CAPITAL GAINS TAX PRIVATE RESIDENCE RELIEF AFTER FA 2015

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A full discussion of private residence relief ("PRR") requires a book to itself, and indeed such books have been written. This article focuses on matters closest to the themes of my book *Taxation of Non-Residents and Foreign Domiciliaries* but it is necessary to look wider to see the matter in its context.

Section 222(1) TCGA provides:

> This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
>
> (a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or
>
> (b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

1. "Residence"

Residence is a key term for PRR.

The CG manual provides:

> CG64435 Meaning Of Residence: Judicial Interpretation [May 2010]
>
> The scheme of private residence relief was summarised by Brightman J in Sansom v Peay (52 TC 1) as,
>
> > "To exempt from liability to Capital Gains Tax the proceeds of sale of a person's home."

Here Brightman J uses the word 'home' in substitution for the word 'residence'.

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And in Frost v Feltham (55 TC 10), where the Court was asked to decide which of an individual's residences was his main residence, Nourse J stated,

> "A residence is a place where somebody lives."

These quotations clearly emphasise the point that the test of residence is one of quality rather than quantity: the dwelling house must have become the owner's home. There is no minimum period of occupation that would enable an individual to establish a residence. This was confirmed by Millet J in Moore v Thompson (61 TC 15) where he stated,

> "It is clear that the Commissioners were alive to the fact that even occasional and short residence in a place can make that a residence; but the question was one of fact and degree for the Commissioners."

Every case must be decided upon its own particular facts.

CG64455 Meaning of Residence: The Meaning in a Wider Context [May 2010]

> Outside the field of taxation there are many circumstances in which the identification of an individual's residence is important. Whilst the word must be construed by reference to its particular context, the use of the word in a similar context to that with which we are concerned assists in the interpretation to be used for private residence relief.

One such example is the identification of the constituency in which an individual is resident for the purpose of voting. Under the Representation of the People Act 1948, entitlement to vote was given to persons resident in a constituency on a qualifying date. In the case of Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge [1970] 3 All ER 7 the Court of Appeal considered whether students should be resident in the constituency of the University that they attended. In his judgment, Lord Denning M.R. cited a passage from the speech of Viscount Cave L.C. in Levene v Inland Revenue Commissioners [1928] AC 217

> "… the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'."

Lord Denning went on to say

> "I derive three principles. The first is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a

> holiday or away for the weekend or in hospital, he does not lose his residence on that account."

Further to this Lord Widgery commented,

> "This conception of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that 'residence' implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence."

These comments are regarded as equally applicable to private residence relief and were relied on in the case of *Goodwin v Curtis*, see CG64460.

CG64460 Meaning Of Residence: *Goodwin v Curtis* [May 2010]

The meaning of the word 'residence' was considered further in the case of Goodwin v Curtis (70 TC 478).

In 1983 Mr Goodwin set up a company to acquire Hazleton Manor Farmhouse. At that time he was buying it with a view to making it a home for himself and his family. On 1 April 1985 Mr Goodwin acquired the farmhouse from the company, but prior to the completion of his purchase he had instructed agents to sell the farmhouse. At the time of his acquisition he had separated from his wife and he took up temporary residence in the farmhouse until 3 May 1985 when the farmhouse was sold. Mr Goodwin contended that the farmhouse was his only or main residence.

In the High Court, Sir John Vinelott drew heavily on the observations of Lord Denning and Widgery L.J. in Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge [1970] 3 All ER 7, and he also quoted with approval the line taken by Brightman J in Sansom v Peay (52 TC 1).

Sir John said,

> "Amongst the factors to be weighed by the Commissioners are the degree of permanence, continuity and the expectation of continuity. On the facts found by the Commissioners in this case…
>
> …in my judgment, they were fully entitled to take the view that the farmhouse was used not as a residence but as mere temporary accommodation for a period that the taxpayer hoped would be brief and

> which in fact lasted some 32 days between completion of the sale to him and the completion of the sale by him."

The Court of Appeal upheld the decision of the Commissioners and the High Court that Mr Goodwin had not established a residence in the farmhouse; it had merely provided temporary accommodation. Millett L J stated in the Court of Appeal,

> "What I derive from Viscount Cave's speech is that the word 'reside' is an ordinary word of the English language and is eminently suitable for a lay tribunal such as the General Commissioners to apply."

He went on,

> "they (the Commissioners) must be taken to have accepted the Revenue's submission that the quality of the taxpayer's occupation of the farmhouse did not have a sufficient degree of permanence, continuity or expectation of continuity to justify its description as residence."

And later,

> "Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide." He went on to say,
>
> "The substance of the Commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the Farmhouse did not make his occupation qualify as residence."

Schiemann LJ added,

> "I agree with the judgment that has just been delivered. I accept, as did the Commissioners, the Crown's contention that in order to qualify for the relief a taxpayer must provide some evidence that his residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity."

1.1 Occupation requirement

The CG Manual provides:

> CG64465 Only or Main Residence: Occupation Is A Requirement [May 2010]
>
> Except in those cases where the legislation deems a dwelling house to be the residence of an individual which are summarised at CG64477, a dwelling

house must have been physically occupied as a residence of the individual at some time during their period of ownership in order to qualify for relief.

It is sometimes argued that private residence relief is due where an individual has acquired a dwelling house with the intention of making it their home, but for reasons outside their control they were forced to sell it without ever having occupied it. In these circumstances relief is not available; an intention to occupy is not enough.
The requirement to physically occupy the dwelling house as a residence is made clear in the judicial comments set out at CG64455 and also in the legislation itself. For example,

- TCGA1992/S222 (8) allows an individual currently living in job related accommodation relief in respect of a dwelling house which they intend to occupy as a residence in due course. See CG64555+. If occupation was not a prerequisite to relief, this provision would not be necessary.
- TCGA92/223 (3) allows relief during certain periods of absence from the dwelling house, see CG65030+. If occupation was not a prerequisite to relief, absence from the dwelling house would not prevent relief from being available and this provision would be unnecessary.
- TCGA92/224 (2) allows relief to be adjusted where there has been a change in what has been occupied as an individual's residence, see CG67460+. If occupation was not a prerequisite to relief, a change in what is occupied as the residence would not affect the amount of relief due.

1.2 Interest in a dwelling a requirement

The CG manual provides:

> CG64470 Only Or Main Residence: An Interest In A Dwelling House Is A Requirement [May 2010]
>
> An individual must have an interest in a dwelling house used as his residence for it to be a residence within the meaning of TCGA92/S222. This is because relief is available on the disposal of, or of an interest in a dwelling house or part of a dwelling house. References to a residence in Section 222 should be interpreted on this basis. Therefore, when considering which of an individual's residences is their main residence for the purpose of private residence relief, it is only necessary to consider those in which that individual has an interest.
>
> An interest in a dwelling house means a legal or equitable interest. It includes all possible forms of ownership from owning the freehold to being the co-owner of a minimal tenancy. In most cases, where a residence is rented a tenancy exists, and such residences therefore remain within Section 222.

> The only circumstance in which an individual can reside in a dwelling house in which he or she has no legal or equitable interest is where the property is occupied under licence. A licence is a permission to reside in a property which may be contractual or gratuitous. For instance, staying in a hotel or in lodgings are examples of residence under contractual licence. And staying with family or friends is an example of residence under gratuitous licence.
>
> An individual's only or main residence may be in a home in which they have no interest. Where it is the case that their main home is occupied under licence but they also reside in another dwelling house in which they have an interest, the residence in which they have an interest will be the only or main residence within S222 because the word residence within Section 222 only refers to residences in which the individual owns an interest.
>
> The question of whether or not a dwelling house is a residence within the meaning of Section 222 may become important where an individual has one or more other residences. This is because where there is more than one residence the individual is able to nominate, within set time limits, which is to be treated as the main residence, see CG64485+. By doing this the individual can ensure that the residence which is treated as their main residence is the one on which a gain is more likely to accrue. In certain circumstances the time limit for making such a nomination may be extended by virtue of ESC D21, see CG64500.

If this is right, then the meaning of the word "residence" for PRR differs from the ordinary meaning, at least in this one respect.

2 Disapplication of private residence relief

2.1 Introduction

There would be no point in imposing the CGT charge on non-residents disposing of UK residential property, for which I follow the statutory terminology and refer to this as "NRCGT", if PRR was not curtailed. The NRCGT consultation paper provides:

Bringing non-residents into CGT without any changes could mean that non-residents invariably chose to nominate their UK residence as their main residence and obtain tax relief on gains made on that property, even where it was not in fact their main residence, yet not pay any UK CGT on gains relating to their other residences outside of the UK. This would undermine the extension of CGT to non-residents.[2]

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2 N RC G T consultation paper para 3.3.

The problem could not be avoided by restricting PRR to UK residents.

The NRCGT consultation paper provides:

> 6.18 The government has sought legal advice and considers it would not be possible to restrict claims for PRR to EU or EEA residents.

No reason is given (readers may infer that a general object of the paper was to close discussion rather than to inform it). But the reason was that there would be a restriction on free movement of capital, which applies to non-EU states as well as within the EU.[3]

2.2 Outline

In summary: the NRCGT provisions treat a residence as not being occupied as a residence (so it does not qualify for PRR) unless

(1) the person is resident in the same territory as the residence; or

(2) the person is present in the residence for at least 90 days per annum. The statutory term for this is the "day count test".

This is most important for non-residents who wish to claim PRR on a UK home; but it can also affect UK residents who wish to claim PRR on a non-UK home.

2.3 The disallowance

In order to follow the legislation, one needs to read s.222(1) TCGA and s. 222B(1) TCGA together:

> 222(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
>
> (a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence…
>
> 222B(1) For the purposes of sections 222 to 226 the dwelling-house or part of a dwelling-house mentioned in section 222(1) is treated as not being occupied as a residence by the individual so mentioned ("P") at any time in P's period of ownership which falls within—
>
> (a) a non-qualifying tax year, or
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> (b) a non-qualifying partial tax year.

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3 See 60.9 (Movement of capital to non-EU countries).

> In the remainder of this section the dwelling-house or part of a dwelling-house is referred to as "the dwelling-house".

This feeds into the rule that PRR relief is restricted where a property is not the residence throughout the period of ownership. Section 223 TCGA provides:

(1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 18 months of that period.

(2) Where subsection (1) above does not apply, a fraction of the gain shall not be a chargeable gain, and that fraction shall be—

> (a) the length of the part or parts of the period of ownership during which the dwelling-house or the part of the dwelling-house was the individual's only or main residence, but inclusive of the last 18 months of the period of ownership in any event, divided by
>
> (b) the length of the period of ownership.

So s.222B works to disallow PPR either wholly or in part. The F(no.1)A 2015 amends s.223(7) which defines the key term "period of ownership" and now reads:

(7) In this section "period of ownership"—

> (a) does not include any period before 31 March 1982, and
>
> (b) where the whole or part of the gain to which section 222 applies is an NRCGT gain chargeable to capital gains tax by virtue of section 14D, does not include any period before 6 April 2015 (but see subsection (7A)).

(7A) Paragraph (b) of the definition of "period of ownership" does not apply in a case where paragraph 9 of Schedule 4ZZB applies by virtue of sub-paragraph (1)(b) of that paragraph (the individual has made an election for the retrospective basis of computation to apply).

2.4 "Non-qualifying tax year"

Section 222B(3) TCGA provides:

> A tax year the whole of which falls within P's period of ownership is "a non-qualifying tax year" in relation to the dwelling-house if—
>
> (a) neither P nor P's spouse or civil partner was resident for that tax year in the territory in which the dwelling-house is situated, and

(b) the day count test was not met by P with respect to the dwelling-house for that tax year (see section 222C).

2.5 Partial tax years

Section 222B(5) TCGA defines "partial tax year":

> Where part only of a tax year falls within P's period of ownership, that part is a "partial tax year" for the purposes of this section.

Section 222B(4) TCGA provides the rule:

> A partial tax year is "a non-qualifying partial tax year" in relation to the dwelling-house if—
>
> (a) neither P nor P's spouse or civil partner was resident for the tax year in question in the territory in which the dwelling-house is situated, and
>
> (b) the day count test was not met by P with respect to the dwelling-house for that partial tax year.

3. Residence in the territory of the dwelling-house

Section 222B(3) TCGA provides:

A tax year the whole of which falls within P's period of ownership is "a non-qualifying tax year" in relation to the dwelling-house if—

(a) neither P nor P's spouse or civil partner was resident for that tax year in the territory in which the dwelling-house is situated

A person who is not so resident will still be entitled to PRR if they meet the day count test.

The question whether an individual is resident in the UK is decided by the statutory residence test.

Section 222B TCGA provides rules to identify when an individual is resident in a foreign state ("NRCGT-residence"). Section 222B(6) provides:

> For the purposes of this section an individual is resident in a territory outside the UK ("the overseas territory") for a tax year ("year X") in relation to which condition A or B is met.

I refer to "foreign residence conditions A and B"

3.1 Foreign residence condition A

Section 222B(7) TCGA provides:

> Condition A is that the individual is, in respect of a period or periods making up more than half of year X, liable to tax in the overseas territory under the law of that territory by reason of the individual's domicile or residence.

The wording is loosely based on the OECD model definition of treaty-residence.[4]

> "Tax" is not defined and it is considered that any residence-based tax[5] will count.
>
> This deals with split years in the foreign state in a sensibly rough and ready manner.

3.2 Foreign residence condition B

Where an individual is resident (in a normal sense of the word) in a country which does not impose residence-based tax, that individual will not meet foreign residence condition A. That may include states with no direct tax at all, such as Saudi Arabia, and states which only tax income from sources in that state, such as Singapore and Hong Kong. Such persons may still fall within foreign residence condition B. Section 222B TCGA provides:

(8) Condition B is that the individual would be resident in the overseas territory for year X in accordance with the statutory residence test in Part 1 of Schedule 45 to the FA 2013, if in Parts 1 and 2 of that Schedule—

(a) any reference to the UK (however expressed) were read as a reference to the overseas territory,

(b) "overseas" meant anywhere outside that territory, and

(c) in paragraph 26 (meaning of "work"), sub-paragraphs (2) to (4), (6) and (7) were disregarded.[6]

(9) In applying the statutory residence test in accordance with subsection (8), any determination of whether—

(a) the individual was resident in the overseas territory for a tax year preceding year X, or

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4 See 6.3 (Residence und er art. 4.1).

5 Or domicile-based tax, though I doubt if there are any.

6 These provisions deal with matters such as travelling and training: see 4 .15 (W ork).

(b) another individual is resident in the overseas territory for year X,

is to be made in accordance with the statutory residence test, as modified by subsection (8).

4. Day count test

Section 222B(3) TCGA provides:

A tax year the whole of which falls within P's period of ownership is "a non-qualifying tax year" in relation to the dwelling-house if…

(b) the day count test was not met by P with respect to the dwelling-house for that tax year (see section 222C).

Section 222C(1) TCGA provides:

This section explains how P meets the day count test (see section 222B) with respect to the dwelling-house or part of a dwelling-house mentioned in section 222(1) for a full or partial tax year.

In the remainder of this section the dwelling-house or part of a dwelling-house is referred to as "the dwelling-house".

After this proem we move on:

(2) P meets that test for a tax year with respect to the dwelling-house if, during that year, P spends at least 90 days in one or more qualifying houses.

Section 222C(6) TCGA explains how to count to 90:

For the purposes of subsections (2) and (3) the days need not be consecutive…

4.1 Ownership in part of year

Where the property is owned for part of a year the 90 day requirement is reduced proportionately. Section 222C TCGA provides:

(3) P meets that test for a partial tax year[7] 34 with respect to the dwelling-house if, during that partial tax year, P spends at least the relevant number of days in one or more qualifying houses.

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7 Section 222 C (10) incorpo rates the definition by reference: In this section "partial tax year" has the meaning given by section 22 2B (5).

(4) To find the relevant number of days for the purposes of subsection (3), multiply 90 days by the relevant fraction and round up the result to the nearest whole number of days if necessary.

(5) The relevant fraction is (X ÷ Y) where—

"X" is the number of days in the partial tax year; "Y" is the number of days in the tax year.

4.2 Days spent

Section 222C(8) TCGA provides:

> For the purposes of this section, a day counts as a day spent by an individual in a qualifying house if—
>
> (a) the individual is present at the house at the end of the day, or
>
> (b) the individual—
>
> (i) is present in the house for some period during the day, and
>
> (ii) the next day, has stayed overnight in the house.

The wording of (8)(a) is taken from the statutory residence test[8]35 but is not appropriate here because under the SRT the question is whether the individual is present in the country, and here the question is whether the individual is present in the residence. The problem will often be solved by para (b). It is easy to envisage circumstances where, like Cinderella, P will need to leave the party before midnight in order to qualify for PRR. But fortunately that will not often be the case.

The rules are unnecessarily complicated. It would be sensible to use the SRT text (present in the dwelling-house on a day for at least some of the time, no matter how short a time).[9]36

4.3 More than one residence in same territory: "Qualifying house"

Where more than one residence is owned in the same territory during the year, the day count test applies across the properties.

Section 222C(6) TCGA provides:

> For the purposes of subsections (2) and (3) … days spent in different qualifying houses may be aggregated.

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8 See 4.13.1 (The midnight test).

9 See 4.10.3 (UK-home condition (b): Sufficient amount of time in U K home).

Section 222C(9) TCGA provides:

> For the purposes of this section—
>
> (a) the dwelling-house is a qualifying house in relation to P, and
>
> (b) any other dwelling-house or part of a dwelling-house which is situated in the same territory as the dwelling-house is a qualifying house in relation to P at any particular time if at that time any of the following has an interest in it—
>
> (i) P,
>
> (ii) an individual who is P's spouse or civil partner at that time, and
>
> (iii) an individual who is P's spouse or civil partner at the time of disposal of the dwelling-house.

5. MPR notice

5.1 Power to make MPR notice

Section 222(5) TCGA provides:

So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period—

> (a) the individual may conclude that question by notice to an officer of the Board given
>
> (i) within 2 years from the beginning of that period
>
> (ii) but subject to a right to vary that notice by a further notice to an officer of the Board as respects any period beginning not earlier than 2 years before the giving of the further notice.

I refer to this as "a MPR notice".

5.2 Time limit for notice

The deadline for making the MPR notice is short, easy to overlook, and if remembered, it has to be made at a time when it may not be clear which is the best property to elect to be the main residence.

> The CG manual provides:
>
> CG64495 two or more residences: time limit for nominating [May 2010]

> TCGA92/222 (5) sets out that a notice nominating which of two or more residences is to be treated as the main residence must be given within two years from the date on which the individual has a particular combination of residences. Each time there is a change in the individual's combination of residences a new period begins and there is a new opportunity to make a nomination. This interpretation of the legislation was confirmed in the case of Griffin v Craig Harvey[10]…
>
> Where a dwelling house is acquired, the date on which there is a new combination of residences will not necessarily be the date of acquisition, it will be the date on which the dwelling house was first used as a residence. Similarly, where an individual ceases to use a dwelling house as a residence, the date on which there is a new combination of residences will be the date on which the dwelling house is no longer used as a residence, it will not necessarily be the date on which that dwelling house is disposed of.

Example:

An individual has a single residence until 1 April 2008. On that date she acquired a dwelling house and immediately began to use it as a second residence. She has until 31 March 2010 to nominate which of these residences is to be treated as her main residence.

On 23 November 2008 she acquired another dwelling house and began to use it as a third residence on 1 June 2009. A new period for nominating begins on 1 June 2009 giving her until 31 May 2011 to nominate which of her three residences is to be treated as her main residence.

On 30 September 2009 she ceased to use one of her dwelling houses as a residence and subsequently disposed of it on 30 November 2009. A new period for nominating therefore begins on 30 September 2009; she has until 31 August 2011 to nominate which of her two remaining residences is to be treated as the main residence.

5.3 Period for which notice applies

The CG manual provides:

> CG64497 two or more residences: date from which a nomination applies [May 2010]
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> A nomination will apply from the beginning of a period to which it relates, i.e. the date on which the individual had that particular combination of residences giving rise to the need to determine which is the main residence.

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10 66 T C 396.

The nomination will have continuing effect until the earlier of,

- The date on which the individual's combination of residences changes, or
- The date from which a variation of the original notice is to apply. A variation of a notice will apply from the date specified in the notice of variation which may be up to two years before the giving of the notice.

5.4 Variation of MPR notice

The CG manual provides:

> CG64510 two or more residences: variation of a notice [May 2010] A notice given under TCGA92/222 (5) can be varied by a further notice at any time. The further notice can be backdated to be effective from up to two years from the date that it was given.

A variation will often be made when a disposal of a residence is in prospect or the disposal has already been made and the individual making the disposal wishes to secure the final period exemption. See CG64985+.

For example, where an individual with two residences validly nominates house A, they may vary that nomination to house B at any time. The variation can then be varied back to house A within a short space of time. This will enable the individual to obtain the benefit of the final period exemption on house B with a loss of only a small proportion of relief of on house A.

5.5 Form of MPR notice

The CG manual provides:

> CG64520 two or more residences: form of notice [May 2010]
>
> There is no statutory form for a notice under TCGA92/S222 (5) or for a variation of such a notice. However the following conditions must be fulfilled,
>
> - A nomination by an individual must be made to an officer of the Board and must be signed by the individual. TCGA92/S222 (5).
> - Spouses or civil partners who are living together can only have one main residence between them for the purpose of private residence relief. If a nomination affects both of them it must be made by notice in writing to an officer of the Board and must be signed by both of

them. TCGA92/S222 (5). See also CG64525 regarding elections on marriage or on registering as civil partners.

- Where one of more of the residences is occupied by a person entitled to occupy it under the terms of a settlement, the notice must be writing to an officer of the Board and should be signed by both the trustees of the settlement and the person entitled to occupy the residence. TCGA92/S225 (b).
- The signature of an agent is not sufficient.

5.6 HMRC procedure on receipt of MPR notice

The CG manual provides:

> CG64530 two or more residences: treatment of notice [May 2010]
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> If a notice or a variation of a notice is received, it should be acknowledged without any comment on its validity, and filed. On acknowledging the notice great care should be taken to avoid giving the impression that the notice is valid where the full facts are not available. In certain circumstances it may be appropriate to ask the taxpayer or their agent for further information with regard to a notice. For example,
>
> - It may be apparent that the notice has been given more than two years after the acquisition of a further dwelling house. This doesn't necessarily mean that the notice is late; the house may not have been occupied as a residence immediately on acquisition. So you should consider asking for more information to establish if the notice has been made after the expiry of the time limit.
> - It may be apparent that the nominated dwelling house has not been a residence of the person giving the notice.
> - If it appears that the nominated dwelling house is occupied under licence, see CG64536, or that the notice takes account of such a residence, you should consider asking the taxpayer or their agent for further information in order to confirm its validity.

Any enquiries that you do make should be to the extent of satisfying yourself, on the facts available, that the notice is valid or invalid. And, where it is invalid, explaining why to the person who has given the notice, or to their agent.

However until a dwelling house is sold any dispute over the validity of a notice will have no tax consequences. Therefore you should not take your enquiries beyond the stage at which, on the facts made available, you believe the notice to be invalid.

5.7 No MPR notice: which is the main residence?

The CG manual provides:

> CG64545 two or more residences: no valid notice made [May 2010] Where an individual has two or more residences within the meaning of Section 222 it is not mandatory for that individual to make a notice nominating which is to be treated as the only or main residence. However where a notice is not made, or an invalid notice is made, the residence which attracts relief is the dwelling house which is the main residence as a matter of fact.

This raises the question of which is the main residence as a matter of fact.

All of the facts and circumstances of the particular case must be considered in order to conclude which the residence is the main residence.

In practice the main residence is not necessarily the residence where the individual spends the majority of their time, although it commonly will be. This question was considered in the case of Frost v Feltham (55 TC 10) and the High Court decision in this case sets out a useful summary of the criteria to be applied. Nourse J comments in the decision,

> "If someone lives in two houses the question, which does he use as the principal or more important one, cannot be determined solely by reference to the way in which he divides his time between the two." The following list of points to consider, although not exhaustive, may be useful in establishing which is the main residence,

- If the individual is married or in a civil partnership, where does the family spend its time?
- If the individual has children, where do they go to school?
- At which residence is the individual registered to vote?
- Where is the individual's place of work?
- How is each residence furnished?
- Which address is used for correspondence?
- Banks & Building Societies
- Credit cards
- HMRC
- Where is the individual registered with a doctor / dentist?
- At which address is the individual's car registered and insured?

- Which address is the main residence for council tax?

5.8 MPR notice under NRCGT regime

The NRCGT charge has a more generous rule for when it is possible to make or change a MPR notice. It is convenient to have different terms for the different types of notice, and in the following discussion I coin the following terms:

(1) "a UK MPR notice" is a an ordinary notice under s.222 TCGA.

(2) "a NRCGT MPR notice" is a notice under s.222A(2).

Section 222A(1) TCGA provides:

This section applies where—

(a) an individual ("P") makes a disposal of, or of an interest in—

(i) a dwelling-house, or part of a dwelling-house, which was at any time in P's period of ownership occupied by P as a residence, or

(ii) land (as mentioned in section 222(1)(b)) which P had for P's own occupation and enjoyment with that residence as its garden or grounds, and

(b) the disposal is a non-resident CGT disposal (see section 14B). In the remainder of this section the residence concerned is referred to as "the dwelling-house".

Section 222A(2) TCGA provides:

> So far as it is necessary for the purposes of section 222, P may determine, by a notice under this section, which of 2 or more residences (of which one is the dwelling-house) was P's main residence for any period within P's period of ownership of the dwelling-house.

The important point is that the time limits for a UK MPR notice do not apply to a NRCGT notice. Section 222A(3) provides:

> A notice under this section may vary, as respects any period within P's period of ownership of the dwelling-house, a notice previously given under section 222(5)(a)….

In principle a notice may be given at any time. Section 222A(4) imposes one limit:

(4) A notice under this section may not vary a notice previously given under section 222(5)(a) as respects any period for which the previous notice had the

effect of determining whether or not a disposed of residence was P's main residence.

(5) In subsection (4) "disposed of residence" means one of P's residences which was disposed of (in whole or in part) before the date of the disposal mentioned in subsection (1)(a).

The expression "disposed of residence" is slovenly, verging on ungrammatical but at least one drafter in the office of parliamentary counsel is fond of it.[11] However clumsy, it is easier to follow the statutory usage.

The new notice can be backdated almost indefinitely. Section 222A(6) TCGA then deals with procedure:

A notice under this section—

(a) must be given in the NRCGT return in respect of the disposal mentioned in subsection (1)(a), and

(b) may not subsequently be varied, whether by a notice under this section or section 222(5)(a).

It will be necessary to consider the position at the time of a sale.

In short, the ability to elect operates more favourably as the determination is made at the time of the disposal in the NRCGT return. By contrast, the regime for UK residents remain restricted to a two-year time limit.

Having different time periods for notice (or determination) by residents and by non-residents raises issues for non-residents who become UK resident. A non-resident (with a house still in the UK) would be able to sell the house while away and make an notice at the time of sale. However, if individual became UK resident and then sold the house they could not elect.

To add to the confusion, the individual may not know whether they are UK resident until late in the tax year or sometime after the year.

The CIOT rightly observed that it would be better to align the provisions for UK and for NRCGT MPR notices.[12] But no one took any notice of that.

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11 Perhaps the same drafter as coined the expression "disposed of interest" in ATED: see 76 .24.1 (AT E D -disposal condition A: Chargeable interest).

12 C IO T "D raft FB 15 C lauses on D isposals of U K residential interest by non-residents" (2 0 1 5)http://www.tax.org.uk/tax-policy/public-submissions/2015/draft_FB15_clauses_ disposals_U K_residential

6. Spouses

The rule is that spouses can only have one residence for PRR. Section 222(6) TCGA provides:

> In the case of an individual living with his spouse or civil partner—
>
> (a) [i] there can only be one residence or main residence for both, so long as living together and,
>
> [ii] where a notice under subsection (5)(a) above affects both the individual and his spouse or civil partner, it must be given by both.

That made sense when the rule was introduced, in 1965, when spouses were effectively dealt with as one person. But it is strange that this policy, which entails a significant discrimination against marriage, has survived independent taxation without more comment.[13]40 In a case where unmarried cohabitees each have a residence, on which each could claim PRR, marriage brings a significant tax cost. Those who argue that the tax system should support marriage, and those who argue it should be neutral, should be in favour of repeal of this rule, or its extension to cohabitees. The principle that spouses are one person runs through to the NRCGT provisions. Section 222C(7) TCGA provides:

> A day spent by P's spouse or civil partner in a dwelling-house or part of a dwelling-house which is a qualifying house in relation to P counts as a day spent by P in the qualifying house (but no day is to be counted twice as a result of this subsection).

7. MPR notice on marriage

The CG manual provides:

> CG64525 two or more residences: nominations on marriage or on registering as civil partners [May 2010]
>
> TCGA92/S222 (6) sets out that spouses or civil partners who are living together can only have one main residence between them for the purpose of private residence relief. If when they marry or register as civil partners they each own a residence and they continue to use both as residences, they can

13 See Loutzenhiser, "Transferable Personal Allowances: A Sm all Step in the Wrong Direction" [2015] B T R 110.

> jointly nominate which is to be treated as the main residence. The two year period for making the nomination commences on the date of marriage or the date of registration.

Where one spouse or civil partner owns more than one residence, but the other spouse or civil partner does not own a residence and there is no change in this on marriage or registration as civil partners, then a fresh period for making a nomination does not begin. This is because neither spouse nor civil partner has had a change in their combination of residences, and neither of them needs to become a party to an existing nomination to which they were not already a party. A notice under TCGA92/S222 (5) only has to be made jointly where it affects both spouses or civil partners.

Where the spouses or civil partners jointly own more than one residence at the date of marriage or on registering as civil partners, and neither separately owns any other residence, a new two year period for making a nomination begins. Even though both spouses or civil partners own the same residences as before, and even if they have both previously nominated the same residence, they now have to make a joint nomination in order for it to be valid from the date of marriage or from the date that they were registered as civil partners.

7.1 NRCGT MPR notice by married persons

Section 222A(7) provides:

> Where a notice under this section affects both P and an individual ("X") who was, in the period to which the notice relates ("the relevant period"), P's spouse or civil partner living with P—
>
> (a) in a case where each of P and X is required to make an NRCGT return in respect of the disposal of an interest in the dwelling-house, notice given by P under this section is effective as respects any part of the relevant period when P and X were living together as spouses or civil partners only if notice to the same effect is also given under this section by X in respect of that period;
>
> (b) in any other case, notice given by P under this section is effective as respects any part of the relevant period when P and X were living together as spouses or civil partners only if it is accompanied by written notification from X agreeing to the terms of the notice in respect of that period.

In short, spouses must act jointly in giving a notice.

8. Periods of absence relief

8.1 Permitted periods of absence

Section 223(3) provides relief for certain periods of absence:

> For the purposes of sections 222(5) and 222A and subsections (1) and (2) above—
>
> (a) a period of absence not exceeding 3 years (or periods of absence which together did not exceed 3 years), and in addition
>
> (b) any period of absence throughout which the individual
>
> [i] worked in an employment or office all the duties of which were performed outside the UK or
>
> [ii] lived with a spouse or civil partner who worked in such an employment or office, and in addition
>
> (c) any period of absence not exceeding 4 years (or periods of absence which together did not exceed 4 years) throughout which the individual was prevented from residing in the dwelling-house or part of the dwelling-house
>
> [i] in consequence of the situation of his place of work or
>
> [ii] in consequence of any condition imposed by his employer requiring him to reside elsewhere, being a condition reasonably imposed to secure the effective performance by the employee of his duties, and in addition,
>
> (d) any period of absence not exceeding 4 years (or periods of absence which together did not exceed 4 years) throughout which the individual lived with a spouse or civil partner in respect of whom paragraph (c) applied in respect of that period (or periods),
>
> shall be treated as if in that period of absence the dwelling-house or the part of the dwelling-house were occupied by the individual as a residence if conditions A and B are met.

In short, conditions A and B require a period of residence before and after the period of absence. In full detail:

> (3A) Condition A is that before the period there was a time when the dwelling-house was the individual's only or main residence.
>
> (3B) Condition B is that after the period—
>
> (a) in a case falling within paragraph (a), (b), (c) or (d) of

subsection (3), there was a time when the dwelling-house was the individual's only or main residence,

(b) in a case falling within paragraph (b), (c) or (d) of that subsection, the individual was prevented from resuming residence in the dwelling-house in consequence of the situation of the individual's place of work or a condition imposed by the terms of the individual's employment requiring the individual to reside elsewhere, being a condition reasonably imposed to secure the effective performance by the employee of his duties, or

(c) in a case falling within paragraph (b), (c) or (d) of that subsection, the individual lived with a spouse or civil partner to whom paragraph (b) of this subsection applied.

Section 222B TCGA provides:

(11) Subsection (1) is subject to—

(a) section 222(8) (job-related accommodation), and

(b) section 223(3) (absence reliefs).

If these reliefs apply, a non-resident period is not disqualified from PRR. HMRC say:

Q11 I lived in the property for 20 years before leaving the UK in 2010 and had met all the conditions for PRR up to that date. Does this mean if I sell the property by 5 October 2016 there will be no CGT liability?

A11 Yes. If you can identify a time prior to 6 April 2015 that the property qualified for PRR then final period relief will be available i.e. the last 18 months of ownership will be eligible for relief.[14]

8.2 Restriction on double relief

A new s.223(4A) TCGA provides:

An individual is not to be allowed both of the following in respect of the same period-

(a) relief under subsection (3) in respect of the dwelling-house or the part of the dwelling-house, and

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14 HMRC, "Capital Gains Tax for no n-U K residents: sales and disposals of UK residential property: Frequently Asked Questions" (March 2015). https://www.gov.uk/governm ent/uploads/system/uploads/attachment_data/file/413988/capital-gains-tax-non-uk-res.pdf

(b) relief under this section in respect of another dwelling-house or part of a dwelling-house of the individual.

But paragraph (b) does not include relief for the last part of the period of ownership referred to in subsections (1) and (2).

The CIOT say:

3 Private residence relief – impact on individuals leaving the UK

3.1 Under present law, an individual leaving the UK who sells his or her residence while non-resident need not be concerned with the period of absence relieving provisions in section 223(3) and particularly the requirement to resume residence in the property because they are not within the charge to CGT by virtue of their non-resident status. However, the effect of the new draft clauses is that an individual who leaves the UK (other than for work abroad) for, say, 2.5 years (thereby potentially falling within a period of absence under section 223(3)(a)) and selling what was their main residence while non-UK resident is treated more harshly than someone who resumes residence in the property and then sells. In the latter case condition B in section 223(3B)(a) (resumption of residence) is not satisfied.

3.2 Similarly, in a material change to the status quo, individuals leaving the UK to work full-time abroad may now need to rely on the period of absence reliefs in section 223(3)(b) or section 223(3)(c) to preserve the period of absence as qualifying occupation. The difficulty here is that section 223(3)(b) requires that 'all the duties of [the employment to be] performed outside the UK …' (our emphasis) or for 'any period of absence [not to exceed] 4 years…' (section 223(3)(c)). Requiring all the duties to be performed in the UK is unhelpfully out of step with the SRT third automatic overseas test (working sufficient hours overseas) that allows for a de minimis number of days spent and work done in the UK. Failure to align the period of absence provisions with SRT now creates something of a bear trap. It would be easy for an individual to assume that the same safe harbour exists for occasional UK duties. Reliance on the section 223(3)(c) period of absence is of course not possible where the individual's work abroad exceeds 4 years (plus the 18 month final period of ownership).

3.3 Take an example of someone who has owned their house for a number of years and is sent to work overseas, originally for 3 years, then another 3 and then another 2. The individual satisfies the third automatic overseas test. The individual visits the UK for 60 days each year, of which 25 are substantive workdays. The individual sells their house in year 7 and buys another one. Currently there is no

chargeable gain because, regardless of the private residence relief rules, the person is non-UK resident. However, as the wording of the working abroad exception at S223(3)(b) requires 'all the duties' to be performed outside the UK and, as a fact, in this example, he or she has 25 days per year spent working in the UK, there remains a residual amount that is going to be chargeable, assuming a gain on sale (The chargeable period will be the period of absence that falls outside the deemed occupation for 4 years under S223(3)(c) plus the last 18 months, assuming the latter is available.) Is this adverse result in accordance with the policy intent?[15]

9. 2015 transitional rules

Draft clauses EN provides a summary:

> … where a non-UK resident person disposes of a dwelling-house, the use of the property prior to 6 April 2015 is ignored in determining eligibility to private residence relief unless the person otherwise elects and specifies the date as to when, prior to then, the property was the person's only or main residence. Any absence from that date to 5 April 2015 is deducted from the amount of absence available for relief for periods after 5 April 2015.

Section 222B(2) TCGA provides:

> Except where the disposal mentioned in section 222(1) is a non-resident CGT disposal, subsection (1) does not have effect in respect of any tax year or partial tax year before the tax year 2015-16.

Section 223A TCGA provides:

> (1) This section applies where—
>
> (a) the individual mentioned in section 223(1) ("P") acquired the asset to which the gain mentioned in section 222(1) is attributable before 6 April 2015, and
>
> (b) P's period of ownership for the purposes of section 223 begins on that date because of section 223(7)(b).
>
> (2) Times before 6 April 2015 are to be ignored in determining whether

15 CIOT "Draft FB15 Clauses on Disposals o f U K residential interest by non-residents" (2015) http://ww w.tax.org.uk/tax-policy/public-subm issions/2015/draft_FB 15_ clauses_disposals_U K_residential

or not condition A in section 223 is met in relation to a period of absence, unless P elects that this subsection is not to apply in relation to the period.

(3) An election under subsection (2)—

(a) must specify which day before 6 April 2015 P relies on in relation to the period of absence for the purpose of meeting condition A in section 223, and

(b) must be made in the NRCGT return in respect of the disposal. (4) Where P has made an election under subsection (2), section 223 applies as if relevant prior periods of absence counted against the maximum periods (and maximum aggregate periods) specified in subsection (3)(a), (c) and (d) of that section.

(5) In relation to a maximum period (or maximum aggregate period) specified in paragraph (a), (c) or (d) of section 223(3), "relevant prior period of absence" means a period of absence which would have counted against that maximum period (or maximum aggregate period) if the bridge period were included in the period of ownership.

(6) In subsection (5) "the bridge period" means the period beginning with the day specified in the election and ending with 5 April 2015. (7) In this section "period of absence" has the same meaning as in section 223.

10. Residence held by trust or PRs

Section 225 TCGA provides PRR for trusts. The FA 2015 makes (relatively) straightforward amendments to bring this into line with the relief for individuals:

(1) Sections 222 to 224 shall also apply in relation to a gain accruing to the trustees of a settlement on a disposal of settled property being an asset within section 222(1) where, during the period of ownership of the trustees, the dwelling-house or part of the dwelling-house mentioned in that subsection has been the only or main residence of a person (<u>"B"</u>) entitled to occupy it under the terms of the settlement, and in those sections as so applied—

(a) references to the individual shall be taken as references to the trustees except in relation ~~to the occupation of the dwelling house or part of the dwelling house~~ <u>the matters dealt with in subsection (2),</u> and

(b) the notice which may be given to an officer of the Board under section 222(5)(a) shall be a joint notice by the trustees and the person entitled to occupy the dwelling-house or part of the dwelling-house B, and;

(c) the notice which may be given by the trustees under section 222A is effective only if it is accompanied by written notification from B agreeing to the terms of the notice;

but section 223 (as so applied) shall apply only on the making of a claim by the trustees.

(2) In sections 222 to 224, as applied by subsection (1), references to the individual, in relation to-

(a) the occupation of the dwelling-house or part of the dwellinghouse,

(b) residence in a territory, or

(c) meeting the day count test,

are to be taken as references to B.

Trustees sometimes have a choice of who should be entitled to occupy a property, and that choice may confer (or deny) PRR.

Section 225A TCGA (not discussed here) provides PRR for trusts. The FA 2015 makes the corresponding amendments to bring this into line with the relief for individuals

11. Commencement of PPR rules

Para 10 Sch 9 F(no.1)A 2015 provides:

> The amendments made by this Schedule have effect in relation to disposals made on or after 6 April 2015.

11.1 Pre-2015/16 years

Section 222A TCGA provides:

(5) Where a gain to which section 222 applies is not a NRCGT gain, subsection (1) [disapplication of PRR] does not apply in respect of a tax year or partial tax year before the tax year 2015-16.

(6) In subsection (5) a "NRCGT gain" is a gain in respect of which an individual is (in whole or in part) chargeable to capital gains tax under section 7AA(1) or (2).