

Attributions of gains to members of non-resident companies

Who is likely to be affected?

UK residents who are participators in non-UK resident closely controlled companies that realise a gain when disposing of assets. Broadly, a close company is one which is under the control of five or fewer participators or where the directors control the company.

General description of the measure

Section 13 of the Taxation of Chargeable Gains Act 1992 (section 13) is an anti-avoidance provision that in broad terms may attribute to UK-resident participators in a non-UK resident closely controlled company gains arising from the disposal of assets. The measure extends the range of commercial activities excluded from the application of the provision and raises the threshold at which apportionment of gains takes place.

Policy objective

The measure aims to update this anti-avoidance provision to maintain its compatibility with EU law and to restrict the range of participators affected to those with easier access to the information they need to report gains.

Background to the measure

An infraction notice (Reasoned Opinion) was issued by the European Commission on 16 February 2011. The Commission argued that section 13 breaches the treaty freedoms of establishment and movement of capital.

On 6 December 2011 the Government announced, by way of written ministerial statement, that there would be a consultation on amendments proposed to update section 13 and address the infraction. This was confirmed at Budget 2012.

The consultation document was published on 30 July 2012 and the closing date for comments was 22 October 2012 and a response to the consultation was published on 11 December 2012.

Detailed proposal

Operative date

The legislation is expected to come into force on the date that Finance Bill 2013 receives Royal Assent, but with retrospective effect on and after 6 April 2012. The effect is expected to be tax-relieving or neutral, but the retrospection will be subject to election to meet any exceptional cases.

Current law

Section 13 is designed to prevent avoidance of tax on capital gains by sheltering them in an overseas closely controlled company. These are gains on which UK resident individuals or companies would otherwise be taxed had they disposed of the asset and realised the gain themselves.

It operates by attributing gains realised by a non-UK resident closed controlled company to UK resident participators in proportion to their interests. Reliefs are available where, for example, a participator to whom gains have been attributed subsequently realises a gain on his shares, and certain types of gain are excluded, notably on trading assets.

Proposed revisions

The measure will modify the existing provision by creating a new exemption which will exclude gains from genuine business activity overseas from the scope of charge.

It will also increase the participation threshold at which participators may have gains attributed to them from over 10 per cent to over 25 per cent.

Summary of impacts

Exchequer impact (£m)	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
	nil	negligible	negligible	negligible	negligible	negligible
	This measure is expected to have a negligible impact on the Exchequer. Any impact will be set out at Budget 2013.					
Economic impact	The measure is not expected to have any significant economic impacts.					
Impact on individuals and households	This measure amends existing anti-avoidance legislation and will only impact on a small number of individuals. In some cases it may ease constraints for minority participators not engaged in tax avoidance.					
Equalities impacts	No equalities impact is expected.					
Impact on business including civil society organisations	The measure is designed to avoid any impact on economically significant activity and focuses on artificial arrangements to avoid tax. A negligible benefit may be felt by some businesses as a result of the certainty the new exemption test will bring, particularly in connection with ongoing compliance costs.					
Operational impact (£m) (HMRC or other)	This measure is not expected to have any significant operational impacts.					
Other impacts	Other impacts have been considered and none have been identified.					

Monitoring and evaluation

This measure will be kept under review through communication with affected taxpayer groups.

Further advice

If you have any questions please telephone Adrian Cooper on 020 7147 2347 or James Driver on 020 7147 3977 or e-mail PTIConsultation.Specialistpersonaltax@hmrc.gsi.gov.uk

1 Attribution of gains to members of non-resident companies

- (1) TCGA 1992 is amended as follows.
- (2) In subsection (4) of section 13 (members to whom rule for attributing gains to members of non-resident companies does not apply), for “one tenth” substitute “one quarter”.
- (3) In subsection (5) of that section (cases where rule for attributing gains to members of non-resident companies does not apply), after the “or” at the end of paragraph (b) insert –
 - “(ca) a chargeable gain accruing on the disposal of an asset used, and used only, for the purposes of economically significant activities carried on outside the United Kingdom by the company through a business establishment in a territory outside the United Kingdom, or
 - (cb) a chargeable gain accruing to the company on a disposal of an asset where it is shown that neither –
 - (i) the disposal of the asset by the company, nor
 - (ii) the acquisition or holding of the asset by the company, formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to capital gains tax or corporation tax, or”.
- (4) After section 13 insert –

“13A Section 13(5): interpretation

- (1) For the purposes of section 13(5)(b) a disposal of an asset is to be regarded as a disposal of an asset used for the purposes of a trade carried on wholly outside the United Kingdom by a company if –
 - (a) the asset is accommodation, or an interest or right in accommodation, which is situated outside the United Kingdom, and
 - (b) the accommodation has for each relevant period been furnished holiday accommodation of which a person has made a commercial letting.
- (2) For the purposes of subsection (1)(b) each of the following is “a relevant period” –
 - (a) the period of 12 months ending with the date of the disposal and each of the two preceding periods of 12 months, or
 - (b) if the company has been the beneficial owner of the accommodation (or interest or right) for a period longer than 36 months, the period of 12 months ending with the date of the disposal and each of the preceding periods of 12 months throughout which the company has been the beneficial owner of the accommodation (or interest or right).
- (3) The reference in subsection (1)(b) to the commercial letting of furnished holiday accommodation is to be read in accordance with Chapter 6 of Part 4 of CTA 2009, but –
 - (a) as if sections 266, 268 and 268A were omitted, and
 - (b) as if, in section 267(1), the reference to an accounting period were a reference to a relevant period as defined by subsection (2) above.

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- (4) For the purposes of section 13(5)(ca) activities carried on by a company through a business establishment are “economically significant activities” if they are activities which consist of the provision by the company of goods or services to others on a commercial basis and involve—
- (a) the use of staff in numbers, and with competence and authority,
 - (b) the use of premises and equipment, and
 - (c) the addition of economic value, by the company, to those to whom the goods or services are provided,
- commensurate with the size and nature of those activities.
- (5) In subsection (4) “staff” means employees, agents or contractors of the company.
- (6) For the purposes of section 13(5)(ca) “business establishment” means a permanent establishment as defined by sections 1141 to 1144 of CTA 2010.”
- (5) The amendments made by this section have effect in relation to disposals made on or after 6 April 2012.
- (6) But, in the case of a disposal made on or after that date but before 6 April 2013, a person to whom a part of a chargeable gain or allowable loss would (but for the amendments made by this section) have accrued on the disposal may make an election in writing for section 13 of TCGA 1992 to apply in relation to the disposal without those amendments.
- (7) An election under subsection (6) in respect of a disposal must be made—
- (a) in the case of a person within the charge to capital gains tax, within 4 years from the end of the tax year in which the disposal was made, and
 - (b) in the case of a person within the charge to corporation tax, within 4 years from the end of the accounting period in which the disposal was made.

EXPLANATORY NOTE

ATTRIBUTION OF GAINS TO MEMBERS OF NON-RESIDENT COMPANIES

SUMMARY

1. The clause modifies section 13 of the Taxation of Chargeable Gains Act (TCGA) 1992, an anti-avoidance provision dealing with assets held through non UK-resident closely controlled companies. It aims to secure compatibility with European Union law. It does this by introducing an exclusion from the scope of charge gains arising from assets used in genuine business activities overseas, clarifying the treatment of furnished holiday accommodation for the purposes of the provision, and raises the threshold at which the charge applies to unconnected minority participants.

DETAILS OF THE CLAUSE

2. Subsection (1) is introductory.
3. Subsection (2) amends section 13(4) of TCGA 1992 and raises the maximum proportion of gains which are not required to be apportioned to a participant (and persons connected with him) from one tenth to one quarter.
4. Subsection (3) inserts two new paragraphs (ca) and (cb) into section 13(5) of the TCGA 1992.
5. New paragraph (ca) excludes from the charge gains on assets used for the purposes of “economically significant activities” outside the UK by a company or business establishment.
6. New paragraph (cb) introduces an exemption for gains where neither the acquisition nor the disposal of the asset formed part of arrangements put in place for the purpose of avoiding tax.
7. Subsection (4) introduces a new section 13A into TCGA 1992.
8. New section 13A(1) clarifies the meaning of assets wholly outside the United Kingdom used for the purposes of furnished letting in relation to section 13(5)(b).
9. New section 13A(2) defines the meaning of “relevant period” for the purposes of assets used for the purposes of furnished lettings.

10. New section 13A(3) applies the rules governing furnished holiday lettings set out in Chapter 6 of Part 4 of the Corporation Tax Act 2009 with certain modifications.
11. New section 13A(4) defines the term “economically significant activities” for the purposes of section 13(5)(ca) and (cb).
12. New section 13A(5) defines “staff” for the purposes of the economically significant activities test.
13. New section 13A(6) provides a definition of the term “business establishment” used in section 13(5)(ca).
14. Subsection (5) provides that the amendments made by the clause have effect for disposals made on or after 6 April 2012.
15. Subsections (6) and (7) permit an election to be made to disapply the amendments for disposals made between 6 April 2012 and 5 April 2013.

BACKGROUND

16. Section 13 TCGA 1992 is designed to prevent avoidance of tax on capital gains by sheltering them in an overseas closely controlled company. These are gains on which UK resident individuals or companies would otherwise be taxed had they disposed of the asset and realised the gain directly.
17. An infraction notice (Reasoned Opinion) was issued to the United Kingdom by the European Commission on 16 February 2011. The Commission argued that section 13 breaches the freedoms of establishment and movement of capital established by Articles 49 and 63 of the Treaty on the Functioning of the European Union.
18. These changes aim to ensure that the legislation is compatible with the Treaty while maintaining effective protection against tax avoidance.
19. If you have any questions about this change, or comments on the legislation, please contact Adrian Cooper on 020 7147 2347 (email: adrian.cooper@hmrc.gsi.gov.uk).