The Offshore Tax Planning Review

MORE OFFSHORE LOSSES

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In their article (3 OTPR 3, at p 187) on capital gains tax losses accruing to non-residents, Stephen Allcock and Andrew Hitchmough considered the use to which losses could be put in limiting or reducing the liability of United Kingdom residents (shareholders, settlors and beneficiaries under settlements) to whom gains could be attributed under the provisions of ss.13, 86 or 87 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). The writers did not explore all the circumstances in which such losses could be put in minimising the liability of United Kingdom residents. Nor did they consider the use of allowable capital gains tax losses in reducing or minimising the liability of non-residents to capital gains tax on chargeable gains.

Why should this last be worth comment? Since the inception of capital gains tax, chargeable gains accruing to persons who are neither resident nor ordinarily resident in the United Kingdom have never, with exceptions, been subject to tax. It would be surprising if losses accruing on disposals of assets, which would be allowable losses if the person making the disposal was a United Kingdom resident, were of interest to a non-resident. Nonetheless it was found necessary to provide:

> "a loss accruing to a person in a year of assessment during no part of which he is resident or ordinarily resident in the United Kingdom shall not be an allowable loss for the purposes of this Act unless, under section 10, he would be chargeable to tax in respect of a chargeable gain if there had been a gain instead of a loss on that occasion" (now s.16(3) TCGA).

The purpose behind this provision is unclear. It is presumably intended to prevent the creation of a pool of allowable losses by non-residents or (perhaps) to complement the provisions limiting the use to which losses accruing to non-resident companies and trustees can be put in the computation of the liability of the United Kingdom resident shareholders, beneficiaries and settlors under ss.13, 86 and 87 TCGA. If losses accruing to a non-resident were treated as "allowable" then (so it might be reasoned) these United Kingdom shareholders or beneficiaries might be able to claim the benefit of any surplus of losses accruing on disposals by

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the non-resident company or trustees which might thus be attributed or apportioned to them under these provisions.

The reference to s.10 TCGA is the only exception to the general rule directly affecting the non-resident. Section 10 preserves the charge to tax on chargeable gains accruing on the disposal of assets used in a trade carried on by the non-resident in the United Kingdom through a branch or agency. The use to which losses can be put in relieving such gains is considered further below.

Losses accruing to non-residents

Apart from s.10 TCGA it might not be thought that losses which had already accrued or which might accrue on future disposals of assets by a non-resident were of much practical utility in reducing a liability to tax on chargeable gains other than a liability arising from an attribution under ss.13,86 or 87 considered by Allcock and Hitchmough. This is not necessarily so.

***Immigrants* - Individuals, Trustees and Companies coming to the United Kingdom**

Losses accruing on disposals in a year of assessment in which a person - whether that person be an individual, company or trustees - becomes resident in the United Kingdom will be allowable losses. The individual, company or trustees will be deemed to be resident in the United Kingdom for at least part of the year of assessment in which the losses accrue. It matters not that the disposal giving rise to the loss preceded the assumption by the person concerned of a United Kingdom residence - provided the disposal was in that year of assessment.

Exceptionally, losses accruing to the person in years of assessment prior to the year of immigration may be carried forward and allowed as against gains accruing on disposals following immigration. This would be so where either (a) the loss has accrued in such prior year on the disposal of an asset employed in a United Kingdom trade carried on through a branch or agency and the loss has not operated to relieve gains otherwise chargeable under s.10, or (b) the loss accrued on a disposal during a prior resident period.

The utilisation of potential losses by individuals coming to the United Kingdom does not require great fiscal ingenuity. Provided they have not been resident or ordinarily resident in the United Kingdom in the previous 3 years non-residents coming to the United Kingdom are not subject to tax on chargeable gains accruing on disposals in the year of assessment prior to taking up United Kingdom residence (see extra-statutory concession D2). It does not follow that losses accruing in the same year of assessment in which the individual comes to the United Kingdom are to be disallowed. What the individual cannot claim (other than in the exceptional cases considered above) is to carry forward losses which have accrued on disposals in past years of assessment. Accordingly, common sense dictates that so far as possible such individuals should realise any gains prior to taking up a United Kingdom residence and conversely should postpone disposals (including deemed disposals occasioned by events such as negligible value claims under s.24(2) TCGA) which are likely to give rise to a loss until the year of assessment in which they plan to take up a United Kingdom residence. If they cannot utilise the losses as allowable losses in that year the balance will be available for carrying forward to later years.

Much the same comments apply to companies. Corporation tax on chargeable gains is assessed on United Kingdom resident companies by reference to the gains accruing in accounting periods - rather than in years of assessment. The taking up of residence in the United Kingdom by a company will operate to cause a new accounting period to commence (s.12 Taxes Act 1988.) But s.16(3) TCGA only disallows losses accruing on disposals in a "year of assessment" during no part of which the company is resident in the United Kingdom. Losses accruing in the year of assessment in which the company takes up residence in the United Kingdom, but prior to that event, will be allowable in computing its liability to corporation tax on chargeable gains subsequently accruing so far as not previously allowed (s.8(1) TCGA).

There is one planning point of particular application to non-resident trustees who wish to pass on the benefit of allowable losses to a beneficiary becoming absolutely entitled as against them under s.71(2) TCGA. Allcock and Hitchmough pointed out that losses accruing to non-resident trustees go to reduce the chargeable gains which might be attributed to a United Kingdom beneficiary receiving a capital payment (ss.87 and 97(6) TCGA). But a surplus of losses accruing to non-resident trustees cannot be attributed or apportioned to a United Kingdom beneficiary receiving a capital payment so as to reduce the liability of that beneficiary to tax on gains otherwise accruing on disposals by him. For non-resident trustees with assets whose disposal would occasion a surplus of losses over gains the repatriation of (or immigration) of the trust followed by an appointment or advance to the United Kingdom beneficiaries would provide a means of utilising these losses. In such cases:

A. If the terms of the settlement under which the assets are held are such that the beneficiaries under the settlement became absolutely entitled to the assets at a time when the trustees were non-resident, repatriation following that event would be futile. The trustees would be *functus officio* by the time of the repatriation; the settlement would be at an end.

B. The trustees should postpone any disposal of assets in respect of which the losses accrued until the year of assessment in which they become United Kingdom residents. The provisions allowing relief for losses to non-resident trustees (in computing the liability of United Kingdom settlors or beneficiaries receiving capital payments) are more generous than those relating to non-resident companies. Sections 86 and 97(6) TCGA allow for the carrying forward of unutilised losses from one year to another in computing gains. Section 13 TCGA does not. Section 97(6) also allows the trustees to deduct carried forward losses accruing in a non-resident period from gains accruing in a resident period. But s.97(6) does not allow carried forward losses to be treated as "allowable losses" for the purposes of s.71(2)[2].

C. A distribution to a United Kingdom beneficiary by "immigrant" trustees having available allowable losses will allow the beneficiary to reduce or extinguish any liability on him to tax on a "capital payment" otherwise chargeable in his hands under ss.87(4) and 89(2) TCGA. Trustees - whether non-resident or not - cannot carry back losses in computing the trust gains of an earlier year. In the case of non-resident trustees - including those who subsequently become resident - the trust gains of past years will thus remain potentially subject to a charge under ss.87 and 89 TCGA. Losses accruing to the trustees in a later year of assessment will remain unused unless either (a) the trustees subsequently realise chargeable gains, or (b) a beneficiary becomes entitled to the benefit of the allowable loss under s.71(2) TCGA. The beneficiary at (b) could set off such loss against the chargeable gain otherwise deemed to accrue to him on the "capital payment" being made. For such losses to be available to the beneficiary the trustees would have to postpone the disposal of the assets in respect of which the losses were likely to accrue until they had established a United Kingdom residence.

Migrants - Individuals, Trustees and Companies leaving the United Kingdom

I. Individuals

Losses accruing to individuals leaving the United Kingdom to take up residence overseas will be allowable losses if the disposal takes place either in the year in which they leave the United Kingdom or in any prior year. Such losses may be made available either (a) to extinguish or reduce a liability to capital gains tax on chargeable gains accruing on disposals prior to the date on which the individual leaves the United Kingdom [3], (b) to extinguish or reduce a potential liability to tax on chargeable gains subsequently accruing on the disposal of an asset used by the individual when non-resident in the carrying on of a trade through a United Kingdom branch or agency, or (c) to be carried forward and set against chargeable

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2 nor does it allow for the carrying forward of losses set against gains subsequently accruing to the trustees which may be attributed to a United Kingdom resident settlor under s.77 TCGA.

3 The gains accruing on disposals effected after emigration may escape tax in reliance on extra-statutory concession D2.

gains accruing to the individual following his resumption of a United Kingdom residence. There is nothing in the wording of s.2(2) TCGA to prevent the carrying forward of losses which were originally allowable to a subsequent year of assessment when they may be made available to the individual concerned.

II. Trustees

Under s.80 TCGA trustees of a settlement who become neither resident nor ordinarily resident in the United Kingdom are deemed to have disposed of all the assets held by them as trustees (other than assets employed by them in carrying on of a trade through a United Kingdom branch or agency) and to have immediately re-acquired the assets at their market value at that time. The settlement trustees will accordingly realise any allowable losses which have accrued - and any corresponding chargeable gains - on this deemed disposal at a time when they are resident in the United Kingdom. The allowable losses so crystallised, so far as not set off against chargeable gains, do not lose their status as allowable losses by virtue of the trustees' loss of United Kingdom residence. They will be available in the same way and in the same circumstance as if the trustees were individuals. There are additional occasions when such losses may be used.

First, the balance of any losses over gains accruing on the disposal deemed to take place under s.80 TCGA can be utilised to reduce the liability of the United Kingdom "settlor" to trust gains under s.86 TCGA. A condition for the application of the charge imposed on United Kingdom settlors is that there is by virtue of disposals of any of the settled property originating from the settlor an amount on which the trustees would be chargeable to tax for the year under s.2(2) TCGA on the assumption as to residence specified in s.86(3). This requires one to assume that the trustees are resident and ordinarily resident in the United Kingdom throughout the year of assessment. On that assumption, allowable losses which accrued to the trustees when they were actually resident in the United Kingdom but which had not operated to relieve gains accruing at that time would be set off against gains which s.86(1)(e) requires to be treated as chargeable gains of the settlor.

Secondly, the balance of any allowable losses accruing to the trustees during their resident period may also be utilised (so far as not otherwise utilised) in computing the trust gains attributable to the United Kingdom beneficiaries receiving capital payments from non-resident trustees under s.87(2) TCGA. The computation required is of the amount on which the trustees would have been chargeable to tax under s.2(2) TCGA if they had been resident or ordinarily resident in the United Kingdom in the relevant year of assessment. That would include the balance of allowable losses from the resident period as well as any losses accruing on disposals in the non-resident period or carried forward from some other non-resident periods.

III. Companies

Sections 185 and 186 TCGA provide that there shall be a deemed disposal by a company of its assets (other than assets employed by the company in the carrying on of a trade through a United Kingdom branch or agency which are situate in the United Kingdom)[4] in the event of the company (a) ceasing to be resident in the United Kingdom, or (b) if the company falls to be regarded under double tax arrangements as resident in a territory outside the United Kingdom and under those arrangements is not liable to United Kingdom tax on gains arising on disposals of assets specified in such arrangements. The provisions provide for a deemed disposal of the company's assets immediately before the time at which the event triggering the disposal takes place, and accordingly at a time when any gains accruing on the deemed disposal and any losses so accruing will be respectively chargeable gains and allowable losses.

So far there is no meaningful distinction to be drawn between companies leaving the United Kingdom corporation tax net and trustees ceasing to be resident in the United Kingdom. Chargeable gains and allowable losses accrue immediately prior to the event giving rise to the charge at a time when the company will be within the corporation tax net. The balance of any allowable losses then accruing which have not been deducted from chargeable gains will become available to the company to extinguish any subsequent liability to corporation tax or capital gains tax on chargeable gains under s.10 of TCGA or may be carried forward and set against chargeable gains accruing to the company on disposals after it has resumed a United Kingdom residence. There the similarity ends.

First, s.187 TCGA (which is applicable where the company affected by ss.185 and 186 is a 75% subsidiary of a United Kingdom resident parent company) contains a special rule which, by election of the two companies concerned, allows the postponement of the charge in respect of the deemed disposal of all "foreign assets" held by the company concerned. Subsections (3) and (4) contain provisions bringing the whole or a proportion of the net gain (that is, the gains less losses) on the disposal of the "foreign assets" which has been postponed into charge in the hands of the United Kingdom parent company in the events there mentioned. An

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4 The provisions of s.186 TCGA do not except assets used (and situate) in United Kingdom in carrying on a trade in the United Kingdom through a branch or agency - although it is unlikely that there are double tax arrangements which would in any event operate to relieve the gains accruing on those assets so as to bring them within the definition of prescribed assets in s.187(6). It is arguable that the United Kingdom trading assets excepted from the disposals deemed to take place under s.80 and 185 are of a more limited class than those the subject of a charge to tax under s.10 which extends to include gains accruing on disposals to assets "acquired for use by or for the purposes of the branch or agency" without ostensibly laying down any condition that they should be situate in the United Kingdom.

unrelieved allowable loss accruing on a disposal of an asset to which s.10 applies or which accrued on the deemed disposal taking place under ss.185 and 186 may be used to limit or extinguish the charge to tax incurred when the postponed gain becomes chargeable under subs.(3) and (4) (under subs.(5)). This provision is limited to "foreign assets" (meaning assets used in a foreign trade). The scope here for utilising losses as a means of restricting the charges likely to be incurred on the deemed disposals under ss.185 and 186 is limited.[5]

Secondly, what of allowable losses which accrue during the "resident" period of the company, including the balance of allowable losses over chargeable gains accruing as a result of the disposals deemed to take place under ss.185 and 186? Can they be set against the chargeable gains accruing to the company in the same year of assessment following the time at which it becomes non-resident? The answer is "no". Section 13(8) provides "this section shall apply in relation to a loss accruing to a company on the disposal of an asset in that year of assessment *as it would apply if a gain instead of a loss had accrued to the company on the disposal,... and subject to the preceding provisions of this subsection this section shall not apply in relation to a loss accruing to the company*". [emphasis added] For the section to apply to a gain it is essential that the company is one which is not resident in the United Kingdom. The provisions have no application to gains accruing to the company prior to its loss of United Kingdom residence. It follows that the provisions of s.13(8) cannot apply to the losses accruing prior to the company leaving the United Kingdom.

Spouses

Potential losses accruing to a non-resident can be made available to and utilised by his or her United Kingdom resident husband or wife (who are "living together) by the simple expedient of first selling the asset to the resident spouse. Thereafter, the resident spouse sells the asset thus realising an allowable loss. Since the amendment of s.282 Taxes Act 1988 (under which a non-resident wife was originally deemed not to be living with the resident husband, and vice versa) no distinction is to be drawn between disposals between a non-resident spouse and a resident spouse on the one hand and disposals between spouses both of whom are resident on the other. A similar point arises in relation to disposals of overseas assets by a United Kingdom tax resident who is not domiciled in the United Kingdom. Losses accruing on such disposals are not allowable losses - whether the proceeds are remitted or not (s.16(4) TCGA). If the owner of such assets has

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5 "foreign assets" means assets of the company which are situate outside the United Kingdom and are used in or for the purposes of a trade carried on outside the United Kingdom (s.187(6)).

a spouse with a United Kingdom domicile they should first transfer the asset to the spouse to enable him or her to utilise the loss.[6]

Gains and Losses on Disposal of United Kingdom Trading Assets - S10 TCGA

The expressed exception provided by s.16(3) appears at first blush to be straightforward and of limited application. One is simply required to imagine what the situation would be if a gain instead of a loss accrued on the disposal of the particular asset concerned. If the gain so accruing would have been chargeable to tax as a chargeable gain under s.10 TCGA in the hands of a non-resident the loss will be an allowable loss. If the gain would not have been a chargeable gain under s.10 the loss will not be an allowable loss, although it might affect the computation of the gains of a company or trustees disposing of the asset for the purposes of ss.13, 86 and 87 of TCGA or of the person disposing of the asset if he became resident in the United Kingdom in the same year.

It is by no means out of the question that losses would accrue on the disposal of assets employed by a non-resident in a trade carried on through a United Kingdom branch or agency. Those engaged in carrying on a trade of farming or a hotel trade in the United Kingdom, to take two obvious examples, may well find that a loss accrues on the sale of any land or buildings employed therein. Such losses may not at first sight present the non-resident with the opportunity of saving tax. There may not be gains (charged under s.10) against which the losses may be set off. It is not unlikely that the non-resident acting on the advice of his solicitors and accountants, without the benefit of hindsight, may have procured that any land or buildings be held by a non-resident entity separate from the individual, company or trustees carrying on the United Kingdom trade with the express object of avoiding the s.10 charge on the gain optimistically thought likely to arise on any subsequent disposal. Now that such losses can no longer be indexed the scope for minimisation by use of such losses is further reduced. How could any unrelieved losses accruing on disposals to which s.10 might apply be utilised so as to provide relief?

Allowable losses accruing on disposals of assets to which s.10 applies cannot reduce or extinguish gains liable to apportionment to United Kingdom shareholders under s.13 TCGA. That section does not apply to gains chargeable to tax under s.10 (s.13(5)(e)). So it does not apply to losses accruing on the disposal of such assets (s.13(8)). But there are possibilities.

First, allowable losses accruing on such disposals may be used to reduce the aggregate amount of trust gains both for the purposes of s.86 TCGA (applying to United Kingdom settlors) and s.87 TCGA (capital payments received by United

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6 S.58 TCGA - disposals between spouses are on a no gain, no loss basis. Caution is needed to avoid a "*Furniss v Dawson*" argument by the Revenue.

Kingdom beneficiaries). The computation of trust gains required by those sections does not exclude s.10 losses.

Secondly, where the non-resident (be it an individual, trustees or company) holds assets situate in the United Kingdom which are suitable for use in a trade and the disposal of those assets is likely to give rise to a loss the individual can convert that loss into an allowable loss by appropriating those assets for use in a trade carried on through a United Kingdom branch or agency prior to disposing of the same. This stratagem is of obvious value to the non-resident individual who also holds assets the disposal of which may result in a gain accruing to the individual under s.10 TCGA. An appropriation of the asset for use in the trade with a view to producing an allowable loss can also be used to relieve gains accruing to non-resident trustees or to non-resident companies which are chargeable in their hands under s.10 TCGA. Any surplus of losses over gains on disposals of United Kingdom trading assets is otherwise of little use in achieving an overall reduction of the gains which may be attributed to United Kingdom settlors and beneficiaries under ss.86 and 87 TCGA. The conversion of the loss to an "allowable loss" has no effect on the computation of the trust gains and losses for the purposes of ss.86 and 87. The loss would be available in such computation whether the asset was used in a United Kingdom trade or not.

More usually, the United Kingdom assets in respect of which losses are likely to accrue to non-residents are United Kingdom land or buildings which are beneficially owned by a non-resident entity (a trust or company) and leased by another entity (whether resident in the United Kingdom or not) which carries on a trade utilising that asset. The reason for structuring arrangements in this way has in almost every case been to ensure that the gain accruing on the ultimate disposal of the freehold which was optimistically anticipated when the letting originally took place would itself escape a charge under s.10. Such arrangements were not uncommonly were made by settlors who were either not domiciled or resident in the United Kingdom or by shareholders who were themselves either not resident or domiciled in the United Kingdom.[7] If a loss rather than a gain has accrued the non-resident entity owning the freehold may convert the loss into an allowable loss by procuring a surrender of the tenancy and thereafter itself carrying on the trade in the United Kingdom through a branch or agency utilising the asset in question. The allowable loss accruing on the subsequent disposal would not

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[7] The effect in each case being to deny the attribution of any gain to a United Kingdom resident providing, at least, the non-residential and non-domiciliary status of the settlor shareholders was preserved.

without more be of great value but it is at least preferable to there being no allowance for the loss at all.[8]

In those cases where gains rather than losses are likely to accrue to the non-resident on the disposal by him of United Kingdom trading assets, any balance of allowable losses accruing from disposals by that non-resident when he was resident in the United Kingdom will first be deducted and set off against chargeable gains taxable under s.10 TCGA.

Non-resident groups - pre-acquisition losses

A company which is a member of a "group" as defined by s.170 TCGA and which has a pool of unrelieved allowable losses accruing on disposals of assets can utilise those losses to reduce or extinguish a chargeable gain accruing to another group member by acquiring from another member of the same "group" an asset the disposal of which was likely to give rise to a gain and thereafter disposing of that asset so realising the gain[9].

The opportunities this presented were gratefully accepted. It had long been accepted that a company having a potential liability for corporation tax on chargeable gains which might accrue on the disposal of an asset or assets could reduce or extinguish those gains by first acquiring the shares in a company with substantial allowable losses and thereafter selling the asset or assets pregnant with gain to the newly acquired subsidiary. The latter would realise the gain on the subsequent disposal to some outside purchaser. The subsidiary would utilise the losses which had accrued to relieve the gain under what is now s.8(1)(a) or (b) TCGA 1992. Conversely, a company having available a substantial pool of unutilised allowable losses could itself acquire shares in a company having an asset pregnant with gain and procure the newly acquired subsidiary thereafter to transfer the asset to itself thus enabling the gain to be realised on a subsequent sale utilising the allowable losses to extinguish any subsequent liability to tax. If the asset the

8 It is immaterial for the purposes of s.10 that the asset whose disposal may give rise to a chargeable gain or allowable loss under that provision has not been used for the purposes of a trade throughout the period of ownership provided it is in use for the trade at the time of disposal. It is also immaterial that there may be two trades carried on by the same non-resident in the United Kingdom through a branch or agency, in respect of one of which the disposal of the assets may give rise to a gain, and in the other of which the disposal may give rise to a loss. The "appropriation" suggested - and thus the subsequent disposal of the asset concerned - can be for use in a wholly new trade commenced by the non-resident wishing to realise the benefit of a loss.

9 The acquisition by the loss-making transferee company and the disposal by the transferor company would be on a "no gain, no loss" basis under s.171 TCGA. The transferor's gain would be realised by the transferee.

disposal of which was likely to give rise to allowable loss had not been sold it could, alternatively, be disposed of to another member of the group having assets pregnant with gain so as to enable that group member to realise the loss with a view to carry-forward to later accounting periods.

Most schemes which utilised losses through the means described in the preceding paragraph were struck down by s.88 and Sch 8 FA 1993, introducing a new s.177A and a new Sch 7A TCGA. It is not the purpose of this article to examine the operation of those provisions save in one respect.

Section 14 TCGA provides:

> "(1) This section has effect for the purposes of section 13.
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> (2) Sections 171 to 174 and 175(1) shall apply in relation to non-resident companies which are members of a non-resident group of companies, as they apply in relation to companies resident in the United Kingdom which are members of a group of companies.
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> (3) Sections 178 to 180 shall apply for the purposes of section 13 as if for any reference therein to a group of companies there was substituted a reference to a non-resident group of companies, and as if references to companies were references to companies not resident in the United Kingdom.
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> (4) For the purpose of this section:
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> (a) a "non-resident group" of companies -
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> (i) in the case of a group, none of the members of which are resident in the United Kingdom, means that group, and
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> (ii) in the case of a group, two or more members of which are not resident in the United Kingdom, means the members which are not resident in the United Kingdom;
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> (b) "group" shall be construed in accordance with section 170 without subsections (2)(a), (9) and (12) to (14)."

The broad effect of s.14(4) is to apply the definition of "group" in s.170 TCGA with the substitution for the requirement that references to a company apply only to a company which is resident in the United Kingdom of a requirement that references to companies be to companies not so resident. Provided a company disposing of an asset (the transferor) is not resident in the United Kingdom and is a member of the same "group" as the company (the transferee) to whom the asset is disposed of and the transferee is itself not resident in the United Kingdom that disposal will proceed on the same "no gain, no loss" basis prescribed for a disposal between United Kingdom resident members of the same group by s.171.[10] Now it would have been perfectly simple for the draftsman of the Finance Act 1993 to have included in the new s.177A or the new Sch 7A TCGA a provision to the effect that subs.(2) of s.14 should be read and construed as if it included a reference to 177A. As it is, the section is left undisturbed in the form which it had prior to the passing of the Finance Act 1993. Pre-acquisition losses remain available to non-resident groups.

The provisions of s.14 TCGA only apply for the purposes of s.13 (relating to the attribution of gains of non-resident companies to United Kingdom resident shareholders). Although the provisions of s.13 TCGA can be described as long in the tooth, their survival in their present form appears to owe more to the lack of public exposure of their manifest defects or failure by the Revenue to invoke the provisions themselves. This may be due to any one of several factors, viz, ignorance on the part of United Kingdom shareholders as to circumstances in which the provisions are likely to bite leading to failure to disclose the same to the Revenue, the operation of double tax treaties or merely lack of willpower by the Revenue itself. One comment commands universal approbation, albeit for different reasons: s.13 TCGA is badly drafted. It is so badly drafted as to suggest that all but the ill-informed or ill-advised may escape the charge to tax by quite elementary planning. Thus:

(a) the non-resident company forms a non-resident subsidiary and transfers the asset to the subsidiary in consideration of the issue of shares (to establish a high price for the shares - the asset being deemed to be disposed of on a "no gain, no loss" basis under ss.14 and 171 TCGA). The transferee sells the asset realising the gain and distributes the proceeds to its parent (the non-resident company) by way, say, of a purchase of own shares. The gain

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10 For these purposes it would be appear to be immaterial that there is interposed between the two non-resident companies a United Kingdom resident company. In my view this is clear from the wording of s.14 itself but if any doubt was felt on this score it is likely to be considered settled by the decision of the Court of Appeal in *I.C.I. plc v Colmer* [1993] STC 710.

It matters not that the non-resident transferee company and the transferor company are each resident in different countries. Provided no members of the purported group are resident in the United Kingdom at the time of transfer and the companies otherwise satisfied the conditions provided by s.170 TCGA relief on inter-group disposals can be obtained. In response to doubts which had been expressed the Revenue have confirmed (see Inland Revenue Interpretation 43, May 1993, STI [1992] 893 that s.14 is intended to apply s.171 to inter-group disposals.

accruing on the sale of the assets escapes under s.13(5) TCGA. The merits of this arrangement were considered by Kevin Prosser and Robert Venables in articles appearing at pages 101, 227 and 229 of OTPR Volume 3;

(b) the rights attaching to the shares are altered so as to ensure that at the time of the disposal the individual United Kingdom shareholders would not become entitled to more than 5% of the net assets of the company if it was then wound up.

It has also been suggested that s.13 is incapable of applying in any case to apportion a gain accruing on the disposal of the asset by a subsidiary of a non-resident holding company rather than by the parent company itself. The writer does not share this view. But the fact that it commands respectable support is indicative of the unsatisfactory way in which s.13 is drafted.

The lines of escape which most obviously present themselves may not be available in every case without a corresponding tax penalty.[11] In such cases other means may have to be found. What use can be made of losses?

One possible way of utilising losses in such circumstances is to make use of the planning device referred to above made obsolete by the provisions of the new s.177A and Sch 7A TCGA considered above.

A non-resident company Y with a potential gain which can be attributed to the United Kingdom shareholders under s.13 and which has no actual or potential losses to set off against that gain under s.13(8) can relieve the gain under s.13(8) by the following:

(1) The shares in another non-resident company X having assets the disposal of which is likely to give rise to a loss or which has already realised losses on disposals in the current year of assessment are acquired so that company X becomes the 75% subsidiary (for the purposes of s.832 Taxes Act 1988) of company Y. It should be noted:

(a) if the gain has already been realised on a disposal prior to that date the subsidiary X would have to own the assets in respect of which the loss was likely to accrue at the date

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[11] Chargeable gains may accrue to a person - including a non-resident company - as a result of circumstances outside its control (as on the liquidation of a company the shares in which form part of the assets of the non-resident). It may not always be possible plan in advance.

of acquisition. If it had disposed of the same there will be nothing to transfer by way of inter-group disposal from X to Y;

(b) it would be possible for the shares in Y to be sold to X thus making Y the "75% subsidiary" of X. But that operation would involve a disposal by the United Kingdom shareholders in Y of their shares. A clearance for "a share for share" exchange under s.137 TCGA would not be forthcoming from the Revenue.

(2) Thereafter the courses open to the companies would depend on the circumstances; either:

(a) if X held the assets in respect of which the loss had accrued those assets would be transferred to Y and both the loss making assets and the assets in respect of which the gain had accrued would be sold in the same year of assessment, or

(b) if the loss had already accrued to X the asset in respect of which the gain had accrued would be transferred by Y to X (relying on s.14 and s.171 TCGA) and sold in the same year of assessment as that in which the loss accrued to X.[12]

Section 13(8) TCGA only allows for the set-off of losses accruing to the company in the same year of assessment. So it would be essential for both the assets in respect of which the gains have accrued and the assets in respect of which the losses have accrued to be disposed of in the same year of assessment. There means of utilising group losses, whether pre-acquisition losses or otherwise as suggested above will be of no use to a non-resident company realising gains the subject of a charge under s.10.

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12 Care is needed to avoid a "*Furniss v Dawson*" situation.