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High Value Residential Property
The new ATED and SDLT/CGT Changes[1]

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Introduction

1. In this lecture I consider the recent changes to UK residential property taxation, including the introduction by the UK Finance Act 2013 (**FA 2013**) of the new Annual Tax on Enveloped Properties (**the ATED**) and the linked proposed changes to the capital gains tax regime for "non natural persons" holding UK residential properties. I also consider briefly the 7% and 15% SDLT charges introduced by Finance Act 2012.

2. I will consider:-

   (1) The ATED: what it covers and the reliefs;
   (2) The capital gains tax provisions;
   (3) The 7% and 15% SDLT charges;
   (4) The pre-April 2013 advice on restructuring: where we are now and what to do with existing structures;
   (5) How to buy high value residential property in the future;
   (6) The GAAR and DOTAS in this context.

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Background

3. The 2012 Budget contained the announcement of the proposed changes to the stamp duty land tax rates for UK residential property worth more that £2 million. The rate was increased to 7% for purchases of such property from 22 March 2012 (the day after Budget day). In addition, it was announced that legislation would be introduced in the Finance Bill 2012 to provide for the rate of SDLT for "non-natural persons" who acquire such property to be 15%. This was effective from 21 March 2012.

4. As part of the package of measures relating to the taxation of high value residential property announced at Budget 2012 two further proposals for FB 2013 were introduced:-

   4.1. An annual charge on residential properties valued over £2 million owned by certain "non-natural persons" and;

   4.2. The extension of capital gains tax to the disposal by certain non-resident non-natural persons of residential property, interests in such property, or the envelopes in which they are held.

5. The policy objective of the package of changes was stated to be:

   "*Both to ensure that individuals and companies pay a fair share of tax on residential property transactions and to tackle avoidance.*

   This measure [15% SDLT] aims to dis-incentivise the ownership of high value residential property in structures that would permit the indirect ownership or enjoyment of the property to be transferred in a way that would not be chargeable to SDLT. The intention is to stop or reduce the number of properties that will enter such complex ownership structures. Taken together with the introduction of the annual charge in 2013 on such property owned by the same sorts of non-natural persons, this will result in a reduction in the number of high value properties owned in such structures".

6. Additionally, the Consultation Document published in May 2012 provided that:

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"*Responses are sought on whether the proposal is the most effective way or achieving the policy objective or creating more equal treatment between UK residents and non residents in the CGT regime, in particular in the light of the introduction of the annual charge* ***to encourage the de-enveloping of residential property***" (emphasis added).

7. So it can be seen that the main aim of these measures was to counter perceived stamp duty land tax avoidance and to encourage "de-enveloping".

8. There was then a period of uncertainty with regard to certain elements of the proposals to be introduced in 2013, for example how far did the scope of non-natural persons extend, did it include trustees? It is now clear that "*non natural persons*" does not include trustees. Would the capital gains tax changes extend to historic gains or would there be "re-basing" provisions? Some of the draft legislation was published on 11 December 2012 and 31 January 2013 and the Finance Bill provisions themselves on 28 March 2013. There were further amendments at committee stage and the Finance Act 2013 became law on 17 July 2013.

9. The encouragement in the Consultative Document to "de-envelope" (particularly before the introduction of the ATED on 1 April 2013) had to be carefully considered in the light of the potential tax consequences of removing such properties from a pre-existing structure. Consideration had to be given to the most effective new structures going forward.

ATED

10. The ATED (called until the publication of the Finance Bill on 28 March 2013 the Annual Residential Property Tax and now contained in part 3 of the Finance Act 2013) is a new charge to tax:-

"*in respect of a chargeable interest if on one or more days in the chargeable period the interest is a single-dwelling interest and has a taxable value of more than £2 million, and a company, partnership or collective investment scheme*

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meets the ownership condition with respect to the interest".

11. HMRC published technical guidance on 14 August 2013.

12. A chargeable interest means:-

"(*a*) *an estate, interest, right or power in or over land in the United Kingdom, or*

(b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power".

13. Chargeable periods begin with the period 1 April 2013 to 31 March 2014 and are each subsequent period of 12 months beginning with 1 April.

14. "*A single dwelling interest*" is "to be read in accordance with" section 108 FA 2013, which is not really a definition. Section 108(6) provides that a single-dwelling interest in one dwelling is distinct from any single dwelling interest in another dwelling, even if the dwellings stand successively on the same land.

15. A building or part of a building counts as a "*dwelling*" at any time when:-

15.1. it is used or suitable for use as a single dwelling; or

15.2. it is in the process of being constructed or adapted for such use (section 110(1)).

16. Land that is, or is at any time intended to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land) is taken to be part of that dwelling at that time (section 112(2)).

17. Section 109 FA 2013 makes provision for the situation where different interests are held in the same dwelling and section 110 FA 2013 for interests held by connected persons. Sections 115, 116 and 117 deal with parts of a greater whole, dwellings in the grounds of other dwellings and dwellings in the same buildings.

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18. A company meets the ownership condition with respect to a single-dwelling interest on any day if on that day the company is beneficially entitled to the interest either solely or jointly with another person. It will be noted that non natural persons also include partnerships and collective investment schemes. I focus on companies in this lecture.

19. The taxable value of the property has to be more than £2 million on any day: "*the relevant day*" and that is its market value at the end of the latest day that falls before that day and is a valuation day in the case of that interest: section 102(1) FA 2013.

20. The "*valuation dates*" include:-

    20.1. 1 April 2012;
    20.2. each 1 April falling 5 years, or a multiple of 5 years, after 1 April 2012;
    20.3. the effective date of any substantial acquisition by the company of a chargeable interest in or over the dwelling concerned;
    20.4. the effective date of any substantial disposal of part (but not the whole) of a single dwelling interest.

21. For the purposes of the valuation dates, the disposal of part includes the grant of a chargeable interest out of the single dwelling interest but does not include the grant of an option.

22. Properties will, therefore, need to be re-valued every 5 years, so a further valuation will be needed at 1 April 2018, when the relevant valuation date will be 1 April 2017.

23. The "*chargeable person*" is liable to pay the tax and that is, in our case, the company: section 96 FA 2013. There is provision made where persons are jointly entitled to an interest: the company and the persons are jointly and

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severally liable for the tax: section 97 FA 2013.

24. The amount of tax charged per chargeable period is on a sliding scale of 4 rate bands: £15,000 for properties between £2 million and £5 million up to £140,000 for properties worth more than £20 million: section 99 FA 2013. The amounts will be indexed from September 2013 in line with the consumer prices index: section 101 FA 2013.

25. Taxpayers will be able to ask HMRC to confirm the banding they will accept the property is within, by sending their valuation for a Pre-Return Banding Check (**PRBC**). HMRC will only provide a PRBC to those who reasonably believe that their property valuation falls within a 10 per cent variance of a banding threshold.

26. HMRC will only confirm that they agree to the banding proposed and not the specific valuation of the property. That confirmation must not be used for any other purposes. HMRC published guidance in March 2013 to tell taxpayers how to ask for a PRBC, which is available on the HMRC website. There is also a PRBC application form available online.

27. The guidance notes that in some cases, the inside of the building might need to be examined as part of the check. HMRC will be able to enquire into returns and challenge valuations, but they state that they will normally be able to accept valuations prepared by a professional property valuer.

28. The ATED is charged according to the number of days that the company is within the charge and a claim may be made for relief if one or more days is relievable by virtue of section 132 to 150 FA 2013. The relief is called "*interim relief*" (section 100 FA 2013) and must be claimed in the ATED return (which is by self assessment: section 159 FA 2013) or by amending such a return.

29. The completed return and payment of the tax must be made by 30 April at the beginning of each ATED period. An ATED period lasts for one year and begins on 1 April.

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30. For the first year of ATED only, which is the full 12-month period beginning 1 April 2013, there is a transitional arrangement; the return will be due by 1 October 2013 and payment will be due by 31 October 2013.

31. For the ATED period beginning 1 April 2014 and for all future years, the return and the payment will be due by 30 April. For example, for the ATED period 1 April 2014 to 31 March 2015, both the return and payment are due by 30 April 2014.

32. If the dwelling first falls within ATED on a date after 1 April in an ATED period, then the return and payment are due within 30 days where purchased or 90 days where the dwelling is newly built. For example, if you buy a property on 1 July, your return and payment would be due on 31 July.

33. The legislation contains detailed rules regarding properties entering and leaving the scope of ATED. There rules deal with:-

    33.1. Substantial acquisitions/ disposal of properties (section 103);
    33.2. New dwellings (section 124);
    33.3. Dwellings produced from other dwellings (section 125);
    33.4. Demolition (sections 126 to 129);
    33.5. Conversion to non-residential use (section 130)
    33.6. Damage to a dwelling.

34. The reliefs that have been introduced are therefore very important. The reliefs apply, broadly to ATED, the new CGT liability and to the increased 15% SDLT charge.

35. They are designed to assist "*genuine businesses carrying out genuine commercial activity*".

The reliefs

36. In summary the primary reliefs contained in sections 132 to 150 FA 2013 apply

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to the following:-

36.1. property rental businesses (sections 133 to 136);
36.2. property development businesses (sections 138 to 140);
36.3. property trading businesses (sections 141 to 142);
36.4. properties open to the public at least 28 days a year and run as a business (section 137);
36.5. employee or parnter accommodation, provided the occupier is not too closely connected with the company/partnership and broadly, owns less than a 10% share in the business (sections 145 to 147);
36.6. farmhouses occupied by a working farmer (sections 148 and 149);
36.7. financial institutions acquiring dwellings in the course of lending (sections 143 and 144);
36.8. providers of social housing (section 150).

37. There is power for the Treasury to modify the reliefs by regulation (section 156).

38. Before relying on a relief it will be necessary to review the exact scope of the wording of the relief and, in particular, that there is no non qualifying occupation.

39. The effect of the reliefs, if they apply, are that for a chargeable period, the adjusted chargeable amount is calculated on the basis that the chargeable person is not within the charge with respect to the interest on any relievable day (section 132(2) FA 2013).

40. We will look at sections 133 to 136 (property rental) by way of example. A day is relievable in relation to a single dwelling interest if on that day the interest-

40.1. is being exploited as a source of rents or other receipts (other than excluded rents) in the course of a qualifying property rental business carried on by a person entitled to that interest, or
40.2. steps are being taken to secure that the interest will, without undue

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delay, be so exploited in the course of a qualifying property rental business that is being carried on, or is to be carried on, by a person entitled to the interest.

41. A "*qualifying property rental business*" means a property rental business that is run on a commercial basis and with a view to profit. A "*property rental business*" is as defined in the Corporation Tax Act 2009 (but without reference to whether the profits are charged to corporation tax). "*Excluded rents*" includes, *inter alia*, rent from caravan sites, electric way lines and pipelines.

42. "*Without undue delay*" in section 133(1)(b) means "*without delay except so far as the delay is justified by commercial considerations or cannot be avoided*".

43. A day is not, however, relievable, if on that day a non-qualifying individual is permitted to occupy the dwelling.

44. Section 135 makes provision for non-qualifying occupation (look forward and look back) and section 136 defines "*non-qualifying individual*". This includes an individual entitled to the interest (otherwise than as a member of a partnership), an individual who is a connected person, a relevant settlor where the trustee is connected with the person entitled to the interest, the spouse or civil partner of a connected person or of a relevant settlor; a relative of a connected person or of a relevant settlor and a relative of the spouse or civil partner of a connected person or of a relevant settlor and their spouses or civil partners. "*Connected persons*" is defined in section 172 and, broadly incorporates the definition in section 1122 CTA 2010.

45. If on a day a non-qualifying individual is permitted to occupy the dwelling, no subsequent day in that chargeable period, or in any of the subsequent three chargeable periods is treated as relievable: section 135(2) FA 2013. In addition, an earlier day in that or the preceding chargeable period is not relievable (unless there has been an intervening relievable day): section 135(5). Accidental occupation must be avoided!

46. Section 134 applies where a rental property is being prepared for sale or

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demolition. A day "*day X*" is relievable if, on day X the dwelling is unoccupied and day X is preceded by one or more days that are relievable under section 133 and all days preceding day X are relievable and:

46.1. Steps are being taken to secure that the interest will be sold without undue delay; or

46.2. Steps are being taken to demolish the dwelling without undue delay and if a new dwelling is to be constructed it will be used in a relievable way;

46.3. Steps are being taken for conversion and the new dwelling will be used in a relievable way;

46.4. Steps are being taken to convert into a building other than a dwelling.

Exemptions

47. There are also exemptions for charitable companies (sections 151 and 152), for public bodies (section 153), for bodies established for national purposes (section 154) and for dwellings conditionally exempt from inheritance tax until there is a chargeable event (section 155).

CGT changes

48. The extension of CGT to non-UK resident non-natural persons has seen the most change since the consultation document was published, including changes to the definition of a non-natural person, the introduction of a rebasing mechanism, details of how the CGT will be calculated and confirmation of certain reliefs.

49. The new provisions are contained in schedule 25 to the FA 2013 and amend the Taxation of Chargeable Gains Act 1992 (**TCGA**).

When does it apply from?

50. Unlike ATED, which applies from **1** April 2013, from **6** April 2013, CGT applies to disposals of UK residential property valued at over £2 million by both UK and non-UK resident non-natural persons.

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Who is affected?

51. The definition of a "*non-natural person*" for CGT purposes is now in line with the ATED (and SDLT) definition.

52. The new CGT charge therefore applies to companies, non-natural persons which are members of partnerships which include companies, and collective investment vehicles.

53. For consistency, the CGT regime applies to disposals of high value residential property by UK non-natural persons (which were until 6 April 2013 subject to corporation tax, including tax on gains they realised on residential property): new sub-section 2(2A) TCGA 1992. This means that all non-natural persons – both UK and non-resident – within the scope of the ATED, will be subject to CGT.

54. Section 2B(1) TCGA provides that:

"*A person (other than an excluded person) ("P") is chargeable to capital gains tax in respect of any ATED-related chargeable gain accruing to P in a tax year on a relevant high value disposal*".

55. A person is "*excluded*" if:-

"*the person is an individual, the trustees of a settlement or the personal representatives of a deceased person and –*

(a) the gain accrues on a disposal of any partnership assets and the person is a member of the partnership, or
(b) the gain accrues on a disposal of any property held for the purposes of a relevant collective investment scheme and the person is a participant in relation to the scheme".

56. It is perhaps odd that there is no express exemption for trustees (except in a partnership or collective investment situation) but gains are only subject to a CGT charge if the property has been in the ATED regime and so property held by a trust directly should not therefore fall within the legislation (even if one of

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the trustees is a company).

57. The Explanatory Notes on Schedule 24 (the FB provisions) confirms at paragraph 8 that:-

> "*where individuals, trustees and personal representatives hold property directly – not via a partnership or through a collective investment scheme – they are also outside the scope of a charge under section 2B. They will not be chargeable to ATED and their gains will therefore not be "ATED-related".*

What is the charge?

58. CGT is charged on the total amount of ATED-related chargeable gains accruing to P in the tax year on relevant high value disposals, after deducting ring-fenced ATED-related allowable losses in relation to that year: section 2B(3) TCGA 1992.

59. The Treasury confirmed in January 2013 that because non-resident non-natural persons are not currently subject to the CGT regime, this charge will apply only to that part of the gain that accrues on or after 6 April 2013, thereby introducing an effective tax free uplift in base cost to 6 April 2013 for disposals by non-UK resident non-natural persons.

60. "*Ring-fenced ATED-related losses*" are defined in section 2B(10) and are, broadly ATED allowable losses accruing in a tax year that have not been allowed in any previous year (not earlier than 2013-14).

61. A "*relevant high value disposal*" (section 2C) is one where conditions A to D are met:

(A) the disposal of the whole or part of a chargeable interest;
(B) the disposed of interest has at any time during the relevant ownership period been or formed part of a single-dwelling interest;
(C) P … has or have been within the charge to ATED with respect to that single dwelling interest on one or more days in the relevant ownership

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period which are not relievable days in relation to that interest;

(D) The amount or value of the consideration for the disposal exceeds the threshold amount.

62. Only direct disposals will be caught; indirect disposals (e.g., the sale of shares in a property-holding company) will not be caught.

63. If it is not a part disposal and P has not made any related disposals, the threshold is £2 million (subject to joint interests): section 2D(2) TCGA 1992.

64. If this is not satisfied, the threshold is a fraction of £2 million: section 2D(3).

65. Where there are joint interests, it is the joint share fraction of £2 million: section 2D(5).

66. "*Related disposals*" are those made within 6 years ending with the day of the current disposal, but not before 6 April 2013.

67. There are restrictions of losses where the consideration for the disposal is less than the threshold amount for that disposal: section 2E TCGA 1992 and tapering relief for gains where the CGT chargeable on the full gain would leave the vendor worse off than they would have been if they had sold their property for less than the threshold amount: section 2F TCGA 1992.

68. The rate of tax is 28%: section 4(3A) TCGA 1992.

69. Section 8 TCGA 1992 contains rules for taxing gains and relieving losses of companies chargeable to corporation tax. Section 8(4A) will provide that these rules do not apply to ATED related gains or losses of such companies.

70. New section 13(1A) prevents ATED related chargeable gains being attributed to participators under section 13 TCGA 1992.

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71. Section 16 TCGA 1992 is amended to allow a loss that accrues to a person resident outside the UK to be an allowable loss where a gain would have been chargeable under new section 2B.

72. New section 57A and Schedule 4ZZA make provision in relation to the computation of the gains and losses, including whether the gains and losses are ATED-related. Section 57A(2) provides that if the effect of Schedule 4ZZA applying would be that no ATED related gain or loss accrues on the disposal, for the purposes of the TCGA 1992 the gain or loss on the disposal is to be computed ignoring the Schedule and is not ATED related.

73. There is a new exemption for certain EEA UCITS (section 100A TCGA 1992), broadly, those which are not open-ended investment companies or unit trust schemes.

74. Section 171 TCGA 1992 is modified so that group relief on a no gain/no loss basis will not apply to a disposal where (as a result of not applying no gain/no loss treatment) the disposal gives rise to a gain or loss that is ATED related.

75. New section 187A modifies the operation of the exit charge for companies so that where the deemed disposal generates ATED related gains taxable under section 2B or losses the gain is not chargeable immediately (or the loss allowable). Instead the ATED related gain or loss is treated as coming into charge (or being allowable) at a later time when the company disposes of the asset.

76. Importantly the scope of section 271 TCGA 1992 is extended so that gains which accrue on the disposal of investments held for the purposes of "*overseas pension schemes*" within section 150(7) FA 2004 are not chargeable gains.

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77. Paragraphs 2 to 4 of Schedule 4ZZA provides rules for computing the ATED related gain (and rules for losses) where the chargeable interest was acquired before 6 April 2013 and no election has been made under paragraph 5. This effectively allows only gains post 6 April 2013 to be brought into charge.

78. Paragraph 5 allows P to elect that paragraphs 2 to 4 do not apply. The election is irrevocable and must be made in a capital gains tax return (or amendment to the return) for the tax year in which P disposes of the interest or for the first tax year after 2013-14 in which P makes a part disposal of the interest. The election only covers the chargeable interest in respect of which it is made. Contrast the rebasing election for trustees in relation to the remittance basis introduced in 2008.

79. The election will be worth considering if the original base cost was higher than the market value, or where much of the pre-6 April 2013 element of the chargeable gain would be exempt from the ATED rules because of reliefs, or where there are ATED-related losses from other transactions.

Reliefs

80. The reliefs set out above for ATED will also apply to the extended CGT charge applicable to non-UK resident and UK resident non-natural persons so those carrying out genuine business activities will be excluded from the charge.

81. Under current CGT anti-avoidance rules, in certain circumstances, some gains realised by non-UK non-natural persons (such as companies and trusts) are already taxable on UK resident individuals.

82. The consultation document did not address the interaction between such provisions and the proposed rules for extending the CGT regime. This "*will be considered with the aim of avoiding unnecessary complexity and to ensure a sensible prioritisation of charging provisions*".

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83. The Government announced, in its summary of responses to the consultation, that the new extended CGT charge will be given precedence over current anti-avoidance provisions.

The 7% and 15% SDLT charges

84. As noted above from 22 March 2012, the acquisition of wholly residential property for a consideration of more than £2 million is charged at the new SDLT rate of 7% (previously 5%): see FA 2012 section 213.

85. On 21 March 2012, a 15% rate of SDLT was introduced on acquisitions of residential dwellings costing more than £2million by non-natural persons: section 55A and Schedule 4A FA 2003, inserted by section 214 and Schedule 35 FA 2012.

86. It should be noted that these changes were introduced differently, the 7% rate amends Table A in section 55A and the 15% charge is stand-alone. The definitions of "*residential property*" and "*dwelling"* are different. It should be noted that mixed residential and non-residential property is still charged at 4% on purchases over £500,000 (as long as the purchaser is not a non-natural person).

87. The purchase of six or more dwellings as part of a single transaction are taxed as non residential property at not more than 4%: section 116(7) FA 2003.

88. The most effective way to ensure that the 15% charge does not apply is not ensure that the purchaser is not a non natural person.

Pre-April 2013 action

89. In relation to what needed to be done for each individual client before the introduction of ATED and the CGT changes from April 2013 (bearing in mind

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the policy of encouraging taxpayers to "de-envelope" existing structures), specific advice was, of course, necessary on all the individual factors of each case. For example, if inheritance tax excluded property relief protection was important or privacy is a main aim, the effect of the CGT charge only applying to gains from April 2013 may have been to shift the balance in favour of retaining a corporate structure and paying ATED or utilising the reliefs. The precise nature of the structure needed to be considered, for example, was there just a company or was there an overlying trust as well.

90. Other important factors that needed to be considered were the value of the property and consequently how large the ATED charge will be. Another important consideration was the likely source of funds to pay the charge. It was important to consider the likely use of the property in the short and medium terms to see whether any reliefs were likely to be available.

91. In relation to the pre and post April position, valuations will need to be obtained as at April 2013 for those relying on the effective rebasing and perhaps at 1 April 2012 to establish banding. Consideration will need to be given to electing out of the rebasing if the property is standing at a loss (as noted above this does not have to be done until the return reporting the disposal but is irrevocable).

92. Timing was important if "de-enveloping" was considered the preferable route. The ATED came into force on 1 April 2013 (Easter Monday!).

93. If liquidation was considered (if there were no adverse tax consequences on the application of the existing anti-avoidance rules, for example for foreign domiciliaries, and no significant SDLT), professionals offshore were suffering heavy demand, for example, local company and property law issues needed consideration. The memorandum and articles of the offshore company would need to have been checked (as well as the local law) to ensure that the company had all the relevant powers to restructure. It had to be checked whether consents were needed (for example from a landlord) in order to transfer the property. If there was outstanding borrowing this had to be factored into the timetable.

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Consideration had to be given to alternative ways of mitigating the IHT liability (insurance, debt).

94. In relation to one popular route (the use of two trusts, the sale of the shares in the company (thereby creating a debt in favour of the former shareholder) followed by the liquidation of the company) these arrangements will now need to be reconsidered as a result of Schedule 36 FA 2013, as the treatment of liabilities for inheritance tax purposes as in some arrangements the debt will no longer be deductible.

How to buy high value residential property in the future

95. New purchases: Each new property purchase will need to be considered on its own facts taking into consideration a number of factors, including:

95.1. The tax status of the individual – residence and domicile;
95.2. The proposed use of the property – occupied or let;
95.3. The funding of the purchase – debt or no debt;
95.4. The personal circumstances of the individual – marital status, age, length of intended ownership
95.5. The GAAR.

GAAR

96. The GAAR came into force on Royal Assent of the Finance Bill (17 July 2013).

97. Other speakers have covered the introduction of the GAAR and its implications. Close examination of the new guidance will be necessary in relation to the acquisition of high value residential property. See, for example, example 31 of Section D of the Guidance (published on 16 April 2013 and with effect from 15 April 2013):-

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*"**D31 Lending to fund UK real estate by foreign domiciliary***

This example illustrates how standard tax planning may have increasing levels of abnormality attached to it. A number of the alternatives are, nonetheless, clearly on the non-abusive side of the GAAR boundary. However, the example aims to illustrate at approximately what point that boundary is crossed, although – given the condensed nature of the illustration – this will always be highly fact dependent. The example also aims to demonstrate a situation (option 7) where the arrangements might fail a single reasonableness test, but be saved by the double reasonableness test.

D.31.1 ***Background***

D.31.1.1 IHT is charged on the worldwide assets of someone who is domiciled in the UK, and on the UK assets of someone who is domiciled abroad. Similarly, property situated abroad and held in a trust that was set up by someone who was domiciled abroad is excluded from charge, whereas UK assets owned by such a trust are subject to IHT.

D31.1.2 Foreign domiciled individuals and the trusts created by them may therefore consider using borrowing when acquiring UK real estate, particularly where residential property will be occupied by the individual or their family. Borrowing is now more likely because the alternative strategy to mitigate IHT by property ownership through a corporate structure may trigger the new annual tax on enveloped dwellings and potentially also capital gains tax.

D31.2 ***The arrangements***

D31.2.1 R is domiciled abroad and wishes to buy a valuable house in the UK for his occupation. He has a number of options

1. R buys the house in his own name, using his own cash resources to fund the purchase.

2. R settles cash from his own resources into a trust that purchases the house. R is a beneficiary of the trust. The reasons for using a trust may be partially non-tax related and may include a desire for confidentiality, to avoid complex probate procedures, or to provide an automatic succession plan on R's death.

3. R even if he could have funded the purchase from his existing resources, chooses to borrow from a bank to fund a large part, say 70%, of the purchase price.

4. R (as in 2. above) partially funds the trust. The trustees (as in 3. above) then borrow the remainder of the purchase price from a bank.

5. R deposits foreign investments with a bank thereby enabling the bank to lend a greater amount (say 95%) to fund the purchase of the property. The borrowing is again secured on the property.

6. R having funded a trust to the value of, say, 5%, of the purchase price of the

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house, agrees to guarantee the trustees' borrowing. This enables R's trust to borrow the remainder of the purchase price from a bank. The borrowing is again secured on the property.

7. R has an existing substantive discretionary trust which he settled many years ago. R is a beneficiary of the trust, but his adult children are also beneficiaries and they have all benefitted from the trust over the years. The trustees previously owned a UK house, but sold it a couple of years ago. The trustees have been looking around for a new UK property suitable for R and his children to use as each of them visit the UK for a few weeks a year. The trustees could afford to buy the new house using existing resources but instead they accept an offer from R to lend them the purchase price via an offshore company that is wholly owned by R. The loan is interest free and repayable on demand. The company owned by R secures the loan on the house.

8. R settles cash from his overseas resources into a newly established trust which then lends it back to him via an underlying company for the purchase of the house in his own name.

9. R adds cash from his overseas resources to a trust, known as the Loan Trust, where he is settlor and beneficiary. His spouse or other relative sets up another trust, known as the Property Trust, which is funded with, say, £1000 cash. R adds no funds to the Property Trust. The Loan Trust forms an overseas company into which the cash is transferred and the company lends the cash to the Property Trustees who acquire the UK property that R wishes to occupy. The loan is repayable on demand and may be interest-free, interest-bearing or index-linked. The Property Trustees incur no personal liability as the lender may have recourse to the house only.

D31.3 ***The relevant tax provisions***

Sections 48(3)(a) and 162(4) IHTA 1984;

Sections 102(3) and 103 and para 5(4) Sch 20 FA 1986; and

Para 11 Sch 15 FA 2004.

D31.4 ***The taxpayer's tax analysis***

D31.4.1 In options 1 and 2 above there is no tax advantage and indeed additional ten year charges arise in relation to option 2. These options are included to illustrate the range of alternatives which R has and by way of contrast with the following options.

D31.4.2 In options 3 and 4 the borrowing provides a clear inheritance tax advantage compared to options 1 and 2. As R is not domiciled in the UK the cash he retains personally abroad is not subject to inheritance tax and the UK property is devalued by commercial borrowing.

D31.4.3 The same tax advantage, albeit to a greater extent, is claimed to apply in options 5 to 9.

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D31.4.4 The reservation of benefit rules do not apply to options 1, 3, 5 and 8 because R owns the property. There is a reservation of benefit in options 2, 4, 6 and 7, but the taxpayer argues that this is only on the net value of the property.

D31.4.5 In option 8, the liability is not, it is claimed, caught by s103 FA 1986 as a self-generated liability due to it being funded with excluded property (see s103(4) FA 1986).

D31.4.6 In option 9, there is no charge on the death of R because he has not gifted any property to the Property Trust (so the reservation of benefit provisions do not apply) and he is a beneficiary only of the Loan Trust that holds excluded property. As he has made no gift to the Property Trust, s102 and para 5(4) Sch 20 FA 1986 are not in point. If he has made such a gift then it is argued that the UK property is devalued by the loan taken out to acquire it.

D31.4.7 Pre-owned assets charge does not apply to options 1, 3, 5 and 8 since R has made no disposal of the property and does not satisfy the contribution condition since the property has been acquired by him and not a third person. It does not apply to the other options on the basis that even if the contribution condition is satisfied, the loan in which R reserves a benefit (or in the case of option 2 the house itself) derives its value from the house and therefore protection under para 11(3) Sch 15 is available.

D.31.4.8 The liabilities are incurred to buy the UK property and therefore on the face of it are not disallowed by [Sch 36 FA 2013].

D31.4.9 HMRC does not accept R's analysis of the legislation and in particular the deductibility of loans against UK property in which he reserves a benefit under options 2, 4, 6 and 7. The GAAR analysis below should be read with this point in mind.

D31.5 ***What is the GAAR analysis under s204(2) of FB 2013****?*

D31.5.1 Are the substantive results of the arrangements consistent with any principles on which the relevant tax provisions are based (whether express or implied) and the policy objectives of those provisions?

D31.5.2 Do the means of achieving the substantive tax results involve one or more contrived or abnormal steps?

It is reasonable to conclude that the obtaining of a tax advantage was the main purpose or one of the main purposes of options 7 to 9. This may not be so in relation to options 3 to 6. R might prefer to borrow from a bank to allow him more flexibility to make other investments with his cash or to preserve his liquidity.

The intention behind the inheritance tax legislation is to tax UK assets and UK domiciliaries. The foreign assets of foreign domiciliaries are excluded property being outside the territorial scope of inheritance tax in the first place, whereas any UK assets they own are subject to tax.

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Options 3 and 4 are an application of the rules whereby IHT is chargeable on the net value of UK assets. The fact that R or his trustees could have funded the purchase using foreign investments is irrelevant: R is not compelled to turn assets which are outside the territorial scope of the tax into assets which are subject to tax, whatever his motivation for the borrowing. R's or the trustees' borrowing is a normal commercial transaction and is not contrived or abnormal. While reservation of benefit may be in point the GAAR is not thought to apply.

Options 5 and 6, similarly, represent a commercial decision by R or his trustees. R or his trustees take the commercial risks associated with the additional borrowing and R takes the economic downsides of depositing funds in support of the borrowing/guarantee. Choosing to borrow a higher amount is similarly neither contrived nor abnormal. R takes the economic consequences of borrowing commercially. He may lose the cash he has chosen to place elsewhere. It can reasonably be regarded as a reasonable course of action.

In option 7, loans to trusts do occur for all sorts of non-tax reasons and therefore cannot be considered in themselves to be necessarily abnormal or contrived. Even though the loan is tax-motivated and (in some senses) self-generated, it involves a single straightforward step. The position might well be different, however, if the trust were not established for some time already or substantive: for instance if R were the sole or principal beneficiary or able to direct the trustees or revoke the trust. A loan to such a newly created trust might be considered a contrivance. In the above example the loan may not be mainly tax motivated anyway e.g. the trustees may wish to preserve cash for liquidity purposes, but even if it were the arrangement is still not necessarily abusive.

In option 8, the cash goes in a circle back to the settlor via a trust and loan arrangement. The position might be different under the GAAR if the trust had been in existence for some time so the gift was not made in contemplation of a loan back. The settlor sets up a trust as a vehicle to lend to himself. The setting up of the trust and company is done simply to enable a loan to be made back to the settlor and this is a contrived step. S103 FA 1986 was designed to stop assets being given away that are then lent back by the donee and it may be thought that option 8 is using a possible loophole in s103 to circumvent the intended policy.

In option 9, the combination of a nominal-value settlement specifically set up to own the property coupled with the establishment of a separate loan trust and a corporate vehicle underlying it which is then used to make a loan which is on a non-recourse basis is on these facts set up only to achieve an artificial tax deduction. And, while taken individually, the steps may be considered normal, when taken in combination they may be considered abnormal. However, each case would be taken on its own facts and a situation where, for instance, both trusts were substantial and existing trusts or where the loan was on fully commercial terms or where the property trust was established for a different beneficiary apart from the settlor might be considered differently (see option 7

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above).

D31.5.3 ***Do the tax arrangements accord with established practice and has HMRC indicated its acceptance of that practice****?*

Neither of the last two options accord with established practice and HMRC has not indicated acceptance of the interpretation that foreign domiciliaries are not caught by s103 as a matter of principle.

D31.6 ***Conclusion***

D31.6.1 Options 1 and 2 do not result in a tax advantage and are included above merely to illustrate the tax advantage of the following options.

D31.6.2 Options 3 and 4 are straightforward applications of the legislation and would not be caught by the GAAR. Similarly, options 5 and 6 involve commercial arrangements which are neither contrived nor abnormal and HMRC would not seek to invoke the GAAR against them.

D31.6.3 With option 7, while economically the liability appears to be self-generated, the trust is of substance and the arrangements are not necessarily contrived or abnormal.

D31.6.4 Options 8 and 9, on these particular facts, would be caught by GAAR. The liabilities would be ignored in calculating the tax due on the house and the transaction counteracted on this basis. However, as with option 7, each case would have to be considered on its full facts and it is not impossible that different scenarios might potentially be saved from the GAAR by the double-reasonableness test.

D31.6.5 With all the options (but particularly options 7, 8 and 9) HMRC would consider whether other legislative means at their disposal should be used to challenge the claimed tax treatment".

DOTAS

98. FA 2013 added ATED to the list of taxes covered by DOTAS: Schedule 35 paragraph 2.

99. HMRC have now published regulations setting out the types of ATED arrangements to be disclosed to HMRC and which apply from 4 November 2013: The Annual Tax on Enveloped Dwellings Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulation 2013.

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100. The arrangements are prescribed and disclosable if the do not comprise excluded arrangements and as a result of the arrangements, or any element of the arrangements –

(a) a company, partnership or CIS ceases to meet the ownership condition in respect of that chargeable interest;

(b) the taxable value of the chargeable interest is reduced to £2 million or less; or

(c) the taxable value of the chargeable interest is reduced with the consequence that the chargeable interest falls within a lower tax band than it otherwise would.

101. Excluded arrangements include non connected arm's length arrangements, arrangements within groups of companies, company distributions where the transferee meets the ownership condition and where the transfer constitutes as settlement.

A final note - escape for trustees - PPR

102. The final CGT provision as first published (clause 18) provided:-

"Where section 225 of TCGA 1992 (private residence occupied under terms of settlement) applies in relation to a gain to which section 2B of that Act (companies etc chargeable to capital gains tax on disposals of residential property) applies, section 225(a) has effect as if the latest time for giving a notice under that provision were the time determined under that provision or, if later, 5 April 2015.

103. This relates to extending the time limit for notices where two properties are an individual's main residence for PPR. Section 225 does not, however, apply where the property is held by an underlying company as it is not ordinarily "occupied under the terms of the settlement" in these circumstances.

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104. It has been removed but shows that in the original proposals, the definition of non-natural persons was to include trustees.

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