Consultation: Taxing gains made by non-residents on UK immovable property
Response by the Chartered Institute of Taxation

1 Introduction

1.1 The CIOT responds to the consultation ‘Taxing gains made by non-residents on UK immovable property’. A technical note setting out the application of the anti-forestalling rule was published at the same time as the consultation document. The key changes are:

- Most non-UK residents will be chargeable on gains accruing on the direct and indirect disposal of non-residential (commercial) property.
- The existing capital gains tax charge for non-UK residents disposing of UK residential property will be extended to indirect disposals and disposals made by widely-held companies.

The scope, commencement date and core design features are outside the scope of the consultation.

1.2 The consultation is a Stage 3 consultation defined as drafting legislation to effect the proposed change. Stages 1 and 2 of the consultation process were not engaged.

1.3 The policy intent is to more closely align the tax treatment of non-UK resident owners of immovable property with that of UK residents creating a single cohesive framework as far as possible.

1.4 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
1.5 Our stated objectives for the tax system include

- a legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences;
- greater certainty so businesses and individuals can plan ahead with confidence; and
- a responsive and competent tax administration, with a minimum of bureaucracy.

It is with these particular objectives in mind that we respond to this consultation.

2 Executive summary

2.1 Following the earlier consultation on ‘Non-resident companies chargeable to Income Tax and Non-Resident CGT’, the implications for the potentially different implementation dates for bringing capital gains within the corporation tax (CT) regime from that for property income need to be addressed. Sufficient time for familiarisation for non-resident companies entering the CT regime for the first time is as important in respect of capital gains as for property income.

2.2 Given the very significant change to the rules for taxing gains on real estate and the government’s very welcome aim to create a single regime rationalising as far as possible existing provisions, we are concerned that draft legislation will be published relatively late in the consultation process.

2.3 We have written previously to note our concerns that draft legislation was not published alongside the announcement of the anti-forestalling measure given that it is already in force. We hope that draft legislation for this measure will be published well in advance of L-Day.

2.4 We are concerned that not providing the option to calculate the gain on the historic cost for indirect disposals risks imposing tax on a post April 2019 gain that exceeds the overall economic gain. This consequence is at odds with the desire to achieve parity of tax treatment between direct and indirect disposals (paragraph 4.4 of the consultation). The taxable gain on an indirect disposal should not exceed the economic gain.

2.5 The distinction between direct and indirect disposals, and the interaction with double tax treaties brings into sharper focus the issue of determining the nature of foreign entities (whether transparent or opaque). We suggest that HMRC’s entity classification list is updated in advance of the implementation date.

2.6 The five-year look back period for indirect disposals is very widely drawn. We suggest that as a minimum the five-year period should be restricted to periods beginning with the Budget announcement on 22 November 2017 as the earliest point at which taxpayers were made aware of it.

2.7 The five-year look back could bring ‘cornerstone investors’ into charge despite holding a 25% interest for a very short period of time. Consideration might be given to the option to elect to use an average holding over the five-year period, or alternatively a linked disposal rule modelled on TCGA 1992 section 19 to address the risk of fragmentation.
2.8 Given the intention is to recognise that indirect ownership equates to direct ownership in economic terms, we suggest that the same approach is adopted as for the transactions in land rules ie a just and reasonable apportionment to identify the gain attributable to the underlying UK property.

2.9 We strongly agree that ATED–related CGT should be abolished from April 2019 and all immovable property gains brought within one regime.

2.10 It is not clear whether the intention is that offshore unit trusts will be treated as opaque or as transparent under the new regime. In the context of the policy approach of achieving parity of tax treatment between UK residents and non-UK residents it is important that the approach is clarified given the scale of inbound investment in UK property through CIVs.

2.11 If the policy intention is to equalise treatment of UK and non-UK investment structures while maintaining the exempt treatment for certain classes of investor, the ability to invest via a CIV without introducing either more than one layer of tax and/or an incidence of tax that is inappropriate for exempt institutional investors may need to be evaluated further. Suggestions for areas that might form part of that evaluation are included in the body of the submission.

2.12 In terms of the reporting obligations to be imposed on third-party advisers, the consultation asks about an ‘undue’ increase in administrative burdens or costs. Clearly there will be a potentially significant increase in the administrative burden for UK advisers in meeting this compliance obligation, the extent of that burden will depend upon the conditions imposed. The question of whether this burden is unwarranted depends in part upon whether there are alternatives that would better meet the compliance and enforcement challenges. The wholesale extension of CGT on immovable property to non-residents and alignment with other jurisdictions indicates perhaps that international experience of enforcement and compliance should be fully evaluated.

2.13 We are concerned that recent case law in relation to penalties for failure to make an NRCGT return has demonstrated a lack of awareness of the NRCGT reporting requirements by non-UK residents and particular confusion for non-UK resident individuals in relation to the thirty-day reporting requirement that applies regardless of whether or not the taxpayer is in the self-assessment.

3 Earlier consultation on ‘Non-resident companies chargeable to Income Tax and Non-Resident CGT’ and implementation dates.

3.1 The summary of responses to the earlier consultation ‘Non-resident companies chargeable to Income Tax and Non-Resident CGT’ states that, in relation to income tax:

*The government agrees that there is a good case to bring the UK property income of non-UK resident companies within the corporation tax regime…The government proposes to bring in this change with effect from 6 April 2020 which will allow affected companies sufficient time to familiarise themselves with the CT regime and its requirements. (Our emphasis).*

3.2 However, we understand that the current intention is that non-UK resident companies will be brought into the CT regime and will be chargeable on gains accruing in
respect of commercial property in April 2019 (rather than from April 2020 as for property income) to align with the changes to the existing capital gains tax charge for non-UK residents in respect of residential property set out in the current consultation.

3.3 Having a different implementation date for bringing capital gains within the CT regime from that for property income could disadvantage non-UK companies with income tax losses and capital gains arising in the year 2019-2020, when two different tax regimes would apply to the non-resident company. Please can HMRC clarify whether it is envisaged that income losses in the transitional year will be available to offset against capital gains subject to CT in that year. If so, transitional provisions will be required. We note that the recent case of CRC v English Holdings (BVI) Ltd (Upper Tribunal (Tax and Chancery Chamber), 14 December 2017) may need to be considered in this context.

3.4 We also note the recognition in the summary (quoted above) of the need for an extended period of familiarisation for non-UK companies entering the CT regime for property income. A similar familiarisation period would be beneficial for the changes proposed in this consultation from the perspective of taxpayers and for HMRC to implement the necessary IT changes. It is noted that the IT changes required will be significant: IT and operational impacts for HMRC will be in the region of £2.5million per annum according to the summary of impacts. These changes will be required alongside major IT changes for Making Tax Digital and the UK’s exit from the EU.

3.5 Aligning the implementation dates to April 2020 for capital gains tax as well as for property income would obviate the need for complex transitional provisions. The failure to do so will mean a further element of piecemeal reform that runs counter to the aim of rationalising the existing regimes (to which paragraph 1.13 of the consultation refers).

4 Timing of the consultation process

4.1 The government will publish its response to the consultation together with draft clauses in ‘late summer 2018’. Legislation will be introduced in the 2018-2019 Finance Bill and will take effect from April 2019. During the consultation period, HMRC has held a number of meetings with stakeholders including the CIOT to seek views on the consultation.

4.2 Given the significant change to the rules for taxing gains on real estate and the government’s very welcome aim to create a single regime rationalising as far as possible existing provisions, we are concerned that draft legislation will be published relatively late in the process in ‘late summer’¹. We consider that insufficient time will be available for consultation (as little as eight weeks) on the detailed legislation implementing the changes.

4.3 We have written previously to note our concerns that draft legislation was not published alongside the announcement of the anti-forestalling measure given that it is already in force. We hope that draft legislation for this measure will be published well in advance of L-Day.

4.4 In paragraph 3 above we consider the disparity in timing of implementation of the earlier consultation proposals for bringing non-resident companies holding residential

¹ We assume this is a reference to L-Day but would welcome confirmation.
property into the charge to CT. As we note above this disparity does not appear consistent with seeking to move away from undesirable piecemeal reform.

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

5.1 Paragraph 2.5 of the consultation indicates that those who are exempt from all UK capital gains or otherwise not in the scope of UK tax for reasons other than non-residence will continue to be exempt or out of scope.

5.2 Exempt entities such as pension funds and charities will typically invest, together with non-exempt investors, in UK property via a non-UK resident pooled vehicle such as a non-resident fund vehicle. Indirect investment through a collective investment vehicle has a number of non-tax advantages that include:

- A diversified portfolio of different properties reducing risk of exposure
- Greater liquidity through the sale or redemption of units at investor level, or the sale of shares/units in intermediate holding vehicles at fund level
- Access to real estate management, advice and expertise.

Until the current changes, exempt bodies (both UK resident and offshore) were able to secure these significant non-tax advantages utilising an offshore fund without incurring capital gains tax at the vehicle level because the investment vehicle was non-UK resident and outside the scope of CGT. The changes mean that the current investment vehicles used by exempt bodies to access the non-tax advantages above will incur capital gains tax at fund level that would not be incurred in the case of direct investment by the exempt body. Alternative UK vehicles that might be used for indirect investment in UK commercial property by an exempt investor such as PAIFs are highly regulated entities more suited to retail investment than institutional investors.

5.3 The changes may therefore have the effect of deterring inbound investment by such exempt bodies. To the extent it is an unintended consequence, consideration should be given to further consultation (see further comments at paragraph [14] below)

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

6.1 Re-basing inevitably carries some compliance cost (mainly valuation) but it is generally an effective method of excluding gains attributable to the period prior to April 2019 subject to some inequities that we consider below.

6.2 There is a recognition in the consultation of one such inequitable result that arises if a non-resident has made a loss based on historic cost whereas rebasing to April 2019 produces a gain. Therefore, there will be an option for direct disposals only to compute the loss/gain on acquisition cost.

6.3 It is understood that the reason for not extending the option of using historic cost to indirect disposals is primarily to maintain a simple approach. However, simplicity is unlikely to be a hallmark of the taxation of gains arising on indirect disposals. (We
note below the fact that valuing a minority interest in a property rich entity will involve a specialist valuation.) In what is already likely to be a complex calculation, there is a balance to be struck between pursuing simplicity at the expense of fairness. We consider that balance is best achieved by providing the option to use historic cost.

6.4 A failure to provide the option to calculate the gain on the historic cost for indirect disposals risks imposing tax on a post April 2019 gain that exceeds the overall economic gain. This consequence is at odds with the desire to achieve parity of tax treatment between direct and indirect disposals (paragraph 4.4 of the consultation). The taxable gain on an indirect disposal should not exceed the economic gain. The taxing rights in respect of disposals of shares in property rich entities under double tax treaties may be restricted in such cases.

6.5 In some cases, the option to use historic cost would be simpler in any case, for example a disposal of shares in an entity that was not property rich (as defined) in April 2019 but subsequently becomes so means that a taxpayer has to determine the value at 2019 without contemporaneous valuations. In such cases establishing historic cost may be more straightforward.

6.6 Under the current NRCGT regime, the default position is also to rebase residential property to its market value at the introduction date (in that case April 2015). However, potential inequities are addressed by allowing the taxpayer to elect to straight-line time apportion the whole gain over their period of ownership (with only that part of the gain apportioned to their post-5 April 2015 period of ownership being subject to NRCGT). Alternatively, the taxpayer may elect to subject the whole gain or loss over their entire period of ownership (both pre- and post-April 2015) to NRCGT. This approach seems a fairer approach to reflect any volatility albeit with greater complexity.

6.7 We note the government’s view that the option under NRCGT to calculate the proportionate gain or loss attributable to post-commencement should not be available to commercial property. It is unclear to us why commercial and residential property should be treated differently for these purposes.

6.8 In summary we suggest on the grounds of fairness that the option to compute the gain or loss on disposal using acquisition cost is extended to indirect disposals with further consideration given to adopting the current NRCGT approach for alternative elections.

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

7.1 We agree with the basic principle. However, we note that the current legislation will require extensive amendment, for example for group relief purposes generally both the claimant and surrendering companies must be resident in the UK, or carrying on a trade in the UK through a permanent establishment. The relief will need to be extended to non-UK resident companies. Transitional provisions will be required for accounting periods that span April 2019.
8 Question 4: Further to the specific modifications identified, are any other changes needed to recognise differences in how the tax system applies to non-residents?

8.1 The distinction between direct and indirect disposals, and the interaction with double tax treaties brings into sharper focus the issue of determining the nature of foreign entities (whether transparent or opaque). Although this issue is not a new one extending the CGT charge on non-residents brings it to the fore as there will be a whole range of entities where previously the problem of determining whether the entity is transparent or opaque and any mismatch in the approach adopted in a treaty jurisdiction, would not have been considered. A number of foreign fund vehicles for example German KVG and foreign REITs are not included on the entity classification list at [https://www.gov.uk/hmrc-internal-manuals/international-manual/intm180030](https://www.gov.uk/hmrc-internal-manuals/international-manual/intm180030).

8.2 We suggest that the entity classification list is updated.

8.3 The interaction with TCGA 1992 section 13 will need to be addressed.

9 INDIRECT DISPOSALS

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

9.1 An indirect disposal means the disposal of an interest in an entity that holds the immovable property. The consultation notes that an indirect disposal is equivalent to a direct disposal of immovable property in economic terms and therefore the same tax treatment should be applied to both. As we note above [para] it therefore appears inconsistent to fail to provide for the option to use historic cost on the calculation of the gain arising from an indirect disposal where it is available for an direct disposal.

9.2 An indirect disposal is in scope if the entity is ‘property rich’ and a non-resident holds a 25% or greater interest in the entity, or has held such an interest at any point in the five years ending on the date of disposal.

9.3 The five-year look back period is very widely drawn and will extend potentially to April 2014 (in the case of a disposal in April 2019). While rebasing will mean that gains are unlikely to arise immediately post implementation, the reporting and compliance obligations will be in point. We suggest that as a minimum the five-year period should be restricted to periods beginning with the Budget announcement on 22 November 2017 as the earliest point at which taxpayers were made aware of the five-year look back period.

9.4 The five-year look back will catch cornerstone investors that ‘seed’ a new investment fund. The first investors in a fund may invariably be above the 25% threshold but as other investors join a fund (funds often have multiple closings) their interest will be diluted below 25%. The current proposal would bring them into the charge albeit that their interest may have been over 25% for a very short period of time. Is this consequence intended? If not, one possibility would be to provide for an election to use an average holding over the five-year period. Averaging should be optional rather than mandatory as using an averaging as the default would be difficult in funds with multiple investors, but an election may offer a solution for the cornerstone investor and similar circumstances.
9.5 A gain derived by a partnership on the disposal of shares in a non-resident company holding UK commercial property would appear to be taxable in the hands of every partner rather than being restricted to those partners who hold 25% or more. This is because the ownership test is determined by reference to CTA 2010 section 1122, supplemented by the ‘acting together’ rules modelled on those in the corporate interest restriction rules in TIOPA 2010 section 465(3), such that a partner will be connected with every other partner in that partnership. We understand that this consequence is unintended and that partners should not be treated as connected solely by virtue of being partners in a partnership.

9.6 Detailed guidance will be needed for the ‘acting together’ rules in relation to minority investors that are parties to joint ventures and shareholder agreements to avoid significant uncertainty for such investors.

9.7 It is recognised that the five-year look back is intended to prevent fragmentation in preparation for a disposal of shares to bring a holding below the 25% threshold. We suggest that consideration is given to a linked disposals rule modelled on TCGA 1992 section 19 to remove the fragmentation risk without impacting commercial investment such as the cornerstone investor issue.

9.8 The property richness test applies where at the time of disposal 75% or more of the gross value of the asset disposed of derives from UK land. The new rules will be modelled on the transactions in land tracing rules in CTA 2010 sections 365OM and 365OR. However, these rules are essentially anti-avoidance in nature rather than providing detailed computational rules for making a return. Section 365OM provides, for example, that ‘the property held by a company, partnership or trust must be attributed to the shareholders, partners, beneficiaries or other participants at each stage in whatever way is appropriate to the circumstances’. Paragraph 4.15 of the consultation indicates that a ‘just and reasonable’ apportionment of value between assets derived from UK land and other non-chargeable assets will be adopted. However, those provisions provide little assistance in determining the process particularly in the context of a corporate group.

Some issues raised include

- How will this test operate in relation to tracing via quoted holdings?
- There are complex valuation issues in applying the property richness test, for example apportioning value where an indirect entity holds interests in investments such as shares in hotel, care or retail companies, where a significant portion of the value of those investment may relate to the property value of those businesses.
- Where the property held is a trade related property (as with hotels, care and retail businesses), an apportionment of value attributable to goodwill as distinct from property value will be required.
- Whether property derivatives are included in gross assets
- Whether loan stock should be included in gross assets.
- How will property value be determined when the disposal occurs at a point when an entity has exchanged contracts for a UK property but not yet completed.
- How will the test operate in relation to fluctuating values of non-property assets?

9.9 It is acknowledged that the relaxation of the Substantial Shareholdings Exemption (SSE) rules in F(No.2) A 2017 will be relevant for qualifying institutional investors and
corporate investors in hotels and care homes groups where the property is part of the operating business. Confirmation is sought that the will apply to a gain on an indirect disposal even if the property rich test is satisfied, and particularly whether it will be extended to apply to disposals by a unit trust or to direct disposals by a qualifying institutional investor.

9.10 Paragraph 4.24 of the consultation indicates that ‘The amount of the gain or loss will be calculated on the basis of the interest being disposed of in the transaction.’ The example computation at paragraph 4.7 illustrates a disposal of shares worth £8.5m corresponding to gross asset values of £8m for UK land (chargeable) and £2m for property outside the UK (non-chargeable). However, the gain is based on the value of the shares so the disposal proceeds of £8.5m form the basis of the charge. Therefore, some of the value of the overseas property owned by the entity is brought into account in determining the value of the shares. In other words, if the 75% richness test is met, 100% of the gain is taxable. The intention is to recognise that indirect ownership equates to direct ownership in economic terms. Given that intention, we suggest that a better approach is to adopt the approach in the transactions in land rules of a just and reasonable apportionment to identify the gain attributable to the underlying UK property. We recognise that this approach is potentially more complex (for example in terms of valuations, interaction with foreign exchange, and determining base cost where the entity is not property rich at April 2019). However, it reflects more closely the underlying principle that it is UK property that is being brought into charge. It could be that taxing assets outside the scope, although apparently initially offering some benefits in terms of simplicity of approach, will ultimately require more complex measures to mitigate inequities and correct excessive impacts on competitiveness when issues such as those highlighted at para 14 below are considered.

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

10.1 No further comments.

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

11.1 We strongly support the government’s intention to structure the new rules such that one cohesive regime applies for all disposals of interests in UK property by non-residents. The case for doing so is underpinned by the complexities involved in the interaction of ATED-related CGT and NRCGT.

11.2 Currently ATED-related CGT applies to any post April 2013 gains arising on UK residential property to the extent that the ATED regime applied to the holding of the property during this period, typically a charge will arise where an offshore company disposes of a property valued over £500,000 (at April 2012) that has been held for personal use. NRCGT applies to any gain which accrues after 5 April 2015 to a non-resident person on the disposal of UK residential property.
11.3 The charge to ATED related CGT and NRCGT may arise in relation to a single disposal. Although ATED related CGT takes precedence over NRCGT a return will be required under both regimes. A particularly complex situation arises where the property being disposed of has been subject to both ATED CGT and NRCGT at different times depending upon the use of the property.

11.4 We strongly agree therefore that ATED–related CGT should be abolished from April 2019 and all immovable property gains brought within one regime.

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

12.1 We note that although the consultation refers to harmonising the ATED related CGT regime the complexities of applying potentially three different regimes, ATED-related CGT, NRCGT and the new regime from April 2019 will remain.

13 CHAPTER 6 COLLECTIVE INVESTMENT VEHICLES

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

13.1 Paragraphs 6.15-16 indicate that overseas CIVs that are presently exempt from gains on disposal of UK property only by reason of non-UK residence will be brought within the scope of UK tax in accordance with ‘normal rules’ and that in general this is the outcome that the government wants for reason of consistency and to reduce avoidance opportunities. Paragraph 1.7 of the consultation also notes that (with some exceptions) the intention is that the usual rules for CT and capital gains tax regimes will be followed for the assets brought into scope.

13.2 Offshore unit trusts are property investment fund vehicles typically used for investment in UK commercial property by non-UK resident investors. An offshore unit trust may hold a UK property directly or (commonly) via intermediate entities such as subsidiary unit trusts or partnerships. Provided that the unit trust is constituted as a ‘Baker trust’ it will be regarded as tax transparent for the purposes of income tax. For the purposes of taxation on capital gains a unit trust is treated as a company under TCGA 1992 section 99 (subject to SI 2017/1204 – see below). A unit trust that is managed and controlled outside the UK by non-UK resident trustees is therefore currently outside the scope of UK tax on gains realised on the disposal of units or directly held property.

13.3 It is not clear whether the intention is that offshore unit trusts will be treated as opaque or as transparent under the new regime. In the context of the policy approach of achieving parity of tax treatment between UK residents and non-UK residents it is important that the approach is clarified given the scale of inbound investment in UK property through CIVs.

13.4 In particular clarification is needed of the interaction of the new regime with SI 2017/1204² (laid December 2017, in force January 2018) and the extent to which it is

² http://www.legislation.gov.uk/cy/uksi/2017/1204/made
intended that these regulations will operate to determine whether funds are opaque or transparent.

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

14.1 If the policy intention is to equalise treatment of UK and non-UK investment structures while maintaining the exempt treatment for certain classes of investor, the ability to invest via a CIV without introducing either more than one layer of tax and/or an incidence of tax that is inappropriate for exempt institutional investors may need to be evaluated further. An evaluation should reflect the need for flexibility to adapt to changing global structures and investment strategies by investors both exempt and non-exempt.

Areas for that could form part of that evaluation might include:

- A refundable credit mechanism for exempt investors
- Ensuring that a potentially appropriately modified version of SSE operates coherently with the new regime
- Evaluating the existing UK open-ended models (Authorised Contractual Schemes and PAIFs) and close-ended REIT and their suitability for use in the context of the new regime, or the extent to which new models are required.
- Consideration given to granting an exemption to foreign entities that are equivalent to UK exempt funds

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

15.1 No comment

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

16.1 No further comments

17 **CHAPTER 7 REPORTING AND COMPLIANCE**

**Question 24** Do you foresee any difficulties with the reporting requirements for the seller?
17.1 Recent case law in relation to penalties for failure to make an NRCGT return has demonstrated a lack of awareness of the NRCGT reporting requirements by non-UK residents and particular confusion for non-UK resident individuals in relation to the thirty day reporting requirement that applies regardless of whether or not the taxpayer is in the self-assessment. The cases demonstrate a lack of knowledge of the compliance obligations.

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

18.1 It is proposed that there will be provision to recover tax from a UK representative of a non-UK resident company or from a related company modelling the provisions on Part 22 of Corporation Tax Act 2010 Chapters 6 and 7. A UK representative for these purposes is defined by reference to a permanent establishment through which the non-UK resident company carries on a trade'. It is unclear how these provisions can read across to offshore investors who are not carrying on a trade through a permanent establishment.

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

19.1 We agree, there seems to be little benefit in creating a two-tier system However allowing a period of familiarisation for non-UK companies entering the CT regime would be reasonable.

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

20.1 The consultation proposes a reporting requirement for UK advisers who meet the following conditions:

- The adviser is based in the UK
- The adviser has received fees for advice or services relating to a transaction that could fall within these rules
- The adviser has reason to believe, in a business capacity, that a contract for disposal of UK property has been concluded that could fall within these rules
- The adviser cannot reasonably satisfy themselves that the transaction has been reported to HMRC

We consider each of these conditions in turn below.

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20.2 The first condition is that the adviser is ‘based’ in the UK.

Does this condition refer to the physical presence of an individual or the locus of a firm or perhaps the main office?

In a complex transaction, there could be a number of advisers, are multiple notifications therefore envisaged, and would that consequence provide HMRC with difficulties in managing reports received in relation to the same transaction?

20.3 The second condition is that the adviser has received fees for advice or services relating to a transaction that could fall within these rules.

The test of ‘a transaction that could fall within these rules’ is very wide. We envisage significant difficulties where an adviser does not have access to the information or the specialist knowledge to establish the residence status of the seller, for example, and, therefore, whether a transaction could fall within the rules. The consequence is likely to be that multiple notifications are made by advisers who have been involved only peripherally but understandably will wish to protect their position by protective notifications.

20.4 The third condition is that the adviser has reason to believe, in a business capacity, that a contract for disposal of UK property has been concluded that could fall within these rules.

Paragraph 7.12 states that in order to ensure that HMRC is aware of indirect disposals by non-residents, the reporting requirement will be imposed on advisers who are aware of the conclusion of the transaction. (Our emphasis). We consider that actual awareness of the conclusion of the transaction should be the test within this condition (rather than the much wider ‘reason to believe’) that needs to met before a reporting obligation arises. Often an adviser may provide early stage advice or services, or only in relation to a specific area or jurisdiction (for example the application of property law in Scotland), with all involvement ceasing after the initial advice or services. Therefore, the adviser would not be aware of the progress of the transaction, or whether it had concluded, but arguably has ‘reason to believe’ that the transaction has taken place due to his early involvement. In our view no reporting obligation should be imposed in such circumstances; to do so would be unduly onerous.

It is not clear whether the notification requirement will go beyond a statement that a disposal has taken place. The requirement to provide details beyond the fact of a transaction having taken place may add significant administrative burdens as advisers would need to establish and verify details to which they have no or limited access.

20.5 The fourth condition is that the adviser cannot reasonably satisfy themselves that the transaction has been reported to HMRC.

In terms of obtaining proof, it should be noted that submission of the online non-resident NRCGT return does not generate a receipt that allows identification of the particular disposal. Where there has been more than one submission on the same day, it is not possible to match the receipt to a particular return.

20.6 The time limit for third-party reporting will be sixty days to allow (as stated) for the thirty-day reporting requirement for CGT and therefore for the adviser to obtain proof.
How will the thirty-day online reporting requirement interact with the CTSA filing
deadline of nine months and one day?

In addition, unless the obligation is linked to actual knowledge of the conclusion of
the transaction, from what date will the sixty days run?

20.7 Will the requirement to notify extend to advisers of the vendor as well as advisers to
the purchaser? The vendor’s advisers are likely to be in the possession of more
information than the purchaser’s advisers in relation to the disposal. In particular, the
purchaser’s advisers will not be in a position to verify whether the vendor has notified
the disposal.

20.8 The sixty-day reporting deadline needs to be extended where an adviser first
becomes involved sometime after a disposal has taken place. An adviser might be
asked specifically to review and advise the consequences of the failure to report a
transaction. It would be counterproductive to prevent appropriate advice being
obtained because the adviser would fall foul of the sixty-day deadline. In such
circumstances the requirement to notify should only run from the point the adviser is
appointed.

20.9 The consultation asks about an ‘undue’ increase in administrative burdens or costs.
Clearly there will be a potentially significant increase in the administrative burden for
UK advisers in meeting this compliance obligation, the extent of that burden will
depend upon the conditions imposed. The question of whether this burden is
unwarranted depends in part upon whether there are alternatives that would better
meet the compliance and enforcement challenges. We note that imposing an
obligation on a UK adviser will not necessarily meet these challenges where an
indirect disposal takes place between two non-residents where no UK adviser is
involved in the transaction at the time of the disposal.

20.10 In terms of alternatives, the imposition of a withholding tax is operated in other
jurisdictions including Australia and Canada. The method was considered as part of
the earlier NRCGT consultation and ultimately rejected due in part at least to
concerns that any withholding tax would need to reflect actual tax liability (as far as
possible) and the potentially competing claims on the proceeds in respect of the
payment of withholding tax and the obligation to pay funds to the mortgagee.
However, the wholesale extension of CGT on immovable property to non-residents
and alignment with other jurisdictions indicates perhaps that the experience of
operating a form of net withholding tax in those jurisdictions could be re-evaluated.

20.11 We note also the extensive powers for cross-border recovery under the Mutual
Assistance Directive and via double tax treaties to enforce compliance.

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

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4 An alternative tax reporting regime (enforced by the imposition of a 3% annual tax) operates in France in respect
of a multi-tiered ownership structures. Exemptions exist if the company owner is resident in a country which has a
double tax treaty with France containing an exchange of information provision.

5 Implementing a capital gains tax charge on non-residents March 2014
21.1 It would be helpful if revenue authorities in jurisdictions where investors are known to hold significant interests in UK property would assist in publicising the changes in such jurisdictions.

21.2 All landlords within the non-resident landlords scheme should be notified of the changes.

21.3 In addition, publicising the changes to persons on the register of people with significant control, the proposed register for beneficial owners of UK land and via the trust registration service would provide directed publicity aimed specifically at non-UK residents in addition to information published on GOV.UK.

22 Acknowledgement of submission

22.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

23 The Chartered Institute of Taxation

23.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 18,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation
16 February 2018