Double remittances – urgent action may be needed

> *This note will be of interest to tax advisers with non-dom clients. It relates to "double remittances" and an area of uncertainty created during the passage of the 2025 Finance Act.*
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> *HMRC's current view of past remittance rules appears out of line with the common understanding of those in practice (and seemingly with HMRC's past approach in relation to enquiries) and attempts to provide clarity have just raised more questions. In addition, there are a number of scenarios where the rules may not work as we understand they were intended to.*
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> *Those affected may need to weigh up their options imminently, as the issues set out below could influence residence decisions and for some, may point on balance to action before 6th April 2025 (whilst leaving no options without risk).*

Summary

Non-doms may previously have been advised that a past remittance was non-taxable (a common reason being that they were non-resident when it happened) and that the funds were thereby "cleansed".

In recent discussions with CIOT[1], HMRC indicated that they now take the view that this was never the case. HMRC appear now to take the view that funds are only cleansed once they have been taxably remitted.

To deal with this seeming change of view, HMRC have introduced a limited relief for those affected. However:

- the relief has a number of conditions before it can apply (in particular a requirement to be UK resident in both 2024/25 and 2025/26);
- there are a number of gaps in the relief; and
- if HMRC's current view of the law later proves to be wrong then the relief is ineffective – any action taken now in reliance on that relief might then make the position worse.

Non-doms affected by this need to take urgent advice ahead of 6 April.

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[1] See also Lord Livermore's comments in the House of Lords debate (@7.38pm) - Finance Bill - Hansard - UK Parliament

HMRC are issuing guidance on this and other issues, but this is unlikely to be available before 6 April.

Background

At present – i.e. until 5 April 2025 - taxpayers who are resident but not domiciled in the UK (non-doms) may opt to be taxed on the remittance basis.

The definition of "remittance" was codified in 2008 – see s809L ITA 2007 and following sections – and defines remittance widely. The width of that definition means that there are a number of ways in which the same foreign income and gains (FIG) can be remitted multiple times ("double remittances"). There are too many examples to give a comprehensive list, but common examples would include:

- buying a foreign chattel (e.g. a car or plane) and bringing it in and out of the UK on multiple occasions
- sending money to the UK; taking it back out of the UK; sending it to the UK again etc.
- sending money to the UK to buy an asset (e.g. a house); it is arguably that the ongoing use of that house might be regarded as a double remittance
- sending money to the UK; later spending that money in the UK.

To prevent multiple tax charges when the same FIG is subject to such a double remittance, s809P(12) currently provides:

> *"if the amount remitted (taken together with any amount previously remitted) would otherwise exceed the amount of the income or chargeable gains, the amount remitted is limited to the amount which (when taken together with any amount previously remitted) is equal to the amount of the income or chargeable gains".*

This takes a bit of reading. A simpler paraphrase is that, once something has been remitted once you ignore second and subsequent remittances of the same FIG.

Does the first remittance have to be taxable / taxed?

A key question here is whether s809P(12) only knocks out subsequent remittances if the first remittance was taxable / taxed?

Seemingly there is nothing on the face of s809P(12) that says this. S809P(12) simply talks about the "amount remitted" and makes no mention of such remittance being chargeable.

This has been the consensus view[2] since 2008.

[2] Among tax practitioners and commentators.

How might the first remittance be non-chargeable? There are again a variety of ways this could be the case:

- the first remittance of the FIG was during a period of non-residence [*although note the temporary non-residence rule in s832A ITTOIA 2005*]

- the first remittance fell within personal allowance or annual exemption [this would be more difficult as, since 2008, most remittance basis users don't get personal allowance or annual exemption (s809B ITA 2007) but there are a few situations (s809D, s809E) where they might]

HMRC's position on this has never been explicit. But there is seemingly nothing in their manuals which disputes the consensus view. HMRC are also known to have settled enquiries since 2008 on this basis.

The leading texts agree with this. For instance:

> *....the same will apply if the income/gains is not taxed on the first remittance, e.g.:*
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> *(1) A remittance by a non-resident of income/gains of a resident period.*
>
> *(2) A remittance before 2008 of source-ceased income or of property enjoyed in specie.*[309]
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> *HMRC agree. December 2008 Q&As provides:*
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> ***Q9** If a taxpayer undertook a source ceasing exercise during the 2006-07 tax year and then remitted the proceeds before the 2008-09 tax year, if those funds were to then be taken back outside of the UK and re-imported, would this constitute a remittance. In other words, would the earlier source ceasing exercise be looked through despite its timing? It is understood that interest/profit from any new investment would be a remittance.*
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> ***A** If the source ceased in 2006-07 and was remitted in 2007-08, then this did not count as a remittance and it will not count as a remittance if it is exported and subsequently re-imported.*
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> *HMRC do not cite a statutory authority to justify their answer; s.809P(12) ITA would do, though there are others as well.*
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> James Kessler: Taxation of Foreign Domiciliaries (17.42) – originally in the 2009/10 edition (10.24.5)

Finance Act 2025

After 17 years without an explicit statement of HMRC's position, Finance Act 2025 (para 5 schedule 9) amends s809P(12) with effect from 6 April 2025 to read:

> *"if the amount remitted (taken together with any amount previously remitted* ***that has been charged to tax****) would otherwise exceed the amount of the income or chargeable gains, the amount remitted is limited to the amount which (when taken together with any amount previously remitted* ***that has been charged to tax****) is equal to the amount of the income or chargeable gains*

Where both remittances are after 6 April 2025, this is not unreasonable. But the provision has no commencement date. CIOT and others therefore raised the question with the government of how this amendment applies where the original remittance is before 6 April 2025, but subsequent remittances are after that date.

While this may feel an obscure topic, it has very real-world implications for those affected. Non-doms are often internationally mobile. So it would not be uncommon to find, for instance, a non-dom who:

- had received FIG while UK resident, but not remitted it
- becomes non-resident
- remitted the FIG during that period of non-residence (on advice at the time that the funds were now clean)
- perhaps used the funds to buy a UK house
- still lives in that house
- or perhaps mixed the funds with other "clean capital" and now lacks records to be able to untangle this.

Amendment 24

In response to CIOT's queries, on 25 February 2005, the government introduced Amendment 24 at report stage in the House of Commons. This is now paragraph 6 schedule 9 Finance Act 2025. It reads:

> *6 (1) This paragraph applies where—*
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> > *(a) Income or chargeable gains of an individual have been remitted to the United Kingdom during a period that exceeds 5 years—*
> >
> > > *(i) that ends before 6 April 2024, and*
> > >
> > > *(ii) in which there was no period for which the individual was UK resident, and*
> >
> > *(b) after the end of that period, but before 6 April 2025—*

(i) the same, or part of the same, income or chargeable gains 2 ("the repeated remitted amount") were again remitted to the United Kingdom, and

(ii) a relevant charge has arisen in relation to that remittance.

(2) A "relevant charge" in relation to a remittance means—

(a) income tax becoming chargeable on that remittance, or

(b) a gain accruing under paragraph 1(2) of Schedule 1 to TCGA 1992 on that remittance.

(3) Any relevant charge that has arisen on the first occasion on which the repeated remitted amount is remitted in circumstances falling within sub-paragraph (1)(b) is to be treated as never having arisen.

(4) But a remittance that is not charged to income tax or capital gains tax as a result of sub-paragraph (3) is to be treated as if it were charged to income tax or capital gains tax (as the case may be) for the purposes of section 809P(12) of ITA 2007.

(5) This paragraph is to be treated as never having applied where

(a) for either, or each, of the tax years 2024-25 and 2025-26, the individual is not UK resident, or

(b) either, or each, of those tax years is a split year as respects the individual.

(6) References in this paragraph to amounts being remitted to the United Kingdom are to be construed in accordance with Chapter A1 of Part 14 of ITA 2007 (see, in particular, sections 809L to 809O of that Act).

There are a number of difficulties with the above drafting, but the most obvious concern is that the second remittance has to be BEFORE 6 April 2025 and must be subject to a relevant charge. But, on the logic set out above, the second remittance will never be subject to a relevant charge (because s809P(12) will mean that subsequent remittances after the first are effectively ignored).

<u>Our understanding of HMRC's view of the existing meaning of s809P(12)</u>

The CIOT put these points to HMRC and recently held a meeting with relevant officials to discuss the concern that "Amendment 24" is ineffective on its terms. The important thing to emerge from that meeting is that HMRC appear[3] now to take the view that

[3] HMRC's revised view is not yet published. It is deduced from (a) comments from HMRC at CIOT's recent meeting with them (b) para 6 schedule 9 not making sense otherwise and (c) Lord Livermore's summary

s809P(12) **<u>has always contained the implicit requirement</u>** that the original remittance must be charged to tax before subsequent remittances are exempted. Or, putting it another way, in HMRC's view the Finance Bill changes to s809P(12) merely clarify the law rather than changing it.

On this view "Amendment 24" provides relief for an existing problem (that affected non-doms didn't, until now, know that they had).

<u>If HMRC is correct in its revised view of the existing law</u>

If HMRC is correct in its revised view of the existing law, then those who fall within the terms of para 6 schedule 9 are relieved from any tax that might (unknowingly) have arisen between 2008 and 2025 – see s40(5) Finance Act 2005.

If the affected assets are currently outside the UK (and haven't yet been remitted a second time), it appears possible to benefit from this by bringing the relevant FIG **<u>back to the UK before 6 April 2025</u>**.

However, two important words of caution for anyone considering this:

- the terms of paragraph 6 schedule 9 Finance Act are restricted in scope and there are a number of gaps (see further below), so great care would need to be taken that the exact terms applied

- what happens if HMRC's revised view of the current law is – as is the consensus professional opinion - later proved to be wrong? (See below.)

<u>Gaps in Amendment 24</u>

There are a number of gaps in para 6 schedule 9 Finance Act. CIOT and others have been campaigning to get these amended, but this will now not be until at least the next Finance Bill. And, as HMRC believe the issue has already been fixed, it seems more likely than not that further amendments won't be forthcoming.

The gaps in Amendment 24 include the following:

- The taxpayer who is non-resident in 2024/25
- The taxpayer who is non-resident in 2025/26
- The taxpayer who was non-resident for less than 5 years (but where the temporary non-residence rule in s832A ITTOIA did not apply[4])

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of the government's intentions in the House of Lords debate – see footnote 1. We expect it to be confirmed in HMRC guidance to be published (hopefully) in April.

[4] For instance, because the taxpayer was resident for fewer than 4 of the 7 years before departure.

- The original remittance being non-taxable for a different reason than non-residence, for instance:

    - Income within personal allowance / Gains within annual exemption

    - Some other tax relief (e.g. EIS deferral relief) applying

Those who fall into these gaps and where the second remittance has already happened have, if HMRC is right, **potentially already triggered a tax charge on the second remittance**. Thought will need to be given to whether HMRC is now out of time to assess this (returns will hopefully have been filed in accordance with "prevailing practice").

(However, even if HMRC is out of time, that does not frank third and further remittances of the same income and gains as the amendment to s809P(12) requires the FIG actually to be "charged to tax", not merely "chargeable".)

If HMRC is still in time then thought will need to be given to what disclosure may now be required. We suspect that some taxpayers will eventually have no choice but to challenge HMRC's view through the Tribunals.

What if HMRC is wrong?

If HMRC is wrong – and the consensus of professional opinion is that they are – then this leaves a mess. In this case:

- Amendment 24 (para 6 schedule 9) is ineffective on its terms as it will be impossible to meet the condition that the second remittance before 6 April 2025 gives rise to a relevant charge

- But the amendment to s809P(12) that takes effect on 6 April 2025 will then have no transitional relief. So any re-remittance after that date will give rise to a tax charge

This is particularly acute for situations, such as a UK house purchased with FIG, where it is arguable that there is a continual remittance every time the house is "used" in the UK such that there will typically be a re-remittance on 6 April 2025.

It is to be hoped that, in this situation, HMRC would amend the law further to reinstate the intent of Amendment 24. However, past experience – for instance around OIGs and Protected Trusts – is that good intentions today, come up against a lack of Parliamentary time and/or government unwillingness to act a few years later.

Unfortunately, it may be 5-10 years before a Tribunal case confirms the correct position – although given the existing problem for those who fall outside Amendment 24, it does seem likely that a case will be brought at some point.

Possible course of action for affected taxpayers

CIOT does not provide tax advice so affected taxpayers and their advisers will need to consider the position carefully on a case-by-case basis.

One possible course of action that may be considered for those whose funds are currently outside the UK, but would otherwise benefit) is to remit those funds to the UK before 6 April 2025 on the basis that:

- If HMRC is right, then Amendment 24 is effective, and there is no tax charge;

- If HMRC is wrong then the existing s809P(12) applies and there is still no tax charge.

One difficulty with this solution is that ongoing use of the funds in the UK after 6 April 2025 might amount to a “third” remittance of the same FIG and, if HMRC’s view is wrong, then there is no protection from a post 6 April 2025 charge.

For those whose past FIG is already in the UK and difficult to take back outside before 6 April 2025, the position is more difficult – particularly if they are continually “using” it. Those in this position will have to hope that HMRC’s view is proved to be right (such that Amendment 24 then saves them). But the consensus professional view is that there is a good chance HMRC is wrong.

In such cases, some taxpayers might consider ceasing UK residence immediately, such that they are non-resident in the 2025/26 year. They would seemingly need to remain so until after the tax year in which the UK asset can be sold and the proceeds taken back outside the UK again.