# CHAPTER 34

# FOREIGN ASPECTS OF CAPITAL GAINS TAX

## 34.1 Introduction

In this chapter we shall take an introductory look at overseas aspects of capital gains tax. First let us examine a few general principles.

The single most important general principle can be found in s.2 TCGA 1992. S.2 tells us that a person can only be chargeable to UK capital gains tax if he is either **resident or ordinarily resident** in the UK. The definitions of residence and ordinary residence are the same as for income tax purposes. TCGA 1992, s. 2(1)

Therefore if a person is **not resident** in the UK – i.e. year-on-year he lives abroad – he will **not pay UK CGT**. This is irrespective of where the asset is situated. Therefore if a French resident individual sells a UK property, and deposits the proceeds in a UK bank account, he will not pay UK CGT as he is neither resident nor ordinarily resident in the UK.

As is the case for most general principles, there are occasional **exceptions**. The most important exception is contained in s.10A TCGA 1992, and we shall look at this section later on in this chapter.

## 34.2 Sales of UK assets

If an individual who is **resident** in the UK sells a UK asset, any **capital gain is taxable** at the point that it is made. This is regardless of his domicile status.

If a **non-resident** individual sells a **UK asset**, he or she will **not pay any UK capital gains tax.**

## 34.3 Sales of foreign assets

If a foreign asset is disposed of by an individual who is **resident and domiciled in the UK**, any capital gain is **taxable at the point it is made**. Therefore for individuals who live in the UK and who were born and remain in the UK, **all capital gains are taxable in the year in which they are made**, regardless of where those assets are situated. An individual who is resident and domiciled in the UK will therefore pay capital gains tax on his **worldwide capital gains**.

Equally, **a capital loss** on a disposal of a foreign asset made by a UK resident and domiciled individual will be **allowable** in the usual way.

If a non-resident person sells a foreign asset and makes a capital gain, that capital gain is not chargeable. Similarly any losses made by non-residents on foreign assets are not allowable.

If a foreign asset is disposed of by an individual who is **resident but not domiciled** in the UK, the rules are more complicated. These are considered below.

## 34.4 Non domiciled individuals

A non-domiciled individual who is resident in the UK can elect under s.809B ITA 2007 for **the remittance basis** to apply in respect of **overseas income and gains**. The s.809B election applies for both income and gains. ITA 2007, S.809B

If such an election is made, the individual will only be taxed on gains on foreign assets **to the extent the gain is remitted to the UK**. Such gains are called "**foreign chargeable gains**".

When the proceeds of any "foreign chargeable gains" are remitted to the UK, the **gain element is deemed to be remitted first**.

The capital gain is **taxed in the year in which the gain is remitted to the UK**. In many cases, the gain will be remitted in a different tax year to that in which the gain was made.

For foreign chargeable gains remitted in 2010/11, the **rate of tax will depend on the date of the remittance**;

- If gains are remitted before 23 June 2010, the remitted gains are taxed at 18%; or

- If gains are remitted on or after 23 June 2010, the remitted gains are taxed at 18% and/or 28% depending on the individual's taxable income.

A taxpayer claiming the remittance basis is **not allowed to claim an annual exemption** in the year in which a S.809B claim is made. ITA 2007, S.809B

If a remittance basis claim is not made in a subsequent year, an annual exemption can be claimed.

If an individual has unremitted foreign income and gains of **less than £2,000** for a tax year, the remittance basis applies automatically and no claim is needed under s.809B. In this case the individual remains entitled to an annual exemption and personal allowance. ITA 2007, s.809D

**Illustration 1**

Milo has been resident in the UK for the past three tax years but is domiciled in Jersey. He works for a UK charity and earns £30,000 per annum. He has no other UK income. He has various investments held overseas and these generate income of £5,000 per annum.

In December 2009, Milo sold;

- Some land in the UK for £85,000 making a gain of £50,000; &
- Shares in Calcio Inc (a foreign company) for £60,000, making a gain of £35,000.

The £60,000 proceeds from the sale of the shares was paid into a new non-interest bearing account in the Bahamas. Milo claimed the remittance basis for 2009/10 and made no remittances of foreign income or gains.

The CGT position for 2009/10 is as follows;

| | £ |
|---|---|
| UK gains (taxed on arising basis) | 50,000 |
| Foreign gain (not remitted) | NIL |
| Chargeable gains | 50,000 |
| Less: AE (not available as S.809B claim made) | (NIL) |
| Taxable gains | 50,000 |
| *Tax:* | |
| £50,000 @ 18% | £9,000 |
| Unremitted foreign gain | £35,000 |

In May 2010 Milo sold a painting in Jersey for £20,000 making a gain of £8,000. The proceeds were paid into his bank account in Jersey.

In March 2011, Milo transferred £40,000 from the account in the Bahamas to his bank account in the UK. Milo will therefore be treated as remitting the whole of the 2009/10 gain of £35,000 in 2010/11. As the remittance took place in March 2011, it will be treated as a post-June 2010 gain.

Milo did not make a S.809B claim for 2010/11.

The CGT position for 2010/11 is as follows;

| | £ |
|---|---|
| UK salary | 30,000 |
| Foreign income (taxed on an arising basis) | 5,000 |
| Total income | 35,000 |
| Less: PA | (6,475) |
| | 28,525 |
| Less: basic rate threshold | (37,400) |
| Basic rate band remaining | 8,875 |

Gains:

| | Before 23 June 2010 | On or after 23 June 2010 |
|---|---|---|
| | £ | £ |
| Painting (taxed on arising basis) | 8,000 | |
| Remitted gain | | 35,000 |
| Less: AE | _____ | (10,100) |
| Taxable gains | 8,000 | 24,900 |

| | |
|---|---|
| *Tax:* | £ |
| £8,000 @ 18% | 1,440 |
| £8,875 @ 18% | 1,597 |
| £16,025 @ 28% | 4,487 |
| | 7,524 |

*Note:*
As no S.809B claim is made for 2010/11, all income and gains are taxed on an arising basis. UK personal allowances and annual CGT exemptions are available. Note that the AE has been set against the post-June gains in order to reduce the amount chargeable to CGT at 28%.

## 34.5 Non-domiciled individuals – "Long-term residents" charge

ITA 2007, s.809H

From 6 April 2008 individuals who:

- are non-UK domiciled (or not ordinarily resident); and
- are aged 18 or over; and
- have been **resident in the UK for seven of the nine** tax years preceding the relevant tax year; and
- claim the remittance basis of taxation,

will have to pay a **£30,000 annual tax charge** in respect of the foreign income and gains they leave outside the UK.

This £30,000 charge is **in addition to any tax due on foreign income and gains actually remitted** to the UK.

An individual who has elected for the remittance basis will nominate the income and/or gains in respect of which the £30,000 is treated as paid. For example, a taxpayer could nominate £107,143 of unremitted gains on which tax is due at 28%, resulting in a capital gains tax charge of £30,000.

If these "nominated" gains are actually remitted to the UK, then **no further tax will be payable** - in this case, the £30,000 will be given as a tax credit. However foreign income and gains which have not been subject to tax will be treated as remitted before the nominated gains. ITA 2007, S.809I

However, as we saw in the Personal Income Tax course, a taxpayer can nominate as little as £1 of income or gains to be subject to the long-term residents charge. In this case, HMRC will "top up" the liability to £30,000.

The £30,000 tax charge is payable through the self-assessment system. If the individual pays the tax charge from an offshore source directly to HMRC by cheque or electronic transfer, the £30,000 will not itself be taxed as a remittance.

Non-domiciled (or non ordinarily resident) individuals can **choose each tax year** whether:

a) to claim to use the remittance basis; or
b) to pay tax on their worldwide income and gains (whether remitted or not).

If the remittance basis is not claimed for that year, the £30,000 tax charge will not apply.

**Illustration 2**

Arsene has been resident in the UK for over 10 years but is domiciled in France. In October 2010 Arsene sold an investment property in France for £600,000, resulting in a gain of £100,000. He does not intend to remit the proceeds to the UK. He did not make any other capital disposals in 2010/11. Arsene has no foreign income in 2010/11, but his UK income is such that he pays income tax at 40%.

Arsene needs to decide whether to claim the remittance basis in 2010/11 under s.809B.

1) <u>Assume Arsene does **not** claim the remittance basis</u>.

   In this case he will pay CGT on his worldwide gains (whether or not remitted). He will be entitled to an annual exemption but he will not be liable to the long-term residents charge.

   His CGT for 2010/11 is as follows:

| | £ |
|---|---|
| Gain | 100,000 |
| Less: AE | (10,100) |
| | 89,900 |
| Tax at 28% | £25,172 |

2) Assume Arsene **claims** the remittance basis.

   In this case he will pay CGT on his remitted gains only. As he remits no gains, his CGT will be NIL. However, he will instead be liable to the long-term residents charge. Arsene's tax charge for the year will therefore be £30,000.

In this case, it will **not be beneficial for Arsene to claim the remittance basis** in 2010/11.

However, instead assume that Arsene makes a capital gain of £100,000 on the French property and in December 2010 he also sold some shares in a French company for £800,000 making a gain of £320,000. He remits £50,000 of the proceeds to the UK.

1) Assume Arsene does **not** claim the remittance basis.

   He will pay CGT on his worldwide gains (whether or not remitted). He will be entitled to an annual exemption but he will not be liable to the long-term residents charge.

   His CGT for 2010/11 is as follows:

| | £ |
|---|---|
| Gain on French property | 100,000 |
| Gain on French shares | 320,000 |
| | 420,000 |
| Less: AE | (10,100) |
| | 409,900 |
| Tax at 28% | £114,772 |

2) Assume Arsene **claims** the remittance basis.

   In this case he will pay CGT on his remitted gains only (£50,000). He will not receive an annual exemption.

   However, he will be liable to the long-term residents charge.

   His CGT for 2010/11 is as follows:

| | £ |
|---|---|
| Remitted gains | 50,000 |
| Less: AE | (NIL) |
| | 50,000 |
| CGT at 28% | 14,000 |
| Add: long-term residents charge | 30,000 |
| Tax payable | 44,000 |

In this case, it **will be beneficial for Arsene to claim the remittance basis under S.809B** in 2010/11.

## 34.6 Non-domiciled individuals and capital losses

Where a non-domiciled individual has a capital loss on a UK asset, the loss must be set against chargeable gains for the year.

Unless S.16ZA applies (covered later), **the loss can be set against any chargeable gains for the year, including remitted gains from an earlier year**. This effectively permits a "carry back" of the loss.

There are different rules for losses on foreign assets (covered later in this chapter).

**Illustration 3**

Per is resident in the UK but is domiciled in Sweden. He has lived in the UK since January 2004.

In 2009/10, Per sold some Swedish shares making a gain of £60,000. He claimed under S.809B to use the remittance basis for 2009/10. No gains were remitted in 2009/10.

In 2010/11, Per sold the following assets;

- A UK investment property at a gain of £30,000;
- Shares in BP plc (a UK company) at a capital loss of £(55,000).

In September 2010 he remitted £48,000 of the 2009/10 gain to his UK bank account.

Per became liable to the long-term residents charge in 2010/11 as this is his 8th year of residence. He therefore decided not make a S.809B claim for 2010/11. His worldwide income for 2010/11 is £70,000.

The CGT position for 2010/11 is as follows;

| | Arising basis gains £ | Remittance basis gains £ |
|---|---|---|
| Investment property | 30,000 | |
| Remitted gains | | 48,000 |
| Less; loss on UK shares | (30,000) | (25,000) |
| Chargeable gains | NIL | 23,000 |
| Less: AE | ___ | (10,100) |
| Taxable gains | NIL | 12,900 |
| | | |
| CGT @ 28% (higher rate taxpayer) | | £3,612 |

Note: an AE is available in a year where Per is not a remittance basis user.

As all gains were made after 23 June 2010, it doesn't matter how the losses and AE are allocated.

## 34.7 Section 16ZA TCGA 1992

Up until April 2008, **non-domiciled individuals could not claim relief for their foreign capital losses**. Foreign gains were taxed if remitted to the UK. UK capital losses were allowable but foreign capital losses were ignored. There was no pooling of gains and losses (as there is for UK assets).

Things changed from 6 April 2008 as taxpayers can now choose whether to be taxed on the remittance basis.

*Taxpayers using the arising basis*

For taxpayers who either;

- are allowed to use the remittance basis **without a claim** (where unremitted foreign income and gains in the year are less than £2,000); or
- who do **not make a claim under S.809B** ITA 2007;

all capital gains (UK and foreign) are taxed on an arising basis.

Such taxpayers will then **receive relief for foreign capital losses** which arise in the year (these are netted off against gains in the year in the same way as for UK domiciled taxpayers).

Foreign capital losses **brought forward from before 6 April 2008 are not allowable**.

*Taxpayers using the remittance basis*

The position is more complicated for remittance basis users.

From April 2008, **foreign capital losses will remain unavailable unless the taxpayer makes an election under S.16ZA TCGA 1992.**

A S.16ZA claim is **irrevocable once made** and cannot be unwound.

Elections should be made within 4 years from the end of the first tax year for which a remittance basis claim is made. For example, taxpayers claiming to use the remittance basis in 2008/09 need to make a S.16ZA election no later than 5 April 2013.

## 34.8 The effects of a S.16ZA election

The advantage of a S.16ZA claim is that **foreign capital losses will be available for relief in all tax years thereafter**, starting with the year for which the claim is made. Relief is given both in years when gains are taxed on an arising or a remittance basis.

However, not all non-domiciliaries should make the election, as there are considerable downsides to doing so.

The 3 main side-effects of a S.16ZA election are described below;

1. Restriction in use of annual exemption

   If an individual has elected for his or her foreign capital losses to be allowable **the annual exemption is not available to be set against remitted gains from an earlier tax year**. TCGA 1992, s.3(5c)(aa) HMRC CG Manual 25325

   This applies even if there is no S.809B claim for the year in which the remitted gain is taxed.

2. Restriction in "carry back" of losses

   If an individual has elected for his or her foreign capital losses to be allowable, then a **capital loss may not be set against chargeable gains taxable on the remittance basis** in a tax year after those gains arose. TCGA 1992, s. 16ZB HMRC CG Manual 25330B

   This means that a loss cannot be "carried back" and set against a remitted foreign gain from an earlier year.

3. The "statutory ordering rules" for offset of capital losses.

   If an individual has elected for his or her foreign capital losses to be allowable, **statutory ordering provisions** are then brought into play whereby **any capital losses** (both UK and foreign) **must thereafter be offset in the following order**; TCGA 1992, s. 16ZC

   1) first against foreign gains; then
   2) against UK gains.

This means that if a S.16ZA election is made and a taxpayer wishes to use capital losses in a year in which he is a remittance basis user, his capital losses (both UK and foreign) will be offset in the following order; TCGA 1992, s. 16ZC(3)

$1^{st}$ against **foreign gains remitted to the UK**; then
$2^{nd}$ against **unremitted foreign capital gains**; then
Last **against UK capital gains**.

The effect of reducing unremitted gains will be that a **lower amount will be charged as and when those gains are remitted to the UK**. Relief for the losses is therefore deferred until the year in which gains are remitted (which could possibly be never).

In practice, making a S.16ZA election will mean that:

- **unremitted foreign gains will have to be disclosed** on the SA return (even if these gains will not be charged in that year); &

- UK gains could be charged in full, because once a S.16ZA election is made, <u>all</u> losses (UK and foreign) will have to reduce unremitted foreign gains before being relieved against UK gains. If there are several unremitted foreign gains, losses are offset against later gains before earlier gains.

Making a S.16ZA election could mean that UK losses may not be relieved against chargeable gains in the year (which they might be if a S.16ZA claim had not been made).

Therefore, aside from adding an additional compliance burden, a taxpayer can be financially penalised in certain instances by making a S.16ZA election.

**Illustration 4**

Olaf is domiciled in Norway. He came to live in the UK in March 2008. He intends to be in the UK for between 5 and 10 years. He is a higher rate taxpayer in the UK.

In 2008/09, Olaf sold an asset in Norway resulting in a capital gain of £100,000. To protect his foreign income and gains from UK tax, Olaf made a claim under S.809B to use the remittance basis for 2008/09. No income or gains were remitted in the year.

In 2009/10 Olaf sold an asset in Norway resulting in a capital loss of £(48,000). No income or gains were remitted in the year. Due to the modest level of foreign income in the year (and in order to secure UK personal allowances), Olaf chose not to claim the remittance basis for 2009/10.

In 2010/11 Olaf sold some shares in a Jersey company making a gain of £35,000. Proceeds of £15,000 in respect of this disposal were remitted to the UK. Olaf also made a gain of £36,000 in March 2011 on the sale of a UK investment property.

Olaf claimed under S.809B to use the remittance basis for 2010/11. He also made an election under S.16ZA TCGA 1992 in respect of his foreign capital losses.

The CGT position for 2010/11 is as follows;

- As a S.16ZA claim has been made, the foreign capital loss of £(48,000) from 2009/10 is an allowable loss and will therefore be carried forward for use against chargeable gains in 2010/11.

- A S.809B claim is made for 2010/11. Therefore the chargeable gains in 2010/11 are:
  - the remitted gain of £15,000; &
  - the UK gain of £36,000.

- However, the loss must be used in accordance with the statutory ordering rules laid down in S.16ZA; ie
  - first against the remitted gain (£15,000);
  - then against the unremitted gains; and
  - finally against the UK gain (£36,000);

- Unremitted gains are £100,000 from 2008/09 and £(35,000 – 15,000) = £20,000 from 2010/11.

- As a S.16ZA claim has been made, the capital loss from 2009/10 cannot be set against the unremitted gain from 2008/09 as to do so would carry back the loss.

The capital loss will therefore be used as follows;

2010/11 gains:

| | | Chargeable |
|---|---|---|
| | £ | £ |
| Remitted gains | 15,000 | |
| Less: foreign loss b/fwd | (15,000) | |
| | | NIL |
| Unremitted foreign gain 2010/11 | 20,000 | |
| Less: foreign loss b/fwd | (20,000) | |
| | NIL | |
| UK gains | 36,000 | |
| Less: foreign loss b/fwd | | |
| £(48,000 – 15,000 – 20,000) | (13,000) | |
| | | 23,000 |
| Chargeable gains 2010/11 | | 23,000 |
| Less; AE (none available as S.809B claim made) | | NIL |
| Taxable gains | | 23,000 |
| CGT @ 28% | | £6,440 |

As some of the loss has been used against unremitted gains, all of the gain on the Jersey shares (£35,000) must be reported (not just the amount remitted).

If Olaf remits the remaining gain of £20,000 in respect of the Jersey shares sold in 2010/11, no CGT will be payable as the gain has been covered by the foreign loss.

Olaf also has unremitted gains of £100,000 from 2008/09. If these gains are remitted to the UK, they will be chargeable in full. As a S.16ZA claim has been made, no losses or annual exemption can be set against these gains.

*Effect on future losses*

S.16ZA elections are irrevocable and they apply to ALL losses (not just losses on foreign assets). Therefore the statutory ordering rules also apply to UK losses made in subsequent years.

**Illustration 5**

Continuing will the example of Olaf.

In 2011/12 Olaf sold 2 UK assets as follows;

- some UK shares at a loss of £(24,000);
- a holiday cottage in the UK at a gain of £40,000.

Olaf also made foreign gains of £75,000 in respect of his overseas share portfolio. To protect these non-UK gains from UK tax, Olaf made a S.809B claim for 2011/12. No remittances were made in 2011/12.

The CGT position for 2011/12 is as follows;

- The UK loss is an allowable loss.

- However, as a S.16ZA election has been made, the loss must first be set against the unremitted foreign gain before the UK gain.

| | | Chargeable |
|---|---|---|
| | £ | £ |
| Unremitted foreign gain 2011/12 | 75,000 | |
| Less: loss 2011/12 | (24,000) | |
| Balance of unremitted gains | 51,000 | |
| | | |
| UK gains | 40,000 | |
| Less: losses remaining | (NIL) | |
| | | 40,000 |
| Chargeable gains 2011/12 | | 40,000 |
| Less; AE (none available as S.809B claim made) | | NIL |
| Taxable gains | | 40,000 |
| | | |
| CGT @ 28% | | £11,200 |

*Notes:*

1) The foreign gains of £75,000 will need to be reported on the SA return (even though none have been remitted).

2) If a S.16ZA election had not been made, the statutory ordering rules would not apply and Olaf could use the 2011/12 loss as he wished – ie, to reduce the UK gains and save CGT.

3) As a S.16ZA election has been made, the loss has been set against the unremitted gains and Olaf will only receive relief for the UK loss of £(24,000) if he remits the foreign gain to the UK (which may never happen).

## 34.9 The "situs" rules

TCGA 1992, s. 275

The remittance basis for non-domiciliaries only applies to assets which are situated outside the UK. It is therefore important that we are comfortable with the "situs" rules for CGT as these tell us where assets are situated.

Assets such as **land and buildings** are situated in the country in which they are **physically located**.

The same rule applies for **chattels** such as paintings, or antiques etc. Therefore CGT can be avoided on the sale of a painting by a non-domiciled taxpayer who simply takes the asset abroad before its sale.

**Shares** in a company which is **incorporated in the UK** are situated in the UK for CGT purposes.

**Shares** in companies which are listed, or registered companies that were **not incorporated in the UK,** are located where the **share register** is kept.

**Goodwill** is situated where the trade or the **business is carried on.**

Assets such as gilts or other Government stocks etc. are situated where the **issuing Government is located**.

In the majority of cases, the location of an asset for CGT purposes is usually obvious.

## 34.10 Temporary non-residence

TCGA 1992, s. 10A

If an individual is not resident in the UK, he is not liable to UK CGT.

Therefore, without anti-avoidance legislation, a taxpayer could **emigrate** and become non-UK resident, wait until after the end of the tax year, then **sell an asset** and make a capital gain. Because the capital gain is made in a non-resident period, the gain will **not be charged** to UK CGT. The taxpayer would then spend a year or so abroad, then return to the UK with the proceeds and no CGT would be payable.

This was a very simple planning idea and was used by a large number of clients to shelter substantial capital gains. As a result, in order to counter what HMRC saw as blatant tax avoidance, anti-avoidance legislation was introduced to charge capital gains tax on individuals who became "temporarily" non-UK resident.

The **rules** can be found at s.10A TCGA 1992, and apply to **individuals leaving the UK on or after 17 March 1998**.

If a taxpayer emigrates from the UK and makes a capital gain in a non-resident period, under general principles, that capital gain will not be taxed.

However, the capital gain made in the non-resident period will **only escape UK tax** if the individual **remains non-UK resident** for at least **5 complete tax years**. TCGA 1992, s. 10A(1)(c)

For example, if a taxpayer left the UK in 2010/11, gains made after departure will only escape tax if the individual does not become UK resident again until at least 6 April 2016.

Under s.10A, if the individual returns to the UK and **becomes UK resident again within 5 tax years**, any capital **gains made in the intervening period will all be taxed in the year of return**.

For example, if a taxpayer left the UK in 2010/11 and resumed residence in the UK in June 2014, any gains made between April 2011 and the date of return will all be taxable in 2014/15.

Therefore to avoid CGT on gains made after departure, the taxpayer will have to spend at least 5 years outside the UK.

Not every taxpayer is caught by these rules. S.10A only applies to individuals who have been **resident** in the UK for at least **4 of the 7 tax years** before their departure. TCGA 1992, s. 10A(1)(d)

Therefore individuals who had only been living in the UK for a short period before leaving, will not be caught by the rules and will be able to sell assets in the non-resident period completely free of tax.

S.10A **only applies to assets which were owned by the taxpayer at the date of his departure from the UK**. This means that if an individual leaves the UK, buys an asset after his departure and subsequently sells it and makes a capital gain, that gain will not be taxed even if he becomes UK resident again within 5 tax years. TCGA 1992, s. 10A(3)

Any gains in the non-resident period are calculated in the normal way. If a taxpayer makes losses in the non-resident period, those **losses are allowable and will be set against gains in the year of return**. Gains and losses in the non-resident period are offset in the usual way.

Any unused annual exemptions whilst the taxpayer is abroad will be wasted. The annual exemption will become available again once the taxpayer becomes UK resident.

## 34.11 Extra statutory concession D2

Technically a taxpayer is either resident or not resident for the whole of a tax year. Under general principles, there is no concept of an individual being resident for part of a tax year only. However, **ESC D2 allows a tax year to be split** either in the year of departure or in the year of arrival.

By splitting the tax year into non-resident and resident periods, gains between 6 April and the date of arrival or between the date of departure and 5 April would not be taxed as the gains arise in period of non-residence.

ESC D2 is not available to every taxpayer. The tax year of departure **cannot be split** into resident and non-resident periods if the taxpayer was **resident in the UK for at least 4 of the 7 tax years before departure**. Therefore if somebody has lived in the UK for a long period of time before deciding to emigrate, ESC D2 is not available to split the year. The individual will therefore be treated as resident in the UK for the whole of the tax year in which they depart.

Similarly the concession is **not available in the year of arrival** if the individual coming to the UK was **resident in the UK in any of the 5 preceding tax years.**

Therefore, ESC D2 will not be available for the vast majority of UK taxpayers. If the concession is not available, all capital gains made in the year of departure or the year of arrival will be fully chargeable.

For planning purposes, if your client is thinking of emigrating from the UK in order to avoid a large capital gain, you should advise him to wait until after the following 5 April before making the gain. Any capital gains made between the date of departure and the following 5 April will probably be fully taxable as ESC D2 will not be available.

## 34.12 The rate of tax on S.10A gains

S.10A(2) TCGA says that gains in the intervening period accrue to the taxpayer "**in the year of return**".

Where the year of return is 2010/11, there are 2 rates of CGT;

- 18% for disposals before 23 June 2010; and
- Either 18% and/or 28% for disposals on or after 23 June 2010 (depending on the taxpayer's taxable income).

S.10A does not prescribe a precise date for the disposal. However we need an exact date in order to determine the rate of tax to be applied.

A taxpayer is caught by S.10A only if he has been **UK resident in any of the 5 tax years before his return**. Where a taxpayer has been resident in any of the last 5 tax years, **HMRC will deny "split-year" treatment under ESC D2**. Therefore the taxpayer will be **UK resident from 6 April in the year of return** (rather than from the actual date of his return to the UK).

HMRC therefore accept that **a S.10A gain in 2010/11 arises before 23 June 2010**. This means that any **S.10A gains arising in 2010/11 will be taxed at 18%** (irrespective of the level of taxable income).

This is only an issue for the tax year 2010/11.

## 34.13 Temporary non-residence for non-domiciled taxpayers

S.10A can apply to non-domiciled taxpayers who are resident in the UK and who then become temporarily non-resident – ie, they leave the UK and then resume residence in the UK within 5 tax years.

In this case, any **UK gains in the intervening period are taxed in the year of return**.

However, the way that any **foreign gains** in the intervening period are taxed **depends on whether the taxpayer claims to use the remittance basis** in the year of return.

If the taxpayer is **not a remittance basis user, foreign gains are taxed in the same way as they are for UK domiciled taxpayers** – ie, gains made in the intervening period are fully taxed in the UK in the year of return.

If the taxpayer **uses the remittance basis in the year of return, foreign gains in the intervening period are taxed if those gains are remitted to the UK**. Therefore any foreign gains remitted in the period while the taxpayer is temporarily non-resident will be taxed in the year of return.

**Illustration 6**

Florence is domiciled in Singapore. She came to the UK in 2000 on a 6-year work assignment. Her UK contract ended in December 2006 at which point she returned to live in Singapore.

In May 2007 she sold some UK quoted shares making a gain of £50,000. She had bought the shares in 2001. She paid the proceeds to her bank account in Singapore.

On 1 March 2010 she was offered a 3-year employment contract in the UK to start in July 2010.

In advance of her return, on 31 March 2010 she sold an investment property in Singapore making a gain of £80,000. She had bought the property in 1985. She immediately remitted £45,000 of the proceeds to her UK bank account to fund her living expenses while in the UK.

Florence returned to the UK on 15 July 2010 and resumed residence. She is not sure whether to make a S.809B claim for 2010/11.

She has foreign income of £6,000 per annum which she does not intend to remit to the UK.

**Solution**

The gains made in May 2007 and March 2010 are not taxable as both gains arose in a tax year when Florence was non-UK resident.

Florence is caught by S.10A TCGA 1992 as;

- she was UK resident for 4 of the 7 years before her departure from the UK; &
- she left the UK in 2006/07 and resumes residence again in 2010/11 (ie, within 5 tax years); &
- in the intervening period she made gains on assets she had held since her departure from the UK.

The UK gain of £50,000 is chargeable in 2010/11 under S.10A.

The extent to which the foreign gain is taxed depends on whether Florence makes a S.809B claim.

<u>No S.809B claim</u>

The whole of the foreign gain of £80,000 is taxed in 2010/11 under S.10A. An annual exemption would be available.

S.809B claim made

If a claim is made to use the remittance basis, only gains remitted in the intervening period are taxed in the year of return. Therefore £45,000 is taxed in 2010/11 under S.10A. No annual exemption would be available.

Florence has an unremitted gain of £(80,000 – 45,000) = £35,000 which will be taxed when (and if) Florence remits the gain to the UK.

**Example 1**

Kevin has been resident in the UK for the past 15 years but is domiciled in South Africa. He is a higher rate taxpayer.

His disposals in 2010/11 (all after 23 June 2010) are as follows:

| *Asset* | *Proceeds* | *Gain/(Loss)* | *Remittance* |
|---|---|---|---|
| | £ | £ | £ |
| South African shares | 100,000 | 60,000 | 45,000 |
| Cottage in UK | 80,000 | (10,000) | N/A |
| House in South Africa | 20,000 | (5,000) | 20,000 |

A S.16ZA election is in force. He has small amounts of foreign income. All beneficial claims are made.

**Calculate Kevin's CGT payable for 2010/11.**

**Example 2**

John has been resident in the UK for the past 5 years but is domiciled in Greece. He is a higher rate taxpayer.

His disposals in 2010/11 (all after 23 June 2010) are as follows:

| *Asset* | *Proceeds* | *Gain/(Loss)* | *Remittance* |
|---|---|---|---|
| | £ | £ | £ |
| Greek shares | 50,000 | 30,000 | 20,000 |
| UK shares | 45,000 | 12,000 | N/A |
| House in UK | 40,000 | (22,000) | N/A |
| Villa in Greece | 30,000 | (5,000) | 30,000 |

A S.16ZA election has been made. John has elected for the remittance basis to apply in 2010/11.

**Calculate John's CGT payable for 2010/11.**

**Answer 1**

Kevin's unremitted gains exceed £2,000, therefore the remittance basis will not automatically apply.

Kevin's gains are not at a level for there to be any benefit in paying the £30,000 tax charge. Therefore he will not make a s.809B claim and will be taxed on the arising basis.

He will obtain relief in respect of the loss on the house in South Africa. He will also receive an annual exemption.

| | £ |
|---|---|
| Gain | 60,000 |
| Less: losses £(10,000 + 5,000) | (15,000) |
| | 45,000 |
| Less: annual exemption | (10,100) |
| | £34,900 |
| | |
| CGT @ 28% | £9,772 |

**Answer 2**

| | £ |
|---|---|
| Gain on Greek shares remitted to UK | 20,000 |
| Less: allowable loss | (20,000) |
| | NIL |
| Gain on UK shares | 12,000 |
| Chargeable gain | 12,000 |
| | |
| CGT @ 28% (no AE available) | £3,360 |

The allowable losses are £27,000 (£22,000 + £5,000). These are first set against the remitted gain of £20,000. The balance of the loss is set against the unremitted gain of £10,000. This reduces the unremitted gain to £3,000. This will be charged when it is remitted to the UK. There is no loss remaining to set against the UK gain.