The Personal Tax Planning Review

MIGRANT INDIVIDUALS AND CONCESSIONARY RELIEF FROM UK CAPITAL GAINS TAX: A CASE FOR JUDICIAL REVIEW?

Robert Venables QC[1]

1 The Position in Law

Individuals are in strict law liable to United Kingdom capital gains tax on the realisation of capital gains at any time in a year of assessment in any part of which they are resident or ordinarily resident in the United Kingdom: Taxation of Chargeable Gains Act 1992 section 2(1). As a matter of Extra-Statutory Concession, immigrating and emigrating individuals have been to a large extent exempted from gains realised before they became, or after they had ceased to be, United Kingdom resident.[2] The relevant concession has been altered with a retrospective effect.

2 New Charge on Temporarily non-UK Resident Individuals

Finance Act 1998 introduced new rules, contained in Taxation of Chargeable Gains Act 1992 section 10A, concerning individuals who are "temporarily" non-UK resident. They apply only to a person who becomes neither resident nor ordinarily resident in the United Kingdom at a time when he has been either resident or ordinarily resident in the United Kingdom in four out of the seven years of assessment immediately preceding the year of departure. If he becomes United Kingdom resident or ordinarily resident in a future year and there have been less than five intervening years during no part of which he was resident or ordinarily resident in the United Kingdom, then certain gains of the years of non-UK residence are taxed as gains of the year of return.

---

1 Robert Venables QC, Consulting Editor.

2 The concession no longer applies to trustees. Personal representatives cannot change their residence status.

Section 10A is not retrospective. It does not affect persons who were not resident or ordinarily resident in the United Kingdom immediately before 17th March 1998 as regards the first year of assessment thereafter in which they become resident or ordinarily resident in the United Kingdom.

3 Extra-Statutory Concession D2

The capital gains tax Extra-Statutory Concession dealing with split years of residence is D2. Not surprisingly, it was drastically revised as the result of the introduction of section 10A. It has, however, been revised much more than was necessary simply to take account of section 10A. This is a trap, especially if one is naive enough to trust HM Treasury Explanatory Note 4 to clause 125 of Finance (No 2) Bill 1998, which inserted section 10A. The Explanatory Note states:

> "4. Extra Statutory Concession (D2) which enables the years of commencement and cessation of residence in the United Kingdom to be split for capital gains tax purposes has been amended to take account of these new rules."

Compare the relevant parts of the text of the Concession before and after the 1998 revision. The relevant part Concession used to read:

> "A person who is treated as resident in the UK for any year of assessment from the date of his arrival here but who has not been regarded at any time during the period of 36 months immediately preceding the date of his arrival as resident or ordinarily resident here, is charged to capital gains tax only in respect of the chargeable gains accruing to him from disposals made after his arrival in the UK."

The relevant parts of the revised Concession new reads:

> "1 An individual who comes to live in the UK and is treated as resident here for any year of assessment from the date of arrival is charged to capital gains tax only in respect of chargeable gains from disposals made after arrival, provided that the individual has not been resident or ordinarily resident in the UK at any time during the five years of assessment immediately preceding the year of assessment in which he or she arrived in the UK.
>
> ...
>
> 5 This revised concession applies to any individual who ... becomes resident or ordinarily resident in the UK on or after 6 April 1998."

4 An Illustration

Take the case of a person who was United Kingdom resident or ordinarily resident for all of his life. In May 1995 he takes up a three-year posting in Ruritania and ceases to be United Kingdom resident or ordinarily resident. He plans to take a month's holiday after the termination of the employment and become United Kingdom resident once more in July 1998. He has accepted the posting on the basis that he will be able to realise capital gains in June 1998 without paying either Ruritanian or United Kingdom tax. Before the text of the Concession was revised, he would in principle have been safe. Now, it has been revised with retrospective effect. He will not have been absent from the United Kingdom for five complete years of assessment and therefore all gains realised by him in 1998/99 will be taxable.

The concessionary relief is withdrawn even though he was already non-UK resident and ordinarily resident at the time of the change. It is withdrawn as respects assets he acquired after becoming neither resident nor ordinarily resident in the United Kingdom, even though a disposal of them would not normally be caught be Taxation of Chargeable Gains Act 1992 section 10A. Moreover, it is equally irrelevant in how may years of assessment prior to the year of departure he had been United Kingdom resident or ordinarily resident, even though section 10A is limited to persons who have been resident here for a substantial amount of time before their departure.

5 Judicial Review

In my view, there would be a good prospect of an action for judicial review succeeding against the Revenue on the grounds that they had acted unreasonably and/ or unfairly and/or defeated the legitimate expectations of those who were already neither United Kingdom resident nor ordinarily resident on 17th March 1998. The precedent is *R v Commissioners of Inland Revenue ex part Unilever PLC.*[3]

---

3 (1996) 68 TC 196; [1996] STC 681.