UK Government Consults On Proposed Reforms To The Remittance Basis

6 July 2011

Background

In 2008 the then Labour Party Government enacted extensive changes to the tax treatment of non-domiciled UK residents ('NDR's). NDRs have historically enjoyed a favourable tax status – known as the remittance basis – which enables them to pay UK tax only on their UK source income and gains arising in a tax year, and any foreign income and gains which are remitted to the UK. The 2008 reforms contained a number of new measures including:

- The introduction of the £30,000 remittance basis charge for tax years commencing on or after 6 April 2008 on NDRs who had been resident in the UK in seven out of the nine preceding tax years.
- The creation of the concept of 'nominated income' (in order to claim the remittance basis and pay the remittance basis charge, NDRs were required to nominate some (or all) of their foreign income and gains of that year) and of complex and potentially punitive rules where nominated income is inadvertently remitted to the UK.
- An extension to the meaning of remittance, including provisions enabling a wide class of persons (known as 'relevant persons') to make a remittance which is taxable in the hands of the NDR to whom the foreign income and gains actually arose (the 'taxable individual') – in broad terms relevant persons can include, amongst others, the taxable individual, certain family members, and connected family trusts and companies.
- The 2008 changes were widely considered to be onerous, creating considerable additional compliance obligations (and associated compliance costs) for NDRs as well as a number of potential traps for the unwary. The remittance basis is also currently available to individuals who are UK resident and domiciled but not ordinarily resident however for simplicity in this publication we have referred to remittance basis users as NDRs.

Overview

On 17 June 2011, the long-awaited consultation documents on the changes to the tax treatment of NDRs and the statutory residence test ('SRT') were published. The deadline for responses to the questions raised in the consultation documents is 9 September 2011. Once the consultation is completed, it is anticipated that the changes to NDR taxation and the SRT will take effect from 6 April 2012. McDermott has published a separate On The Subject on the SRT consultation, available here

Tax treatment of NDRs – remittance basis changes

The purpose of the proposed changes is to achieve two aims: first to encourage NDRs to invest and do business in the UK, and secondly to ensure that long-term NDRs make a greater tax contribution. There is also a desire to simplify the remittance basis rules where these are overly complex but without creating tax avoidance opportunities. Perhaps most encouragingly the consultation states that the current Coalition Government has no intention to change the broad principles underlying the remittance basis and that, following the changes which result from the consultation, there will be no further substantive changes for the life of the current Parliament (until 2015).

Changes are proposed in three key areas.

1. Remittance basis charge

The remittance basis charge for NDRs who have been resident in the UK in at least twelve of the fourteen preceding tax years will increase to £50,000 per annum.

This proposed change means that for a NDR coming to the UK, presuming continuous residence from arrival, in years 1 to 7 the NDR can claim the remittance basis with no charge other than the loss of the personal income tax allowance and capital gains annual exempt amount, from years 8-12 the NDR must pay the remittance basis charge at £30,000 per annum, and from year 13 the NDR must pay the remittance basis charge at £50,000 per annum. As under the current rules it will be possible to opt in or out of the remittance basis from year to year.

2. Encouraging business investment

Encouragingly the proposed exemption appears very widely drawn and designed to be permissive and simple. Specifically the scope of the exemption:

- Does not aim to exempt only investment in entrepreneurial or smaller business where the risk might deter some investors - instead it will be allowed for investments into 'qualifying businesses' which are business carrying out trading activity as a substantial proportion of their overall activities, and businesses undertaking the development or letting of commercial property (again as a substantial proportion of the overall activities) and can therefore apply to financial services businesses which are trading.
- Perhaps unsurprisingly it does not apply to holding and letting of residential property (perceived as an area for potential abuse) or to leasing of tangible moveable property (cars, yachts, etc) or the provision of personal services (nannies, cooks, etc.); these are 'excluded activities'.

- Applies only to investments into companies because other types of entity (such as partnerships) are perceived as presenting an 'unacceptable risk of avoidance'.
- May be wide enough to apply to investments into companies listed on a recognised stock exchange, although the consultations asks for views on whether it would be preferable to create a more limited exemption to allow investment only in unlisted companies or companies listed on exchange regulated markets.
- Will not apply solely to direct investment by the taxable individual (so that offshore trusts could invest and, for example, not make a taxable remittance of income under the settlor charging regime as a relevant person under the remittance basis rules – trustees would however need to consider the inheritance tax consequences of acquiring UK situs investments).
- The exemption is unrestricted in terms of size (no upper or lower limits).
- Can be made as an investment in share capital or by way of loan;
- Can be in a UK permanent establishment of a non-UK incorporated company;
- Can be into a holding company provided that the underlying group companies meet the qualifying business requirements, do not carry out excluded activities, comprise only companies (not other types of entity) and which are either UK resident or have a UK permanent establishment;
- Envisages that the taxable individual can have a connection to the qualifying business - anti-avoidance rules will be introduced to prevent the taxable individual taking non-commercial payments from the company but commercial remuneration will be permitted;
- Proposes to include anti-avoidance measures in order to prevent abuse, including:

a) A requirement that overseas income and gains which have been remitted for investment in a qualifying business must be taken out of the UK when the investment is disposed of - the time limit for this is proposed to be 2 weeks (otherwise there is a remittance of the original income and gains invested).

b) The original foreign income and gains will be identified and matched with the first amounts taken out of the company which are not a permitted commercial payment.

c) There will be anti-avoidance rules to prevent 'leakage' to the NDR by way of non-commercial loans and other arrangements and to prevent the NDR selling an existing UK business to a new company funded by their foreign income and gains - i.e. the exemption only applies to new investment in the UK.

d) The relief will be claimed in the NDR's tax return and the consultation suggests that only limited information will be requested.

e) NDR's using the exemption will still be subject to the remittance basis charge where the remittance basis is claimed.

3. Simplification of certain of the remittance basis rules

Simplification is proposed in four main areas:

- Nominated income: it will be possible, under the proposed changes, to remit up to £10 of nominated income before triggering the penal identification rules. For persons who only nominate up to £10 of income or gains as their total nominated income, it seems it will be possible to remit the entire amount without triggering the identification rules. This would not however make much difference for NDRs who nominate significantly more than £10 because they need the tax credits.
- Foreign currency bank accounts ('FCBA's): the proposal is to remove all amounts in an individual's FCBAs from the scope of capital gains tax so that foreign currency gains will no longer arise on the operation of the account (this change would apply to both NDRs and UK domiciliaries). If enacted, this would very significantly reduce the administrative costs relating to calculating gains on FCBAs and is a welcome reform.
- Taxation of assets remitted to and sold in the UK: there are some existing limited exemptions allowing assets purchased out of foreign income and gains to be brought to the UK without triggering a taxable remittance. But if such an asset is sold in the UK the sale immediately triggers a remittance of the original income and gains used to fund the asset. The exemption proposed under the consultation is designed to encourage NDRs to bring assets in to the UK for sale and provides that there will be no taxable remittance of the original income/gains provided that all the sale proceeds are taken out of the UK within two weeks of the sale proceeds being received.
- Employees who are UK resident but not ordinarily resident and who have overseas duties and UK duties under a single contract of employment currently rely on a statutory concession to distinguish on a simplified basis the income attributable to the overseas duties which is mixed in a single bank account with the income from the UK duties. It is proposed to put this on a statutory footing.

Comments and conclusion

The increase in the remittance basis charge for NDRs who have been resident in the UK in more than 12 years is in line with the Coalition Government's desire for NDRs to pay more tax, but it is reassuring that more stringent measures, such as the Liberal Democrat Party manifesto pledge to implement worldwide taxation on NDRs who have been resident for only seven years, are not considered as part of the consultation and will not be considered within the current Parliament (if this statement can be relied upon). The introduction of a wide and permissive exemption allowing investment in the UK of foreign income and gains taxable on the remittance basis would be of great benefit to NDRs and their offshore structures.

Although the proposed simplifications of the remittance basis rules do not go as far as they perhaps could, the consultation invites responses proposing further areas within the remittance basis rules for simplification. As a starting point, therefore, the consultation can be regarded as a step in the right direction.

McDermott anticipates that it will submit a response to the consultation on a number of the detailed points, either via one of the professional bodies, or independently and will monitor the consultation and subsequent developments closely.

The full consultation document can be downloaded from the HM Treasury website