General

Q: **Relevant Person** - Is there a minimum period during which couples must live together as spouses or civil partners to fall within section 809M(3)(a) and (b)?

A: No, there is a no minimum period for cohabitation; it is a question of fact as to whether two individuals are living together as spouses or civil partners.

Q: **Capital Losses Election** - When does a section 16ZA TCGA 1992 election, enabling overseas losses to be offset against chargeable gains, need to be made?

A: The election should be made in the first year for which the remittance basis is claimed. It should usually be within the same Self Assessment Return as the first claim. The election is irrevocable. The usual time limits for claims/elections apply.

Remittances

Nominated income

Q: HM Revenue & Customs (HMRC) have indicated that individuals do not have to specify which account the nominated income comes from, and from this it could be inferred that without further disclosure of the particulars of the account the taxpayer may be at risk of 'tainting' every other source of income of that type. For example if an individual has an account with one bank in Jersey and another bank in a different jurisdiction, he could nominate bank interest on his Jersey account, so that it would be obvious that if he remitted income from his other account, he might not fall foul of re-characterisation provisions. However, this may not be the case if he had three different accounts with the same bank in Jersey and he wishes to nominate income from one of those accounts without disclosing the account number of that account. Can HMRC clarify what their approach to this will be?

A: It is up to the individual to decide how much information to give HMRC on their Self Assessment returns in order to identify the source of the nominated income or gains; if, as in this example, there is more than one account the individual should provide sufficient detail to distinguish between them and identify the 'nominated' account. That might be the entire account number, or the account 'name', or some other unique identifying feature of the account.

Q: As HMRC seems to consider that foreign expenditure does not reduce amounts to be identified with remittances under section 809J, it appears that in most cases it will never be possible to remit the full nominated amount. Is this correct?

A: Yes.

Q: If I accidentally remit some nominated income or gains to the UK can I undo the mistake, so that sections 809I and 809J do not apply, by repaying the income or gains to the original account?

A: Where there has been a genuine accidental remittance then so long as the individual reverses the transfer without unreasonable delay, and in any event before the end of the

tax year, then so long as there have been no relevant transactions or other benefits conferred on a relevant person in the interim then HMRC will use its discretion to accept that sections 809I and 809J do not apply.

For example, if £20,000 is transferred in error from an overseas bank to a UK bank account and two weeks later the account owner realises the mistake and immediately transfers that £20,000 straight back from the UK bank account to the overseas bank account. Then HMRC will accept that sections 809I and 809J do not apply. However if, for example, the £20,000 was spent in the UK and then £20,000 from another UK account transferred into the UK account and then back to the overseas account then sections 809I and 809J would apply.

6

Q: If I use nominated income or gains to pay the remittance basis charge of £30,000 it would appear that does not trigger the provisions in sections 809I and 809J. Is that right?

A: If £30,000 of the nominated income or gains is brought to the UK to pay the remittance basis charge, it is treated as not remitted to the UK under section 809V. Therefore section 809I does not apply because none of the individual's nominated income or gains is regarded as having been remitted to the UK in that tax year. If the £30,000 is repaid by HMRC then it is treated as remitted at that point and so section 809I will be triggered.

7

Q: The question has arisen whether less than £1 (ie pence) can be nominated income. Given current interest rates there is concern that accounts specifically set up to generate nominated income may not generate £1 before 6 April 2009. The concern expressed is that because pence are rounded down on tax returns, it might be your view that there is no nominated income?

A: The minimum nomination of income or gains required to calculate the relevant tax increase is £1. This is the minimum figure to be declared on the relevant supplementary page of the Tax Return.

Taxable remittance

8

Q: The term 'used in' in section 809L(2)(a) is very wide and could mean that an asset is in a continuous state of remittance (ie if it is used in more that one year) or that an asset taxed when it is brought to, or received in, the UK would again be taxable when it is later used here. Could HMRC please comment?

A: Subject to the various asset exemptions, an asset brought to the UK will trigger a taxable remittance only to the extent of the underlying income or gains from which it is derived (indirectly or directly). The taxable remittance will only occur once; this will usually be the time the asset is first brought to the UK by a relevant person, but otherwise will be the time that the asset is first received or used by a relevant person. See section 809P(3) ITA 2007.

9

Q: The scope of the concept of derivation needs to be clarified. It seems that it requires a tracing exercise to be carried out. It is not clear whether double derivation could arise, for example X gives assets representing income and gains to his spouse who then independently gifts those assets to a trust. At some point in the future the trustees may remit the assets to the UK for the benefit of a different relevant person. Must tracing be done through more than one relevant person?

Does derivation require there to have been some conscious planning that the income and gains gifted or assets or funds representing them will be used for the benefit of a relevant person? If not, then it would seem to catch situations where remittance occurs without the knowledge of the donor. One example of this would be where, due to a change in circumstances/health of a relevant person many years after the gift, the donee remits funds to pay nursing home fees or medical expenses for that relevant person.

A: The rules introducing the concept of tracing the source of untaxed foreign income and gains were introduced to prevent avoidance schemes which relied upon the re-characterisation of the original income or gains or upon a form of alienation where the enjoyment of the original income or gains continues to remain accessible to the individual whose income or gains they were originally. Therefore the tracing rules apply to look through a series of transactions, including through relevant persons, gift recipients and where there is a connected operation, to the original event from which the untaxed income or gains arose.

The rules ensure that untaxed foreign income or gains cannot be transferred into, for example, capital gains which would attract tax at a lower rate than income on remittance to the UK, or into property which can be brought to the UK for the benefit of the individual who generated the original untaxed foreign income or gains.

Where an individual gives untaxed foreign income or gains to another person then they should ensure the donee is aware that they must tell the donor if the property or anything subsequently derived from it is bought to the UK. If the record keeping requirements are felt to be too onerous and the probability of remittance to the UK is high the donor may wish to consider making a gift of taxed income or gains.

---

(10)

Mixed funds

Q: There may be cases where a UK broker sells a non-UK asset on behalf of a resident non-domiciled client. If the proceeds of the sale of the non-UK asset abroad are paid into the UK broker's offshore account and then subsequently paid across to the client, does HMRC consider there will be a remittance?

A: No, assuming that the broker's payment to the client is also offshore. Fees paid to the broker for services performed in the UK in respect of this sale are likely also to be exempt under section 809W.

Bank accounts

(11)

Q: (Duke Roxburghe's Executors v CIRCould) Can it be confirmed whether HMRC will continue its practice, in the light of this decision, that a remittance will not be treated as having occurred where a mistake is made by a bank in contravention of express instructions by the account holder.

A: Yes; if the mistake is one made by the bank in direct contravention of the individual's express instructions then the bank may alter the transaction in line with the instructions and HMRC will accept this 'new' transaction as the only/original one.

---

(12)

Q: Will HMRC continue their practice of accepting that interest on a maturing deposit which is credited to the same account comprising the principal but which under the bank's normal internal system is then immediately and identifiably transferred to an income account will not taint the principal and that the mixed fund rules in s.809Q-S will not apply?

A: Yes.

13

Q: Cross-collateralisation of debts. Many banks are currently setting up dedicated accounts (with capital of say £100) which will earn just sufficient income (say £1) to be used as nominated income for the purposes of the £30,000 charge. However, under their standard terms and conditions, the bank will often have a floating charge over every account the individual has with them as support for any lending. If any of that lending is brought into the UK then there is a concern that the £1 income in the nominated account might be said to be 'used outside the UK in respect of a relevant debt' because it is, theoretically at least, capable of being taken in support of the borrowing under the cross-collateralisation. In practice, of course, the £1 in the nominated income account makes no difference one way or the other to the bank's security. One answer to this, of course, is for the banks to change their standard terms and conditions to exclude the nominated account. However, this is easier said than done and is unlikely in most cases to be done before 6 April 2009. The concern, as you will realise, is that if any nominated income is - as a result of this - deemed to be remitted then this results in re-characterisation under s809I and s809J, spoiling careful account segregation for ever afterwards.

Is there any possibility that we could have some de minimis here so that, say, up to £100 of nominated income would not be treated as remitted in these circumstances?

A: No. Whether or not this is an issue will depend on the terms and conditions attached to the accounts and loans held with the bank or other financial institution. If individuals are concerned about this issue then it would make sense to simply open a separate account with a different financial institution.

14

Q: Does HMRC consider that identifiable separate bank accounts are discrete even when they are set up as sub-accounts under an umbrella agreement?

A: Yes.

15

Q: **S 809** - Will HMRC accept that segregated accounts at the same bank (for example segregated income and capital accounts or a segregated account to bear nominated income) will be regarded as discreet, even if established with the same bank/branch, under a single all embracing agreement and mandate or structured by the bank concerned as sub-accounts. Can you confirm (or otherwise) whether you would accept that such accounts, as long as clearly capable of analysis and segregated in all other senses, would be regarded as separate sources of income and separate accounts for the mixed fund rules?

A: Yes; HMRC will accept that the sort of accounts described here will be regarded as separate sources of income and separate accounts for the mixed fund rules.

16

Q: The question has been raised with HMRC whether there would be a remittance where a sterling payment is made abroad and the payment is cleared through London in the normal banking process. The note says that the machinery employed is irrelevant provided that, without express provision, the individual has:

- no right to payment at any intermediate point; and

- no control over the funds transferred by their foreign bank to secure payment at the agreed point.

In such circumstances the passage of funds through the UK would not be regarded as a sum remitted to the UK.

We understand that the way in which banks arrange the transfer of funds is as follows:

The offshore bank will have an account with a UK clearing bank. A transfer of funds to the account holder's account with the offshore bank will have to be made by the payer making a payment into the account of the offshore bank at the UK clearing bank.

A non domiciled payer will therefore have to instruct his or her offshore bank to make a payment to the account of the payee's bank held with the UK clearing bank for onward credit to the ultimate recipient.

In looking at this machinery, funds will leave the account of the payer abroad and remain in the banking system going through the bank account of the offshore bank in the UK and thence to the account of the recipient with the offshore bank.

Could it be confirmed with this structuring that the requirements set above in the note would be complied with and that provided it is the case that the ultimate credit is for the service provider's offshore account, no remittance would have occurred and that s.809W will have been complied with.

A: In this circumstance the payment is cleared through the normal banking process and the passage of funds through the UK would not be regarded as a sum remitted to the UK. The requirement at s809W(4) may be complied with; there is insufficient detail to confirm that the other requirements of s809W are complied with.

17

Q: Will HMRC apply the same principle, expressed in relation to mechanistic banking transfers which pass through the UK in the banking system, in a case where a courier passes through the UK in transit carrying property not covered by the temporary importation exemption?

A: Yes. In principle, where the 'passing through' is a mechanistic part of the courier service provision and, no relevant persons have any rights to use or access the property at any intermediate point; and no control over how property is transported to and from the agreed points. In such circumstances the passage of property which merely 'touches' the UK would not be regarded as a sum remitted to the UK

The remittance basis and the £30,000 charge

18

Q: How will payment of the remittance basis charge interact with payments on account? It seems that an individual will have to make payments on account of the £30,000 charge if income is nominated but not if capital gains are nominated. Apart from that inconsistency, we are unclear how the payment on account process applies where the decision to claim the remittance basis must be taken annually and need not have been made when payments on account fall due. (In fact the deadline under s43 TMA 1970 is long after the final payment for the year is due). How will this work in practice?

A: The remittance basis charge (RBC) is only payable from tax years 2008-09 onwards. So even if a claim in made in 2008-09 and the RBC is due, then the first year that any

payments on account (POA) can be considered in relation to the RBC is 2009-10. The fact that the individual's tax liability for 2008-09 will be substantially increased for those paying the RBC has no effect on the payments on account position for 2008-09, but, to the extent that the RBC is income tax, it will be taken into account when calculating payments on account for 2009-10.

The same principle applies to the payment on account position in relation to the RBC for any first year that a claim to the remittance basis is made, and the RBC is due.

For example:

If the income tax liability for 2007-08 was £50,000, then the two POAs for 2008-09 will each be £25,000 payable on 31 January 2009 and 31 July 2009. The fact that the liability for 2008-09 will be substantially increased by the RBC has no effect on the POAs for 2008-09 but will be taken into account when calculating POAs for 2009-10 to the extent that the £30,000 is income tax.

The payment on account position in relation to RBC will be affected by any claims to reduce payments on account. Any claim to reduce payments on account on form SA 303 must be made. Further information on the rules and the time-limits for making a claim to adjust payments on account can be found in the Self Assessment Manual under SAM1110.

Where the RBC is paid in the previous year on nominated income, the amount feeds through to their POA for the next year, unless they make a claim to reduce their POAs on grounds that they will not claim the remittance basis for the following year.

Of course, if they subsequently do claim the remittance basis and pay the RBC in the following year then we will charge interest on the reduction in the POA, as usual.

This is shown in the example below:

- Mr A's 2008-09 income tax liability is £55,000, of which £25,000 related to tax on UK source income, and the reminder is the £30,000 RBC (all in respect of nominated foreign income). Nothing is taxed at source. His payments on account for 2009-10, payable on 31 January 2010 and 31 July 2010 will each be £27,500

  If Mr A does not think he will claim the remittance basis and so will not need to pay the remittance basis charge for 2009-10 he could reduce his payments on account for 2009-10 to £12,500 each, that is 50 per cent of his 2008-09 income tax liability of £25,000 (if the RBC is excluded). However, if Mr A later decides to claim the remittance basis 2009-10 and so has to pay the remittance basis charge, he will be regarded as erroneously claiming the POA reduction. He will be charged interest on the payments that he should have made, that is, on £15,000 from 31 January 2010 and £15,000 from 31 July 2010 until the date these amounts are paid.

- Mr B's income tax liability for 2009-10 was such that his POAs for 2010-11 should be £100,000 each. Mr B did not pay the RBC in 2009-10 last year and doesn't claim to reduce the POAs. When Mr B files the 2009-10 return Mr B also claims the remittance basis and has to pay the RBC of £30,000 bringing total liability for 2009-10 to £230,000. As the £100,000 POA was right, based on Mr B's income for 2009-10 and Mr B did not claim to reduce them, interest will only be chargeable in the usual way, that is, to the extent that Mr B did not pay either of the £100,000 POAs on time.

Offshore mortgages

19

Q: It would be helpful to understand more fully the meaning of the requirement in paragraph 90(1) (b) that the loan was made for the purpose of acquiring an interest in residential property 'and for no other purpose' and in particular to what extent any other purpose might cause the whole loan to fall outside paragraph 90.

In a situation where money is lent before 12 March 2008 from a non-UK bank to an individual (resident but not domiciled in the UK) outside the UK under a facility letter for £5 million. £4.5 million of the facility is initially drawn down and the money used by the individual to purchase a residential property in the UK. Assume for these purposes that the loan was secured on a UK residential property.

Subsequently (and before 12 March 2008) a second tranche of £0.5 million was drawn down under the same loan facility, also outside the UK. The money from the second draw down was used to refurbish the residential property purchased by the first draw down.

A: The effect of paragraph 90(1) is to provide transitional provisions for loans made for the purpose of acquiring an interest in residential property in the UK. In this scenario, there are effectively two separate loans, even though they were made under a single facility letter: it is the drawdown of the money rather than the facility letter which constitutes the lending of the money. Therefore the first £4.5m drawn-down was money lent to the individual before 12 March and used to purchase a UK residential property and for no other purpose and was secured on that interest. That being the case, the transitional conditions will apply if, and to the extent which, relevant foreign income is used to pay interest on the debt.

However, because the second £0.5m tranche of money was used to refurbish the property rather than to acquire an interest in it, it is does not meet the conditions set out paragraph 90(1)(b). Therefore, any relevant foreign income which is used to pay interest on this part of the debt will be treated as a taxable remittance in the UK.

20

Q: We would also welcome confirmation that the provisions in paragraph 90(1)(c)(iii) apply to a non-UK loan drawn down before 12 March 2008 where there are two (or more) guarantees in place for repayment of the debt, of which only one is secured on the UK residential property.

A: We can only reply in general terms to this query. The way in which this provision will apply will be determined in practice by the details of the particular loan or guarantee transactions in question. We would generally treat repayments of a debt secured on the property itself as falling within the provisions of paragraph 90 regardless of what guarantees might also exist. Likewise, any repayments made under such a guarantee will also be covered by the paragraph. However, any repayments made under a guarantee which is not secured on the UK property will not be covered.

21

Q: We would welcome guidance on the principles for calculating the interest on that part of the debt which can be paid from relevant foreign income of the individual outside the UK without triggering a taxable remittance (under paragraph 90(2)). We suggest a reasonable approach is to calculate the interest element based on the loan capital ratio (ie that part of the loan which meets the paragraph 90 conditions over total capital of the loan facility), and apply that ratio to the total amount of interest due.

A: The approach you suggest is, in broad terms, one which HMRC would consider acceptable, with the obvious caveat that the actual approach in any specific case would depend entirely on the terms of the loans.

22

Q: We would welcome confirmation that the remittance protection in paragraph 90 applies where a husband and wife (or civil partners), both of whom are resident but not domiciled in the UK, have a joint non-UK bank account and a joint offshore mortgage. The offshore mortgage meets the conditions set out in paragraph 90 (1).
If only one spouse (or civil partner) has relevant foreign income and that spouse makes a payment into a joint non-UK bank account using that relevant foreign income and these funds are then used to pay the interest on the offshore mortgage, then it is our understanding that such payment of interest will not constitute a remittance of any of the relevant foreign income by virtue of paragraph 90.

A: We are not able to provide the confirmation you are seeking because whether there is a taxable remittance in this situation will depend on the composition of the joint account and the way in which the mixed fund rules section 809Q apply to it. Therefore we can again only answer in general terms.

Provided the payment of relevant foreign income by one spouse or civil partner into the joint account is the only income within that account (in other words, section 809Q is not in point) which is then used to pay the interest on the mortgage which meets the conditions within paragraph 90(1), then that payment would also fall within paragraph 90.

Guidance on interpretation of section 809L and section 809W ITA in Sch 7 FA 2008

23

Q: It will be helpful to understand more fully the scope of sections 809L and 809W and the application of the exemption for services in circumstances where services have been provided which may only partially constitute a remittance. In the following, we assume that Condition B in section 809W relating to payment is satisfied.
What is meant by 'provided in' in section 809L(2)(b)? If a service provider engages with the Jersey resident trustees of a trust of which a UK resident but non-domiciled individual is a beneficiary and settlor and provides advice which is prepared and issued from the UK, but received and read in Jersey, it is not clear if this would be 'a service provided in the UK.' From the point of view of the trustees, the service is provided to them in Jersey although the providers of the service are in the UK.

A: Whether the exemption for services in section 809W applies to the provision of a particular service will be determined by whether it meets condition A in section 809L(2)(b), namely whether it has been provided in the UK. The general rule is that, for the purposes of this condition, a service is regarded as being provided in the jurisdiction where the providers of that service are based. Advice which is researched, prepared and issued from the UK would therefore fall within the definition of 'provided in the UK' irrespective of where the client might receive it.

24

Q: As part of providing advice to clients who have an international aspect to their affairs, a service provider may prepare advice in several different jurisdictions, which may then be issued from only one office, and therefore country, that being the office which has the main relationship with the client.

A: In the case where an offshore service provider provides advice which has been prepared in several different jurisdictions, the same approach will need to be taken to determine whether the test in section 809L is met, and, because the advisors in your scenario are based in the UK, their service will be provided in the UK.

25

Q: In circumstances where an investment adviser gives advice to a relevant person regarding their investments over the course of the year, how should we apply the 'wholly or mainly' test in section 809W(3) to determine whether payment for the service would constitute a remittance? This is particularly unclear where a service is provided which relates to property situated both within and outside the UK.

A: If the service can be clearly identified, by the relevant fees structure, invoicing arrangements and similar information, as being directly related to assets situated in the UK then, it will not be regarded as having met condition A in section 809W(3). If, on the other hand, the service cannot be clearly identified in this way, then it will be necessary to consider other means to decide whether section 809W(3) applies; for instance, if the provider of the services charges fees for the work undertaken on the basis of both time and fee rate, it might be appropriate to use this as a way of determining the extent to which the service relates to property situated in the UK or to property outside the UK.

Nominated income and Discretionary Trusts

26

Q: An individual may have no, or virtually no, overseas income of his own, but may be taxable, under the provisions of sections 720 ITA and 624 ITTOIA, on the income of a discretionary trust. As a result, he is treated as having sufficient income that it may be sensible for him to pay the £30,000 levy to claim the remittance basis. Assuming that he does so and wishes to nominate income, with a view to possibly later claiming a tax credit when the income is remitted (assuming that the client wants to cover all circumstances, including one in which eventually all his overseas income and gains are remitted to the UK) he would need to nominate income within the trust. Since the income is not his own in law, whatever the position for tax purposes, then in order for him to remit the funds and claim the tax credit the trust would need to make a distribution of this income to him. It is not clear whether, in making the transfer, the tax credit would still continue to attach to the income, in the hands of the individual.

We consider that, in these circumstances, section 743 of ITA would operate, such that the distribution of income from the discretionary trust would not be treated as a new source of income, and it is our understanding that HMRC take a similar view with regard to the provisions of section 624 ITTOIA. As a result the distribution would simply be a transfer of income, treated for tax purposes as already having arisen to the client, into the client's hands. As such, assuming that all untaxed income and gains of the client had already been remitted to the UK, he should be able to remit this income and claim a credit for the £30,000 levy.

A: If the income of trustees is deemed to be that of the settlor under section 624 ITTOIA , any actual payments made to the settlor are ignored for income tax purposes (see section 685A (5) ITTOIA). Of course, if the remittance basis applies, these two events are likely to occur in the same tax period, but the charge on the settlor becomes liable under section 624 ITTOIA, so there will be no charge on the annual payment made by the trustees, whilst section 623 ITTOIA will allow the settlor the deductions and reliefs to which they would have been entitled had they actually received the income.