Alienation

Q. If income has been gifted by father to an adult son before 6 April 2008 does it matter how long ago it happened?

A If income was gifted by a parent to an adult child before 6 April 2008 than paragraph 86 of Schedule 7 Finance Act 2008 applies. The child may remit the gift to the UK after 5 April 2008 without triggering a charge to tax on the father provided that the father does not benefit from the remittance, or anything derived from it.

Q. Are my assumptions correct in the following scenarios?
Non-UK domiciled, UK resident individual (X). Relevant Foreign Income (RFI) arisen in tax year 2007-08.

1. X gifts RFI to relevant person (RP) in 2008-09. RP remits RFI to UK (not for X's benefit). Under para 86(4) Sch 7 FA 2008 no taxable remittance.

X uses RFI to purchase asset in 2008-09. X gifts asset to RP who remits to UK (not for X's benefit). Under para 86(4) Sch 7 FA 2008 no taxable remittance.

2. Para 82(2) to (4) only seems to be relevant to the 'individual' not other 'relevant persons' eg gift of asset (purchased out of RFI) at any time pre 6 April 2008 by X to RP followed by remittance to UK in 2008-09 not taxable as protected by para (5).

A. Paragraph 86(4) of Schedule 7 to FA 2008 means that remittances of income and gains arising before 6 April 2008 that have been genuinely alienated are not taxable upon the donor. The assumptions at (1) and (2) are correct.
The provisions of 86(2) and (4) apply only to RFI and protect remittances from being chargeable to tax where the RFI or other property deriving from the RFI was brought to the UK before 6 April 2008 or where property deriving from RFI was acquired before 12 March 2008 and is subsequently brought to the UK.

Q Please clarify the application of Schedule 7 FA 2008 to the following scenarios.

Scenario 1
A UK resident non domiciled individual alienates untaxed foreign income/gains to a non UK resident trust, in which he is also one of the beneficiaries.
With these funds the trust capitalises a (100 per cent owned) non UK resident company which in turn invests in UK properties to let (see below) and minority share participations in UK companies.
If the investment is in properties, the funds are not used to buy the individual's residential home (whether principal private residence or second house).
Does the original contribution of funds into the trust constitute remittance?

Scenario 2
Same as Scenario 1 apart from the fact that the funds are used by the trust to capitalise a (100 per cent owned) UK trading company and the individual in question is a PAYE salaried officer/employee of this company.
Does the original contribution of funds into the trust constitute remittance?

A Where the alienation occurred after 5 April 2008 any remittance by the trustees to the UK of settled property deriving from untaxed foreign income or gains of the settlor will be a taxable remittance by the settlor.

Q Non resident companies
Please clarify
1. Are gains on non UK assets of a non-resident company within Section 13 TCGA 1992 taxed on an arising basis or on a remittance basis?

2. Does the UK resident participator obtain credit for relevant foreign taxes paid by the non UK resident company on the same gain in its jurisdiction of residence?

A

1. The gains are charged on the arising basis, unless the participator uses the remittance basis in which case gains on non UK assets are taxed on the remittance basis.

2. A chargeable gain that is apportioned between the participators of a non UK resident company under section 13 is computed as though it were chargeable to tax upon the company; credit is given for foreign taxes paid by the company in computing that gain. So the gain is already reduced before it is apportioned between the participators in the company.

Arising basis

(5)

Q Under what circumstances would a tax payer have to account for tax on un-remitted income or gains in the previous year (ie 2007-08 income and gains)? Also if amounts of capital arising in 2007-08 are remitted in 2008-09 and tax payer is on the arising basis is there any liability?

A If an individual paid tax on the remittance basis in 2007-08 or earlier years and has un-remitted income or gains from that year or earlier years remaining offshore, they will have to account for tax on that income or gains if they remit the income or gains to the UK.

This is the case whether they pay tax on the remittance basis or the arising basis in the year in which they make the remittance. What is important is the basis on which they were chargeable to tax in the year in which the income or gains arose.

(6)

Q I have been resident in the UK for almost 14 years with non-domiciled status. My non-UK income from interest will be more than £2,000 but far less than £30,000, and consequently I will not be opting for the remittance basis and paying £30,000 annually. Therefore, with the new rules on non-domiciles, I will have to declare my income wherever it has arisen in the world from this tax year 2008-09 onwards. I have the following questions:

1. I have a capital account offshore, interest of which has been transferred since the start of my non-domiciled status to another mixed account offshore. Can capital only accounts still be transferred to the UK without incurring tax liability?

2. Given that I will have to pay additional tax because of the inclusion of non-UK income, can this additional tax be paid from an offshore income account without incurring further tax on the remittance itself?

3. I have never remitted money from abroad and don't intend to do so in the foreseeable future. However, if remittances are needed at some point in the future and I have paid tax on the income, for how much further back would previous non-taxed income be taxed? Is there a cut-off point? How will this be calculated?

A On the basis of the information given, from 6 April 2008 you will be taxed on all new income, whether from a UK or overseas source, in the tax year in which it arises. But the remittance basis will continue to apply to offshore income arising in earlier years which has not previously been remitted to the UK. This earlier income will be taxed as and when it is remitted.

1. If the 'capital account' consists of pure capital, for example it was received as an inheritance then the monies can be remitted to the UK without a tax charge. But if the

monies in the 'capital account' were derived from untaxed income or gains then remittances will be taxable in the UK. It is possible that you have in mind the 'ceased source' rule, which used to allow overseas investment income to be brought to the UK tax free if the account from which it arose had been closed in a previous tax year. This loophole has been stopped by the provisions in the FA 2008. From 6 April 2008 all overseas income remitted to the UK is taxable, whether or not the source is still in existence.

2. All payments of UK tax paid from untaxed income or gains will count as a remittance to the UK except for payments of the £30,000 remittance basis charge (where certain conditions are met.)

3. The new remittance basis provisions include rules to determine what part of a remittance is taxable where it is made from a 'mixed fund' consisting of both taxed and untaxed income.
But in principle all overseas income that has not been taxed because the remittance basis applied will be taxable when it is remitted, without time limit. Income arising on or after 6 April 2008 is of course taxable whether you bring it to the UK or leave it offshore.

(7)

Q If a non-domiciled individual elects to pay tax on the arising basis rather than on the remittance basis, will the individual be able to take into account any losses arising offshore against any gains arising offshore when calculating the individual's worldwide income for the purpose of paying tax on an arising basis; and if so, over how many years can any losses be applied.

- if a non-domiciled individual pays tax on the arising basis rather than on the remittance basis, will any offset or credit apply in the UK in respect of any taxes paid in any foreign jurisdiction?

- will a non-domiciled individual be able to transfer capital back into the UK, and if so, will this be treated as a remittance?

A If the individual ever claims the remittance basis for 2008-09 or a subsequent year then different rules apply, and the individual would need to make an election under section 16ZA(2) TCGA in order to claim foreign losses. Individuals will be able to claim relief for foreign taxes suffered under the relevant double taxation agreement.

Capital remitted to the UK will not be chargeable to tax but you should note the effect of the new rules on determining the chargeability of income and gains on remittances from mixed funds under new sections 809P and 809Q ITA.

Day counting

(8)

Q For determining residence in 2008-2009, do I need to count one of the arrival-departure days for each visit during the previous three tax years (2007-2008, 2006-2007, 2005-2006) or does the old rule for counting (excluding departure - arrival) apply for those years?

A For 2007-08 and before, the old day counting practice (excluding days of arrival and departure) will continue to apply. For 2008-09, the new practice (counting days where the individual is present at the end of the day) will be applied. So when calculating periods of residence that straddle both sets of practice, individuals will have to take into account both of the day counting practices. You should therefore exclude days of arrival and departure for 2005-06, 2006-07 and 2007-08.

General

9

Q If a taxpayer undertook a source ceasing exercise during the 2006-07 tax year and then remitted the proceeds before the 2008-09 tax year, if those funds were to then be taken back outside of the UK and re-imported, would this constitute a remittance. In other words, would the earlier source ceasing exercise be looked through despite its timing? It is understood that interest/profit from any new investment would be a remittance.

A If the source ceased in 2006-07 and was remitted in 2007-08, then this did not count as a remittance and it will not count as a remittance if it is exported and subsequently re-imported.

10

Q Bringing investment income into the UK
I am a non-UK national who has been resident non-domiciled in the UK since July 2005. I have an investment portfolio, mix of shares and bonds and cash, held outside the UK that I would like to bring into the UK some time later this year. What will be the basis for the calculation of tax on this - 2007 gains or 2008 gains or other? And how do I go about declaring this? Some of the income received on this will be dividends, how will these be treated?

A Your tax position for 2008-09 (and later tax years) will depend in the first instance on whether you choose to be taxed on the remittance basis for that year. If you do not and are taxed instead on the arising basis, all income and gains arising from 6 April 2008 onwards will be taxed in the tax year in which they arise. But overseas income and gains that arose in earlier years to which remittance basis applied will be taxed as and when they are remitted to the UK.

Dividends are treated as relevant foreign income (i.e. not foreign earned income) for these purposes.

If you remit gains from an account that contains a mixture of gains from earlier years, special rules apply to determine the nature of the gains remitted. Broadly gains of a later year are treated as being remitted before gains of an earlier year. If the account contains income as well as gains then income is treated as being remitted before gains.
You will need to make a claim in a self assessment tax return if you wish to be taxed on the remittance basis for the current year. The return is also the place to declare overseas income and gains, including those from earlier tax years that have been remitted to the UK in the year to which the return refers.

11

Q I hope you can help me with Para 93 to Schedule 7 which deals with the proposed enactment of Section 14A TCGA 1992 - Section 13 non-UK domiciled individuals. My concerns relate to the view to be taken by HMRC in looking at US LLCs. In this particular instance I do not have a Delaware LLC (DLLC) in mind.
In Tax Bulletin 29 released in June 1997, it was noted by HMRC that for federal tax purposes a LLC is fiscally transparent but 'for the purposes of United Kingdom tax we have taken the view in relation to those LLCs that we have so far considered that they should be regarded as taxable entities and not as fiscally transparent. Accordingly we tax a United Kingdom member of a LLC by reference to distributions made by the LLC and not by reference to the income of the LLC as it arises.'
HMRC recently considered the principles applicable to ordinary share capital in Business Brief 54/07. Specific reference was made in the Brief to DLLCs but no mention was made to the concept of LLCs generally apart from noting 'Other States within the United States of America have comparable legislation to Delaware. Where it can be shown that a particular State has legislation analogous to the Delaware legislation with which we are familiar, HMRC would expect to be able to provide advice in line with that of DLLCs.'
In terms of the proposed legislation can you confirm that a UK resident and ordinarily resident taxpayer but who is not domiciled in the UK and has an interest in an LLC will not be regarded as a participator for the purposes of proposed Section 14A TCGA 1992?

A We cannot give confirmation in the terms you request. There are two separate questions here. The first is whether a body such as an LLC has issued share capital and is to be regarded as a company for UK tax purposes. The second is whether a person with an interest in an LLC will be a participator in it. The answer to both questions will depend on the facts of the particular case. The answer to the second question will specifically depend on the nature both of the LLC and the individual's interest in it.

New section 14A TCGA depends on section 13 and both of them refer to chargeable gains which accrue to a company. So for the gains of a particular body to be attributed to anyone with an interest in it, the body must first of all be a non-UK resident company. In the case of an LLC this will depend on the characteristics of the body. Whether it issues 'share capital' to its investors/members is one factor in deciding this, but not the only one. Also, the (non UK resident) company would have to be a close company if it were resident in the UK

A further condition for sections 13 and 14A to apply is that a person must be a 'participator' in the company. The term is defined at section 417(1) ICTA 1988 as 'a person having a share or interest in the capital or income of the company'. The word 'share' is not used in the sense of issued share capital (ie a bundle of rights in a company), but in its non-technical sense of entitlement to part of, or a stake in, the company (as evidenced by the alternative term 'interest in'), so someone can be a participator other than by owning share capital issued by a company. On the face of it someone with 'an interest in' an LLC is capable of being a participator on this basis.

There would seem to be no reason in principle why section 13 should not apply for CGT purposes at any rate to some LLCs. But whether an LLC is considered to be a company for UK tax purposes generally will depend on all the facts and in particular on the terms of the law of the US state in question.

Non-resident trusts

12

Q A non UK resident interest in possession trust with a UK resident non-UK domiciled beneficiary (prior to 6 April 2008) has been in existence for a number of years. The trust's only income has been foreign source and no income has been remitted to the UK, as such no UK tax has been paid on this income.
If the foreign source income accumulated in previous years and capital of the trust are distributed in the current tax year to the beneficiary who is UK resident and waived non domicile status from 6 April 2008 will there be any UK tax consequences in the following circumstances:

1. The income and capital is distributed to the beneficiary outside the UK
2. The income and capital is distributed to the beneficiary in the UK

A The changes to the remittance basis rules do not require an individual to change their domicile status. Non domiciled individuals may choose to use the remittance basis, otherwise they will be taxed on the arising basis. It would appear that the beneficiary is not the settlor of the settlement.
If a beneficiary is taxed on the arising basis from 6 April 2008 then any income distributed to the beneficiary or gains treated as accruing to the beneficiary from 2008-09 will be chargeable to tax on the arising basis whether or not the income or gains are provided within or outside the UK. Any income which arose prior to 6 April 2008 but is not remitted to the UK until after 5 April 2008 will be charged to tax when remitted – whether or not the individual is a remittance basis user at the time of the remittance.

13

Q S624 ITTOIA and S 629 ITTOIA

1. How do section 624 ITTOIA and section 629 ITTOIA interact where you have a non domiciled UK resident parent not electing to use the remittance basis and a non domiciled child electing to use the remittance basis for 2008-2009?

2. Does it apply where (the relevant capital and accumulated untaxed income) arose from an outright gift by the parent under a bare trust?

3. What is the position where both parent and child do not elect?

4. Please distinguish between pre 09 March 1999 and post 09 March 1999 gifts.

5. Can the trustees of the bare trust remit the accumulated income and capital to the UK in 2007 -2008 where the source ceasing rules have been used in prior years without a S660A or B tax charge on the settlor or a tax charge on the child?

6. What is the tax position of income left offshore arising in 2008-2009 on the bare trusts?

A

1) Assuming that the parent is the settlor and settlor/spouse/civil partner can benefit from the trust then the income of the trustees is taxed on the settlor on an arising basis. If the settlor/spouse/civil partner are excluded from benefiting then the trust is taxed in the normal way but payments made to a minor child of the settlor are treated as the income of the settlor and not the income of the child (see section 629(1) so the child's election is simply irrelevant

2) Yes, income arising under a bare trust for a minor is treated as the income of the parent whether or not payment is made – section 629(1)(b)

3) See answer to 1 & 2 above

4) Before March 1999 you couldn't use what was section 660B to attribute the income of a bare trust for a minor to a settlor parent unless a payment had been made to a child. Where the parental gift, from which income arises, was made before that date that continues to be the case. There will be a small number of trusts set up before March 1999 ~~which get around the change but this will cease to be relevant in March 2017 when the~~ beneficiaries cease to be minors.

~~5) The normal rules apply for the particular source or charging provision, but will be subject to the remittance basis rules now contained in Schedule 7, Finance Act 2008.~~ Where legislation deems income to be chargeable on an individual then the question of whether the remittance basis applies depends on whether or not the chargeable person has made a claim (where applicable) for it to apply. The question of whether there has been a remittance will depend on the actual facts.

6) See answer to 5 above

(14)

Q If an interest free loan is made from an offshore trust to a beneficiary post 5 April 2008 is the value of the capital payment still the interest not paid or is it the whole value of the loan. If it is the whole value of the loan please could you advise me of the statutory reference in the new legislation?

A The new residence and domicile rules do not affect the question of what is a capital payment, or how the amount of a capital payment should be computed. Section 97 of TCGA 1992 continues to apply.

(15)

Q If a gift is effected outside the UK by a non UK resident /non UK domiciled individual to a UK resident non domiciled individual to whom he is connected is there a charge to tax if the funds are brought back to the UK by the donee. It would appear there can be no charge on the donor as he is non UK resident. Is there a charge on the donee? Again, if so, please advise the section/s of the draft legislation that imposes such a charge.

A If a genuinely non-resident person makes a genuine gift to a UK resident individual there is no tax charge on the donee. A tax charge could arise where the donor and donee

had entered into an arrangement where the effect was that the gift derived from the income or gains of the donee.

(16)

Q Please clarify - A non-UK domiciled person is the settlor and beneficiary of an offshore trust with a wholly owned offshore company that owns shares in a UK trading company. I understand that the rebasing election can be made so that only gains arising since 6 April 2008 will be taxed when shares in the UK company are sold by the offshore company owned by the trust.

If the company distributes the shares out to the settlor/beneficiary there would be no CGT, on the basis there is no increase in value in the shares since 6 April 2008. However, the distribution of the shares by the offshore company would appear to be a dividend received by the trustees and therefore taxable income for the settlor/beneficiary. There does not appear to be an exemption in respect of this.

Presumably, the alternative is to wind up the offshore company as a capital transaction, on the basis that the shares in that company have to be rebased so there is no capital gain on the wind up and assuming no anti-avoidance legislation is applied to treat the distribution on winding up as an income receipt rather than a capital receipt.

A Where non-resident trustees make an election for rebasing under paragraph 126 of the Finance Act 2008 then chargeable gains treated as accruing to a non-domiciled beneficiary under section 87 TCGA will be taxable only to the extent that they relate to the period after 5 April 2008.
The rebasing election has no other effect, for example, in relation to chargeable gains treated as accruing to a non-domiciled beneficiary on the arising basis or to a UK domiciled beneficiary or to the computation of the section 2(2) amount accruing to the trustees on disposal of the shares. In all cases the chargeable gains include amounts relating to the period before 6 April 2008.
It follows that the existing rules in relation to distributions and the winding up of companies continue to apply.

(17)

Q If a non-UK domicile has been UK resident for more than seven years, and is the beneficiary of a non-UK trust with income and gains accruing, we understand the tax treatment is now different. If the individual opts for remittance tax treatment, and pays the £30,000 charge, then the trust's gains are not taxable. However if he decides to not pay the £30,000, are the gains taxable on him personally?

A The new rules mean that non-domiciled beneficiaries of non-resident trusts may be chargeable to tax on gains treated as accruing to them under section 87 TCGA. If a non-domiciled beneficiary uses the remittance basis the gains will be chargeable to tax only where they are remitted to the UK. Any income received by the beneficiary will be taxable on the beneficiary as before, depending on whether the beneficiary opts to use the remittance basis. Whether or not a beneficiary uses the remittance basis has no effect upon how the trust gains or income are computed.

(18)

Q Could you please indicate for me how a non-resident trustee makes the election to rebase trust assets to market value as at 6 April 2008 so that trust gains accruing, but not realised, prior to 6 April 2008 will not be chargeable if matched to capital payments made on or after 6 April 2008 to non-UK domiciled beneficiaries? Could you also please indicate for me the time by which a trustee must make this election if it is to be made?

A HMRC is introducing a form for trustees of a non-UK resident trust to make a 'rebasing' election. The earliest deadline for trustees to make an election for rebasing will be 31 January 2010 where a trigger such as a capital payment is made to a UK resident beneficiary in 2008-09 or the trustees transfer property in another settlement. See paragraph 126(2) of Schedule 7 of FA 2008.

Q Is the non-domiciled resident recipient of an interest free loan from an offshore trust structure compelled by the enjoyment of that benefit to be within the remittance system, or could the benefit be reported as 'deemed income' as a part of the world wide income and gains of the non-domiciled resident tax payer ?

A A non-domiciled beneficiary who derives a benefit from an interest free loan from an offshore trust will not be compelled to be taxed on the remittance basis. Any deemed income or gain arising to the beneficiary as a result of the receipt of the benefit can be reported in the individual's tax return on the normal arising basis

Remittances

Q Can a UK resident non domiciled not electing to use the remittance basis in 2008-2009 continue to use his offshore current account for UK expenditure if he funds it totally from UK source taxed income eg a UK salary?
Would there be any UK tax consequences of continuing to use the current account eg deemed remittance if he had other separate bank accounts with untaxed mixed funds at the same bank but did not mix these with the current account?

A As long as the offshore current account contains only UK source, UK taxed income, payments from this account will not be taxed as a remittance. If interest on this income is paid into the account this will be foreign income. If the individual has chosen to use the arising basis for the year in which the interest has arisen they will have to pay UK tax on this income. However, if there is any untaxed interest in the account which arose in a year in which the individual was chargeable to tax on the remittance basis then the mixed fund rules will apply to remittances.
The presence of other accounts at the same bank, even containing untaxed mixed funds, will not change this position. The mixed fund rules will apply to remittances from these other accounts if they contain mixed funds of untaxed income and/or gains which arose in years in which the remittance basis applied.

Q Where a taxpayer has an existing mortgage with a non-UK institution, secured on a residential property in the UK, with interest payments made out of untaxed foreign income and that existing facility includes an open credit line, would a draw-down of funds after 12 March 2008 constitute a 'further advance'? Just to clarify, no variation to the pre-12 March 2008 terms and conditions of the loan would occur, the draw-down is made under the existing facility.
If such a draw-down would constitute a 'further advance', can you clarify whether the payments of interest from that point being treated as remittances would comprise (a) only those (pro rated) interest payments which relate to the further sum advanced or (b) all payments of interest on the full loan sum (ie the pre-existing loan sum plus the further advanced sum)?

A A draw down of funds after 12 March 2008 would constitute a further advance and cannot be exempted from tax under paragraph 90 because the monies have to have been lent before 12 March 2008. Only the interest payments in relation to the loan received before 11 March 2008 would be eligible for exemption from tax.

Q 1. Section 809L Condition A, refers to 'any money or property brought into, or received or used in the United Kingdom by or for the benefit of a relevant person'. In the context of the remittance basis, can you please clarify that the property which may be used is intended to mean movable assets capable of being remitted (such as the car in the explanatory note example)? The wording could be read to deem fixed assets, ie real estate, capable of remittance; clearly real estate cannot be remitted, meaning transferred, transmitted or sent, within the verb's common meaning. In addition, the section appears to seek to charge the use of these fixed assets (including real estate) by or for the benefit of the relevant person on the remittance basis. How would the benefit derived by a relevant person in, say, investment property, be identified/quantified?

Q If an asset were purchased overseas in tax year 2008, using overseas income, for a value then equal to £200,000 but the asset is not brought to the UK until two tax years later, by which time it has depreciated to a market value of £100,000, would the remittance be charged at the lower amount, here market value?

A 1. 'Any money or property' includes moveable assets but may apply also to any other form of property. While real estate may not be remitted physically to the UK, a remittance may be made for example where an offshore loan is used for the acquisition of a fixed asset in the UK. Whether a relevant person benefits from a remittance is a question of fact. The amount of the benefit chargeable will depend upon the specific tax rules applying to the remittance.

A Where property is acquired off shore for a value of £200,000 but the value has dropped by the time it is remitted, the amount chargeable is the amount paid for the acquisition of the asset, namely £200,000.

Q Please clarify the position in the following hypothetical circumstances:-

1. Non domiciled taxpayer A has two offshore accounts, capital account with £100,000 in it and an 'income' account which has received all of the income of the first account for the last few years showing £30,000. He has been claiming the remittance basis for three years to 5 April 2008 and all remittances have been made from the capital account. From 6 April, taxpayer decides to pay tax on his worldwide income and is not subject to the remittance basis or the charge and is unlikely to do so in the future. His income from both accounts in 2008-09 is £5,000. He actually draws £20,000 from his 'income' account and pays this into a UK bank account.
Is his taxable income from overseas for 2008-09 £5,000 or £20,000? Would it be different if he had remitted the £20,000 from the capital account? Ie are the new remittance rules retrospective?

2. Non domiciled taxpayer B made a gain offshore which qualified for full business taper relief in 2005/2006 at 75 per cent . Every year he remits a bit more of the gain with the benefit of taper relief and his tax rate has been 10 per cent . There is still £500,000 of gains un-remitted. In 2008-09 he remits £100,000 of the gain. Does he pay tax at 18 per cent of £100,000 or 18 per cent of £25,000?

A 1. The taxable income for 2008-09 in the example you have given will be £20,000. If the remittance was made from the capital account there would be no tax assuming that the monies in the account are capital and not, for example derived from income or gains, such as from the use of the source ceased loophole, in which case remittance from the account would be taxable. The rules are not retrospective because it is the individual's decision to remit the income in 2008-09 which then gives rise to the tax charge. Of course even if the rules had not changed, the £20,000 would have been chargeable to tax when remitted to the UK.

2. The gain on disposal of an asset is computed according to the rules applying as at the date of disposal. Remittances of the gain after 5 April 2008 will be charged to tax at 18 per cent except in the case of offshore income gains which are charged to income tax.

Q From 6 April 2008, if a resident non-domiciled who elects to pay world wide tax on arising basis, then he/she disposes of some of his/her assets and paid capital gain tax on the profit derived from the disposal. Later when the resident remits the lump sum of the sales proceeds (capital + profit) to the UK, how can he/she differentiate which part of the remittance is profit, and which part is the capital (which will not be taxable)?
What are the new rules for determining how much of a transfer from a mixed fund is treated as income/gains, and the manner in which these amounts are chargeable to tax? Also how about the determination of how much of the transfer amount is capital?

A In the example you give, the individual makes a disposal which leads to a capital gain in a year in which they paid tax on the arising basis. They pay tax on the gain as it arises so there will be no further tax when the proceeds of the disposal are remitted.
The new rules for determining what is remitted from a mixed fund are at Section 809Q ITA 2007. They apply only where the account contains untaxed income or gain. Broadly a remittance from a mixed fund is treated firstly as being income, then chargeable gains and finally capital of the latest year. If the remittance is greater than the income or gains of the year then the same order is applied to income and gains of the preceding year, and so on.

(25)

Q Under the new legislation can you clarify the following:
1. At 6 April 2008 a non-domiciled has an offshore bank account which contains £100,000 capital and £50,000 interest accumulated over many years (mixed account)
2. The interest credited in 2008-09 is £10,000 and the arising basis applies for 2008-09 onwards.
3. He remits £5,000 to the UK in 2008-09 from the mixed account.

Will the £5,000 remitted be deemed to come from the 2008-09 interest taxed on the arising basis or the untaxed interest not remitted from earlier years? In other words will he be taxed on £10,000 or £15,000?

A The mixed fund rules operate by matching remittances to the UK from a mixed fund in a year with the income, gains and capital credited to the account for that year. Only if the remittances are greater than the combined amounts credited in the year is it necessary to look at income, gains and capital credited in preceding years (on a year by year basis, starting with the latest year). In your example a remittance of £5000 is made from an account to which £10,000 interest was credited in the same year, where the £10,000 is taxed under the arising basis. It follows that the £5000 is not taxable as a remittance because it has already been charged to tax.

(26)

Q 1. Resident non domiciled with an off shore mortgage secured on UK property prior to 12 March has a £1,000,000.00 on the facility. £750,000.00 transferred to UK prior to 12 March. What are tax consequences if:

a. Remainder received off shore by borrower prior to 12 March but not remitted to UK yet; or
b. Remainder still with bank and borrower looking to ask for the money post 12 March.

2. Resident non domiciled looking to borrow unsecured £1,000,000 from an off shore bank post 12 March 2008 and bring the money to the UK for use in the UK.
a. Is this a remittance of capital?
b. Interest on loan to be repaid from funds in the UK, any taxable implications?

A 1. The £750,000 will be covered by grandfathering so long as the money was lent to enable the borrower to acquire an interest in the property (and for no other purpose) and the money was used to acquire the interest. The £250,000 is not covered in (a) or (b) because the money was not received in the UK before 6 April.

2. (a) Yes - but if income or gains, or anything deriving from them, are used outside the UK in respect of the debt (which is a relevant debt in so far as it relates to the use of the capital in the UK), then there will be a taxable remittance of that income or gains.
2 (b). No implications for remittance basis purposes, as the repayments are from UK sources.

(27)

Q **Remittance basis - offshore borrowing** If a mortgage was arranged and contracts for the purchase of the relevant property were exchanged in October 2007 but completion was not until March 31 2008 and the mortgage funds were not drawn down until completion, would this be considered to be an existing mortgage as at 12 March 2008?

A The conditions for the grandfathering relief to run would only be met if the 'lending' took place before 12 March 2008, providing the funds were received in the UK and used to acquire the interest in the property in question before 6 April 2008. The answer depends on the terms and conditions of the mortgage arrangement, which determine the point at which the funds are regarded as 'lent'.

28

Q Our query relates to the rules concerning payment of UK professional fees and whether this constitutes a remittance. Our understanding is that the basic position under S809L(3) and S809W is that when money or other property derived from untaxed foreign income or gains is used as consideration for services provided in the UK to or for the benefit of a relevant person this is a taxable remittance UNLESS service relates wholly or mainly to property situated outside the UK and consideration is paid to an offshore bank account of service provider ('the exemption'). HOWEVER this exemption does not apply where UK service relates to provision in UK of benefit that is treated as deriving from income by virtue of S735 ITA 2007 (transfer of assets legislation) or is a relevant benefit within meaning of S87B TCGA derived from chargeable gains. We are uncertain as to the precise circumstances in which the exemption will not apply. For instance would it catch, for example, a situation where we advise offshore trustees about a house they own in France (via a holding structure) which is used as a holiday home by UK beneficiaries.

A The exemption for services does not apply where the payment would amount to the provision of a benefit in the UK to a beneficiary by non-resident trustees under Section 87 TCGA or by a person abroad under Section 735 ITA. The rules for determining what constitutes a benefit have not changed. It follows that where a payment for services would not be caught as a benefit under either of those provisions, and meets the criteria in Section 809W ITA then the payment will be exempt.

29

Q If an individual has an offshore mortgage with a two year fixed rate, will the grandfathering provision only last until the two year fixed rate period ends?

A Assuming the mortgage meets the other conditions for grandfathering whether relief would continue to apply after the fixed rate period ends would depend on the exact terms of the relevant loan agreement which was entered into before 12 March 2008. If, after the two year point was reached, the existing terms of that agreement would need to be amended, or a new agreement entered into (including a side agreement to the existing loan agreement), there would be a variation of the terms of the original agreement and the grandfathering provisions would no longer apply after that time. But if the loan agreement automatically provided for the move from a fixed rate to a variable rate, that would not on the face of it result in a variation in the agreement, and if so relief would continue.

30

Q A non UK domiciled resident in the UK receives salaries from a UK employer under his UK employment contract. These salaries are taxed in the UK. Part of the salary is either
(i) paid directly to a bank account in Jersey or Guernsey by the employer or
(ii) transferred by the employee to a Jersey/Guernsey banking account from the UK banking account where he receives his/her salary.
The individual is a non-UK domiciled having spent the past seven years in the UK. From tax year 2008-2009 onwards, he/she chooses to be taxed on the 'remittance basis' and to pay the yearly £30,000 remittance basis charge.
He/She invests the moneys (say £100,000) transferred to the Jersey banking account so that any interest (say 5 per cent p.a.) earned on that money is paid to another account held by the individual with the same bank.
If the interest paid on the second account is not remitted, will the individual will be able to subsequently bring back the £100,000 to the UK with no tax consequences (on the basis that the £100,000 was moneys which have already been taxed in the UK)?
or, will the Inland Revenue consider that the money transferred in the first instance and subsequently brought back to the UK would -had it been invested in the UK instead of being transferred- have been subject to UK income tax on interest earned on that investment and therefore cannot be remitted tax free even if the interest accumulated on the second Jersey account is not itself remitted to the UK?

A Account A appears to contain only taxed UK employment income; in general terms remittances to the UK that are clearly made from this account will be remittances of already taxed income and should not be subject to further taxation in the UK. Any remittances from Account B would appear to be liable to taxation on remittance to the UK. However, on a cautionary note, if the income in Account A falls to be regarded as a 'mixed fund', that is, it contains more than one type of income/capital or contains income/capital from more than one year (see Section 809Q (4) of the new legislation proposals) any remittances from this account may become subject to UK tax if these fall to be regarded as remittances of foreign income or gains. Regard must therefore be taken of the composition of each account from which remittances are made, and also of any other remittances or nominations of income in respect of the £30,000 Remittance Basis Charge.

(31)

Q A UK non-domiciled came to the UK in July 2007. He made an offer to purchase a residential property in the UK in November 2007. The deal became unconditional in February 2008 and entry was agreed for 16 March 2008. He has an offshore mortgage and the loan offer was made prior to 12 March but of course not drawn until 16 March Does paragraph 90 of Schedule 7 of FA 2008 apply?

A The grandfathering provisions for offshore mortgages apply only where the loan was made before 12 March 2008. This means that the money had to be in the hands of the non-domiciled individual (or for example in the Solicitor's client account) before that date.

The remittance basis and the £30,000 charge

(32)

Q Non-domiciled individual owns an offshore investment portfolio. From 6 April 2008 he will elect to retain the remittance basis and pay the £30,000 charge

1) The individual has previously made capital gains from the disposal of various investments although the proceeds have not been remitted to the UK. The gains have arisen in respect of assets which were purchased prior to 11 March 2008 out of untaxed relevant foreign income. If the proceeds from these historic disposals are brought to the UK after 5 April 2008 will they be exempt from charge under the remittance basis?

2) A number of investments purchased out of untaxed foreign income prior to 11 March 2008 are still held. If these investments are subsequently sold (either pre or post 5 April 2008) with the proceeds subsequently brought to the UK after 5 April 2008. Will they be exempt from charge under the remittance basis?

A No, the gains will not be exempt from the charge. The proceeds on disposal of an offshore asset to which the remittance basis applied have always been chargeable to tax when remitted to the UK.

(33)

Q A US domiciled individual is resident in the UK :

1. He currently prepares US self employed accounts to 31 December. For 2008-09 do I use his accounts figures for y/e 31/12/08?
2. Do I accept the profit/loss on those accounts even though the US expenses may be allocated differently to the UK? In other words do I have to adjust them to fit in with UK tax rules?

A There is insufficient information to answer these questions fully, but, if we assume the individual has been a UK resident carrying on the same trade for more than three years, then:

1. He can also compute his 2008-09 profits for UK tax purposes using the 12 month period to 31 December 2008.

2. Yes – he will need to adjust the profit/loss on his accounts to fit UK tax rules, which include adjustments required to comply with UK accounting practice.

(34)

Q Can you please clarify the interaction between the £30,000 charge and payments on account in the following examples:
1. Mr Jones, a remittance basis user, has a tax liability for 2007-08 of £100,000 and would normally make payments on account of his 2008-09 liability of £50,000 on 31 January 2009 and £50,000 on 31 July 2009. He anticipates that his liability for 2008-09 will be £110,000 being £80,000 on his UK income which will be lower than in 2007-08 and the £30,000 remittance basis charge. He wishes to pay the remittance basis charge from his offshore income.
The amount of additional payment on account liability attributable to the £30,000 charge appears to be £20,000 (£100,000 final liability for 2007-08 minus £80,000 anticipated liability on other income). Is this HMRC's view? If so, may he rely on S809V to pay £10,000 of the £50,000 payable on 31 January from an offshore account directly to HMRC and £10,000 of the 31 July payment in a similar manner, without making a taxable remittance?
Alternatively, can he treat £30,000 of payment on account liability as attributable to nominated income and pay all of this on 31 January 2009 directly from his offshore account (without making a remittance)? The difficulty arises because there is nothing in the legislation to identify which part of the payment on account relates to the remittance basis charge. Will HMRC accept that any payment made directly from a non UK bank account is eligible to relate to the remittance basis charge?

A 1 Section 809V provides that money brought into the UK by way of direct payment to HMRC to meet the £30,000 Remittance Basis charge to be treated as not remitted to the UK. The section provides for one or more payments to be made in relation to a tax year to which S809H applies, as long as they do not exceed £30,000 in total. HMRC will apply this treatment to amounts received in relation to such a tax year (ie in relation to a tax year when the RBC is due), if paid directly from non-UK accounts, up to £30,000. It will make no difference whether the £30,000 amount is paid in one lump sum or in several stages, and whether paid on the 31 January or 31 July as long as it is in relation to such a tax year.

(35)

Q 2 Mr Smith is in the same position as Mr Jones but his income is uncertain and he will not know whether he wishes to claim the remittance basis until after the end of 2008-09 when he knows what his offshore income and gains are. He anticipates provisionally that he will claim the remittance basis.
He subsequently decides not to claim the remittance basis for either 2008-09 or 2009-10, and his final liability for 2008-09 turns out as £80,000. As a result of taking a prudent view and making what turns out to be excessive payments on account he appears to have made a taxable remittance. This is because the payments on account will not, so far as they are attributable to the £30,000 charge, now benefit from the remittance exemption in S809V. Indeed, if he files his 2008-09 return in, say, November 2009 and receives a repayment of whatever part of the first payment on account (on 31 January 2009) that is attributable to the £30,000 charge (see Example 1) he will be treated as retrospectively making a further remittance in 2008-09, and his return for that year will be incorrect. Do HMRC agree with this analysis?

A 2 No. When Mr Smith filed his2008-09 return in November 2009 it did not contain a claim to the remittance basis, and subsequently no liability to pay the Remittance Basis charge. Thus none of the payments on account can be 'attributable' to the RBC.

Mr Smith is not a remittance basis user is 2008-09. He will therefore be chargeable on the full amount of his worldwide income and gains arising in 2008-09, which will include any part of the payment on account made on 31 January 2009 that is paid from offshore income/gains arising in 2008-09. Any part of the payment on account paid from offshore income and gains arising prior to 2008-09 may be taxable as a remittance if Mr Smith used the remittance basis under the 'old rules' in the relevant years.

Mr Smith will be aware of the position when he completes his 2008-09 Return in November 2009; as he has not claimed the remittance basis that Return, when filed, should include liability in respect of the offshore monies used as part of his 31 January and/or 31 July 2009 payment(s) on account. Mr Smith's liability to tax on these monies is not connected to any repayment he may be due, so he can file his return in the correct figures in November 2009.