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# REBASING AND ADJUSTMENT TO THE CGT FOREIGN CAPITAL LOSSES ELECTION - PROFESSIONAL BODIES Q&A

May 2019

**Version 2 updated for HMRC comments.**

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## FOREWORD

### Introduction

Finance (No 2) Act 2017 introduced very significant changes to the taxation of foreign domiciliaries. Section A of these Q&As covers Capital Gains Tax rebasing a transitional measure only available to foreign domiciliaries who become deemed domiciled in 2017/18 and meet specified conditions. The rebasing legislation is found at Finance (No 2) Act 2017, Sch 8, Part 3 (reproduced in Appendix 1).

Section B looks at the interactions between Capital Gains Tax rebasing and mixed fund cleansing (a transitional relief introduced for the period from 6 April 2017 to 5 April 2019 where specified conditions are met). Those interested in cleansing should refer to our separate FAQs on cleansing. Section C considers the consequential changes to the foreign capital losses election. The amended TCGA 1992 legislation and the Finance (No 2) 2017, Sch 8 amendments are reproduced in Appendix 2.

Initial HMRC Guidance was issued on 31 January 2018 and reissued on 2 February 2018 (reproduced in Appendix 3 for rebasing and Appendix 4 for the foreign losses election). This initial HMRC Guidance is aimed primarily at ordinary taxpayers.

These professional body Q&As are intended to assist professional advisers.

Questions and draft suggested answers were prepared by committee members of ICAEW, STEP CIOT and LSEW to highlight and consider areas of uncertainty in the statutory provisions for:

- cleansing of mixed funds
- rebasing and the changes to the CGT foreign capital losses election
- trust protections and other trust issues
- the extension of IHT to overseas property representing UK property interests

as introduced by Finance Act (No 2) Act 2017 with effect from 6 April 2017. The questions and the draft suggested answers were sent to HMRC for comment.

### HMRC response

HMRC comments are:

- summarised in the schedule on page 3; and
- reproduced verbatim (in red italics) under each individual Q&A.

In addition, where HMRC has either agreed, said it is OK with or has no problem with an answer we highlight the question number in green (both in the schedule and in the main text).

In certain instances, text in purple addresses points made in the HMRC comments.

HMRC does not think it appropriate to comment further on these Q&As. As such, this is expected to be the final version of these Q&As.

### Caveat

These Q&As are intended to assist professional advisers in considering generic issues with respect to rebasing and adjustments to the foreign capital losses election.

The Q&As do not constitute advice and are not a substitute for professional consideration of the issues by the professional adviser in each client's specific context. Furthermore, these Q&As should be read in conjunction with HMRC's comments and advisers should consider the position to take for themselves. Where an adviser adopts a position contrary to that of HMRC the fundamental principles and standards set out in PCRT (with particular reference to paragraph 2.21 et seq) should be considered in terms of communication with the client and any reporting and disclosure required on the tax return.

## SUMMARY OF HMRC COMMENTS PER QUESTION

See the individual questions for HMRC's precise comments.

Question	Summary of HMRC comments
1	Agreed. Note that HMRC state that it does not feel rebasing applies to carried interests.
2	Agreed. Note that, at the request of HMRC some changes to the original suggested answer have been made to emphasise that the list in HMRC Manual INTM180030 cannot be looked at in isolation. INTM1800020 must also be considered.
3	Broadly agreed, though HMRC state that: <i>"We wouldn't endorse the final parts of the answer. D(i) isn't really about rebasing, similarly for (ii) DD status would have been lost so possibly not a point about rebasing. The basic planning being you can avoid CG on worldwide assets (excluding UK residential property) by becoming and staying NR for long enough."</i>
4	Agreed. Additional example and text added at the request of HMRC.
5	Agreed
6	Agreed
7	Agreed
8	The gain is correct at £400k. HMRC's interpretation remains unchanged. The conversion of foreign currency into sterling is carried out using the spot rate on the date of remittance. HMRC does not agree the alternative approach suggested.
9	HMRC comment's on the suggested answer: <i>"I think the opening sentence is slightly confusing. Working out what gets remitted and how a gain is calculated are separate things."</i> <b>Cleansing aspects of the example agreed.</b>
10	Agreed. Note HMRC asked for the additional wording, referring to normal loss set off restrictions such as clogged losses possibly applying, to be added. These changes have been made as requested.
11	Agreed

## SECTION A – CAPITAL GAINS TAX REBASING

### Question 1

*Which of the following does rebasing apply to:*

- a) chargeable assets;*
- b) non-reporting funds;*
- c) deeply discounted securities;*
- d) life policies?*

#### **Suggested answer put to HMRC**

(a) and (b).

Rebasing relief enables individuals to calculate gains on qualifying foreign assets held by reference to the market value of the chargeable asset as at 5 April 2017.

Since the actual gain is computed using Capital Gains Tax rules rebasing applies to non-reporting funds (where income tax is payable on the gain) as well as chargeable assets.

Rebasing does not apply to deeply discounted securities or life policy gains (since the chargeable amounts are not computed as chargeable gains).

#### **HMRC Comment**

First part agreed. That is everything above is agreed, as the further HMRC comment relates to carried interest (below).

#### **Carried Interest**

It should be noted that special rules apply when computing carried interest gains. Only “permitted deductions” can be subtracted from the proceeds figure (TCGA 1992, s 103KA). Thought is being given as to whether rebasing interacts with TCGA 1992, s 103KA such that market value consideration can be deemed to have been paid to the carried interest scheme on 5 April 2017, so that the deemed consideration is a “permitted deduction” in accordance with s 103KA(6)(a). This will be dealt with separately.

#### **HMRC Comment**

On the final section on carried interest in our view it wouldn't apply to carried interest. So we wouldn't endorse any comments around carried interest that suggested otherwise.

### Question 2

*Do partnership assets qualify for rebasing?*

#### **Suggested answer put to HMRC**

Yes, the legislation is wide enough that it applies to:

- the qualifying individual's share of qualifying foreign assets belonging to a UK partnership (including LLPs); and
- the qualifying individual's share of qualifying foreign assets belonging to a transparent foreign situs partnership (including LLPs).

Prior to the passing of the legislation advice was taken by HMRC as to whether it was necessary to incorporate TCGA 1992, s 59 (Partnerships) and TCGA 1992, s 59A (Limited Liability Partnerships) into the rebasing legislation. It was decided that it was not, as they are both general provisions about how the taxation of chargeable gains works and, therefore, automatically apply in the context of rebasing. Statement of Practice D12 refers to partnerships normally being transparent for taxation purposes (assets held by a transparent partnership being held by the partners) such that dealings of the partnership (including disposals) are seen as dealings by the partners, and this is consistent with the legislation.

For foreign partnerships the question of whether they are transparent or not will come down to establishing the facts and then determining whether the entity should be seen as transparent for UK tax purposes. Guidance on the treatment of foreign entities can be found in the HMRC International Manual (at INTM180020+) which details entities that are regarded as transparent for UK tax purposes. If an entity is regarded as transparent a qualifying individual's share of qualifying foreign situs assets will be rebased.

### HMRC Comment

Agreed.

Note HMRC asked for some wording changes to be made to the last paragraph to emphasise that the list in 180030 cannot be looked at in isolation. 180020 must also be considered. These changes to the suggested answer have been made as requested by HMRC.

### Question 3

**Which one or more of the following would prevent an individual from qualifying for rebasing?**

- a) ***the individual was born in the UK with a UK domicile of origin;***
- b) ***the individual is not deemed domiciled until 2019/20;***
- c) ***the individual becomes domiciled in the UK prior to the disposal of the asset;***
- d) ***the foreign domiciliary leaves the UK for six years, returns having shed his deemed domiciled status and then disposes of the asset***

### Suggested answer put to HMRC

All of (a) to (d) above would prevent an individual from qualifying for rebasing.

Going through each in turn:

- a) Individuals born in the UK with a UK domicile of origin cannot benefit from rebasing or cleansing. For UK CGT purposes they are subject to tax as if they are a UK domiciliary.
- b) To benefit from rebasing an individual must be deemed domiciled in 2017/18 (the first tax year that the legislation is effective from).
- c) Retaining a foreign domicile remains important for tax purposes even when an individual is deemed domiciled. If an individual's domicile changes under common law to being within the UK prior to the sale of assets that would otherwise qualify for rebasing no rebasing will be due.
- d) Where an individual qualifies for rebasing and wants to leave the UK to re-start the deemed domicile clock consideration should be given to either: (i) selling assets that can benefit from rebasing prior to leaving the UK; or (ii) selling the assets prior to returning to the UK (the individual will have to be non-resident for six years to re-start the domicile clock, so the temporary non-residence anti-avoidance legislation will not be in point).

### HMRC Comments

Agreed up to C.

We wouldn't endorse the final parts of the answer. D(i) isn't really about rebasing, similarly for (ii) DD status would have been lost so possibly not a point about rebasing. The basic planning being you can avoid CG on worldwide assets (excluding UK residential property) by becoming and staying NR for long enough.

### Question 4

**The published guidance includes the following as example 5:**

*Mr D acquires a non-UK situs asset on 5/3/14 and transfers it to his wife Mrs D on 30/6/17. For Mr D, his transfer is subject to the no gain/no loss provisions as normal. On a later*

*disposal by Mrs D rebasing would not be available as her acquisition of the asset is after 5/4/17.*

The example does not make it clear, but we assume that Mr D cannot qualify for rebasing. If Mr D could qualify for rebasing then it would be the rebased cost that Mrs D took over (see Finance (No 2) Act 2017, Sch 8, para 41(5) and para 41(6)). This is illustrated in the following further example:

**Further example added in version 2 of these Q&As (as requested by HMRC)**

*Mr D acquires a non-UK situs asset on 5/3/14. He became deemed domiciled as at 6 April 2017 and met all the other qualifying conditions for rebasing. He transfers the asset to his wife Mrs D on 30/6/17. For Mr D, his transfer is subject to the no gain/no loss provisions as normal. On a later disposal Mrs D would benefit from the rebasing that Mr B was entitled to as she would take over the rebased cost of the asset from Mr D as a result of the provisions.*

**Is this agreed?**

**Suggested answer put to HMRC**

Yes, the above is agreed. Where rebasing applies a spousal disposal does not cause it to be lost. This is made clear by Finance (No 2) Act 2017, Sch 8, para 41(5) and para 41(6).

Example 5 in the HMRC Guidance can only be correct if Mr D does not qualify for rebasing. If Mr D does not qualify for rebasing then Mrs D cannot benefit either as she does not own the asset prior to 6 April 2017.

If Mr D had qualified for rebasing (as in the further example) the transfer to Mrs D would mean that she would have taken over the 5 April 2017 rebased cost of the asset.

**HMRC Comments**

I wonder if the points may be better drawn out by having two examples ie, no5 from the published guidance and then a further example where Mr D became DD and met the other conditions for rebasing. Further example added as requested by HMRC.

Mrs D would never get rebasing, but she may benefit from rebasing that Mr D had been entitled to.

**Question 5**

Katya is a UK resident foreign domiciliary who qualifies for rebasing. She acquired a painting in February 2011 using £750,000 of Remittance Basis relevant foreign income (2008/09 to 2009/10) and a £500,000 inheritance received in 2010/11. The painting is kept out of the UK. It is worth £4.5 million on 5 April 2017. Katya retains her foreign domicile under common law and is still UK resident when she comes to sell the painting in 2020/21. She receives £4.75 million.

**The funds are paid into a separate bank account. What is the composition of the mixed fund account?**

**Suggested answer put to HMRC**

Tax Year	Type of Funds	Amount
2008/09 and 2009/10	Remittance Basis relevant foreign income	£750,000
2010/11	Inheritance – clean capital	£500,000
2020/21	Gain that disappears as a result of rebasing – other income or capital not subject to UK tax	£3,250,000
2020/21	Arising Basis Gain	£250,000
		<u>£4,750,000</u>

Since the mixed fund rules match per tax year on a last in, first out basis the £4 million can be brought to the UK without a tax liability (without the need to cleanse first) as it will be matched to:

- the 2020/21 Arising Basis gain of £250,000;
- the gain that disappears due to rebasing of £3,250,000 (deemed to arise in 2020/21, the tax year of disposal) and;
- the 2010/11 inheritance of £500,000.

#### **HMRC Comment**

Strictly this is a cleansing question. HMRC agrees with the answer.

## SECTION B – INTERACTION BETWEEN REBASING AND CLEANSING

### Question 6

**How does Finance (No 2) Act 2017, Part 3 (Capital Gains Tax rebasing) interact with, Part 4 (cleansing)?**

#### Suggested answer put to HMRC

It is possible to benefit from both rebasing and cleansing. However, to do so an individual has to meet the conditions in both sets of legislation. Assuming they do the asset would need to be sold so as to leave enough time for the cleansing transaction prior to 6 April 2019 (the cleansing deadline).

It is only necessary to cleanse where rebasing has been carried out if the acquisition costs were tainted (in whole or in part) with Remittance Basis income or chargeable gains. Where they are not the proceeds can be brought into the UK without any resulting tax liability since:

- the acquisition costs are clean capital;
- rebasing wipes out the gain up to 5 April 2017; and
- any post 5 April 2017 gain is taxed on the Arising Basis (since the individual must be deemed domiciled to qualify for rebasing).

Cleansing will be necessary where in whole or in part the acquisition cost traces to Remittance Basis income or chargeable gains and the individual wants to bring the clean capital to the UK. This can be done either by:

- transferring out the Remittance Basis income and/or chargeable gains; or
- Transferring out: (i) the clean capital (if any); (ii) the gain that disappears as a result of rebasing; and (iii) the Arising Basis gain (if any) – which remains chargeable.

#### Example

An individual is deemed domiciled in 2017/18 and qualifies for rebasing. A valuable painting (qualifying for rebasing) is sold on 19 April 2018. The painting was:

- acquired for £11 million using £7 million of clean capital and £4 million of Remittance Basis relevant foreign income without a foreign tax credit;
- worth £15.2 million on 5 April 2017; and
- sold for £15.4 million.

The £15.4 million is paid into a new offshore bank account (account C). The rebasing means that only £200,000 is subject to tax on the Arising Basis in 2018/19.

Funds representing the £7 million of clean capital, the £4.2 million gain benefitting from rebasing and the £200,000 chargeable gain taxed on the Arising Basis can all be brought into the UK free from additional tax if the £4 million of Remittance Basis relevant foreign income is cleansed from account C. To do this the following would happen:

- New offshore account D is opened and a £4 million cleansing transfer from account C to account D takes place. An appropriate nomination with respect to the ITA 2007, s 809Q(4)(d) Remittance Basis relevant foreign income is made.
- The £11.4 million remaining within account C is brought into the UK (no tax is payable as a result of this remittance).

Note that if it was decided to do the cleansing the other way around, with the £4 million of Remittance Basis relevant foreign income without a foreign tax credit remaining in account C the nomination for the £4.2 million gain benefitting from rebasing would not refer to ITA 2007, s 809Q(4)(e) as the rebasing means that the £4.2 million is not a foreign chargeable gain. Rather it would be within ITA 2007, s 809Q(4)(i) (income or capital not within another paragraph of s 809Q(4)). This is important when documenting the cleansing nomination (incorrect documentation could lead to the nomination being invalid).



## HMRC Comments

The trick here seems basically to ensure the disposal is made at a point that still allows the funds to be received, presumably to a bank account that they can cleanse before the final date for cleansing arrives. HMRC can agree the cleansing and remittance basis aspects.

### Question 7

Kiki is deemed domiciled in 2017/18 and qualifies for rebasing. She has a mixed fund investment portfolio that contains a significant amount of clean capital which she wants to cleanse. Kiki does not, however, want to be out of the market for long or acquire different investments. As such:

- a new investment portfolio is opened for the clean capital;
- all the investments are sold on 19 June 2018;
- a cautious cleansing transfer (and nomination) to the new clean capital investment portfolio takes place;
- on 20 June 2018 acquisitions are made such that, once all the acquisitions are made, across the two portfolios Kiki is left with exactly the same investments and in the same quantities as she held on 19 June 2018.

### ***What is the tax analysis?***

#### **Suggested answer put to HMRC**

From a CGT perspective because there has been a re-acquisition within the period of 30 days after the disposal the base cost for the disposal is the acquisition cost of the new shares (that is the “bed and breakfasting” rule applies).

The base cost for the shares Kiki has in her portfolios as at 20 June 2018 is the rebased 5 April 2017 amount.

As explained in Question 14 of the Cleansing of Mixed Funds FAQs, holding the same shares/securities of the same class in more than one portfolio should be avoided to prevent significant mixed fund analysis difficulties.

## HMRC Comments

The CG analysis is OK and looks to be another mechanism to convert an asset to cash that goes to an account that can then be cleansed. HMRC can agree the cleansing aspects of this.

### Question 8

HMRC’s view, as expressed in the manuals, is that if a taxpayer receives \$1,000 of foreign income when it is worth £500 but brings it to the UK when it is worth £700 (due to forex movements) then he is considered to have made a taxable remittance of £700. (Equally if the funds are worth £300 when brought to the UK there is a taxable remittance of £300.)

The HMRC view led to double taxation issues for foreign currency within bank accounts and the law was changed. There is still, however, an issue for other assets if the view expressed in HMRC’s Manual is followed (it should be noted that we think that the HMRC view is incorrect, so there are good grounds for not filing on that basis provided disclosure is made).

This issue was discussed with HMRC in 2012 and 2013. The conclusion of these discussions was an agreement to differ in our technical opinions. The issue is, however, thrown into sharp focus by rebasing since the HMRC view does not result in the results one would expect given the Chancellor’s announcement

Consider the following example:

#### **Example**

The taxpayer (who is deemed domiciled in 2017/18 and qualifies for rebasing) has \$1 million of 2014/15 income which was worth £500,000 when received. It is then invested in an asset. At 5 April 2017 it is worth \$1.2 million (worth £900,000 at that date) and sold for that amount on 7

April 2017. The taxpayer remits the \$1.2 million (placed in a segregated account) to the UK immediately.

HMRC's interpretation is that the \$1.2 million represents:

- the \$1 million of original income, worth £750,000 at the date of remittance; and
- the £400,000 gain (that is £900,000 less £500,000) subject to rebasing relief.

Under this HMRC approach, since the entire mixed fund has been brought into the UK (so the remittance is not limited to the sterling value of the amount brought into the UK) the taxable remittance is £750,000 notwithstanding that the taxpayer has only remitted £900,000 of cash and expected to benefit from £400,000 rebasing relief.

In contrast, taking the alternative approach (as agreed by the professional bodies) with the same figures the \$1.2 million represents:

- the \$1 million of original income (£500,000); and
- the £400,000 gain (that is £900,000 less £500,000) subject to rebasing relief.

That is £900,000 is brought in per the mixed fund analysis, which agrees to the value of the sterling amount transferred. Only £500,000 is taxable meaning the taxpayer benefits in full from the £400,000 rebasing relief.

**Given this issue what should be done in these circumstances?**

### **Suggested answer put to HMRC**

Provided a consistent year on year approach is taken for each individual mixed fund bank account analysis the conversion of Remittance Basis foreign income to sterling can take place either on the date the income arises or when the income is remitted.

### **HMRC Comments**

The gain is correct at £400k. HMRC's interpretation remains unchanged. The conversion of foreign currency into sterling is carried out using the spot rate on the date of remittance. HMRC does not agree the alternative approach suggested.

### **Question 9**

Whilst HMRC in its manuals states that income in a foreign currency should be translated to sterling using the foreign exchange spot rate on remittance this is not the case for gains as there is clear case law to the contrary (*Bentley v Pike [1981] STC 360*, *Capcount Trading v Evans [1993] STC 11*). As such, HMRC and practitioners agree on the position for gains.

How will rebasing work where just foreign chargeable gains were used wholly (or in part) to fund the acquisition?

### **Suggested answer put to HMRC**

This is best explained by way of an example.

### **Example**

The taxpayer (who is deemed domiciled in 2017/18 and qualifies for rebasing) had \$1 million within a bank account (this traced to the sale of an investment in 2009/10 and represented clean capital of £400,000 and Remittance Basis foreign chargeable gains of £200,000). This \$1 million was immediately re-invested in an asset such that the CGT base cost of the asset was £600,000 sterling. At 5 April 2017 the new foreign asset was worth \$1.2 million (worth £900,000 at that date) and sold for that amount on 7 April 2017. The taxpayer remits the \$1.2 million (placed in a segregated account) to the UK immediately.

The \$1.2 million represents:

- the \$1 million of original funds (£400,000 clean capital and £200,000 Remittance Basis foreign chargeable gains); and
- the £300,000 capital gain (that is £900,000 less £600,000).

That is £900,000 is brought to the UK per the mixed fund analysis, which agrees to the value of the sterling amount transferred.

### **HMRC Comments**

I think the opening sentence is slightly confusing. Working out what gets remitted and how a gain is calculated are separate things.

On the example - I think it would be helpful if the example confirmed that the new asset was acquired straight after the sale of the investment, otherwise that raises questions on what the acquisition cost for CG would be. HMRC agrees the cleansing aspects of this. Example adjusted in line with HMRC comments.

## SECTION C – THE CGT FOREIGN CAPITAL LOSSES ELECTION

### Question 10

***Do surplus losses which arise while a capital loss election is in force remain available to offset gains accruing once deemed domiciled?***

#### **Suggested answer put to HMRC**

Section 16ZA TCGA provides for an election, the consequence of which is to confirm foreign losses as allowable losses. While the election has effect, s16ZB, s16ZC and s16ZD also have effect (subject to other specific criteria) and provide for special ordering rules on how to offset foreign losses.

Once an individual becomes deemed domiciled, s16ZA(2A) disapplies the election for that, and subsequent, tax years and consequently s16ZB, s16ZC and s16ZD are also turned off. Surplus foreign losses which arose while the election was in place remain as allowable losses under s16 once the individual becomes deemed domiciled. And since the special ordering rules at s16ZB, s16ZC and s16ZD no longer apply, the surplus losses may be offset against both UK and foreign gains which arise (subject to any normal restrictions that might apply eg, to a foreign loss that is also a clogged loss) once the individual is deemed domiciled.

For individuals who did not make the foreign capital loss election, any losses which accrued prior to becoming deemed domiciled are not allowable losses and remain so.

#### **HMRC Comments**

Agreed.

Note HMRC asked for the additional wording, referring to normal loss set off restrictions such as clogged losses possibly applying, to be added. These changes have been made as suggested by HMRC.

### Question 11

***Can capital losses which are realised while deemed domiciled be offset against Remittance Basis foreign chargeable gains that are remitted to the UK during the deemed domiciled period?***

#### **Suggested answer put to HMRC:**

S16ZB operates to stop allowable losses being offset against earlier foreign chargeable gains remitted at a later date (ie, to prevent the effective carry back of losses). Loss relief is instead provided by the special ordering rules in s16ZC.

However, once an individual becomes deemed domiciled, s16ZA(2A) disapplies the election under s16ZA for that, and subsequent, tax years and consequently s16ZB, s16ZC and s16ZD are also turned off. Thus, allowable losses which are realised while the individual is deemed domiciled can be offset against Remittance Basis foreign chargeable gains remitted while the individual is deemed domiciled.

It should be noted that the same result applies where the individual did not make the foreign capital losses election (that is a loss realised after an individual is deemed UK domiciled can be set against a gain that: (i) was realised when an individual was not deemed UK domiciled; and (ii) is remitted when the individual is deemed UK domiciled).

#### **HMRC Comment**

Agreed

**APPENDIX 1 – THE CAPITAL GAINS TAX REBASING LEGISLATION  
FINANCE (NO2) ACT 2017, SCH 8, PART 3**

**41**

- (1) This paragraph applies to the disposal of an asset by an individual ("P") where--
  - (a) the asset was held by P on 5 April 2017,
  - (b) the disposal is made on or after 6 April 2017,
  - (c) the asset was not situated in the United Kingdom at any time in the relevant period, and
  - (d) P is a qualifying individual.
- (2) The relevant period is the period which--
  - (a) begins with 16 March 2016 or, if later, the date on which P acquired the asset, and
  - (b) ends with 5 April 2017.
- (3) P is a qualifying individual if--
  - (a) section 809H of ITA 2007 (claim for remittance basis by long-term UK resident: charge) applied in relation to P for any tax year before the tax year 2017-18,
  - (b) P is not an individual--
    - (i) who was born in the United Kingdom, and
    - (ii) whose domicile of origin was in the United Kingdom,
  - (c) P was not domiciled in the United Kingdom at any time in a relevant tax year, and
  - (d) P met condition B in section 835BA of ITA 2007 in relation to each relevant tax year.
- (4) The relevant tax years are--
  - (a) the tax year 2017-18, and
  - (b) if the disposal was made after that tax year, all subsequent tax years up to and including that in which the disposal was made.
- (5) In computing, for the purpose of TCGA 1992, the gain or loss accruing on the disposal, it is to be assumed that P acquired the asset on 5 April 2017 for a consideration equal to its market value on that date.
- (6) Sub-paragraph (5) applies notwithstanding section 58(1) of TCGA 1992 (disposals between spouses).
- (7) Where under section 127 of TCGA 1992 (including that section as applied by sections 132, 135 and 136 of that Act) an original and a new holding of shares or other securities are treated as the same asset, the condition in sub-paragraph (1)(c) applies to both the original and the new holding.
- (8) This Part of this Schedule has effect as if it were included in TCGA 1992.

**42**

- (1) This paragraph applies for the purposes of paragraph 41(1)(c) in the case of an asset which, having been situated outside the United Kingdom, becomes situated in the United Kingdom before the end of the relevant period.
- (2) The asset is to be regarded as not situated in the United Kingdom at a time in the relevant period when--
  - (a) it meets the condition in section 809Z(3)(a), (b) or (c) of ITA 2007 (public access),
  - (b) it meets the condition in section 809Z3(3)(a), (b) or (c) of ITA 2007 (repairs),
  - (c) the sole or principal purpose of its being situated in the United Kingdom is to sell it or put it up for sale, or
  - (d) in the case of clothing, footwear, jewellery or a watch, it is for the personal use of--
    - (i) P or a husband, wife or civil partner of P, or

- (ii) a child or grandchild of a person within sub-paragraph (i), if the child or grandchild has not reached the age of 18.
- (3) The asset is to be regarded as not situated in the United Kingdom at any time in the relevant period if it is brought to, or received or used in, the United Kingdom in circumstances in which section 809L(2)(a) of ITA 2007 applies but--
  - (a) by virtue of section 809X(5)(c) of ITA 2007 (notional remitted amount less than £1000) it is treated as not remitted to the United Kingdom, or
  - (b) by the end of the relevant period it has not failed to meet the temporary importation rule in section 809Z4 of ITA 2007.
- (4) Section 809M(3)(a) and (b) of ITA 2007 (persons living together) apply for the purposes of sub-paragraph (2)(d)(i).

#### **43**

- (1) An individual may make an election for paragraph 41 not to apply to a disposal made by the individual.
- (2) Sections 42 and 43 of TMA 1970 (procedure and time limit for claims), except section 42(1A) of that Act, apply in relation to an election under this paragraph as they apply in relation to a claim for relief.
- (3) An election under this paragraph is irrevocable.
- (4) All such adjustments are to be made, whether by way of discharge or repayment of tax, the making of assessments or otherwise, as are required to give effect to an election under this paragraph.

## APPENDIX 2 – UK RESIDENT FOREIGN DOMICILIARIES THE FOREIGN CAPITAL LOSS ELECTION LEGISLATION

TCGA 1992 – NOTE THAT SOME OF THIS LEGISLATION HAS BEEN AMENDED AS A RESULT OF THE FA 2019 RE-WRITE NO CHANGES TO THE MEANING SHOULD HAVE BEEN MADE

### [16ZA Losses: non-UK domiciled individuals

- [(1) An individual may make an election under this section in respect of--
- (a) the first tax year in which section 809B of ITA 2007 (claim for remittance basis) applies to the individual, or
  - (b) the first tax year in which that section applies to the individual following a period in which the individual has been domiciled in the United Kingdom.
- (2) Where an individual makes an election under this section in respect of a tax year, the election has effect in relation to the individual for--
- (a) that tax year, and
  - (b) all subsequent tax years.
- (2A) But if after making an election under this section an individual becomes domiciled in the United Kingdom at any time in a tax year, the election does not have effect in relation to the individual for--
- (a) that tax year, or
  - (b) any subsequent tax year.
- (2B) Where an election made by an individual under this section in respect of a tax year ceases to have effect by virtue of subsection (2A), the fact that it has ceased to have effect does not prevent the individual from making another election under this section in respect of a later tax year.
- (3) If an individual does not make an election under this section in respect of a year referred to in subsection (1)(a) or (b), foreign losses accruing to the individual in--
- (a) that tax year, or
  - (b) any subsequent tax year except one in which the individual is domiciled in the United Kingdom,
- are not allowable losses.]<sup>2</sup>
- (4) Sections 42 and 43 of the Management Act (procedure and time limit for making claims), except section 42(1A) of that Act, apply in relation to an election under this section as they apply in relation to a claim for relief.
- (5) An election under this section is irrevocable.
- (6) In this section "foreign loss" means a loss accruing from the disposal of an asset situated outside the United Kingdom.]<sup>1</sup>
- [(7) Section 835BA of ITA 2007 (deemed domicile) applies for the purposes of this section.]<sup>2</sup>

### Amendments--

<sup>1</sup> Sections 16ZA-16ZD inserted by FA 2008 s 25, Sch 7 paras 55, 62 with effect for the tax year 2008-09 and subsequent tax years.

<sup>2</sup> Sub-ss (1)-(3) substituted, and sub-s (7) inserted, by F(No 2)A 2017 s 29(2), Sch 8 paras 2, 3(1)-(3) with effect in relation to the tax year 2017-18 and subsequent tax years. Sub-ss (1)-(3) previously read as follows--

- "(1) In this section "the relevant tax year", in relation to an individual, means the first tax year for which--
- (a) section 809B of ITA 2007 (claim for remittance basis) applies to the individual, and
  - (b) the individual is not domiciled in the United Kingdom.

- (2) An individual may make an election under this section for the relevant tax year (in which case sections 16ZB and 16ZC have effect in relation to the individual for the relevant tax year and all subsequent tax years).
- (3) If an individual does not make such an election, foreign losses accruing to the individual in--
  - (a) the relevant tax year, or
  - (b) any subsequent tax year except one in which the individual is domiciled in the United Kingdom,
 are not allowable losses."

**[16ZB Individual who has made election under section 16ZA: foreign chargeable gains remitted in tax year after tax year in which accrue**

- (1) This section applies to an individual for a tax year ("the applicable tax year") if--
  - [(a) the individual has made an election under section 16ZA in respect of a tax year before the applicable year,
  - (aa) the election has effect in relation to the individual for the applicable year,
  - (b) foreign chargeable gains accrued to the individual in or after the tax year in respect of which the election was made but before the applicable year, and]<sup>3</sup>
  - (c) by reason of the remission of any of the foreign chargeable gains to the United Kingdom, chargeable gains are treated under section 12 as accruing to the individual in the applicable tax year [or a part of the applicable tax year]<sup>2</sup> ("the relevant gains").
- (2) Section 2(2) or (4) has effect for the applicable tax year as if the relevant gains had not accrued.
- (3) The amount on which the individual is charged to capital gains tax for the applicable tax year is (instead of the amount given by section 2(2) or (4)(b), as reduced under section 3) the sum of--
  - (a) the adjusted taxable amount, and
  - (b) the amount of the relevant gains.
- (4) "The adjusted taxable amount" is--
  - (a) if section 3(1) (annual exempt amount) does not apply to the individual for the applicable tax year, the amount given by section 2(2) or (4)(b) as it has effect by virtue of subsection (2), and
  - (b) otherwise, so much of that amount as exceeds the exempt amount for the applicable tax year (within the meaning of section 3).
- (5) In subsection (1) "foreign chargeable gains" has the meaning given by section 12(4).
- (6) For the purposes of subsection (1)(c) foreign chargeable gains are remitted to the United Kingdom if they are regarded as so remitted for the purposes of section 12.<sup>1</sup>

**Cross-references--**

F(No 2)A 2017 Sch 8 paras 5, 6 (disapplication of this section in connection with elections made under s 16ZA).

**Amendments--**

<sup>1</sup> Sections 16ZA-16ZD inserted by FA 2008 s 25, Sch 7 paras 55, 62 with effect for the tax year 2008-09 and subsequent tax years.

<sup>2</sup> Words in sub-s (1)(c) inserted by FA 2013 s 218, Sch 45 paras 92, 98 with effect in calculating an individual's liability to income tax or capital gains tax for the tax year 2013-14 or any subsequent tax year, subject to transitional provisions and savings in FA 2013 Sch 45 paras 154-158.



<sup>3</sup> Sub-s (1)(a)-(b) substituted for sub-s (1)(a), (b) by F(No 2)A 2017 s 29(2), Sch 8 paras 2, 4 with effect in relation to the tax year 2017-18 and subsequent tax years. Sub-s (1)(a), (b) previously read as follows--

- "(a) the individual has made an election under section 16ZA,
- (b) foreign chargeable gains accrued to the individual in or after the relevant tax year (within the meaning of section 16ZA) but before the applicable tax year, and"

**[16ZC Individual who has made election under section 16ZA and to whom remittance basis applies**

- (1) This section applies to an individual for a tax year if--
- [(a) the individual has made an election under section 16ZA in respect of the tax year or any earlier tax year,
  - (b) the election has effect in relation to the individual for the tax year, and
  - (c) section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to the individual for the tax year.]<sup>3</sup>

- (2) The following steps apply for the purpose of calculating the amount on which the individual is to be charged to capital gains tax for the tax year.

*Step 1* Deduct any relevant allowable losses from the chargeable gains referred to in subsection (3) in the order in which they appear there (starting with paragraph (a) of that subsection).

If allowable losses are deductible from the chargeable gains referred to in subsection (3)(b) but are not enough to exhaust them all--

- (a) those chargeable gains are to be ordered according to the day on which they accrued,
- (b) the losses are to be deducted from those gains in reverse chronological order (starting with the last chargeable gain to accrue), and
- (c) if allowable losses are deductible from chargeable gains that accrued on a particular day but are not enough to exhaust all of the chargeable gains that accrued on that day, the amount deducted from each of those chargeable gains is the appropriate proportion of the losses.

In paragraph (c) "the appropriate proportion", in relation to a chargeable gain, is the amount of that gain divided by the total amount of the chargeable gains that accrued on the day in question.

*Step 2* Treat the amount referred to in section 2(2) or (4)(a) or 16ZB(3)(a) as being equal to--

- (a) the amount it would be if there were no relevant allowable losses, minus
- (b) the total amount deducted under Step 1 from chargeable gains within subsection (3)(a) or (c).

- (3) The chargeable gains are--

- (a) foreign chargeable gains accruing to the individual in the tax year, to the extent that they are remitted to the United Kingdom in that year [or, if that year is a split year as respects the individual, in the UK part of that year]<sup>2</sup>,
- (b) foreign chargeable gains accruing to the individual in that year, to the extent that they are not so remitted in that year [or they are so remitted in that year but it is a split year as respects the individual and they are so remitted in the overseas part of the year]<sup>2</sup>, and
- (c) chargeable gains accruing to the individual in that year (other than foreign chargeable gains).

- (4) Chargeable gains treated as accruing under section 87 or 89(2) (read, where appropriate, with section 10A) are not within any paragraph of subsection (3).

- (5) Chargeable gains treated as accruing under section 12 are not within subsection (3)(c).

(6) For the purposes of subsection (3) foreign chargeable gains are remitted to the United Kingdom if they are regarded as so remitted for the purposes of section 12.

(7) In this section--

"relevant allowable losses" means the allowable losses that section 2(2) provides may be deducted from chargeable gains accruing to the individual in the tax year [or a part of the tax year]<sup>2</sup>, and

"foreign chargeable gains" has the meaning given by section 12(4).]<sup>1</sup>

#### **Cross-references--**

F(No 2)A 2017 Sch 8 paras 5, 6 (disapplication of this section in connection with elections made under s 16ZA).

#### **Amendments--**

<sup>1</sup> Sections 16ZA-16ZD inserted by FA 2008 s 25, Sch 7 paras 55, 62 with effect for the tax year 2008-09 and subsequent tax years.

<sup>2</sup> Words in sub-ss (3)(a), (b), (7) inserted by FA 2013 s 218, Sch 45 paras 92, 99 with effect in calculating an individual's liability to income tax or capital gains tax for the tax year 2013-14 or any subsequent tax year, subject to transitional provisions and savings in FA 2013 Sch 45 paras 154-158.

<sup>3</sup> Sub-s (1)(a)-(c) substituted by F(No 2)A 2017 s 29(2), Sch 8 paras 2, 5 with effect in relation to the tax year 2017-18 and subsequent tax years. Sub-s (1)(a)-(c) previously read as follows--

"(a) the individual has made an election under section 16ZA for the tax year or any earlier tax year,

(b) section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to the individual for the tax year, and

(c) the individual is not domiciled in the United Kingdom in the tax year."

#### **[16ZD Section 16ZC: supplementary**

(1) This section applies if section 16ZC applies to an individual for a tax year.

(2) Any allowable loss deducted under step 1 of section 16ZC(2) is to be regarded (for the purposes of section 2(2)(b)) as allowed as a deduction from chargeable gains accruing to the individual in the tax year.

(3) If a deduction is made under step 1 of section 16ZC(2) from a foreign chargeable gain within section 16ZC(3)(b), the amount of the foreign chargeable gain is reduced by the amount deducted.]<sup>1</sup>

#### **Amendments--**

<sup>1</sup> Sections 16ZA-16ZD inserted by FA 2008 s 25, Sch 7 paras 55, 62 with effect for the tax year 2008-09 and subsequent tax years.

#### **Changes Introduced made to the foreign capital loss election legislation by Finance (No 2) Act 2017), Sch 8, Part 1 paragraphs 2 to 5**

#### **2**

TCGA 1992 is amended as follows.

#### **3**

(1) Section 16ZA (losses: non-UK domiciled individuals) is amended as follows.

(2) For subsections (1) to (3) substitute--

"(1) An individual may make an election under this section in respect of--

- (a) the first tax year in which section 809B of ITA 2007 (claim for remittance basis) applies to the individual, or
  - (b) the first tax year in which that section applies to the individual following a period in which the individual has been domiciled in the United Kingdom.
- (2) Where an individual makes an election under this section in respect of a tax year, the election has effect in relation to the individual for--
- (a) that tax year, and
  - (b) all subsequent tax years.
- (2A) But if after making an election under this section an individual becomes domiciled in the United Kingdom at any time in a tax year, the election does not have effect in relation to the individual for--
- (a) that tax year, or
  - (b) any subsequent tax year.
- (2B) Where an election made by an individual under this section in respect of a tax year ceases to have effect by virtue of subsection (2A), the fact that it has ceased to have effect does not prevent the individual from making another election under this section in respect of a later tax year.
- (3) If an individual does not make an election under this section in respect of a year referred to in subsection (1)(a) or (b), foreign losses accruing to the individual in--
- (a) that tax year, or
  - (b) any subsequent tax year except one in which the individual is domiciled in the United Kingdom,
- are not allowable losses."
- (3) After subsection (6) insert--
- "(7) Section 835BA of ITA 2007 (deemed domicile) applies for the purposes of this section."
- (4) The amendments made by this paragraph have effect in relation to the tax year 2017-18 and subsequent tax years.
- (5) Where--
- (a) an individual makes an election under section 16ZA of TCGA 1992 as originally enacted for a tax year before the tax year 2017-18, but
  - (b) after making the election the individual becomes domiciled in the United Kingdom at any time in a tax year,
- sections 16ZB and 16ZC of that Act do not have effect in relation to the individual by virtue of that election for that tax year or any subsequent tax year.
- (6) Section 835BA of ITA 2007 (deemed domicile) applies for the purposes of sub-paragraph (5).

#### 4

- (1) In section 16ZB (election under section 16ZA: foreign chargeable gains remitted in the tax year after that in which they accrue), in subsection (1), for paragraphs (a) and (b) substitute--
- "(a) the individual has made an election under section 16ZA in respect of a tax year before the applicable year,
- (aa) the election has effect in relation to the individual for the applicable year,
  - (b) foreign chargeable gains accrued to the individual in or after the tax year in respect of which the election was made but before the applicable year, and".
- (2) The amendment made by this paragraph has effect in relation to the tax year 2017-18 and subsequent tax years.

#### 5

- (1) In section 16ZC (election under section 16ZA by individual to whom remittance basis applies), in subsection (1), for paragraphs (a) to (c) substitute--
  - "(a) the individual has made an election under section 16ZA in respect of the tax year or any earlier tax year,
  - (b) the election has effect in relation to the individual for the tax year, and
  - (c) section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to the individual for the tax year."
- (2) The amendment made by this paragraph has effect in relation to the tax year 2017-18 and subsequent tax years.

## APPENDIX 3 – HMRC CAPITAL GAINS TAX REBASING GUIDANCE

### Revised 2 February 2018

An individual that becomes deemed domiciled under condition B of s835BA ITA2007 on 6 April 2017 will be entitled to rebase certain foreign assets to their market value at 5 April 2017 for the purposes of calculating the gain or loss on the disposal of that asset. This is subject to a number of conditions.

For the individual:

- i. Section s809H (claim for remittance basis and a charge applies) applied to the individual in relation to 2016/17 or an earlier year
- ii. The individual was resident in the UK for 2017/18
- iii. For 2017/18 and each year up to and including the year in which the disposal is made condition B of s835BA is met (ie, he is deemed domiciled under the 15 out of 20 rule) and the individual has not become domiciled in the UK
- iv. Condition A of s835BA ITA2007 does not apply to the individual eg, rebasing is not available where the individual is born in the UK with a domicile of origin in the UK
- v. For the year of disposal the individual is not domiciled in the UK at any time in the year under common law

For the asset:

- a) The asset was held on 5/4/17
- b) The disposal is made on or after 6/4/17
- c) The asset was not situated in the UK at any time in the period from 16/3/16 (or acquisition if later) to 5/4/17

Additional points:

- On disposal of an asset an election can be made for the rebasing not to apply to that asset. An election is irrevocable and can be made within normal time limits.
- For a) additional considerations apply where s127 TCGA 1992 applies
- For c) certain periods when an asset was brought into the UK for repair or public access will be discounted when considering whether an asset was UK Situs. In addition certain personal items may not be considered UK situs. The detail of these rules is outside the scope of this material.
- Rebasing of an asset only affects its base cost for the purposes of calculating the amount of the gain (or loss) arising on disposal. It does not act to remove any previously rolled over gains from the calculation of the gain arising.
- Rebasing is available for units held personally in a non-reporting status offshore fund
- Rebasing can apply where assets are held under nominee arrangements or in a partnership that is transparent for capital gains tax purposes.

Examples

- 1) Mr A first becomes deemed domiciled under condition B of s835BA ITA2007 for 2018/19. Rebasing is not available for Mr A.
- 2) Mrs B is the settlor of a non UK resident trust that holds non-UK assets. Rebasing is not available for the trust assets.
- 3) Non UK situs assets are held by a nominee for Mr C. Subject to the other conditions being met, the assets are within the scope of the rebasing rules.
- 4) Mr D acquires a non UK situs asset on 20/5/15 and transfers it to his wife Mrs D on 21/3/17. She disposes of the asset on 20/12/17. Subject to the other conditions being met Mrs D would be entitled to rebasing for the asset transferred, rather than her acquisition cost being the amount provided by the no gain/no loss provisions for transfers to a spouse. (For Mr D, his transfer to Mrs D is subject to the no gain/no loss provisions as normal.)
- 5) Mr D acquires a non UK situs asset on 5/3/14 and transfers it to his wife Mrs D on 30/6/17. For Mr D, his transfer is subject to the no gain/no loss provisions as normal. On a later

disposal by Mrs D rebasing would not be available as her acquisition of the asset is after 5/4/17.

- 6) Mr E becomes deemed domiciled under condition B of s835BA ITA2007 for 2017/18 but has not previously made any claims to the remittance basis and s809H has not applied in any year. Rebasing is not available to Mr E.
- 7) Ms F becomes deemed domiciled under condition B of s835BA ITA 2007 and has owned a UK property for many years. Rebasing is not available for UK situs assets.

## **APPENDIX 4 – HMRC GUIDANCE FOREIGN CAPITAL LOSS ELECTIONS – TCGA1992 S 16ZA TO 16ZC**

**Revised 2 February 2018**

The rules governing foreign loss elections have been amended.

From 2017/18 losses on the disposal of foreign situs assets in a year will be allowable losses if the individual is deemed domiciled for the year. Losses that accrued while a foreign loss election was in place which have not been used (ie, losses realised but not offset against gains under the special ordering rules) will be available to offset against gains once the taxpayer becomes deemed domiciled.

An individual who was born in the UK with a UK domicile of origin will be UK deemed domiciled on his or her return to the UK regardless of how many years they spend outside of the UK. Deemed domicile can only be lost by an individual who acquires that status only by virtue of being UK resident in 15 of the immediately preceding 20 tax years. If such an individual loses his deemed domicile status by being non-UK resident for six years or more and later becomes UK resident but not domiciled, then a foreign loss election can again be made. The normal rules apply so this is triggered by the first year in this later period to which s809B ITA 2007 applies. The election is irrevocable but only applies to the later period. See example 1 and 2.

For the years when the election was in force the special rules concerning the allocation of allowable losses are unaffected.

### **Example 1**

Mr A is a non-domiciled individual that has claimed the remittance basis since 2008/09. He made a foreign loss election for 2008/9 onwards. The effect of the foreign loss election will continue up to 2016/17. A is deemed domiciled in the UK from 6/4/17 (only as a result of being a long term UK resident).

In 2019/20 he leaves the UK returning in 2026/27. He is not deemed domiciled from 6/4/26 and he claims the remittance basis for 2026/27. If Mr A wants to be able to claim foreign capital losses he will need to make a foreign loss election. The normal time limit applies. That is four years from the end of 5 April 2027 (so prior to 6 April 2031).

### **Example 2**

Mr B. Facts are the same as A except B didn't make a foreign loss election in 2008/09. B will have an opportunity to make a foreign loss election for 2026/27 and subsequent years.

