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Table of Contents

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Non-UK resident companies

1. Non-UK resident companies: Territorial scope of the charge to tax following Finance Act 2019

The scope of the charge to tax for non-resident companies is not only complex but has been subject to considerable recent change by *Finance Act* 2019. This includes changes to the scope of tax on chargeable gains which are generally effective from 6 April 2019, and changes to the charge to income tax generally effective from 6 April 2020. This article provides an overview of how the charge to tax on non-resident companies looks after these changes.

1.1 Trading or property income attributable to a UK PE

It remains the case, both after 6 April 2019 and 6 April 2020, that the profits (wherever arising) of a non-resident company, attributable to a UK permanent establishment (PE) through which a UK trade is carried on, are chargeable to corporation tax to the extent that they represent:

- trading income arising directly or indirectly through or from the PE; or
- income from property or rights used by, or held by or for, the PE.

For these purposes, the profits of a *trade of dealing in or developing UK land* (see below) are, since 5 July 2016, treated as not attributable to any PE of a company and are therefore taxed in priority under the separate provisions applicable to those trades. From 6 April 2020, the same priority rule will apply to:

- the profits of a *UK property business*;
- profits consisting of *other UK property income*; and
- profits arising from loan relationships or derivative contracts that a company is party to for the purposes of its *UK property business* or for the purposes of enabling it to generate *other UK property income*.

1.2 Dealing in or developing UK land

The profits of a non-resident company (wherever arising) from a trade of *dealing in or developing UK land* have been chargeable to corporation tax under CTA 2010, Part 8ZB since 5 July 2016. *Finance Act* 2019 makes no changes to these rules and they continue to take priority, as described above, over income attributable to a UK PE.

1.3 UK property business

The profits of a *UK property business* of a non-UK resident company will continue to be chargeable to **income tax** until 6 April 2020 unless attributable to a UK PE through which a UK trade is carried in which case **corporation tax** applies.

From 6 April 2020, profits become chargeable to **corporation tax** to the extent that they represent:

- profits of the *UK property business*; or
- profits arising from a loan relationship or derivative contracts that the company is a party to for the purposes of that business.

This brings the losses of a *UK property business* within the corporation tax loss relief rules generally and, in particular, within the *general 50% restriction on profits over £5m* against which carried-forward losses may be relieved.

Transitional rules provide for the avoidance of tax asymmetries where pre-6 April 2020 UK property business profits are chargeable to income tax and the profits of a derivative contract used for the purposes of that business become chargeable to corporation tax on or after 6 April 2020.

1.4 Other UK property income

Before 6 April 2020, the following types of income are, unless attributable to a UK PE through which a UK trade is carried on, chargeable to **income tax**:

- rent receivable in connection with *mines, quarries and similar concerns*;
- rent receivable for *UK electric-line wayleaves*; and
- *post-cessation receipts* arising from a UK property business.

From 6 April 2020, such profits will become collectively defined as **other UK property income** and will be charged to **corporation tax,** as will profits from loan relationships or derivative contracts that a company is party to in order to generate *other UK property income*.

1.5 Chargeable gains attributable to a UK PE

Before 6 April 2019, the chargeable gains of a non-UK resident company were chargeable to *corporation tax* (unless exempt under a double tax treaty) on the disposal of a *UK situated asset*:

- used in (or for the purposes of) a UK trade carried on through a UK PE;
- used (or held) for the purposes of a UK PE through which a UK trade is carried on;
- acquired for use by (or for the purposes of) a UK PE through which a UK trade is carried on.

From 6 April 2019, this charge to corporation tax remains unchanged, but *Finance Act* 2019 introduces the concept of a *relevant connection* to the UK PE of a non-resident company. This covers much the same ground as before but extends the charge to circumstances where the asset was formerly used in the circumstances described.

Notwithstanding this change, the gains must still accrue at a time when the non-resident company has the UK PE and, for this purpose, to have a PE the non-resident company must be carrying on a trade through that PE. The profits must also be *attributable to* the UK PE in accordance with CTA 2009, ss. 20 to 32.

1.6 ATED-related gains; non-resident gains & gains on an interest in UK land

From 6 April 2013 to 5 April 2019, the *ATED-related gains* of a non-UK resident company were chargeable to *capital gains tax* at a rate of 28% in relation to *relevant high value disposals* of residential property subject to the *ATED annual charge*.

From 6 April 2015 to 5 April 2019, closely held non-UK resident companies were also chargeable to *capital gains tax* on disposals of UK residential property at a special rate of 20% (*non-resident chargeable gains* or *NRCGT*). In cases where both charges applied to the same disposal, the higher *ATED-related charge* generally prevailed.

Both charges are repealed from 6 April 2019 and replaced with a NRCGT *corporation tax* charge on gains on disposals of *interests in UK land* (including commercial property as well as residential property) and on *indirect disposals of UK land* (see below).

1.7 Gains on assets deriving at least 75% of their value from UK land

From 6 April 2019, chargeable gains on assets (wherever situated) that *derive at least 75% of their value from UK land* (as defined in new TCGA 1992, Sch. 1A) are chargeable to *corporation tax* where the company has a *substantial indirect interest* in that land. There was no equivalent charge for periods before 6 April 2019.

An anti-forestalling rule applies with effect from 22 November 2017 where a person has entered into any arrangements the main purpose, or one of the main purposes, of which is to obtain a tax advantage in relation to either corporation tax or capital gains tax as a result of TCGA 1992, Sch. 1A either applying or not applying, or to exploit double tax arrangements. Any such tax advantage will be counteracted by making just and reasonable adjustments.

1.8 Apportionment of chargeable gains to close company participators

Before 6 April 2019, the chargeable gains of non-resident companies could, to the extent that they relate to a tax avoidance scheme or arrangement, be apportioned to UK resident participators of a non-UK resident close company.

These provisions have been rewritten to new TCGA 1992, sections 3 to 3G as part of the consolidation of Part 1 of that Act by FA 2019. The rules now specify the gains that fall within their scope, unlike the former TCGA 1992, s. 13 which applied the rules to all chargeable gains accruing to a company subject to exceptions.

For disposals on or after 6 April 2019, gains are attributed to UK-resident individuals where a gain accrues at any time to a non-UK resident close company and:

- the gain is *connected to avoidance*;
- the gain is not connected to a foreign trade or other economically significant foreign activities; and
- the gain would not otherwise be chargeable to corporation tax.

1.9 Transitional anti-avoidance rule

An anti-avoidance rule applies in relation to the transition from income tax to corporation tax on 6 April 2020. If, on or after 29 October 2018, a company enters into an *arrangement*, the main purpose (or one of the main purposes of which) is to secure a *tax advantage* related to the *coming into force* of FA 2019, Sch. 5, then the tax advantage can be counteracted. There is a limited exception for ordinary commercial steps taken in accordance with generally prevailing practice to obtain the benefit of a tax relief expressly conferred by the *corporate interest restriction* rules.