Keeping up with Alternative Investment Funds

June 2019

pwc

Introduction

Welcome to our inaugural edition of 'Keeping Up with Alternative Investment Funds'. PwC's Alternative Investment Funds Network is a new group which brings together specialists across the increasingly diverse alternative investment markets. This network specifically focuses on the tax, legal and regulatory issues facing fund managers of single or multi-asset classes and covers investment platforms, fund vehicles and particular issues relevant to the "house" and exec levels, as well as investors.

Over the course of the year, we will be sharing with you our latest thoughts on topical issues that are affecting the Alternative Investment Funds industry, brought to you by our extensive network of industry and subject matter experts both in the UK and further afield.

Brexit seems like it may move away from centre stage over the next few weeks but there is still plenty that can be done in terms of planning and preparation. You can find Keeping up with Brexit for Asset and Wealth Managers on the PwC Suite, focusing on a range of political, tax and regulatory considerations for AWMs looking to mitigate the risks of Brexit and the continued uncertainty. It remains as important as ever that AWMs are ready for all eventualities, up to and including a 'no deal' exit from the European Union. This view is also shared by the UK fund industry trade body, the Investment Association, who have told their members to implement their contingency plans.

Meanwhile, there are plenty of other things to be doing and updating you on. As such, this first edition focuses on the following topics:

- CJEU decisions on beneficial ownership within a group
- Employer year-end compliance reminders
- Carry and co-invest reporting
- Application of ATAD in Luxembourg
- Taxation of gains on non-UK resident investors

With a fast changing global tax environment, Alternative Investment Funds with an international group structure are required to be increasingly more mindful of balancing business growth with financial and reputational risk. The CJEU decisions on beneficial ownership within a group is an example of this as it addresses a potential abuse of law and numerous controversies over the meaning of the term "beneficial ownership".

Similarly, ATAD aims at stopping companies from abusing national mismatches between EU Member States to avoid taxation as well as generally tackling aggressive tax planning in the EU market. In this edition, we have focused on the application of ATAD in Luxembourg but these rules are being or have already been implemented across the EU in different member states.

Separately this time of year brings many compliance obligations for employers of individuals taxed as employees and officeholders, for employment income as well as carry and co-invest (if applicable).

We hope that you find this edition helpful and, we look forward to bringing you more informative updates and insights in the future. Your usual PwC contact, or one of our colleagues listed on the contacts page, will be more than happy to discuss the finer details of any topics that grab your attention.

Marc Susgaard Vigon

M: +44(0)7795 222478
E: marc.susgaard-vigon@pwc.com

Robert Mellor

M: +44 (0)7734 607 485
E: robert.mellor@pwc.com

CJEU decisions on beneficial ownership in a group

On 26 February 2019, the Court of Justice of the European Union ('CJEU') issued its judgments in two cases against the Danish Ministry of Taxation (Joined Cases C-116/16 and C-117/16 ('the dividend cases') and Joined Cases C 115/16, C 118/16, C 119/16 and C 299/16 ('the interest cases')). The underlying question of the cases was whether dividend and interest payments were exempt from withholding tax, when the payments were made from a Danish company to a company resident within the EU if the payments were fully or partially passed on to an ultimate parent company resident in a third country.

Facts

In the cases, the Danish companies were all owned by a parent company resident in another EU Member State (Luxembourg, Cyprus or Sweden). The EU parent companies were all directly or indirectly owned by companies resident in third countries (e.g. Bermuda or the Cayman Islands) or by private equity funds with unknown residency of the investors. The Danish companies paid out either dividends or interest to their EU-resident parent companies, and claimed that such payments of dividends or interest were free of withholding tax in accordance with the Parent-Subsidiary Directive ('PSD') or the Interest/Royalty Directive ('IRD').

The Danish tax authorities claimed that the withholding tax exemptions following from the PSD and IRD should not be granted, as the recipients were not the beneficial owners of the payments. The cases were appealed to the Danish High Court, which referred questions to the CJEU.

The referred questions in the dividend and interest cases are generally the same, but the question on beneficial ownership (see below) was only asked in the interest cases, as it is a requirement in the IRD that the recipient is the beneficial owner of the interest, whereas this is not a requirement in the PSD.

Next steps for Alternative Investment Funds

These judgments will be extremely important for Alternative Investment Funds looking at the application of the IRD and PSD going forward and also more generally for the interpretation of terms such as 'beneficial owner' or 'abuse of rights'.

Alternative Investment Funds with international group structures relying on the IRD or PSD but whose ultimate parent is resident in a third country should ensure they have understood the potential impact of this judgement.

Judgments

In the interest cases, the first question was whether the recipient of the interest was the beneficial owner, and thereby could enjoy the withholding tax exemption following from the IRD. The CJEU first stated that the term 'beneficial owner' concerned not a formally identified recipient but rather the entity which benefits economically from the interest. The CJEU considered the OECD Commentary on the OECD Model Tax Convention to be relevant for interpreting the term 'beneficial owner'.

In case the conditions for obtaining the withholding tax exemption in the IRD or the PSD were formally met, the CJEU stated that the general EU anti-abuse principle implied that an EU Member State has to deny such benefit if an arrangement constitutes abuse of rights irrespective of whether any specific anti-avoidance legislation has been implemented in domestic law.

The CJEU provided guidance on when an arrangement constitutes abuse of rights:

- if the funds are passed on wholly or partially shortly after they are received, this may serve as an indication that the entity is a flow through or conduit and this could be an indicator of abuse;
- it is not a requirement that there is a contractual obligation to pass on the payment;
- if the recipient lacks substance or has been interposed in a structure that otherwise wouldn't be covered by the IRD or PSD; or
- the fact that the ultimate parent is resident in a third country, with which a tax treaty has been concluded, can neither prove nor disprove an abuse of rights.

Regarding the burden of proof, the CJEU stated that an EU Member State is obliged to prove that an arrangement is abusive, but if the authorities conclude that the recipient of the income is not the beneficial owner, they are not obliged to determine which entity is the actual beneficial owner.

It is now up to the Danish High Court to decide the final outcome of each case based on the guidance from the CJEU regarding whether in fact the recipients are the beneficial owners and/or whether there is an abuse of rights.

Contacts

Tim Hill

M: +44 (0)7734 958732
E: tim.hill@pwc.com

Farhana Raval

M: +44 (0)7703 563245
E: farhana.raval@pwc.com

Employer year-end compliance reminders

The end of the UK tax year generally brings about a flurry of activity for employers and payroll managers in particular. There are a number of deadlines in close succession and whilst your payroll provider is likely to handle a lot of the requirements on your behalf, it is important that you are aware of the various deadlines so that you can maintain oversight and ensure that information is fully and correctly reported.

5 April – If you provide any benefits in kind to your employees which you would like to tax through payroll rather than including on a Form P11D, then there is a voluntary mechanism for doing so which involves agreeing the benefits to be payrolled with HMRC before the tax year begins. Items that you have already agreed with HMRC do not need to be reconfirmed but any new items you wish to start payrolling need agreeing up front.

5 April – Deadline for applying for a Short-Term Business Visitor ('STBV') agreement for the 2018/19 tax year although in practice we often find that these are submitted with the annual report (see below) without any adverse impact. If you have business visitors to the UK it is imperative that you monitor these business visitors and assess whether either UK PAYE should be applied to UK workdays or whether an exemption can be applied and the individuals are reported on the report instead. Monitoring your business visitors can also help you stay compliant in other aspects including corporate tax permanent establishments, immigration and regulatory requirements.

19 April – If you have business visitors to the UK who do not qualify for STBV exemption as described above, but who have spent less than 30 days in the UK in a tax year, a modified arrangement may be in place in order to collect tax from them at the end of the tax year rather than via real time payroll. In this case, the deadline for providing this information and tax payment to HMRC is 19 April.

19 April – Deadline for making your final Full Payment Submission ('FPS') under RTI and also your last opportunity to make any in-year adjustments to your payroll to amend, adjust or include taxable items.

22 April – Final payment due for PAYE and NICs payments corresponding to your the final FPS. Your payroll provider will generally handle this submission on your behalf.

19 May – Deadline for any Earlier Year Updates ('EYU') that may be required which have not already been addressed via an in-year update. Note that, for updates for 2019/20 onwards, the EYU mechanism is replaced by a further FPS.

31 May – Form P60 to be given to employees summarising their total pay and deductions.

31 May – Annual STBV report to be submitted to HMRC providing different levels of information depending on the precise number of days spent in the UK.

4 July – The last date for employees to reimburse any PAYE that employers have thus far paid on their behalf – for example on notional payments – to avoid any additional tax charges arising.

5 July – Last date for agreeing any new items that an employer wants to include on their PAYE Settlement Agreements ('PSA'). PSAs are used for employers who wish to settle taxes on certain benefits in kind on their employees' behalf. Only items that are minor, irregular or impracticable can be included on a PSA and the taxes and NIC due must be settled on a grossed up basis.

6 July – Form P11D to be finalised and provided to employees, along with filing of P11D(b) with HMRC –along with the calculation of employer NICs – reporting benefits in kind either not reported on the PSA or not covered by an exemption.

6 July – Online reporting of chargeable events relating to Employment Related Securities ('ERS') which could include award, vest and exercise of restricted shares awards, stock options, carry instruments and co-investment units to former, current or prospective employees. See overleaf for more detailed information about reporting of carry and co-invest.

6 July – Notification of termination payments to HMRC along with explanation of the tax treatment.

22 July – Payment of NICs calculated on benefits in kind on the P11Ds.

22 October – PSA payment deadline including the tax and grossed up NICs.

Next steps for Alternative Investment Funds

- Confirm with your payroll providers which items they will handle for you
- Review all payments made to or on behalf of individuals and expenses reimbursed to ensure that taxable items are recorded
- Review your business visitors to the UK and obtain necessary information for your STBV submission

Contacts

Jonathan Berger

M: +44 (0)7841 563863
E: jonathan.p.berger@pwc.com

Leena Malde

M: +44 (0)7850 516334
E: leena.malde@pwc.com

Carry and co-invest reporting

Key messages:

- Online report due for submission – 6 July 2019.
- Employers may need to report either Carried Interest or Co-investment partnership interests awarded to employees on the HMRC annual report for Employment Related Securities ('ERS').
- It can be difficult to report awards correctly because the HMRC online form was designed for awards of restricted shares and share options and not reporting partnership interests.
- Getting this report right is really important particularly if employees are being awarded carried interest or co-investment.
- Increasingly HMRC are using these reports to test compliance with the detailed tax rules that can apply to carried interest and co-investment.
- We are seeing increasing scrutiny from HMRC into how employers value and treat these types of awards for the purposes of employment taxes.

What do I need to report to HMRC?

- The award of an interest in a carried interest partnership to an employee or office holder is often regarded as an ERS and is a reportable event. A co-investment partnership interest could also be a reportable ERS.
- New carry and co-invest scheme may need to be registered with HMRC.
- It does not matter that the employee may have paid the fair market value for those interests. Even when the individual pays the fair market value of the ERS they may still need to be reported.

Should we report awards that we believe are in the MOU?

- Yes. Awards of carry that are within the Memorandum of Understanding ('MOU') are still ERS and therefore need to be reported.
- Your reporting needs to be consistent with your house view on your awards. Consistency is important in any situation where an employer needs to explain the reason for their treatment to HMRC.

Is it difficult to complete this report?

- It can be complex because the questions contained in the online report and the HMRC guidance notes are designed for awards of restricted shares and share options.
- Answering the questions literally can result in some misleading answers and therefore employers need an approach which is consistent and reflects the commercial reality of what is being awarded.
- HMRC software will reject a report which is not formatted correctly (it can be as minor as leaving a cell blank).

What about awards of carry to partners?

- Only awards of employment related securities to employees (including 'salaried members') or office holders (e.g. company Directors) need to be reported.
- However, it can be difficult to determine who is an office holder given that investment managers can often hold a number of roles within the organisation which may include Directorships. Employers should establish whether the holding of these offices require their carried interest and co-investment interests to be reported.

Why is it important to get the reporting right?

- HMRC use these on-line reports as part of testing the complex tax rules that govern carried interest and the associated employer compliance.
- Certain entries will flag areas for further investigation such as the online entries not matching up with the payroll treatment.
- There are also financial penalties for incorrect annual returns including a fine of up to £5,000 for an incorrect return.

Next steps for Alternative Investment Funds

- Consider whether you need to register a scheme and make an ERS report
- Gather data on what awards have been made in the period 6 April 2018 to 5 April 2019 and the key data needed to report
- Analysis on which awards have been made to employees, individuals taxed as employees and officeholders and therefore need to be reported.

Mike Haynes

M: +44 (0)7779 148699
E: mike.j.haynes@pwc.com

Matthew Wright

M: +44 (0)7738 310483
E: matthew.g.wright@pwc.com

Application of ATAD in Luxembourg

Background

On 21 December 2018, the Luxembourg parliament voted the law that implements ATAD1 in the Luxembourg domestic law. It entered into force on 1st January 2019, and applies to tax years starting on or after 1st January 2019 (except for the exit tax provisions that will come into force as from 1st January 2020).

1. Interest limitation rules

- Exceeding borrowing costs as defined in ATAD1 remain deductible but only for an amount corresponding to the higher between EUR3M or 30% of the tax EBITDA.
- Depreciation and amortization added back for the computation of EBITDA are the amounts of amortization and depreciation deductible for tax purposes.
- Exempt income (and related business expenses economically connected) are excluded from tax EBITDA.
- The rules should apply to any financing, irrespective of whether provided by related parties or third parties as required by ATAD1.
- Exclusion: financial undertakings and standalone entities. Financial undertakings definition includes also securitization vehicles in the meaning of article 2 point 2 of Regulation (EU) 2017/2402.
- Grandfathering rule: it should apply to any loans granted to a Luxembourg taxpayer before June 17, 2016 excluding any subsequent modification. In case of a subsequent modification, the grandfathering would not apply to any increase of exceeding borrowing costs arising from the modification but would be limited to the original terms of the loan.
- EU long term infrastructure projects: exceeding borrowing costs may be excluded when arising from long-term infrastructure projects where the project operator, borrowing costs, assets and income are all located in the EU.
- Group equity ratio: a taxpayer that is member of a consolidated group for financial accounting purposes may deduct in full its exceeding borrowing costs if it can demonstrate that the ratio of its equity to its total assets is equal to or higher than the equivalent ratio of the group (2% higher/lower accepted).
- Carry forward: exceeding borrowing costs not deductible in a tax period could be carried forward without time limitation. Interest capacity which cannot be used in a given tax period may be carried forward for 5 years.
- The law has been amended by the 2019 Budget law of 26 April 2019 to include the option foreseen in article 4(1) of ATAD 1 allowing to apply interest limitation rules at group level for entities being part of a tax unity for Luxembourg tax purposes, with effect as of 1st January 2019.

2. CFC rules

- New CFC rules are also introduced in order to potentially include in the tax basis of a Luxembourg company the undistributed income generated by a controlled foreign subsidiary/permanent establishment that is taxed at less than 50% of the CIT rate that would have been applied if the entity was located in Luxembourg (i.e. 9% levied on a similar basis).
- Controlled foreign entity: at least 50% of its voting power/capital/profit is owned directly or indirectly by the Luxembourg one (alone or with associated enterprises).
- Luxembourg has opted for option B meaning that it aims at tackling situations where undistributed income of the controlled entity arise from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
- Non genuine arrangement: the entity or permanent establishment would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income.
- Inclusion rules: if CFC rules are applicable, the Luxembourg controlling taxpayer would have to include totally or partially the non distributed income earned by the CFC entity/ies if, and to the extent that the significant people functions are performed totally or partially at the level of said Luxembourg shareholder and in proportion to its ownership in the CFC (capital votes or right to profits).
- Exceptions: exclusion from the application of the above mentioned CFC rules for:
  - CFCs with accounting profits of no more than EUR750K; and
  - CFCs for which the accounting profits amount to no more than 10% of their operating costs for the period.
- Avoidance double taxation:
  - Income already included as CFC income and afterwards distributed (in case of dividend) or realised (in case of again on the shares of the CFC) may be deducted when computing the amount of the dividend or gain subject to Luxembourg tax.
  - Luxembourg may ALSO grant a credit for the tax paid by the CFC against the tax on the income included in the Luxembourg tax base of the taxpayer.

Application of ATAD in Luxembourg

3. Intra-EU Hybrid rules

- The Luxembourg government decided to introduce ATAD1 anti-hybrid provisions as from 1st January 2019, covering only intra EU hybrid instruments and hybrid entity mismatches. The wider measures of ATAD2 will be included in a subsequent law (not yet available) that will enter in to force as from 1st January 2020.
- Definition: a hybrid mismatch as defined in ATAD1, arises when differences in the legal characterisation of a financial instrument or entity give rise to the following consequences:
  - a deduction of the same expenses or losses occurs both in Luxembourg, and in another MS where the expenses or losses originated ("double deduction"); or
  - there is a deduction of payment in Luxembourg in which the deduction has its source, without a corresponding inclusion of the corresponding income in the total net revenues in the other MS ("deduction without inclusion").
- Elimination of the tax advantage arising from a hybrid mismatch:
  - to the extent that it results in a double deduction, the deduction shall be given only in the MS where such payment has its source;
  - to the extent that the hybrid mismatch results in a deduction without inclusion, the MS of the payer shall deny the deduction of such payment.
- Upon request by the Luxembourg tax authorities, the taxpayer has to be able to provide a declaration of the issuer of the financial instrument, or any other relevant material such as tax returns, other tax documents or certificates issued by tax authorities of the other MS, evidencing the tax treatment of the income or expense or loss in the other MS.

4. General anti-abuse rules

- The domestic general anti-abuse rule is augmented in order to define more precisely what constitutes an abuse of law. It will be recognised if the legal route which, having been used for the main purpose or one of the main purposes or circumventing or reducing tax contrary to the object or purpose of the tax law, is not genuine having regard to all relevant facts and circumstances (i.e. the legal route was not used for valid commercial reasons which reflect economic reality).
- This new definition is designed to comply with ATAD1 requirements while preserving certainty from existing case law–it should not therefore change materially the criteria and general current practice.

5. Exit tax

- Under ATAD1, there is a modification to the existing Luxembourg exit tax rules to provide for a payment of tax in instalments over 5 years. The possibility of payment in instalments will apply on the taxes derived from the gains upon transfer of assets outside Luxembourg as depicted in ATAD1, but only where the transfer is to an EU MS or an EEA State with which Luxembourg has an agreement on the recovery of taxes.
- No guarantee will be required from, nor will interest will be charged to, taxpayers opting for payment of tax in instalments.
- The right to defer the payment of tax is immediately discontinued and the corresponding balance of tax debt becomes immediately recoverable in the cases depicted by ATAD1.

Next steps for Alternative Investment Funds

- Alternative Investment Funds should review their structures in order to determine whether they are affected by these changes in law - particular focus should be placed on the impact of the interest limitation rules where Luxembourg holding structures are financed with shareholder debt.

Contacts

Luc Petit

T: +352 494 848 3148
E: luc.petit@lu.pwc.com

Jim Whittle

M: +44 (0)7841 560469
E: jim.whittle@pwc.com

Taxation of gains on non-UK resident investors

Background

The measures in Finance Act 2019 extend the scope of the UK's taxation of gains accruing to non-UK residents to include all gains on direct and certain indirect disposals of UK property, on or after 6 April 2019 which represents a significant change to the rules for taxing property held as an investment by non-residents.

The following summarises the changes, with particular focus on the detailed provisions in relation to Collective Investment Vehicles ("CIVs"). These include various exemptions/reliefs in response to concerns raised during the consultation process.

Recap on basic rules

These new rules extend the scope of the UK's taxation of gains accruing to non-UK residents to include all gains on direct and certain indirect disposals of UK property, on or after 6 April 2019.

Broadly, the indirect disposal rules will apply where a person makes a disposal of an entity, in which it has at least a 25% interest (or any interest in certain CIVs) where that entity derives 75% or more of its gross asset value from UK land.

The 25% ownership test applies where the person holds at the date of disposal, or has held within 2 years prior to disposal, a 25% or more interest in the property rich company. This holding may be directly, or through a series of other entities, or via connected persons.

The 75% property richness test applies to the gross assets of the entity being disposed of. Where a number of entities are disposed of in one arrangement, their assets will be aggregated to establish whether the 75% test is met.

Disposals of interest in entities where the property is used in a trade are excluded from the charge, subject to certain conditions being satisfied. This is likely to apply where, for example, a non-UK resident disposes of shares in a retailer which owns a significant value of UK real estate used in the retailer's trade.

All non-UK resident companies (including certain CIVs which are treated as companies) will be charged to corporation tax on their gains (at a rate of 19% for disposals prior to 1 April 2020). Non-resident individuals and trusts (unless treated as companies) will be subject to capital gains tax (different rates of tax apply depending on the circumstances).

Existing reliefs and exemptions available for capital gains will be available to non-UK residents, with modifications where necessary these including the substantial shareholding exemption ("SSE"), and exemption for sovereign immune investors, overseas pension schemes and certain charities. The provision of any relevant double tax treaty would also need to be considered.

The gain or loss is calculated by reference to the market value (of the asset being disposed of) on 5 April 2019, with the option to use the original acquisition cost. However, where the original acquisition cost is used in the case of an indirect disposal, and this results in a loss, this will not be an allowable loss. There are transitional rules that apply in the case of direct disposals of UK residential property that would previously have been within the charge to UK tax prior to 6 April 2019.

Disposal events

In addition to a sale, gift or transfer, a disposal may also be triggered in a number of other ways, e.g. on the grant of a lease or the receipt of capital sum (e.g. compensation for "rights of light" and payments made on the early surrender of leases), or on receipt of a capital distribution from a company (or a CIV which is treated as a company).

Where an asset is disposed of under a contract the disposal occurs at the time when the contract is made, or if the contract is conditional, at the time condition is satisfied.

Special rules for Collective Investment Vehicles (CIVs)

The 25% de minimis holding requirement is removed for UK property rich CIVs, which are broadly defined to include:

a) A Collective Investment Scheme ('CIS')

b) An Alternative Investment Fund ('AIF')

c) A UK Real Estate Investment Trust ('REIT')

d) A non-UK resident company which meets the following:

- Is not a close company (as defined);
- At least 50% of its income is property income from long term investments;
- It distributes all or substantially all of its property income on an annual basis; and
- It is not liable to tax on that income in the territory in which it is tax resident.

Certain offshore CIVs which are formed as trusts or contractual co-ownership arrangements will be deemed opaque for capital gains purposes and subject to corporation tax on direct and indirect interests in UK immovable property.

Taxation of gains on non-UK resident investors

The transparency election for certain UK property rich CIVs

Where such UK property rich vehicles are also transparent for the purposes of UK tax on income (as in the case of most Jersey Property Units Trusts for example), they will have the ability to make an election to be treated as partnerships for the purposes of UK tax on capital gains.

All participants needs to consent to the irrevocable election, which needs to be made within 12 months of the date the first UK property is acquired/6 April 2019, and which has retrospective effect to that date.

This election will be particularly attractive where all investors are tax exempt. However, in other cases disposals by the CIV would trigger disposals at the level of a taxable investor if the election has been made; in those cases the following exemption election may be potentially more appropriate, particularly for open ended/evergreen funds.

The fund exemption election for UK property rich CIVs / certain companies

An election may be made for a qualifying CIV, or a qualifying company which is not itself a qualifying CIV (but is wholly or almost wholly owned by a CIS partnership or CoACS).

The effect of the election is to exempt that entity, and any other entities in which it has at least a 40% stake, on direct and indirect disposals of UK property.

Where a company is disposed of by an elected entity there is a deemed (exempt) disposal and reacquisition of its direct and indirect UK property interests (which have been within the exemption regime within the preceding 12 months or more) i.e. the tax basis is potentially stepped up.

The exemption regime is only available to UK property rich funds in order to be able to tax gains at the investor level and there are special provisions under which an investor may be taxed if capital profits are remitted to the investor in a non-capital form.

Special taxing provisions also apply where the conditions (including UK property rich condition) cease to be met, including provisions where a fund is wound up.

An election may be made by the fund manager with retrospective respect of up to 12 months (or such longer period as HMRC may agree). This election does not require the consent of all the investors.

HMRC have powers to specify information to be provided by the fund manager in relation to the fund and its investors.

There are various qualifying conditions, not all of which have to be met in all cases, reflecting the different types of funds that invest in UK property.

Qualifying conditions for the exemption election

Generally, a CIV will be qualifying for this purpose if it meets the following conditions:

a) It is a CIS and it meets the genuine diversity of ownership condition;

b) it is a company which meets the recognised stock exchange condition (i.e. it has ordinary share capital which is regularly traded on a recognised stock exchange) and the non-close condition; or

c) it is a CIV and it meets the “UK tax condition” and the “non-close condition”.

A UK property rich company which is not a CIV and wholly (or almost wholly) owned by a CIS which constituted by two or more persons carrying on a trade or business in partnership or is constituted by a CoACS will be qualifying if it meets the following conditions:

a) the company meets the UK tax condition and the non-close condition; or

b) the CIS which wholly (or almost wholly) owns the company meets the genuine diversity of ownership condition.

The “UK tax condition” will be satisfied where, at any time “solely as a result of double tax arrangements”, the person making the election reasonably considers that no more than 25% of proceeds on a deemed disposal by investors would not be subject to tax.

The “non-close condition” will be satisfied where the company is not a close company (broadly a company controlled by five or fewer participators), or is a close company but only by taking into account a qualifying investor as a direct or indirect participator. The definition of qualifying investor broadly follows that used for the REIT regime, and includes UK and overseas pension schemes, entities which are sovereign immune, UK or overseas REITs and other funds which have made the exemption election.

There is also an exemption for disposals made by a company (which is not itself a CIV) of its interest in an entity which has made an election under the fund exemption regime where that company is wholly owned by a person or persons who would be exempt from tax on capital gains.

Taxation of gains on non-UK resident investors

Non-UK property rich funds

As noted above the exemption election is not available to funds which are not UK property rich. However where the fund is constituted as a CIS partnership or CoACS, and it wholly, or almost wholly, owns companies which themselves are UK property rich, then it may be possible to make elections in relation to those companies.

In other cases where the exemption election is not available, the existing SSE may be available in respect of disposals of UK property rich companies by the fund.

UK REITs

To coincide with the aforementioned changes with effect from 6 April 2019 in relation to other CIV changes have also been made to the UK REIT regime.

Gains on the disposal of UK property rich entities are exempted under the same mechanism as direct property disposals.

As in the case of a direct disposal of a property which is developed by a UK REIT and disposed of within 3 years (where various conditions are met), gains on indirect disposals where those conditions are met will not be exempted either.

Elected entities which are treated as partnerships for the purposes of these rules will be “looked through” for the purposes of REIT exemptions on capital gains, and may be traced through for the purposes of determining whether a company forms part of a REIT group for capital gains purposes.

Filing and payment dates

Individuals and trusts (other than those trusts which are treated as companies) will need to notify HMRC, and pay any tax due, within 30 days of the completion of a disposal (subject to transitional provisions where there is an existing requirement to file a tax return).

Where a non-UK resident company which is not already within the charge to corporation tax (e.g. by trading through a permanent establishment in the UK) becomes chargeable as a result of a disposal on or after 6 April 2019, it must register within 3 months of the date of that disposal.

The date corporation tax becomes due and payable depends on the amount of the company’s taxable profits and the length of the company’s accounting period. In practice it is likely that any payment of corporation tax will be due and payable 3 months and 14 days after the disposal date.

Next steps for Alternative Investment Funds

- If you invest in UK property, it is important that you understand your investor base and your holding structure of UK property in order to assess if these rules or exemptions apply.
- The conditions for making the fund exemption election are complex and require detailed consideration. The pros and cons of making this election should be weigh against existing reliefs or exemptions (for example the availability of SSE).
- For non-UK resident companies (including deemed companies) registration is required within 3 months of the date of disposal and corporation tax is payable 3 months and 14 days from the date of the disposal.

Contacts

Richard Williams

M: +44(0)7725 632540
E: richard.x.williams@pwc.com

Farhana Raval

M: +44 (0)7703 563245
E: farhana.raval@pwc.com

Contacts

Robert Mellor

M: +44(0)7734 607485
E: robert.mellor@pwc.com

Marc Susgaard Vigon

M: +44(0)7795 222478
E: marc.susgaard-vigon@pwc.com

Fiona Carpenter

M: +44(0)7818 016620
E: fiona.carpenter@pwc.com

Malcolm Collings

M: +44(0)7702 678205
E: malcolm.j.collings@pwc.com

Darren Docker

M: +44(0)7761 823601
E: darren.m.docker@pwc.com

Leo Humphries

M: +44(0)7802 659271
E: leo.humphries@pwc.com

Elisabeth Hunt

M: +44(0)7841 491410
E: elisabeth.hunt@pwc.com

Moonir Kazi

M: +44(0)7748 248665
E: moonir.x.kazi@pwc.com

Jonathan Page

M: +44(0)7876 446492
E: jonathan.page@pwc.com

Lachlan Roos

M: +44(0)7738 311271
E: lachlan.j.roos@pwc.com

Richard Williams

M: +44(0)7725 632540
E: richard.x.williams@pwc.com

This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

© 2019 PwC. All rights reserved. PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see www.pwc.com/structure for further details.

MA-2019-05-01-1718-EG