT is the requirement to make market rate interest payments, which is an added cost to RNDs. In addition, it is important to take into account the remittance rules when paying interest or capital, even if the lender is located outside the UK (see 2.4 below). Lastly, the RND should consider whether the UK rules on deduction of interest at source are applicable[18], or whether there is a double tax treaty between the UK and the lender's country of residence that effectively allocates the taxing rights between the countries.

It is worth noting that in time the net value of the property will increase due to regular repayments of capital, resulting in a greater IHT charge.

(ii) Private loans/self-generated debt.

The use of private loans is more complicated because HMRC, quite rightly, sees greater scope for IHT abuse and can disallow deductions. This is more likely to occur now with amendments to IHTA 1984, s 5(3) as it may be more difficult to show a commercial reason and no tax avoidance motive in cases of private borrowings.

In addition, FA 1986, s 103 may prevent a deduction of liability where the borrowed funds (directly or indirectly) derive from the borrower. There is also a risk that the loan can be treated as having been

[16] IHTA 1984, s 175A, as inserted by FB 2013, Sch 34 para 4.

[17] See also the STEP Technical Committee, "The Treatment of Liabilities for Inheritance Tax Purposes: Comments on Draft Legislation and Explanatory Notes Published on 28 March 2013" (22 April 2013), at 14 <http://www.step.org/sites/default/files/STEP%20Response%20-%20Treatment%20of%20liabilities%20for%20IHT.pdf> accessed 28 August 2013.

[18] ITA 2007, s 874.

granted as part of the regulated activity[19], which may require authorisation from the Prudential Regulation Authority.

As already mentioned, care should be exercised to ensure no taxable remittance takes place.

(iii) Insurance.

RNDs may also consider non-UK insurance policies[20]. The cover should not be very expensive for younger RNDs in good health owning relatively inexpensive property; although it is unlikely to be a cost-effective solution where high value property is at stake.

(iv) Exempt transfer: spouse exemption.

IHTA 1984, s 18(1) provides that transfers of value (including lifetime transfers) between spouses are exempt from IHT. Therefore, if a RND leaves the property under a will to his non-domiciled spouse, on RND's death the spouse may be able to sell the property free of IHT. If the spouse fails to do so, the IHT liability will be due on the spouse's death subject to a maximum "double" nil rate band (£650,000)[21]. Similar rules apply to RND's UK-domiciled spouse. In addition, if the RND was a legal and beneficial joint tenant of the property, on death the 50% share will pass to the RND's spouse free of IHT.

There are separate rules that deal with mixed domicile marriages where the transferor is (deemed) domiciled in the UK, but the transferee is not. In such cases only limited spouse exemption exists. From 6 April 2013 the exemption amount was increased from £55,000 to "the exemption limit at the time of the transfer"[22], and, as a result, the surviving spouse will only be able to use a maximum of £650,000. However if the surviving spouse elects to be treated as UK domiciled for IHT purposes, no IHT will be due (see below).

(v) Other options.

There are other ways to mitigate IHT but most of them are fact-specific. For example, the property can be acquired by all family members as tenants in common so that the value of their respective shares does not exceed the nil rate band.

[19] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, s 61.

[20] Excluded property for IHT purposes if sited outside the UK.

[21] IHTA 1984, s 8A(3). The spouse exemption is a lifetime limit and any amounts over it are PETs.

[22] IHTA 1984, s 18(2), as amended by FB 2013, s 178(2).

RND may also gift a share of the property to another and, provided the gift is genuine (i.e. no consideration was received in any form) and the RND outlives the gift for 7 years, the RND's IHT liability will be reduced[23].

Lastly, the property can be transferred to RND's children with the RND retaining the right to occupy. Subject to PET rules, IHT is mitigated and, as long as the market rent is payable to the children, gift with reservation and pre-owned assets rules should not be triggered. However IT will be payable on rent receipts and, if RND's children reside in the UK, CGT on disposal will be due, and the main residence relief will not apply.

Deemed Domicile

The concept of deemed domicile is used primarily for IHT purposes. A taxpayer is deemed to retain his UK domicile for a period of 3 years after he has terminated his common law domicile in the UK[24]. This means that all chargeable transfers made by the taxpayer within three calendar years after abandoning his UK common law domicile are subject to IHT. This rule is unlikely to have much impact on RNDs given their non-domicile status in the first place.

The taxpayer will also be deemed to have a UK domicile if he was resident in the UK for 17 or more out of 20 years of assessment (**the 17-year rule**)[25]. Given the fact that the UK residence – for purposes of the 17-year rule – is determined in accordance with IT principles but without provision for split years, residence in part of a tax year is treated as residence during the entire tax year. For example, if the taxpayer arrives in the UK on 5 April (one day before the start of a new tax year), resides there for 15 years and leaves the UK on 7 April of the 17th tax year, he will acquire deemed domicile in the UK. Therefore, a diligent day count should be maintained as once the deemed domicile status is established the excluded property status of foreign assets is lost, and the RND will become liable to IHT on his worldwide estate.

The 17-year rule is an automatic rule and so acquisition of deemed domicile is inevitable[26]. In fact, one can obtain UK domicile status much earlier by, for instance, coming to the UK with an intention to remain there permanently.

[23] See also Malcolm James Finney, *Wealth Management Planning: the UK Tax Principles* (John Wiley and Sons Ltd, UK 2008), at 361.

[24] IHTA 1984, s 267(1)(a).

[25] IHTA 1984, s 267(1)(b).

[26] Unless the taxpayer is from India, Pakistan, France or Italy, in which case the relevant double tax treaty can disapply the deemed domicile rules.

Election to be Treated as a UK-Domiciled

Once FB 2013 receives Royal Assent, a non-domiciled taxpayer will be able to elect to be treated as a UK domiciled for IHT purposes by submitting a written request to HMRC[27]. Under the new rules, the election can be made during the UK domiciled spouse's lifetime[28] or within 2 years of death occurring on or after 6 April 2013[29]. Lifetime election can be made within 7 preceding years of the date of election (but not earlier than 6 April 2013)[30], so full spouse exemption becomes available for any gifts made in the last 7 years.

The election cannot be revoked unless the person who makes the election becomes a non-UK resident for 4 successive tax years beginning at any time after the election is made[31]. The deemed domicile rules will not apply to the person making the election[32].

When considering the wider scope of the rule, one should note the Government's encouraging attitude towards RNDs. It can even be suggested that the election may attract more RNDs to the UK. This can be contrasted with the developments in 2008 when the legislature, in a somewhat bold move, closed down many beneficial avenues available to RNDs resulting in the run of a number of RNDs from the UK[33].

The election now allows the UK property owned by a (deemed) UK-domiciled taxpayer to pass on death to his non-UK domiciled spouse free of IHT liability, and it is notable that this will not affect the RND's entitlement to remittance basis taxation. The downside of making the election is that the non-domiciled spouse will become UK domiciled for IHT purposes, making the spouse liable to IHT on both UK and foreign-sited assets. As a result, one should carefully consider the location of his or her assets (both in the UK and abroad) and calculate any resulting tax liability[34]. However, even if the election is chosen, the Government expressly allows tax planning to take place using the 4-year non-residence exemption.

---

[27] IHTA 1984, ss 267ZA and 267ZB, as inserted by FB 2013, s 177.

[28] IHTA 1984, s 267ZA(3).

[29] IHTA 1984, ss 267ZA(4) and 267ZB(8).

[30] IHTA 1984, s 267ZB(5).

[31] IHTA 1984, s 267ZB(11)-(12).

[32] IHTA 1984, s 267ZA(8).

[33] According to the freedom of information request by Pinset Masons LLP <http://www.accountancylive.com/croner/jsp/Editorial.do?channelId=-601055&contentId=2492242&Failed_Reason=Invalid+timestamp,+engine+has+been+restarted&Failed_Page=%2fjsp%2fEditorial.do&BV_UseBVCookie=No> accessed 25 August 2013.

[34] Other considerations may include the review of the domicile rules in the origin country and availability of double tax treaty relief on estate duties.

Nonetheless, as will be seen below, this encouraging development is negligible in comparison with other unfavourable changes to the legislation.

Capital Gains Tax

CGT is payable on chargeable gains accruing to a UK-resident seller on disposal of assets[35]. The rates are 18% or 28% depending on the seller's total amount of taxable income. As mentioned in 2.4, RNDs are not entitled to an annual exemption amount[36]. Spouse exemption is available to married couples[37], but if the RND transfers the property to his spouse and continues living there, the gift with reservation rules may apply.

The main advantage of direct ownership of UK property is protection from CGT by virtue of the main residence relief[38]. In order to qualify for the relief, the gain must be accruing to a dwelling that is occupied by a UK resident as the main residence throughout the entire ownership period[39]. If the property was not so occupied, partial exemptions are available[40]. A property's status as the main residence depends on the facts of each case. For example, if the property was acquired with a view of subsequent sale at a profit, the main residence relief may not be available[41].

If the RND has other residential properties (whether in the UK or abroad), a revocable election can be submitted to HMRC within 2 years of acquisition of the UK property to the effect that such property is the RND's main residence[42]. Disposal of the main residence on death is also exempt from CGT if certain other conditions are satisfied[43]. It is worth mentioning that the election is made for CGT purposes only and should not affect one's domicile status in the UK.

[35] TCGA 1992, ss 1(1) and 2(1).

[36] Subject to a limited number of double tax treaties that grant taxpayers access to the same rights to allowances as any UK citizens who are non-residents.

[37] TCGA 1992, s 58(1).

[38] TCGA 1992, ss 222(1) and 223(1).

[39] Married couples can only have one main residence.

[40] TCGA 1992, s 223(2).

[41] Op cit (note 23), at 351.

[42] TCGA 1992, s 222(5).

[43] TCGA 1992, s 225A.

If main residence relief is not available and potential gain is significant, subject to temporary non-resident provisions found in s 10A of TCGA 1992[44], a RND might consider becoming a non-UK resident prior to disposal of the UK property.

As it now stands s 10A overrides any applicable double tax treaty[45] and treats a non-resident as a UK resident if the following conditions are satisfied:

(i) an individual is a UK resident (**the year of return**);

(ii) an individual was at some stage a UK resident, which was followed by a period of non-UK residence (**the year of departure**);

(iii) there are less than 5 tax years between the year of departure and the year of return (**the non-residence period**); and

(iv) the individual was a UK tax resident at any time before the year of departure for 4 out of 7 tax years.

If the above conditions are satisfied, the RND will be liable to CGT on gains arising during the non-residence period in the year of return[46]. Remittance rules will not apply as the property is situated in the UK. In addition, subject to limited exceptions[47], gains accruing under s 10A include gains that would have been attributed to UK residents under s 13 but for their temporary non-residence status[48] and to offshore trusts that would be chargeable to CGT on their temporary non-UK resident beneficiaries who received capital payments under s 87[49].

It follows that, subject to the above conditions, the RND can sell the UK property after having maintained the status of non-resident for at least 5 tax years prior to returning to the UK.

Stamp Duty Land Tax

SDLT is a transaction tax on the acquisition of interests in land or property (freehold, leasehold or options) in the UK for consideration. It is payable by the purchaser and is calculated as a percentage of consideration at different rates. The rates were increased in 2012 and now the residential property

[44] Similar rules exist for income tax purposes (ITTOIA 2005, s 832A). FB 2013, Sch 43(4) purports to revise and align existing non-residence rules for income and gains purposes.

[45] S 10A(9C) of TCGA 1992.

[46] TCGA 1992, s 10A(2).

[47] TCGA 1992, s 10A(3)(a)(1).

[48] TCGA 1992, s 10A(2)(b).

[49] Whilst not expressly stated in the legislation, this seems to be the view of HMRC (HMRC Helpsheet 278 (undated), at 4 <http://www.hmrc.gov.uk/helpsheets/hs278.pdf> accessed 28 August 2013).

rates for individuals vary between 0% (purchase price up to £125,000) and 7% (purchase price over £2 million). The higher threshold applies to interest in land or property acquired on or after 22 March 2012[50].

No intra-spouse exemption for SDLT purposes exists, and even gifts of property subject to mortgage to a spouse can be assessed to SDLT. However, no SDLT is payable if the property that is unencumbered by mortgage is transferred by way of a gift (but note IHT consequences for a donor) or is acquired under a will.

Other Considerations

There are no adverse IT consequences in cases of direct ownership of UK property by RNDs for personal use, and the New Legislation described below does not apply to natural persons. Accordingly, direct ownership is likely to be an attractive option going forward, provided IHT risk is mitigated.

However, in practice it may be that RNDs are more concerned about non-tax consequences of direct ownership. For example, RNDs may want to ensure their identity is kept confidential, the property is beyond the reach of creditors, that divorce risks are mitigated or succession matters are dealt with more efficiently. In this regard RNDs might consider implementing a tailor-made offshore structure.

2.2.2. Ownership through Offshore Companies

Contrary to popular belief, it may be quite inefficient from a tax perspective for RNDs to hold UK residential property via offshore companies. In light of the New Legislation designed to discourage taxpayers from using "envelopes", the tax burden has become even greater. The widely-used offshore property structures may also be unattractive because upon acquisition of a UK deemed domicile the shares in offshore companies will automatically become part of the RND's estate for IHT purposes.

Inheritance Tax

One of the few (temporary) advantages of holding UK property via an offshore company is the beneficial IHT regime afforded to non-UK property. Provided that the register of members of the company is held outside the UK and no transactions involving its shares take place in the UK, the shares beneficially owned by non-domiciles are foreign situs assets and fall under the excluded

[50] FA 2003, s 55(2), as amended by FA 2012, s 213.

property regime[51]. Therefore, until the RND acquires a deemed or actual[52] domicile the UK property will be outside the scope of IHT.

However, IHT risk is revived if HMRC determines that the company acts as a nominee for a RND. In this case corporate ownership is disregarded for tax purposes and the RND is deemed to hold his UK property directly. The risk of nomineeship depends heavily on the facts of each case but the following is usually considered:

(i) Whether ultimate management decisions with regard to the UK property are down to the company or its shareholders.

(ii) Whether the shareholders act as if they were beneficial owners of the property.

(iii) Whether anything in the corporate documents of the company suggests that the property was acquired by the company as a nominee for the RND and not as the beneficial owner. For instance one should ensure that the purchase funds are properly documented in the company's books (e.g. as shareholder loan or subscription for shares).

(iv) Whether articles of association of the company or any other corporate documents suggest that their shareholders manage the property[53].

Benefit in kind rules and issues with central management and control (discussed below) do not apply to nominee companies[54].

Annual Tax on Enveloped Dwellings

ATED came into force on 1 April 2013. It is charged if on one or more days during the period of 12 months a body corporate[55], partnership with a corporate member[56] or collective investment scheme[57]

[51] Ss 3(2) and 6(1) of IHTA 1984.

[52] See op cit (note 15), at 14.3 for examples of how to maintain foreign domicile.

[53] It is sometimes suggested that only (iii) and (iv) are relevant for purposes of establishing nomineeship as, whilst important when determining benefit in kind and corporate residence issues, the behaviour of shareholders cannot alter the legal status of the company and its interest in the UK property.

[54] See also op cit (note 8), at 70.9.1.

[55] FB 2013, ss 92(4) and 166(1). Joint entitlement to residential property by a company is treated as if the ownership is over the whole property, and joint and several liability is imposed (FB 2013, ss 92(7) and 95(2)).

[56] FB 2013, ss 92(5) and 167(1).

[57] FB 2013, s 92(6).

(a non-natural person, or **NNP**) is beneficially entitled to a single-dwelling interest[58] valued at more than £2 million[59]. NNPs are not restricted to those incorporated in the UK, and trustees, personal representatives and settlements are not NNPs[60].

ATED is due from NNPs[61], and the annual tax ranges between £15,000 and £140,000, depending on the market value of the property[62]. The usual split-year provisions and adjustments are available[63]. Several reliefs can be claimed from HMRC; for instance, reliefs for property development businesses, leases to third parties and dwellings conditionally exempt from IHT (such as those of outstanding historic or architectural interest[64]). For the purposes of this dissertation, none of the available reliefs are applicable due to the fact that ATED is aimed almost exclusively at residential property for personal, non-commercial use.

The legislation also includes specific anti-avoidance provisions. For example, the anti-fragmentation rule provides that connected persons may not own interests in the same dwelling unless one of the connected persons is a natural person and the other person's (NNP's) respective share is valued at less than £500,000[65]. In addition, disclosure of tax avoidance schemes regime now applies to ATED[66] although at this stage it is unclear what information will have to be provided to HMRC.

Given the significant amount of tax to be paid by RNDs on a yearly basis, consideration of ATED is crucial. For some, paying 0.7% (or less) of the value of a £20 million+ property per year is a better option than the risk of IHT at 40%. Indeed, if the property is valued at £50 million, the IHT due is £20 million, which equals 142 annual ATED payments at the current rates. RNDs should consider the remittance basis rules prior to funding NNPs for payment of the annual tax (see 2.4 below), and several practical concerns in this regard have already been expressed[67]. On the other hand, if IHT can be successfully mitigated, corporate ownership structures will become redundant and no ATED will be due. Loss of privacy should, of course, be taken into account as well as succession and estate planning considerations.

---

[58] Defined as interest in land consisting of a single-dwelling or, broadly, residential property (FB 2013, ss 105(1), 106(2) and 111). Periods during which single-dwelling is being constructed for such use are not excluded (FB 2013, s 111(1)(b)).

[59] FB 2013, s 92(2)(a).

[60] FB 2013, s 93(2), although bare trusts are not settlements (FA 2003, Sch 16, para 1).

[61] FB 2013, s 94(2)-(3).

[62] FB 2013, s 97(4). ATED resembles a wealth tax that exists in several other jurisdictions (e.g. France up to 1.5% and Spain up to 2.5%) but with lower rates.

[63] FB 2013, ss 97(3), 98 and 104.

[64] IHTA 1984, s 31(1).

[65] FB 2013, s 108(2).

[66] FB 2013, Sch 33, para 2.

[67] Op cit (note 7), at 2.10(e).

Capital Gains Tax

As mentioned in 2.2.1, no CGT is payable on disposals of UK property by non-resident sellers. However TCGA 1992, s 13 can apportion gains of offshore companies to their UK-resident shareholders without protection afforded by remittance basis rules (see 2.3 below). Whilst the main residence relief cannot be claimed as it does not apply to UK properties owned by legal persons, s 13 risk can be mitigated if RND becomes non-UK resident and complies with temporary non-resident rules (see 2.2.1 above).

Furthermore, on 6 April 2013 the extended CGT regime targeting UK properties worth over £2 million came into force. In many respects it mirrors the provisions of ATED. The new TCGA 1992, s 2B(1) provides that a person "is chargeable to capital gains tax in respect of any ATED-related chargeable gain accruing to [such person] in a tax year on a relevant high value disposal" (**ATED-related gains**) at the rate of 28%[68], provided that four conditions are satisfied[69]:

(i) Disposal must be of the whole or part of the chargeable interest (chargeable interest has the same meaning as in the ATED legislation).

(ii) The chargeable interest has at the relevant ownership period (see below) been or formed part of a single-dwelling interest (single-dwelling interest has the same meaning as in the ATED legislation).

(iii) A person is within the charge to ATED on one or more days in the relevant ownership period and reliefs do not apply.

(iv) The disposal consideration exceeds £2 million or, in cases of partial disposals or disposals of joint interests, a relevant fraction of £2 million.

As a result of condition (iii) it is safe to assume that (notwithstanding somewhat confusing wording of TCGA 1992, s 2B(2)) the extended CGT regime applies only to NNPs falling under the charge to ATED and, therefore, trusts and settlements are excluded. As with ATED, ATED-related gains accrue irrespective of the residence status of the NNP or its shareholder.

The relevant ownership period is between 6 April 2013 (or date of acquisition, if later) and the day before the date on which the disposal occurs[70]. Any gains on UK properties valued at over £2 million that are held by NNPs subject to ATED will be treated as ATED-related gains and will not give rise to a charge on the participator under s 13 or be treated as capital payment to beneficiaries under s 87

[68] TCGA 1992, s 4(3A).

[69] TCGA 1992, s 2C(2)-(5).

[70] TCGA 1992, s 2C(6)(b).

(unless the sellers are trustees, see 2.2.4 below)[71]. Any ATED-related losses can be deducted from ATED-related gains[72]. Properties worth less than £2 million held by NNPs or those not falling under ATED are subject to the old regime and corresponding anti-avoidance legislation (see 2.3 below).

The reliefs, in general, are the same across the New Legislation, which shows that ATED, the extended SDLT (except for relief on dwellings conditionally exempt from IHT[73]) and CGT regimes have been aligned as far as possible[74].

To prevent market distortions, the Government introduced tapering relief where consideration is just over £2 million. It provides that the chargeable gain is either actual gain or gain exceeding five-thirds of the difference between disposal amount and £2 million, whichever is lower[75]. For example, if the property was purchased for £1 million and later sold for £2.2 million, the chargeable gain is £1.2 million resulting in a tax of £336,000 and net proceeds of £1,864,000. The taxpayer could (and probably would) sell the property for just under £2 million incurring no ATED-related gains, have a total saving of £136,000 and retain the risk of triggering anti-avoidance legislation. However, tapered ATED-related gain is rounded down to around £333,000 (5/3 of the difference between disposal amount and £2 million), which is lower than the chargeable gain of £1.2 million. Accordingly the tax due is around £93,240.

Lastly, as a result of conditions (i) and (ii), the extended CGT regime will not apply to indirect sales because only disposal of chargeable interest that is a single-dwelling is caught. Hence no CGT should be due if the shares in a NNP are sold by RND-shareholder or another NNP. If, as in the present scenario, the RND is the sole shareholder of the NNP, the RND-seller will be liable to CGT due to his residence status. Similarly, whilst taxpayers may engage in creative structuring using several layers of jurisdictions with favourable double tax treaties, this is unlikely to pass the scrutiny of HMRC or indeed mitigate other taxes discussed in this chapter.

Stamp Duty Land Tax

The rates for acquisition of UK property valued at under £2 million are the same as for individuals. However, effective from 21 March 2012, transactions involving UK properties worth over £2 million

[71] TCGA 1992, s 13(1A).

[72] TCGA 1992, ss 2(7A) and 2B.

[73] FB 2013, Sch 38.

[74] Evidently to reduce compliance costs. See also op cit (note 5), at 1.5 and 1.19.

[75] TCGA 1992, s 2F(2).

attract a punitive SDLT rate of 15% if the purchaser is a NNP[76]. The definition of a NNP for the purposes of the higher rate SDLT is the same as for ATED.

The effect of the revised legislation is that "enveloping" has become less attractive from the outset. However, the advantage of holding UK property via an offshore company is that SDLT can be avoided on subsequent sales[77] provided that the buyer agrees to purchase the shares in the offshore company and accepts the costs of due diligence.

Other Considerations

There also exist a number of slightly less obvious tax risks for RNDs when using offshore companies to hold UK property.

Firstly, the occupation of UK property by a shareholder of the company may trigger a benefit in kind (**BIK**) charge under ITEPA 2003, Part 3, Chapter 5. The BIK charge is subject to IT rules and is due if, *inter alia*, a UK resident is a director (including de facto/shadow director[78]) or an employee of the company and the UK property was provided to such UK resident in consideration of performance of his duties[79]. Specifically, and based on the facts of each case, the more the RND directs what the company should do with the property and the board is "accustomed to act" in accordance with such directions, the more likely he will be treated as shadow director of the company[80] or, if the jurisdiction of incorporation does not recognise the concept of shadow directorship, as having usurped the role of existing directors of the company. For example, if the RND incorporates the company that subsequently purchases the UK property, there is a risk that HMRC might argue that the company acted on directions of the RND[81]. As will be seen in 2.2.4, such risk is reduced if trustees own the company, assuming always that directors and trustees are different persons.

Calculations of IT liability for purposes of BIK rules are complex, but generally where the property is worth over £75,000 the tax due is by reference to the cash equivalent of the cost of providing accommodation and the official rate of interest in force for the purposes of taxing loans (currently

[76] FA 2003, Sch 4A, para 3.

[77] Unless the share register of the company is kept in the UK, in which case SDRT at the rate of 0.5% of consideration is due (FA 1986, s 99(4), as amended).

[78] EIM11413. See also *R v Dimsey and Allen* [2001] UKHL 46.

[79] ITEPA 2003, ss 97(1) and s 102(1).

[80] ITEPA 2003, s 67(1). For a detailed discussion of the concept of shadow directorship and what constitutes acting in accordance with directions of shadow directors, see op cit (note 8), at 70.15. See also *Secretary of State for Trade and Industry v Deverell and Another* [2000] 2 W.L.R. 907, at 354.

[81] Op cit (note 8), at 70.15.2.

4%)[82]. In the simplest scenario, if the property is worth £80 million, the annual IT liability can be as high as £1,426,100[83]. In certain circumstances tax can be mitigated by making rent payments to the company[84]. However this too can create an IT liability for the company as, unless the company has deductible expenses, rent receipts would be UK source income and, therefore, subject to IT. Rent payments can also trigger transfer of assets abroad or settlor-interested trust provisions (see 2.3 below).

For RNDs BIK earnings can be qualified as chargeable overseas earnings subject to taxation upon remittance as long as the duties are performed outside the UK[85]. Whilst in practice it may be difficult to establish whether remittance of deemed earnings has taken place, HMRC's view (as with most instances of UK source income) is that remittance would have occurred[86]. In any event, some uncertainty exists, and practical application of the rules can vary[87].

Secondly, the central management and control of the company can be inadvertently shifted to the UK, which will result in UK corporation tax on any gains on disposal of the UK property[88] and class A1 NIC contributions at the rate of 13.8%. If the only asset of the company is UK property and the UK resident shareholder makes major decisions regarding such property, HMRC might take a view that the company is in fact managed in the UK. Whilst each case is different, the risk can generally be mitigated if the directors reside in the jurisdiction of incorporation of the company, meet regularly outside the UK, exercise their duties free from any influence of the RND and make decisions independently based on professional judgment.

If the BIK rules are triggered and HMRC determines that the RND is a shadow director of the company, the risk of the UK corporate residence becomes even greater.

Lastly, in some cases gift with reservation or pre-owned assets rules can apply (see 2.2.3 below).

Therefore, it seems that RNDs would need to have very good reasons to set up property holding structures using offshore companies as, as will be examined in chapter 3, at least with regard to "de-enveloping", the New Legislation achieves the Government's objectives.

---

[82] ITEPA 2003, s 106.

[83] £3,200,000 deemed income taxed at a rate of 45%, disregarding any deductions.

[84] ITEPA 2003, ss 104 and 106(2). See also op cit (note 15), at 21.8 and 82.11.

[85] ITEPA 2003, s 23(2). Incidental duties performed in the UK may be disregarded (ITEPA 2003, s 39(2)).

[86] EIM40303.

[87] See also op cit (note 8), at 70.32-70.33.

[88] CTA 2009, s 2(1). The rate varies between 20% and 23%, and, in the present scenario, will only apply to gains that are not ATED-related gains. No corporation tax is due if the gains of an offshore company resident in the UK are ATED-related gains; in this case extended CGT regime applies.

2.2.3. Ownership through Offshore Trusts

Ownership of UK property through offshore trusts can bring with it a number of non-tax advantages. In particular, trusts can be used as wealth planning and succession tools allowing more freedom for a RND to distribute his assets and, unlike with wills, maintain confidentiality. Protection against political risks, such as expropriation of assets, and doubtful claims from creditors can also be achieved. Lastly, the use of trusts removes the need to go through UK probate as on death the RND is not the owner of the property.

There are tax advantages for non-domiciles too, although these were curtailed by IT and CGT anti-avoidance legislation in 2008. The taxation of trusts rules are complex and, as suggested by James Rivett, "lack any coherent policy or classification"[89]. The main principles are analysed below.

Inheritance Tax

One of the main disadvantages of holding UK property via offshore trusts is the unfavourable IHT regime which, whilst can be mitigated, is even harsher than in cases of direct ownership due to the existence of the relevant property regime. In addition, the UK property can remain within the RND's estate under the gift with reservation rules.

Relevant Property Regime

In most cases, the UK property settled in trust will fall under the relevant property regime governed by IHTA 1984, ss 64-69. The relevant property regime applies to trusts with interests in possession[90] unless, *inter alia*, the trust property is situated outside the UK and the settlor is not UK (deemed) domiciled at the time of creation of or adding assets to the trust (**excluded property trust regime**)[91]. Consequently, the relevant property regime will apply if the RND-settlor creates an offshore trust and transfers UK property into it. The creation of a trust is not in itself an IHT event.

Trusts falling under the relevant property regime are subject to entry, 10-yearly and exit charges.

(i) The entry charge.

The charge is a CLT and is described in 2.2.1 above.

(ii) The 10-yearly/periodic charges.

[89] James Rivett, "Taxation of Non-Resident Trusts in the United Kingdom" (2008) 14(8) T.& T. 605, at 605.

[90] Defined as a "present right to the present enjoyment of something" (*Pearson and Others Respondents v Inland Revenue Commissioners Appellants* [1981] A.C. 753, at 772).

[91] IHTA 1984, s 48(3)(a). Subsequent changes in the RND's domicile are irrelevant.

In addition to the entry charge, the trust is subject to a 10-yearly charge. The charge is payable on the 10th anniversary of the date on which the trust was established and at subsequent similar intervals[92]. The calculation is based on the value of the property in the trust, taking into account any CLTs made within the last 7 years. The effective tax rate is three-tenths of the rate of the CLT charge, subject to the nil rate band[93]. The calculations are more complex if the property was held in trust for less (or more) than 10 years[94], but the charge is broadly 0.6% per year.

(iii) The exit charge.

The exit charge applies where trustees dispose of the property (for example when beneficiaries become absolutely entitled to the trust capital or when the trust comes to an end), which results in the value of the relevant property being less than it would have been had the disposition not occurred[95]. The charge is on "the amount by which the value of relevant property [is reduced]"[96] and is calculated according to the same principles as the 10-yearly charge.

On 31 May 2013 the Government issued a second consultation document simplifying the way periodic and exit charges are calculated and charged, as well as suggesting amendments to administrative procedures[97]. The consultation closed on 23 August 2013.

In certain circumstances, the relevant property charges can be mitigated using common IHT-mitigation methods, such as the use of commercial debt or the RND selling UK property to a trust with a purchase price equal to the market value of the property remaining outstanding.

Gifts with Reservation Rules

Gifts with reservation (**GWR**) rules were introduced to stop individuals from avoiding IHT liability by gifting their assets away during their lifetime whilst at the same time continuing to enjoy them. GWR rules provide that on death the value of gifted assets is deemed to form part of the deceased's estate (with resulting IHT liability) provided that the asset was a GWR during the relevant period, which ends on the donor's death and starts seven years earlier[98]. If the donee predeceases the donor, the gifted

[92] IHTA 1984, s 61(1).

[93] IHTA 1984, s 66(1).

[94] IHTA 1984, ss 68(1) and 69(1).

[95] IHTA 1984, s 65(1)(b).

[96] IHTA 1984, s 65(2)(a).

[97] HMRC Consultation Document, "Inheritance Tax: Simplifying Charges on Trusts – the Next Stage" (31 May 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204105/130530_final_draft.pdf> accessed 28 August 2013.

[98] FA 1986, s 102.

assets *also* form part of the donee's estate. GWR rules apply not only to transfers into trusts, but also to other transfers, for example, to a company.

FA 1986, s 102 lists three conditions that have to be satisfied for the GWR rules to apply:

(i) the transfer has to be made by way of a gift[99]. HMRC treats any sale for less than full consideration (other than bad bargain) or grant of interest-free loan repayable on demand as a gift but not necessarily a GWR[100], so whether a gift is a GWR depends on the facts of each case;

(ii) the transferred property must not be enjoyed by the donee or the donor (or his spouse) must not be entirely excluded from the property; and

(iii) the gift must have been made on or after 18 March 1986.

GWR rules, therefore, apply to UK properties held in trust with the settlor as the main occupant[101] (unless the court accepts that the settlor reserved a mere life interest, or other limited carve-outs are established whereby the settlor retained a reversion), and indeed this has been HMRC's view[102]. There are special rules dealing with interests in land, making it clear that the GWR rules apply to real estate gifted on or after 9 March 1999[103].

GWR risk in relation to property occupation can be mitigated if the donor occupies the gifted property for consideration (usually market rate) or if the transfer was an exempt transfer[104]. Similarly GWR rules do not apply if a RND transfers the property to trust and his spouse (but not the RND) occupies the property[105]. Lastly, GWR rules should not be triggered where the RND transfers the property into a trust for consideration with the purchase price left outstanding. The rules on deductibility of debts apply to trustees who incur debts in relation to trust assets[106], although care must be taken not to trigger a deemed disposal under trustee borrowing provisions[107] as this may have an impact on capital payment rules under s 87.

---

[99] Even if the donor subsequently releases himself from the gift, it will become PET.

[100] IHTM14316 and IHTM14317. See also op cit (note 8), at 59.5.

[101] Op cit (note 15), at 65.5.

[102] IHTM14393.

[103] FA 1986, ss 102A-102C.

[104] These include transfers to spouses (FA 1986, s 102(5)(a)).

[105] FA 1986, s 102(5A).

[106] *St Barbe Green v IRC* [2005] EWHC 14 (Ch).

[107] TCGA 1992, Sch 4B. The rules can be triggered if trustees have outstanding borrowing at the time of making the loan.

Pre-Owned Assets Rules

FA 2004, Sch 15 extended the scope of the GWR rules to those instances where a UK-resident donor disposes of his interest in the property but continues occupying it without triggering the GWR rules. If the donor is a RND, the rules apply only to UK-sited property[108]. Where pre-owned assets rules apply, the donor is subject to an annual IT charge on the benefit received from the gifted asset. In cases of UK property, such benefit is based on the rental value of the property less any rent payments[109]. In case of conflict with the BIK rules, the latter prevail[110].

Pre-owned assets rules can be avoided if the transfer is to a spouse[111] or the GWR rules apply (in which case an election ought to be made within a prescribed timeframe)[112]. Accordingly if the RND subscribes for the entire share capital of an offshore company holding UK property, the shares (and not the UK property) are in the RND's estate[113], and thus in most cases Sch 15 will not apply pursuant to exemption in para 11(1). Similarly, where the trust owns UK property or shares in offshore company which owns UK property, the GWR rules will usually prevent the charge by virtue of para 11(3)[114].

As a result, in the majority of cases the pre-owned assets rules will not apply as the property is subject to the GWR rules.

Capital Gains Tax

Offshore trusts are not subject to CGT on disposal of UK property. Nevertheless, there are anti-avoidance provisions that attribute gains realised by offshore trustees to the settlor (s 86) or beneficiaries (s 87). These provisions can be mitigated using the main residence relief. The relief is available if the RND-beneficiary is allowed to occupy the property under the terms of the trust deed (e.g. as a life tenant) or if trustees grant a revocable licence[115]. The RND and trustees will have to

[108] FA 2004, Sch 15, para 12(2).

[109] FA 2004, Sch 15, paras 3(5), 4 and 5. See further Robert Maas, *Anti-Avoidance Provisions* (26th edn, Bloomsbury Professional, UK 2012), at 15.304.

[110] FA 2004, Sch 15, para 19.

[111] FA 2004, Sch 15, para 10(1)(b) and (c).

[112] FA 2004, Sch 15, para 11(3) and (5).

[113] By virtue of IHTA 1984, s 5(1)(b).

[114] See further op cit (note 15), at 22.7, 84.25 and 84.40-84.43.

[115] Licences granted for no consideration may be attributed to a UK-resident settlor under ITTOIA 2005, s 624 or treated as capital payments under TCGA 1992, s 87 (see 2.3 below).

make a joint election to HMRC for the relief to apply[116], which puts the trust on notice and, therefore, may go against the wishes of the settlor to keep his assets confidential.

As mentioned above, the extended CGT regime does not apply to trustees.

It is worthwhile to note that, as with other transfers to third parties, transfers of UK property by RNDs to trusts are chargeable disposals and can be taxed based on the market value of the property[117] (unless the RND can claim the main residence relief).

Stamp Duty Land Tax

Given that the SDLT is a tax on land transactions located in the UK, the residence status of the purchaser is irrelevant. Accordingly, the acquisition of UK property by offshore trustees will be subject to up to 7% SDLT.

The SDLT rate of 15% does not apply to trustees[118]. Also, no SDLT is chargeable on the grant of licences by trustees (or the board of offshore companies) as these are exempt interests for the purposes of SDLT[119].

Other Considerations

Changes in the trust structure itself, such as transfers of trust assets to another trust, can trigger tax implications (for example, CGT). In addition, HMRC can request offshore trustees to complete Form 50(FS) specifying any income or gains realised and any payments made to beneficiaries. Lastly, ownership of property using trusts results in loss of control for RNDs, which some RNDs (especially from CIS and the Middle East) may not be willing to accept. The practical effect of this is that RNDs will inevitably shadow-manage the trust property and so open the doors for HMRC to argue that the trust is a sham.

BIK and corporate residence issues do not apply when trustees own UK property directly. Likewise trustees are not liable to ATED.

2.2.4. Ownership through Offshore Trusts and Companies

[116] TCGA 1992, s 225(b). See also op cit (note 23), at 358.

[117] TCGA 1992, s 17(1).

[118] FA 2003, Sch 4A, para 3(4).

[119] FA 2003, s 48(2)(b).

It has been shown that a corporate structure on its own poses significant tax risks for RNDs. Interposing a trust between a RND and an offshore company has historically been a solution but is unlikely to remain so given the recent developments.

Inheritance Tax

The use of offshore trusts to hold shares in offshore companies may shelter the trust from the relevant property regime taxes as long as the RND was not (deemed) domiciled in the UK at the time of establishing the trust or transferring the company holding UK property into the trust (excluded property trust regime, see 2.2.3 above). This applies even if the RND-settlor is a beneficiary. Similarly, such structures will also shelter the RND from IHT on death even if on death the RND is UK (deemed) domiciled.

Care should be exercised to ensure that any subsequent funding of the trust (e.g. to pay UK taxes) takes place when taxpayer is non-domiciled to ensure that an excluded property trust regime remains applicable.

Capital Gains Tax

The existence of an offshore company in the structure prevents the RND from claiming the main residence relief. As a result, the CGT risk is inevitable given the rules apportioning gains to the trust (s 13) that will be added to the trustees' s 2(2) amount and taxed on a matching basis as capital payment in the hands of beneficiaries (s 87). As discussed in 2.3 below, capital payments include rent-free occupation.

Where the UK property is worth more than £2 million, the extended CGT regime shall displace the aforementioned rules and the company will be taxed on gains on the date of disposal at the rate of 28%. However, if trustees dispose of the shares in a company that owns the UK property worth over £2 million, the extended CGT regime will not apply (indirect disposals are not caught, see 2.2.2 above), but s 87 risk will remain.

Other Considerations

The BIK charge is less likely to apply unless there is clear evidence that a RND manages the company. Whilst there may be an argument that the RND is a shadow director of the company, it is the trustees who are more likely to have apparent power to influence the company's decision-making process and thus shadow-manage the company.

Unless the BIK argument succeeds, the risk that the RND has shifted the tax residence of the company to the UK is also minimal. The RND is not the legal owner of the structure (the trustees are), and it would be more difficult to argue that a non-owner was managing the company. Even if HMRC claimed that the board did not exercise its duties, it is more likely that trustees would.

The risk of application of GWR and pre-owned assets rules is the same as in cases of direct trust ownership.

Lastly, the extended SDLT regime and ATED will apply due to the existence of a NNP in the structure.

2.3. ANTI-AVOIDANCE LEGISLATION

Offshore zones, also known as tax havens, are often associated with confidentiality, cash-box entities and asset protection schemes involving trusts, shell companies and nominees. Tax havens are also renowned for their tax-friendly regimes attracting multinational enterprises and individuals allowing income and gains to bypass the revenue authorities and end up untaxed in the hands of taxpayers.

In order to bring the untaxed profits of UK residents back to the UK, the Government has been constantly revising its anti-avoidance legislation and closing down existing loopholes. Below is a summary analysis of the relevant UK anti-avoidance legislation as it stands today.

S 720 and S 624

Transfer of assets abroad rules were introduced to counter IT avoidance by UK residents. The rules apply if a UK resident makes a transfer of an asset to a person located abroad (trust or company) for full or nominal consideration as a result of which income from the asset becomes payable to such person abroad. ITA 2007, s 720 charges the transferor to IT on income arising from the transferred asset as if it had been paid to the transferor provided that the transferor (or his spouse) retains the power to enjoy the income. There are also separate rules that deal with non-transferors and capital sums received by UK residents as a result of the relevant transfers. Exemptions exist where UK tax avoidance was not the reason for the transfer.

Likewise, ITTOIA 2005, s 624 (known as settlor-interested trust provision) attributes the income arising under a trust to the settlor or his spouse if the settlor has retained an interest in the settled property. For the purposes of s 624 and subject to limited exceptions, the settlor is deemed to have retained an interest in the property if the income is or will become payable to or applicable for the benefit of the settlor or his spouse[120]. In other words, if the settlor or his spouse can benefit from the

[120] ITTOIA 2005, s 625(1).

trust property, the income arising to trustees shall be attributed to the settlor[121] if it arises during the life of the settlor and he is a UK resident in the year of distribution.

Given that the RND-settlor occupies the UK property, there is little question that s 624 will attribute the benefit of the property income to the RND. Whilst there may not be much income arising from the property occupied for personal use, the income does not necessarily have to be in monetary form. For example, the value of licences granted by trustees of discretionary trust (or, in some cases, by offshore companies held in trust[122]) for no consideration to the RND to occupy the property may be attributed to the RND as income under s 624, resulting in an IT charge to the RND[123]. Even if the licence was granted for consideration, the somewhat bizarre result of literal interpretation of s 624 is that the rent receipts of trustees are income of the trust subject to IT in the hands of the settlor[124]. Therefore, to reduce the value of such licences and a corresponding tax charge, licences should be terminable at will and include various maintenance obligations. The above analysis by and large applies to s 720[125], but in cases of conflict s 624 prevails[126].

Whilst remittance rules usually apply[127], the benefit of rent-free occupation of the UK property and any rental income derive from a UK source. Therefore, RNDs will be taxed on the arising basis.

S 13

The UK anti-avoidance rules also include TCGA 1992, s 13, which was introduced to counter CGT avoidance by UK residents using offshore companies. S 13 applies if a chargeable gain accrues to a non-resident company that would be a close company if it was a UK tax resident and apportions such gain directly to UK-resident participators of the company[128] or non-resident trustees[129] in proportion to their shareholdings. The gain so apportioned is calculated as if the company was subject to corporation tax in the UK. If the company subsequently distributes capital profits (dividends or capital)

[121] Or trustees (ITTOIA 2005, s 646(8)).

[122] For more detail see op cit (note 15), at 72.24.

[123] Rental income of over £1,000 is charged at the rate of 45%.

[124] *Rogge, Kent and others v HMRC* [2012] UKFTT 49(TC).

[125] ITA 2007, ss 723(3) and 724(2).

[126] Op cit (note 8), at 26.12. See also HMRC's views on tax assessments under both provisions: HMRC Tax Bulletin 40 (1999), at 652, <http://webarchive.nationalarchives.gov.uk/20110620155444/http://hmrc.gov.uk/bulletins/tb40.pdf> accessed 7 August 2013.

[127] ITTOIA 2005, s 648(3) and ITA 2007, s 726(4).

[128] TCGA 1992, s 13(2).

[129] TCGA 1992, s 13(10). The gains are not taxed in the hands of trustees but increase their s 2(2) amount.

to its participators within 3 years of the gain, any tax payable under s 13 will be credited against tax on capital profits[130]. As mentioned in 2.2.2 above, s 13 does not apply to ATED-related gains.

As from 6 April 2008 non-domiciled participators are within the s 13 charge, but remittance rules only apply if the asset is non-UK situs[131]. Accordingly, gains attributed to a RND participator under s 13 from disposal of a UK property are taxable on the arising basis. However, s 13 gains can become foreign chargeable gains if the RND settlor funds an offshore company held by trustees and that company subsequently acquires UK property. Any gains on disposal of the UK property will be chargeable on the remittance basis if the proceeds are paid to the RND-beneficiary as capital payment (see s 87 below).

Another way of mitigating s 13 is by using double tax treaties. If a treaty exists between the UK and the country of incorporation of the company that effectively allocates the rights to tax capital gains to the latter (and not to the country where real property is located), s 13 will not apply[132]. The interaction of s 13 and double tax treaties has been on HMRC's agenda for some time, but no changes have been implemented so far[133].

S 87

Where settlements are involved, TCGA 1992 prevents taxpayers from escaping the CGT liability using offshore trusts by attributing gains of trustees to either settlors or beneficiaries. Capital gains cannot be attributed to non-domiciled settlors[134], but from 6 April 2008 such gains can be attributed to UK resident non-domiciled beneficiaries (s 87).

TCGA 1992, s 87 provides that the net chargeable gains realised by the offshore trustees (referred to as matched gains, or s 2(2) amount) are matched at the end of each tax year with any capital payments (or other form of benefit) received by UK-resident beneficiaries in accordance with the matching rules, resulting in accrual of chargeable gain to a beneficiary[135]. In other words, beneficiaries are taxed on the amounts or value of benefits they receive or enjoy.

---

[130] TCGA 1992, s 13(5A).

[131] TCGA 1992, s 14A(2).

[132] CG57380. However no treaty relief is available to non-resident trustees receiving s 2(2) gain from the company (TCGA 1992, s 79B(2)).

[133] HMRC Consultation Document, "Reform of Two Anti-Avoidance Provisions: (i) the Attribution of Gains to Members of Closely Controlled Non-Resident Companies, and (ii) the Transfer of Assets Abroad" (30 July 2012), at 2.21-2.22 <http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032463> accessed 28 August 2013.

[134] TCGA 1992, s 86(1)(c).

[135] TCGA 1992, s 87(2).

As mentioned in 2.2.2 and 2.2.4 above, the gain on disposal by trustees is attributed to UK-resident beneficiaries as capital payment under s 87, but ATED-related gain on disposal by the company displaces s 87 and is taxable only under the extended CGT regime.

The trustees' matched gains comprise of any gains upon which the trustees would have been chargeable to CGT had they been UK residents in the year of disposal, less amounts attributed under s 86, if any[136]. Both actual and deemed[137] disposals are caught. The s 2(2) amount includes any s 13 gains apportioned from underlying offshore companies[138] and any licences distributed to non-resident trustees to occupy the property. The capital payments, on the other hand, are payments or benefits made at non-arm's length that are not chargeable to the IT in the beneficiary's hands[139], excluding any benefits taxed under ITA 2007, s 731 and any amounts allocated under trustee borrowing provisions mentioned in 2.2.3 above.

Accordingly, in a simple scenario where trustees sell the UK property and make a one-off capital payment to a UK-resident beneficiary in the same tax year, the beneficiary will be charged to tax at the marginal rate applicable at the time of matching (currently 28%), subject to certain qualifications[140]. As with s 721 and s 624, the term "benefit" is defined broadly and includes the value of the licence to occupy property[141] (unless the licence is revocable with maintenance obligations in which case little tax should be due as the value of revocable licences is minimal).

In cases of disposal of UK property, any chargeable gain accruing to the RND-beneficiary who claims the remittance basis is taxable under TCGA 1992, s 87B(2) as foreign chargeable gain within the meaning of TCGA 1992, s 12[142]. Accordingly, the RND is only liable to CGT if the proceeds of the sale are remitted to the UK[143] at the rate applicable in the year of remittance. Alternatively, trustees can refrain from making capital payments to the RND-beneficiary until he becomes non-resident and provided that temporary non-resident rules are complied with. Note that for the purposes of s 87B, the taxpayer must be a RND in the year of accrual of gains and corresponding matching under s 87A, not in the year of remittance[144].

---

[136] TCGA 1992, s 87(4).

[137] TCGA 1992, s 71.

[138] TCGA 1992, s 13(9)-(10). This may result in unrelieved double taxation of gains; therefore, use of an offshore company from this perspective is not advisable.

[139] TCGA 1992, s 97(1).

[140] TCGA 1992, s 91.

[141] CG38211. See also TCGA 1992, s 97(2).

[142] This is so whether the asset is sited in the UK or abroad. See also op cit (note 15), at 78.3.

[143] TCGA 1992, ss 87B(2) and 12(2).

[144] TCGA 1992, s 87B(1).

The issue is a little more complex in cases of conferring benefits to beneficiaries because it is more difficult to ascertain whether conferring of benefits, as in the case of a licence to occupy UK property, is also a capital payment subject to remittance basis taxation under s 87B. It is not clear how the courts would rule in this instance, especially given the purposive interpretation of the legislation in *Rogge, Kent and others*[145], but HMRC's view is that occupation of the UK property is a taxable remittance of the capital payment created by reference to the value of the benefit (licence to occupy)[146]. HMRC's reasoning is that the use of the UK property meets condition A in ITA 2007, s 809L(2)(a) (property is used in the UK for the benefit of a relevant person) and condition B in ITA 2007, s 809L(3)(b) (property derives from chargeable gains) by virtue of the wording in s 87B(3)[147].

The interaction of the anti-avoidance rules is beyond the scope of this dissertation[148], but suffice it to mention that the grant of licences to occupy property may potentially be chargeable to CGT under s 87 and to IT under s 721 or s 624. In any event, as noted above, if the licence is terminable at will and imposes maintenance obligations, its value and the corresponding tax charge are likely to be minimal.

2.4. REMITTANCE BASIS TAXATION

One of the main reasons why the UK is sometimes called a tax haven is the remittance basis regime available to RNDs. It has been suggested that the remittance basis rules (**RB rules**) attracted wealthy individuals and their families to the UK, contributed significantly to the economy[149] and made the City the leading global financial centre[150].

The RB rules have been through a number of revisions and form one of the lengthiest and most detailed statutory provisions in the UK. Accordingly, an in depth analysis is outside the scope of this dissertation. This chapter merely outlines the main principles covering remittances of funds for the purpose of acquisition of UK property and payment of relevant taxes. The interrelation of the RB rules with anti-avoidance legislation was analysed in 2.3 above.

---

[145] See also op cit (note 15), at 78.6-78.7.

[146] HMRC Guidance, "Finance Act 2008 Changes to the Capital Gains Tax Charge on Beneficiaries of Non-Resident Settlements" (undated), example 9 <http://www.hmrc.gov.uk/cnr/beneficiaries-non-resident.pdf> accessed 6 August 2013.

[147] See also op cit (note 23), at 304.

[148] For a detailed discussion see op cit (note 15), at 24.

[149] Simon KcKie, "Squeezing the Pips" (2008) 161(4153) Tax. 415.

[150] Marilyn McKeever, "The New UK Tax Rules for Non-Domiciliaries: Tax Haven or No-Go Area?" (1 March 2008) T.P.I.R., Bloomberg BNA News Archive.

Outline of the Rules

The general rule is that UK tax residents are subject to UK tax on their worldwide income and gains on the arising basis, but RNDs are liable to UK tax only if and when their foreign income or gains[151] are remitted to the UK.

The RB rules are governed by Part 14 of ITA 2007. Remittance is defined in ITA 2007, s 809L and includes bringing money or other property which is (or is derived from) foreign income or gains to the UK or using such money or other property in the UK for the benefit of the taxpayer[152]. Accordingly the RB rules cover both direct and indirect remittances. For example, if a RND invests foreign income or gains abroad, sells the investment at no gain and then brings the proceeds to the UK, indirect remittance will occur. Similarly, bringing personal items of property acquired using foreign income or gains to the UK is a taxable remittance[153].

In general, any foreign income or gains that would normally be taxable in the UK on the arising basis will be subject to IT or CGT in the year of remittance by the RND or the relevant persons[154] provided that such foreign income and gains accrued when the RND resided in the UK. Few reliefs, such as business investment relief, and exemption for genuine gifts are available.

The application of the RB rules is not automatic and must be claimed by the taxpayer each year in the self-assessment tax return[155] (no claim is required in certain limited instances[156]). If no claim is made, the taxpayer is taxed in the UK on the arising basis. Accordingly there is some scope for determining one's tax base in the UK depending on the amount of foreign income or gain expected in any particular tax year.

In addition to making a claim, as a fee for continued access to the RB rules, the remittance basis charge (**RBC**)[157] of £30,000 is due each year the remittance basis is claimed if the taxpayer has resided in the UK for at least 7 out of the proceeding 9 tax years. From 2012/2013 for those residing in the UK for at least 12 out of the preceding 14 tax years, the RBC is £50,000[158].

---

[151] ITTOIA 2005, s 832 (foreign income subject to remittance taxation), TCGA 1992, s 12 (foreign gain subject to remittance taxation) and ITEPA 2003, s 22 (foreign earnings subject to remittance taxation).

[152] ITA 2007, s 809L(2)-(3).

[153] See RDRM33000 for more examples.

[154] Defined in ITA 2007, s 809M(2).

[155] ITA 2007, s 809B.

[156] ITA 2007, ss 809D(2) and 809E.

[157] The RBC is worded as a tax on nominated foreign income and gains to allow RNDs claim a tax credit in the country of source of income or gains.

[158] ITA 2007, s 809C.

Prior to choosing to use the remittance basis taxation, RNDs should carefully consider any downsides. These are higher IT rates for foreign dividends (40% or 50%, depending on the taxpayer's level of income[159]) and the loss of personal allowance for IT and the annual exemption amount for CGT[160] (unless the taxpayer is using the remittance basis without a claim). RNDs will also need to determine whether to make a one-off election to use foreign capital losses[161].

The Relevant Debt Rules

The relevant debt rules (**RD rules**) are a good example of the wide scope of the RB rules. The RD rules have been in force since 6 April 2008 and apply when UK assets are financed by foreign banks. Subject to limited grandfathering rules[162], the RD rules provide that loans obtained from foreign banks by a RND to finance the acquisition of UK property can constitute taxable remittance if the repayment of such loans is made outside the UK using foreign income or gains. The following conditions have to be satisfied[163]:

(i) money or other property is brought to, received in or used by a taxpayer in the UK;

(ii) a certain foreign debt is connected, whether in whole or in part or directly or indirectly, to money or other property brought to, received in or used by a taxpayer in the UK (the **relevant debt**); and

(iii) foreign income or gains are used outside the UK in respect of the relevant debt.

The amount of taxable remittance equals the amount of income or gains used in the UK[164].

As a result of the RD rules, the use of foreign income or gains to repay foreign debt obtained to acquire UK property will be treated as taxable remittance. Moreover, the use of offshore collateral (e.g. another property located outside the UK) deriving from foreign income or gains can result in automatic remittance in the amount of capital loaned by a foreign bank[165], although one may spread the tax over the life of the relevant debt if foreign income or gains are used to service or repay the

[159] Although a tax credit may be claimed.

[160] ITA 2007, s 809G.

[161] TCGA 1992, s 16ZA.

[162] FA 2008, Sch 7, para 90.

[163] ITA 2007, s 809L.

[164] ITA 2007, s 809P(4).

[165] RDRM35050.

foreign debt (in which case only the relevant income/capital payments are taxable remittances)[166]. This may be an attractive option for those RNDs who have run out of clean capital (see below).

Income and Capital Accounts

Any foreign income or gain accruing to an individual prior to becoming a UK tax resident does not fall under the RB rules and can be remitted tax-free. It is, therefore, crucial to keep foreign income and gain in a separate account prior to arrival in the UK, which, together with bequests, inheritances[167] and gifts would form part of a "clean capital". Similarly, funding of trusts with foreign income or gains prior to becoming a UK resident should convert the funds into a clean capital. The clean capital account will retain its status even after a RND becomes a UK resident as long as no further income or gains are added to it. The account can be in any currency, and from 6 April 2012 no tax is due on foreign exchange gain provided that the account is held by individuals[168].

The funds in the clean capital account should be kept separately from any foreign income or gains accruing to the RND after becoming a UK resident. The latter should be kept in separate "foreign income" and "foreign gains" accounts (so if inadvertent remittance does occur, the RND can establish whether foreign income or gains are being remitted, and a corresponding tax charge). Any income accruing to the clean capital account should be automatically paid to the foreign income account. All three accounts can be kept in the same foreign bank[169]. For UK income or gains, the RND should use a separate UK bank account.

A similar strategy of segregating bank accounts should be maintained for trusts and companies to assist in computation of tax under the relevant anti-avoidance provisions. If accounts are not segregated, mixed funds' rules will apply[170], but in practice it may be virtually impossible to determine whether remitted funds or assets derive from foreign income or gains.

It is, therefore, advisable to use foreign income and foreign gains accounts for non-UK expenses and a clean capital account for UK living expenses, acquisition of UK property (and any chattels) or personal use in the UK. The same applies to payments of UK taxes and fees of UK advisers, contractors or service providers. A UK bank account can be used for either foreign or UK expenses and investments.

[166] RDRM33170.

[167] Op cit (note 15), at 15.8.

[168] TCGA 1992, ss 251(1) and 252(1).

[169] RDRM33560. See also *Kneen v Martin* (1934) 19 TC 33.

[170] ITA 2007, ss 809Q-809S.

3. CONCLUSION

It has been shown that the UK tax legislation that applies to RNDs is all but straightforward. Any prospective ownership structure has to be carefully examined, taking into account all relevant factors, including objectives of the RND, funding, protection of privacy, matrimonial and wealth management considerations, existing and future tax exposure, tax status of the RND and his spouse, the age and health of the RND, anticipated period of stay in the UK, and, to a lesser degree, the risk appetite of the RND and costs of setting up and annual maintenance of corporate structures. Accordingly, there is no "one size fits all" solution. Nonetheless, as a starting point, most RNDs should consider direct ownership.

In cases of direct ownership the New Legislation does not apply, no CGT on disposal is due provided that the main residence relief is claimed and BIK or corporation tax risks do not exist. IHT liability can be mitigated using spouse exemption or debt. Alternatively, certain offshore partnerships without corporate members[171] or Dutch Stichtings may, in some cases, offer non-UK situs protection which will mitigate IHT liability (although note the HMRC's cautious approach to non-common law entities[172]). Protection of confidentiality can be achieved using offshore nominee companies and, as long as correct documentation is put in place (see 2.2.2 above), the tax analysis will not change as the companies will act in a nominee capacity for the individual beneficial owner of the property.

On the other hand, some RNDs may still decide to pay ATED of less than 0.7% per year (and bear other tax consequences), but eliminate the IHT risk using offshore companies until deemed domicile is acquired.

It has also been shown that trusts can be a viable alternative to direct ownership, provided IHT liability and IT risks of using licences are mitigated. S 87 will not apply if the main residence relief is claimed.

In addition to choosing an appropriate ownership structure, the RND should also consider whether to be treated as a remittance basis user, which will largely depend on his intentions and extent of ongoing connections with the UK and home jurisdiction, and how to fund the UK property. As shown above, this should be determined prior to acquiring the property and, ideally, prior to becoming a UK resident.

Criticisms of the Government's Policy on the New Legislation[173] and Suggestions

[171] E.g. Mauritius or Jersey.

[172] See also Robert Venables QC, "The Liechtenstein Foundation and UK Tax Avoidance" (1993) 4(3) O.T.P.R. 6, where the author concluded that anyone who decided to incorporate a foundation "must appreciate that he is entering upon unchartered waters".

[173] Only those criticisms that are relevant to the present scenario are noted.

The primary policy objective of the Government, as mentioned in the title of the consultation and reiterated by the UK Chancellor[174], was to prevent avoidance of tax on high value residential property transactions using NNPs, and ensure taxpayers pay their fair share of tax[175]. Its secondary objective was to ensure equal tax treatment of residents and non-residents[176].

Whilst the general policy aimed at prevention of tax avoidance is welcome, the primary objective is somewhat flawed. It is true that taxpayers are now less likely to "envelope" their UK property into NNPs given the introduction of such deterrents as ATED and the extended CGT, so in this regard the objective is met. However several major criticisms can be made:

(i) Most taxpayers pay their fair share of SDLT on initial acquisitions of the properties. On subsequent sales (which seems to be the Government's concern[177]) most buyers do not acquire shares in offshore companies as, *inter alia*, the risk of inheriting unknown liabilities can be high. Instead, the preferred choice has often been to acquire property directly, thereby paying the fair share of SDLT. Importantly, if the initial purchaser acquires the UK property via a NNP for which SDLT at the rate of 15% is paid, a subsequent purchaser will still have an option to buy shares in the NNP thereby avoiding SDLT[178]. Accordingly, the extended SDLT does not fully meet the Government's concern.

It is worth noting that in its summary of responses the Government made fewer references to "property *transactions*" and limited itself to "a fair share of tax on high value residential property"[179], presumably recognising the weight of non-SDLT reasons of "enveloping". This is worrying because one might note the Government's doubts as to the aims and wider implications of its own policy.

(ii) In the vast majority of cases NNPs are used for non-SDLT reasons, such as reasons relating to foreign laws[180] or legitimate mitigation of IHT liability[181]. SDLT avoidance is

[174] <http://www.propertywire.com/news/europe/uk-stamp-duty-foreigners-201203216328.html> accessed 25 August 2013.

[175] Op cit (note 5), at 1.2, 2.12, 2.2 and 2.59.

[176] Ibid, at 1.6 and 1.18.

[177] Ibid, at 2.4 and 2.12.

[178] Admittedly, this is one of the reasons why ATED was introduced.

[179] Compare op cit (note 5), at 1.1 and op cit (note 9), at 1.1.

[180] E.g. jurisdictions with forced heirship rules or where trusts are not recognized.

[181] See Response by CIOT to 31 May 2013 Consultation (8 August 2012), at 5.4-5.5 <http://www.tax.org.uk/Resources/CIOT/Documents/2012/08/120808_Ens_res_proptrans_CIOT.pdf> accessed 29 August 2013.

hardly ever a major consideration[182], and indeed HMRC does not have a study on the use of NNPs to avoid SDLT. As a result, although unlikely and contrary to what was explicitly stated in the Budget 2012, the Government may have also intended to prevent avoidance of taxes unrelated to property transactions. If so, such an approach will inevitably produce unexpected results and create scope for uncertainty. As a minimum, if the intention was to close down avoidance of IHT by use of NNPs, a separate draft legislation should have been produced and a detailed consultation should have been held[183]. As currently drafted, the New Legislation affects many ownership structures for the wrong reasons.

(iii) If the policy objective was indeed to prevent SDLT avoidance, a rule catching indirect transfers of the UK property (i.e. disposal of shares in property holding companies) would have achieved it[184]. The argument that the enforcement would be impractical can be countered by the existence of the wide-ranging UK anti-avoidance rules discussed above, which bring offshore profits back to the UK. In addition, this approach would have lesser detrimental effect on legitimate planning using NNPs, avoid the need for punitive taxes and prevent possible rumours among foreign taxpayers regarding how unattractive and constantly-changing the UK tax legislation is.

It is noteworthy that the Government introduced a similar proposal[185] (then viewed as a revenue-collecting exercise) in 2002, but it never reached the statute book.

(iv) The Government reiterated that the objective of the policy was not to collect tax[186] but to discourage "enveloping" and, in effect, penalise the (often legitimate) use of NNPs. If this is the case, the New Legislation is wholly unwarranted given the relatively small amount of tax allegedly avoided[187] compared with the wider negative impact on the UK property market and attractiveness for inbound property investment. The Government's claim that these measures will have no long-term effect on the property market[188] is hard

[182] There has been scope for SDLT planning using "sub-sale schemes", which was addressed in FB 2013.

[183] See also op cit (note 181), at 16.1.

[184] Many jurisdictions have similar legislation (e.g. France). See also op cit (note 8), at 70.5.4.

[185] Inland Revenue, "Modernising Stamp Duty on Land and Buildings in the UK: a Consultative Document" (April 2002), at 2.34-2.42 <http://webarchive.nationalarchives.gov.uk/20080305120016/hmrc.gov.uk/consult_new/mod_stamp_duty.pdf> accessed 29 August 2013.

[186] HM Treasury, Budget 2013, HC 1033 (March 2013), at 1.164 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221885/budget2013_complete.pdf> accessed 29 August 2013. See also op cit (note 8), at 70.5.1.

[187] Op cit (note 5), tables A.1 and A.2.

[188] Op cit (note 9), at 3.68.

to sustain and is contrary to what property specialists forecast[189]. Even by making an educated guess one can conclude that the increase of SDLT by 300% (from 5% to 15%) must have a knock-on effect on the property market.

The flipside of this argument is that tax considerations in property transactions may now outweigh commercial goals, which is not what any Government's tax policies should strive for.

(v) Lastly, the New Legislation might not prevent all taxpayers from "enveloping" their UK properties because for some, as mentioned in 2.2.2 above, paying 0.7% (or less) per year will still be a better option than the risk of 40%.

The discussion on "paying a fair share of tax" needs a dissertation to itself but, as seen in *Rogge, Kent and others* in 2.3 above, in practice the notion of "fair tax" is arbitrary, to say the least[190].

The secondary policy objective has its own criticisms. The Government's position is that ATED and the extended CGT were also introduced to align the tax treatment of residents and non-residents so that non-residents pay UK CGT[191].

This objective is met in the sense that the New Legislation now applies irrespective of the residence status of the NNP's shareholder and imposes CGT at the rate of 28% on both UK and non-UK NNPs. However, tax equality was not extended to non-resident non-NNPs (e.g. non-resident natural persons or trustees[192]) or to non-residential properties. In addition, it only goes as far as the properties concerned are worth over £2 million (a small number outside the London property market). Accordingly, only partial tax equality has been achieved.

To sum up, the New Legislation does not fully achieve the Government's policy objectives, is overly complex (partially due to the fact that the objectives were not targeted enough) and will not attract foreign taxpayers. The Government's claim to ensure "a simpler tax system"[193] also contradicts the reality.

Impact of the New Legislation on RNDs

[189] Savills Research, "Market in Minutes: Prime London Residential Markets" (April 2012), at 2 <http://pdf.euro.savills.co.uk/uk/market-in-minute-reports/prime-london-residential-market-in-minutes-april-2012.pdf> accessed 28 August 2013.

[190] See also Response by Mark Davies & Associates Ltd to 31 May 2013 Consultation (22 August 2012), at 2 <http://www.nondom.com//wp-content/uploads/2013/01/Condoc_Response_28-08-12.pdf> accessed 29 August 2013.

[191] Op cit (note 5), at 1.17-1.18.

[192] Although the initial proposal was to treat trustees as NNPs.

[193] Op cit (note 4), executive summary. See also op cit (note 8), at 1.8.

On the face of it, the New Legislation does not discriminate against RNDs. However, if prevention of IHT avoidance was an implied intention of the Government, then one could suggest that the focus was on RNDs.

In practice, RNDs will be affected more than other taxpayers as they are more likely to hold shares in offshore companies due to the reasons described above. The long-term impact of the New Legislation on RNDs is yet to be seen, but it is worth noting that most RNDs come to the UK for business or personal reasons; investment in real estate is usually only a consequence of such relocation.

Two practical concerns should also be noted. Firstly, if the RND opts for a corporate holding structure, remittance of funds to the UK to pay ATED can become an issue. It may be that the clean capital has dried out and, therefore, payments of ATED will be taxable remittances. Accordingly, in order to attract RNDs (and hence foreign investment), carve outs should be implemented that treat remittances of foreign income or gains for purposes of ATED tax free[194]. Secondly, as there may be legitimate reasons for retaining ownership of UK property via NNPs, limited exemptions for RNDs should be introduced.

Does the UK Remain a Tax Haven?

In most instances a tax haven has a number of set characteristics and one of them is, unsurprisingly, tax-related. It is generally agreed[195] that if a jurisdiction imposes no, or nominal, taxes, or offers significant tax incentives, it may be treated as a tax haven.

The UK may have been a tax haven before 6 April 2008 (the date of, *inter alia,* extension of s 13 and s 87 to RNDs) and maybe even before 21 March 2012 (the date of extension of SDLT), but, given the New Legislation and at least a dozen of complicated tax provisions discussed above, it is safe to assume that, with regard to the RND's UK property, the UK is not a tax haven any longer.

[194] See also op cit (note 67).

[195] OECD, "Harmful Tax Competition: An Emerging Global Issue" (1998), at 52 <http://www.oecd.org/tax/transparency/44430243.pdf> accessed 13 August 2013.

4. BIBLIOGRAPHY

In alphabetical order.

Books

1. Angharad Miller, Lynne Oats, *Principles of International Taxation* (3rd edn, Bloomsbury Professional Ltd, UK 2012).

2. Giles Clarke, Dominic Lawrence and John Roberts, *Clarke's Offshore Tax Planning* (19th edn, LexisNexis Butterworths, UK 2012).

3. James Kessler QC, *Taxation of Non-residents & Foreign Domiciliaries* (11th edn, Key Haven Publications Plc, UK 2012).

4. Jonathan Schwarz, "Booth and Schwarz: Residence, Domicile and UK Taxation" (16th edn, Bloomsbury Professional, UK 2012).

5. Malcolm James Finney, *Wealth Management Planning: the UK Tax Principles* (John Wiley and Sons Ltd, UK 2008).

6. Robert Maas, *Anti-Avoidance Provisions* (26th edn, Bloomsbury Professional, UK 2012).

Articles

7. Alan Binnington, Richard Brooks, "Foundations in the Spotlight" (2010) 165(4246) Tax. 16.

8. Alan Dolton, "Cases: Reporting the Tax Cases that Matter" (2012) Tax Journal, Issue 1136, 4.

9. Amanda Hardy, "The New Treatment of Liabilities for Inheritance Tax Purposes: Finance Bill 2013 Schedule 34" (24 April 2013) <http://www.taxchambers.com/sites/default/files/The%20New%20Treatment%20of%20Liabilities%20for%20Inheritance%20Tax.pdf> accessed 15 August 2013.

10. Amanda Sullivan, "Non-Doms' Capital Losses" (2012) 321 S.T.B. 27.

11. Andrew Goodall, "News: Covering the Key Developments in Tax" (2012) Tax Journal, Issue 1134, 2.

12. Anton van Zantbeek, "Tax-Driven Relocation of High Net Worth Individuals: Where to Run to?" (2010) 50(5) Euro.Tax. 196.

13. Carolyn Steppler, "Opportunity Knocks?" (2012) 170(4378) Tax. 16.

14. Christopher Groves, "Limits on Deductions for Loans Against IHT" (2013) Tax Journal, Issue 1176, 9.

15. David Barton, "Analysis – The Tax Agenda for May" (2013) Tax Journal, Issue 1167, 12.

16. David Jervis, "Tax Changes for Individual Investors in UK Real Estate" (14 January 2009) T.P.I.R., Bloomberg BNA News Archive.

17. Douglas Roxburgh, "Domicile and the Remittance Basis in UK Taxation" (2006) 46(10) Euro.Tax. 496.

18. Dr. Luca Cerioni, "New Rules for Resident/Non-Domiciled Taxpayers in the United Kingdom: Reflections in Light of Tax Treaties and EC Tax Law" (2008) 62(12) B.F.I.T. 551.

19. Edward Emblem, Michael Flaherty, "Lots of Knots" (2013) 171(4399) Tax. 12.

20. Emma Chamberlain, "Carrot and Stick" (2011) 168(4315) Tax. 12.

21. Felicity Cullen, "Private Foundations – An Aspect of the Remittance Basis" (undated) <http://www.taxbar.com/Private_Foundations_An_Aspect_of_the_Remittance_Basis_FC.pdf.pdf> accessed 29 August 2013.

22. George Bull Baker, "Tax Highlights from the Main UK Political Party Manifestos" (20 April 2010) T.P.I.R., Bloomberg BNA News Archive.

23. Helena S. Whitmore, "UK Remittance Basis Charge to Offset US Income Tax" (30 September 2011) T.P.I.R., Bloomberg BNA News Archive.

24. James Kessler, Amanda Hardy, "Hurdles to Jump: Tax Avoidance" (2009) 163(4194) Tax. 164.

25. James Rivett, "Taxation of Non-Resident Trusts in the United Kingdom" (2008) 14(8) T.& T. 605.

26. Jane Lee, "In Practice: Practice Points: Defining Domicile" (2013) 6 LS Gaz. 25.

27. John Woolley, "Offshore Wind" (2012) 170(4360) Tax. 14.

28. Laura Kermally, "New Rules on High Value Residential Property – Implications for Trustees" (2013) 2 P.C.B. 67.

29. Lyndsey West, "When Is a Debt Not a Debt? HMRC Rewrites the Rules on Deductibility of Debts for Inheritance Tax" (12 April 2013) <http://www.charlesrussell.co.uk/UserFiles/file/pdf/Private%20Client/debt_not_a_debt.pdf> accessed 1 August 2013.

30. Lynne Poyser, "Temporary Structure" (2013) 171(4394) Tax. 10.

31. Lynnette Bober, "UK Resident Foreign Domiciliaries – Remittance Basis" (2010) Tax Journal, Issue 1012, 12.

32. Malcolm Finney, "Non-Resident Trusts Post FA 2008" (27 December 2008) <http://www.taxationweb.co.uk/tax-articles/capital-taxes/non-resident-trusts-post-fa-2008.html> accessed 29 August 2013.

33. Malcolm Finney, "Unresolved Issues" (2013) 171(4396) Tax. 16.

34. Marc McLaughlin, "Offshore Structures and Non-Domiciliaries" (2009) Busy P., May/Jun, 4.

35. Marc McLaughlin, "Offshore Tax Planning For Non-Domiciles" (2010) Busy P., Jan/Feb, 4.

36. Marc McLaughlin, "Tax Planning For Non-Domiciles" (2011) Busy P., Jan/Feb, 4.

37. Marilyn McKeever, "The New UK Tax Rules for Non-Domiciliaries: Tax Haven or No-Go Area?" (1 March 2008) T.P.I.R., Bloomberg BNA News Archive.

38. Mark Cripps, "Non-Doms & Tax Residence" (2011) 35(8) C.S.R. 57.

39. Mike Truman, "Dubai Doubts" (2011) 167(4298) Tax. 26.

40. Mike Truman, “Non-Dom Delays” (2011) 168(4334) 26.

41. Mike Truman, “Year or There” (2012) 170(4369) Tax. 24.

42. M. Roger Moore, “United Kingdom: Taxation of Inward Expatriates” (2000) 40(5) Euro.Tax. 175.

43. Nigel Doran, “Analysis – Reform of Two Anti-Avoidance Provisions” (2012) Tax Journal, Issue 1138,12.

44. Partick C. Soares, “The Changes to the Remittance Basis and New Structures” (undated) <http://www.taxbar.com/The Changes to the Remittance Basis and New Strucrtures PS.pdf.pdf> accessed 29 August 2013.

45. Patrick O'Hagan, “Foundations and Trusts” (2009) 23(2) Tru.L.I. 80.

46. Paul Bramall, Priya Dutta, “Analysis - Back to Basics: Distributions from Trusts” (2012) Tax Journal, Issue 1136, 22.

47. Peter Vaines, “One Size Does Not Fit All: Legal Update Commercial” (2011) 161(7481) N.L.J. 1243.

48. Rebecca Murray, “Transfers Abroad: Tax Avoidance” (2007) 159(4110) Tax. 638.

49. Richard Dew, “Tax Planning Through Trusts or Alternative Structures” (undated) <http://www.tenoldsquare.com/Tax%20Planning%20thru%20Trusts.pdf> accessed 29 August 2013.

50. Rob Durrant-Walker, “Remittance Refresher” (2011) 168(4332) Tax. 12.

51. Rob Durrant-Walker, “Tales of the Alhambra” (2013) 171(4403) Tax. 10.

52. Robert Venables QC, “The Liechtenstein Foundation and UK Tax Avoidance” (1993) 4(3) O.T.P.R. 6.

53. Robin Hutton, “Analysis – Practice Guide: Overseas Structures for UK Property Investment” (2011) Tax Journal, Issue 1073, 16.

54. Robin Vos, Jon Rollason, “Acceptable Tax Planning – Unacceptable Tax Avoidance Measures” (2007) 1 P.C.B. 73.

55. Roy Saunders, “An Introduction to the Benefits of Establishing Residence in the UK for Non-Domiciled Individuals” (undated) <http://www.offshoreinvestment.com/media/uploads/Establishing%20residence%20in%20the%20UK%20for%20non-domiciled%20individuals.pdf> accessed 14 August 2013.

56. Stephen Smith, “Tucked Away – Residence & Domicile” (2011) 167(4303) Tax. 14.

57. Simon McKie, “Inhospitable Shores”, 4 P.C.B. 192.

58. Simon KcKie, “Squeezing the Pips” (2008) 161(4153) Tax. 415.

59. “Tax Bulletin: Latest on the Tax Attacks on High Value Residential Property: the New Annual Residential Property Tax, the New 28 Per Cent Charge to Capital Gains Tax and SDLT at 15 Per Cent” (2013) 33(10) P.L.B. 77.

60. “The New Annual Residential Property Tax, the New 28 Per Cent Charge to Capital Gains Tax and SDLT at 15 Per Cent” (2013) 33(8) P.L.B. 61.

61. "The Non-Dom Bombshell: New Remittance Basis Rules and Property Structures" (2008) 29(1) P.L.B. 5.

62. Wendy Walton, "Analysis – The Private Client Briefing for January" (2013) Tax Journal, Issue 1153, 16.

63. Wendy Walton, "Analysis – The Private Client Briefing for February" (2013) Tax Journal, Issue 1157, 14.

HMRC Consultation (31 May 2013) and Related Documents

64. "Ensuring the Fair Taxation of Residential Property Transactions", HM Treasury (31 May 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81334/consult_ensuring_fair_taxation_residential_property_transactions.pdf> accessed 26 June 2013.

65. "Ensuring the Fair Taxation of Residential Property Transactions: Summary of Responses", HM Treasury (1 December 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190256/summary_of_responses_ensuring_fair_taxation_of_residential_property_transactions.pdf> accessed 1 July 2013.

66. Response by CIOT to 31 May 2013 Consultation (8 August 2012) <http://www.tax.org.uk/Resources/CIOT/Documents/2012/08/120808_Ens_res_proptrans_CIOT.pdf> accessed 29 August 2013.

67. Response by ICAEW to 31 May 2012 Consultation (23 August 2012) <http://www.icaew.com/~/media/Files/Technical/Tax/Tax-faculty/TAXREPs/2012/taxrep-41-12-fair-tax-res-propty-trans.pdf> accessed 29 August 2013.

68. Response by Mark Davies & Associates Ltd to 31 May 2013 Consultation (22 August 2012) <http://www.nondom.com//wp-content/uploads/2013/01/Condoc_Response_28-08-12.pdf> accessed 29 August 2013.

69. Response by Mishcon de Reya LLP to 31 May 2012 Consultation (August 2012) <http://www.mishcon.com/assets/managed/docs/downloads/doc_2609/23_08_12_Mishcon_de_Reya_Consultation_Response_-_Ensuring_the_Fair_Taxation_of_Residential_Property_Transactions.pdf> accessed 29 August 2013.

70. Response by the STEP Technical Committee to 31 May 2012 Consultation (22 August 2012) <http://www.step.org/pdf/HMT%20Residential%20Property%20Letterhead%20FINAL.pdf> accessed 31 May 2013.

Other Research Materials

71. HMRC Budget 2013 Note "Taxation of High-Value UK Residential Property Held by Certain Non-Natural Persons" (undated) <http://www.hmrc.gov.uk/budget2013/tiin-1182.pdf> accessed 29 August 2013.

72. HMRC Consultation Document, "Inheritance Tax: Simplifying Charges on Trusts – the Next Stage" (31 May 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204105/130530_final_draft.pdf> accessed 28 August 2013.

73. HMRC Consultation Document, "Reform of Two Anti-Avoidance Provisions: (i) the Attribution of Gains to Members of Closely Controlled Non-Resident Companies, and (ii) the Transfer of Assets Abroad" (30 July 2012) <http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032463> accessed 28 August 2013.

74. HMRC Guidance, "Finance Act 2008 Changes to the Capital Gains Tax Charge on Beneficiaries of Non-Resident Settlements" (undated) <http://www.hmrc.gov.uk/cnr/beneficiaries-non-resident.pdf> accessed 6 August 2013.

75. HMRC Helpsheet 278 (undated) <http://www.hmrc.gov.uk/helpsheets/hs278.pdf> accessed 28 August 2013.

76. HMRC Note "Inheritance Tax: Limiting the Deduction for Liabilities" (undated) <http://www.hmrc.gov.uk/budget2013/tiin-2006.pdf> accessed 15 August 2013.

77. HMRC Note "Stamp Duty Land Tax Rate: Enveloping of High Value Residential Properties" (undated) <http://www.hmrc.gov.uk/budget2012/tiin-2120.pdf> accessed 15 August 2013.

78. HMRC Tax Bulletin 40 (1999), <http://webarchive.nationalarchives.gov.uk/20110620155444/http://hmrc.gov.uk/bulletins/tb40.pdf> accessed 7 August 2013.

79. HM Treasury, Budget 2012, HC 1853 (March 2012) <http://webarchive.nationalarchives.gov.uk/20120403104631/http://cdn.hm-treasury.gov.uk/budget2012_complete.pdf> accessed 11 July 2013.

80. HM Treasury, Budget 2013, HC 1033 (March 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221885/budget2013_complete.pdf> accessed 29 August 2013.

81. ICAEW, "Domicile, Remittance Basis and Residence: Guidance on the Finance Act 2008 Legislation", Tax Guide 1/09 (9 January 2009) <http://www.icaew.com/~/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-1-09-Domicile-Remittance-Basis-and-Residence-Guidance.pdf> accessed 29 August 2013.

82. Inland Revenue, "Modernising Stamp Duty on Land and Buildings in the UK: a Consultative Document" (April 2002) <http://webarchive.nationalarchives.gov.uk/20080305120016/hmrc.gov.uk/consult_new/mod_stamp_duty.pdf> accessed 29 August 2013.

83. OECD, "Harmful Tax Competition: An Emerging Global Issue" (1998) <http://www.oecd.org/tax/transparency/44430243.pdf> accessed 13 August 2013.

84. Savills Research, "Market in Minutes: Prime London Residential Markets" (April 2012) <http://pdf.euro.savills.co.uk/uk/market-in-minute-reports/prime-london-residential-market-in-minutes-april-2012.pdf> accessed 28 August 2013.

85. STEP Technical Committee, "The Treatment of Liabilities for Inheritance Tax Purposes: Comments on Draft Legislation and Explanatory Notes Published on 28 March 2013" (22 April 2013) <http://www.step.org/sites/default/files/STEP%20Response%20-%20Treatment%20of%20liabilities%20for%20IHT.pdf> accessed 28 August 2013.

86. The freedom of information request by Pinset Masons LLP <http://www.accountancylive.com/croner/jsp/Editorial.do?channelId=-601055&contentId=2492242&Failed_Reason=Invalid+timestamp,+engine+has+been+restarted&Failed_Page=%2fjsp%2fEditorial.do&BV_UseBVCookie=No> accessed 25 August 2013.

87. <http://www.propertywire.com/news/europe/uk-stamp-duty-foreigners-201203216328.html> accessed 25 August 2013.

Databases

88. HMRC Manuals, accessed via <www.hmrc.gov.uk>.

89. LexisNexis, accessed via <www.lexisnexis.com>.

90. Practical Law Company, accessed via <http://uk.practicallaw.com/>.

91. Westlaw, accessed via <www.westlaw.co.uk>.