

NO LOSS ALL GAIN FOR NON-RESIDENT COMPANIES

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Sections 148-155 FA 2003 have changed the basis of the charge to corporation tax for non-resident companies.

Until the introduction of FA 2003, non-resident companies were charged to corporation tax if they carried on a trade in the UK through a branch or agency. For accounting periods beginning on or after 1 January 2003, non-resident companies are charged to corporation tax if they carry on a trade in the UK through a “permanent establishment” (as defined in s.148 FA 2003) and on the profits attributable to that permanent establishment.

This Note considers the position of capital gains and capital losses accruing to non-resident companies and does not consider the broader position.

Section 11(2A) ICTA 1988 (introduced by s.149 FA 2003) provides that the profits attributable to a permanent establishment for the purposes of corporation tax are (so far as relevant to this note):

“(2A) ...

(c) chargeable gains falling within s.10B of the 1992 Act –

- (i) by virtue of assets being used in or for the purposes of the trade carried on by the company through the establishment, or
- (ii) by virtue of assets being used or held for the purposes of the establishment or being acquired for use by or for the purposes of the establishment.”

Section 10B(1) TCGA 1992 (introduced by s.149 FA 2003) provides as follows:

“10B Non resident company with United Kingdom permanent establishment

(1) Subject to any exceptions provided by this Act, the chargeable profits for the purposes of corporation tax of a company not resident in the United Kingdom but carrying on a trade in the United Kingdom through a permanent establishment there include chargeable gains accruing to the company on the disposal of –

- (a) assets situated in the United Kingdom and used in or for the purposes of the trade at or before the time the gain accrued, or
- (b) assets situated in the United Kingdom and used or held for the purposes of the permanent establishment at or before the time the gain accrued or acquired for use by or for the purposes of the permanent establishment.”

So the basis of charge to corporation tax on chargeable gains is acceptably clear.

As regards capital losses the general position is that, in reading the provisions of TCGA 1992, reference to gains can be read as references to losses and reference to chargeable gains can be read as references to allowable losses: see s.16(2) TCGA 1992.

Section 16(3) TCGA 1992 deals specifically with losses accruing to non-residents as follows:

“(3) A loss accruing to a person in a year of assessment during no part of which he is resident or ordinarily resident in the United Kingdom shall not be an allowable loss for the purposes of this Act unless, under section 10, he would be chargeable to tax in respect of a chargeable gain if there had been a gain instead of a loss on that occasion.”

No mention is made in the “unless” to section 10B – the new provision bringing into charge gains accruing to non-resident companies carrying on a trade in the United Kingdom through permanent establishments; and so losses accruing to non-resident companies cannot be allowable losses as a result of the opening words of s.16(3) TCGA 1992.

Section 153 FA 2003 contains provisions replacing references in the Taxes Act to branches or agencies of companies with references to permanent establishments of companies but does not remedy the position.

Neither is the solution in Schedule 27 FA 2003 which contains amendments consequential on the provisions of sections 148 to 153 FA 2003: paragraph

2(2) of Schedule 27 amends s.10 TCGA 1992 to take out the parts (including s.10(3) TCGA 1992) relevant to corporation tax which are now in s.10B TCGA 1992. Paragraph 2(3) Schedule 27 substitutes “10B” for “10(3)” in many sections of TCGA 1992 in order to deal with the introduction of section 10B, but does not include any amendments to s.16(3) TCGA 1992.

No doubt the absence of any amendment to s.16(3) TCGA 1992 is an unintended error but, unless and until the position is rectified, the strict position for non-resident companies which are chargeable to tax in the United Kingdom under s.11 ICTA 1988 and s.10B TCGA 1992 is that chargeable gains are comprised within profits attributable to permanent establishments but there can be no allowable losses to reduce these chargeable gains.