NRCG Consultation
HM Revenue & Customs
Room 3C/04
100 Parliament Street
London
SW1A 2BQ

15 February 2018

Dear Sirs

Taxing gains made by non-residents on UK immovable property

PricewaterhouseCoopers LLP (we) welcome the opportunity to respond to the above consultation and we hope that this written submission is helpful. We are responding as advisers to a wide variety of private business, institutional and other UK property investors.

Scope

We note that to date, the UK has been the exception amongst most other major jurisdictions in that it does not currently exercise its full taxing rights where non-residents dispose of non-residential immovable property and that this potentially puts non-residents at an advantage over UK residents.

We therefore acknowledge the policy intention to align the tax treatment of non-UK resident owners of UK immovable property with that of UK residents. We also note the intention "*to reduce the incentive for multinational groups to hold UK property through offshore structures*".

There are however potential issues in situations where the quantification of the taxable gain as set out in the proposals may give rise to a gain which is greater than the economic gain realised. This may also be an issue in the context of a double tax treaty which limits the UK's taxing rights on a non-resident to the gain on the direct (and sometimes indirect) disposal of UK property. The rebasing rules could result in the taxable gain exceeding the economic gain, in relation to an indirect disposal where it is not proposed that there be an option to use original cost. For example, if the value of the shares at April 2019 was less than the original cost of the shares, the post April 2019 increase in the value of the shares may be greater than the overall economic gain realised.

Indirect disposals

There are a number of issues arising in respect of the proposal to charge indirect disposals of UK immovable property. As mentioned above, the lack of an option to use original cost on an indirect disposal may result in the taxable gain exceeding the economic gain. It may also result in a potentially expensive and unnecessary cost of obtaining a share valuation. Other potential issues, which are discussed in more detail in the Appendix, include:

- The fact that the shares satisfy the 75% test (i.e. 75% of value of the gross asset value derives from UK land), 100% of the gain on a share disposal is taxed; this would appear to potentially go further than the intention to tax gains on UK property only;

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- The 25% ownership test (which has a five year lookback and also aggregates holdings) potentially brings in investors to which the rules may not have been intended to apply;

- The current substantial shareholding exemption ('SSE') in relation to the disposal of investment companies would not apply in a number of cases involving indirect disposals where entities other than UK companies are involved for various technical reasons (these are set out in more detail in the Appendix); and

- The potential for multiple levels of taxation (eg where there is a disposal of a property rich entity and then a subsequent disposal of the underlying property) (see further comments below).

Tax exempt investors

It is our experience that offshore structures are often used for a number of non-tax reasons. In particular, many UK based tax exempt investors such as pension funds and charities, and non-UK investors such as overseas pension schemes and sovereign wealth funds (which would be exempt from UK tax on gains for reasons other than residence) invest in UK immovable property through non-UK collective investment vehicles. They require a pooled investment vehicle (rather than direct investment) in order to spread risk, allow for liquidity and to benefit from the expertise of fund managers. They may then require a non-UK pooled investment vehicle (compared to a UK pooled investment vehicle which under existing rules may be exempt from tax on capital gains) because it offers more flexibility from a regulatory perspective and is less costly to run.

The proposed changes could inadvertently result in such tax exempt investors becoming effective UK taxpayers in relation to capital gains; investors who would otherwise be tax exempt on gains on direct investments could be disadvantaged by investing via (for example non-UK) fund vehicles. It will be important to ensure that appropriate exemptions are therefore also given to non-UK fund vehicles (which currently do not require any such exemption given that, in most cases, they will be outside the scope of UK tax on capital gains).

Measures, a combination of which could prevent exempt investors in non-UK funds becoming effective UK taxpayers as a result of the proposed changes, include:

- Amendment to the current Substantial Shareholding Exemption ('SSE') rules in relation to Qualifying Institutional Investors (QII) to allow tracing through entities other than partnerships and companies (eg fund vehicles constituted as contractual arrangements or trusts). As part of this process, the existing list of QIIs would need to be carefully reviewed, and potentially expanded. For example it would be appropriate to include certain tax transparent funds falling within section 103A TCGA 1992. The practical issues arising from self certification by QIIs (eg overseas pension schemes) also need to be considered.

- An extension of the existing SSE regime to make it applicable to fund structures making direct disposals of property to the extent that the fund investors are tax-exempt QIIs.

- Where SSE is available, the provision by HMRC of a clearance service in respect of QII status in order that investors are able to verify their status with the relevant fund and ensure that the full benefit of the SSE is obtained.

- The ability to make an (irrevocable) election to allow fund vehicles (irrespective of their legal form and regulatory status) to be treated as opaque or transparent, and thus preserve investor exemptions in the latter case.

We consider that it is important that a range of options are available to funds to address the issue highlighted given the complexity of the real estate fund industry and different types of funds available, and this should mitigate risks of disruption caused by unforeseen consequences.

In the event that there is no relief from the gains impact on overseas CIVs which are unable to qualify as tax transparent, consideration would need to be given to reliefs to allow reorganisations to move towards a tax transparent alternative, or direct ownership/de-enveloping (e.g. SDLT reliefs).

Insurance companies

A number of issues arise in relation to an investor who is a life insurance company, including situations where the life insurance company is investing via a non-UK entity. These issues are particularly acute where the assets are held for the purposes of the long term business (the majority of the assets held by life insurers), and it appears, for example, that the SSE QII definition would not assist because of the restriction to assets held as part of long term business fixed capital (which excludes the assets backing the life business itself).

Pension business - comparison with exempt pension funds

Life insurance companies offering pension business will be impacted in a similar way to exempt investors. Life companies hold real estate as an asset class. As with pension funds, income and gains need an effective exemption, preserving in a life company the system whereby the pension policyholder obtains relief (insofar allowed) on contributions, and is subject to income tax when taking the funds at retirement. Proprietary companies do pay corporation tax on the profits from the business, but this is on the profit they make out of writing the business (taking account of the fact that most of the assets and investment return on them are matched by liabilities to policyholders). This is therefore in practice similar to the treatment of pension funds.

As for pension funds, there are many commercial reasons why real estate may be held by a life company through investment vehicles (which may be non-UK resident), not least that the company may not wish to own the whole of the property. Currently, holding investment property through a non-resident entity may be no different than holding it directly, from a corporation tax perspective. This is because the profit on which the life insurance company is taxed includes the accounting value of all the assets, including the holdings in vehicles, and all the assets are normally included in the accounts at fair value, and they are marked to market. Therefore if as a result of the proposed changes capital gains tax is charged on the gain on an asset at the investment vehicle level, the tax suffered would be significantly in excess of the tax which would be suffered were the property to be held directly by the life company, being on the gain with no offset for liabilities, and being in addition to the profit already taxed in the company which includes the market value of the holding in the investment vehicle.

Therefore if adjustments are made to the proposals to address the issues with pension funds, we suggest that similar adjustments should be made for life insurance companies writing pension business. Otherwise there would not be a level playing field between pension funds as a pension vehicle and life companies writing pension business, which are two different legal ways of providing the same offering. It is also important to ensure that the buy out and buy in market (where employer

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pension schemes can buy insurance from a life company or transfer the liabilities to a life company) is not disrupted by there being a difference between the holding of real estate in one or the other.

Other classes of life insurance business

It is likely that, to the extent that the holding of land is permitted in these categories, the same analysis applies for other categories of UK business taxed on a gross roll-up basis (non-BLAGAB in Finance Act 2012).

Life savings business (I minus E business)

Where a UK policyholder holds a life savings contract (for example a unit linked life contract), the life company pays tax on income and gains at policyholder rate (20%) and the policyholder has an income tax charge on the ultimate difference between the proceeds received and premiums paid at his or her marginal income tax rate, less a 20% credit for the tax paid at company level.

Where the company holds UK real estate, it is charged to corporation tax on chargeable gains at 20%. Where the company holds the real estate in an offshore collective (which it may need to for commercial reasons), this would normally be taxed on an annual market value deemed disposal basis which is then spread over 7 years. Therefore to subject the vehicle to tax again at the fund level would be double taxation.

Overseas companies carrying on a life insurance business

It is not clear to us that it would be within the policy intent to charge capital gains tax on an overseas company holding UK real estate if a UK company holding the real estate would not have been subject to such a charge. For example, a foreign company writing pension business may be taxed on its profits on a gross roll-up basis. In the UK, as explained above such a company holding UK real estate would not have a charge to capital gains tax, because the profits basis takes precedence. So it follows a foreign insurance company should also not have such a charge.

It is also not clear to us that a policyholder holding an overseas life savings insurance policy would be treated evenly in this case. The policyholder would be subject to full income tax on the proceeds less premium in respect of the policy, with no credit (because the overseas company is not subject to the I minus E regime). If the overseas life insurance company is required to pay capital gains tax, the full charge to income taxation of the policyholder with no credit would represent double taxation. As with the example in I minus E above, the capital gains tax charge does not fit with the income tax regime which determines the taxation of the policyholder, which is designed to combine with the tax position of the company.

Ownership by and through collective investment vehicles ('CIVs')

Broadly, the rationale behind the UK CIV regimes (including Investment Trusts, REITs, AIFs, PAIFs and CoACSs), in so far as it relates to capital gains, is to avoid multiple levels of taxation on gains, ensure that tax is not levied until the investor realises a gain, and ensure that investors who are entitled to a particular relief or exemption do not indirectly bear tax on capital gains at the intermediate fund level. In effect, this puts the investor in a similar position to that where they have a direct holding in the underlying investments, or if they had invested in a CIV which is transparent for the purposes of tax on gains.

If the same considerations are not taken into account in relation to overseas CIVs then this would have a distortive effect on the market, effectively favouring some CIVs (including the more highly regulated UK funds) over others. Is there a policy intent that the more highly regulated (and in particular "authorised") funds should qualify for tax transparency (or quasi transparency) whereas less regulated entities should become unattractive to tax exempt institutional investors?

Reporting and compliance

We see significant practical difficulties with some aspects of the reporting obligations. It will be important that obligations are only placed on those who are in a position to have access to the relevant information. If the requirement results in multiple reporting of the same instance or of transactions that do not in fact occur, this will add to the administrative costs and also reduce rather than increase the information available to HMRC through the creation of superfluous reports which would need to be identified and excluded.

Consequential amendments

Given that the proposals are intended to level the playing field by bringing non-resident companies within the charge to corporation tax on capital gains, it will clearly be important to ensure that a non-UK company is not put in any worse position than a UK company. Not only will this require a number changes to other corporation tax provisions (such as group relief), but careful consideration as to how a non-resident company would obtain relief for management expenses and loan relationships/derivatives debits will be required given that such items may partly relate to items outside of the scope of corporation tax.

Timing

We would recommend that the timing of such an important change is deferred, at least until 2020, for a number of reasons:

- Firstly, in order that an adequate period of consultation and drafting is allowed to address issues such as those outlined above and to minimise the number and extent of any other unintended consequences;

- Secondly, the proposal to bring UK property income of non-UK residents within the scope of UK corporation tax from April 2020 may result in either mismatches or more complex transitional rules during the transitional year 2019/2020 (as discussed in detail below); and

- Thirdly, changes are likely to be required in relation to holding structures, particularly in relation to real estate funds, which may require regulatory approval and inevitably have significant lead times. Other practical issues are also likely to arise (eg in relation to determining whether there are QIIs for the purposes of the SSE or how tax liabilities at the fund level should ultimately be economically borne by investors, some of which may be QIIs). Stakeholders will need time to make those changes.

Whilst making the point that an adequate consultation period is needed, stakeholders also need certainty and a 'road map' so that investment decisions can be made and appropriate investment vehicles established where necessary. We consider that there is a significant advantage to all affected (including HMRC) if all potential changes to the taxation of property are considered together so that a comprehensive revision (and where possible simplification) can be undertaken at one time rather than the current approach of successive and therefore necessarily complex changes.

We have set out further comments in respect of the proposals in the Appendix to this letter.

Yours faithfully

Tim Jones
for and on behalf of PwC

Appendix - Detailed response to the questions set out in "Taxing gains made by non-residents on UK immovable property"

In this appendix we have set out our replies to the questions specifically asked in the consultation document, together with other comments that we have on the proposals.

Chapter 2 Scope of the Measure

Question 1) Are there any issues specific to non-residents when considering how they fit into the UK definitions of persons chargeable to UK tax (CGT or CT)?

As a result of the proposed extension of UK tax on capital gains, we would expect that it would be necessary to consider the nature of certain non-residents, which has either not been previously relevant given that such persons have been outside the scope of UK tax on gains (and have no UK source income), or where a 'practical' approach has been taken in determining how the person should be taxed for another purpose (eg the taxation of UK property rental income). Examples might include whether certain entities should be treated as the equivalent of a UK trust, and entities which have no separate legal personality but which for practical reasons have been taxed as opaque entities for the purpose of UK tax on income because of the administrative complexity in taxing the ultimate investors if the entity were to be treated as tax transparent (eg German open ended funds).

It may also be necessary to consider whether it is appropriate for a non-resident company to be subject to capital gains tax if a resident company would not be subject to capital gains tax and the application of capital gains tax would introduce a much heavier tax charge e.g. as noted above non-resident insurers who are taxed on an accounts profits basis, usually mark to market with offsets for liabilities.

Question 2) Do you see any issues or complications arising with respect to rebasing which need to be addressed?

We can see potential issues in situations where the quantification of the taxable gain as set out in the proposals may give rise to a gain which is greater than the economic gain realised. This may also be an issue in the context of a double tax treaty which limits the UK's taxing rights on a non-resident to the gain on the direct (and sometimes indirect) disposal of UK property.

The rebasing rules could result in the taxable gain exceeding the economic gain, in particular in relation to an indirect disposal where it is not proposed that there be an option to use original cost. For example, if the value of the shares at April 2019 was less than the original cost of the shares, the post April 2019 increase in the value of the shares may be greater than the overall economic gain realised.

Where part of the immovable property in question has been within the scope of the NRCGT and/or ATED related gains regimes, it is possible that different calculation rules will apply depending on when the property was acquired (as set out in paragraph 5.12 of the consultation document). For example, in the case of a property falling within the NRCGT regime between April 2015 and April 2019, (and also possibly falling within the ATED related gains regime prior to April 2015) it will be important to ensure that the element of the gain (on a disposal post 2019) calculated under the NRCGT (and ATED) rules, and the element of the gain from April 2019 falling under the proposed rules do not exceed the overall economic gain.

The capital gain may also be greater than the economic gain in other situations given how the current capital gains computational rules operate; for example, in the way the wasting rules apply to leases

such that on the disposal of a short lease only an element of the original cost of the lease will be deductible.

Please also see further comments below in the context of indirect disposals.

Chapter 3 Direct disposals

Question 3) Do you agree with the basic principle that gains on direct disposals within these new rules should be computed using the same computational rules as other chargeable gains?

We agree with this basic principle, subject to the following issues/clarifications:

- As referred to above, there may be a range of circumstances where under other rules in respect of UK capital gains (for example, under the NRCGT regime, under the wasting rules for leases, or the rules in respect of enhancement expenditure) the taxpayer suffers a taxable gain which exceeds the economic gain.

- We assume that it will be the case that a non-UK corporate taxpayer will be able to claim indexation relief up to 31 December 2017 in relation to a gain computed by reference to cost (assuming this was incurred prior to 31 December 2017) in the same way as a UK corporation taxpayer.

- We assume that reliefs available to UK resident companies will also be available to non-UK companies (see further comments below in relation to consequential amendments).

Question 4) Further to the specific modifications identified, are any other changes needed to recognise differences in how the tax system applies to non-residents?

In relation to roll-over relief, given that non-residents carrying on a trade through a permanent establishment in the UK are already likely to be within the charge to capital gains in relation to UK immovable property used in that trade, presumably the reference in the consultation document at paragraph 3.12 and 3.13 is to very specific circumstances eg the sale of a property by a non-UK property investment company where the property is used in the trade of a UK group trading company (i.e. the circumstances set out in section 175(2B) TCGA 1992)?

We assume that existing capital gains provisions in respect of groups of companies will apply under the proposed new rules on a worldwide basis. For example, where there is a transfer from a non-UK company to another member of the worldwide group after April 2019, presumably the transfer will be treated as a no-gain no loss disposal, and the intention is that the ability to choose to rebase at April 2019 or use cost will be preserved? Also, it would appear that modifications would be required in relation to other provisions such as section 171A(2) TCGA 1992.

The corporation tax 'group relief' provisions will also presumably be modified. In particular, the definition of UK-related company in section 134 CTA 2010 would need to be extended to include non-UK resident companies subject to corporation tax. NB we understood that this was also due to be amended to take into account the provisions of section 5(2)(a) CTA 2009.

Presumably section 13 TCGA 1992 would not apply in relation to gains which are subject to tax under the proposals, but where gains on disposals from April 2019 are subject to rebasing, would the gain which has accrued prior to April 2019 still be subject to the provisions of section 13? Would that gain

be deferred in relation to disposals from April 2019 by a non-UK resident group company to a UK resident group company? We presume that section 14 TCGA 1992 relief from section 13 will be extended to take account of UK property always remaining within the charge to tax.

The gains proposals are intended to take effect from April 2019. Separately, it has been announced that non-resident companies chargeable to income tax and NRCGT will be brought into UK corporation tax from April 2020.

If that is the case, this may create certain anomalies. For example, for the period from 1 April 2019 to 31 March 2020, a non-resident company which is suffering income losses in respect of their rental property business would be unable to offset such losses against any capital gains arising in respect of property disposals (in contrast to a resident company) absent any special provisions.

We assume that any other reliefs potentially available in respect of capital gains on the disposal of UK immovable property (eg under section 161(3) and section 162 TCGA 1992) will apply.

We assume that non-resident companies will also be entitled to any other reliefs/loss offsets available to UK resident companies. However, given that the activities of non-resident companies may not be fully within the scope of UK tax, modifications of those rules may therefore be required, eg in relation to relief for management expenses and loan relationships/derivatives, and non-trade debits. Further modification of the interest capping rules may also be required.

Question 5) For businesses: Will the proposals for direct disposals mean that your company will now be required to register for UK CT?

Question 6) For businesses: Will the proposals for direct disposals lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

Question 7) For individuals: Will the proposals for direct disposals mean that you will be required to pay Capital Gains tax for the first time?

In accordance with the scope of our response, we do not have any comment to make in respect of questions 5, 6 and 7.

Chapter 4 Indirect disposals

Question 8) Do you consider that the rules for indirect transactions are fair and effective?

'Property rich entities' and SSE

We understand the proposal is that property rich entities are to be defined as per section 356OR of CTA 2010. Broadly, this would include:

- Any shareholding in a company deriving its value directly or indirectly from land;
- Any partnership interest deriving its value directly or indirectly from land;
- Any interest in settled property deriving its value directly or indirectly from land; and

- Any option, consent or embargo affecting the disposition of land.

This will potentially result in multiple levels of taxation (eg where there is a disposal of a property rich entity and then a subsequent disposal of the underlying property). To some extent, this is already addressed by the SSE (and is also discussed under chapter 6 in relation to CIVs).

However, there are some fundamental issues relating to the applicability of the SSE which have not been as relevant historically, in so far as it has not been necessary to consider the UK capital gains position for most non-residents. Some of the issues include:

(i) As noted in our response to question number 1 above, it may not be clear whether certain overseas entities should be classified as opaque or transparent for the purposes of tax on capital gains. Presumably, where an entity is classified as opaque, it should qualify as a disposing entity (i.e. a company) for the purposes of SSE.

(ii) As noted above, the proposals would potentially tax the disposal of any shareholding in a company. This would include companies which do not have ordinary share capital for the purposes of SSE, which is more likely to be a relevant issue as a result of the proposed extended scope of UK tax on capital gains. This issue was not addressed in the amendments to the SSE in 2017.

(iii) The SSE potentially applies to the sale of shares in companies which hold UK land on trading account. However, a disposal of an interest in a partnership (or any other entity which is not a company) which holds land on trading account, which would fall within the definition of a property rich entity (assuming the interest in the partnership/other entity is held as an investment), would not currently fall within SSE.

(iv) If the disposing entity is transparent for the purposes of tax on capital gains, and the person treated as having made the disposal is treated as opaque, then the SSE may not be available because, as a general matter, it is not possible to trace the ownership of ordinary share capital through tax transparent entities. This was partly addressed in relation to tracing holdings by QIIs though partnerships (see further comments below) but does not apply in relation to the disposal of shares in a trading company where the disposing entity is not held by QIIs, which would otherwise qualify for SSE by virtue of being a trading company.

In addition to the more general comments noted above, there are inconsistencies in the way the SSE rules currently apply (in relation to QIIs, and more generally). Under the proposals, these will become more relevant as the scope of UK tax on capital gains is extended. Some examples are given below:

(v) When tracing the ownership of a disposing company, ownership by QIIs can be traced through companies with ordinary share capital, and in certain cases, partnerships. Therefore, in the case of other types of fund vehicles (eg trusts, contractual arrangements, overseas equivalents of limited liability partnerships and companies without ordinary share capital) it is not currently possible to trace through the ownership to QIIs.

(vi) It is proposed that where a fund vehicle has invested in (and disposes of) a land rich entity which is opaque for the purposes of tax on capital gains but is not a company (for example, until 31 December 2017, the units in an offshore property unit trust). This is not a 'share' disposal and so SSE is not available.

'Property richness' test

Our understanding is that if the shares satisfy the 75% test (i.e. 75% of value of the gross asset value derives from UK land), it is intended that 100% of the gain on a share disposal is taxed. This would not appear to be in line with the intention to tax gains on UK property only (i.e. it potentially goes further).

This would be particularly relevant for property investment groups which hold properties in a number of territories and would result in double taxation where the direct or indirect disposal of properties in those territories are likely to be taxed by those territories.

By comparison, the trading in and developing UK land provisions allow for a just and reasonable apportionment of profits/gains and we recommend that this same proportionate approach be adopted in the non-resident gains legislation. This would also deal with the situation where a company satisfies the property richness test at the time of disposal notwithstanding that this has not been the case for the majority of the period of ownership.

The 25% ownership test

The proposals indicate that investors will be subject to tax on indirect disposals where they satisfy the 25% ownership test (which has a five year lookback, i.e to April 2014) and also aggregates their holdings with connected parties and anyone with whom they are 'acting together' (still to be defined). This could potentially bring in investors to which the rules may not have been intended to apply. Some examples are given below:

(i) A 'Cornerstone' or 'seed' investor in a fund may be caught as a result of the five year look back. The first investors in a fund are often initially above the 25% threshold but as other investors join the fund (as the fund often has multiple closings) their interest will be diluted below 25%. To deal with this, such investors, who may only have held an interest in excess of 25% for a short time, could be excluded.

(ii) The partners in a partnership which holds UK real estate through a non-resident company are, irrespective of their partnership interest, likely to be treated as having held 25% or more of the non-resident company as a result of the proposal to aggregate the interests of connected parties (as defined by section 1122 CTA 2010). Since partnerships are often used in the context of real estate funds as a fund vehicle, this would seem to be an unintended consequence as similar investors investing directly in a company would not be in the scope of the provisions.

It seems to us unlikely that this is the intended result and so modification of the aggregation/connected party rules should be made.

(iii) In the case of a closed ended real estate investment fund of fixed duration, there will typically be a stated intention in relation to the underlying assets (for example the assets are expected to be held for a period of 7 years and then, directly or indirectly disposed of, and the fund wound up). There may however be disposals by investors of their interests during the life of the fund.

The consultation document states that the section 1122 CTA 2010 connected party test will be supplemented by the 'acting together' rules modelled on those in the corporate interest restriction rules in section 465 TIOPA 2010 "to include situations where persons come together as a group with a common object in relation to the envelope entity". The latter definition is used to address a specific issue (interest deductions on loans from a related party) and is potentially too widely drafted, so as to apply where investors simply share a common investment objective.

It seems to us unlikely that this is the intended result where the investors simply share a common investment objective and so the 'acting together' principle should be tightly drafted in the legislation.

Base cost

The option of using original cost is not proposed to be available in respect of share disposals. For property disposals, the rebasing of the properties at 1 April 2019 can be ignored if the historic tax basis of the properties exceeds the market value at that date. However, the same principle is not intended to apply to the rebasing of shares. When previous regimes (the 1965, 1982 and non-resident capital gains (NRCGT) regimes) were introduced, an original cost alternative was provided.

The proposed treatment could disadvantage certain taxpayers, and, as noted above, may give rise to situations where the capital gain would be greater than the economic gain realised (over which the UK has taxing rights under a double tax treaty).

Also, on a share disposal, a professional valuation of the shares as at April 2019 may be required. This can be expensive, and also appears to represent an unnecessary cost given that the alternative of identifying original cost will in most cases be straightforward. It would also seem to give rise to practical problems since it may not be possible to obtain a contemporaneous valuation at April 2019 where the company is not property rich at that point but subsequently becomes so.

The problems outlined above would be avoided if the original cost option is also offered for share disposals.

The anti-forestalling and targeted anti-avoidance rules

The consultation document states that the proposed anti-forestalling provision is intended to apply to arrangements where, in addition to other conditions being satisfied, a tax advantage arises by reason of any provisions of a double taxation arrangement, but only in a case where the tax advantage is 'contrary to the object and purpose of those provisions'.

The consultation document goes on to say that 'The sorts of arrangements, which will be in scope, are in general called 'treaty shopping', whereby a person structures or restructures their investments in such a way as to deliberately put profits or gains beyond the taxation rights of one or more territories'.

There is also a proposed targeted anti-avoidance rule which is intended to apply to all arrangements entered into the main or one of the main purposes of which is to secure that gains are not subject to the new rules (to be modelled on section 356OK of the Corporation Tax Act 2010).

In order to understand the potential circumstances in which these broadly drafted provisions will be applied, it would be helpful to give specific examples (eg in guidance).

Other reliefs

As noted above in relation to direct disposals, we assume that any other reliefs potentially available on the disposal of property deriving its value from land (eg entrepreneurs relief in relation to shares in a trading company owning land or indeed any other reliefs available to residents (see also comments above under chapter 3 in relation other reliefs available to UK resident companies)) will also apply to non-residents.

Question 9) Are any other conditions necessary to ensure the policy is robust in meeting the objective of taxing non-residents on gains on indirect disposals?

We believe this question is best considered further as the proposals are developed; we look forward to having the opportunity to comment in the future.

Question 10) For businesses: Will the proposals for indirect disposals mean that your company will now be required to register for UK CT?

Question 11) For businesses: Will the proposals for indirect disposals lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

Question 12) For individuals: Will the proposals for indirect disposals mean that you will be required to pay Capital Gains tax for the first time?

In accordance with the scope of our response, we do not have any comment to make in respect of questions 10,11 or 12.

Chapter 5 Disposals of residential property

Question 13) Do you consider that it is right to harmonise ATED-related CGT given the changes proposed in this document?

In principle, we consider it right to harmonise ATED- related CGT with the proposed new regime as this will tend to simplification and over time a reduction in administrative tasks. We also understand that it is proposed that the existing NRCGT regime will be harmonised with the proposed new regime in April 2019 (rather than April 2020). Again, we consider the principle of harmonising the regimes to be appropriate given the potential benefits for HMRC and taxpayers alike.

However, given the complexity of the current residential regime, we would query whether it is realistic whether this can be achieved within the legislative timescale suggested, bearing in mind that this will impact on existing as well as previously out of scope taxpayers.

In relation to the proposals set out in 5.2 of the consultation document in relation to residential disposals, will the option of calculating a proportionate post-commencement gain or loss which is currently available in the NRCGT regime still be available under new rules for calculating the element of the gain/loss for the period up to April 2019? Will this option continue to be available in relation to the calculation of the element of the gain from April 2019?

There are also a number of practical issues with the existing NRCGT and ATED related gains regimes which should be addressed when implementing the new regime:

- HMRC's valuation office does offer valuation services but a valuation can only be requested after a sale has gone through, and may take up to three months. This timeframe often means that the 30 day deadline for submitting an NRCGT return cannot be satisfied. An extension of HMRC's valuation service so that a valuation can be obtained ahead of the sale would mitigate this issue.

- The current 30 day NRCGT return deadline does not allow much time to obtain the data, complete the return and calculations, have them signed off and submit the return. A longer

period - say 60 days - would be more realistic. Under current rules, extending the deadline should not have a significant impact on when HMRC receives the CGT payments, as most individuals defer payment until the submission of their SA Return. However, in the event that the due date for payment were to be accelerated, a minimum of 60 days from sale (rather than 30 days) would be recommended.

- The current online system for submission of the NRCGT return lacks security and functionality. It is possible to complete the filing without providing any security confirmations etc (as for example, an individual would need to in order to access their SA online account and submit an SA Return). There is also no functionality to save the return whilst in progress and come back to it. The system is therefore not designed for agents who would prepare the return and then require a client to approve it before submission.

- For authorised agents there seems to be some issue in terms of whether form 64-8 covers NRCGT.

- There are existing conflicting FTT judgments as to whether or not a return is required where there is no CGT payable. HMRC clearly think it is required, but assuming that is the policy intention then the wording of the legislation should be clearer to provide more certainty for taxpayers.

- The requirement to submit NRCGT returns when the entire gain/loss is also reported on an ATED return seems unnecessary and an additional administrative burden.

- The lack of a signature box on the NRCGT return causes issue with obtaining approval from clients.

Question 14) Are there any issues, risks, or complexities created by harmonising the ATED-related CGT rules in the manner proposed, and how can these be addressed?

Please refer to our response to question 13 above.

Question 15) For businesses: Will the proposals for disposals of residential property mean that your company will now be required to register for UK CT?

Question 16) For businesses: Will the proposals for disposals of residential property lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

Question 17) For individuals: Will the proposals for disposals of residential property mean that you will be required to pay Capital Gains tax for the first time?

In accordance with the scope of our response, we do not have any comment to make in respect of questions 15,16 or 17.

Chapter 6 Collective Investment Vehicles

Question 18) Do you agree with the general approach to ownership of non-residential property through CIVs outlined above?

REITs and UK CIVs other than REITs

The consultation document states that consideration will be given to whether any changes to the UK REIT rules (and to similar UK fund rules that exempt gains in particular circumstances) are required to ensure that the new rules for non-residential property are robust and cannot be easily avoided. There is a similar comment in relation to UK CIVs.

It is important that there is full consultation on any proposed changes to ensure there are no unforeseen consequences.

We have also noted above specific circumstances in which the SSE does not currently apply as drafted, some of which may apply to UK CIVs and should therefore be considered in the context of this proposal.

As discussed in further detail below, there are circumstances where the UK CIV regimes require a certain type of UK regulation which is not appropriate to certain investors and the modification of these regulatory requirements, eg in relation to Authorised Investment Funds (including PAIFs) and CoACSs is likely to lead to more widespread adoption of these 'onshore' vehicles.

Overseas CIVs

Key issues

We acknowledge the policy intention that offshore funds which are currently UK tax exempt 'only by reason of not being UK tax resident' in respect of gains on disposals of UK property should not be excluded from the proposals.

However, it will be necessary to consider whether the proposed rules would work in a way that is discriminatory (under general principles, the provisions of a double tax treaty or any other applicable provisions) to overseas CIVs. Whilst we acknowledge that some of the UK CIV regimes mentioned in the consultation document may have requirements in relation to residence, which may be in part linked to obligations regarding the collection of withholding tax, there are mechanisms that could be put in place to ensure that withholding tax is collected without discriminating on the grounds of residence.

Overseas CIVs such as property unit trusts and contractual co-ownership schemes, which are cheaper to operate and subject to fewer regulatory constraints than a UK CIV, are therefore preferred fund vehicles for many investors, including overseas pension funds, charities, sovereign immune entities as well as UK tax exempt investors such as UK pension funds. Similar considerations apply for comparable entities such as life insurance companies writing pension business (as explained in our covering letter above).

Broadly, the rationale behind the UK CIV regimes, in so far as it relates to capital gains, is to avoid multiple levels of taxation on gains, ensure that tax is not levied until the investor realises a gain, and that investors who are entitled to a particular relief or exemption do not indirectly bear tax on capital gains at the intermediate fund level. In effect, this puts the investor in a similar position to that where

they have a direct holding in the underlying investments, or if they had invested in a CIV which is transparent for the purposes of tax on gains.

If the same considerations are not taken into account in relation to overseas CIVs then this would have a distortive effect on the market, effectively favouring some CIVs over others. As noted above, there may be practical issues to address (eg in relation to withholding tax). In addition, in some cases, non-resident investors may be advantaged compared to a resident investor where there is an indirect disposal and they have less than a 25% interest, but under the proposals, such non-resident investors would in any event be advantaged if they invested in a UK CIV.

Potential solutions in relation to overseas CIVs

Whilst there are further details to consider, based on our experience we believe there are a number of potential solutions to the issue outlined above. These do not take into account the potential implications arising from SI 2017/1204 and how it may interact with the proposed changes (which are separately considered in further detail below):

- The existing exemptions available to UK CIVs could be extended to non-UK equivalent entities, with appropriate mechanisms to ensure the collection of withholding tax if relevant.
- An (irrevocable) election to allow fund vehicles to be treated as transparent for the purposes of tax on capital gains, or to override any other provision that would otherwise deem them to be opaque.
- In the case of opaque entities where tax is paid at the level of the fund, investors could be given a credit which in the case of tax exempt investors could be reclaimed.
- Modification of the existing SSE provisions to deal with existing anomalies in the way the regime applies (see comments in relation to chapter 4 above).
- Introduce a new relief on the direct disposal of UK immovable property which would operate in a similar way to the existing SSE provisions where there are QIIs.

Consideration also needs to be given to reliefs to allow reorganisations to move towards direct ownership/de-enveloping (eg capital gains and SDLT reliefs/deferrals).

All solutions will need to take account of applicable UK and international provisions and ensure a level playing field for taxpayers.

The impact of SI 2017/1204 on the position of offshore transparent funds

The recent changes introduced by SI 2017/1204 in relation to offshore transparent funds have created some uncertainty in terms of their treatment for the purposes of UK tax on capital gains, particularly in relation to the proposed changes.

Offshore unit trust schemes (such as Jersey Property Unit Trusts ('JPUTs')) have typically been treated as companies for capital gains purposes (section 99 TCGA 1992). In addition, certain other offshore funds which are not companies, partnerships or unit trusts (such as Luxembourg FCPs and Irish CCFs) have also been treated as companies for capital gains purposes (section 103A TCGA 1992).

Therefore, absent any specific provisions, the offshore unit trust schemes and offshore funds referred to above would (on the assumption that they are centrally managed and controlled outside the UK), under the proposed changes, become subject to UK tax on disposal gains of UK immovable property from April 2019. As noted above, this could result in additional levels of tax on gains which would not be the case if they were taxed in accordance with general principles (i.e. as tax transparent entities).

We understand that the purpose of SI 2017/1204 is to bring the affected offshore unit trust schemes/funds into line with the capital gains treatment of the investors' interest in 'co-ownership schemes' (referred to as CoACSs or ACSs); the investor's interest in the offshore fund is treated as an asset for capital gains purposes (rather than the investor being treated as having an interest in the underlying assets) and the underlying assets are effectively disregarded for capital gains purposes. In the case of unit trust schemes which are not 'offshore funds' they continue to be deemed to companies under section 99 TCGA 1992.

If SI 2017/1204 is expected to be amended from April 2019, or the position outlined above modified by other means, this should be clarified as soon as possible.

Question 19) Will the proposals for CIVs mean that you will now be required to register for UK tax?

Question 20) Will the proposals for CIVs lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

In accordance with the scope of our response, we do not have any comment to make in respect of questions 19 and 20.

Question 21) Are there changes needed to the rules for CIVs, particularly around exemptions, to ensure a robust system of taxing non-residents on gains on disposal of interests in UK property?

See above.

Question 22) Are there any specific circumstances where the treatment of gains on non-residential UK property should be different to the treatment of gains on UK residential property in the context of a CIV?

Please see comments above in relation to non-residential property.

Question 23) Do you have any further comments on the taxation of gains on non-residential UK property held through CIVs?

See above.

Chapter 7 Reporting and compliance

Question 24) Do you foresee any difficulties with the reporting requirements for the seller?

As mentioned at question 13 above, from experience of the NRCGT regime, a 30 day return deadline does not allow much time to obtain the data, complete the return and calculations, have them signed

off and submit the return. There is likely to be more complexity involved in respect of indirect disposals, such that a 30 day deadline (to the extent that this would apply) would not be realistic.

Question 25) Do you foresee any difficulties with the charge on the UK group company?

We note (at paragraph 7.16) that if non-resident companies are brought within the charge to corporation tax as a result of the proposals, they will become subject to the provisions in Chapter 7 of Part 22 CTA 2010 (Recovery of unpaid corporation tax due from non-UK resident company).

However, it is not clear how the provisions in Chapter 6 of Part 22 CTA 2010 (Collection etc of tax from UK representatives of non-UK resident companies) would apply. Chapter 6 applies to situations where there is a UK representative as a result of a UK permanent establishment, whereas the proposed new rules could apply where there is no UK permanent establishment. How is it intended to determine who a UK representative would be in the context of the new rules?

Question 26) Do you agree with the proposal to use the normal CT Self-Assessment framework?

This appears to be the most practical way forward.

Question 27) Will the proposed information and reporting requirements lead to an increase in your administrative burdens or costs? Please provide details of the expected one-off and ongoing costs.

We are not in a position to assess costs that will fall to us as advisers in the absence of more detailed proposals. However, we expect that these will be both one off and recurring costs to comply with any new obligations.

Question 28) For third-party advisors: what is the best way to ensure the proposed information and reporting requirements do not lead to an undue increase in your administrative burdens or costs? Please provide details of likely one-off and ongoing costs in respect of any options or proposals.

We understand why the Government proposes to require certain advisors to report transactions they are aware of. It is important that this proposal is developed with care or difficulties may arise in practice:

- The consultation paper proposes that an adviser would only be required to report if they have reason to believe that a contract for the indirect disposal of the property had been concluded. This is important - it is not uncommon for an adviser to be consulted at an early stage of a transaction (or only in relation to specific aspects of a transaction) but to cease to be involved as it progresses; in these circumstances the adviser would not be aware of the progress of the transaction and should not have a reporting obligation.

- It is unclear exactly what information an adviser's report should include. In our opinion the duty should be limited to reporting that a transaction which could fall within the rules has taken place. It is important that the adviser should only be expected to report facts they have in their possession; advisers should not need to prepare a computation, as the information might not be in the adviser's possession and they would not in a position to verify it.

- We presume that the duty would only apply to those advising the vendor, although this isn't clear from the consultation document, and it could be read as applying to advisers to either party. In our opinion the duty should be limited to those advising the vendor, as advisers to the purchaser would often not have access to sufficient information to form a view as to whether the transaction could fall within the rules. They would certainly not be in a position to require the vendor to tell them whether the transaction has been reported to HMRC.

- In relation to vendors who are in the charge to corporation tax, is there intended to be a reporting requirement within 30 days, notwithstanding that the gain or loss will be returned within the corporation tax self assessment framework? If not, how will the 60 day time limit for third party reporting work?

- The proposal is to require reporting of transactions which "could fall within the rules". We would appreciate some guidance as to how this would apply in practice. For example the vendor might take the view that there is no tax liability, perhaps because it is a pension fund, or because the UK immovable property represents less than 75% of the value of the company which is being sold. The adviser might take the view that although these are both reasonable conclusions, the adviser cannot be sure that they are correct. What would the adviser be expected to do in these circumstances? See also comments above in respect of NRCGT reporting where there is no gain.

- Some thought will need to be given to the form of any declaration (if any) which the adviser is required to given when making a report. In particular advisers should not be required to verify the accuracy of any facts, in the way that would be expected of taxpayers, as advisers would not be in a position to verify the facts.

- In our opinion it is quite likely that this requirement would result in reports being made by advisers when there is in fact no actual liability. It would be helpful if HMRC's guidance to Inspectors recognised this, so Inspectors do not automatically assume that an adviser's report means that there is a failure to report by the taxpayer.

- There may situations where an adviser becomes aware of a transaction more than 60 days after it takes place. In such a case there would need to be an extended deadline - maybe 30 days after the adviser becomes aware of the transaction.
  It isn't clear how the provisions would apply when a professional is first involved after the transaction has happened. For example, a professional might be asked to advise a taxpayer who has failed to report a disposal within the required period. There would need to be an extended deadline for the adviser in such a case.

Question 29) What channels and methods should HMRC use to raise awareness of this change in the law, to ensure that affected non-residents will know that they are impacted?

We presume that HMRC already have experience of this issue because of the earlier introduction of ATED and NRCGT relating to residential property. The compliance process around NRLs would provide an additional route that would allow access to many direct owners of UK commercial property. The liability relating to indirect holdings in property rich companies will require widespread and sustained communication of the changes; this may not be appreciated by the international taxpayer, particularly given the UK's longstanding practice not to tax such gains.