Non residents disposing of residential property

From April 2015 a capital gains tax charge will be introduced on future gains made by non-residents disposing of UK residential property. This is a fundamental change to the treatment of non-residents, and a consultation on how best to introduce it will be published in early 2014.

This change highlights the need for non-residents to carefully consider their tax position when acquiring and disposing of property in a foreign country. In general, most countries do tax non-residents when they dispose of residential property, and the proposed changes will bring the UK into line with this underlying tax treatment.

This article provides some initial insight into how various countries tax non-residents disposing of residential property. From the countries considered, it can be seen that there is a remarkable variety of treatment. Not surprisingly, no two tax systems are the same, and specific local advice will be necessary to appreciate the intricacies of the applicable tax regime.

I am grateful to the contributions provided by the member firms of HLB International in each of the countries considered in this article.

AUSTRALIA

Non-residents are subject to capital gains tax (CGT) only on disposals of assets that qualify as 'Taxable Australian Property' (TAP). TAP is defined as including Taxable Australian real property, being direct interests in Australian real estate and certain mining, quarrying or prospecting rights, as well as indirect Australian real property interests held through a chain of entities in certain circumstances. While the CGT exclusions for non-residents have increased in the last few years, Australian real estate has always been taxed to both residents and non-residents, and this is unlikely to change in the near future.

In Australia CGT is imposed under the income tax system, so the rate of tax depends on the type of taxpayer. Non-resident individuals are currently taxed on a sliding scale that charges 32.5% for the first $80,000 of taxable income, 37% for amounts in the range $80,001 - $180,000, and 45% for any amounts over $180,000. All companies, resident and non-resident, are taxed at a flat rate of 30%.

Currently there is no withholding mechanism under CGT, so non-residents disposing of Australian real estate will be required to lodge an income tax return for the relevant year and pay any assessed tax. This is the case even where they do not normally lodge Australian income tax returns, and the process of registering for a Tax File Number (TFN) with the associated identification requirements can be difficult. While traditionally there has been a significant risk of non-compliance, the ATO is becoming better able to identify transactions, e.g. through State-based land title transfers and other data matching.

A proposal was included in the 2013/14 Federal Budget by the former Labor Government to introduce a 10% withholding tax for disposals of certain TAP by foreign residents, excluding residential property transfers valued at under $2.5m, to apply from 1 July 2016. The incoming Liberal Government has announced its intention to proceed with this proposal, but no other details are available at this stage.

For asset disposals after 8 May 2012, non-residents are ineligible for the 50% CGT discount that applies to resident individuals.   The change applies only to gains accrued after that date, and it may be helpful for non-residents to obtain a valuation as at 8 May 2012 so as to maximise the portion of a future capital gain to which the 50% CGT discount can be applied.

CANADA

Canada applies capital gains tax, as well as recaptured depreciation for real property, when a non-resident disposes of residential property. A 25% withholding tax is applied to the gain, and a section 116 certificate is also required. No reliefs are available to reduce the tax liability.

A non-resident tax return should be filed, because if the gain is less than approx. $130,000 (top marginal rate for individuals), part of the withholding tax could be refunded based on marginal rates.

Additionally, the Canadian Revenue Authority (CRA) must approve withholding tax to be on the gain rather than gross proceeds. Typically, CRA will issue a “comfort letter” allowing the lawyer to hold the gross withholding tax in trust until the certificate approving the reduced withholding is approved.

CHINA

Relevant information for non-resident individuals in China is as shown in the table below:

Methods	Type of building		Years	Tax situation
Tax	Transfer Housing	Ordinary housing	Within 5 years	Business tax and surcharges (5.55%of transfer income); Individual income tax (20% of the difference between transfer income and original cost or 1% of the transfer income)
			More than 5 years (including 5)	Exempted from Business tax and surcharges; For individuals selling the housing which is counted as the only family housing and has been lived over five years, shall enjoy individual income tax exemption; otherwise individual income tax shall be levied (20% of the difference between transfer income and original cost or 1% of transfer income)
		Non-ordinary housing	Within 5 years	Business tax and surcharges (5.55% of transfer income); individual income tax (20% of the difference between transfer income and original cost or 1% of the transfer income)
			More than 5 years (including 5)	Business tax and surcharges (5.55% of the difference between transfer income and original cost); individual income tax (20% of the difference between transfer income and original cost or 1% of the transfer income)
	Transfer shops or non-housing			Business tax and surcharges (5.55%of transfer income); individual income tax (20% of the difference between transfer income and original cost or 2% of transfer income); stamp tax(0.05% of transfer income) ; land value increment tax.

It should be noted that the standards of ordinary housing and non-ordinary housing are different in different cities, such as the unit price and building area.

FRANCE

The capital gain equal to the difference between the sales price and the acquisition price, increased by the fees of the sale and reduced by a specific percentage per year of ownership after the fifth year, is taxed at a rate of 34.5% on non-resident individuals leading to a total exemption of tax after 22 years and of social contributions after 30 years. The 34.5% tax is comprised of 19% withholding tax rate plus 15.5% social contributions. The tax is withheld from the capital gain within one month from the sale on a specific form n° 2048.

A one shot specific exemption (the exemption applies for one real estate in the taxpayer's lifetime) applies for capital gains realised by non-residents provided the following conditions are met:

- The owner is resident of an EU member for tax purposes;
- The taxpayer has been tax resident in France for at least two years before the sale;
- The taxpayer has had the free disposal of the property at least since the first of January of the year proceeding the year of sale.

ITALY

Capital gains arising from the sale of real estate properties owned by resident as well as non-resident individuals are taxable in Italy only if such properties were purchased less than 5 years from the date of transfer. Therefore, property kept for more than five 5 years will not give rise to Italian capital gains taxation upon its disposal. Special rules and tax benefits apply in the case of a "first home".

For individuals selling a building held no longer than five years and who opt for Substitutive tax on capital gains, the current rate is 20%. Without option, personal income tax rates apply (23% up to 43%). If the building is owned for more than five years, then the gain is tax exempt.

The tax is collected via a withholding tax mechanism, applied directly by the Italian Notary.

INDIA

The transfer of residential property is chargeable to Capital Gains in India. Certain transfers, like those made as a gift to relatives, or by way of inheritance, are exempt from the Capital Gains.

Sale of residential property by non-residents held for a period of 3 years from the date of purchase shall be chargeable to tax as Long Term Capital Gains (LTCG) @ 20% (plus applicable surcharge & education cess). In case the property is held for a period of less than 3 years the same shall be taxable as Short Term Capital Gains (STCG) at the normal slab rate applicable to net taxable income in India. The slab rate applicable to Non-residents is as follows:

SLAB OF INCOME	RATES OF TAX
Up to Rs. 2,00,000	NIL
Rs.2,00,001 – Rs. 5,00,000	10%
Rs. 5,00,001-Rs. 10,00,000	20%
Rs. 10,00,001 and above	30%

(a) STCG shall be computed as follows:

Sales Consideration	XXX
(-) Expenses of Transfer	XXX
(-) Cost of purchase	XXX
STCG	XXX

(b) LTCG shall be computed as follows:

Sales Consideration	XXX
(-) Expenses of Transfer	XXX
(-) **Indexed** *Cost of purchase	XXX
STCG	XXX

$$\text{*Indexed} = \frac{\text{Cost Inflation Index (CII) of the year of transfer of asset} \quad \text{X} \quad \text{Cost of purchase}}{\text{CII of the year in which asset was first held by the assesse}}$$

In case the residential property is acquired by way of inheritance or gift, then the date and cost of purchase for the purpose of computing the period of holding as well as cost of purchase is taken to be date and cost to the previous owner.

The LTCG computed above shall be exempt where the investment is made in purchase or construction of another residential house subject to certain specified conditions such as number of residential houses owned by the tax payer, specified time period within which investment in new residential house is to be made, lock in period for holding the new residential house etc. Where the entire LTCG is invested in new residential house property, the entire gains will be exempt from tax. If only part of the LTCG is invested in purchase of a new house, the exemption will be available in proportion to the cost of the new house and the balance gains shall be chargeable to tax.

Any person responsible for making payment to a non-resident is responsible to withhold tax normally referred as Tax Deducted at Source (TDS) as per the provisions contained in Income tax Act. Hence, payment being made to Non- resident for sale of residential property will be subject to withholding tax in India and rate of tax shall be: LTCG- 20%; STCG- 30%

SINGAPORE

Gains from the disposal of property are only taxable when a taxpayer is regarded as trading in properties. Otherwise, the gains are generally regarded as capital in nature and Singapore does no impose capital gain tax.

If taxable, the tax rate will be 20% for non resident individual and 17% for a corporate taxpayer. The tax will be collected under a withholding tax mechanism.

USA

Where U.S. property owned by a foreign person is sold for more than $300,000, a ten percent (10%) withholding tax is applied to the entire amount realized on the sale. The withholding tax will not be required if (i) the transferee acquires the property for use as his or her residence, and (ii) the amount realized on the disposition of the property is less than three hundred thousand dollars ($300,000).

A US Real Property Interest (USRPI) is acquired for use as a residence if on the date of the transfer the transferee has definite plans to reside at the property for at least 50% of the number of days that the property is used by any person during each of the first two 12-month periods following the date of the transfer. The number of days that the property will be vacant is not taken into account in determining the number of days it is used by any person. A transferee is considered to reside at the property on any day on which a member of his family, as defined in Code Sec. 267(c)(4), resides at the property.