CAPITAL GAINS
TAX CHARGE ON
RESIDENTIAL
PROPERTY
OWNED BY NON-
RESIDENTS

Tolley®Guidance

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Capital gains tax charge on residential property owned by non-residents

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Historically only UK resident individuals and entities, together with temporary non-UK resident individuals and those operating via a UK permanent establishment, branch or agency, have been subject to UK capital gains tax (CGT) whilst non-UK residents have not. However, this was widened from 6 April 2013 to include disposals of UK dwellings owned by non-resident companies, partnerships and collective investment schemes where the dwelling was subject to the annual tax on enveloped dwellings (ATED) charge. For more on the ATED charge and the ATED-related CGT charge, see Simon's Taxes Division B6.7 and C2.1125.

From 6 April 2015 the CGT regime is extended to non-UK residents disposing of UK residential property. This was introduced because the Government was concerned at the disparity between how individuals and entities are taxed in the UK on disposals of UK residential property (as outlined above), compared to how other countries tax the disposal of residential property in their jurisdictions.

This guidance note is intended to provide an overview of the new rules with a focus on the application to individuals, although other chargeable persons are also mentioned.

Summary

Essentially Individuals, personal representatives, trustees, companies or funds are subject to CGT under these rules if:

- that person is non-resident in the UK at the time of disposal, and
- the disposal is of UK residential property

The rates of tax which apply are 18% and 28% for unincorporated persons and 20% for corporates.

TCGA 1992, s 4

The gains and losses themselves are calculated under the normal rules applicable to those types of persons. For example, non-resident companies can benefit from indexation allowance whereas non-resident individuals cannot. The annual exempt amount is available to individuals to reduce the amount of the chargeable gains.

TCGA 1992, s 3
Due to the Government’s concerns that non-residents would use the principal private residence (PPR) relief provisions to exempt the gain on the disposal of UK residential property, well-publicised changes have been made to the main residence election rules to ensure the person has to be UK resident for the property to be a main residence or spend a minimum number of nights at the property in the tax year.

**Chargeable persons**

Before looking at the assets which are subject to the ‘non-resident capital gains tax’ (NRCGT) rules on disposal, it is helpful to consider which types of taxpayer are caught.

The following non-resident persons are subject to capital gains tax under the ‘non-resident capital gains tax’ (NRCGT) rules:

- individuals
- personal representatives
- trustees
- companies
- funds

Some of these persons are considered in further detail below.

**Individuals**

Individuals can already be subject to gains made whilst non-resident under the temporary non-residence rules, although the tax charge is not crystalised until the tax year of return. Broadly, gains are chargeable if:

- the period of non-residence is less than five years
- before leaving the UK the individual had been resident for at least four out of the previous seven tax years, and
- the gain arises on an asset held prior to departure (ie gains on assets purchased whilst non-resident are not taxable)

**TCGA 1992, ss 10A-10AA**

See the [Finance Act 2013 — meaning of 'temporary non-residence' [updated]](https://www.lexisnexis.co.uk) and [Finance Act 2013 — temporary non-residence application to income and gains [updated]](https://www.lexisnexis.co.uk) news items for full details.
The NRCGT rules take precedence over the temporary non-residence rules. This means that where an individual who is temporarily non-resident holds UK residential property, the temporary non-residence rules only apply to gains arising on that property to the extent that they relate to the period before 6 April 2015. To work out what part of a gain relates to the period before 6 April 2015, see below.

As pointed out in the responses to the 2014 consultation, under the statutory residence test (SRT) it can be difficult to determine whether individuals are UK resident or not in real time. This is because the SRT is very much a retrospective test, looking back over the tax year and previous tax years to determine residence after the fact. It is not possible for the individual or you as his adviser to determine with 100% accuracy whether he will be non-resident in the tax year at the time of the disposal (or within 30 days of conveyance, which is the point at which the NRCGT Return is due, see below).

FA 2015, Sch 7, para 9

To deal with this problem, if there is uncertainty around the non-residence status of the individual but it is thought that he is likely to be non-resident, the NRCGT Return should be filed within 30 days (see below). If the individual is later found to be UK resident the NRCGT Return is treated as not having been made. At the time of writing the mechanism of informing HMRC that the Return should not have been made is unclear. In the absence of HMRC guidance on this point, it is suggested that this be confirmed to HMRC in writing and that a note to this effect be included on the Self-Assessment Tax Return for the year.

TMA 1970, s 12ZJ

Companies

Before explaining situations in which a non-resident company is excluded from the NRCGT charge, it is worth remembering that the anti-avoidance rules in TCGA 1992, s 10B take precedence. This means that if the non-resident company operates in the UK through a UK permanent establishment the disposal will be subject to UK CGT as normal. See the Corporate capital gains guidance note and Simon’s Taxes C1.602. The NRCGT rules discussed in this guidance note do not apply.

TCGA 1992, s 14B(5)(b)
It was announced in the responses to the 2014 consultation that a form of ‘close company’ test would be introduced to limit the scope of the NRCGT charge. Several respondents identified that, without such a test, institutional investors could be inadvertently caught.

If the company is a ‘diversely-held company’ it will not be subject to the NRCGT provided it makes a claim under TCGA 1992, s 14F. It appears that the claim should be made on the NRCGT Return, therefore a Return is required to be filed within 30 days of conveyance.

The legislation defines a ‘diversely-held company’ as one that is not ‘closely-held’ and the meaning of ‘closely-held’ is modelled on the close company test in CTA 2010, ss 439–441. A closely-held company is one which is:

- under the control of five or fewer participators, or
- five or fewer participators together possess or are entitled to acquire rights to receive the majority of assets available for distribution to the participators on winding up (excluding any loan creditors who are qualifying institutional investors, such as widely marketed unit trusts, pension schemes etc)

TCGA 1992, Sch C1, paras 2–4, 5(3), (4)

The main difference between the closely-held company test and the close company test is that the test only considers participators in the company, directors who are not participators are not taken into account.

The non-resident company is not closely held if one of those participators included for the purposes of the test above is itself a ‘diversely-held company’.

TCGA 1992, Sch C1, para 5(2)

Anti-avoidance rules apply to prevent the non-resident company entering into arrangements to ensure it is a diversely-held company so as to avoid the NRCGT rules. If such steps are taken they can be ignored.

TCGA 1992, s 14H

There are provisions to allow non-resident groups to form NRCGT groups which means that transfers of UK residential property between group members are ignored and the compliance burden for the entire group is borne by one group company.

TCGA 1992, ss 188A-188K
What is a non-resident capital gains tax disposal?
The charge to capital gains tax applies to NRCGT disposals. A NRCGT disposal is one in which:

• the asset subject to disposal is a UK ‘residential property interest’ (see below)
• the person disposing of the property is non-resident in the UK

TCGA 1992, s 14B(1)

The period over which the non-residence is assessed for these purposes depends on the type of person involved.

For individuals to be caught the disposal must take place either in a tax year in which the individual is non-resident or in the overseas part of split year (a year of departure or return to the UK). For guidance on determining the residence position of individuals, see the Finance Act 2013 — statutory residence test [updated] and Finance Act 2013 — codification of split year treatment for residence [updated] news items.

TCGA 1992, s 14B(2)(a), (3)(a), (4)

Trustees of a settlement are treated as a single person by the capital gains tax legislation and are only caught within these rules if that person is treated as non-resident for the whole of the tax year. For guidance on the residence position of trustees, see the Tax position of non-resident trusts guidance note.

TCGA 1992, s 14B(2)(c) as read with TCGA 1992, s 69

Similarly personal representatives are also treated as a single person, which takes its residence status from the residence status of the deceased. Therefore if the deceased individual was not resident in the UK at the time of death, the personal representatives are also non-resident.

TCGA 1992, s 14B(2)(b) as read with TCGA 1992, s 62(3)

The residence of all other persons, including companies and funds, is measured at the time of disposal. For a discussion of how to determine the residence of companies, see the Residence of companies guidance note. The residence of funds is covered in OFM04100 and Simon’s Taxes B8.622.

TCGA 1992, s 14B(2)(d), (3)(b)
UK residential property interest

The NRCGT rules apply to disposals of UK ‘residential property interests’ only, which essentially means UK dwellings (subject to some exceptions listed below). However it is worth considering the definition in detail, as although some of the law has been copied from the stamp duty land tax (SDLT) and ATED rules, there are significant differences.

A UK residential property interest is an ‘interest in UK land’ (see below) which either:

- has consisted of or included a ‘dwelling’ (see below) at any time in the period between the date of acquisition (or 6 April 2015 if later) and the date of disposal (termed the ‘relevant ownership period’ in the legislation), or
- has been acquired off-plan (ie the dwelling was purchased prior to construction or before it has been adapted for use as a dwelling)

TCGA 1992, Sch B1, para 1

Therefore it is possible for the disposal to be caught under the NRCGT rules when it is not residential property at the time of the disposal but where a dwelling existed at some point in the post-6 April 2015 ownership period. This might be the case if the dwelling house had been demolished or the dwelling has been converted for use as commercial property. However the gain would be apportioned to ensure only the period during which the dwelling existed would be charged to CGT under these rules.

Interest in UK land

The meaning of an ‘interest in UK land’ is modelled on the definition of chargeable interests for SDLT purposes, although there are differences.

An interest in UK land includes any “estate, interest, right or power in or over land” sited in the UK. Security interests (ie charges against properties held by mortgage providers), licences to occupy, plus tenancies at will and manors (in England, Wales and Northern Ireland) are excluded interests (see SDLTM00320 for more on these terms). Franchises and advowsons are also excluded interests for SDLT purposes but would appear to be interests in UK land as far as the NRCGT rules are concerned.

TCGA 1992, Sch B1, para 2

Although it might seem obvious, it is perhaps worth a reminder that these NRCGT rules also apply to land in Scotland. It is only SDLT and landfill tax which have been devolved to Scotland from 1 April 2015; CGT remains reserved by the UK Parliament.
Dwelling

Although the definition of ‘dwelling’ for the NRCGT rules has elements which are modelled on the ATED definition, the exclusions are completely different.

A dwelling is:

- a building or part of a building which is used or is suitable for use as a dwelling
- a building or part of a building which is in the process of being constructed or adapted for such use
- land which is or is intended to be occupied or enjoyed as garden or grounds of a dwelling at any time during the ownership period

TCGA 1992, Sch B1, para 4(1), (2), (11)

Any period of temporary unsuitability as dwelling is normally ignored. The exceptions to this are where the building is unsuitable due to accidental damage beyond the owner’s control or the building is in the process of being demolished or converted to non-residential use. Where this is the case this unsuitable period is taken into account when calculating the gain or loss on disposal chargeable under the NRCGT rules.

TCGA 1992, Sch B1, paras 4(10), 6, 8

As the definition of dwelling is almost identical to the ATED definition (the difference being that ATED is levied on single dwellings), HMRC guidance is available. ‘Dwelling’ is to take its normal meaning and whether a property is suitable to be used as a dwelling is a question of fact. The guidance also includes a useful quote from SDLTM20076, part of which is worth repeating here:

“Use at the effective date of the transaction overrides any past or intended future uses for this purpose. If a building is not in use at the effective date but its last use was as a dwelling, it will be taken to be ‘suitable for use as a dwelling’ and treated as residential property, unless evidence is produced to the contrary.”

HMRC guidance on ATED, paras 19.1–19.2

As noted above, the dwellings excluded from the NRCGT rules are completely different from the ATED exclusions. For example, property rental businesses are excluded from the ATED regime but are caught by the NRCGT rules. This was a deliberate policy decision.

Consultation document 2014, paras 2.4–2.5

The following buildings are not treated as being used as a dwelling:
residential accommodation used by school pupils or members of the armed forces

- home or institution providing residential accommodation to children, old age pensioners, disabled people, people with mental illness or those dependent on alcohol or drugs

- a hospital, hospice or prison

- a hotel or inn

- residential accommodation with at least 15 bedrooms which is purpose-built / converted for occupation by students and is occupied by them for at least 165 days in the tax year

TCGA 1992, Sch B1, para 4(3)-(9)

Calculating the gains and losses

Although the normal rules apply for the purposes of calculating a gain or a loss, as only the gain arising after 5 April 2015 is chargeable under the NRCGT rules, there needs to be a legislative mechanism to ensure this. In fact there are three methods:

<table>
<thead>
<tr>
<th>Method</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default method</td>
<td>This is the calculation which must be used if no election is made. The dwelling must be valued as at 5 April 2015 and the chargeable gain is the difference between that figure and the net sales proceeds. The gain is pro-rated so that only days during which the land consists of or includes a dwelling</td>
</tr>
<tr>
<td>Elect for straight line time apportionment</td>
<td>No valuation is needed under this method. Instead the chargeable proportion of the gain is calculated on a days basis, with only the post-5 April 2015 proportion being taxable and days during which the land did not consist of or include a dwelling excluded</td>
</tr>
<tr>
<td>Elect for retrospective basis of computation</td>
<td>Under this method the entire gain is</td>
</tr>
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| chargeable, not just the post-5 April 2015 proportion. Therefore this election is most likely to be useful where the disposal results in a loss as, under this method, the entire loss is allowable. See below for the discussion on utilising NRCGT losses |

TCGA 1992, Sch 4ZZB, para 2

See Example 1.

If the chargeable person wishes to use one of the alternative methods of calculating the gain, an irrevocable election must be made on either:

- the UK Tax Return (if the non-resident is required to submit a Return)
- the NRCGT Return (see below)

TCGA 1992, Sch 4ZZB, para 3(1), (2)

To properly advise clients caught by these rules it will be necessary to run comparative calculations to see which produces the lowest chargeable gain or highest allowable loss. Therefore it may be a good idea to suggest that a 5 April 2015 valuation is obtained now whilst it can be made on an almost contemporaneous basis. The professional valuation fees are deductible in the capital gains tax calculation as a cost of sale. For a discussion on best practice when obtaining valuations, see the Basic calculation principles of capital gains tax guidance note. Although that guidance note discusses March 1982 valuations, the same principles apply.

Use of NRCGT losses

NRCGT allowable losses are ring-fenced; they cannot be used against ATED-related gains. This is because ATED-related gains are subject to tax at a higher rate. There is no need to ring-fence NRCGT losses against UK gains because, as a non-resident, the person is only subject to UK CGT under the ATED-related gains rules or the NRCGT rules.

TCGA 1992, ss 2(7B), 14D(2), 14E

At the point that the chargeable person becomes UK resident (or operates through a UK permanent establishment or via a UK branch or agency) and is subject to UK CGT on disposals of all UK-sited assets then any brought forward NRCGT losses can be utilised in
the same way as any other brought forward allowable losses and set-off in the most tax
effective way. For individuals, see the Use of capital losses guidance note.

**TCGA 1992, ss 2(2A), (2B), 4B**

NRCGT losses can only be carried back to earlier years on death.

**TCGA 1992, ss 14D(4), 14E(2), 62(2), (2AA)**

**Collection of tax**

All persons making a NRCGT disposal have 30 days from the **conveyance** of the property
(not the date of exchange) to submit a NRCGT Return to HMRC (although a NRCGT Return
is not required if the UK residential property is transferred within companies in a NRCGT
group, see above). If there is any uncertainty around whether the person is, in fact, non-
resident, a NRCGT Return should be filed and can later be treated as not having been made
if the person is found to be UK resident.

**TMA 1970, ss 12ZB, 12ZJ**

Normally a separate NRCGT Return is required for each NRCGT disposal, but if more than
one disposal occurs on the same day then all those disposals can be recorded on the same
Return.

**TMA 1970, s 12ZC**

The NRCGT Return must include a calculation of the chargeable gain or allowable loss and
the amount of UK CGT due (termed the ‘amount notionally chargeable’, **unless** the person
has already been issued with a Self-Assessment Tax Return by HMRC under **TMA 1970, ss
8, 8A** or **FA 1998, Sch 18, para 3** or ATED Return has been filed instead. If the person has
been issued a notice to complete a Self-Assessment Return, a NRCGT Return is still
required but the calculation of the ‘amount notionally chargeable’ is not.

**TMA 1970, ss 12ZE, 12ZG**

The ‘amount notionally chargeable’ is calculated on the basis that no further NRCGT gain or
loss will arise later in that tax year. However the NRCGT gain can be reduced by any
unutilised NRCGT losses arising in the same tax year up to that point. The NRCGT gain can
also be reduced by any other CGT relief which may apply (eg gift relief).

**TMA 1970, s 12ZF(2), (3)**

If the person is required to include the ‘amount notionally chargeable’ within the NRCGT
Return, the tax due must be paid within 30 days of conveyance (ie the same deadline as the
Therefore those persons who have been issued a notice to complete a Self-Assessment Tax Return do not need to pay the tax within 30 days. The normal due date for payment of the tax applies. For individuals, trustees and personal representatives the tax must be paid by 31 January after the end of the tax year (ie 31 January 2017 for disposals in the 2015/16 tax year).

TMA 1970, s 59AA

The legislation recognises that deadline for compliance is much shorter than normal compliance time limits and so it may not be possible to obtain all the information necessary within the deadline. In this situation it is possible to submit a provisional calculation, although if HMRC later finds the estimate to be ‘unreasonable’ it may charge penalties for filing an inaccurate Return.

TMA 1970, s 12ZF

Where the non-resident person is an individual, it may not be possible to correctly calculate the amount of UK CGT due on the NRCGT disposal within 30 days of conveyance as the rate of tax depends on his UK taxable income for the whole tax year. Again it is possible to file a provisional calculation using a reasonable estimate and amend the return once the final UK taxable income figure is available.

TMA 1970, s 12ZF

Late filing penalties will be charged if the 30 day deadline is missed. Again the existing harmonised late filing penalty rules in FA 2009, Sch 55 have been extended to incorporate NRCGT Returns. Note that the penalty is due if the NRCGT Return is late even if no calculation of the gain or the tax due is required because taxpayer has been issued with a Self-Assessment Return or ATED Return. See the Self-Assessment filing deadline guidance note. Although that guidance note is specific to Self-Assessment Returns filed by individuals, the same principles apply to NRCGT Returns.

Note that the FA 2009, Sch 56 rules, penalties for late paid tax, have not been amended. This is likely to be because not all NRCGT Returns require the payment of tax, as discussed above. Where the taxpayer includes the gain on the Self-Assessment Tax Return or ATED
Return it will form part of the tax payment due and so any late payment will fall under the existing FA 2009, Sch 56 rules. See the Late payment penalties for income, capital gains and corporation tax guidance note.

Tax-geared penalties can be charged for the submission of an inaccurate NRCGT Return under the harmonised penalty regime in FA 2007, Sch 24. See the Penalty rates and structure for inaccuracies in returns guidance note.

**Interaction with other provisions**

**Interaction with the ATED-related capital gains tax charge and other anti-avoidance provisions**

Despite the requests for simplification by the respondents to the 2014 consultation, the ATED-related CGT regime remains in place. For non-resident companies this means that the normal chargeable gains rules, ATED-related CGT and these new rules need to be considered when deciding the correct tax treatment on the disposal of UK residential property.

The order of precedence for non-resident companies is as follows:

1. ATED-related CGT rules, which impose a 28% tax charge on the gain (see Simon’s Taxes Division B6.7 and C2.1125)
2. NRCGT rules, which impost a 20% tax charge on the gain
3. attribution to UK resident shareholder rules, under which the gain is calculated by the company but taxed on the UK shareholders at their marginal rates in proportion to their ownership (see Simon’s Taxes D4.134)

Non-resident trustees are also subject to existing anti-avoidance rules. The order of precedence is as follows:

1. NRCGT rules, which impost a 28% tax charge on the gain
2. attribution to UK resident settlors or beneficiaries (see the Offshore trust avoidance — attribution of gains to settlors and Matching capital payments — section 87 TCGA 1992 guidance notes)
Main residence elections

Where an individual has more than one residence he can elect which one he would like to qualify as his main residence under the principal private residence (PPR) relief rules, provided the election is made within the deadline. For a discussion on what constitutes a residence and the time limit for making the election, see the Principal private residence relief — more than one residence guidance note.

TCGA 1992, s 222(5)

It was decided that, without a change to the rules on main residence elections, non-resident individuals could have taken advantage of the generous PPR rules to exempt a gain on UK residential property from UK CGT.

Therefore, the concept of a ‘non-qualifying tax year’ has been introduced from 6 April 2015. Note that this new rule does not preclude PPR relief being available where the individual is not living at the dwelling due to being in job-related accommodation or one of the other acceptable absences in TCGA 1992, s 223(3). In those situation the PPR relief is preserved.

A dwelling cannot be treated as a 'residence' for the purposes of the PPR rules in any tax year (or part of a tax year if the dwelling was not owned for the entire year) in which:

- neither the individual nor the individual’s spouse or civil partner is tax resident in the country in which the dwelling is situated, and
- the individual and / or the individual's spouse or civil partner is physically present in that dwelling (or any other dwelling in that country) for less than 90 'days' in the tax year (with the 90 day threshold pro-rated if the dwelling has not been owned for the whole tax year)

TCGA 1992, ss 222B, 222C

For the purposes of these rules, the individual is considered to be tax resident in an overseas territory if either:

- he is liable to tax in that territory under the local jurisdiction on account of his tax residence status or domicile, or
- he is treated as resident in that territory by applying the SRT as if the references to the UK were references to the overseas territory (ie using the residence rules for the UK and pretending the rules in the local jurisdiction are the same), see the Finance Act 2013 — statutory residence test [updated] news item
It is worth looking at more detail at the meaning of a ‘day’ for the purposes of the 90 day threshold, as the definition is different to other day counts in the legislation, such as the one for the SRT. Physical presence in a dwelling is counted as a ‘day’ if:

- the individual or the individual’s spouse / civil partner is present at midnight (i.e., presence of one member of the couple counts as presence of the other, but it is not possible to double count this as a day for both the individual and the spouse), or
- the individual or the individual’s spouse is present in the dwelling during the day (but not stayed the night) and stays over at the house the next night (thus both ‘days’ will count towards the 90 day threshold)

**TCGA 1992, s 222C**

All the ‘days’ spent in dwellings in the same territory can be aggregated for the purposes of the 90 day test. There appears to be no prohibition to double counting for this subsection of the legislation, meaning the same 90 days can be used to validate all dwellings in the territory as qualifying residences. However, it is also worth remembering here that there is an overriding case law principle that the dwelling must have the quality of a residence to even be eligible to be the subject of a PPR election in the first place. This can prove to be quite a hurdle and has been tested in numerous cases over the years. This is discussed in the *Principal private residence relief — more than one residence* guidance note and in *Tolley’s Tax Cases Chapter 71.296–71.308*.

**TCGA 1992, s 222C(6)**

The need to be resident in a country for a dwelling to be considered a residence means that UK residents with holiday homes abroad who had benefited under the PPR rules can no longer benefit as well as non-residents with such homes in the UK. However, for UK residents the previous PPR elections have been ‘banked’ meaning that if such an overseas holiday home has ever been the subject of a PPR election it should qualify for relief for the last 18 months of ownership.

It will be necessary to review clients’ PPR elections in light of the new rules to determine if the elections are still valid and, even if the election is still valid, whether a new election needs to be made to ensure the most tax efficient outcome for the client.