DRAFT LEGISLATION FOREIGN DOMICILED RESIDENTS AND THE REMITTANCE BASIS

BACKGROUND

The Pre-Budget Statement contained an announcement that, with effect from 6 April 2008, foreign domiciliaries resident in the UK (and those not ordinarily resident) would only be able to avoid UK taxation on unremitted foreign income and gains if:

a) resident in the UK for fewer than seven years; or

b) resident for more than seven years, on payment of an additional charge of £30,000 per annum.

It was also announced that the rules for determining whether funds had been remitted to the UK would be tightened, and that the avoidance of tax through the use of offshore companies and trusts would be addressed.

Draft legislation was finally published on 18 January. It is immediately evident that there is to be a radical overhaul of the rules and a far wider than expected extension of the anti-avoidance provisions, particularly in relation to offshore trusts, where the proposals will effectively deny the remittance basis of taxation when capital is extracted from overseas settlements.

The principal points are:

1. The loss of personal allowances for those claiming the remittance basis.
2. An additional charge of £30,000 for each year when the remittance basis is claimed if the taxpayer has been UK resident for 7 years.
3. Denial of capital loss relief for foreign domiciliaries, even where the remittance basis is not claimed (this may be inadvertent).
4. A general tightening of the remittance rules to catch remittances by connected persons or entities, and the import of assets purchased from foreign income and gains.
5. The abolition of the “ceased source” principle.
6. Statutory rules for identifying remittances which may increase taxable amounts remitted from the proceeds of sales and gains.
7. The extension of anti-avoidance provisions to foreign domiciliaries with interests in foreign companies which realise capital gains, and to foreign domiciled settlors and beneficiaries of offshore trusts. These provisions as drafted are draconian and will mean that the extraction of capital from offshore trusts will in most cases result in a liability to Capital Gains Tax (CGT) regardless of remittance. Due to an absence of transitional provisions, trust gains realised before 6 April 2008 (and not distributed before that date) will be potentially taxable in future, and capital distributions that have already been made in excess of realised trust gains will attract future gains which will be immediately taxable.
8. Provisions requiring the disclosure of offshore settlements.
9. Changes to the basis for counting days of presence in the UK for determining residence.

The provisions are drafted so as to come into force for tax years from 2008/09 onwards, but are retroactive in certain respects. Most aspects (other than the additional charge and provisions relating to temporary non residence – which depend upon a past history of UK residence) will apply to all foreign domiciliaries, regardless of the length of time they have spent in the UK.

Briefing

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RAWLINSON & HUNTER

CLAIMS FOR THE REMITTANCE BASIS

At present, foreign domiciliaries (and those not ordinarily resident in the UK) are only subject to tax on most categories of foreign income and foreign capital gains, to the extent that they make taxable remittances to the UK. This is known as the "remittance basis".

This basis is automatically applied to foreign employment income and foreign capital gains. Strictly, a claim has to be made for the basis to apply to relevant foreign income (generally savings income) but in practice such a claim has not always been required when no UK tax liability arises.

Henceforth (except where unremitted foreign income and gains fall below £1,000 in the year) a qualifying tax payer will have to make a claim for the remittance basis to apply. It will not be sufficient to rely on non remittance. No time limit is provided, but notes published with the draft legislation state that such a claim has to be made on the self assessment tax return, and there will be a special box for this purpose. That would imply that HMRC expect the claim to be made by 31 January following the year of assessment.

If such a claim is made, the taxpayer will forfeit any entitlement to Income Tax personal allowances, tax reduction amounts (ie the standard and age related personal allowances, the blind person's allowance and the married couple's/civil partner's allowance) and the CGT annual exemption.

The claim is an annual claim, and so the remittance basis can be chosen for one year, and an arising basis the next. However, if a taxpayer chooses not to make a claim, foreign income or gains that have arisen in earlier years will continue to be taxable if remitted. Currently this is not the case for certain categories of foreign income.

Foreign domiciliaries (or individuals not ordinarily resident) who have unremitted foreign income and gains below £1,000 (the de minimis limit):

1. will not have to make a claim to be taxed on the remittance basis; and
2. will be entitled to the same personal allowances as a UK domiciliary.

ADDITIONAL CHARGE FOR LONG-TERM RESIDENTS CLAIMING THE REMITTANCE BASIS

The provisions give effect to the additional charge which is to be paid by those:

a) whose income and gains exceed the de minimis limit

b) who have been resident in the UK in at least seven of the nine tax years immediately preceding the relevant tax year

c) make a claim for the remittance basis to apply.

As announced in the Pre-Budget Statement, the charge will be £30,000 for each year concerned.

Residence for any part of a tax year will count as a whole year for these purposes. Thus for an individual arriving towards the end of a tax year, the charge could apply after little more than six years.

The first year for which this charge will apply is 2008/09 and any taxpayer (not eligible for the de minimis exemption) who claims the remittance basis for this year and satisfies the seven year test will be liable to pay it. The charge will be due on 31 January following the tax year for which the claim is made.

The answer to one of HMRC's "Frequently Asked Questions" makes it clear that the use of foreign income or gains to pay the £30,000 charge will be regarded as a taxable remittance. It is also admitted that this charge is not a tax on income, though it will be collected through the self assessment system as if it were. HMRC note that it will be up to individual treaty partners to decide whether the charge will be dealt with as if it were a tax for foreign tax credit purposes under a double tax agreement, but it seems unlikely that this will be accepted.

As this is an additional charge, rather than a tax, it will not be possible to recover the sum retrospectively if it later transpires (outside the normal window for amendment) that an error or mistake in the return made the payment of the charge disadvantageous.

It was suggested in the Pre-Budget Statement that a higher charge may eventually apply to claimants who have been resident in the UK for more than 10 years. A Consultative Document was published in December 2007, inviting comments, and it cannot be ruled out that there will be a more costly basis of taxation or higher rate of charge applied to longer term residents in the future.

COMPUTATION OF LOSSES

The draft provisions would mean that a foreign domiciliary is not entitled to relief for losses arising from foreign assets, regardless of whether a claim is made to be taxed on the remittance basis, or the arising basis is accepted. In the case of a

foreign domiciliary who is to be taxed on the arising basis, this appears both unfair and contrary to EU law.

MEANING OF "REMITTANCE"

As announced in the Pre-Budget Statement, the draft legislation includes provisions to extend the definition of 'remittance', and to ensure that this enhanced definition applies equally to 'Relevant Foreign Income' (RFI – broadly, foreign trading and investment income), foreign employment income and foreign chargeable gains. Previously, a slightly different definition applied to each category, the rules for RFI remittances being the least stringent. The new legislation will introduce a broad 'catch all' meaning of 'remittance' as being any money or other property 'brought to, or received or used in the United Kingdom' which 'derives (wholly or in part, and directly or indirectly) from the income or chargeable gains'. It also treats as a taxable remittance the use of income or gains to satisfy a debt where property has been brought to or used in the UK and the debt relates 'directly or indirectly' to that property. It appears that these changes, as well as broadening the scope of the remittance rules generally, would henceforth tax as remittances uses of RFI, which have, until now not been considered as such (the rules for foreign gains and emoluments may have been sufficient to constitute a remittance in these circumstances); for example:

I. the use of RFI to purchase an asset, such as a car or a painting, outside the UK which is then brought to the UK.

II. the use of RFI to repay the principal of a mortgage taken out with a foreign lender to purchase a property in the UK, where the completion of the property was undertaken outside the UK. Such a loan was thought not to meet the definition of a 'UK linked debt' under the previous rules, but this will be superseded by the broader provisions described above. Although needing clarification, the use of unremitted income and gains to service the interest on a foreign loan, even where the loan has been used to purchase property in the UK, appears still not to constitute a taxable remittance.

The import of an asset that has been paid for out of foreign income or gains will constitute a remittance equal to the income or gains used to purchase the property rather than its value at the time of its importation. The provisions also deem a remittance to be effected where any service is provided for the benefit of the taxpayer or a relevant person in the UK. For the definition of "**relevant person**" see (**Alienation of income and gains**) below.

The payment of UK expenses (such as property costs, or professional fees) by an offshore trust settled with foreign income or gains, will therefore, constitute a remittance.

Whilst this extended definition of 'remittance' will apply to remittances from 2008/09 onwards, it will have equal application to foreign income or foreign gains which have arisen in earlier years as to income or gains arising thereafter. Affected taxpayers would be advised carefully to review their situations and where appropriate consider actions before 6 April 2008.

ALIENATION OF INCOME AND GAINS

It has long been understood (and confirmed by case law) that where a foreign domiciliary makes a gift of unremitted foreign income or chargeable gains outside the UK, the gift in the hands of the donee loses its income or gain characteristics and can be remitted to the UK by the donee without a UK tax liability arising. Provided such gifts were substantive (and not a conduit mechanism through which the donor would benefit), it has been possible for such remittances to be made even where the donee was closely related – for example a spouse. It was clear that this was an area the draft legislation would address.

In fact the provisions go a long way beyond ensuring that inter-spouse/civil partner gifts will be ineffective for avoiding tax on remittance. Instead foreign income or gains will be treated as remitted when:

1. an individual makes a gift, which either includes unremitted foreign income and foreign gains, or was purchased using such funds, to a "**relevant person**"; and
2. the donee remits any part of the gift – the definition of remittance is the new wider definition explained in the section above.

In these circumstances, a tax liability arises on the donor as though he or she had made the remittance personally.

The definition of "**relevant person**" includes the individual and connected persons. Thus foreign income or gains gifted to and remitted by the following will be treated as remittances by the donor:

- spouses or civil partners (or those living together as such)

- any relative
- any relative of a spouse or civil partner
- any spouse or civil partner of a relative
- any trust of which the individual, or someone connected with him, is the settlor
- any company under the control of the individual
- a person with whom the individual is in partnership.

There are two particular refinements to be noted:

i) in a controversial and ground breaking measure, the definition of 'connected' is specifically to include a man and woman living together as if they were husband and wife, or two persons of the same sex living together as if they were civil partners. Such individuals have always been denied tax reliefs afforded to married couples and civil partner couples, but are now to be deemed to have that status for the purposes of these rules.

ii) if an asset is transferred to a connected person for less than full consideration, the gain which arises by reference to the transfer is treated as being inherent in the asset transferred. Therefore, if a foreign domiciled tax payer gifts foreign shares, standing at a gain, to his son, the gain on transfer is rolled up within the shares. If the son then sells the shares and remits the proceeds, he would be treated as having remitted cash which includes the gain which arose on transfer. Since the son is 'connected' with his father, this would be treated as a remittance of a gain by the father. Similarly a remittance would arise on a UK resident but non-domiciled tax payer who gifts income to a foreign trust or company, if the recipient entity then uses the gift to make an investment in the UK.

The commencement date for the provisions relating to alienation through related persons is 6 April 2008. Surprisingly, it appears that foreign income and gains arising in 2007/08 or earlier will not be subject to these provisions and if such property has been gifted to a relevant person, even remittances after 6 April 2008 would seem to fall outside these revisions. However, the new rules are to apply to gifts of foreign income and gains arising after 6 April 2008.

REMITTANCES FROM MIXED ACCOUNTS

The draft legislation provides a statutory basis for identifying funds within a mixed account with transfers made from it. It provides an order of priority for determining the categories (referred to as "paragraphs") of taxable and non-taxable funds with which the transfer is to be matched. These are:

1. employment income already taxed in the UK
2. foreign employment income taxed on the remittance basis
3. relevant foreign income taxed on the remittance basis
4. foreign chargeable gains (whilst they are subject to income tax, offshore income gains fall into this category)
5. anything else, principally tax free capital (presumably, this would include UK taxed income or gains other than employment income).

It is noteworthy that where proceeds of sale are credited to an account, the gain element of the proceeds is now to be identified with any transfer before any capital originally invested. This is more onerous than current practice which has been to treat such a transfer as containing gain and capital on a pro rata basis. However, it appears that transfers will be matched with amounts falling within the above paragraphs in the year concerned. Only if the transfer exceeds the credits in that year is it then matched with additions in the previous year and so on in a reverse chronological order. Thus it would appear that if there is an account which contains only unremitted income and gains at the start of a tax year, and capital (such as a legacy) is the only addition in the tax year concerned, a transfer out of the account will be matched with the legacy in priority to the earlier unremitted income.

It is not clear whether the identification rules apply only in respect to transfers which constitute remittances to the UK or whether foreign expenditure or transfers abroad are to be identified in the same manner. The draft clauses state that when establishing the amount of income within each paragraph one should use a "just and reasonable" basis but does not give any details of what exactly is meant by this.

These provisions apply to transfers from a mixed account on or after 6 April 2008. Current practice will apply to remittances for 2007/08 and earlier years.

REMITTANCES IN A YEAR OF NON-RESIDENCE

As an anti-avoidance refinement to the remittance rules, it will no longer be possible for a foreign domiciliary to leave the UK for a short period of non-residence and whilst abroad remit previously accumulated foreign income. Where an individual:

1. has been UK resident in four out of the seven years preceding his departure; and
2. is non-UK resident for fewer than five complete tax years

he will be subject to Income Tax, in his year of return, on any remitted income which arose in either the year of departure or any earlier tax year during which he was UK resident. The same rules apply to foreign chargeable gains which arose in a year of UK residence and which are remitted in a period of absence of less than five tax years.

These provisions apply to foreign income or gains remitted on or after 6 April 2008. Potentially, therefore, they could apply to someone who had already left the UK, prior to the publication of this draft legislation, with the intention of using this remittance planning. Anyone in this situation should consider making remittances by 5 April 2008, if it is possible to do so without triggering a liability.

ABOLITION OF "SOURCE CEASING"

It has been a recognised principle that remittances of RFI are taxable only if the source is extant in the year concerned. If the source had ceased to exist in a previous year, tax has been avoidable. As expected, the new rules for remittances will apply irrespective of whether the source of income exists when the remittance is made. Furthermore, it appears that this will be the case from 6 April 2008 even when the source ceased in earlier years. Such income may have long been assumed to be capitalised, and this provision is, therefore, retrospective. Where the amounts involved are significant and individuals will expect to require sums within these accounts for UK expenditure, consideration should be given to remitting funds before 6 April 2008.

ATTRIBUTION OF FOREIGN CORPORATE GAINS

Foreign domiciliaries have previously been exempt from anti-avoidance provisions which operate to apportion gains in certain foreign companies to UK resident shareholders whose interest in the company exceeds 10%. This exemption is removed by the draft legislation. Where after 5 April 2008 a foreign company, which would be a 'close company' if resident in the UK, realises a capital gain, any UK resident but foreign domiciled shareholder whose interest (when taken with persons connected with him) exceeds 10% will be 'attributed' with the proportion of the gain as represents his participation in the company. If the asset is situated in the UK, the participator will pay UK tax on his share of the gain as though he had realised it personally; if the asset sold is a foreign asset, the participator will pay CGT if he remits the proceeds to the UK. Any tax paid in this way on an attributed chargeable gain is not available as a credit against CGT which the same tax payer may eventually pay on remittance of proceeds from the sale of his participation in the offshore company.

These provisions interact with those attributing trust gains to settlors and beneficiaries, so that gains realised in companies held within trusts will be exposed to tax as described in the following sections.

This change is likely to be of greatest concern to those foreign domiciliaries who have been holding UK assets, perhaps private corporate businesses or real estate assets, through offshore companies. All such cases will need to be reviewed carefully with a view possibly to winding up the corporate holding structure by 5 April 2008 and achieving a step up in base cost. This may not be appropriate in every case and each will need to be considered having regard to the specific circumstances and priorities.

It is important to note that residences owned by a company cannot benefit from private residence relief. Gains from the disposal of UK real estate may, therefore, be liable to apportionment and tax, whereas relief may have been available had the property been owned outright.

ATTRIBUTION OF GAINS TO SETTLORS WITH AN INTEREST IN AN OFFSHORE SETTLEMENT

The current legislation specifically exempts foreign domiciliaries from the anti-avoidance provisions (in section 86 TCGA 1992), which operate to tax gains realised in foreign trusts on a settlor who retains an "interest" under the settlement. An "interest" for these purposes is broadly defined and a settlor has an interest if:

- the settlor,
- the settlor's spouse or civil partner,

- any child (including stepchildren) of either the settlor or his spouse or civil partner,
- any grandchild of either the settlor or his spouse or civil partner,
- the spouses or civil partners of any such children or grandchildren,
- any company controlled by a person or persons falling within the previous categories,

may benefit from the trust. For these purposes step relationships are treated the same as blood relationships.

Broadly, section 86 acts by attributing to a UK domiciled and resident settlor, the gains made by the trustees.

The draft legislation provides that section 86 will apply to foreign domiciliaries from 6 April 2008. Where the settlor makes a claim to be taxed on the remittance basis, he will be taxable on gains from UK assets as realised and on gains from foreign assets treated as remitted by him (or by a connected person such as the trustee). To the extent they are not remitted and (taxed on the settlor) foreign gains will be attributed to capital payments made to beneficiaries (including the settlor) and taxed regardless of whether remitted as described below.

ATTRIBUTION OF GAINS TO BENEFICIARIES OF OFFSHORE SETTLEMENTS

Currently, section 87 TCGA 1992 applies to attribute gains made within foreign trusts to capital payments made to beneficiaries of offshore trusts and imposes a CGT charge when a capital payment is made to such a beneficiary domiciled in the UK. The draft provisions extend the charge such that it will apply to foreign domiciled beneficiaries and does so without regard to remittance. It is the most draconian element in the draft provisions, and will make it virtually impossible to extract capital from foreign trusts, even where such capital is retained abroad.

The current provisions are complex but can be summarised as follows:

1. Each year the trustees have to compute the capital gains they would have been assessable on if they had been subject to UK CGT. The pool of gains computed excludes any gains attributed to the settlor under section 86
2. Relief is given for capital losses as these are offset against the current year gains. It is important to note that allowable losses of a later year cannot be used to reduce gains accruing in an earlier year
3. These gains are pooled and the beneficiaries are assessed to CGT when they receive a capital payment or benefit
4. Taper relief applies at trust level. That is, only tapered gains are included in the pool
5. Gains are attributed to beneficiaries on a first in first out basis
6. Where capital payments exceed trust gains, the trust gains are allocated to beneficiaries pro rata to their respective capital payments and the excess payments carried forward
7. The tax chargeable is increased by a supplementary charge of 10% per annum (subject to a 6 year maximum) by reference to the years elapsed between realisation of the gain and distribution. Assuming a CGT rate of 18%, this provision would increase the rate of tax on gains distributed six years after realisation to 28.8%.

From 6 April 2008 UK resident foreign domiciliaries will be subject to a section 87 charge on any capital payments regardless of whether they remit the funds to the UK or not. The remittance basis is specifically excluded from applying. This is a penal provision which makes a trust less advantageous for CGT purposes than holding assets personally.

There appear to be no transitional provisions. Accordingly unmatched capital gains made by an offshore settlement prior to 6 April 2008 will give rise to a CGT charge on capital distributions to foreign domiciliaries (as well as UK domiciliaries) occurring after 6 April 2008 . Furthermore, a capital payment to a foreign domiciliary made prior to 6 April 2008 but not franked by trust gains would fall to be matched with trust gains arising after 6 April 2008 and the beneficiary, if UK resident, would be subject to tax.

As noted above where the trust is settlor interested any foreign gains that the settlor does not remit are added to the section 87 pool. Accordingly, gains which have not been taxed on the settlor will be attributed to any capital distribution and taxed regardless of remittance. The only mitigation is that such gains will not attract the supplementary charge.

TRANSFER OF ASSETS ABROAD

Anti-avoidance provisions subject to tax income arising to foreign entities. Where the transferor can benefit (and is UK ordinarily resident) such income is treated as his. In other cases, beneficiaries are taxable on income attributed to capital payments or benefits received. Where there is foreign income the remittance basis can apply for both the transferor and beneficiary charges. The draft legislation incorporates the wider definition of "remittance" into this code.

Where the transferor charge applies, remittances of income in a subsequent tax year will remain taxable. Where the charge applies to a beneficiary, provisions matching benefits conferred to relevant income have been modified. A specific order is set down (broadly the earliest relevant income treated as arising is matched against the earliest benefit received).

ACCRUED INCOME SCHEME

The accrued income scheme requires the interest which has accrued since the last interest date to be identified on sale of a fixed interest security. This element of the proceeds of sale is then taxed as income rather than capital gain. These anti-avoidance provisions were introduced at a time when CGT was levied at a substantially lower rate than income tax (a valid consideration once again) and there was therefore an incentive for a tax payer to want to convert income to capital gain. The accrued income scheme did not, however, apply to non-UK securities held by foreign domiciliaries. This exemption is now being withdrawn and foreign income within the accrued income scheme arising on or after 6 April 2008 is to be included in the definition of 'Relevant Foreign Income'.

INCOME FROM THE REPUBLIC OF IRELAND

Irish source income of a UK resident foreign domiciled person (or ordinarily resident individual) has for historical reasons previously been taxed by statute on the 'arising basis' as though it were UK source income. This is acknowledged to be discriminatory and contrary to EU law, and the draft legislation amends these provisions from 2008/09 onwards so that Irish source income will be taxable on the remittance basis. To prevent double taxation there are specific provisions to exempt from tax on the remittance basis Irish source income which arose before 6 April 2008 and was, therefore, taxable on the arising basis.

FOREIGN TRUSTS NOTIFICATION REQUIREMENTS

At present, a settlor who is resident or ordinarily resident and domiciled in the UK has to notify the HMRC of:

1. the day on which the settlement was created;
2. the name and address of the person delivering the return; and
3. the names and addresses of the persons who are the trustees immediately before the delivery of the return.

There are time limits for such notice to be given (three months from the establishment of the trust or 12 months from becoming resident or domiciled in the UK).

The draft legislation extends this requirement to foreign domiciliaries. This requirement applies to all trusts that the individual has settled whether they were established before or after 6 April 2008 and regardless of the individual's residency status at the time the settlements were constituted. Existing foreign domiciliaries who settled offshore trusts before 6 April 2008 will have until 5 April 2009 to make the appropriate disclosure to HMRC.

RESIDENCE - THE DAY COUNT

As proposed at the time of the Pre-Budget Statement, steps have been taken to ensure that in determining whether an individual is resident in the UK, days both of arrival and departure are included in the day count. The only reference to the number of days in the sparse legislation on UK residence is to the '183 day test', which makes clear that an individual is resident in the UK in any tax year in which he spends 183 days or more here. It is this rule which has been amended so that days of arrival and departure are to be counted. An exception is made for someone who arrives and departs in transit and never leaves the restricted area of a port or airport.

Most of the controversy over the 'day count' has related to the non-statutory '90 day test' whereby a temporary visitor to the UK is not treated as resident unless his visits, when viewed in average over a four year period, exceed 90 days per year. This is the test loosely based on case law and advocated by HMRC in the published guidance on residence in the booklet IR20. This guidance explained that in ascertaining days spent in the UK the normal HMRC practice was to ignore days of arrival and departure, a practice from which HMRC appeared to depart in the high profile *Gaines-Cooper* case.

When it became clear in the Pre-Budget Report that it was proposed to change this practice and include days of arrival and departure in the 90 day test, many assumed that for the first time the 90 day test might become law rather than being widely applied practice. While controversial, the inclusion of the 90 day test on the statute book would at least have brought a degree of certainty to the issue of UK residence, instead of having to rely on non-statutory HMRC practice from which HMRC appear happy to depart when it suits them to do so. Sadly, the uncertainty for the tax payer over this fundamental issue is to continue since the requirement to count days of arrival and departure has been introduced only as part of the already codified 183 day test. HMRC will simply adopt this statutory provision when applying the non-statutory 90 day test, and will presumably issue a revised IR20 booklet in due course. The excuse for amending the day count method was that the old basis of discounting days of arrival and departure had become anachronistic in an era when international and inter-continental travel is so easily achieved. The tax payer, however, is still expected to study nineteenth and early twentieth century case law, some of it conflicting, in order to work out whether he is or is not UK resident. The continued failure of the Government to put forward coherent legislation on tax residence where other countries have managed to do so is a great disappointment, and leads one to the conclusion that they have no interest in allowing taxpayers to have this clarity.

NOTA BENE

This briefing is written in response to newly published material dealing with highly complex issues.

The information contained in this briefing does not constitute advice and is intended solely to provide the reader with an outline of the provisions. It is not a substitute for specialist advice in respect of individual situations.

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