

THE TAXATION OF UK PROPERTY HELD BY NON-RESIDENTS

James Kessler QC*

1. This article considers the UK tax treatment of gains accruing to non-UK residents from land/land-rich assets.

The layout of the statutory provisions is as follows:

TCGA	Topic
s.1A(3)(b)/2B(4)(b)	CGT/CT charge on UK land
s.1A(3)(c)/2B(4)(c)	CGT/CT charge on land-rich assets
s.1C	Definition of “interest in UK land”
sch 1A	Definition of land-rich assets
sch 2	Reporting and payment sch 4AA UK land rebasing
sch 5AAA	Collective investment vehicles

The development of the rules can be traced through:

- HMRC, “Taxing gains made by non-residents on UK immovable property: Consultation document” (Nov 2017)¹
- HMC “Taxing gains made by non-residents on UK immovable property - Application of the anti-forestalling rule - Technical Note” (Nov 2017)²

* James Kessler QC, 15 Old Square, Lincolns Inn, London, WC2A 3EU. Tel: 020 7242 2744; E-mail: kessler@kessler.co.uk

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/661

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661470/Taxing_gains_made_by_non-residents_on_UK_immovable_property_technical_note.pdf Despite its name, this note does not in fact contain any material which a practitioner would call “technical”.

- HMRC “Taxing gains made by non-residents on UK immovable property Summary of Responses” (July 2018)³ (“Consultation Response Document”)
- Draft clauses (July 2018)

The rules for property-rich collective investment schemes, and for reporting and payment are not within the scope of this article but HMRC have issued draft guidance:

- App 14 CG Manual: the general charge⁴
- App 15 CG Manual: collective investment schemes

For an overview, see Lawrance and Coward, “Non-residents and UK real estate: the April 2019 changes” *Tax Journal*, 29 June 2019.

2 Charge on land/land-rich assets

The CGT/CT charge is in s.1A(3)/2B(4) TCGA. S1A(3) TCGA is set out below:

A person who is not UK resident for a tax year is chargeable to capital gains tax on chargeable gains accruing to the person in the tax year on the disposal of ...

- (b) assets not within paragraph (a) [UK branch/agency] that are interests in UK land (see section 1C), and
- (c) assets (wherever situated) not within paragraph (a) or (b) that
 - [i] derive at least 75% of their value from UK land
 - [ii] where the person has a substantial indirect interest in that land (see section 1D and Schedule 1A).

In short, individuals/trusts pay CGT and companies pay corporation tax on the gains. The charge replaces the former non-resident CGT charge and ATED-related CGT.

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722418/Taxing_gains_made_by_non-residents_on_UK_immovable_property_summary_of_responses.pdf

4 http://www.hmrc.gov.uk/gds/cg/attachments/CG-APP14__Non-resident_capital_gains_from_6_April_2019_draft_guidance.pdf

I refer to an asset which derives at least 75% of its value from UK land as a “land-rich asset” and a gain within s1A(3)(b)(c) is a “UK-land gain”.

2.1 Reliefs/exemptions

The Consultation Response Document provides:

Existing reliefs and exemptions will apply to non-residents as they do for residents. This will include, among the other exemptions and reliefs, the Annual Exempt Amount, the Substantial Shareholdings Exemption, and the no-gain/no-loss intra-group transfer rules...⁵

3 Land-rich asset

Para 1(1) Sch 1A TCGA provides:

This Schedule makes provision, for the purposes of section 1A(3)(c) or 2B(4)(b), for determining in the case of any disposal of any asset—

(a) whether the asset derives at least 75% of its value from UK land (see Part 2 of this Schedule) ...

Para 3 Sch 1A TCGA provides:

- (1) An asset derives at least 75% of its value from UK land if—
 - (a) the asset consists of a right or an interest in a company, and
 - (b) at the time of the disposal, at least 75% of the total market value of the company’s qualifying assets derives (directly or indirectly) from interests in UK land.⁶

I refer to this as the “land-rich test” and assets which meet the test are “land-rich assets”.

This is a “cliff-edge” test and that is deliberate. The Consultation Response Paper provides:

- 3.51. In looking at the gross asset value of an entity, the 75% property richness test mirrors the provisions in international treaties.⁷ A different domestic test would still need to be underpinned by consideration of the Treaty test, to see whether the UK has taxing

5 Para 3.11.

6 See 59.30 (“Interest in UK land”).

7 The author wisely does not seek to identify these provisions. Article 13(4) OECD model in fact has a 50% test; but this is not normally included in UK treaties; see 58.16.4 (Land-rich company).

rights, meaning it would only add complexity to deviate from this. The government also considers that a quantitative test is easier than a qualitative one.

- 3.52. The government believes that setting the bar at 75% or more of the gross asset value is sufficiently high so as to catch only cases where an entity is, in essence, an envelope for UK land.

The last paragraph does not bear serious examination.

3.1 Computation of gain

The chargeable gain is computed by reference to the value of the interest in the entity disposed of. Thus in the case of a company that was only 75% property-rich, the remaining assets would be effectively charged to UK tax. But HMRC were probably right to conclude that the alternative was not workable.

3.2 Standard of care

The Consultation Response Paper provides:

- 3.53. Officials will produce guidance making it clear what level of due diligence is required to assess the property richness test. In many cases, it will be sufficient to look at a balance sheet or similar statement that represent recent valuations of the assets.

This is not to be relied on, and I would expect some back-tracking.

4 Derivation

“Derived” is not sensibly possible to define, but that does not stop the drafter from trying. Para 3 Sch 1A TCGA provides:

- (2) Market value may be traced through any number of companies, partnerships, trusts and other entities or arrangements but may not be traced through a normal commercial loan.
- (3) It is irrelevant whether the law under which a company, partnership, trust or other entity or an arrangement is established or has effect is—
 - (a) the law of any part of the United Kingdom, or
 - (b) the law of any territory outside the United Kingdom.
- (4) The assets held by a company, partnership or trust or other entity or arrangement must be attributed to the shareholders, partners,

beneficiaries or other participants at each stage in whatever way is appropriate in the circumstances.

It comes down to a just and reasonable apportionment.

5 “Qualifying assets”

“Qualifying assets” matters because the land-rich test requires (in short) that at least 75% of the company's qualifying assets derives from UK land. Para 3(5) Sch 1A TCGA provides:

For the purposes of this paragraph ...

“qualifying assets” has the meaning given by paragraph 4.

Para 4(1) Sch 1A TCGA provides:

Subject as follows, all of the assets of the company are qualifying assets.

6 Chose in action disregard

The land-rich test disregards liabilities. Para 4(2) Sch 1A TCGA provides:

An asset of the company is not a qualifying asset so far as it is matched to a related party liability...

I refer to this as the “chose in action disregard”.

6.1 Chose in action

Para 4 Sch 1A TCGA provides:

- (4) An asset of the company is matched to a related party liability if— (a) the asset consists of a right under a transaction (for example, a right under a loan relationship or derivative contract),
 - (b) the right entitles the company to require another person to meet a liability arising under the transaction, and

I refer to an asset which meets this condition as a “chose in action” though the term is not completely apt. I refer to the other person as “the debtor.”

6.2 The debtor

Para 4 Sch 1A TCGA provides:

- (4) An asset of the company is matched to a related party liability if ... (c) the other person [the debtor]
- [i] is relevant to the paragraph 3 tracing exercise or
 - [ii] is a related party of the company on the day of the disposal.

Para 4(5) Sch 1A TCGA provides:

For the purposes of this paragraph a person is relevant to the paragraph 3 tracing exercise if—

- (a) the person has assets that fall to be taken into account in the tracing exercise mentioned in paragraph 3, or
- (b) the person has obligations (whether as a trustee or otherwise) in relation to the holding of assets comprised in any trust or other arrangement that fall to be taken into account in that exercise.

6.3 Interest in UK land

The chose in action rule does not apply to an interest in UK land. Para 4(3) Sch 1A TCGA provides:

But an interest in UK land is a qualifying asset of the company even if it is matched to any extent to a related party liability.

Classifying non-land as non-qualifying assets makes it easier to pass the land-rich test.

6.4 “Liability”

Para 4(7) Sch 1A TCGA provides a commonsense definition of liability:

In this paragraph a liability includes a contingent liability (such as one arising as a result of the giving of a guarantee, indemnity or other form of financial assistance).

7 “Related party”

Para 4(6) Sch 1A TCGA provides:

Whether, for the purposes of this paragraph, a person is a related party of the company on any day is determined in accordance with the rules in Part 8ZB of CTA 2010 but as if, in section 356OT(4) of that Act,

the words “, within the period of 6 months beginning with that day” were omitted.

That takes us to s.356OT CTA 2010. The definition is intricate:

- (1) For the purposes of this Part [Part 8ZB Transactions in UK Land] a person (“A”) is related to another person (“B”)—
 - (a) throughout any period for which A and B are consolidated for accounting purposes,
 - (b) on any day on which the participation condition is met in relation to them, or
 - (c) on any day on which the 25% investment condition is met in relation to them.

7.1 Consolidated accounts

Section 356OT CTA 2010 provides:

- (2) A and B are consolidated for accounting purposes for a period if—
 - (a) their financial results for a period are required to be comprised in group accounts,
 - (b) their financial results for the period would be required to be comprised in group accounts but for the application of an exemption, or
 - (c) their financial results for a period are in fact comprised in group accounts.
- (3) In subsection (2) “group accounts” means accounts prepared under—
 - (a) section 399 of the Companies Act 2006, or
 - (b) any corresponding provision of the law of a territory outside the UK.

7.2 Participation condition

Amended as para 4(6) Sch 1A TCGA requires, s.356OT CTA 2010 provides:

- (4) The participation condition is met in relation to A and B (“the relevant parties”) on a day if
 - (a) one of the relevant parties directly or indirectly participates in the management, control or capital of the other, or

- (b) the same person or persons directly or indirectly participate in the management, control or capital of each of the relevant parties.

See 20.8 (Participation condition).

7.3 25% investment condition

Section 356OT CTA 2010 provides:

- (5) The 25% investment condition is met in relation to A and B if—
 - (a) one of them has a 25% investment in the other, or
 - (b) a third person has a 25% investment in each of them.
- (6) Section 259NC of TIOPA 2010 applies for the purposes of determining whether a person has a “25% investment” in another person for the purposes of this section as it applies for the purposes of section 259NB(2) of that Act.

8 Trading exemption

Para 5 sch 1A TCGA provides:

- (1) A disposal of a right or interest in a company is not to be regarded as a disposal of an asset deriving at least 75% of its value from UK land if it is reasonable to conclude that, so far as the market value of the company’s qualifying assets derives (directly or indirectly) from interests in UK land—
 - (a) all of the interests in UK land are used for trading purposes, or
 - (b) all of the interests in UK land would be used for those purposes if low-value non-trade interests in UK land were left out of account.

I refer to this as the “trading exemption”.

This is the first time I am aware that the expression “reasonable to conclude” has ventured from its usual (anti-avoidance) context. But it makes little if any difference.

Trading companies must review their position. If they hold any non- trading land (more than insignificant) there is no relief. A group reorganisation may be needed. A company which does not meet this trading exception may still meet the SSE trading requirement.

The trading exemption applies to a disposal of a company. If a trading company disposes of land, the disposal is taxable (though roll-over relief may apply).

8.1 “Used for trading purposes”

Para 5(2) sch 1A TCGA provides:

An interest in UK land is “used for trading purposes” for the purposes of this paragraph if (and only if), at the time of the disposal—

- (a) it is being used in, or for the purposes of, a qualifying trade, or
- (b) it has been acquired for use in, or for the purposes of, a qualifying trade.

8.2 “Qualifying trade”

Para 5(3) sch 1A TCGA provides:

A trade is a “qualifying” trade for the purposes of this paragraph if—

- (a)
 - [i] it has been carried on
 - [A] by the company, or
 - [B] by a person connected with the company,
 - [ii] throughout the period of one year ending with the time of the disposal
 - [iii] on a commercial basis with a view to the realisation of profits, and
- (b) it is reasonable to conclude that the trade will continue to be carried on (for more than an insignificant period of time) on a commercial basis with a view to the realisation of profits.

Draft guidance CG73946 provides:

Whether a given trade continues is based on similar principles to those applied under Part 14 of CTA10. It is necessary for the disponent to reasonably conclude that the trade is likely to continue for a ‘more than insignificant’ period of time – ‘insignificant’ in this context is a matter of degree, and should be taken in the context of these provisions to mean that the intention of the buyer is to continue to operate the trade. There may be circumstances where the trade is in distress and at risk of closing down after the sale; providing that there is a genuine understanding that the buyer is acquiring the land and trade with the intention of making the trade profitable this can meet the conditions.

8.3 Low-value non-trade interest

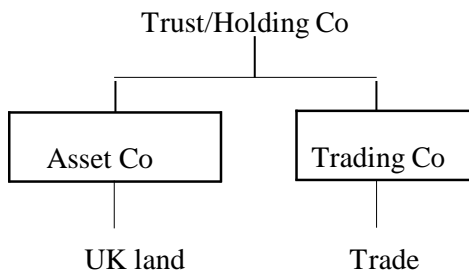
Para 5(4) sch 1A TCGA provides:

For the purposes of this paragraph, “low-value non-trade interests in UK land” means interests in UK land—

- (a) which are not used for trading purposes, and
- (b) the total market value of which is, at the time of the disposal, no more than 10% of the total market value at that time of the interests in UK land that are used for trading purposes.

8.4 Planning implications

In a typical structure, the land and the trade are held in two separate companies, thus:



Asset Co and Trade Co are connected persons. So a disposal of Asset Co by the shareholder is not subject to CGT/CT (though a direct disposal of the land by Asset Co would be subject to CT).

The very wide definition of connected persons may be helpful here.

9 **Linked disposals**

Para 6 Sch 1A TCGA provides:

- (1) This paragraph applies if—
 - (a) there are two or more disposals of rights or interests in companies,
 - (b) the disposals are linked with each other,
 - (c) some but not all of the disposals would, apart from this paragraph, be disposals of assets deriving at least 75% of their value from UK land, and

- (d) if one of the companies included all of the assets of the others, a disposal of a right or interest in it would not be a disposal of an asset deriving at least 75% of its value from UK land.
- (2) None of the disposals are to be regarded as disposals of assets deriving at least 75% of their value from UK land.
- (3) In determining whether the condition in sub-paragraph (1)(d) is met in the case of a disposal of a right or interest in a company, it is to be assumed that, for the purposes of paragraph 4, each of the other companies in which rights or interest are disposed of is (so far as this would not otherwise be the case) a related party of the company on the day of the disposal.

9.1 “Linked”

Para 6 Sch 1A TCGA provides:

- (4) For the purposes of this paragraph a disposal of a right or interest in a company is linked with a disposal of a right or interest in another company if—
 - (a) the disposals are made under the same arrangements,
 - (b) the disposals are made by the same person or by persons connected with each other,
 - (c) the disposals are made to the same person or to persons connected with each other, and
 - (d) in the case of each disposal, the person making the disposal is connected with the company in which the right or interest is disposed of.
- (5) For the purposes of this paragraph, the question whether or not a person is connected with another is to be determined immediately before the arrangements are entered into.
- (6) Section 286 (connected persons: interpretation) has effect for the purposes of this paragraph as if, in subsection (4), the words “Except in relation to acquisitions or disposals of partnership assets pursuant to bona fide commercial arrangements,” were omitted.

Suppose a holding company has two subsidiaries of equal worth, one of which derived 100% of its value from UK property. The holding company is not property-rich, deriving only 50% of its value from UK property. If the holding company sells the subsidiaries separately, it would be chargeable on the disposal of the property-rich company. But if the disposals are “linked” this does not apply.

10 Substantial indirect interest

A disposal of a land-rich asset is only chargeable if the taxpayer has a “substantial indirect interest”.

Para 1 Sch 1A TCGA provides:

This Schedule makes provision, for the purposes of section 1A(3)(c) or 2B(4)(b), for determining in the case of any disposal of any asset...

- (b) whether the person making the disposal has a substantial indirect interest in the UK land (see Part 3 of this Schedule).

Para 8 Sch 1A TCGA provides:

- (1) If—

- (a) a person disposes of an asset consisting of a right or an interest in a company, and
- (b) the asset derives at least 75% of its value from UK land,

the person has a substantial indirect interest in UK land if, at any time in the period of 2 years ending with the time of the disposal, the person has a 25% investment in the company.

10.1 Insignificant ownership period

Para 8 Sch 1A TCGA provides:

- (2) But a person is not to be regarded as having a 25% investment in the company at times falling in the person’s qualifying ownership period if, having regard to the length of that period, the times (taken as whole) constitute an insignificant proportion of that period.
- (3) The “person’s qualifying ownership period” means the period throughout which the person has held an asset consisting of a right or an interest in the company, but excluding times that fall before the beginning of the 2 year period mentioned in subparagraph (1).

10.2 Insignificant proportion

This term is not defined. Draft guidance CG73936 provides:

As a general rule, HMRC will consider ‘insignificant’ to be 10% or less of the time (so 75 days or less for a full two year period). Where the total ownership period is very brief and the facts and circumstances indicate that the person was never intended to hold a 25% or greater investment for any length of time, this may allow a greater leeway.

11 “25% investment”

Para 9 Sch 1A TCGA provides:

- (1) A person (“P”) has a 25% investment in a company (“C”) if—
 - (a) P possesses or is entitled to acquire 25% or more of the voting power in C,
 - (b) in the event of a disposal of the whole of the equity in C, P would receive 25% or more of the proceeds,
 - (c) in the event that the income in respect of the equity in C were distributed among the equity holders in C, P would receive 25% or more of the amount so distributed, or
 - (d) in the event of a winding-up of C or in any other circumstances, P would receive 25% or more of C’s assets which would then be available for distribution among the equity holders in C in respect of the equity in C.
- (2) In this paragraph references to the equity in C are to—
 - (a) the shares in C other than restricted preference shares, or
 - (b) loans to C other than normal commercial loans.

11.1 “Shares in C”

This expression is used in para 9(2)(a). Para 9 Sch 1A TCGA provides:

- (3) For this purpose “shares in C” includes—
 - (a) stock, and
 - (b) any other interests of members in C.
- (4) For the purposes of this paragraph a person is an equity holder in C if the person possesses any of the equity in C.
- (6) In a case where C is a company which does not have share capital, in applying for the purposes of this paragraph the definitions of “normal commercial loan” and “restricted preference shares”—
 - (a) sections 160(2) to (7) and 161 to 164 of CTA 2010, and
 - (b) any other relevant provisions of that Act, have effect with the necessary modifications.

11.2 Receipt

Para 9 Sch 1A TCGA provides:

- (7) In this paragraph references to a person receiving any proceeds, amount or assets include—
- (a) the direct or indirect receipt of the proceeds, amount or assets, and
 - (b) the direct or indirect application of the proceeds, amount or assets for the person's benefit,
- and it does not matter whether the receipt or application is at the time of the disposal, distribution, winding-up or other circumstances or at a later time.
- (8) If—
- (a) there is a direct receipt or direct application of any proceeds, amount or assets by or for the benefit of a person ("A"), and
 - (b) another person ("B") directly or indirectly owns a percentage of the equity in A,
- there is, for the purposes of sub-paragraph (7), an indirect receipt or indirect application of that percentage of the proceeds, amount or assets by or for the benefit of B.
- (9) For this purpose the percentage of the equity in A directly or indirectly owned by B is to be determined by applying the rules in sections 1155 to 1157 of CTA 2010 with such modifications (if any) as may be necessary.

11.3 Normal commercial loan

Para 9(10) Sch 1A TCGA provides:

Sub-paragraph (7) is not to result in a person being regarded as having a 25% investment in another person merely as a result of their being parties to a normal commercial loan.

11.4 Partnership

Para 9(11) Sch 1A TCGA provides:

Any reference in this paragraph, in the case of a person who is a member of a partnership, to the proceeds, amount or assets of the person includes the person's share of the proceeds, amount or assets of the partnership (apportioning those things between the partners on a just and reasonable basis).

12 Normal commercial loan

Normal commercial loan matters for:

- (1) The derivation test in para 3 (Market value not traced through a NCL)
- (2) The 25% test in para 9 (NCL does not count as equity)

The definition is intricate. It is taken from the CT group relief rules and illustrates how private client practitioners now have to extend their knowledge to matters which they could formerly have left to corporation tax practitioners.

Para 3 Sch 1A TCGA provides:

- (5) For the purposes of this paragraph-
normal commercial loan” means a loan which is a normal commercial loan for the purposes of section 158(1)(b) or 159(4)(b) of CTA 2010

That only applies for para 3, but the definition is repeated in para 9(5). That takes us to s.162 CTA 2010 which provides:

- (1) For the purposes of sections 158(1)(b) and 159(4)(b) “normal commercial loan” means a loan—
 - (a) which is of or includes new consideration, and
 - (b) in relation to which each of conditions A to D is met.

I refer to “NCL conditions A-D”.

12.1 NCL cond. A: unconvertible

Section 162 CTA 2010 provides:

- (2) Condition A is that the loan does not carry any right to conversion into shares or securities other than a right to conversion into—
 - (a) shares to which section 164(1) applies,
 - (b) securities to which section 164(2) applies, or
 - (c) shares or securities
 - [i] in a quoted unconnected company (see section 164(2A)) or
 - [ii] in the relevant company's quoted parent company (see section 164(3) to (7)).

Reference must therefore be made to section 164 CTA 2010 which is not reproduced here.

12.2 Cond. B: no acquisition rights

Section 162 CTA 2010 provides:

- (3) Condition B is that the loan does not carry any right to the acquisition of shares or securities.

12.3 NCL condition C: interest

Section 162 CTA 2010 provides:

- (4) Condition C is that the loan does not entitle the loan creditor to any amount by way of interest which—
 - (a) depends to any extent on the results of the relevant company's business or on the results of any part of that business,
 - (b) depends to any extent on the value of any of the relevant company's assets, or
 - (c) exceeds a reasonable commercial return on the new consideration lent.

This subsection needs to be read with section 163.

Section 163 CTA 2010 provides:

- (1) Interest is not within section 162(4)(a) by reason only that the terms of the loan provide for the rate of interest—
 - (a) to be reduced if the results of the relevant company's business or any part of the business improve, or
 - (b) to be increased if such results worsen.
- (2) Interest is not within section 162(4)(b) by reason only that the terms of the loan provide for the rate of interest—
 - (a) to be reduced if the value of any of the relevant company's assets increases, or
 - (b) to be increased if the value of any such assets decreases.
- (3) Subsection (4) applies if—
 - (a) a loan is made to the relevant company for the purpose of facilitating the acquisition of land,
 - (b) the loan is made on the basis mentioned in subsection (5), and

- (c) none of the land that the loan is used to acquire is acquired with a view to resale at a profit.
- (4) Interest on the loan is not within section 162(4)(b) by reason only that the terms of the loan are such that the only way the loan creditor can enforce payment of an amount due is by exercising rights granted by way of security over the land that the loan is used to acquire.
- (5) The basis referred to in subsection (3)(b) is that—
 - (a) the whole of the loan is to be applied in the acquisition of land by the relevant company or in meeting incidental costs incurred wholly and exclusively for the purpose of obtaining the loan or providing security for the loan,
 - (b) the payment of any amount due in connection with the loan to the person making it is to be secured on the land that the loan is used to acquire, and
 - (c) no other security is to be required for the payment of any such amount.
- (6) “Incidental costs” means expenditure on fees, commissions, advertising, printing or other incidental matters.

12.4 NCL condition D: repayment

Section 162 CTA 2010 provides:

- (5) Condition D is that the loan is a loan in relation to which the loan creditor is entitled, on repayment, to an amount which—
 - (a) does not exceed the new consideration lent, or
 - (b) is reasonably comparable with the amount generally repayable (in relation to an equal amount of new consideration) under the terms of issue of securities listed on a recognised stock exchange.

13 Connected persons aggregated

Para 10 Sch 1A TCGA provides:

- (1) In determining for the purposes of paragraph 9 [definition of substantial indirect interest] the investment that a person (“P”) has in a company, P is to be taken to have all of the rights and interests of any person connected with P.

13.1 “Connected”

Para 10 Sch 1A TCGA amends the standard definition of connected person for the purposes of the aggregation rule in para 9:

- (2) A person is not to be regarded as connected with another person for the purposes of this paragraph merely as a result of their being parties to a loan that is a normal commercial loan for the purposes of paragraph 9.
- (3) Section 286 (connected persons: interpretation) has effect for the purposes of this paragraph—
 - (a) as if, in subsection (2), for the words from “, or is a relative” to the end there were substituted “or is a lineal ancestor or lineal descendant of the individual or of the individual’s spouse or civil partner”, and
 - (b) as if subsections (4) and (8) were omitted.

Section 286 TCGA as amended provides:

- (1) Any question whether a person is connected with another shall for the purposes of this Act be determined in accordance with the following subsections of this section (any provision that one person is connected with another being taken to mean that they are connected with one another).
- (2) A person is connected with an individual if that person is the individual’s spouse or civil partner, or is a lineal ancestor or lineal descendant of the individual or of the individual’s spouse or civil partner.
- (3) A person, in his capacity as trustee of a settlement, is connected with—
 - (a) any individual who in relation to the settlement is a settlor,
 - (b) any person who is connected with such an individual,
 - (c) any body corporate which is connected with that settlement,
 - (d) if the settlement is the principal settlement in relation to one or more sub-fund settlements, the trustees of the sub-fund settlements, and
 - (e) if the settlement is a sub-fund settlement in relation to a principal settlement, the trustees of any other sub-fund settlements in relation to the principal settlement.

(3ZA) [definitions of “settlement” and “trustee”]

- (3A) For the purpose of subsection (3) above a body corporate is connected with a settlement if—
- (a) it is a close company (or only not a close company because it is not resident in the UK) and the participators include the trustees of the settlement; or
 - (b) it is controlled (within the meaning of section 1124 of CTA 2010 [strict sense control]) by a company falling within paragraph (a) above.

14 Land-rich TAAR

Of course there is a TAAR.

Para 11 Sch 1A TCGA provides:

- (1) This paragraph applies if a person has entered into any arrangements⁸ the main purpose, or one of the main purposes, of which is to obtain a tax advantage⁹ for the person as a result (wholly or partly) of—
- (a) a provision of this Schedule applying or not applying, or
 - (b) double taxation arrangements¹⁰ having effect despite a provision of this Schedule in a case where the advantage is contrary to the object and purpose¹¹ of the double taxation arrangements.

This applies if the advantage arises as a result of a provision of sch 1A or a DTA. An advantage arising as a result of any other provision does not count.

Para 11(6) sch 1A TCGA provides:

In this paragraph ... “tax” means capital gains tax or corporation tax.

Para 11 Sch 1A TCGA provides:

- (2) The tax advantage is to be counteracted by the making of such adjustments as are just and reasonable.

8 Para 11(6) Sch 1A TCGA provides (with minor contextual modification) the standard (unnecessary) definition.

9 Para 11(6) Sch 1A TCGA sets out the GAAR definition of “tax advantage.”

10 Para 11(6) Sch 1A TCGA provides the standard commonsense definition: “In this paragraph ... “double taxation arrangements” means arrangements that have effect under section 2(1) of TIOPA 2010”.

11 See 71.6 (OECD-concept abuse).

- (3) The adjustments may be made (whether by an officer of Revenue and Customs or the person) by way of an assessment, the modification of an assessment, amendment or disallowance of a claim, or otherwise.

This is a counteraction-style TAAR.

14.1 Treaty override

Para 11(4) Sch 1A TCGA provides a treaty override:

The counteraction has effect in a treaty shopping case¹² regardless of section 6(1) of TIOPA 2010.

The Consultation Response Document provides:

- 3.158. The wording as set out in paragraph 19 of the Technical note, is rooted in the internationally agreed principles governing what the OECD Commentary calls “improper use of the Convention”. This is explored at length in the Commentary to Article 1 of the OECD Model (paragraphs 7 to 26.2 in the 2014 version).
- 3.159. The wording has also appeared in the anti-forestalling rules for a number of recent measures (see for example, the rule in section 356OK of Corporation Tax Act 2010, and the accompanying commencement provisions in section 80(5) of Finance Act 2016, for the Transactions in Land provisions, and also section 917A Income Tax Act 2007 for the 2016 changes to the withholding tax rules).
- 3.160. The government believes that in practice, given the motive test, customers will have certainty as to whether actions they undertake could trigger the anti-forestalling rule.

The reader may doubt if para 3.160 is intended to be taken seriously.

14.2 TAAR commencement

Para 11(5) Sch 1A TCGA provides:

This paragraph applies by reference to—

- (a) arrangements entered into on or after 22 November 2017 in a treaty shopping case, and
- (b) arrangements entered into on or after 6 July 2018 in any other case.

¹² Defined para 11(6) sch 1A TCGA: "treaty shopping case" means a case where this paragraph applies as a result of sub-paragraph (1)(b).

15 Grant of option

Section 1C TCGA provides:

- (4) The grant of an option by a person binding the person to dispose of an interest in UK land is (so far as it would not otherwise be the case) regarded as a disposal of an interest in UK land by the person for the purposes of section 1A(3)(b).
- (5) This does not affect the operation of section 144 in relation to the grant of the option (or otherwise).¹³

This is derived from the former NRCGT rule. Why is it needed?

16 UK land rebasing: introduction

The rebasing rules (“UK land rebasing”) are in sch 4AA TCGA. There are three types of UK land rebasing.

I coin the following terminology:

Type of rebasing	Rebase to	sch 4AA	Applies to:
2019 rebasing	2019	Part 2	(a) indirect disposal (b) direct disposal, no residential use (c) direct disposal by non-chargeable person
2015 rebasing	2015	Part 3	Direct disposal, fully residential
2015/19 rebasing	2015/2019	Part 4	Direct disposal, partly residential use

13 Para 4(4)(5) sch 1B TCGA makes the same provision for the purposes of that schedule.

The elections out of these rebasing rules are:

Type of rebasing	Elections	Sch 4AA para
2019 rebasing	Historic cost ¹⁴	4
	Time apportionment	Not available
2015 rebasing	Historic cost	8
	Time apportionment	9
2015/19 rebasing	Historic cost	14
	Time apportionment	Not available

17 General rebasing conditions

Para 1(1) sch 4AA TCGA provides:

Part 2, 3 or 4 of this Schedule applies on the first occasion on which a person disposes of an asset that the person held on 5 April 2019 where—

- (a) the disposal is either a direct or indirect disposal of UK land, and
- (b) the disposal is made by a non-resident or a UK resident in the overseas part of a tax year.

These requirements apply to each of the 3 types of UK land rebasing. I refer to this as the “general rebasing conditions”.

17.1 Direct/indirect disposal

Para 1(3) sch 4AA TCGA provides a (relatively) commonsense definition of direct/indirect disposal of UK land, which is the requirement in general rebasing condition (a):

For the purposes of this Schedule—

- (a) a disposal is a “direct disposal of UK land” if it is a disposal of an interest in UK land, and
- (b) a disposal by a person is an “indirect disposal of UK land” if it is a disposal of an asset (other than an interest in UK land) deriving at

¹⁴ Statute calls this the retrospective basis of calculation, but I think my term is clearer.

least 75% of its value from UK land where the person has a substantial indirect interest in that land.

The wording mirrors s.1A(3)/2B(4) TCGA.

17.2 Disposal by non-resident

Para 1(4) sch 4AA TCGA provides a complex definition of “non- resident”, which is the requirement in general rebasing condition(b):

For the purposes of this paragraph, the disposal is made by a non- resident or a UK resident in the overseas part of a tax year if it is—

- (a) a disposal on which a gain accrues that falls to be dealt with by section 1A(3) because the asset disposed of is within paragraph (b) or (c) of that subsection [land/land-rich asset],
- (b) a disposal on which a gain accrues that falls to be dealt with by section 1A(1) in accordance with section 1G(2) [split year] because the asset disposed of is within section 1A(3)(b) or (c) [land/land-rich asset],
- (c) a disposal on which a gain accrues that falls to be dealt with by section 2B(4),or
- (d) a disposal of an asset
 - [i] on which a gain does not accrue
 - [ii] but which, had a gain accrued, would fall to be dealt with as mentioned in any of the preceding paragraphs of this subparagraph.

This is convoluted drafting, but it works.

Land rebasing is therefore an unusual relief: it applies (in short) to non-residents but it does not generally apply to UK residents. It follows that the relief does not apply for the purpose of computing s.3 gains or s.1(3) amounts (trust gains).

18 2019 rebasing

Para 2(1) sch 4AA TCGA provides:

This Part [part 2] of this Schedule applies to-

- (a) all indirect disposals of UK land,

- (b) direct disposals of UK land that were not fully residential before 6 April 2019, and
- (c) direct disposals of UK land by persons who were not chargeable before 6 April 2019.

I refer to this as “2019 rebasing heads (a)-(c)”.

18.1 “Not fully residential”: Head (b)

2019 rebasing applies (under head (b)) to direct disposals of UK land that were not fully residential before 2019. Para 2(2) sch 4AA TCGA provides the definition:

For the purposes of this paragraph a direct disposal of UK land made by a person was “not fully residential before 6 April 2019” if in the period-

- (a) beginning with the day on which the person acquired the interest in land being disposed of or, if later, 6 April 2015, and
- (b) ending with 5 April 2019,

there was no day on which the land to which the disposal relates consisted of or included a dwelling.

“Not fully residential” seems an odd way to express this concept: Not residential (or not fully or partly residential) would be clearer.

18.2 Contract to buy dwelling off-plan

Para 2(3) sch 4AA TCGA provides:

If the disposal is of an interest in land subsisting under a contract for the acquisition of land that, at any time before 6 April 2019, consisted of or included a building to be constructed or adapted for use as a dwelling, the disposal is taken to be fully residential before that date.

18.3 Non-chargeable person: Head (c)

2019 rebasing applies to direct disposals of UK land by non-chargeable persons. Para 2 sch 4AA TCGA provides the definition:

- (4) For the purposes of this paragraph, a disposal is made by a person who was not chargeable before 6 April 2019 if, immediately before that date, the person was-
 - (a) a company which was not a closely-held company (see sub-paragraph (5)),
 - (b) a widely-marketed scheme (see sub-paragraph (6)), or

- (c) a company carrying on life assurance business (as defined in section 56 of the Finance Act 2012) where the interest in UK land was, immediately before that date, held for the purpose of providing benefits to policyholders in the course of that business.
- (5) The question as to whether a company is “a closely-held company” is determined in accordance with Part 1 of Schedule C1; but if-
 - (a) the company is a divided company within the meaning of section 14G, and
 - (b) the company would not otherwise be regarded as a closely-held company,the company is to be so regarded if the conditions in subsection (3) of that section are met.
- (6) A person is a “widely-marketed scheme” if-
 - (a) the person is a scheme within the meaning of section 14F, and
 - (b) condition A or B in that section is met, reading the reference in subsection (8)(a) of that section to the non-resident CGT disposal as a reference to the disposal mentioned in paragraph 1(1).
- (7) In determining for the purposes of this paragraph whether or not-
 - (a) a person is a closely-held company, or
 - (b) a person is a widely-marketed scheme,arrangements are to be ignored if the main purpose of, or one of the main purposes of, them is to secure a tax advantage as a result of the person not being a closely-held company or the person being a widely-marketed scheme.¹⁵
- (8) In this paragraph ...
 - (b) any reference to section 14F, 14G or Schedule C1 are to those provisions as they had effect on 5 April 2019 (before their repeal by Schedule 1 to the Finance Act 2019).

Thus the very complex pre-2019 provisions continue to matter for 2019 rebasing head (c).

¹⁵ Para 2 incorporates the standard definitions, but for some reason does so indirectly: “(8) In this paragraph ... (a) “arrangements” and “tax advantage” have the same meaning as in section 16A”.

19 2019 Rebasing: The relief

Assuming the general rebasing conditions are met, and one of 2019 rebasing heads (a)-(c) apply, para 3(1) sch 4AA TCGA provides the relief:

In calculating the gain or loss accruing on the disposal it is [to¹⁶] be assumed that the asset was on 5 April 2019 sold by the person, and immediately reacquired by the person, at its market value on that date.

The wording is based on s.35 TCGA (1982 rebasing).

20 Election out of 2019 rebasing

Para 3(2) sch 4AA TCGA

This paragraph [2019 rebasing relief] has effect subject to any election made by the person under paragraph 4 (retrospective basis of calculation).

So we turn to para 4(1) sch 4AA TCGA which provides:

The person may make an election under this paragraph for the assumption that the asset is sold and reacquired as mentioned in paragraph 3 not to apply.

Statute calls this the retrospective basis of calculation but I think “historic cost” is clearer. There is no time apportionment, so the entire historic gain (if any) will come into charge. So an election will rarely be advantageous. The Consultation Response document provides:

3.21. The government recognises the burden on taxpayers in having to obtain valuations, but believes that offering the retrospective basis as an option means those unable to get a valuation can use original cost. Time apportionment is still available on purely residential property disposals, and for commercial and mixed-use property it is likely most taxpayers will obtain a valuation for rebasing to ensure they use the most tax effective calculation method.

20.1 Para 4 election: Loss

Para 4(2) sch 4AA TCGA provides:

If, in the case of an indirect disposal of UK land-

(a) a person makes an election under this paragraph, and

16 Typos in Acts of Parliament are exceptional. But on this occasion the word “to” has been erroneously omitted.

- (b) a loss accrues on the disposal, the loss is not an allowable loss.

The Consultation Response document provides:

- 3.22. The government recognises that in some circumstances on indirect disposals it will not be practical to obtain a valuation at April 2019, and so will allow the retrospective basis to be used. To prevent this creating significant losses arising from assets that were not in the UK tax base prior to commencement, where the retrospective basis is used on indirect disposals, it will not be able to produce an allowable loss. Not allowing losses that accrued pre- commencement is coherent with the overall policy, and aligns with the treatment of gains.
- 3.23. Hence in indirect disposal cases the retrospective basis would only be capable of producing a chargeable gain. Any loss would not be an allowable loss...

This does not apply to a direct disposal. Why is that?

20.2 Para 4 election: Residential property gain

Para 5 sch 4AA TCGA provides:

- (1) This paragraph applies if-
 - (a) a person makes an election under paragraph 4 in respect of a disposal on which a gain accrues, and
 - (b) it is necessary to determine, in accordance with Schedule 1B, how much of the gain is a residential property gain.
- (2) Paragraph 2 of Schedule 1B has effect as if-
 - (a) sub-paragraphs (5) and (6) of that paragraph were omitted, and
 - (b) in that paragraph, “the applicable period” had the definition given by the next sub-paragraph.
- (3) “The applicable period” means the period-
 - (a) beginning with the day on which the person acquired the interest in land being disposed of or, if later, 31 March 1982, and
 - (b) ending with the day before the day on which the disposal is made.

Amended as para 5 requires, the key parts of para 2 sch 1B TCGA provide:

- 2 (1) The proportion of a chargeable gain attributable to residential property is equal to—
- (a) the relevant fraction of the gain, and
 - (b) if there has been mixed use of the land to which the disposal relates on one or more days in the applicable period, the relevant fraction of the gain as adjusted, on a just and reasonable basis, to take account of the mixed use on the day or days.
- (2) The relevant fraction is A/B where—
- A is the number of days in the applicable period on which the land to which the disposal relates consists of or includes a dwelling, and
- B is the total number of days in the applicable period. (3) [Definition of “mixed use of land”]
- (4) [Contract for the acquisition of dwelling]
...
- (7) [Interests in land acquired by the person at different times]. (x) “The applicable period” means the period-
- (a) beginning with the day on which the person acquired the interest in land being disposed of or, if later, 31 March 1982, and
 - (b) ending with the day before the day on which the disposal is made.

21 2015 rebasing conditions

Para 6(1) sch 4AA TCGA provides:

This Part [Part 3, 2015 rebasing] of this Schedule applies to any direct disposal of UK land if-

- (a) the person held the interest in UK land being disposed of throughout the period beginning with 6 April 2015 and ending with the disposal, and
- (b) the disposal was fully residential before 6 April 2019.

I refer to this as “2015 rebasing conditions”.

21.1 “Fully residential”

Para 6 sch 4AA TCGA provides:

- (2) For this purpose a direct disposal of UK land made by a person is “fully residential before 6 April 2019” if in the period-
 - (a) beginning with 6 April 2015, and
 - (b) ending with 5 April 2019,every day on which the land to which the disposal relates consisted of a dwelling.
- (3) If the disposal is of an interest in land subsisting under a contract for the acquisition of land that, at any time in that period, did not consist of a building to be constructed or adapted for use as a dwelling, the disposal is taken to be not fully residential before 6 April 2019.
- (4) This Part [Part 3] of this Schedule does not apply to a direct disposal of UK land made by a person who was not chargeable before 6 April 2019, as determined for the purposes of paragraph 2.

22 2015 rebasing relief

Para 7(1) sch 4AA TCGA provides:

In calculating the gain or loss accruing on the disposal it is [to¹⁷] be assumed that the asset was on 5 April 2015 sold by the person, and immediately reacquired by the person, at its market value on that date.

The wording is based on s.35 TCGA (1982 rebasing).

23 Elections out of 2015 rebasing

Para 7(2) sch 4AA TCGA provides:

This paragraph has effect subject to any election made by the person under either-

- (a) paragraph 8 (retrospective basis of calculation), or
 - (b) paragraph 9 (straight-line time apportionment),
- (and an election may be made under only one of those paragraphs).

23.1 Historic cost election

Para 8 sch 4AA TCGA provides:

¹⁷ As already noted typos in Acts of Parliament are exceptional. The word “to” has been erroneously omitted.

The person may make an election under this paragraph for the assumption that the asset is sold and reacquired as mentioned in paragraph 7 not to apply.

I call this a para 8 historic cost election.

23.2 Time apportionment election

Para 9 sch 4AA TCGA provides:

- (1) The person may make an election under this paragraph-
 - (a) for the assumption that the asset is sold and reacquired as mentioned in paragraph 7 not to apply, and
 - (b) for the gain or loss accruing on the disposal to be apportioned so that only the post-5 April 2015 proportion of it is treated as accruing on the disposal.
- (2) The “post-5 April 2015 proportion” is the proportion that the days in the post-5 April 2015 period bear to the days in the ownership period.
- (3) For this purpose-

“the post-5 April 2015 period” means the day beginning with 6 April 2015 and ending with the day on which the disposal is made, and

“the ownership period” means the period beginning with the day on which the person acquired the interest disposed of or, if later, 31 March 1982 and ending with the day on which the disposal is made.

I call this a para 9 time apportionment election.

Draft CG Manual CG73972 gives a straightforward example:

Disposal made in June 2020 (1500 days after 5/4/15) and acquisition February 2011 (1500 days before in 6 April 2015). Gain before any apportionment £1,000.

The post 5 April 2015 proportion of the gain would be £500 i.e. $1,000 \times (1,500/(1,500 + 1,500))$

23.3 Para 8/9 elections: Residential property gain

Para 10 and 11 sch 4AA TCGA are best read side by side:

Para 10 sch 4AA:historic cost	Para 10 sch 4AA: time apportion
(1) This paragraph applies if-	(1) This paragraph applies if-

(a) a person makes an election under paragraph 8 in respect of a disposal on which a gain accrues, and	(a) a person makes an election under paragraph 9 in respect of a disposal on which a gain accrues, and
(b) it is necessary to determine, in accordance with Schedule 1B, how much of the gain is a residential property gain.	[identical]
(2) Paragraph 2 of Schedule 1B has effect as if-	[identical]
(a) sub-paragraphs (5) and (6) of that paragraph were omitted, and	[identical]
(b) in that paragraph, “the applicable period” had the definition given by the next sub-paragraph	[identical]
(3) “The applicable period” means the period-	(3) “The applicable period” means the period-
(a) beginning with the day on which the person acquired the interest in land being disposed of or, if later, 31 March 1982, and	(a) beginning with 6 April 2015, and
(b) ending with the day before the day on which the disposal is made.	[identical]

These are the equivalents to para 5 sch 4AA TCGA but with different applicable periods.

24 2015/2019 rebasing conditions

Para 12 sch 4AA TCGA provides:

- (1) This Part [Part 4, 2015/2019 rebasing] of this Schedule applies to any direct disposal of UK land if-
 - (a) neither Part 2 [2019 rebasing] nor Part 3 [2015 rebasing] of this Schedule applies to the disposal, and
 - (b) the interest in UK land being disposed of was not a post-April 2015 asset that was fully residential before 6 April 2019.

- (2) For this purpose-
 - (a) the interest in UK land being disposed of is a “post-April 2015 asset” if it was acquired by the person after 5 April 2015, and
 - (b) the asset “was fully residential before 6 April 2019” if, in the period beginning with the day on which it was acquired and ending with 5 April 2019, every day on which the land to which the disposal relates consisted of a dwelling.
- (3) If the disposal is of an interest in land subsisting under a contract for the acquisition of land that, at any time in that period, did not consist of a building to be constructed or adapted for use as a dwelling, the disposal is taken to be not fully residential before 6 April 2019.

I refer to this as “2015/2019 rebasing conditions”.

25 2015/2019 rebasing: the relief

Assuming the general rebasing conditions and the 2015/2019 rebasing conditions are met, para 13 sch 4AA TCGA provides:

- (1) In calculating the gain or loss accruing on the disposal (“the actual disposal”) it is [to¹⁸] be assumed that-
 - (a) the asset was on 5 April 2015 sold by the person, and immediately reacquired by the person, at its market value on that date (but see sub-paragraph (3)), and
 - (b) in addition, the asset was on 5 April 2019 sold by the person, and immediately reacquired by the person, at its market value on that date.
- (2) In the case of the assumed sale on 5 April 2019, the gain or loss accruing on that sale is treated as accruing on the actual disposal (in addition to the gain or loss that actually accrues on the actual disposal).
- (3) If the asset was acquired by the person after 5 April 2015, the assumption that it is sold, and immediately reacquired, on 5 April 2015 is not to apply.

26 Election out of 2015/2019 rebasing

Para 13(4) sch 4AA TCGA provides:

This paragraph has effect subject to any election made by the person under paragraph 14 (retrospective basis of calculation).

18 Once again the word “to” has been erroneously omitted.

So we turn to para 14 sch 4AA TCGA which provides:

The person may make an election under this paragraph for the assumptions that the asset is sold and reacquired as mentioned in paragraph 13 not to apply.

26.1 Para 14 election: Residential property gain

Para 15 sch 4AA TCGA provides:

- (1) This paragraph applies if-
 - (a) a person makes an election under paragraph 14 in respect of a disposal on which a gain accrues, and
 - (b) it is necessary to determine, in accordance with Schedule 1B, how much of the gain is a residential property gain.
- (2) Paragraph 2 of Schedule 1B has effect as if-
 - (a) sub-paragraphs (5) and (6) of that paragraph were omitted, and
 - (b) in that paragraph, “the applicable period” had the definition given by the next sub-paragraph.
- (3) “The applicable period” means the period-
 - (a) beginning with the day on which the person acquired the interest in land being disposed of or, if later, 31 March 1982, and
 - (b) ending with the day before the day on which the disposal is made.

This is the equivalent to para 5 sch 4AA TCGA but with a different applicable period; see? (Para 4 election: residential property gain).

27 **Rebasing: Company onshoring**

Para 16 sch 4AA TCGA provides:

- (1) This paragraph applies in any case where-
 - (a) a company becomes resident in the UK after 5 April 2019,
 - (b) the company makes a direct or indirect disposal of UK land after that date, and
 - (c) (ignoring this paragraph) Part 2, 3 or 4 of this Schedule would have applied to the disposal but for the fact that it is made at a time when the company is resident in the UK.

- (2) In that case, Part 2, 3 or 4 of this Schedule applies in relation to the disposal (regardless of paragraph 1(1)(c)).

This only applies to companies, so individuals and trustees who become UK resident after 5 April 2019 do not qualify for rebasing. This anomaly is deliberate. The consultation response paper provides:

- 3.31. In order not to dis-incentivise on-shoring, the government is content to allow for companies who become UK resident to retain the ability to calculate their gains or losses using rebasing to April 2019.
- 3.32. This retention of rebasing does not currently apply to those chargeable to CGT. This will continue to be the case.

The policy to facilitate onshoring companies, but discourage onshoring of trusts, seems a strange one; but there it is.

28 Company/trust leaves UK

Similar rules apply to companies and trusts, and it is easiest to follow if the text is set out side by side:

Para 17 sch 4AA TCGA (trust)	Para 18 sch 4AA TCGA (company)
(1) This paragraph applies in any case where-	(1) This paragraph applies in any case where-
(a) the trustees of a settlement cease to be resident in the UK after 5 April 2019, and	(a) a company ceases to be resident in the UK after 5 April 2019, and
(b) the trustees make a direct or indirect disposal of UK land after that date.	(b) the company makes a direct or indirect disposal of UK land after that date.
(2) Nothing in Part 2, 3 or 4 of this Schedule applies to the disposal.	Identical
(3) The asset that is disposed of is excepted from the application of section 80(2) (deemed disposal of assets on trustees ceasing to be resident in UK).	(3) The asset that is disposed of is excepted from the application of section 185(2) and (3) (deemed disposal of assets on company ceasing to be resident in UK).

29 Rebasing: Wasting asset

Para 19 sch 4AA TCGA provides:

- (1) This paragraph applies if, in calculating a gain or loss accruing to a person in a case where paragraph 3, 7 or 13 is applicable, it is necessary to make a wasting asset determination in relation to the asset disposed of.
- (2) The assumption that the asset was acquired on a date mentioned in paragraph 3, 7 or 13 (as the case may be) is to be ignored in making that determination.
- (3) In this paragraph “a wasting asset determination” means a determination whether or not an asset is a wasting asset, as defined for the purposes of Chapter 2 of Part 2 of this Act. Capital allowances

Para 20 sch 4AA TCGA provides:

- (1) This paragraph applies if, in calculating a gain or loss accruing to a person in a case where paragraph 3, 7 or 13 is applicable, it is to be assumed that the asset disposed of was acquired on a particular date for a consideration equal to its market value on that date.
- (2) For the purposes of that calculation-
 - (a) section 41 (restriction of losses by reference to capital allowances and renewals allowances), and
 - (b) section 47 (wasting assets qualifying for capital allowances), are to apply in relation to any allowance made in respect of the expenditure actually incurred in acquiring or providing the asset as if it were made in respect of the expenditure assumed to have been incurred. (3) In this paragraph “allowance” means any capital allowance or renewals allowance.

30 Rebasing election procedure

Para 21 sch 4AA TCGA sets out the administrative provisions relating to an election and this is not reproduced here.

31 Interaction with anti-avoidance

31.1 UK-land gain outside s.3

Section 3(1) TCGA provides:

- (1) This section applies if ...
- (d) apart from this section, some or all of the gain would not be chargeable to corporation tax on the company.

This takes UK-land gains outside s.3 TCGA.

31.2 UK-land gain outside s.86/87

The wording follows a common template so it is helpful to read the provisions side by side:

Section 86(4ZA) TCGA	Section 87(5A) TCGA
Where (apart from this subsection) the amount mentioned in subsection (1)(e) would include a chargeable gain or allowable loss to which section 1A(3)(b) or (c) applies (disposals by non-UK residents within the charge to capital gains tax), so much of the gain or loss as would be so included is to be disregarded for the purposes of subsection (1)(e).	Where (apart from this subsection) the amount mentioned in subsection (4)(a) would include a chargeable gain or allowable loss to which section 1A(3)(b) or (c) applies (disposals by non-UK residents within the charge to capital gains tax), so much of the gain or loss as would be so included is to be disregarded for the purposes of determining the section 1(3) amount.

This takes UK-land gains outside s.86 and s.87 TCGA.

32 Hold-over relief

CGT has two hold-over reliefs which (in short) may avoid the charge otherwise arising on gifts:

- (1) Section 165 TCGA (business and agricultural property) (2) Section 260 TCGA (disposals giving rise to IHT)

Both reliefs apply in an amended way for UK land. One might refer to them as “UK-land s.165” and “UK-land s.260”. I only discuss UK-land s.260, as UK-land s.165 is of specialist interest.

32.1 UK resident transferee

Section 260 TCGA provides:

- (6ZA) Subsections (6ZB) and (6ZC) apply in any case where—
- (a) the disposal is a direct or indirect disposal of UK land which meets the non-residence condition, and
 - (b) the transferee is resident in the UK.
- (6ZB) Subsections (3) and (4) have effect in relation to the disposal as if the reference to “chargeable gain” were a reference to “so much of any gain accruing on the disposal as falls to be dealt with as mentioned in subsection (6ZD)(a) or (b)”.
- (6ZC) Subsection (5) has effect in relation to the disposal as if the reference to “the excess referred to in paragraph (b) above” were a reference to “so much of the gain mentioned in subsection (6ZB) which, ignoring this section and section 17(1), would accrue to the transferor on the disposal”.
- (6ZD) For the purposes of subsections (6ZA) to (6ZC) a disposal is a “direct or indirect disposal of UK land which meets the non-residence condition” if it is—
- (a) a disposal on which a gain accrues that falls to be dealt with by section 1A(3) because the asset disposed of is within paragraph (b) or (c) of that subsection, or
 - (b) a disposal on which a gain accrues that falls to be dealt with by section 1A(1) in accordance with section 1G(2) because the asset disposed of is within section 1A(3)(b) or (c).

Amended as these provisions require, s.260 provides:

- (1) If:
- (a) an individual or the trustees of a settlement (“the transferor”) make a disposal within subsection (2) below of an asset,
 - (b) the asset is acquired by an individual or the trustees of a settlement (“the transferee”), and
 - (c) a claim for relief under this section is made by the transferor and the transferee or, where the trustees of a settlement are the transferee, by the transferor alone,

then, subject to subsection (6) below and sections 169, 169B, 169C, 261 and 261ZA, subsection (3) below shall apply in relation to the disposal. (2) A disposal is within this subsection if it is made otherwise than under a bargain at arm’s length and—

- (a) is a chargeable transfer within the meaning of the Inheritance Tax Act 1984 (or would be but for section 19 of that Act) and

is not a potentially exempt transfer (within the meaning of that Act)...

Section 260(3) provides the relief:

- (3) Where this subsection applies in relation to a disposal—
- (a) the amount of so much of any gain accruing on the disposal as falls to be dealt with as mentioned in subsection (6ZD)(a) or (b) which, apart from this section, would accrue to the transferor on the disposal, and
 - (b) the amount of the consideration for which, apart from this section, the transferee would be regarded for the purposes of capital gains tax as having acquired the asset in question,
- shall each be reduced by an amount equal to the held-over gain on the disposal.
- (4) Subject to subsection (5) below, the reference in subsection (3) above to the held-over gain on a disposal is a reference to so much of any gain accruing on the disposal as falls to be dealt with as mentioned in subsection (6ZD)(a) or (b) which would have accrued on that disposal apart from this section.
- (5) In any case where—
- (a) there is actual consideration (as opposed to the consideration equal to the market value which is deemed to be given by virtue of any provision of this Act) for a disposal in respect of which a claim for relief is made under this section, and
 - (b) that actual consideration exceeds the sums allowable as a deduction under section 38,
- the held-over gain on the disposal shall be reduced by so much of the gain mentioned in subsection (6ZB) which, ignoring this section and section 17(1), would accrue to the transferor on the disposal...

32.2 Non-resident transferee

Section 261 TCGA disallows hold-over relief in the case of a non-resident transferee and that makes sense because the non-resident transferee is not subject to CGT on the gain on a later disposal. But UK land is different, so s.261ZA TCGA provides different rules:

- (1) This section applies where the disposal in relation to which a claim could be made under section 260 is a disposal of an asset within section 1A(3)(b) or (c) to a transferee who is not resident in the UK and, ignoring section 260—

- (a) a gain would accrue to the transferor on the disposal, and
- (b) on the assumption that the disposal is a direct or indirect disposal of UK land which meets the non-residence condition (whether or not that is the case),

that gain would be a relevant gain (see subsections (6) and (7)). (2) Section 260(3) has effect in relation to the disposal as if it read—

“(3) Where this subsection applies in relation to a disposal, the amount of any chargeable gain which, apart from this section, would accrue to the transferor on the disposal, shall be reduced by an amount equal to the held-over gain on the disposal.”

- (3) Where the disposal is a direct or indirect disposal of UK land which meets the non-residence condition—
 - (a) section 260(3), as modified by subsection (2) of this section, and section 260(4) have effect in relation to the disposal as if the references to “chargeable gain” were references to “relevant gain”, and
 - (b) section 260(5) has effect in relation to the disposal as if the reference to “the excess referred to in paragraph (b) above” were a reference to “the relevant gain which, ignoring this section and section 17(1), would accrue to the transferor on the disposal”.

So in all there are four versions of s.260:

- (1) The standard version
- (2) The version as amended by s.260(6ZA) - (6ZC) set out above
- (3) The version as amended by s.261ZA(2)
- (4) The version as amended by s.261ZA(2)(3)

Simplicity was, evidently, not much of a consideration here.

32.3 Disposal by transferee

Section 261ZA(4) deals with the position where:

- (1) A transfer a dwelling-house to B and claims UK-land s.260 hold-over relief
- (2) B later disposes of the asset:
 - (4) Where a claim for relief is made under section 260 in relation to the disposal mentioned in subsection (1), on a subsequent

disposal by the transferee of the whole or part of the asset within section 1A(3)(b) or (c) which is the subject of the disposal mentioned in subsection (1), the whole or a corresponding part of the held-over gain (see section 260(4))—

- (a) is deemed to accrue to the transferee (in addition to any gain or loss that actually accrues on that subsequent disposal), and
 - (b) (if that would not otherwise be the case) is to be treated as a relevant gain accruing on a direct or indirect disposal of UK land which meets the non-residence condition.
- (5) Where the subsequent disposal mentioned in subsection (4) is a disposal within section 260(2)(a), subsection (7) of that section has effect in relation to the disposal as if—
- (a) the reference to “the chargeable gain accruing to the transferee on the disposal of the asset” were a reference to the chargeable gain accruing on the disposal as computed apart from subsection (4), and
 - (b) the reference in section 260(7)(b) to “the chargeable gain” were a reference to—
 - (i) the chargeable gain (or, where the disposal is a direct or indirect disposal of UK land which meets the non-residence condition, the relevant gain) accruing on the disposal, and
 - (ii) the held-over gain deemed to accrue under subsection (4).
- (6) For the purposes of this section, a disposal is a “direct or indirect disposal of UK land which meets the non-residence condition” if it is—
- (a) a disposal on which a gain accrues that falls to be dealt with by section 1A(3) because the asset disposed of is within paragraph (b) or (c) of that subsection, or
 - (b) a disposal on which a gain accrues that falls to be dealt with by section 1A(1) in accordance with section 1G(2) because the asset disposed of is within section 1A(3)(b) or (c).

- (7) For the purposes of this section, a “relevant gain” means so much of any chargeable gain accruing on a disposal as falls to be dealt with as mentioned in subsection (6)(a) or (b).

Amended as ss(5) directs, s.260(7) TCGA reads:

In the case of a disposal within subsection (2)(a) above (whether or not subsection (3) above applies in relation to it) there shall be allowed as a deduction in computing the chargeable gain accruing on the disposal as computed apart from subsection (4) in question an amount equal to whichever is the lesser of—

- (a) the inheritance tax attributable to the value of the asset; and
- (b) the amount of ~~the chargeable gain~~
 - (i) the chargeable gain (or, where the disposal is a direct or indirect disposal of UK land which meets the non-residence condition, the relevant gain) accruing on the disposal, and
 - (ii) the held-over gain deemed to accrue under subsection (4)

as computed apart from this subsection.

33 Unascertainable consideration

It will be rare to sell UK land for unascertainable consideration, but provision is made for this in s.48A TCGA. This is not considered further in this article.

34 Residential property gain: definition

This term matters for rates of CGT and private residence relief and the definition is in Sch 1B TCGA and Sch 4AA TCGA (which amends the sch 1B rules where there is an election out of UK land rebasing).

35 Commencement

Para 120 sch 1 FA 2019 provides:

- (1) The amendments made by this Schedule have effect—
 - (a) for the purposes of capital gains tax, for the tax year 2019-20 and subsequent tax years, and

- (b) for the purposes of corporation tax, for accounting periods beginning on or after 6 April 2019.
- (2) The amendments made by this Schedule also have effect for the purposes of corporation tax in relation to disposals made on or after 6 April 2019 (whether in their application to accounting periods beginning on, and ending on or after, that date or to later accounting periods).

35.1 Pre-2019 losses

Para 121 sch 1 FA 2019 provides:

121(1) This paragraph applies to—

- (a) allowable NRCGT losses accruing to a person before 6 April 2019, and
- (b) ring-fenced ATED-related allowable losses accruing to a person before that date,

so far as they have not been deducted under section 2B, 8(1)(b)(ii), 14D or 188D of TCGA 1992 (as those provisions have effect before the amendments made by this Schedule) from chargeable gains accruing before that date.

- (2) If losses to which this paragraph applies accrued to a company, they are deductible in accordance with section 2A(1) of TCGA 1992 as if they had accrued to the company while it was within the charge to corporation tax.
- (3) If losses to which this paragraph applies accrued to any other person, they—
 - (a) are deductible in accordance with section 1(3) of TCGA 1992, and
 - (b) are to be treated for the purposes of section 1E of TCGA 1992 as if they accrued on a disposal of assets that were within section 1A(3) of that Act.
- (4) In this paragraph—
 - (a) the reference to allowable NRCGT losses is to be read in accordance with Schedule 4ZZB to TCGA 1992 (as that Schedule has effect before its repeal by this Schedule), and
 - (b) the reference to ring-fenced ATED-related allowable losses is to be read in accordance with section 2B of that Act (as that section has effect before its repeal by this Schedule).

36 Non residents CGT: Critique

36.1 Non-residents CGT: History

Until 2016 a non-resident did not pay CGT on disposals of UK land. From 2013/14 there was a charge (ATED-CGT) on companies within ATED.

From 2015/16 there was a charge (NRCGT) on non-residents, but restricted to residential property.

In the 2017/18 edition of this work, I said:

HMRC say:

“The government believes that it is right that CGT should apply to disposals of interests in UK residential property. The government does not intend to broaden the scope of the charge and apply CGT to disposals of interests in non-residential property. This change is focussed on rectifying the unfairness in the system that currently allows non-residents to escape UK CGT on disposals of UK property that are or could be used as a dwelling house.”¹⁹

The bold font is in the original. The author rightly considered the issue an important one. But no reason is given. The claim that this rectifies “unfairness” (and is “right”) is a rhetorical device which avoids answering the question while appearing to do so.

There is no need to justify the taxation of non-residents on gains accruing on UK land (or indeed other UK assets). That is consistent with the general principles of international tax law.²⁰ Many countries with CGT (perhaps a majority) impose tax in this situation. The question is why there should be a tax on residential property but not on non-residential; and why an exemption for widely held companies?... Is there any other country in the world which charges non-residents on gains from residential property, but not from non-residential property?

... The fact that the rest of the world is out of step does not prove that UK policy is wrong, but it might have given pause for thought - had there been time for thought. The legislation was published in draft in December 2014, and completely recast in the Finance Bill. Because of the 2015 election,

19 NRCGT response paper para 3.9. The same point was made in the NRCGT consultation paper para 2.3: “The government does not intend to change the tax treatment for property, such as office and industrial buildings, which cannot be used as and are not in the course of being converted to a place to live.”

20 OECD Model recognises this.

the Finance Bill was published on 24 March 2015 and enacted on 26 March, without consideration or amendment. Does anyone think that law enacted in this way is likely to be stable?

Does it now matter? Readers may think it pointless to cry “foul” in a game which has no referee, and whose result is now declared. But I think the story deserves to be recorded, as a lesson in how not to legislate, and as a warning to those who might rely on HMRC promises about future tax reform.

36.2 Non-residents CGT: Critique

The 2019 extension of CGT to non-residents holding UK land and land- rich assets is in line with the policy of many, perhaps most countries. Policy considerations in favour of the reform are fairness and additional revenue.

Policy considerations in favour of the position as it was from the inception of CGT in 1965 to 2019 are: encouragement of inward foreign investment, avoiding the lock-in effect of CGT, and simplicity.²¹

Needless to say, there has been no informed debate on the challenge of finding a balance between the conflicting policy considerations.

This is illustrative of a much wider problem: CGT as a whole is

... a highly unsatisfactory tax. Possibly more than any other tax, it has been subject to frequent, dramatic, and often controversial changes...²²

21 An indication of HMRC unease concerning the complication of the new rules is that the consultation response document contains no less than six claims that its proposals constitute simplification.

22 Mirrlees Review, “Tax by Design” (2011) p.326.