

CGT Losses of Non Domiciliaries

Up to 2007/08, those who were not domiciled in the United Kingdom could not claim relief against capital gains for losses realised on foreign assets. This was in the context of the remittance basis regime as it then was under which gains on foreign assets were equally not liable to UK capital gains tax unless the gain was remitted to the United Kingdom.

With the major reforms to the remittance basis regime which took effect from 6 April 2008, there were also changes to the rules relating to CGT loss relief. As a result, those not domiciled in the United Kingdom now have a choice of three different regimes in relation to foreign losses:

1. If the remittance basis is not claimed, so that worldwide income and capital gains are taxed on an arising basis, there is now relief in the ordinary way for losses realised on foreign assets, that is the losses can be set against any capital gains realised during the same year, with carry forward of unused losses to subsequent years.
2. If the remittance basis is claimed, without further action (see 3. below) the right to obtain relief for foreign losses is lost forever, even if in the course of time the remittance basis is no longer worthwhile and a claim for it is discontinued.
3. Alternatively if the remittance basis is claimed, an election can be made for foreign losses to be allowed for relief, but under this election both UK and foreign losses are pooled and allocated primarily to foreign gains. So the election affects the relief for UK losses which are thereafter no longer automatically set against UK gains. However if the election is made and in a future year the remittance basis is not claimed, all losses are then freely deductible from realised gains.

Those claiming the remittance basis of taxation therefore have to choose between the second and third regimes given above. The choice has to be made for the first fiscal year in which the remittance basis is claimed: it is not possible to leave the choice indefinitely on a "wait and see" basis. However if an election is to be made for the third choice, the time limit is reasonably generous, being the normal time limit for tax purposes which is five years after the 31 January date following the relevant year of assessment. This means that an election in relation to 2008/09 can be made at the latest by 31 January 2015. However, once made, it will then apply for all years in which the remittance basis of taxation operates for the claimant, including years in which the remittance basis applies automatically without a claim (because foreign income and gains for that year are below £2,000).

Where no election is made

If the election referred to at 3 above is not made and the remittance basis is claimed, as already explained relief for foreign losses is thereafter permanently prohibited whilst the taxpayer remains domiciled outside the United Kingdom. On the other hand, there is no restriction on the use of losses realised on UK assets and these

losses will be freely deductible from gains on UK assets, or from gains remitted in respect of foreign assets.

Where the election is made

On the other hand, if the taxpayer chooses to elect for the regime at 3 above, all losses, UK and foreign, are pooled and these losses are set against gains in the following order:

- (a) Against foreign chargeable gains arising in the year to the extent that they are remitted to the UK.
- (b) Against foreign chargeable gains arising in the year to the extent that they are not remitted to the UK.
- (c) Against UK chargeable gains.

Any gains attributed to capital payments from non resident trusts may not be reduced by any losses if the election is made.

It will be appreciated that the election will require a certain amount of record keeping which has not been necessary in the past. It will be necessary for all foreign gains and losses to be calculated, even if not remitted to the United Kingdom, and losses must then be allocated according to the order set out above in each year and a track record maintained every year going forward.

Making the choice

Some guiding principles to assist those who have to choose between regimes 2. and 3. above are as follows.

Those non domiciliaries who have few chargeable assets in the UK, but have significant overseas assets, should probably make the election. This will enable foreign losses to be set against foreign gains which can then be remitted tax free to the United Kingdom, and the absence of UK assets will mean that there is no adverse impact in that regard.

Those with significant UK assets but no significant foreign assets (an unlikely scenario for wealthy non-domiciliaries) may not find it worthwhile to make the election because UK losses will then as a result of that choice be freely deductible from both UK gains and gains remitted from overseas, although there will not be any relief for foreign losses.

If foreign assets are principally held in trust, it may be better not to make the election because gains attributed from the trust with capital payments to beneficiaries will not in any event be attributable for relief against personal losses and so the election will not assist.

If foreign assets are principally held in privately owned offshore companies, it must be remembered that gains realised within the company are attributed each year to

UK shareholders having a more than 10% interest in the company; for non domiciled but resident shareholders, these gains are foreign chargeable gains and are eligible for relief against personal losses and so they should be counted in with personal gains when reaching a decision about whether or not to elect.

Those who have a mix of UK and foreign assets will probably find it beneficial to make the election unless they do not foresee any occasion on which they will need to remit foreign gains to the United Kingdom, when the election will probably not be worthwhile.

Parmentier Arthur Group Limited

**90 Long Acre
Covent Garden
London
WC2E 9RZ**

**7 The Waits
St Ives
Cambs
PE27 5BY**

**Tel: 020 7849 3018
Fax: 020 7849 3171**

**Tel: 01480 465522
Fax: 01480 461221**

Disclaimer

These notes are not intended to be exhaustive and they should not be regarded as such. Neither do these notes offer specific advice. They are merely an outline of the subject matter.

No liability will be accepted in respect of actions taken or refrained from as a result of information given herein or given by the author during the presentation. Specific professional advice should always be obtained.