

Offshore Trusts - Payments To UK Resident but Non Domiciled Beneficiaries: The Rebasing Election

Background

Finance Act 2008 made substantial changes to the taxation of individuals who are UK resident but not UK domiciled with effect from 6th April 2008. These changes have a significant impact on offshore structures (trusts and closely held companies of trusts) with UK resident but non-domiciled beneficiaries. In particular, capital gains realised in such a structure after 5th April 2008 will be attributed to a UK resident but non-domiciled individual who receives a capital payment from the trust after 5th April 2008.

What is the rebasing election

Whilst there is no automatic protection for UK resident but non-domiciled beneficiaries from capital gains tax relating to gains that had built up but not been realised by 6th April 2008, the rebasing election gives the opportunity to acquire such protection. The extension of the provision which attributes gains to UK resident but non-domiciled recipients only applies where the gain attributed is realised after 5th April 2008. In addition, the rebasing election allows trustees to limit the Capital Gains Tax exposure of non-UK domiciled beneficiaries to gains which had accrued but not been realised before 6th April 2008.

It should be noted that the rebasing election does not trigger a deemed disposal of trust assets i.e. it does not change their base value for the purposes of calculating the capital gain. It is merely a mechanism for restricting the tax charge (under section 87 of the Taxation of Chargeable Gains Act 1992 (TCGA 1992)) for UK resident but non-domiciled beneficiaries of offshore trusts who receive a capital payment after 5th April 2008.

The Rebasing Election for these purposes should be distinguished from the automatic rebasing which applies for the purposes of the ATED (Annual Tax on Enveloped Dwellings)/Related Capital Gains Tax introduced in Finance Act 2013.

Effect of election

If the election is made, where the trustees dispose of an asset held by the trust after 5th April 2008 the element of the gain which relates to the period of ownership prior to 6th April 2008, although attributed, is not taxable on the UK resident but non-domiciled beneficiary when they receive a capital payment which is matched to that gain. (Although it should be noted that post 5th April 2008 gains will be matched to capital payments in priority to pre 5th April 2008 gains on a Last In First Out basis).

The gain is not time apportioned. The calculation of the post 5th April 2008 element of the gain is the difference between the sale proceeds and the value of the asset at 5th April 2008. Valuations will therefore need to be obtained as at 5th April 2008.

Whether an election improves the tax position will depend upon the history of an asset, however, it cannot put the beneficiary in a worse position than if the trustees did not make such an election. The tax payable by a beneficiary will not be increased.

Procedure and Time Limits

The election needs to be made by the trustees. The election is irrevocable and applies to all the assets in the trust structure, including assets held in underlying non-resident close companies. You cannot specify which assets you want to include in the election.

The election is made on Form RBE1. The form asks for the name of the Settlement, the date it was created, the trustees names and addresses and whether a capital payment has been made to a UK resident beneficiary or a transfer of property has been made to another trust.

An election must be made on or before 31st January following the end of the tax year in which the earlier of the following occurs after 5th April 2008;

- The trustees make a capital payment to a UK resident beneficiary. Although the relief only affects individuals, the trigger is any capital payment made to any beneficiary, whether an individual, company or charity, regardless of domicile and whether or not the funds are remitted to the UK. Capital payment includes benefits such as interest-free loans and rent-free occupation of property.
- The trustees transfer assets to another trust and section 90 of TCGA 1992 applies. Where section 90 applies a proportion of the gains realised in the Transferor Settlement are transferred across to the Transferee Settlement.

The trustees can make an election at any time; they do not have to wait until one of the above events occur before making an election. The election only has to be made once; it does not need to be made every year.

Considerations for Trustees

Trustees will need to consider all of the circumstances relating to a particular trust in order to decide whether or not to make a rebasing election. Given the strict time limits, this is something that trustees will need to address now.

The key questions for trustees are:

- Was there an event in the UK tax year ending 5th April 2014 which has triggered the time limit?
- Are there (or is there any possibility there may be in the future) UK resident but non-domiciled beneficiaries?
- Did the structure have assets standing at a capital gain at 5th April 2008?

Conclusion

Trustees will need to be aware of the time limits imposed by the Finance Act 2008 and the procedure involved in making the irrevocable election.

Consideration needs to be given not only to current beneficiaries but also to future potential beneficiaries of the trust and their residence/domicile status. Even where the trust currently has no beneficiaries that will benefit from the election they may do so in the future. Furthermore, even if the time limit has not started running Trustees may wish to consider making the election in any event to avoid the possibility of missing a trigger event in the future.

For further information or to discuss any of the issues raised in this briefing note, please contact a member of the Rooks Rider Solicitors' team:



Karen Methold
Partner
Head of Wealth Planning
+44 (0)20 7689 7112
kmethold@rooksriders.co.uk



Nicholas Jenkins
Managing Partner
Wealth Planning
+44 (0)20 7689 7161
njenkins@rooksriders.co.uk



Christopher Cooke
Senior Partner
Corporate & Wealth Planning
+44 (0)20 7689 7110
ccooke@rooksriders.co.uk



Robert Drysdale
Associate
Wealth Planning
+44 (0)20 7689 7168
rdrysdale@rooksriders.co.uk



Jeremy Duffy
Solicitor
Wealth Planning
+44 (0)20 7689 7185
jduffy@rooksriders.co.uk



Elena Tzialli
Solicitor
Wealth Planning
+44 (0)20 7689 7141
etzialli@rooksriders.co.uk



Rooks Rider Solicitors LLP
Challoner House
19 Clerkenwell Close ■ London ■ EC1R0RR

Disclaimer:

Please note that the information on the law contained in this bulletin is provided free of charge for information purposes only. Every reasonable effort is made to make sure the information is accurate and up to date, but no responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by the author or the firm. The information does not, and is not intended to, amount to legal advice to any person.