General

Capital Gains Tax Losses

Q: Where are the provisions which make loss relief conditional not just upon election but on the remittance basis not being claimed for the year concerned?

A: If an election is made under section 16ZA TCGA 1992 then losses on foreign assets which accrue in the year of the election or subsequent years are allowable losses which may be set against chargeable gains, subject to the other rules in the TCGA and in particular the rules at sections 16ZB-ZC.

Allowable foreign losses may not be set against foreign chargeable gains which accrued in a year before the losses, even if those gains are not remitted to the UK until after the loss has accrued (section 16ZB).

For years in which the remittance basis applies and there is or has been an election under section 16ZA, sections 16ZC and 16ZD determine how allowable foreign losses are to be set against chargeable gains. Where an election is not made in the first year for which a claim for remittance basis applies, any losses on foreign assets in that or any later year are not allowable.

Q: How do the clogged losses rules in s18 TCGA 1992 interact with the new rules in s16ZA to s16ZD TCGA?

A: Section 18 TCGA modifies the effect of Step 1 of section 16ZC(2) by preventing relevant allowable losses which are within the scope of section 18(3) from being set against any chargeable gain within section 16ZC(3) unless that gain accrued on a disposal to the person who acquired the asset in respect of which the loss arose.

Q: Does s16A TCGA 1992 operate to restrict the availability of a clogged loss? For example, if foreign loss assets were given to a connected party, say an offshore trust under which the donor was excluded from benefit, together with sufficient gain assets to match those losses, would HMRC regard the netting off of the losses as arising simply as a result of the operation of the tax rules rather than something that sought to achieve a special advantage?

A: HMRC's interpretation of section 16A TCGA is set out in Appendix 9 to the CG Manual (see CG Manual appendix 9 and particularly example 11). We would not expect to apply different tests or criteria in cases where the remittance basis was involved but each case will of course be decided on its own facts.

Non-resident trusts

Q: Paragraph 125(2) appears to disregard payments between 12 March and 5 April altogether, which is different to the treatment proposed in the Budget documentation published on 12 March.

A: The original intention set out in the Budget documentation of 12 March and legislation was to allow the matching of capital payments between 12 March 2008 and 5 April 2008 with any gains relating to the period up to 5 April 2008 arising to the trustees after 5 April 2008. However, this proposal was dropped because it would have introduced additional and unnecessary complexity to the legislation.

Q: If a trust makes a loan of the income on which the settlor is chargeable under s721 to buy a UK asset, such as real estate or shares, there appears to be no grandfathering (which is restricted to individuals). That being the case, would the use of income to fund servicing costs be treated as a remittance of the settlor's s721 income?

A: It is correct that grandfathering applies only to loans to individuals for the acquisition (and remortgaging) of residential properties.

This means that, where a settlor-interested trust acquires property (in its wider sense) in the UK after 5 April 2008 and loan interest is paid offshore, the payment of that interest will be treated as a remittance.

Q: On the interrelation between s727 or s731 ITA and s87, could it be clarified that where a payment has been made – such as one under s731 which has attracted relevant income but has been protected from tax by non remittance - such a payment will not be regarded as a capital payment for s87 purposes?

A: Where a payment (benefit) results in an amount becoming taxable by virtue of s731 ITA 2007, but the charge is deferred by a remittance basis claim because no relevant amount has at that time been remitted to the UK, the benefit will not also be taken into account for the purpose of s87 TCGA. Where the 'capital receipt' condition is met for the purpose of a charge under s727 ITA, even though the charge may be deferred by a remittance basis claim, nothing in that section alters the nature of any payment that triggered the charge.

Q: How will rebasing operate when property is appointed from one non-UK resident trust to another?

A: In applying the allocation rules to transfers between settlements, the transferor trust gains carried across will be treated as having accrued to the transferee trust in the year in which they in fact accrued to the transferor trust. Those gains that have been matched with capital payments out of the transferor trust in the year of transfer or previous years will be left out of account. Gains carried across will be allocated to a capital payment from the transferee trust on a 'last in first out' (LIFO) basis. Gains on such assets will be governed by whether or not the transferor trust has made a rebasing election under paragraph 126 schedule 7 FA 2008.

If the transferor settlement has made a rebasing election by the time of the transfer to the transferee settlement, then pre and post April 2008 gains which

are deemed to have accrued on the actual disposal of an asset go across pro rata.

If the transferor settlement has not made a rebasing election by the 31 January following the year of the transfer, then even if no capital payment has yet been made, the right to rebase is lost in relation to the transferred assets and any assets retained in the transferor trust.

However, it should be noted that any transfers between settlements made prior to 6 April 2008 will not trigger a time limit on rebasing and any assets moving over to the transferee settlement as a result of a transfer made prior to 6 April 2008 will not be affected by any subsequent election for rebasing made by the transferor trust. If the asset appointed over to the transferee settlement before 6 April 2008 includes shares in a company within section 13 TCGA 1992, then the transferee settlement may wish to elect for rebasing in its own right. An election made by the transferee settlement may cover gains made by such a company – see paragraph 127 Schedule 7 FA 2008. Transferee settlements which receive property on or after 6 April 2008 cannot elect for rebasing in relation to the transferred assets – the decision is solely that of the transferor settlement.

Example

Trust 1 –- £300,000 gains made

Capital payment made of £10,000 to a remittance basis user.

Election for rebasing made: 90% (£270,000) of gains relate to the period pre 6 April 2008 and 10% (£30,000) post 5 April 2008.

The capital payment is matched only to post 5 April 2008 gains and taxed on remittance basis. £290,000 gain carried forward (£270,000 pre 6 April and £20,000 post 5 April 2008). So now 6.90% is post 5 April 2008 gain and 93.10% is pre 6 April 2008 gain.

Trust 1 appoints cash to Trust 2 of £2.5m at a time when Trust 1 is worth £20m (i.e. 12.5% of fund). £36,250 gains are transferred to Trust 2 (12.5% of £290,000). 93.1% of these relate to the period pre 6 April 2008 and 6.9% after.

Trust pool in Trust 1 reduced to £253,750 (93.1% pre 6 April and 6.9% post 5 April 2008).

Personal allowances

Q: Belgian resident working in UK. A Belgian national lives in Brussels with his family who has commuted, each week, to London for 5 years. He will have to pay tax on his employment income in the UK but he is happy to do so as he works 100% of his time in UK. He is ordinarily resident in the UK.

He has money invested in a Belgian bank and his investment income is substantial. He wishes to pay tax only in Belgium on this income. Under the

treaty he is resident in Belgium only, and under Article 28(2) he is entitled to the same allowances as ‘a UK subject who is not resident in the UK’.

A non-resident would appear to be entitled to full allowances, so is it correct that a Belgian resident who is also ordinarily resident in the UK and who elects to be taxed on the remittance basis has his allowances withdrawn by section 809G ITA 2007 and reinstated by Article 28(2) of the treaty?

If this is the case for a Belgian resident, is it equally true for any other EU country resident on the basis that, in the majority of situations, a resident of a country is likely to be a national of the country. In addition, of course, discrimination on the grounds of nationality within the EU is contrary to European law.

A: An individual (X) who is deemed to be treaty resident in Belgium under the UK-Belgium DTA can take advantage of the provisions of Article 28(2) of the treaty and claim UK personal allowances on the same basis as a British subject not resident in the UK, even though X would still be regarded as resident in the UK under domestic law. That would apply to any individual treaty resident in Belgium, and not just to Belgian nationals.

DTAs vary in their provisions from country to country. The fact that the majority of people benefiting from a particular DTA are likely to be nationals of one or both of the countries concerned is not an unsurprising result and does not amount to discrimination on the grounds of nationality.

Q: Dual residents - DTA provision for personal allowances. Is it possible for individuals to be resident both in the UK and in another country or countries in a tax year?

A: Whilst it is possible in these circumstances, we look to the provisions of existing Double Taxation Agreements (DTAs) to determine in which country the individual is resident for treaty purposes, i.e. a person may be resident in the UK but ‘treaty resident’ elsewhere.

Q: Dual residents, personal allowances and remittance basis claims. Is it correct that under the terms of some DTAs people can claim the remittance basis but keep their personal allowances?

A: It is possible under the terms of some DTAs for non-residents to claim personal allowances. This can occur where the individual is resident in both the UK and another country and under the provisions of the Double Taxation Agreements (DTAs) with that country is treated as ‘treaty resident’ in the other country. The countries where this can happen are Austria, Belgium, Fiji, France, Germany, Ireland, Kenya, Luxembourg, Mauritius, Namibia, Netherlands, Portugal, Swaziland, Sweden, Switzerland and Zambia.

However, whether such dual residents can also claim the remittance basis of taxation will depend on their personal circumstances and the terms of the DTA. For the vast majority it will simply not be beneficial to claim the remittance basis, so in reality very few people can claim the remittance basis and still

benefit from UK personal allowances. For example, it is technically possible for someone one who is dual resident in the UK and Fiji to make such a claim but there are unlikely to be many Fijian treaty residents in the UK.

Remittances

Q: I am US domiciled and have been living in the UK for 10 years. I hold three types of investment accounts in the US: a brokerage account and two different retirement accounts. My first retirement account is called a Roth IRA, similar to an ISA in that it grows tax free forever and you are not taxed in the US when you withdraw from it during retirement. The other account is called a Traditional IRA which is similar to a UK personal pension in that growth is tax deferred, i.e. you only pay tax on the income that you take from it during retirement. The third type of account that I hold is a standard brokerage account, i.e. stocks, mutual funds (similar to unit trusts), etc. I will not be making withdrawals from these accounts until I am retired.

Could you confirm whether these US retirement vehicles will be subject to UK tax?

A: The tax treatment is different for the IRAs and the brokerage account.

Brokerage account – any income and gains from this investment will be taxed on the arising basis, unless you make a claim for the remittance basis to apply, in which case you will only be taxed on sums remitted to the UK.

IRAs - the UK/US Double Tax convention was amended in 2003 which made significant changes to the treatment of pensions (Article 17 of the convention). These comments apply to the UK tax years from 2003/2004.

Roth IRA - paragraph 1(b) of article 17 provides for a distribution to be exempt from tax in the UK to the extent that it would be exempt in the US. This means that withdrawals from this IRA should be exempt from UK tax.

Traditional IRA - the UK treatment follows the US treatment: sums are taxed on withdrawal. But, of course, if you make a claim for the remittance basis to apply you will only be taxed on sums remitted to the UK.

Q: Exchange rates - What rate of exchange must be used when converting foreign currency to sterling when working out whether unremitted foreign income and gains are below the £2,000 threshold?

A: Strictly, you should convert each item of foreign income and gains into sterling using the rate of exchange prevailing at the time the income or gain arose.

However, where income credits are frequent, you may choose to convert income using the average, or 'mean' rate of exchange for the tax year in question. The amount of unremitted income arrived at using this method must not differ greatly from an amount which would be arrived at using the spot rate, and, if adopted you must use the same method consistently in later years.

Q: If £1,000 is expended on a holiday in Italy paid to an Italian travel agent, would you still regard it as being part of the individual's foreign income that is potentially taxable in the UK even though the fund/value would no longer exist?

A: Yes

Q: A Polish plumber comes to the UK in September 2008, having worked until August 2008 in Poland. He will be caught by 809D as ESC A11 does not apply but will not be caught by 809X as ESC A11 does apply. It appears anomalous that the April to August income can be treated as unremitted and potentially taxable income for one purpose and then not taxed when remitted for another purpose.

A: The disregard of split year treatment applies solely for the purposes of determining whether an individual will need to claim the remittance basis under s809B ITA or whether they can rely upon s809D to use the remittance basis without making a claim because their total foreign income and gains are below the £2,000 threshold (and thereby retain their personal allowances and AEA). ESC A11 continues to apply in terms of what income is chargeable to tax.

Remittances of foreign income arising in the months before an individual came to the UK (assuming the individual was not temporarily non-resident) will not be taxable under the terms of the A11 concession.

Q: A Polish plumber has 2 suits, one of which was purchased in June 2008 and the other in December 2008. Both were purchased out of income from work done in Poland. When returning to the UK in January 2009, is it correct that if he brings the June 2008 suit, it is not taxable but if he brings the December 2008 suit, he is taxed on the remittance?

A: It is correct that the suit purchased in December would be taxable whereas the suit purchased in June 2008 would not be taxable by virtue of ESC A11 (assuming the relevant criteria are met). This would still have been the case before the new remittance basis was introduced as, under the old rules, remittances of assets purchased from foreign earnings were taxable. The only difference between then and now is that the remittance basis was automatic in relation to foreign earned income whereas the Polish plumber can now decide not to use the remittance basis and not worry about the taxation consequences of bringing his suits into the UK because tax will already have been charged on foreign earnings used to purchase the December suit under the arising basis.

Q: I understood that it was the intention that subsections (2) and (4) of paragraph 86 would apply so long as property brought to the UK before 6 April 2008 remained in the UK but it seems to me that the exception it provides is conditional only upon remittance before 6th April and not denied by re-export and re-remittance.

A: The provisions allow an asset that was brought to the UK before 6 April 2008 to be exported and then re-imported without incurring a tax charge. That is the policy intention.

Q: On deemed remittances where are services provided? For example, if someone purchases an aeroplane ticket in New York for a flight from JFK to Heathrow, does the fact that the plane lands here mean that the entirety of the service is deemed to be provided in the UK and therefore if the plane ticket is purchased out of relevant foreign income it is deemed to be remitted?

A: Yes, the payment for the flight to the UK is taxable as a remittance because a service is provided in the UK (Condition A of section 809L), the consideration for which is the individual's foreign income (Condition B of section 809L).

Application of section 809W ITA

Q1: Please confirm that wholly or mainly means 'in excess of 50%'. If that is the case how is this to be judged:

(i) by reference to value?
(ii) by reference to work done?

A2: Yes, 'wholly or mainly' in s809W ITA means 'in excess of 50%' and this was set out in the Explanatory Notes to the legislation published in March 2008

Whether this condition is met will be judged by reference to work done (normally time spent). However, if advisers value the measurement of work done on the basis of both time and fee rate (e.g. use of a team specialising in international property), it would be appropriate that that should be reflected in considerations of 'wholly or mainly'.

Q2: Is it acceptable to have split contracts between work on UK property, and non-UK property?

A2: Yes. However, HMRC will only accept the computations if the split bears a reasonable resemblance to the actuality of service undertaken. The principle is the same regardless of whether a split-contract is used or not; if the work can be distinguished and charged separately, it should be.

Q3: If the work is undertaken for a foreign trust or company, is it relevant whether or not it holds UK property?

A3: In all these questions the provisions in section 809W depend on sections 809L and 809M being met; i.e. the <u>individual's</u> foreign income and gains must be used to pay for this service, and the company must be a relevant person. The remaining answers are based on that assumption:

Q3.1: A Jersey company owns a portfolio of UK real estate; and a UK-based advisor produces a tax report in respect of the company's UK activities. Is this work in respect of a foreign asset, i.e. the Jersey company, or UK assets, i.e. the real estate?

A3.1: The relevant UK service is the provision of advice in a tax report to a relevant person, which relates to the Jersey company's UK activities. It is the UK activities which are the subject of the advice.

Q3.2: What would happen if the Jersey company in the example above had a second French property business and the UK-based advisors produced a report in respect of the French business; would it matter that the majority of the value of the company's shares was attributable to its UK business?

A3.2: No. The service provided to the relevant person – in this case the preparation of the report – relates to a non-UK property. So section 809W would apply, assuming the other conditions are also met.

Q4: We produce a US tax return for a UK resident non-domicile; please comment on the following and say whether relief is possible:

(i) his major source of income is UK salary,
(ii) most of the work undertaken is in respect of his UK sources of income and gains, albeit these are small compared to his world wide income and gains.

A4: Advice on the completion of a non-UK tax return would be within the exemption providing the majority of the advice relates to non-UK property. To expand on this a little:

(i) advice relating to non-asset related income, e.g. employment income, whether UK or not – as there is no property, section 809W cannot apply;
(ii) advice relating to investment income/gains from UK sources is outside the exemption if the work is related mostly to this;
(iii) advice relating to investment income/gains from non-UK sources – within the exemption if the work is related wholly or mainly to this.

Q5: The provisions say that relevant consideration must be given by way of payments outside the UK; what happens if there is an initial payment on account in the UK out of core capital; would this mean no relief could apply to any of the later payments made outside the UK?

A5: The 'relevant consideration' is only so much of the consideration as is given by the relevant person which either is, or derives from, the income/gains. Section 809W only applies to income/gains if they would otherwise be regarded as remitted because Conditions A and B in section 809L are met. Section 809W(1)(c) does say that condition B in section 809L is met because section 809L(3)(a) or (b) applies to the consideration for the relevant UK service. Section 809L(3)(a) and (b) both cover situations where part only of the consideration given is or derives from income/gains. So Condition B in section

809W(4) only applies to that part of the consideration to which section 809L(3)(a) or (b) applies.

Section 809W is an exemption, and it will be up to the individual to demonstrate that remittances within Section 809L fall within the exemptions provided by that section. If this cannot be done, then there will be a taxable remittance.

The remittance basis and the £30,000 charge

Q: Will the £30,000 charge apply to individuals who are regarded as resident in both the UK and another country with which the UK has a Double Taxation Agreement (DTA)?

A: All years of actual residence in the UK will count towards the ‘more than seven years out of ten' test, even if for some or all of those years the taxpayer was treated as 'treaty resident' in another country for the purposes of a DTA tie-breaker.

Where a taxpayer is dual resident (in the UK and in another country) and DT treaty residence is given to the other jurisdiction then, in most cases, taxing rights over non-UK source income or gains will rest with the other country. Where, exceptionally, such an individual is subject to UK tax on some or all of their overseas income or gains, they will need to consider carefully whether a claim for the remittance basis of taxation is in their best interest or if, instead, they should pay tax on the arising basis.

A taxpayer who has been UK resident for more than seven out of the previous ten years and claims the remittance basis is, if their unremitted foreign income and gains is £2,000 or more, liable to the £30,000 remittance basis charge, irrespective of treaty residence.

Q: When completing a tax return for a split year, in our view income that is not taxable (under ESC A11) because the individual is not resident does not count towards the £2,000 de minimis limit. This is because it is not within the statutory definition of ‘foreign income and gains’ within the meaning of S8099Z7 ITA 2007. Could you confirm our understanding?

A: Individuals resident in the UK are resident for the whole of that year, and likewise chargeable to income and gains for the whole of that period. There is nothing in statute which provides for splitting a tax year, but by concession liability to UK tax which is affected by residence is allowed to be computed by reference to the period of a person’s residence here during the year. However the underlying definitions of foreign income and gains at section 809Z7 continue to apply for the full year, and are not affected by the concessionary treatment.

Q: Nominated income and gains - A non-UK domiciled individual has £100,000 of foreign investment income in an offshore account. Under s809C

he nominates £75,000 of the income within the account as his nominated income.
He subsequently remits £10,000 from the account to the UK leaving £90,000 in the account. Is any of the £10,000 treated as a remittance of nominated income or gains?

If he spends £1,000 outside the UK on a holiday, is that treated as reducing the nominated income or the income which has not been nominated?

A: It is not possible to give a definitive answer to this question as in practice it will be determined by the facts in each case. The legislation simply talks in terms of the individual 'nominating income' and in accordance with the principles of SA it will be for the individual to show what income they have nominated and what they have done with it, and identify it as such on their SA return. The legislation also provides, at section 809J, that an individual cannot be regarded as remitting 'nominated income and gains' while any 'remittance basis income and gains' remain unremitted; in this respect the use to which the foreign income is put offshore is not relevant to the calculation. So the £10,000 will be taxable upon remittance. Likewise it does not matter if the £1,000 is spent abroad. It remains part of the individual's foreign income that is potentially taxable in the UK. So in the example, if there was £100,000, £75,000 has been nominated, £10,000 remitted and £1,000 spent abroad. Then of the £100,000, £15,000 is still available to be taxed in the UK. So if subsequently £15,000 is remitted it will all be taxed. If £20,000 is remitted than £15,000 is treated as taxed and £5,000 treated as nominated income.

Individuals may choose to separate out nominated income and gains into separate accounts as that will make it much simpler for them to show what income they have nominated and what has happened to the remainder. And of course, depending on the construction of the account and other income sources that feed into it, the mixed fund rules at section 809Q and s809S may also apply.

Q: Offshore Life Insurance Policies - What is the tax treatment of payments deriving from a part-surrender of an overseas insurance policy under the remittance basis?

A: Where an individual purchases an overseas life insurance, or other income-generating, policy and subsequently part of that policy is surrendered for a cash payment and that money is brought to the UK, such payments will be treated as taxable remittances to the extent that the purchase of the original premium was made with the individual's untaxed foreign income and gains that would have been taxed on the remittance basis if remitted to the UK. Such remittances are regarded as derived from the untaxed foreign income and gains used to purchase the policy.