

Finance Act 2008 changes to the Capital Gains Tax charge on beneficiaries of non-resident settlements

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Introduction

1. This guidance explains the changes made by Part 2 of Schedule 7 to FA 2008 (Schedule 7) to section 87 and Schedule 4C Taxation of Chargeable Gains Act 1992 (TCGA) and the supporting provisions such as section 90 TCGA. This is the October 2009 version of this guidance. The only difference from the original published version are revised Examples 6 & 7.
2. Section 87 and Schedule 4C TCGA 1992 tax UK-resident beneficiaries on chargeable gains accruing to non-resident settlements if the beneficiary receives, or has received, a capital payment from the settlement (or another settlement to which assets have been transferred). Until FA 2008 section 87 and Schedule 4C taxed only UK resident or ordinarily resident beneficiaries who were domiciled in the UK. FA 2008 extended section 87 and Schedule 4C so that they also tax non-domiciled beneficiaries. This change was part of a wider reform of the remittance basis of taxation.
3. The amendments to section 87 and Schedule 4C preserve the basic framework of those provisions which is to match capital payments received by the beneficiaries with gains made by the trustees. The changes are those necessary to extend the charge to Capital Gains Tax to non-UK domiciled beneficiaries. Transitional measures ensure that these changes operate fairly in relation to payments and gains made or relating to periods before 6 April 2008.
4. The main changes made by FA 2008 are:
 - From 6 April 2008 section 87 and Schedule 4C apply to all UK resident or ordinarily resident beneficiaries whatever their domicile.
 - If the beneficiary is non-UK domiciled in a year the section 87 or Schedule 4C gain accrues to them, they will remain not chargeable to Capital Gains Tax on the gain to the extent the gain arises from matching
 - settlement gains realised before 6 April 2008, or
 - capital payments received before 6 April 2008.
 - The remittance basis applies if a section 87 gain accrues to a non-domiciled beneficiary who is a remittance basis user.
 - The trustees of the settlement can make an election which restricts the gain charged on a non-domiciled beneficiary to the amount which relates to the growth in the value of the assets since 6 April 2008.
 - New rules which match capital payments against chargeable gains are introduced. Payments are matched first against the gains of the most recent year. Similarly gains are matched first against payments of the most recent year. This is the last-in first-out or LIFO basis. It replaces the first-in first-out or FIFO basis used to calculate the additional charge under section 91 TCGA in the pre-FA 2008 legislation.
 - No account is taken of any capital payment received between 12 March 2008 and 6 April 2008 by a non-UK domiciled beneficiary unless the beneficiary becomes UK domiciled.
 - There are also changes to section 90 TCGA which deals with transfers from one settlement to another and Schedule 4C TCGA which deals with

the taxation of gains where Schedule 4B TCGA has applied to a transfer from one settlement to another.

5. FA 2008 made no changes to the charge under section 86 TCGA on UK resident or ordinarily resident settlors of settlor interested settlements. Section 86 taxes the gains of such settlements on the settlor. The section applies only if the settlor is domiciled in the UK and FA 2008 has not changed that.

Section 87 TCGA from 6 April 2008

6. FA 2008 has substituted a new section 87 to take effect from 6 April 2008. The main function of the new section 87 is to impose the charge on beneficiaries of non-resident settlements. In doing this it retains many of the features of the original section 87. The basic principle remains the same. If the trustees make chargeable gains those gains are treated as accruing to the beneficiaries to the extent that beneficiaries receive capital payments from the trustees.
7. Whether there is a charge to Capital Gains Tax depends on the general rule in section 2 TCGA. This imposes a charge to Capital Gains Tax on UK resident and ordinarily resident persons. So if the gain accrues to a person who is not UK resident or not ordinarily resident there is no charge to Capital Gains Tax but section 87 still applies to match the gain. FA 2008 has not changed this. Neither has it changed the rule in section 2(4) TCGA that personal losses cannot be set against section 87 gains. But there are a number of changes in the new section 87.
8. First, it doesn't repeat section 87(7). This subsection provided there was no charge to Capital Gains Tax if a chargeable gain was treated as accruing to a non-UK domiciled beneficiary. From 6 April 2008 a non-UK domiciled beneficiary may be charged to Capital Gains Tax on any section 87 gain accruing to them if a capital payment received on or after 6 April 2008 is matched with a settlement gain for the year 2008-09 onwards. If the beneficiary is a remittance basis user the gain will not be charged until it is remitted to the UK. See paragraph 37+ below. The amount of the gain charged on the beneficiary may be restricted if the trustees have made an election under paragraph 126 of Schedule 7 for 6 April 2008 values to be used. See paragraph 79+ below.
9. Second, it introduces the concept of the section 2(2) amount. This is defined in section 87(4). It is the amount on which the trustees would be liable to Capital Gains Tax if they had been resident and ordinarily resident in the UK during the year. As in the original section 87 this is the amount of the gains after deducting losses and without giving any annual exempt amount. The definition also rewrites the effect of the original section 87(3) and reduces the section 2(2) amount by the amount of any gains charged on the settlor by section 86 TCGA.
10. Section 87(5) provides that the section 2(2) amount for a year in which section 87 does not apply is nil. In particular this is needed to deal with transfer between settlements. The transferee settlement may have a section 2(2) amount for a year in which the trustees were resident in the UK. Section 87(5) ensures no account is taken of that amount. But it can still be treated as having a section 2(2) amount for that year from the transferor settlement. See paragraph 68 below.
11. Third, the original section 87(4) treats the gains that would have accrued to the trustees if they had been resident in the UK as if those gains had

accrued to the beneficiaries in the year the capital payment was received. Section 87(2) does not look through to the trustees' gains. It provides that a chargeable gain accrues to the beneficiary in the year a capital payment is matched to a section 2(2) amount.

12. The effect is the same but section 87(2) does not retain the approach of the original section 87(2) which is to carry forward unmatched gains and treat them as arising in the following year. Instead this is dealt with through the new matching rules in section 87A and 87C.
13. The effect of the commencement provisions in the original sections 87(10) and 88(7) is preserved in paragraphs 116 and 117 of Schedule 7. The effect of the commencement provisions in section 130 FA 1998 is preserved in paragraph 118 of Schedule 7.

Matching of capital payments with section 2(2) amounts: introduction: section 87A TCGA

14. A key element of the FA 2008 changes is the introduction of rules for matching capital payments to section 2(2) amounts from 6 April 2008. The basic rules are set out in section 87A TCGA in a series of steps. Capital payments are matched against section 2(2) amounts in the following order:
 15. First against section 2(2) amounts of the same year.
 16. Second against unmatched section 2(2) amounts of earlier years taking the most recent year first.
 17. Third against section 2(2) amounts of later years. In this case priority is given first to any capital payments received in that year and then to any capital payments brought forward. If capital payments are brought forward from more than one year the capital payment received in the latest year is matched first.
 18. Capital payments received by a non-UK domiciliary between 12 March and 5 April 2008 are disregarded. See paragraph 50+below.
 19. FA 2008 has made no changes to the definition of capital payment in section 97(1) TCGA. It has made one change to the circumstances in which a beneficiary is treated as receiving a capital payment. Capital payments received by a non-UK resident close company may be disregarded. See paragraph 52 below.

Matching of section 2(2) amounts in the year a payment is received: section 87A TCGA

20. Section 87A Steps 1 and 2 require that you calculate the section 2(2) amount for the tax year and identify the total of the capital payments that the beneficiaries have received during the year.
21. Step 3 is the basic rule that capital payments received during a year are matched with section 2(2) amounts for the year. There are three possible results to this matching.
22. *The payments are equal to or lower than the section 2(2) amount* - a chargeable gain equal to the amount of the payment is treated as accruing in the year. Under Step 4 the section 2(2) amount for the year is reduced by the amount of the capital payment and the capital payment for the year is reduced to nil. See example 1.
23. *The payments are higher than the section 2(2) amount* - Step 3 provides that a 'relevant proportion' of the payments are matched against the section 2(2)

amount. A gain equal to the relevant proportion accrues in the year. The relevant proportion is:

$$\frac{\text{Value s2(2) amount}}{\text{Total capital payments}}$$

24. Arithmetically the relevant proportion will be equal to the value of the section 2(2) amount. The formula is required if more than one capital payment is received in the year. Step 3(b) requires that you match a relevant proportion of each payment. This ensures that the gains are allocated fairly between beneficiaries. See example 2. Under Step 4 the section 2(2) amount for the year is reduced to nil and the capital payments for the year are reduced by the amount of the gain that accrues. You then need to consider if the capital payment should be set against the section 2(2) amounts of earlier years. If the payment cannot be set against the section 2(2) amount of an earlier year it will be carried forward until it can be set against a section 2(2) of a later year. See the next section.
25. *There is no section 2(2) amount for the year* - You need to consider if the capital payment should be set against the section 2(2) amounts of earlier years. If the payment cannot be set against the section 2(2) amount of an earlier year it will be carried forward until it can be set against a section 2(2) of a later year. See the next section.

Example 1: New section 87A - Capital payment equal to or lower than section 2(2) amount

At the start of 2008-09 there are no unmatched capital payments or section 2(2) amounts.

2008-09	Section 2(2) amount	£20,000
	Capital Payment received	£11,000

A chargeable gain of £11,000 accrues in 2008-09 to the beneficiary who received the capital payment.

The section 2(2) amount for 2008-09 is reduced to £9,000.

The capital payments for 2008-09 are reduced to nil.

Example 2: New section 87A - Capital payment received greater than section 2(2) amounts

At the start of 2008-09 there are no unmatched capital payments or section 2(2) amounts.

2008-09	Section 2(2) amount	£20,000
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Capital payments received	Beneficiary A	£15,000
	Beneficiary B	£10,000
Beneficiary A is resident and domiciled in the UK. Beneficiary B is not resident in the UK.		
A chargeable gain equal to the relevant proportion of the section 2(2) amount accrues on each beneficiary in 2008-09.		
Beneficiary A	$£15,000 \times \frac{20,000}{25,000}$	= £12,000
Beneficiary B	$£10,000 \times \frac{20,000}{25,000}$	= £8,000
Only beneficiary A has a liability to Capital Gains Tax.		
The section 2(2) amount for 2008-09 is reduced to nil.		
The unmatched capital payments for 2008-09 are beneficiary A £3,000 and beneficiary B £2,000.		

Matching capital payments with section 2(2) amounts of earlier or later years: section 87A TCGA

26. If there are unmatched capital payments for a year they should be matched against section 2(2) amounts of earlier years. Any surplus capital payments are then carried forward and set against section 2(2) amounts for a later year. This is achieved by Step 5 and subsections (3) and (4) of section 87A.
27. The starting point is section 87A(3). This stops the matching process if there are no unmatched capital payments or section 2(2) amounts for the year or any earlier year. Otherwise Step 5 requires that you consider the matching process set-out in Steps 1 to 4 again. Because Steps 1 to 4 are considered first in relation to the current year, priority is always given to capital payments received in the current year.
28. If the section 2(2) amount of the current year is greater than the capital payments received in the year the first leg of Step 5 applies. You look back and match the section 2(2) amount against unmatched capital payments of earlier years. Because Step 5 applies on a year by year basis capital payments received in later years are matched first. See example 3. If any section 2(2) amounts remain unmatched they will be matched against unmatched capital payments of later years as set-out in the second leg of Step 5.
29. If the capital payments received in the current year are greater than the section 2(2) amounts or there are no section 2(2) amounts then the second leg of Step 5 applies. The unmatched capital payments are set against section 2(2) amounts of earlier years taking the latest year first. See example 4. If any capital payments remain unmatched they will be matched against unmatched section 2(2) amounts of later years as set-out in the first leg of Step 5.

Example 3: New section 87A - Section 2(2) amounts greater than capital payments in latest year

At the start of 2008-09 there are no unmatched capital payments or section 2(2) amounts.

2008-09	Capital payment	£10,000
	Section 2(2) amount	Nil
2009-10	Capital payments	£15,000
	Section 2(2) amount	Nil
2010-11	Capital payment	£2,000
	Section 2(2) amount	£24,000

When the years 2008-09 and 2009-10 are considered immediately after the end of those years no chargeable gains accrue.

In 2010-11 the capital payment of £2,000 is matched against the section 2(2) amount. A chargeable gain of £2,000 accrues in the year 2010-11.

The capital payments for 2010-11 are reduced to nil. The section 2(2) amount is reduced to £22,000 (£24,000 - £2,000).

The £22,000 section 2(2) amount for 2010-11 is matched against the capital payments of £15,000 in 2009-10. A chargeable gain of £15,000 accrues in the year 2010-11.

The section 2(2) amount for 2010-11 is reduced to £7,000 (£24,000 - £2,000 - £15,000)

The capital payments for 2009-10 are reduced to nil.

The £7,000 section 2(2) amount for 2010-11 is matched against the capital payments of £10,000 for 2008-09. A chargeable gain of £7,000 accrues in the year 2010-11.

The section 2(2) amount for 2010-11 is reduced to nil (£24,000 - £2,000 - £15,000 - £7,000). The capital payments for 2008-09 are reduced to £3,000 (£10,000 - £7,000). These capital payments will be set against future section 2(2) amounts.

The chargeable gains for 2010-11 total £24,000 (£2,000 + £15,000 + £7,000).

Example 4: New section 87A: Capital payments greater than section 2(2) amounts in latest year

At the start of 2008-09 there are no unmatched capital payments or section 2(2) amounts.

2008-09	Capital payments	Nil
	Section 2(2) amount	£ 12,000
2009-10	Capital payments	Nil
	Section 2(2) amount	£15,000
2010-11	Capital payment	£43,000
	Section 2(2) amount	£ 4,000

When 2008-09 and 2009-10 are considered immediately after the end of those years no chargeable gains accrue.

In 2010-11 the capital payment £43,000 is matched against the section 2(2) amount £4,000. A chargeable gain of £4,000 accrues in 2010-11.

The section 2(2) amount for 2010-11 is reduced to nil. The capital payments for 2010-11 are reduced to £39,000 (£43,000 - £4,000).

The capital payments £39,000 are matched against the section 2(2) amount of £15,000 for 2009-10. A chargeable gain of £15,000 accrues in 2010-11.

The section 2(2) amount for 2009-10 is reduced to nil. The capital payments for 2010-11 are reduced to £24,000 (£43,000 - £4,000 - £15,000).

The capital payments of £24,000 are matched against the section 2(2) amount for 2008-09.

A chargeable gain of £12,000 accrues in 2010-11.

The section 2(2) amount for 2008-09 is reduced to nil. The capital payments for 2010-11 are reduced to £12,000 (£43,000 - £4,000 - £15,000 - £12,000). These capital payments are available for matching against future section 2(2) amounts.

The chargeable gains for 2010-11 total £31,000 (£4,000 + £15,000 + £12,000).

Assuming the beneficiary is UK resident and domiciled Capital Gains Tax will be chargeable on these chargeable gains. Section 91 TCGA will apply to increase the capital gains tax due on the £12,000 gains that accrue from matching capital payments against the section 2(2) amounts for 2008-09. Section 91 will not apply to the £15,000 gains relating to the 2009-10 section 2(2) amounts. This is because section 91 applies only if the capital payment is made more than one year after the

end of the tax year in which the section 2(2) arose.

At the time of writing this guidance the annual exempt amount and rate of Capital Gains Tax are not known for 2010-11. This example assumes they are the same as for 2008-09 at £9,600 and 18% respectively. The annual exempt amount is set against the £12,000 gains which are liable to the increase in tax. The tax due £432 is increased by £86. The tax due on the other gains £19,000 is £3420 giving a total Capital Gains Tax for 2010-11 of £3938.

Identifying unmatched section 2(2) amount for years before 2008-09: paragraph 120 of Schedule 7

30. Although the new matching rules in section 87A take effect from 2008-09 they will apply to match capital payments received in 2008-09 and later against unmatched section 2(2) amounts of 2007-08 and earlier. This means it is necessary to calculate what those section 2(2) amounts are. Paragraph 120 of Schedule 7 explains how to do this in a series of steps. Capital payments matched with these section 2(2) amounts may be subject to the increased tax charge under section 91 TCGA.
31. First you calculate what the section 2(2) amount would be for each earlier year using the definition in the new section 87(4) but applying the Capital Gains Tax rules for the earlier year. So you give taper relief and indexation allowance as appropriate. These section 2(2) amounts include gains made by the trustees which have been matched with capital payments.
32. Second you identify the total chargeable gains that have accrued to beneficiaries under section 87 in the years up to and including 2007-08. This includes chargeable gains that have not been charged to tax – for example because of the non-UK residence or domicile status of the beneficiary. This figure is called the “total deemed capital gains”.
33. Third you allocate the total deemed capital gains to years in which there is a section 2(2) amount taking the earliest year first. You reduce the section 2(2) amount by the amount of the total deemed gains. If the total deemed gains are greater than the section 2(2) amount the section 2(2) for the year is reduced to nil. A corresponding reduction is made in the total deemed gains. When all the total deemed gains have been allocated you are left with the unmatched section 2(2) amounts for 2007-08 and earlier years. See example 5.

Example 5: Identifying unmatched section 2(2) amounts for years before 2008-09: paragraph 120 of Schedule 7

The section 2(2) amounts for a settlement are:-

2005-06	£50,000
2006-07	£75,000
2007-08	£60,000

Up to and including 2007-08 capital payments of £90,000 have been received by

beneficiaries and the total deemed gains are £90,000. None of the capital payments were received in the period 12 March to 5 April 2008. See example 12 for an example of payments received in this period by a non-UK domiciled beneficiary.

The total deemed gains are allocated against the section 2(2) amounts using the FIFO rules in paragraph 120 of Schedule 7 that apply to matching for 2007-08 and earlier years. They are allocated as follows:

	Original s2 (2) amount	Total deemed gains	Deemed s2(2) amount
2005-06	£50,000	£50,000	Nil
2006-07	£75,000	£40,000	£35,000
2007-08	£60,000	Nil	£60,000

Suppose capital payments of £70,000 were received by beneficiaries in 2009-10 and there is no section 2(2) amount for that year or 2008-09. The £70,000 capital payments are matched under the LIFO rules in the new section 87A TCGA that apply for matching in 2008-09 and later years. £60,000 of those payments are matched against the section 2(2) amount for 2007-08 and £10,000 of those payments are matched against the section 2(2) amount for 2006-07. The total deemed gains are £70,000 (£60,000 + £10,000) treated as accruing in 2009-10. This leaves unmatched a deemed section 2(2) amount for 2006-07 of £25,000 (£35,000 - £10,000) available to match against capital payments made in 2010-11 or later years.

Assuming all the beneficiaries were resident in the UK in 2009-10 their liability to Capital Gains Tax on the section 87 gains accruing to them will depend on their domicile in 2009-10. If any of the beneficiaries are non-UK domiciled individuals paragraph 124(2)(b) of Schedule 7 will prevent them being charged to Capital Gains Tax. This applies whether or not they have claimed to use the remittance basis for 2009-10. If any of the beneficiaries are UK domiciled they will be charged to Capital Gains Tax on the section 87 gains. Any tax due on these gains will be increased by section 91 TCGA.

Assume the entire capital payment is received by a UK resident and domiciled beneficiary who has no other capital gains and losses in 2009-10. At the time of writing the annual exempt amount and rate of Capital Gains Tax are not known for 2009-10. This example assumes they are the same as for 2008-09 at £9,600 and 18% respectively. The annual exempt amount is set first against the gain accruing from the 2006-07 capital payment. i.e. £10,000 - £9,600 = £400. The tax due on the gain accruing from the 2006-07 capital payment is £36 (£400 @ 18%). This tax is increased by £10 (£36 @ 30% = £10). The tax due on the gain accruing from the 2007-08 amount is £10,800 (£60,000 @ 18%). This tax is increased by £2,160 (£10,800 @ 20%). The total Capital Gains Tax payable for 2009-10 is £13,006 (£36 + £10 + £10,800 + £2,160).

Identifying unmatched capital payments received before 2008-09: paragraph 122 of Schedule 7

34. In the same way that it is necessary to deal with unmatched section 2(2) amounts for a year before 2008-09 it is also necessary to deal with unmatched capital payments received before 2008-09. You have to identify the year in which an unmatched capital payment was received. This is dealt with in paragraph 122 of Schedule 7.
35. First you apply the rule in the original section 87(6) to determine if all or any of a capital payment would be left out of account. A payment would be left out of account to the extent that chargeable gains accrued to a beneficiary as a result of making the payment. In other words if the payment is matched against gains made by the trustees. See example 6.
36. If more than one capital payment is matched against the trustees' gains for a year and the total of the payments is greater than the chargeable gain that accrues the rule in paragraph 122(3) applies. You identify the year the unmatched payment was received by matching the payments received in the earliest years first. See example 7.

Example 6: Identifying unmatched capital payments received before 2008-09: paragraph 122(1) & (2) of Schedule 7

2005-06	Capital payments received	Beneficiary A	£15,000
		Beneficiary B	£12,000
	Trustees' gains (section 2(2) amount)		£37,000
2007-08	Capital payments received	Beneficiary A	£ 8,000
		Beneficiary B	£ 9,000

In 2005-06 the capital payments £15,000 and £12,000 are matched against £37,000 trustees' gains and chargeable gains of £15,000 and £12,000 accrue to A and B. In 2008-09 and later years paragraph 122(1) of schedule 7 applies and the capital payments are reduced to nil. The unmatched trustees' gains of £10,000 are carried forward under the old section 87(2) to later years.

In 2007-08 £10,000 trustees' gains are matched against the £17,000 capital payments received. Gains of £4,705 ($£10,000 \times 8,000/17,000$) accrue to A and gains of £5,295 ($£10,000 \times 9,000/17,000$) accrue to B. Their respective unmatched capital payments are reduced to £3,295 ($£8,000 - £4,705$) and £3,705 ($£9,000 - £5,295$). Paragraph 122(2) of Schedule 7 ensures only those unmatched parts of the capital payments are carried forward for use in 2008-09 or later years.

Example 7: Identifying unmatched capital payments received before 2008-09: Paragraph 122(3) of Schedule 7

2005-06	Capital payments received	Beneficiary A	£16,000
		Beneficiary B	£14,000
	Trustees' gains (section 2(2) amount)		£ 5,000
2007-08	Capital payments received	Beneficiary A	£10,000
		Beneficiary B	£ 8,000
	Trustees' gains (section 2(2) amount)		£13,000
2008-09	Section 2(2) amount		£20,000

In 2005-06 gains of £2,667 ($£5,000 \times 16,000/30,000$) would accrue to beneficiary A and the unmatched capital payment would be reduced to £13,333 ($£16,000 - £2,667$). Gains of £2,333 ($£5,000 \times 14,000/30,000$) would accrue to beneficiary B and the unmatched capital payment would be reduced to £11,667 ($£14,000 - £2,333$).

In 2007-08 A receives a further capital payment of £10,000 giving them total unmatched capital payments of £23,333. B receives a further capital payment of £8,000 giving them total unmatched capital payments of £19,667. Gains of £7,054 ($£13,000 \times 23,333/43,000$) accrue to A. Gains of £5,946 ($£13,000 \times 19,667/43,000$) accrue to B. A's unmatched capital payments to carry forward to 2008-09 are £16,279 ($£23,333 - £7,054$). B's unmatched capital payments are £13,721 ($£19,667 - £5,946$).

In 2008-09 the conditions for paragraph 122(3) of Schedule 7 are satisfied:

- (a) Chargeable gains have accrued to both beneficiaries in 2007-08.
- (b) Capital payments from 2005-06 and 2007-08 have been used for the purposes of determining those gains.
- (c) The amount of the chargeable gains £13,000 is less than the total of the capital payments £43,000.

Paragraph 122(3) matches the £13,000 gains first against the capital payments received in 2005-06. In 2005-06 A's unmatched capital payments were £13,333. The 2007-08 gains of £7,054 are matched first against those payments reducing the unmatched capital payments to £6,279. B's unmatched capital payments were £11,667. The 2007-08 gains of £5,496 are matched first against those payments reducing the unmatched capital payments to £5,721. The total unmatched capital payments to carry forward to 2008-09 are then:

- To A £16,279 consisting of £6,279 from 2005-06 and £10,000 from 2007-08
- To B £13,721 consisting of £5,721 from 2005-06 and £8,000 from 2007-08

The ordinary rules of section 87A then apply for the purpose of matching the £20,000 2008-09 section 2(2) amount with the earlier years' capital payments. Gains of £10,000 accrue to A and gains of £8,000 accrue to B as a result of matching the section 2(2) amount against the capital payments received in 2007-08. That leaves £2,000 of the section 2(2) amount to match with capital payments from 2005-06. A gain of £1,046 ($£2,000 \times 6279/12,000$) accrues to A and a gain of £954 ($£2,000 \times 5721/12,000$) accrues to B as a result of matching that £2,000 of the section 2(2) amount. The total gains attributed under section 87 for 2008-09 are:

- To A £11,046 (£10,000 + £1,046)
- To B £8,954 (£8,000 + £954)

The total unmatched capital payments to carry forward to 2009-10 are then:

- To A £5,233 (£6,279 - £1,046) all from 2005-06
- To B £4,767 (£5,721 - £954) all from 2005-06.

Non-UK domiciled beneficiaries - remittance basis: section 87B TCGA

37. A non-UK domiciled beneficiary may have made a claim for the remittance basis to apply, or may be entitled to the remittance basis without claim, for a year in which a section 87 chargeable gain accrues to them. They will not be liable to Capital Gains Tax until the gain is remitted to the UK. Any unremitted section 87 gains are included in the total of the beneficiary's unremitted foreign income and gains for the purposes of section 809D ITA 2007. That section applies the remittance basis without a claim for any year in which the beneficiary's unremitted income and gains are below £2000.
38. The key provision is section 87B TCGA. This applies if
- chargeable gains accrue to an individual under section 87
 - in a year in which the remittance basis applies, and
 - they are not domiciled in the UK in that year.
39. The second condition means that the beneficiary must be UK resident as the remittance basis applies only to UK residents.
40. The third condition is necessary as the remittance basis in sections 809B, 809D, and 809E ITA 2007 applies to individuals who are not ordinarily resident in the UK. Such individuals, who are UK domiciled, have always been liable to Capital Gains Tax on any chargeable gains accruing to them under section 87.
41. Section 87B(2) provides that the chargeable gains are treated as foreign chargeable gains within the meaning of section 12 TCGA. This has three consequences. First, section 12(2) means the gains accrue and are taxed only when they are remitted to the UK. Second, section 12(4) means that even if the section 2(2) amount arises from the disposal of assets situated in the UK the gains will be subject to the remittance basis. Third, section 12(5)

means that the rules in section 809L ITA 2007 onwards apply to determine if a gain is remitted to the UK.

42. Section 809L Conditions A and B require that the foreign chargeable gain or property derived from it is remitted to the UK. That isn't possible if the gain accrues under section 87 as the gain does not derive from a disposal. Broadly the gain is treated as remitted if the capital payment (or property derived from it) is remitted to the UK or benefits are received or enjoyed in the UK. Section 87B(3) provides for this by deeming relevant property or benefits to derive from the foreign chargeable gains. Relevant property and benefits are defined in section 87B(4). Property will be relevant if the capital payment consists of the payment or transfer of the property or if a beneficiary becomes absolutely entitled to the property such that section 60 TCGA applies. A benefit will be relevant if the capital payment consists of the conferring of the benefit. See examples 8 and 9.
43. The remittance basis applies to the section 87 gain not the gain that created the section 2(2) amount. For example, trustees dispose of an asset held outside the UK creating a section 2(2) amount. In the same year they make a capital payment outside the UK to a non-domiciled beneficiary. The capital payment is matched against the section 2(2) amount. A section 87 gain accrues to the beneficiary who has claimed the remittance basis for that year. The trustees apply the proceeds of the disposal in buying investments in the UK. This remittance of the gain which created the section 2(2) amount is not treated as a remittance of the section 87 gain by the beneficiary.
44. Because a foreign chargeable gain is only liable to Capital Gains Tax in the year it is remitted to the UK the rate of Capital Gains Tax for that year applies; not the year in which the section 87 gain accrues through the matching process. But the year in which the section 87 gain accrues through the matching process is used for the purposes of calculating any tax due under section 91. This is illustrated in example 8.
45. The beneficiary may not have claimed the remittance basis for the year in which the gain is remitted to the UK. They will be entitled to their annual exempt amount for that year and this can be set against the section 87 gain which is liable to the section 91 charge. This is illustrated in example 8.

Example 8 – New section 87B - remittance of capital payment: payment

A is a UK resident and domiciled beneficiary of a non-UK resident settlement. B is a UK resident but non-UK domiciled beneficiary of the same settlement. The settlement owns shares in X Inc. X Inc is an American company registered on the New York Stock Exchange.

In 2008-09 the trustees sell shares in X Inc for \$120,000 when the spot rate is £1 = \$1.50. The acquisition cost of the shares was \$20,000 when spot was also £1 = \$1.50. This creates a section 2(2) amount of £66,666 for 2008-09, ie \$100,000 @ 1.50.

In 2010-11 the trustees make capital payments of \$40,000 into the US bank accounts of each beneficiary. The spot rate of the US dollar at the date of the payment is £1 = \$1.75. Chargeable gains of £22,857 accrue to each beneficiary under section 87 in 2010-11 in respect of these capital payments. \$40,000 @ \$1.75 = £22,857.

At the time of writing the annual exempt amount and rate of Capital Gains Tax are not known for 2010-11 and 2012-13. This example assumes the rate of Capital Gains

Tax is 18% for both years and the annual exempt amount was £10,000 in 2010-11 and £11,000 in 2012-13.

Beneficiary A has other gains in 2010-11. The overall position is as follows.

- Section 87 gains £22,857
- Other personal gains £40,000
- Other personal losses £20,000
- Annual exempt amount £10,000

The amount on which Capital Gains Tax is chargeable is £32,857. The personal losses can be set only against the other personal gains but the annual exempt amount is allocated first to the section 87 gain leaving £12,857 of that part of the gain chargeable at 18%. The tax due on £12,857 is £2,314 (£12,857 @ 18%). This is increased by £462 (£2,314 @ 20%) because there is a delay of over one year in making the capital payment.

Beneficiary B claims the remittance basis for 2010-11 and leaves the \$40,000 in the US bank account. B also has other gains in 2010-11. These gains and losses arise on the disposal of assets situated in the UK. The overall position is as follows.

- Section 87 gains £22,857
- Other personal gains on UK assets £40,000
- Other personal losses on UK assets £20,000

B does not have an annual exempt amount in 2010-11 because they have claimed the remittance basis. B is not liable to Capital Gains Tax on the section 87 gain of £22,857 because of section 87B. B is liable to CGT at 18% on the full amount of the other net personal gains £20,000.

Because B has claimed the remittance basis they also have to decide whether or not to make an election under section 16ZA TCGA. The effect of that election is allow losses on the disposal of assets situated outside the UK to be set-off against gains, either foreign chargeable gains or gains on the disposal of assets situated in the UK. Unless the election is made the foreign losses will be lost. An effect of the election is that the annual exempt amount cannot be set foreign chargeable gains remitted to the UK, section 16ZB(4). B makes a valid election within the time limit, 31 January 2017.

In 2012-13 B remits \$30,000 of the \$40,000 from the US bank to their UK bank where it is converted to sterling at a rate of £1 = \$2.00 ie £15,000. B is not a remittance basis user in 2012-13. The rate of Capital Gains Tax is 18%. The annual exempt amount is £11,000. The remittance is a disposal of foreign currency in the US bank account giving a loss of £2,142 [$\$30,000 @ \$2.00 = £15,000 - \$30,000 @ 1.75 = £17,142$].

B is liable to Capital Gains Tax in 2012-13 on the following elements.

The section 87 gain is a foreign chargeable gain. Section 12(2) and (3) TCGA provides this chargeable gain is treated as accruing in 2012-13 equal to the full amount of the gains remitted in 2012-13. B has remitted 75% of the £22,857 chargeable gain ($30,000/40,000 \times £22,857 = £17,142$). Section 2(4) TCGA prevents the personal losses, £2,142, being set against this gain. Because of the election under s16ZA neither can the annual exempt amount be set against this part of the gain. Tax is due at 18% on £17,142 = £3,085. This tax is subject to the increase in section 91 TCGA. This is calculated by reference to the year the gain was matched ie 2010-11 not the year the gain was remitted. The rate charged, 20%, will be the same that applied to beneficiary A. The total tax charged on this part of the gain is £3,085 +

£617 = £3702.

If B had not made the election under s16ZA the annual exempt amount could be set against the remitted gains reducing the amount liable to the increase under s91. But they would lose the benefit of losses on any assets situated the UK.

Additionally for 2012-13 B has other personal gains on UK assets of £18,000. Because of the election under s16ZA the personal losses £2,142 can be set against these gains as can the annual exempt amount £11,000. With a tax rate of 18% the total tax charged on the net gains of £4858 is £971. The total Capital Gains Tax payable for 2012-13 is £4673 (£3702 + £971).

Example 9 - New section 87B - Remittance of capital payment: benefit

C is a UK resident but non-UK domiciled beneficiary of a non-UK resident settlement. C claims the remittance basis. The settlement owns 100% of the issued share capital of a Gibraltar holding company which in turn owns 100% of the issued share capital of a Gibraltar company. That company owns a property in Spain. Both companies are non-UK resident.

The company sells the property in Spain creating a section 2(2) amount of £120,000 through section 13 TCGA. The company invests some of the proceeds in the purchase of a smaller property in Spain. C is allowed to use the property rent-free. C is also allowed rent-free use of a cottage in Devon owned by the settlement.

The use of both properties by C gives rise to a capital payment equal to the value of the benefit. These capital payments are matched against the section 2(2) amount and a section 87 chargeable gain accrues to C. Section 87B(2) TCGA provides this is a foreign chargeable gain. The use of the property in Devon meets condition A in section 809L. Because section 87B(3) TCGA provides the benefits derive from the chargeable gains the use of that property also meets condition B in section 809L(3)(b) ITA 2007. C is treated as remitting the capital payment created the use of the Devon property to the UK and C is liable to Capital Gains Tax on that payment. The use of the property in Spain is not treated as a remittance to the UK and C is not liable to Capital Gains Tax on that payment.

Non-UK domiciled beneficiaries: events before 6 April 2008: paragraph 124 of Schedule 7

46. The major change made by FA 2008 was to extend the scope of section 87 so that Capital Gains Tax will be charged if chargeable gains accrue to UK resident or ordinary resident beneficiaries who are not domiciled in the UK. Paragraph 124 of Schedule 7 ensures that this change has no application to events which happened before 6 April 2008. A non-UK domiciled beneficiary will not be chargeable to Capital Gains Tax if:

- They received a capital payment before 6 April 2008 which is matched against a section 2(2) amount accruing in 2008-09 or later. See example 10
- A capital payment received in 2008-09 or later is matched with a section 2(2) amount for 2007-08 or earlier. See example 11.

47. This rule applies only if the beneficiary was non-UK domiciled in the year the chargeable gain accrues. There is no requirement that the beneficiary is a remittance basis user. If the beneficiary becomes domiciled in the UK between the two events that make up the matching process they will be liable to Capital Gains Tax. This is illustrated in examples 10 and 11.
48. As shown in examples 5 to 7 it is possible that a chargeable gain accruing in 2008-09 or later may be made up of section 2(2) amounts or capital payments some of which relate to years before 2008-09 and some to 2008-09 and later. In these cases a non-UK domiciled beneficiary may be liable to Capital Gains Tax on part only of the gains. This is illustrated in examples 10 and 11.
49. Another measure of relief available to UK resident but non-domiciled beneficiaries is for the trustees to make an election under paragraph 126 of Schedule 7. This restricts the amount of the section 87 gain on which the beneficiary pays tax to the amount which accrued after 5 April 2008. See paragraph 79+ below for further details.

Example 10: Capital payments received by non-UK domiciled beneficiary before 6 April 2008 matched with section 2(2) amount for 2008-09 or later: paragraph 124 of Schedule 7

2005 -06	Capital payments received	£10,000
2008-09	Capital payments received	£16,000
	Section 2(2) amount	£24,000

The capital payments are received by a beneficiary who is UK resident but non-UK domiciled in 2008-09. A chargeable gain of £24,000 accrues to the beneficiary in 2008-09. On the LIFO basis the capital payments received are matched £16,000 2008-09 and £8,000 2005-06. The beneficiary is liable to Capital Gains Tax on the £16,000 only. The beneficiary is not liable on the £8,000 because the section 2(2) amount realised in 2008-09 is matched to a capital payment received in 2005-06 by a person who is not domiciled in the UK. This applies whether or not the beneficiary is a remittance basis user.

The Capital Gains Tax due on the £16,000 will depend on whether the beneficiary is a remittance basis user and on whether the trustees had made an election under paragraph 126 of Schedule 7. If the trustees have made the election the gain will be restricted to the amount that relates to the growth in the value of the asset since 5 April 2008. If the beneficiary is a remittance basis user the gain will not be charged until it is remitted.

In any circumstances the settlement's section 2(2) amount for 2008-09 is reduced to nil. There are unmatched capital payments from 2005-06 of £2,000 (£10,000 - £8,000) to carry forward.

If the beneficiary was non-UK domiciled in 2005-06 but became UK domiciled sometime before the capital payment was received the condition in paragraph 124(1)(b) is not satisfied. The beneficiary is liable to Capital Gains Tax on the entire gain of £24,000. It is irrelevant whether the domicile status changed before or after 6 April 2008.

Example 11: Gain accruing in respect of section 2(2) amount for a year before 2008-09 when beneficiary non-UK domiciled: paragraph 124 of Schedule 7

2005-06	Capital payments received	Nil
	Section 2(2) amount	£ 7,000
2006-07	Capital payments received	Nil
	Section 2(2) amount	£ 5,000
2008-09	Capital payment received	£30,000
	Section 2(2) amount	£16,000

The capital payment in 2008-09 was received by a UK resident but non-UK domiciled beneficiary. A chargeable gain of £28,000 accrues in 2008-09. Using the last-in first-out basis of matching the capital payment £30,000 is matched against the section 2(2) amounts as follows.

2008-09	£ 16,000
2006-07	£ 5,000
2005-06	£ 7,000
	£28,000

The beneficiary is liable to Capital Gains Tax only on the £16,000 matched with the section 2(2) amount for the year 2008-09. The beneficiary is not liable to Capital Gains Tax on the section 87 gains that accrue as a result of matching the capital payment against section 2(2) amounts for 2006-07 and 2005-06. This is because the beneficiary was not domiciled in the UK in 2008-09 when the capital payment was received and the section 2(2) amounts are for years before 2008-09.

The Capital Gains Tax due on the £16,000 will depend on whether the beneficiary is a remittance basis user and on whether the trustees had made an election under paragraph 126 of Schedule 7. If the trustees have made the election the gain will be restricted to the amount that relates to the growth in the value of the asset since 5 April 2008. If the beneficiary is a remittance basis user the gain will not be charged until it is remitted.

In any circumstances the settlement's section 2(2) amounts for 2008-09, 2006-07 and 2005-06 are reduced to nil. The unmatched capital payments for 2008-09 are reduced to £2,000 (£30,000 - £28,000).

Suppose the beneficiary was non-UK domiciled in 2005-06 and 2006-07 but became UK domiciled in 2007-08 or 2008-09. They would be liable to Capital Gains Tax on the whole chargeable gain £28,000. The fact that they were non-UK domiciled in the

years before 2008-09 when the section 2(2) amounts were realised is not relevant. The test in paragraph 124(1)(b) of Schedule 7 is the domicile status for the year in which the gain accrues as a result of matching those amounts with a capital payment.

Non-UK domiciled beneficiaries: capital payments received 12 March to 5 April 2008: paragraph 125 of Schedule 7

50. Paragraph 125 of Schedule 7 is an anti-avoidance measure. Its purpose was to discourage trustees making large capital payments to non-UK domiciled beneficiaries immediately before the beginning of 2008-09. These would then be matched against section 2(2) amounts for 2008-09 or later and, unless they had become UK domiciled, the beneficiaries would not be liable to Capital Gains Tax on any gains accruing to them.
51. The paragraph provides that any capital payment received by a UK resident or ordinary resident beneficiary is ignored if it was received on or after 12 March and before 6 April 2008 by a non-UK domiciled beneficiary. The payment is ignored only if the chargeable gain accrues in 2008-09 or later and the beneficiary is still non-domiciled when the gain accrues. See example 12.

Example 12: Non-UK domiciled beneficiary: capital payment received 12 March to 5 April 2008: paragraph 125 of Schedule 7

2007-08	Capital payment	£200,000
	Section 2(2) amount	£ 50,000
2010-11	Capital payment	Nil
	Section 2(2) amount	£ 80,000

The 2007-08 capital payment was made on 4 April 2008 to a UK resident but non-UK domiciled beneficiary.

A chargeable gain of £50,000 accrues to the beneficiary in 2007-08 but they are not liable to Capital Gains Tax on this gain. The settlement's section 2(2) amount for 2007-08 is reduced to nil. The unmatched capital payment for 2007-08 is reduced to £150,000.

If the beneficiary is non-UK domiciled in 2010-11 the unmatched capital payment £150,000 for 2007-08 is not matched against the section 2(2) amount £80,000 for 2010-11 and no section 87 gain accrues for that year. This is because the capital payment was received in the period 12 March 2008 to 5 April 2008 inclusive by a beneficiary who was not domiciled in the UK when they received the payment. The settlement's unmatched section 2(2) amount for 2010-11 remains at £80,000.

The capital payment will remain unmatched against section 2(2) amounts for future years provided the beneficiary remains non-domiciled. If the taxpayer has become UK domiciled by the time a section 2(2) amount is realised in a future year the

payment can be matched against that amount and a section 87 gain will accrue to the beneficiary in that year.

In the example suppose a section 2(2) amount of £20,000 is realised in 2011-12. There are no capital payments in that year. The beneficiary is still non-UK domiciled. The unmatched capital payment £150,000 from 2007-08 is not matched against this section 2(2) amount.

The beneficiary becomes UK domiciled in 2012-13 and stays UK domiciled in later years.

In 2014-15 a section 2(2) amount of £80,000 is realised. No capital payments are made in that year. Paragraph 125 of Schedule 7 does not apply to year 2014-15 because the taxpayer is UK domiciled in that year. The rules in section 87A match the section 2(2) amount for 2014-15 with the unmatched capital payment £150,000 2007-08. A chargeable gain of £80,000 accrues to the beneficiary in 2014-15. At the time of writing the annual exempt amount and rate of Capital Gains Tax are not known for 2014-15. This example assumes they are £15,000 and 18% respectively. Assuming that the annual exempt amount is £15,000 and the rate of Capital Gains Tax 18% the beneficiary will be liable to £11,700 Capital Gains Tax on this gain.

The section 2(2) amount for 2014-15 is reduced to nil and the unmatched capital payment for 2007-08 is reduced to £70,000 (£150,000 - £80,000). This capital payment will be matched against section 2(2) amounts realised in later years. Applying the matching rules in section 87A TCGA to a section 2(2) amount for 2014-15 does not result in a capital payment received in 2007-08 being matched against section 2(2) amounts for years 2010-11 and 2011-12. The section 2(2) amounts for those years will be matched against capital payments received in years after 2014-15. The remaining unmatched capital payments for 2007-08 £70,000 will be matched against section 2(2) amounts for years after 2014-15.

Capital payments to non-UK resident close companies: section 87C TCGA

52. A feature of section 87 is that chargeable gains are treated as accruing whenever capital payments are matched against section 2(2) amounts. This matching reduces the section 2(2) amount even if the beneficiary is not liable to Capital Gains Tax. In some circumstances payments received by non-UK resident close companies can be treated as received by UK resident persons. See section 96(3) to (5) TCGA. FA 2008 has not changed this. But if a payment received by a non-UK resident close company on or after 6 April 2008 is not treated as received by a UK resident person it is disregarded for the purposes of the matching rules. See section 87C TCGA.
53. Section 87C(2) identifies a non-UK resident close company as a company that is not resident in the UK and which would be a close company if it were so resident.

Increase in tax payable - section 91 TCGA

54. Section 91 TCGA imposes an 'increase in tax' charge if a capital payment is matched against gains of an earlier year and the payment is received more than one year after the year in which the gains accrued. The amount of the tax payable is increased by 10% a year up to a maximum of six years.

55. For years before 2008-09 sections 92 to 95 TCGA gave rules to match the payments against the gains. These worked on a first in first out basis. Section 87A has allowed the repeal of sections 92 to 95. Section 91 now follows the ordinary matching rules of section 87A so section 2(2) amounts and capital payments are matched on a last-in first-out basis. This may reduce the increased tax payable. It is possible that the chargeable gains accruing to a beneficiary in a tax year are a result of matching capital payments received in different tax years. This may mean only part of the gain is liable to the increase in tax. See example 13.
56. The introduction of a flat rate of Capital Gains Tax of 18% by FA 2008 means that the maximum increase in tax is 10.8% giving a total tax rate of 28.8%. A beneficiary's Capital Gains Tax annual exempt amount is set against these gains thus reducing the gain which is liable to the increased charge. If the beneficiary claims the remittance basis for the year the effect of section 3(1A) TCGA is that they lose their annual exempt amount. If the beneficiary is a remittance basis user they may have made an election under section 16ZA TCGA so that foreign losses can be set against gains. If they have made such an election the effect of section 16ZB(3) and (4) TCGA is that the annual exempt amount cannot be set against foreign chargeable gains if those gains are remitted to the UK in a year after they accrue. This applies even if the taxpayer does not claim the remittance basis in that later year. The annual exempt amount is set against any other gains accruing in the later year. See example 8.

Example 13: New section 91 - tax increase under section 91 TCGA

As at 2008-09 there are no unmatched capital payments or section 2(2) amounts.

2008-09	Capital payment	£ 3,000
	Section 2(2) amount	£17,000
2009-10	Capital payments	£ 5,000
	Section 2(2) amount	£ 6,000
2010-11	Capital payment	£37,000
	Section 2(2) amount	£16,000

In summary the capital payments for each year are matched against the section 2(2) amounts for each year as shown below.

	Capital payment	S2(2) amount	Gain	Unmatched s2(2) amount	Unmatched capital payments
2008-09	3,000	17,000	3,000	14,000	
2009-10	5,000	6,000	5,000	1,000	
2010-11	37,000	16,000	16,000	nil	21,000

In 2010-11 it is necessary to match the unmatched capital payments for that year

against the unmatched section 2(2) amounts of earlier years. On a last in-first out basis £1000 is matched against the unmatched amount section 2(2) for 2009-10 and £14,000 against the unmatched section 2(2) amount for 2008-09.

Total gains of £31,000 arise as a result of the capital payment in 2010-11 matched as follows:

2010-11	£16,000
2009-10	£1,000
2008-09	£14,000

At the time of writing the annual exempt amount and rate of Capital Gains Tax are not known for 2010-11. This example assumes they are £10,200 and 18% respectively. The tax due for 2010-11 is £3744 ($[\text{£}31,000 - \text{£}10,200] @ 18\%$). Section 91 TCGA will apply to increase the tax due on the gain £14,000. The taxpayer's annual exempt amount can be set against that part of the gain. The tax due on £14,000 - £10,200 is £3800 @ 18% = £684. This amount of tax is increased by 20% ie £136 making the total tax payable £3880 (£3,744 + £136).

Transfers between settlements – introduction: sections 90 & 90A TCGA

57. Section 90 TCGA deals with unmatched trust gains that trustees have when they transfer assets to another settlement. The general rule is that part, or all, of the unmatched trust gains are transferred to the transferee settlement.
58. It is designed to prevent avoidance. Without this provision a settlement with unmatched trust gains could transfer all its assets to a second settlement with no unmatched trust gains. The second settlement could then make capital payments to beneficiaries without triggering a gain under section 87 TCGA because there are no trust gains in the second settlement with which to match the capital payments.
59. The main changes made by FA 2008 are to replace the old section 90 with a new section 90 & 90A (paragraph 111 of Schedule 7). The new sections do not fundamentally change the operation of section 90. Instead they make clear issues not specifically covered in the old section 90.
60. Paragraph 111 of Schedule 7 has substituted a new section 90, and introduced a new section 90A, which apply to transfers between settlements that take place after 5 April 2008.

Transfers between settlements - transfers section 90 does not apply to

61. Section 90 does not apply to:
 - Transfers between settlements where market value, or more than market value, is given for the assets transferred. This rule has always been applied in relation to section 90, but is now specifically stated in the legislation in section 90A(1).
 - Transfers to which Schedule 4B TCGA 1992 applies. These are transfers linked with trustee borrowing. This rule existed in the old legislation. The new section 90(10)(a) replaces the old section 90(5)(a).
 - Any section 2(2) amounts that are in a Schedule 4C TCGA 1992 pool. A Schedule 4C pool can exist from a previous transfer linked with trustee

borrowing. This rule existed in the old legislation. The new section 90(10)(b) replaces the old section 90(5)(b).

62. In the old section 90(1) there was a specific requirement that section 87 or 89(2) applied to the transferor settlement in the year of transfer. This is not in the new section 90, but the new legislation has the same effect. A transferor settlement that has always been UK resident and has not received unmatched gains on a previous transfer will have no section 2(2) amounts by virtue of the new section 87(5).

Transfers between settlements - calculating the section 2(2) amounts transferred where section 90 applies

63. Where section 90 applies to a transfer you first carry out the section 87A matching in the transferor settlement for the year of transfer. This will include any gain arising on the transfer. It is only unmatched section 2(2) amounts remaining that may be transferred to the transferee settlement – new section 90(3).
64. The value of unmatched section 2(2) amounts that are transferred to the transferee settlement depend on what part of the settled property is transferred and what consideration is given for the transfer.
- If all the settled property is transferred for nil consideration then all the unmatched section 2(2) amounts of the transferor settlement are treated as added to the section 2(2) amounts of the transferee settlement – new section 90(3)(a). See example 14.
 - If only part of the settled property is transferred and that is for nil consideration then only a proportion of the unmatched section 2(2) amounts of the transferor settlement are treated as added to the section 2(2) amounts of the transferee settlement – new section 90(3)(b). The relevant proportion treated as transferred is ‘the market value of the property transferred’ divided by ‘the market value of the property comprised in the transferor settlement immediately before the transfer’ – new section 90(4). See example 15.
 - If all or part of the settled property is transferred for a consideration equal to or greater than market value no unmatched section 2(2) amounts of the transferor settlement are added to the section 2(2) amounts of the transferee settlement. See example 16.
 - If all the settled property is transferred for consideration less than the market value of the property transferred then only a proportion of the unmatched section 2(2) amounts of the transferor settlement are treated as added to the section 2(2) amounts of the transferee settlement. That proportion is ‘the market value of the property transferred less the amount (or value) of the consideration’ divided by ‘the market value of the property comprised in the transferor settlement immediately before the transfer’ – new section 90A(2) and (4). See example 17.
 - If only part of the settled property is transferred for consideration less than its market value then only a proportion of the unmatched section 2(2) amounts of the transferor settlement are treated as added to the section 2(2) amounts of the transferee settlement. That proportion is ‘the market value of the property transferred less the amount (or value) of the consideration’ divided by ‘the market value of the

property comprised in the transferor settlement immediately before the transfer.’ – new section 90A(2) and (4). See example 18.

65. For any of these calculations, where property is subject to a debt, the market value of the property should be reduced by the amount of the debt – new section 90(9).
66. These calculations result in part (or all) of the unmatched section 2(2) amounts of the transferor settlement being treated as added to the section 2(2) amounts of the transferee settlement. The effect can be that unmatched section 2(2) amounts of the transferee settlements can be treated as increased for the year of transfer and earlier years. But this increase in the unmatched section 2(2) amounts only takes effect for the year of transfer and subsequent tax years – new section 90(7). This means:
- You don't have to do a re-matching of earlier years capital payments that have already been matched with actual section 2(2) amounts in the transferee settlement, and
 - Earlier years unmatched capital payments from the transferee settlement cannot be matched with earlier years section 2(2) amounts now treated as added to the transferee settlement.
67. See example 19.
68. A transferee settlement which has been UK resident throughout is treated for the purposes of section 89 as though it had been non-UK resident and its last non-UK resident tax year was the year the transfer took place – new section 90(6). This enables the settlement to be treated as having section 2(2) amounts which can be matched with capital payments to treat a gain as arising on a beneficiary.
69. To the extent that the section 2(2) amounts of the transferee settlement are treated as increased by these rules the unmatched section 2(2) amounts of the transferor settlement are treated as reduced – new section 90(5). This reduction first has effect for the year after the year of transfer – new section 90(8). This is to allow gains arising in the transferor settlement in the year of transfer (including those on transfer) to be matched first with any capital payments from the transferor settlement in the year of transfer or an earlier year. See example 20.

Example 14 – New section 90 – All settled property transferred between settlements for nil consideration

All the settled property of the transferor settlement is transferred to the transferee settlement for nil consideration in 2008-09. No capital payments have been made out of the transferor settlement. The transferor settlement had the following gains made by the trustees:

2005-06	Trustees' gains (section 2(2) amount)	£20,000
2008-09	Section 2(2) amount on transfer of all settled property	£75,000

The transferee settlement acquires these unmatched section 2(2) amounts. They are added to any unmatched section 2(2) amounts it already has for the years 2005-06 and 2008-09. This applies whatever the residence status of the transferee settlement.

The unmatched section 2(2) amounts in the transferor settlement are now reduced to Nil.

Example 15 – New section 90 – Part of settled property transferred between settlements for nil consideration

The transferor settlement's assets consist of shares with a market value of £400,000 and cash of £100,000. The shares are transferred to the transferee settlement for nil consideration in 2008-09. The cash remains in the transferor settlement.

No capital payments have been made out of the transferor settlement. The transferor settlement has the following gains made by the trustees:

2005-06	Trustees' gains (section 2(2) amount)	£20,000
2008-09	Section 2(2) amount on transfer of shares	£75,000

It is only the 'relevant proportion' of these unmatched section 2(2) amounts that is transferred to the transferee settlement. The relevant proportion is 4/5 ($\frac{£400,000}{£400,000 + £100,000}$).

Transferee settlement

The transferee settlement acquires the following unmatched section 2(2) amounts:

2005-06	£16,000	(£20,000 x 4/5)
2008-09	£60,000	(£75,000 x 4/5)

They are added to any unmatched section 2(2) amounts it already has and can be matched with capital payments made from the transferee settlement in 2008-09 or a later year. This applies whatever the residence status of the transferee settlement.

Transferor settlement

The unmatched section 2(2) amounts of the transferor settlement are reduced by the section 2(2) amounts that have been treated as transferred to the transferee settlement. The unmatched section 2(2) amounts become:

2005-06	£4,000	(£20,000 - £16,000)
2008-09	£15,000	(£75,000 - £60,000)

This reduction has effect for matching in the year after the year of transfer (2009-10) and subsequent years.

Example 16 – New section 90A – All settled property transferred between settlements for consideration of market value

All the settled property of the transferor settlement is transferred to the transferee settlement in 2008-09. The transferee settlement pays market value to the transferor settlement for these assets.

No capital payments have been made out of the transferor settlement. The transferor settlement has the following gains made by the trustees:

2005-06	Trustees' gains (section 2(2) amount)	£20,000
2008-09	Section 2(2) amount on transfer of all settled property	£75,000

These unmatched section 2(2) amounts remain in the transferor settlement and can be matched with future capital payments from that settlement. None of the unmatched section 2(2) amounts are transferred to the transferee settlement.

Example 17 – New section 90A – All settled property transferred between settlements for consideration less than market value

The transferor settlement's assets consist of shares with a market value of £400,000 and cash of £100,000. All these assets are transferred to the transferee settlement in 2008-09. The transferee settlement pays £300,000 to the transferor settlement for these assets.

No capital payments have been made out of the transferor settlement. The transferor settlement has the following gains made by the trustees:

2005-06	Trustees' gains (section 2(2) amount)	£20,000
2008-09	Section 2(2) amount on transfer of all settled property	£75,000

The transfer is treated as if it was a transfer of part only of the settled property. This is to bring in the 'relevant proportion' rules in section 90(3) and (4) TCGA in deciding how much of the unmatched section 2(2) amounts are transferred to the transferee settlement. In calculating the 'relevant proportion' you deduct the amount paid by the transferee settlement from the 'market value of the property transferred'. The relevant proportion is $\frac{2}{5}$ ($[\text{£}400,000 + \text{£}100,000 - \text{£}300,000] / [\text{£}400,000 + \text{£}100,000]$).

Transferee settlement

The transferee settlement acquires the following unmatched section 2(2) amounts:

2005-06	£8,000	(£20,000 x 2/5)
2008-09	£30,000	(£75,000 x 2/5)

They are added to any unmatched section 2(2) amounts it already has and can be

matched with capital payments made from the transferee settlement in 2008-09 or a later year.

This applies whatever the residence status of the transferee settlement.

Transferor settlement

The unmatched section 2(2) amounts of the transferor settlement are reduced by the section 2(2) amounts that have been treated as transferred to the transferee settlement. The unmatched section 2(2) amounts become:

2005-06	£12,000	(£20,000 - £8,000)
2008-09	£45,000	(£75,000 - £30,000)

This reduction has effect for matching in the year after the year of transfer (2009-10) and subsequent years.

Example 18 – New section 90A – Part of settled property transferred between settlements for consideration less than market value

The transferor settlement's assets consist of shares with a market value of £400,000 and cash of £100,000. The shares are transferred to the transferee settlement in 2008-09. The cash remains in the transferor settlement. The transferee settlement pays £300,000 to the transferor settlement for the shares. No capital payments have been made out of the transferor settlement. The transferor settlement has the following gains made by the trustees:

2005-06	Trustees' gains (section 2(2) amount)	£20,000
2008-09	Section 2(2) amount on transfer of shares	£75,000

This transfer of part of the settled property brings in the 'relevant proportion' rules in section 90(3) and (4) TCGA in deciding how much of the unmatched section 2(2) amounts are transferred to the transferee settlement. In calculating the 'relevant proportion' you deduct the amount paid by the transferee settlement from the 'market value of the property transferred'. The relevant proportion is $1/5$ ($[\pounds400,000 - \pounds300,000] / [\pounds400,000 + \pounds100,000]$).

Transferee settlement

The transferee settlement acquires the following unmatched section 2(2) amounts:

2005-06	£4,000	(£20,000 x 1/5)
2008-09	£15,000	(£75,000 x 1/5)

They are added to any unmatched section 2(2) amounts it already has and can be matched with capital payments made from the transferee settlement in 2008-09 or a later year.

This applies whatever the residence status of the transferee settlement.

Transferor settlement

The unmatched section 2(2) amounts of the transferor settlement are reduced by the section 2(2) amounts that have been treated as transferred to the transferee settlement. The unmatched section 2(2) amounts become:

2005-06 £16,000 (£20,000 - £4,000)

2008-09 £60,000 (£75,000 - £15,000)

This reduction has effect for matching in the year after the year of transfer (2009-10) and subsequent years.

Example 19 – New section 90(7) – Unmatched section 2(2) amounts transferred on a transfer between settlements do not affect matching in earlier years in transferee settlement

All the settled property of the transferor settlement is transferred to the transferee settlement for nil consideration in 2008-09. No capital payments have been made out of the transferor settlement. The transferor settlement has the following gains made by the trustees:

2005-06 Trustees' gains (section 2(2) amount) £20,000

2008-09 Section 2(2) amount on transfer of all settled property £75,000

The transferee settlement acquires these unmatched section 2(2) amounts. They are added to any unmatched section 2(2) amounts it already has. This applies whatever the residence status of the transferee settlement.

The unmatched section 2(2) amounts in the transferor settlement are now reduced to Nil.

In its own right the transferee settlement had:

2001-02 Trustees' gains (section 2(2) amount) £10,000

2004-05 Capital payments £30,000

2006-07 Trustees' gains (section 2(2) amount) £50,000

This has resulted in chargeable gains treated as accruing to the beneficiary of:

2004-05 £10,000 (Also possible increase in tax charged under section 91)

2006-07 £20,000

There is no reworking of this matching when section 2(2) amounts are transferred from the transferor settlement. So the 2005-06 section 2(2) amount transferred in is not matched with any of the 2004-05 capital payments. The transferee settlement has unmatched section 2(2) amounts to carry forward of:

2005-06	£20,000	From transferor settlement
2006-07	£30,000	In its own right
2008-09	£75,000	From transferor settlement

Example 20 – New section 90(3) – Capital payments out of transferor settlement in year of transfer matched with section 2(2) amounts of transferor settlement for that and earlier years before calculating section 2(2) amounts transferred

The transferor settlement's assets consist of shares with a market value of £400,000 and cash of £100,000. The shares are transferred to the transferee settlement for nil consideration in 2008-09. The cash remains in the transferor settlement.

The transferor settlement has the following gains made by the trustees:

2005-06	Trustees' gains (section 2(2) amount)	£20,000
2008-09	Section 2(2) amount on transfer of shares	£75,000

The first capital payment made out of the transferor settlement is made in 2008-09. It does not matter whether the capital payment is made before or after the transfer of the shares between settlements. The capital payment is £50,000 to a beneficiary. That £50,000 capital payment is matched with £50,000 of the 2008-09 section 2(2) amount and a chargeable gain of £50,000 is treated as accruing to the beneficiary under section 87 for 2008-09. The remaining unmatched section 2(2) amount for 2008-09 is reduced to £25,000 (£75,000 - £50,000).

It is only the 'relevant proportion' of the remaining unmatched section 2(2) amounts that is transferred to the transferee settlement. The relevant proportion is $\frac{4}{5}$ (£400,000 / [£400,000 + £100,000]).

Transferee settlement

The transferee settlement acquires the following unmatched section 2(2) amounts:

2005-06	£16,000	(£20,000 x 4/5)
2008-09	£20,000	(£25,000 x 4/5)

They are added to any unmatched section 2(2) amounts it already has and can be matched with capital payments made from the transferee settlement in 2008-09 or a later year.

This applies whatever the residence status of the transferee settlement.

Transferor settlement

The unmatched section 2(2) amounts of the transferor settlement are reduced by the section 2(2) amounts that have been treated as transferred to the transferee settlement. The unmatched section 2(2) amounts become:

2005-06 £4,000 (£20,000 - £16,000)

2008-09 £5,000 (£25,000 - £20,000)

This reduction has effect for matching in the year after the year of transfer (2009-10) and subsequent years.

Transfer of settled property before 6 April 2008 – calculation of section 2(2) amounts: paragraph 121

70. The rules in paragraph 120 of Schedule 7 have to be adapted if there has been an old section 90 transfer. This is to prevent the total deemed gains being matched against trust gains (section 2(2) amounts) that have been transferred to another settlement. This is covered in paragraph 121 of Schedule 7.
71. The approach in paragraph 121 is to match the total deemed gains against the trust gains (section 2(2) amounts) in stages:
- First for each settlement you match the total deemed gains against the trust gains (section 2(2) amounts) up to the year of transfer.
 - Second you calculate the effects of the old section 90 transfer on the trust gains (section 2(2) amounts).
 - Finally you match the trust gains (section 2(2) amounts) for the years after the transfer and before 2008-09 against the total deemed gains accruing after the year of transfer and before 2008-09. If there are any unmatched trust gains (section 2(2) amounts) for the pre-transfer period these are matched against the deemed gains in priority to trust gains (section 2(2) amounts) of the post-transfer period.
72. The detailed rules are give below in paragraphs 73+ (transferee settlements) and 76+ (transferor settlements). See example 21 after paragraph 78 below.

Transfer between settlements before 6 April 2008 – transferee settlement paragraph 121 of Schedule 7

73. Follow the general rules in paragraph 120 of Schedule 7 in respect of the transferee settlement's own unmatched trust gains for the year of transfer and earlier tax years to calculate unmatched section 2(2) amounts for those years on those gains. For this purpose:
- In Step 1 include trust gains (section 2(2) amounts) for the year of transfer and earlier years only, and
 - In Step 2 treat the 'total deemed gains' as only being those accruing to beneficiaries in the year before the year of transfer and earlier years.

74. Then add to these unmatched section 2(2) amounts the unmatched section 2(2) amounts of the transferor settlement that are treated as transferred from the transferor settlement on the transfer of settled property.
75. Go back and apply the general rules in paragraph 120 to arrive at final figures of unmatched section 2(2) amounts of the transferee settlement for 2007-08 and earlier years. But in doing this calculation:
 - treat the section 2(2) amounts for the year of transfer and earlier years as those unmatched section 2(2) amounts calculated in the previous two paragraphs, and
 - only include in 'total deemed gains' in Step 2 the chargeable gains accruing to beneficiaries (under section 87 or 89(2)) from the year of transfer to 2007-08 inclusive.

- Transfer between settlements before 6 April 2008 – transferor settlement: paragraph 121 of Schedule 7

76. Follow the general rules in paragraph 120 of Schedule 7 in respect of the transferor settlement's unmatched trust gains for the year of transfer and earlier tax years to calculate unmatched section 2(2) amounts for those years on those gains. For this purpose:
 - In Step 1 include section 2(2) amounts for the year of transfer and earlier years only, and
 - In Step 2 treat the 'total deemed gains' as only being those accruing to beneficiaries in the year of transfer and earlier years.
77. Then treat these unmatched section 2(2) amounts as reduced by the amount the unmatched section 2(2) amounts of the transferee settlement are treated as increased as a result of the transfer of settled property.
78. Go back and apply the general rules in paragraph 120 to arrive at final figures of unmatched section 2(2) amounts of the transferor settlement for 2007-08 and earlier years. But in doing this calculation:
 - treat the section 2(2) amounts for the year of transfer and earlier years as those unmatched section 2(2) amounts resulting from the calculation in the previous two paragraphs, and
 - only include in 'total deemed gains' in Step 2 the chargeable gains accruing to beneficiaries (under section 87 or 89(2)) from the year after the year of transfer to 2007-08 inclusive.

Example 21 – Paragraph 121 Schedule 7 – Calculating unmatched section 2(2) amounts of transferor and transferee settlements following transfer of settled property before 6 April 2008

In 2005-06 there is a transfer of settled property to which the old section 90 applies. At the time of transfer the transferor settlement's assets consist of shares with a market value of £400,000 and cash of £100,000. The shares are transferred to the transferee settlement for nil consideration. The cash remains in the transferor settlement.

As not all the trust assets have been transferred only a proportionate part – 4/5ths – of the trust gains (section 2(2) amounts) will be transferred to the transferee settlement.

Transferor settlement

Details of the trustee's gains and capital payments made are:

2002-03	Trustees' gains (section 2(2) amount)	£50,000
2003-04	Trustees' gains (section 2(2) amount)	£10,000
2004-05	Capital payment	£30,000
2005-06	Trustees' gains on transfer (section 2(2) amount)	£75,000
2006-07	Capital payment	£5,000

Under Step 1 of paragraph 121(3) Schedule 7 you apply the general rules in paragraph 120 for converting unmatched trust gains into unmatched section 2(2) amounts. But you only apply those rules for years up to and including the year of transfer of settled property – 2005-06.

In those years chargeable gains of £30,000 will have been treated as accruing to a beneficiary under section 87 in 2004-05. The £30,000 is the 'total deemed gains' of the transferor settlement up to and including 2005-06. Under Step 3 of paragraph 120 these are all set against the earliest year's trustees' gains. That leaves an unmatched section 2(2) amount for 2002-03 of £20,000 (£50,000 - £30,000). The unmatched section 2(2) amounts for 2003-04 and 2005-06 remain unaltered.

Next, under Step 5 of paragraph 121(3) Schedule 7, you have to deduct the amount of unmatched section 2(2) amounts that are treated as transferred to the transferee settlement. The amounts treated as transferred are $\frac{4}{5}$ (£400,000 / [£400,000 + £100,000]) of each of the unmatched section 2(2) amounts. So the unmatched section 2(2) amounts remaining in the transferor settlement after the transfer of settled property are:

2002-03	£4,000	([£50,000 - £30,000] x 1/5)
2003-04	£2,000	(£10,000 x 1/5)
2005-06	£15,000	(£75,000 x 1/5)

Finally, under Step 6 of paragraph 121(3) Schedule 7, you apply the general rules in paragraph 120 for converting unmatched trust gains into unmatched section 2(2) amounts for all years up to and including 2007-08. In applying these rules you treat

- the section 2(2) amounts for years up to and including the year of transfer – 2005-06 – as those just calculated under Step 5 of paragraph 121(3) Schedule 7, and
- only include in 'total deemed gains' the chargeable gains that have been treated as accruing to beneficiaries in the year after the year of transfer to 2007-08 inclusive – that is 2006-07 to 2007-08 inclusive.

In the years we are looking at 'total deemed gains' of £5,000 have been treated as accruing to a beneficiary under section 87 in 2006-07. Under Step 3 of paragraph 120(3) Schedule 7 these are all set against the earliest year's unmatched trustees' gains (section 2(2) amounts). So £4,000 is set against 2002-03 and the remaining

£1,000 against 2003-04. So the final unmatched section 2(2) amounts for the transferor settlement at the end of 2007-08 are:

2002-03	£Nil	(£4,000 - £4,000)
2003-04	£1,000	(£2,000 - £1,000)
2005-06	£15,000	

Transferee settlement

Details of the trustees' gains (excluding amounts treated as transferred under section 90) and capital payments made are:

2002-03	Trustees' gains (section 2(2) amount)	£40,000
2003-04	Trustees' gains (section 2(2) amount)	£5,000
2004-05	Capital payment	£20,000
2006-07	Capital payment	£45,000

Under Step 2 of paragraph 121(3) Schedule 7 you apply the general rules for converting unmatched trustees' gains into unmatched section 2(2) amounts. But you only apply them for the year before the year of transfer and earlier years – that is 2004-05 and earlier years.

In those years chargeable gains of £20,000 will have been treated as accruing to a beneficiary under section 87 in 2004-05. The £20,000 is the 'total deemed gains' of the transferee settlement up to and including 2004-05. Under Step 3 of paragraph 120 these are all set against the earliest year's trustees' gains. That leaves an unmatched section 2(2) amount for 2002-03 of £20,000 (£40,000 - £20,000). The unmatched section 2(2) amount of £5,000 for 2003-04 remains unaltered.

Under Step 3 of paragraph 121(3) you then calculate the section 2(2) amount for the year of transfer, 2005-06. There is no section 2(2) amount for this year.

Next, under Step 4 of paragraph 121(3) Schedule 7, you add in the section 2(2) amounts treated as transferred from the transferor settlement for years up to, and including the year of transfer. So the unmatched section 2(2) amounts for these years for the transferee settlement become:

2002-03	£36,000	([£40,000 - £20,000] + [£50,000 - £30,000] x 4/5)
2003-04	£13,000	(£5,000 + [£10,000 x 4/5])
2005-06	£60,000	(£75,000 x 4/5)

Finally, under Step 7 of paragraph 121(3) Schedule 7, you apply the general rules in paragraph 120 for converting unmatched trust gains into unmatched section 2(2) amounts for all years up to and including 2007-08. In applying these rules you treat

- the section 2(2) amounts for years up to and including the year of transfer – 2005-06 – as those just calculated under Steps 2 to 4 of paragraph 121(3) Schedule 7, and

- only include in ‘total deemed gains’ the chargeable gains that have been treated as accruing to beneficiaries in the year of transfer to 2007-08 inclusive – that is 2005-06 to 2007-08 inclusive.

In the years we are looking at ‘total deemed gains’ of £45,000 have been treated as accruing to a beneficiary under section 87 in 2006-07. Under Step 3 of paragraph 120(3) Schedule 7 these are all set against the earliest year’s unmatched trustees’ gains (section 2(2) amounts). So £36,000 is set against 2002-03 and the remaining £9,000 against 2003-04. So the final unmatched section 2(2) amounts for the transferor settlement at the end of 2007-08 are:

2002-03	£Nil	(£36,000 - £36,000)
2003-04	£4,000	(£13,000 - £9,000)
2005-06	£60,000	

“Rebasing” to 6 April 2008: paragraph 126 of Schedule 7

79. Paragraph 126 of Schedule 7 is a transitional rule which may benefit UK resident but non-domiciled beneficiaries of non resident trusts in existence at 6 April 2008. The paragraph allows the trustees to make an election which restricts the section 87 gain charged on the beneficiary to the growth in the value of the assets from 6 April 2008. The election is irrevocable and applies to all the assets whose disposal creates a section 2(2) amount. It cannot increase the tax payable by a beneficiary. Whether it improves the position of the beneficiary depends on the history of the assets disposed of. It is not possible to make the election only in respect of assets which have increased in value since 6 April 2008.
80. The election is commonly known as a “rebasing” election and that is how it will be described in this article. But it is not rebasing as that term applies to section 35 TCGA and assets held at 31 March 1982. There is no across the board revaluation of the assets in the trust fund as at 6 April 2008.
81. The election has no effect on the matching of capital payments to section 2(2) amounts or the reduction of capital payments and section 2(2) amounts. It has no effect on gains accruing to UK domiciled beneficiaries.

Rebasing : conditions for making election:

82. The election can be made only if the settlement was non-UK resident throughout 2008-09. Paragraph 126(1) requires that the election be made by the trustees of the settlement. It must be made by all the trustees or by a majority of them if they are permitted to act through a majority. It cannot be made by a beneficiary. If the beneficiary’s Self Assessment tax return is taken up for enquiry an election may require additional disclosure to HMRC about assets held by the trustees in order to agree the valuation.
83. The relief is given only to individuals, paragraph 126(7), but the time limit is triggered if a capital payment is received by any UK resident beneficiary.
84. The election is irrevocable, paragraph 126(5).

Rebasing : time limit for making election

85. The time limit for making the election is 31 January after the end of the first tax year in which either of the following two events occurs in 2008-09 or later, paragraph 126(2).
- A capital payment is received by a UK-resident beneficiary; or
 - There is a transfer of the settled property to which section 90 TCGA applies. See paragraph 57+ above.
86. For example if the trustees make a capital payment to a UK resident beneficiary in June 2008 they have until 31 January 2010 to make the election.
87. An election may be made before a triggering event happens. There is no requirement that the beneficiary receiving the payment was a beneficiary of the settlement as at 6 April 2008. The recipient may become a beneficiary at some later time. The time limit in paragraph 126(2) of Schedule 7 runs from the time the trustees first make a capital payment to a UK resident beneficiary. If the trustees make such a payment and do not make the election they may be out of time for making the election if they make a payment to a UK-resident but non-domiciled beneficiary at a later time. The election can be made even if there are no non-UK domiciled beneficiaries when the payment is made.
88. Any election made late will be considered in accordance with the guidance in paragraph 13801 onwards in HMRC's Capital Gains Tax manual.

Rebasing: how to make the election

89. The election must be made in the way and form specified by HMRC, paragraph 126(6). HMRC have provided a form RBE1 to satisfy this requirement and all elections must be made on that form. The form asks for the name of the settlement and the date it was created. The date is used to distinguish between settlements with similar names in particular those created by settlors with a prevalent surname. The form also asks the trustees to identify if and when a trigger event has occurred. The RBE1 can be downloaded from the HMRC website <http://www.hmrc.gov.uk> or can be ordered by phoning HM Revenue and Customs CAR Residency on 0151 472 6384 or +44 151 472 6384 if you are calling from abroad.
90. Some trustees may have made the election by writing to CAR Residency before the form was available. That election remains valid and there is no need to make a further election on the form.
91. The completed form should be returned to:
- HM Revenue and Customs
CAR Residency (Unit 358)
St Johns House
Merton Road
Liverpool
L75 1BB
England

Rebasing: when do you need to consider the effect of the election?

92. Paragraph 126(7) identifies when the election will apply. An election will be in point when a section 87 gain accrues to a UK resident but non-domiciled

individual. The reference to individual includes the case in which section 96 TCGA treats a beneficiary as receiving a capital payment received by a non-resident close company. If the beneficiary is a remittance basis user in the year the section 87 gain accrues the reduction in the gain is calculated for that year but the gain is not charged until it is remitted to the UK.

93. Because the assets must be held at the 6 April 2008 the section 87 gain must accrue as a result of matching a capital payment to a section 2(2) amount for 2008-09 or later. Similarly the section 87 gain must accrue as a result of a matching with a capital payment made after 5 April 2008 to a UK resident but non-domiciled individual. If the matching was with an earlier payment to a UK resident but non-domiciled individual paragraph 124(2)(a) of Schedule 7 would prevent any liability to Capital Gains Tax. The beneficiary would not have to be a remittance basis user for this to apply.

Rebasing: how does the election take effect?

94. Relief is given for the year in which the capital payment is matched against a section 2(2) amount if the payment is received by a UK resident but non-domiciled individual beneficiary. The beneficiary is not liable to Capital Gains Tax on that part of the gain that relates to the period before 6 April 2008. Paragraph 126(8) of Schedule 7 restricts the charge to Capital Gains Tax to the “relevant proportion” of the gain.
95. The “relevant proportion” of the gain is defined in paragraph 126(9) of Schedule 7 as

$$\frac{A}{B}$$

96. A is what the section 2(2) amount would be if the gain that accrues to the trustees was calculated by reference to the market value of the assets held at 6 April 2008. B is the actual section 2(2) amount. If A is greater than, or equal to, B then all of the gain is liable to Capital Gains Tax. The gain cannot be increased by the relevant proportion.
97. You consider only the assets whose disposal gave rise to the section 2(2) amount. Any assets held at 6 April 2008 which are not disposed of are not included in the comparison. This means that assets held at 6 April 2008 need be valued only when they are disposed of.
98. The asset must be held continuously since 6 April 2008 to qualify for rebasing. See the definition of “relevant asset” in paragraph 126(10). Paragraph 126(13) deals with the case in which section 43 TCGA has applied because an asset has been derived from another asset in the same ownership. If the settlement held the old asset at 6 April 2008 paragraph 126(13) provides that the new asset shall be treated as if it were owned on 6 April 2008.
99. The ordinary definition of market value in sections 272 and 273 TCGA applies. You are calculating a section 2(2) amount. That concept is defined in section 87 TCGA and is therefore subject to the definitions in TCGA.
100. The election has no effect on the matching of section 2(2) amounts. The section 87 gain accrues to the UK resident but non-domiciled beneficiary in accordance with the ordinary matching rules. Both the section 2(2) amount and the capital payments are reduced as a result of the matching. The sole effect of the election is to reduce the amount of the section 87 gain on which the UK resident but non-domiciled beneficiary has to pay Capital Gains Tax. See example 22.

101. It is possible that the market value of the asset disposed of may have fallen since 6 April 2008. Depending on what other gains there are for the year of disposal paragraph 126 will still reduce the Capital Gains Tax payable. This is illustrated in example 22 for the year 2009-10.
102. The fall in value may be so significant that the “relevant proportion” is 0. This is because the section 2(2) amount cannot be a negative figure. In that case UK resident but non-domiciled beneficiary is not liable to Capital Gains Tax on any part of the section 87 gain. But the section 87 gain is still reduced by the amount of the matched capital payment. See example 23.

Example 22: Rebasing: basic operation: paragraph 126 of Schedule 7

Settlement X is a non-UK resident settlement created in September 2000. The trust fund consists of a number of quoted investments. Some of these have been held since September 2000. Others have been acquired since 6 April 2008. The settlement has two UK resident beneficiaries. A is domiciled in the UK. B is not domiciled in the UK.

As at 6 April 2008 there are no unmatched capital payments and section 2(2) amounts.

2008-09

In 2008-09 a section 2(2) amount of £180,000 accrues to the trustees and capital payments of £50,000 are made to A and B. The capital payments are matched to the section 2(2) amount as shown below.

	2008-09	Matched	c/f
Section 2(2) amount	£180,000	£100,000	£80,000
Capital payments A	£50,000	£50,000	nil
Capital payments B	£50,000	£50,000	nil

A chargeable gain of £50,000 accrues to each beneficiary. Beneficiary A is liable to Capital Gains Tax on the full amount of £50,000. The trustees make a valid election under paragraph 126(1) of Schedule 7 before 31 January 2010. The effect of the election is to reduce the gains chargeable on beneficiary B in accordance with paragraph 126(8) of Schedule 7.

You calculate the section 2(2) amount that the trustees would have made if the gain were calculated by reference to the 6 April 2008 value of assets held at that date and included in the disposal.

	Held 6/4/08	Acquired after 6/4/08	Total		
Disposal Proceeds	£180,000	£170,000	£350,000		
Acquisition cost	£10,000	£160,000	£170,000		
Gain	£170,000	£10,000	£180,000		
Disposal Proceeds	£180,000				
6/4/08 value	£165,000				
Gain	£15,000				
Relevant proportion of s87 gain £50,000 =					
$£50,000 \times \frac{15,000 + 10,000}{180,000} = £6944$					
Beneficiary B is liable to Capital Gains Tax on £6944 of the £50,000 capital payment. If beneficiary B is a remittance basis user the gain will be taxed only when the gain is remitted to the UK.					
<i>2009-10</i>					
The trustees dispose of assets creating a £20,000 section 2(2) amount. They make capital payments of £15,000 to each beneficiary. £10,000 of each capital payment is matched to the 2009-10 section 2(2) amount. Section 87 gains of £10,000 accrue to each beneficiary in respect of the 2009-10 section 2(2) amount. The £5,000 balance of each capital payment is matched to the £80,000 2008-09 section 2(2) amount. Section 87 gains of £5,000 accrue to each beneficiary in respect of the 2008-09 section 2(2) amount giving total chargeable gains of £15,000 for 2009-10 for each beneficiary. The capital payments for that year are reduced to nil. The section 2(2) amount for 2008-09 is reduced to £70,000.					
	Amount/payment	Matched	Year	c/f	
2009-10	Section 2(2) amount	£20,000	£20,000	2009-10	Nil
	Capital payments A	£15,000	£10,000 £5,000	2009-10 2008-09	nil
	Capital payments B	£15,000	£10,000 £5,000	2009-10 2008-09	Nil
2008-09	Section 2(2) amount	£80,000	£10,000	2009-10	£70,000

Beneficiary A will be liable to Capital Gains Tax on the full £15,000 section 87 gain. Beneficiary B's liability will be reduced in accordance with paragraph 126(8) of Schedule 7. This has to be calculated separately for the £10,000 payment matched to the 2009-10 amount and the £5,000 payment matched to the 2008-09 amount.

For 2009-10 the figures are:

	Held 6/4/08	Acquired after 6/4/08	Total
Disposal proceeds	£70,000	£100,000	£170,000
Acquisition cost	£65,000	£85,000	£150,000
Gain	£5,000	£15,000	£20,000
Disposal proceeds	£70,000		
6/4/08 value	£80,000		
Loss	(£5,000)		

The section 2(2) amount calculated using 6 April 2008 values is £10,000 ie £15,000 - £5,000. The relevant proportion of the £10,000 section 87 gain is:

$$£10,000 \times \frac{10,000}{20,000} = £5,000$$

The Capital Gains Tax liability on the £5,000 section 87 gain relating to the 2008-09 section 2(2) amount is limited to:

$$£5,000 \times \frac{25,000}{180,000} = £694$$

B's total liability to Capital Gains Tax in 2009-10 is on gains of £5,694 (£5,000 + £694). If beneficiary B is a remittance basis user the gain will be taxed only when the gain is remitted to the UK.

Example 23: Rebasing: relevant proportion is 0: paragraph 126 of Schedule 7

The facts are the same as that in example 22 year 2009-10 except for the 6 April 2008 value of the assets sold. This is £120,000.

The calculation is now:

	Held 6/4/08	Acquired after 6/4/08	Total
Gain	£5,000	£15,000	£20,000
Disposal proceeds	£70,000		
6/4/08 value	£120,000		
Loss	£50,000		

The section 2(2) amount calculated using 6 April 2008 values is £15,000 - £50,000. This is restricted to 0 as a section 2(2) amount cannot be negative. Beneficiary B is not liable to Capital Gains Tax on any of the £10,000 2009-10 gain ie $£10,000 \times 0 = 0$. B remains liable to Capital Gains Tax on the section 87 gain matched to the 2008-09 section 2(2) amount. As in example 22 this is £694.

B's capital payments for 2009-10 are still reduced to nil.

Rebasing and section 13 TCGA: paragraph 126(11) of Schedule 7

103. In a non-UK resident trust structure it is common for assets to be held in a non-UK resident company underlying the trust. Where that company would have been a close company if it had been UK resident then gains on disposals made by the company can be treated as accruing to the non-UK resident trustees under section 13 TCGA 1992.
104. Section 13 TCGA applies to attribute chargeable gains accruing to non-resident close companies to the participators in those companies. Section 13(10) applies this rule to the trustees of a settlement who are participators. Paragraph 126(11) provides for rebasing to apply to the gains of these companies. The basic rule is the same. For rebasing to apply the company making the disposal must have owned the asset from 6 April 2008 to the date of the disposal, paragraph 126(11)(b). A number of special rules are required to deal with particular issues that arise on section 13.
105. The main problem is that the gains are attributed to participators in proportion to their interest in the company and this interest may fluctuate between 6 April 2008 and the date of disposal. Paragraph 126(11)(c) provides that the trustees must have been a participator in the company throughout the period from 6 April 2008 to the date of disposal. Changes in the value of the interest are dealt with in paragraph 126(16) to (18). Only the "appropriate proportion" of the asset is rebased, paragraph 126(16). This is defined in paragraph 126(18) as:

Minimum proportion

The proportionate interest at the date of disposal

106. The “minimum proportion” is the smallest proportionate interest the trustees have for section 13 purposes from 6 April 2008 to the date of disposal.
107. The other problem is that section 14 TCGA extends section 171 TCGA so that it applies to a non-resident group of companies allowing assets to be moved between group companies at no gain/no loss. If this has happened to an asset held at 6 April 2008 paragraph 126(14) applies. This treats the transferee company making the disposal which gives rise to the gain as owning the asset on 6 April 2008.
108. It is possible that the trustees’ proportionate interest in the transferor and transferee companies may differ, particularly if there are loan creditors. Paragraph 126(15) provides you apply the “appropriate proportion” relevant to the company which held the asset on 6 April 2008.
109. Example 24 illustrates the application of paragraph 126(11). Section 13 only attributes gains accruing to non-resident companies. It has no application to losses. Example 25 illustrates the effect if the rebasing of a gain accruing to a non-resident company gives rise to a loss.

Example 24: Rebasing and section 13 gains: paragraph 126 of Schedule 7

X is a non-UK resident settlement. It has two UK resident beneficiaries, A and B. A is UK domiciled. B is not domiciled in the UK. The trust fund includes assets held directly and an interest as a participator in a non-resident close company, Y Ltd. Section 13 TCGA applies to Y Ltd but because Y Ltd has a number of loan creditors the proportion of X’s interest in Y Ltd fluctuates.

In 2010-11 the trustees of X sell assets owned from before 6 April 2008 accruing a gain of £200,000. In the same year Y Ltd sells assets held from before 6 April 2008 accruing a gain of £800,000. X’s interest in Y Ltd at the date of disposal was 40%. 40% of Y Ltd’s gain is attributed to X, £320,000. The smallest proportionate interest the trustees held in Y Ltd from 6 April 2008 to the date of disposal was 30%.

X’s section 2(2) amount for 2010-11 is £520,000 (£200,000 + £320,000).

In 2010-11 the trustees make capital payments of £100,000 to each beneficiary. Section 87 gains of £100,000 accrue to each beneficiary. X’s section 2(2) amount for 2010-11 is reduced by £200,000 to £320,000. The capital payments of each beneficiary are reduced to nil.

A is liable to Capital Gains Tax on the £100,000. The trustees make a valid election under paragraph 126(1) of Schedule 7 by 31 January 2012 and B’s liability is reduced by paragraph 126 of Schedule 7. It is necessary to calculate the relevant proportion of the £100,000 chargeable gain. This has two elements to it. The gain on the assets held directly by the trustees and the gain on the disposal by Y Ltd attributed to the trustees by section 13 TCGA. Assume that rebasing reduces the gain on the disposal of the assets held directly by the trustees from £200,000 to £40,000. It is then necessary to calculate the effect of rebasing on the section 13 gain £320,000.

First you calculate the appropriate proportion of the assets sold by Y Ltd, paragraph 126(18). This is the smallest proportionate interest the trustees had in Y Ltd, 30%, divided by their proportionate share at the date of disposal, 40% - that is $30/40 \times 100 = 75\%$. So rebasing applies to 75% of the assets Y Ltd sold.

		para 126(11)	no para 126(11)
Disposal proceeds	£1.2m	£900,000	£300,000
Acquisition cost	£400,000	£300,000	£100,000
Un-rebased gain	£800,000	£600,000	£200,000
Disposal proceeds	£1.2m	£900,000	not relevant
6/4/08 value	£1m	£750,000	
Rebased gain	not relevant	£150,000	

The trustees rebased gain on the appropriate proportion of Y Ltd's assets is 40% of £150,000 = £60,000. The remaining 25% of the £320,000 section 13 gain, £80,000, is not rebased. This amount has to be included in the numerator (A) in the paragraph 126(9) calculation of the relevant proportion of beneficiary B's chargeable gains. That requires a calculation of the section 2(2) amount as if every relevant asset had been sold immediately before 6 April 2008. The £80,000 does not come from the disposal of a relevant asset but is still part of the section 2(2) amount.

The relevant proportion of B's chargeable gains is: :

$$\frac{\text{Rebased section 2(2) amount} = \underline{\underline{\pounds 60,000 + \pounds 40,000 + \pounds 80,000}}}{\text{Original section 2(2) amount} \quad \pounds 520,000} \times \pounds 100,000 = \pounds 34,615$$

B is liable to Capital Gains Tax on £34,615 of the £100,000 section 87 gain. If B is a remittance basis user the gains will not be chargeable until they are remitted to the UK.

Example 25: Rebasing and section 13 TCGA: losses: paragraph 126 of Schedule 7

The facts are the same as in example 16 except that the 6 April 2008 value of the assets sold by Y Ltd is £1.4m. This produces a loss of £200,000 by reference to the 6 April 2008 value (£1.2m - £1.4m). The appropriate proportion of this loss is £150,000 but it cannot be attributed to the trustees.

The relevant proportion of beneficiary B's £100,000 section 87 gain is calculated by reference to the rebased value of the assets sold by the trustees and the £80,000 gain on the disposal of Y Ltd's assets which are not relevant assets. .

$$\pounds 100,000 \times \frac{(\underline{\underline{\pounds 40,000 + \pounds 80,000}})}{\pounds 520,000} = \pounds 23,076$$

Rebasing and transfers between settlements

110. A rebasing election made by the transferor settlement can cover gains made by that settlement after 5 April 2008 even if they are not brought into charge until they are matched with capital payments made by the transferee settlement. Transferee settlements receiving property on or after 6 April

2008 cannot elect for rebasing in relation to the transferred assets – the decision is solely that of the transferor settlement. See example 26.

111. An election made by the transferee settlement can cover gains made by that settlement after 5 April 2008 including those on assets received, prior to 6 April 2008, from another settlement.

Example 26 – Paragraph 126 of Schedule 7 – Effect of ‘rebasement election’ made by transferor settlement on gains made by transferor settlement treated as accruing when matched with capital payments made by transferee settlement

All the settled property of the transferor settlement is transferred to the transferee settlement for nil consideration in 2009-10. No capital payments have been made out of the transferor settlement. The transferor settlement had no gains made by the trustees prior to the transfer.

Gains arise on the transfer of £100,000. These are on the disposal of an asset which had been held by the trustees since 2001. The post 5 April 2008 element of the gain is £15,000 based on the difference between the value at 6 April 2008 and the value at the time it is transferred.

The transferee settlement has no unmatched section 2(2) amounts of its own. Its only unmatched section 2(2) amount is the £100,000 for 2009-10 it is treated as receiving on the transfer.

In 2010-11 the transferee settlement makes a capital payment of £300,000 to a UK resident but non-UK domiciled beneficiary. Under section 87 £100,000 of the capital payment is matched with the section 2(2) amount and a £100,000 chargeable gain is treated as accruing to the beneficiary.

If a valid election under paragraph 126 Schedule 7 has been made by the trustees of the transferor settlement then only the post 5 April 2008 element of the gain (£15,000) is chargeable to tax on the beneficiary. And that is subject to the remittance basis if the beneficiary is a remittance basis user.

If no valid election has been made by the trustees of the transferor settlement then the full £100,000 is chargeable to tax on the beneficiary. Again this is subject to the remittance basis if the beneficiary is a remittance basis user.

An election made by the trustees of the transferee settlement has no effect on this gain.

Rebasing and transfers between settlements owning non-UK resident companies: paragraph 127 of Schedule 7

112. The transfer of settled property between settlements does not result in a disposal of the assets held in the underlying non-UK resident company. Where the transfer takes place after 5 April 2008 a disposal may subsequently be made by the underlying company of assets it acquired prior to 6 April 2008. In such a case the rules in paragraph 126 do not apply to any gains made by the underlying company as it has not been part of the transferee settlement structure since 5 April 2008 – paragraph 126(11)(c).

There are special rules in paragraph 127 to give 'rebasing election' relief in such cases.

113. For any relief to be available the trustees of the transferor settlement must have made a 'rebasing election'. How any relief is calculated depends on whether, or not, the trustees of the transferee settlement have also made a 'rebasing election'.
114. If the trustees of the transferee settlement have made a rebasing election then the assets disposed of by the underlying company are treated in the same way as any assets the transferee settlement has owned from before 6 April 2008 – paragraph 127(2).
115. If the trustees of the transferee settlement have not made a rebasing election then you have to calculate a fraction 'A/B' called the 'relevant proportion' where
 - (A) is defined as the section 2(2) amount for the transferee settlement for the year a gain is treated as accruing to the non-UK domiciled beneficiary on the assumption the underlying company had sold and immediately re-acquired all its relevant assets at market value immediately before 6 April 2008, divided by
 - (B) is defined as the actual section 2(2) amount for the transferee settlement for the relevant tax year
116. The non-UK domiciled beneficiary is not charged to tax on so much of the gains treated as accruing to him that exceeds the 'relevant proportion' of those gains – paragraph 127(3) & (4). See example 27.

Example 27 – Paragraph 127 of Schedule 7 – Effect of 'rebasing election' made by transferor settlement on gains made by underlying non-UK resident close company after company has been transferred to another settlement

All the settled property of the transferor settlement is transferred to the transferee settlement for nil consideration in 2009-10. No capital payments have been made out of the transferor settlement. The transferor settlement had no gains made by the trustees prior to the transfer.

The transferor settlement's only assets at the time of transfer are shares in a wholly owned non-UK resident company which it has owned since 2001. A gain arises on the transfer of £100,000. The post 5 April 2008 element of the gain is £15,000 based on the difference between the value at 6 April 2008 and the value at the time it is transferred.

The underlying non-UK resident company continues to own an asset which it acquired in 2002. That asset is sold in 2011-12 and produces an overall gain of £150,000. The post 5 April 2008 element of the gain is £20,000 based on the difference between the value at 6 April 2008 and the value at the time of its disposal.

The transferee settlement has no unmatched section 2(2) amounts of its own. Its only unmatched section 2(2) amount is the £100,000 for 2009-10 it is treated as receiving on the transfer.

In 2011-12 the transferee settlement makes a capital payment of £250,000 to a UK resident but non-UK domiciled beneficiary.

Under section 87 £150,000 of the capital payment is matched with the £150,000 gain made by the underlying non-UK resident company in 2011-12. A £150,000 chargeable gain is treated as accruing to the beneficiary in 2011-12.

Under section 87 a further £100,000 of the capital payment is matched with the section 2(2) amount for 2009-10 and a £100,000 chargeable gain is treated as accruing to the beneficiary in 2011-12.

If no valid election has been made by the trustees of the transferor settlement then the full amount of the gains (£150,000 and £100,000 respectively) are chargeable to tax on the beneficiary in 2011-12. This is subject to the remittance basis if the beneficiary is a remittance basis user. The tax due on the gain relating to the 2009-10 section 2(2) amount will be increased by section 91.

If a valid election under paragraph 126 of Schedule 7 has been made by the trustees of both settlements only the post 5 April 2008 element of both of the gains (£20,000 for the 2011-12 section 2(2) amount and £15,000 for the 2009-10 section 2(2) amount) are chargeable to tax on the beneficiary in 2011-12. This is subject to the remittance basis if the beneficiary is a remittance basis user. The time limit for making the election is 31 January 2011 for the transferor settlement and 31 January 2013 for the trustees of the transferee settlement. The tax due on the gain relating to the 2009-10 section 2(2) amount will be increased by section 91.

If a valid election has been made by the trustees of the transferor settlement but not the trustees of the transferee settlement the formula in paragraph 127(4) applies to determine the relevant proportion of the gain on which the beneficiary is taxed. Suppose the facts are the same as the example but there is further section 2(2) amount for 2011-12 when the trustees dispose of an asset they have held since before 6 April 2008. The gain on this asset is £80,000. £80,000 of the capital payment made in 2011-12 is matched against this section 2(2) amount. The total amount matched against the 2011-12 section 2(2) amount is £230,000 leaving only £20,000 to be matched against the 2009-10 section 2(2) amount.

A in the formula in paragraph 127(4) is the transferee settlement's section 2(2) amount for 2011-12 if all the relevant assets had been sold and reacquired at their value immediately before 6 April 2008. These are the assets in the underlying company. This part of the section 2(2) amount is £20,000 to which you have to add the £80,000.

B in paragraph 127(4) is the full section 2(2) amount of the transferee settlement for 2011-12 of £230,000 (£150,000 + £80,000).

The UK resident but non-UK domiciled beneficiary is charged on $£230,000 \times £100,000/£230,000 = £100,000$ of the gains matched to the 2011-12 section 2(2) amount. The gain on the payments matched against the section 2(2) amount on the transfer in 2009-10 is covered by the paragraph 126 election made the trustees of the transferor settlement. The amount of that gain charged to Capital Gains Tax on the UK resident but non-UK domiciled beneficiary is limited to £3000 ($£20,000 \times 15,000/100,000$). The total gains chargeable in 2011-12 are £103,000. This is subject to the remittance basis if the beneficiary is a remittance basis user. The tax due on the gain relating to the 2009-10 section 2(2) amount will be increased by section 91.

Rebasing and Schedule 4C TCGA

117. Rebasing applies also for the purposes of Schedule 4C TCGA. Schedule 4C uses a similar set of rules to match section 2(2) amounts if there has been a transfer of value within Schedule 4B to the rules used to match section 87 gains. Paragraph 126(3) modifies paragraph 126 so that rebasing applies if a chargeable gain accrues under Schedule 4C because a capital payment is received by a beneficiary of a settlement other than the settlement with the section 2(2) amount. Paragraph 126(4) applies the definition in paragraph 8A of Schedule 4C to identify these relevant settlements.

Schedules 4B & 4C Taxation of Chargeable Gains Act 1992 – transfers of value by non-UK resident trustees linked with trustee borrowing: Introduction

118. Schedules 4B & 4C Taxation of Chargeable Gains Act 1992 (TCGA) apply to non-UK resident (and dual resident) trustees that make a transfer of value linked with trustee borrowing. They apply in place of the normal rules about transfers between settlements in section 90 TCGA.
119. The legislation was originally introduced to combat certain avoidance schemes. These schemes arranged for trust gains to arise in one non-UK resident settlement and capital payments to be made from another settlement to a UK resident and domiciled beneficiary. It was argued that as two different settlements were involved there would be no matching of the trust gains with the capital payments under section 87 or 89(2) TCGA.
120. In broad terms, the legislation creates a Schedule 4C pool of trust gains. Capital payments from the transferor settlement or any transferee settlement can be matched with the gains in the Schedule 4C pool to give an amount of gains treated as accruing to a beneficiary.

Changes introduced by Finance Act 2008

121. There are a small number of changes to Schedule 4B. The main thing they do is make clear that the legislation applies to offshore income gains treated as arising through the application of the section 87 or 89(2) TCGA – paragraph 130 Schedule 7 Finance Act 2008 (Schedule 7).
122. The most significant changes are to Schedule 4C. For 2008-09 onwards the treatment depends on whether the Schedule 4C pool was created before or after 6 April 2008.

Schedule 4C pools created before 6 April 2008

123. Schedule 4C pools created before 6 April 2008 are dealt with differently from those created after 5 April 2008. In broad terms Schedule 4C pools created before 6 April 2008 continue to be dealt with under Schedule 4C as it applied before Schedule 7 changes – paragraph 152 of Schedule 7. See example 28. It is not possible for post 5 April 2008 trust gains to be added to a pre 6 April 2008 Schedule 4C pool.
124. There are ordering rules for matching capital payments made after 5 April 2008. They are matched in the following order under paragraph 155 of Schedule 7: See example 29.
- First against gains in a Schedule 4C pool created after 5 April 2008
 - Second against gains in a Schedule 4C pool created before 6 April 2008
 - Third against gains not in a Schedule 4C pool

125. Where capital payments are matched against gains in a Schedule 4C pool created before 6 April 2008 earlier gains continue to be matched with earlier capital payments. In other words FIFO (first in, first out) rules continue to apply rather than the general new LIFO (last in, first out) rules. This is relevant for calculating the “increase in tax” charge under paragraph 13 of Schedule 4C.

Example 28 – Paragraph 152 of Schedule 7 – Pre 6 April 2008 Schedule 4C TCGA pool – Capital payments made post 5 April 2008 to UK domiciled and non-UK domiciled beneficiaries

A Schedule 4C TCGA pool of gains was created in 2006-07 as a result of a transfer of value linked with trustee borrowing. The transfer was between two non-UK resident settlements. The Schedule 4C TCGA pool consists of the following gains:

2004-05	Trustees' gains (section 2(2) amount)	£20,000
2005-06	Trustees' gains (section 2(2) amount)	£30,000
2006-07	Trustees' gains (section 2(2) amount) on transfer	£70,000

No capital payments have been made out of either settlement prior to 2008-09. The following capital payments are made subsequently out of the transferee settlement:

2008-09	Payment to non-UK domiciled beneficiary	£90,000
2009-10	Payment to UK resident and domiciled beneficiary	£60,000

Paragraph 152 Schedule 7 confirms that you apply the pre FA 2008 version of Schedule 4C TCGA when matching post 5 April 2008 capital payments to gains in the pre 6 April 2008 Schedule 4C TCGA pool.

The 2008-09 £90,000 capital payment to a non-UK domiciled beneficiary is not matched with any of the gains (section 2(2) amounts) in the pre 6 April 2008 Schedule 4C TCGA pool. This comes from the pre FA 2008 wording of paragraph 8(3) Schedule 4C TCGA. The capital payment is still available to carry forward to be matched with future gains under section 87 or 89(2) TCGA or gains in a post 5 April 2008 Schedule 4C TCGA pool.

The 2009-10 £60,000 capital payment to a UK resident and domiciled beneficiary is matched with £60,000 of the gains (section 2(2) amounts) in the pre 6 April 2008 Schedule 4C TCGA pool. This results in £60,000 gains being treated as accruing to the beneficiary in 2009-10. The capital payment is matched against gains (section 2(2) amounts) on a first in first out (FIFO) basis. This comes from the pre FA 2008 wording of paragraph 8B(2) Schedule 4C TCGA. So for the purpose of the “increase in tax” charge under paragraph 13 Schedule 4C TCGA the £60,000 capital payment is matched against gains (section 2(2) amounts) in the following order:

- First against the 2004-05 £20,000 gains (section 2(2) amounts)
- Second against the 2005-06 £30,000 gains (section 2(2) amounts)
- Third the remaining £10,000 (£60,000 – [£20,000 + £30,000]) of the capital

payment against £10,000 of the 2006-07 gains (section 2(2) amounts)

This leaves £60,000 gains in the Schedule 4C TCGA pool which are all gains (section 2(2) amounts) from 2006-07.

Example 29 – Paragraph 155 of Schedule 7 – Ordering rules for allocating capital payments between different Schedule 4C pools and gains dealt with under section 87 or 89(2)

A pre 6 April 2008 Schedule 4C TCGA pool of gains was created in 2006-07 as a result of a transfer of value linked with trustee borrowing. A post 5 April 2008 Schedule 4C TCGA pool of gains was created in 2008-09 as a result of a further transfer of value linked with trustee borrowing. Paragraph 152 of Schedule 7 applies to keep the Schedule 4C TCGA pools separate. Both transfers were between the same two non-UK resident settlements. Additionally there are unmatched gains (section 2(2) amounts) in the transferee settlement. In summary the gains are:

2004-05	Trustees' gains (section 2(2) amount) in transferee settlement	£10,000
2006-07	Pre 6 April 2008 Schedule 4C pool - gains	£50,000
2008-09	Post 6 April 2008 Schedule 4C pool - gains	£30,000
2009-10	Trustees' gains (section 2(2) amount) in transferee settlement	£20,000

In 2010-11 a capital payment of £95,000 is made from the transferee settlement to a UK resident and domiciled beneficiary. The rules in paragraph 155 Schedule 7 say that the capital payment is allocated against gains in the following order:

- First against the £30,000 gains in the post 5 April 2008 Schedule 4C TCGA pool
- Second against the £50,000 gains in the pre 6 April 2008 Schedule 4C TCGA pool
- Third the remaining £15,000 (£95,000 – [£30,000 + £50,000]) of the capital payment against £15,000 trustees' gains (section 2(2) amount) in the transferee settlement.

Next you go to the new section 87A TCGA matching rules to decide which trustees' gains these £15,000 capital payments are matched with. The last in first out (LIFO) rule there matches it all with £15,000 of the 2009-10 £20,000 trustees' gains (section 2(2) amount). This leaves unmatched trustees' gains (section 2(2) amount) of:

2004-05	Trustees' gains (section 2(2) amount) in transferee settlement	£10,000
2009-10	Trustees' gains (section 2(2) amount) in transferee settlement	£5,000

Schedule 4C pools created after 5 April 2008 – amount of gains

126. The Schedule 4C pool continues to comprise the unmatched gains of the transferor settlement up to, and including, the year in which the transfer

takes place. It continues to include any gains treated, by virtue of Schedule 4B, as made by the transferor settlement on the transfer – paragraph 132 of Schedule 7.

127. The legislation for calculating the unmatched gains is altered to refer to the new terminology of “outstanding section 2(2) amounts”. Its effect remains broadly the same. Paragraph 133 of Schedule 7 introduces a new paragraph 1A to Schedule 4C(1A) which replaces the existing paragraph 7A.
128. The legislation for dealing with gains that are to be brought into a Schedule 4C pool on a subsequent transfer of value is altered to refer to “section 2(2) amounts”. Its effect remains broadly the same – paragraph 137 of Schedule 7.

Schedule 4C pools created after 5 April 2008 – attributing gains to beneficiaries

129. The legislation for attributing Schedule 4C gains to beneficiaries has altered. The three substantive changes are:
 - The adoption of the new LIFO (last in, first out) section 87A rules for matching gains in the Schedule 4C pool with capital payments. This also applies for the purposes of the “increase in tax” charge rules in paragraph 13 Schedule 4C.
 - Schedule 4C gains can now be attributed to a non-UK domiciled beneficiary if that beneficiary is resident or ordinarily resident in the UK.
 - Such a beneficiary, who is a remittance basis user, can have the benefit of the section 87 remittance basis rules in respect of Schedule 4C gains attributed to them.
130. These changes are introduced by paragraphs 138 to 140 of Schedule 7. See example 30.
131. There were some restrictions on capital payments that could be matched with Schedule 4C gains in paragraphs 9 & 10 of the pre Finance Act 2008 Schedule 4C. Those restrictions are rewritten in paragraphs 141 and 148 of Schedule 7. The only substantive changes are to add two additional types of capital payment that are to be disregarded in the matching process:
 - Certain post 5 April 2008 capital payments to non-UK resident companies which would have been close companies if they had been UK resident. This addition in paragraph 141 Schedule 7 (new paragraph 9(4) Schedule 4C) mirrors a provision introduced in the new section 87C for section 87 and 89 gains.
 - Capital payments made in the period 12 March 2008 to 5 April 2008 to a non-UK domiciled individual who was UK resident (or ordinarily resident) at the time. These capital payments cannot be matched with Schedule 4C gains unless, and until, that beneficiary becomes UK domiciled. This addition in paragraph 151 of Schedule 7 mirrors a provision introduced by paragraph 125 of Schedule 7 for section 87 and 89 gains.

Example 30 – Paragraphs 138 & 139 Schedule 7 – New last in first out (LIFO) rules for allocating capital payments against gains in post 5 April 2008 Schedule 4C pools. Application of remittance basis to gains treated as accruing to beneficiaries who are non-UK domiciled remittance basis users.

A Schedule 4C TCGA pool of gains was created in 2008-09 as a result of a transfer of value linked with trustee borrowing. The transfer was between two non-UK resident settlements. The Schedule 4C TCGA pool consists of the following gains:

2004-05	Trustees' gains (section 2(2) amount)	£20,000
2005-06	Trustees' gains (section 2(2) amount)	£30,000
2008-09	Trustees' gains (section 2(2) amount) on transfer	£35,000

No capital payments have been made out of either settlement prior to 2009-10. The following capital payments are made subsequently out of the transferee settlement:

2009-10	Payment to non-UK resident and non-UK domiciled beneficiary	£90,000
2010-11	Payment to UK resident but non-UK domiciled beneficiary	£21,000
2010-11	Payment to UK resident and domiciled beneficiary	£42,000

The 2009-10 £90,000 capital payment to a non-UK resident and non-UK domiciled beneficiary is not matched with any of the gains (section 2(2) amounts) in the post 6 April 2008 Schedule 4C TCGA pool. This comes from the wording of the new paragraph 8(3)(b) Schedule 4C TCGA. The capital payment is still available to carry forward to be matched with future gains under section 87 or 89(2) TCGA.

The 2010-11 capital payments total £63,000 (£21,000 + £42,000). As this is less than the £85,000 gains in the post 6 April 2008 Schedule 4C TCGA pool then all the capital payments can be matched. The restriction that does not allow capital payments to a UK resident but non-UK domiciled beneficiary to be matched with gains in a pre 6 April 2008 Schedule 4C TCGA pool does not apply to a post 5 April 2008 Schedule 4C TCGA pool.

The new last in first out (LIFO) rules for matching capital payments with gains in the post 5 April 2008 Schedule 4C TCGA pool apply. These are applied by paragraph 138 Schedule 7 which introduces a new paragraph 8 Schedule 4C TCGA which applies the LIFO rules in section 87A TCGA.

So we look first at the latest gain (section 2(2) amount) in the post 5 April 2008 Schedule 4C TCGA pool. That is the 2008-09 gain of £35,000. This is all matched with capital payments. Gains of £11,667 ($£35,000 \times £21,000 / [£21,000 + £42,000]$) are attributed to the UK resident but non-UK domiciled beneficiary in 2010-11. Gains of £23,333 ($£35,000 \times £42,000 / [£21,000 + £42,000]$) are attributed to the UK resident and domiciled beneficiary in 2010-11.

Next we look at the 2005-06 gain (section 2(2) amount) of £30,000. There are only capital payments left of £28,000 (£63,000 - £35,000) to match with this. Gains of £9,333 (£28,000 x £21,000 / [£21,000 + £42,000]) are attributed to the UK resident but non-UK domiciled beneficiary in 2010-11. Gains of £18,667 (£28,000 x £42,000 / [£21,000 + £42,000]) are attributed to the UK resident and domiciled beneficiary in 2010-11.

What remains in the post 5 April 2008 Schedule 4C TCGA pool are

2004-05 Trustees' gains (section 2(2) amount) £20,000

2005-06 Trustees' gains (section 2(2) amount) £2,000

The UK resident and domiciled beneficiary has attributed to them gains of £42,000 (£23,333 + £18,667). These are all chargeable to tax on the beneficiary for 2010-11.

The UK resident but non-UK domiciled beneficiary has attributed to them gains of £21,000 (£11,667 + £9,333). £9,333 of these are not chargeable to tax because they result from a matching with trustees' gains (section 2(2) amount) of a year before 2008-09 – paragraph 150 Schedule 7. The remaining £11,667 are chargeable to tax on the beneficiary in 2010-11 subject to the remittance basis. Paragraph 139 Schedule 7 introduces a new paragraph 8AA Schedule 4C TCGA which applies the section 87B remittance basis rules.

Reporting requirements: paragraph 3 of Schedule 5A to TCGA

132. Paragraph 3 of Schedule 5A to TCGA requires the settlor of a non-UK resident settlement to notify HMRC of the creation of the settlement within three months of it being created. This rule applies only if the settlor is resident or ordinarily resident and domiciled in the UK. FA 2008 has not changed this. Non-UK domiciled settlors are not required to notify HMRC about settlements they have created.

Record keeping

133. Before 6 April 2008 trustees of non-UK resident settlements that have no UK domiciled beneficiaries, or beneficiaries who may become UK domiciled, will not have had to consider the possible UK Capital Gains Tax liabilities of the beneficiaries. From 6 April 2008 they will have to consider the possibility that a charge under section 87 or Schedule 4C TCGA may accrue to UK resident but non-UK domiciled beneficiaries.

134. In relation to pre 6 April 2008 transactions HMRC recognise that in such cases trustees

- May not have kept sufficient records to calculate precisely the post 5 April 2008 Capital Gains Tax liabilities that may accrue on UK resident but non-UK domiciled beneficiaries, or
- May not want to incur the expense of searching through old records to obtain all the necessary information to calculate precise Capital Gains Tax liabilities.

135. In such cases HMRC will consider any reasonable solution suggested to them. Usually proposed solutions will have to be considered on a case by case basis. One solution that HMRC will accept generally is that all assets

held by trustees or underlying companies at midnight on 5 April 2008 are treated as having a zero acquisition cost. Provided the trustees make a valid election under paragraph 126 of Schedule 7 there will be no disadvantage to the beneficiaries. This is because the chargeable gain is restricted to the growth in the value of asset since 6 April 2008.

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