Capital gains tax

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A lull before the storm

The coronavirus has nearly brought the country to a standstill. Among much else the sale and purchase of residential property has almost ceased. This lull in activity is an opportunity for conveyancing solicitors to prepare themselves for the introduction of the capital gains tax (CGT) 30-day reporting requirement which came into effect on 6 April and to decide what action they should take when house sales activity recommences.

Previously, direct or indirect disposals of UK land (both residential and commercial) which met the non-residence condition required a non-resident capital gains tax return to be made to HMRC within 30 days of the completion of the disposal. This was the case regardless of whether or not a gain accrues on the disposal. All other CGT disposals were normally reported on the disponer's self-assessment return submitted from 10 to 22 months after the disposal takes place.

From 6 April, however, under schedule 2 to the Finance Act 2019 a return (a CGT land return) is required of all direct disposals of UK land on which a residential property gain is made (returns are required from non-residents in respect of direct and indirect disposals of UK residential property even when no gain is made). Schedule 2 will not apply to excluded disposals which include a no gain/no loss disposal, such as a disposal between a husband and wife or between civil partners. No return is required where no payment on account (see below) is payable. So, returns will not be required of disposals on which gains accrue which do not exceed the annual exempt amount (which in 2020/21 will be £12,300).

Whether a return is required, therefore, will depend, *inter alia*, on a person's tax residence status. In many cases it will be simple to determine if someone is UK resident under the statutory residence test in schedule 45 to the Finance Act 2013, but for some that will not be the case. For example, where a disposal is made by trustees the residence status of each trustee needs to be determined as does the residence and domicile status of the settlor at the time the settlement was made or, if it was made on the settlor's death, under his will or intestacy at the time immediately before that death (section 69 of the Taxation of Chargeable Gains Act 1992).

The definition of a 'residential property gain' is in schedule 1B to the TCGA 1992 and runs to almost four pages of legislation. Where a property is comprised of both residential and commercial elements any gain arising is to be apportioned on a just and reasonable basis and only the residential part needs to be reported.

Where a CGT land return is required, a payment on account of the CGT is due on the filing date of the return. This represents a fundamental change in the administration of CGT payment which, except in respect of non-residents, has always been primarily based on an annual cycle under the regular self-assessment process.

The payment on account will be the amount of CGT which would be chargeable for the year ignoring disposals completed after the completion of the disposal which is the subject of the return. Brought forward CGT losses and losses realised up to the date of disposal can be taken into account in calculating the net chargeable gain, but losses which are expected to be realised after the disposal cannot.

Relevant CGT reliefs (for example main residence relief (MRR)) and the annual exemption will be applied in the usual way. The applicable rate of CGT (either 18% or 28%) will then be applied to the chargeable gain to calculate the notional CGT payable. To apply the correct rate of CGT will require the person to estimate his income for the year. This will be difficult for those whose income is not consistent, such as the self-employed. As we have seen, a CGT land return will not be required where there is no notional CGT to pay. Much of the information required to determine the CGT which would be chargeable on the disposal will not be known when the return is made, but the taxpayer is permitted to make reasonable estimates.

Many disposals of residential property are disposals of the vendor's main residence on which MRR will be available to relieve the entire chargeable gain, so that a return will not be required. Not all disposals of residential property qualify for MRR, however, and deciding whether relief is available and if so, how much, can be difficult.

Gains on residential property can be wholly or partly chargeable and, therefore, a return will be required where, for example, a rental property or a second home is sold or where MRR is restricted because the vendor has moved into a nursing home or parts of the property have been exclusively used for business purposes. In such common situations a return may be required.

Due to the 30-day limit it will be difficult in some cases for actual figures to be used because for example where the property concerned has been inherited or has been acquired by way of gift other than on death, valuations will be needed. As we have explained, the legislation provides for reasonable estimates and assumptions to be made based on the information available at that time. The difficulty will be in deciding what is reasonable. If the taxpayer acts in a way which, although he considers it reasonable, is not, they will be at risk of bearing interest and penalties on the tax under-assessed due to their unreasonable act.

A CGT land return can later be amended but 'only so far as the return… could, when originally delivered, have included the amendment by reference to things already done'. This would seem to suggest that if a higher-rate taxpayer was made redundant after he made his disposal with the result that his CGT rate was less than he expected when making his CGT land return, he would have to wait until the submission of his self-assessment return to obtain a repayment of the CGT.

The CGT land return will, to a large extent (although there are to be some variations) be subject to the same provisions relating to amendments, enquiries, HMRC determinations and discovery assessments as those that apply to self-assessment. The return form contains a declaration that

'the return is, to the best of the person's knowledge, correct and complete'. The reporting and paying of CGT can be made through an online portal.

For a person within the self-assessment regime, submitting a CGT land return will be in addition to reporting the disposal on his self-assessment tax return. HMRC says that those not within the self-assessment regime who make a 'one-off' disposal will be able to remain outside the self-assessment regime provided 'there is no other reason for them to be part of it'. This would seem to require the calculation of their tax liabilities in their land tax returns to result in liabilities at least as large as those which result from the calculations made when all relevant information is known after the end of the tax year. HMRC has recently announced that it will allow 'a period of time to adjust' to the new requirements. It will not issue penalties for late returns reporting disposals taking place between 6 April and 30 June provided they are reported on or before 31 July 2020. Interest will, however, continue to accrue. Penalties will be issued for late returns relating to disposals taking place after 30 June.

The introduction of the requirement to make CGT land returns will change solicitors' relations with their clients. Some solicitors will see it as an opportunity to extend their services to clients. Many will not want to dabble in tax advice and compliance, however, and it is common, even now, for solicitors' terms of engagement to exclude any provision of tax advice. If the solicitor does not provide advice, however, the client will still need to obtain it.

If the solicitor does not alert their client to that need and the client is subsequently investigated by HMRC, which then imposes penalties on them, the client is likely to feel let down whatever the terms of engagement may have been. Many clients who now have to make CGT land returns will have no existing relationship with a tax adviser because they have not needed to submit annual self-assessment returns. This is likely to be the case (for example) if the client's income is wholly subject to PAYE. If the client does engage a tax adviser, he will develop a relationship with another professional (or at least one hopes the adviser will be a professional – there are many unqualified 'tax advisers' offering their services). For the client's sake, and for the sake of the solicitor's relationship with their client, it is important that the tax adviser should be honest and competent.

It would be worthwhile, therefore, for solicitors involved in conveyancing of residential property to develop relationships with reputable tax advisers. At an early stage of their engagement to convey residential property, they can alert their client to the possibility that a return will be required in due course, recommend the taking of independent tax advice and provide an introduction to a reputable adviser. Doing so will benefit clients and enhance the value of the solicitor's service to them.

Simon and Sharon McKie are partners at taxation consultancy firm McKie & Co (Advisory Services) LLP. They are the joint authors of Tolley's Estate Planning and McKie on Statutory Residence

Decisions and interventions

Decisions filed recently with the Law Society (which may be subject to appeal)

Queen Gladys Appoh

Application 11851-2018

Admitted 2010

Hearing 4 February 2020

Reasons 5 March 2020

The SDT ordered that the respondent should be suspended from practice for 12 months from 4 February 2020, and upon the expiry of that term she should be subject to conditions, that she might not: (i) act as a manager or owner of any authorised body or authorised non-SRA firm; (ii) act as a compliance officer for legal practice or compliance officer for finance and administration for any sole practitioner, authorised body or authorised non-SRA firm; hold, receive or have access to client money, or act as a signatory to any client or office account, or have the power to authorise electronic transfers from any client or office account; that she might practise only in employment approved by the Solicitors Regulation Authority, with liberty to apply to vary those conditions.

The respondent had failed to take any or adequate steps to locate and safeguard escrow monies and to return them or cause them to be returned, in breach of principles 2 and 6 of the SRA Principles 2011.

She had failed to cause the firm to obey a court order to repay escrow monies plus interest and costs to company C or its solicitors, thereby failing to achieve outcome 5.3 of the Solicitors Code of Conduct 2011, and breaching principles 2 and 6.

She had failed to produce and keep accounting records properly written up to show accurately the money held on behalf of every client and trust, in breach of rules 29.1, 29.2, 29.8, 29.11, 29.12, 29.17(b), 31.1 and 31.8 of the SRA Accounts Rules 2011, thereby failing to achieve outcomes 7.2 and/or 7.4 of the code and breaching principle 7.

She had failed to carry out her duties as COFA adequately or at

all, thereby failing to achieve outcomes 7.2 and 7.4 of the code, and breaching principles 6, 8 and 10.

In relation to client P, she had failed to challenge and stop the firm's practice of charging clients for a contribution towards its professional indemnity insurance, thereby breaching outcome 1.1 of the code.

The SDT had considered carefully a statement of agreed facts and outcome proposed by the parties.

It appeared the respondent had been misled to some extent by solicitor X (against whom proceedings had been subsequently stayed indefinitely on the grounds of ill- health), although she ought not to have allowed that to happen as a partner and COFA of the firm.

Permanently removing the respondent's ability to practise would be unreasonable and disproportionate in the light of solicitor X's involvement in the allegations and the indefinite stay on those proceedings.

The SDT was satisfied that the statement of agreed facts and outcome should be approved.

The respondent was ordered to pay costs of £13,800, such order not to be enforced without leave.

Mark John Hughes Walker

Application 12047-2020

Admitted 1992

Hearing 12 February 2020

Reasons 5 March 2020

The SDT ordered that the respondent should be suspended from practice for 18 months from 12 February 2020.

While in practice as a solicitor and manager at Hughes Walker Solicitors Limited the respondent had:

- failed to prevent, or have in place adequate systems to prevent, client monies being transferred from client account to office account other than in the circumstances allowed by rule 20.1 of the SRA Accounts Rules 2011, thereby breaching principles 7 and 8 of the SRA Principles 201,1 and rule 20.1 of the rules;
- caused or allowed sums to be held in client account, or failed to prevent sums being so held, which did not relate to an underlying transaction or a service forming part of the respondent's normal regulated activities, thereby breaching principles 7 and 8, and rule 14.5 of the rules;
- failed to keep, or cause to be kept, accounting records and ledgers properly written up to show dealings with client money, thereby breaching principles 7 and 8, and rules 29.1(a) and 29.2(b) of the rules;
- failed to ensure that staff of the firm complied with the firm's obligations under the rules, thereby breaching principles 7 and 8, outcomes O(7.2), (7.4) and (7.6) of the SRA Code of Conduct 2011, and rule 8.5(e)(i)(A) of the SRA Authorisation Rules 2011;
- when the firm was acting on behalf of individuals in respect of potential personal injury claims relating to holiday sickness, recklessly caused, allowed or failed to prevent the firm sending letters to potential defendants, purporting to advance personal injury claims relating to holiday sickness on behalf of clients, which contained assertions of fact in support of claims which had not been provided by clients, had not been otherwise verified by the firm as being correct and were misleading, thereby breaching principles 2 and 6;
- recklessly caused or allowed a case management system to be operated in respect of personal injury claims relating to holiday sickness which generated correspondence capable of misleading recipients, thereby breaching principles 7 and 8; and
- failed to provide to clients or potential clients any or adequate advice as to the merits of their possible claims, or as to their potential costs liability in the event of their claims being unsuccessful, thereby breaching principles 4 and 5.

The parties invited the SDT to deal with the allegations against the respondent in accordance with a statement of agreed facts and outcome. The SDT was satisfied that the respondent's admissions had been properly made, and that a fixed term of suspension of 18 months was appropriate, given the seriousness of the misconduct.

The respondent was ordered to pay costs of £21,000.

Richard Daniel Smith

Application 11982-2019

Admitted 2004

Hearing 26-28 November 2019

Reasons 2 March 2020

The respondent denied the allegations made against him by the applicant and the SDT, by a majority, found the allegations not proved. It therefore ordered that the allegations be dismissed and that there be no order for costs.

The allegations against the respondent were that, while in practice as a partner at Steele Raymond LLP, he had acted towards A in a manner which was inappropriate and/or unwanted in that, while in the firm's office, he had touched her bottom on more than one occasion in circumstances in which:

- he knew or ought to have known that Person A had given no indication that such conduct was wanted; and/or
- he knew or ought to have known that his conduct was inappropriate; and/or
- the conduct occurred in the firm's office while the respondent and A were engaged in their professional roles; and/or
- he was in a position of seniority over A in that he was a partner in the firm; and/or
- he knew or ought to have known that his conduct was an abuse of his position of seniority; and
- in doing so he had breached one or both of principle 2 and principle 6 of the SRA Principles 2011.

The SDT had been unable to reach a consensus, with the solicitor and lay members reaching a majority decision and the chair dissenting.

The majority of the tribunal had concluded that A was not a credible witness and that another witness, B, did not assist in corroborating her allegations, and had therefore found the allegations not proved beyond reasonable doubt.

Simon Taylor Solicitor

On 30 March 2020, the Adjudication Panel intervened into the former sole practice of Simon Taylor who practised as Simon Taylor Solicitor from 22 Upton Gardens, Worthing, West Sussex BN13 1DA.

The ground for intervention was: it was necessary to intervene to protect the interests of former clients of Mr Taylor (paragraph 1(1)(m) Schedule 1, Solicitors Act 1974).

Mr Taylor died on 15 December 2019.

No intervention agent has been appointed.

Elliotts Solicitors

On 24 March 2020, the panel resolved to intervene into the above-named former sole practice of Rebecca Jane Elliott, formerly based at Suite 22, Enterprise House, Ocean Village, Southampton SO14 3XB.

The grounds for intervention were:

- Failure to comply with the SRA Accounts Rules 2011, SRA Code of Conduct 2011 and the SRA Principles 2011, which are rules made under sections 31 and 32 of the Solicitors Act 1974 (as amended); and
- It was necessary to exercise the powers of intervention to protect the interests of the former clients of Miss Elliott and the firm.

Michael Veal of Lester Aldridge LLP, Russell House, Oxford Road, Bournemouth BH8 8EX, tel: 01202 786341, DX: 7623 Bournemouth, has been appointed as intervention agent.

The SRA is making arrangements to uplift the practice files and documents.