CHAPTER 4

MIGRATION OF A COMPANY

4.1 Introduction

We have seen in the chapter looking at residence, that a company's residence can be determined by the location of its central management and control or effective management. Thus, if a company changes the location of its central management and control, or effective management, then it may **cease** to be **UK resident.**

To protect the revenue, there are certain procedures that need to be followed when a company migrates. In addition, there is **anti-avoidance** legislation.

In this chapter we look at the steps to be followed for a company to migrate and the tax consequences as a result of the migration.

The new rules relating to Societas Europaea are considered in a later chapter.

4.2 Payment of outstanding tax

TIOPA 2010, Sch 7, Part 10

TMA 1970, s.109B-F

TIOPA 2010 Sch 7 Part 10 amends TMA 1970 and introduces new sections 109B-109F. These set down the procedures to be followed prior to a company ceasing to be non resident.

A company **must give notice** to the board of its intention to cease to be UK resident, specifying the time at which it will cease to be resident, together with a **statement** of the amount of **tax** that is or will be payable, and particulars of the **arrangements** which it proposes to make for securing the payment of the tax.

SP 2/90 sets down guidance notes to help companies comply with these requirements. The Statement of Practice provides details of where the notice should be sent to, what information it should contain and recommends that the notice be given at least two months before the company intends to migrate.

4.3 Penalties

TMA 1970, s.109C-D

If a company becomes non resident and does not notify the Revenue in advance, making arrangements to pay its tax outstanding under s. 209B, it will be liable to **a fine** of up to the amount of **the tax payable,** which has not yet been paid.

If a company that has control of the migrating company, or a director of the migrating company, or a company that controls it, commits any act that leads to the migrating company failing to comply with TMA 1970 s. 109B, they will be liable to a penalty of up to the amount of the tax due.

4.4 Liability of other persons for unpaid tax

TMA 1970, s.109E

If tax remains unpaid by the migrating company **6 months** from the time it became payable, then the Revenue can, within 3 years of the tax being finally determined, issue a notice on certain persons stating the amount of tax due and requiring that they pay it.

The persons who can be issued with such a notice are:

- any company that was a member of the same group of companies in the 12 months before the company migrated;
- anyone who was in the same time period a controlling director of the migrating company or a company that controlled it.

The person on whom the notice is served must pay the tax as if it was their own tax bill and has a right to recover it from the migrating company.

4.5 Tax consequences of migration

When a company migrates, it will cease to be within the charge to corporation tax thus it will be treated as if it has **ceased to carry on a trade.**

The consequences of migration are as follows:

i) an accounting period will end;

ii) stock will be treated as disposed of on migration under s.162 CTA 2009, unless it is left in a UK PE;

iii) balancing allowances and charges will arise on capital assets;

iv) capital gains will arise.

We need to look at the rules relating to capital gains in detail.

4.6 Capital gains on migration

TCGA 1992, s. 185 & 187

The rules relating to capital gains on migration of a company are set down in s.185 and s.187 TCGA 1992.

The company is deemed to have disposed of and repurchased its chargeable assets immediately before migration, **except** for any assets **situated in the UK** which are used for the purposes of a trade that continues to be carried on in the UK through a PE.

It is possible to **postpone** the charge arising in relation to foreign assets where the migrating company is a 75% subsidiary of a UK company and a joint election is made by the companies within two years of the migration. Foreign assets are those assets situated outside the UK and used in or for the purposes of a trade outside the UK (i.e. non-trading and UK situated assets not included).

The postponement operates as follows:

(1) The net gains on foreign assets on migration are calculated. (There is no postponement should a net loss arise).

(2) The disposal is treated as giving rise to a single chargeable gain which can be postponed.

(3) The postponed amount on the foreign assets will be brought into charge on the parent company as follows:

   (i) If within six years the migrating company disposes of any of the assets which contributed towards the chargeable gain postponed, a proportion of the gain postponed will be brought in

$$\text{Gain postponed} \times \frac{\text{gain postponed on asset disposed of}}{\text{gross gains postponed at migration}}$$

   (ii) If at any time the company ceases to be a 75% subsidiary of the UK parent by the disposal of shares or otherwise, any remaining postponed gain will be charged.

   (iii) If the UK parent ceases to be UK resident any remaining gain will be charged.

Illustration 1

Fleco Ltd, a 75 % subsidiary of Pelo Ltd, migrates on the 30 June 2011 and the following deemed gains and losses on foreign assets arise on migration:

	£
Asset 1	25,000
Asset 2	150,000
Asset 3	(72,900)
Asset 4	95,000
Total	£197,100

If a joint election is made by 30 June 2013 the net gain of £197,100 can be postponed.

If Asset 4 is disposed of by Fleco Ltd on 31 May 2014 for £130,000, then part of the postponed gain will be charged on Pelo Ltd as follows:

$$197{,}100 \times \frac{95{,}000}{270{,}000} = £69{,}350$$

This gain will be charged in the accounting period of Pelo Ltd in which the disposal takes place.

If in 2016 Fleco ceases to be a 75% subsidiary of Pelo Ltd, then the remaining gain of £127,750 will be brought into charge.

Where the migrated company has unused or actually realises allowable **capital losses** and a postponed charge on the disposal of a foreign asset crystallises on the parent, then if a **joint election** is made within two years after the disposal, the losses can be used by the parent to shelter the postponed gain brought into charge.

In deciding whether a company is a 75% subsidiary only direct holdings of ordinary share capital are taken into account.

4.7 Intangible Fixed Assets (IFAs) on migration

CTA 2009, s.859 & 860

Where a company migrates owning IFAs (which are held in an overseas PE for the purpose of a trade) that came in to existence after 1 April 2002, it will be treated as having sold the IFA at its market value immediately before migration.

If the migrating company is a 75 % subsidiary of a UK resident company, then a joint election can be made to postpone any resulting gain. The time limit for the election is two years from the date of migration.

As for capital gains, the postponed gain will become chargeable if the IFA is disposed of within six years or the company ceases to be a 75% subsidiary or the parent ceases to be UK resident.

The postponed gain will be charged on the parent company as a non trading credit and in the case of the disposal of only part of the IFA, the gain is calculated using the formula:

$$\text{Postponed gain} \times \frac{MVB - MVA}{MVB}$$ CTA 2009, s.861

MVB is the market value of the asset immediately before the part realisation.
MVA is the market value of the asset immediately after the part realisation.

Example 1

Peine Ltd a 100% subsidiary of Tijeras Ltd migrates on 30 September 2010 and the following deemed gains and losses on foreign assets arise:

Deemed gains	£120,000
Deemed losses	£45,000

You are required to:

(a) Calculate the gain that can be postponed on the making of a joint election at migration.

(b) Calculate the postponed gains that will become chargeable (if any) if the following transactions take place:

i) Tijeras Ltd sells 15% of the ordinary share capital of Peine Ltd on 31 May 2011.

ii) Peine Ltd sells an asset for £35,000 on 31 May 2011. This asset gave rise to a deemed loss on migration of £12,000.

iii) Peine Ltd sells an asset for £200,000 on 30 September 2012. This asset gave rise to a deemed gain of £50,000 on migration.

iv) Peine Ltd sells an asset for £75,000 on 1 October 2016. This asset gave rise to a deemed gain of £35,000 on migration.

v) Tijeras Ltd sells a further 20% shareholding in Peine Ltd on 31 May 2017.

vi) Tijeras Ltd disposes of its remaining shareholding in Peine Ltd on 31 May 2018.

Answer 1

a) The gain that can be postponed is £120,000 – £45,000 = £75,000

b)

i) None of the postponed gain will become chargeable as Peine Ltd is still a 75% subsidiary.

ii) None of the postponed gain will become chargeable as the asset sold gave rise to a deemed loss on migration.

iii) A deemed gain will crystallise on Peine Ltd of:

$$75{,}000 \times \frac{50{,}000}{120{,}000} = £31{,}250$$

iv) None of the postponed gain will become chargeable as the asset was sold more than 6 years after migration.

v) The remaining postponed gain of £43,750 will be brought into charge as Peine Ltd ceases to be a 75% subsidiary.

vi) The whole of the postponed gain has been brought into charge thus no further amounts can be brought in.