

## **Offshore Property Holding Companies**

*A simple and effective structure for non domiciliaries to hold a UK home now faces multiple tax problems.*

Until the early 1980s, foreigners coming to the UK to take up residence on a long term basis had an effective method of sheltering a UK home from inheritance tax liability. A company incorporated and resident outside the United Kingdom would be formed to hold the property and the shares in the company would be transferred to a non resident trust whilst the foreigner was still not domiciled in the United Kingdom for inheritance tax purposes, nor deemed domiciled here. The use of a trust to hold the shares meant that the structure would continue to be excluded property for inheritance tax purposes, even though the non domiciliary might at a later time become deemed domiciled in the United Kingdom for inheritance tax purposes.

It is less likely that this structure will now be recommended because it has been hit with successive tax charges over the years.

The first of these was the possibility of a benefit in kind charge for income tax purposes, through the occupation of a property by virtue of employment. Although the individual concerned would not be a director of the property- owning company (for fear of causing it to become UK resident) suggestions arose to the effect that the non- domiciliary could nevertheless be treated as a shadow director of the company thus giving rise to the possibility of the benefit in kind charge. Although this suggestion was widely criticised by various tax counsel, the House of Lords upheld the point in *R v Allen* 2001 STC 1537.

Although this tax charge could be overcome by gifting the property to the company, so that there was no cost to the company upon which a benefit in kind charge could attach, this solution ran into difficulty on the introduction of stamp duty land tax. In circumstances such as these, the gift of a property to the company would incur stamp duty land tax liability. In turn, that could be avoided if the gift to the company took place at the same time as the acquisition of the property. A non-domiciliary would contract to buy the property and pay the purchase price, but on the day of completion he or she would authorise a transfer of the property to be made into the name of the company as its own asset, so that they would only be one stamp duty charge - the normal liability on purchase of the property. The sub-sale relief in section 45(3) Finance Act 2003 would prevent a double liability in such a case.

Following the Finance Act 2008, there is now a further significant problem with this structure. This is that the capital gain on eventual sale of the property will be apportioned up to the trust and will therefore be attributed to beneficiaries of the trust who either have received, or thereafter receive, "capital payments" from the trustees. Prior to the Finance Act 2008, non domiciled beneficiaries had no capital gains tax liability under these provisions but that changed and they are now chargeable under the remittance basis rules. The problem here of course is that the benefit of living in a property each year commencing with 2008/09 is a notional "capital payment" from the trustees received in the United Kingdom and these benefits will be matched in due course with any capital gain which arises on disposal of the property. Accordingly, whether or not the non domiciliary is a remittance basis

user at that time, the benefits will then give rise to capital gains tax liability at the rate in force at the time of the sale. The only possible escape from liability will be if the non domiciliary is no longer United Kingdom resident at that time and is not within the temporary non- residents rules of section 10A TCGA 1992.

Obviously liability to capital gains tax on the gain , or the matched proportion of the gain, will be better than inheritance tax liability on the full value of the property, but even so it would be most unwelcome, particularly as there may be better methods of structuring the property ownership to preserve capital gains tax exemption as the main residence whilst minimising an inheritance tax liability.

There is of course no relieving provision for trust/company structures already in place at 5 April 2008, except to the extent that the gain up to 5 April 2008 can be given exemption by election of the trustees. So it is clear that all such cases need review and it will normally be advisable to dismantle the structure before any significant chargeable gain starts to accrue.

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