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## The Personal Tax Planning Review

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# AVAILABLE ACCOMMODATION FOUND AMIDST FINANCE ACT 1993 SECTION 208(2),(4)

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It is a fallacy that (by the insertion of the TCGA 1992 s.9(4)) Finance Act 1993 s.208(2),(4) abolished, for all CGT purposes for years of assessment 1993-94 onwards, "available accommodation"<sup>2</sup> as a factor in determining whether an individual is resident in the United Kingdom.

Section 9(3) TCGA 1992 provides:

"Subject to section 10(1)<sup>3</sup>, an individual who is in the United Kingdom for some temporary purpose only and not with any view or intent to establish his residence in the United Kingdom shall be charged to capital gains tax on chargeable gains accruing<sup>4</sup> in any year of assessment if and only if the period (or the sum of the periods) for which he is resident in the United Kingdom in that year of assessment exceeds 6 months."

A point to note about section 9(3) is that it states "... *resident*<sup>5</sup> in the United Kingdom in that year of assessment exceeds 6 months", when it should state

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<sup>2</sup> See *Cooper (Surveyor of Taxes) v Cadwalader* (1904) 5 TC 101, Court of Exchequer (Scotland), First Division.

<sup>3</sup> In brief, s.10 TCGA 1992 treats the charge on gains realised by corporate and non-corporate non-United Kingdom residents, trading through a United Kingdom branch or agency, on the disposal of United Kingdom *situs* assets of the trade.

<sup>4</sup> Somewhat unsatisfactorily, the words "to him" need to be read in here.

<sup>5</sup> Italicisation added.

"*physically present* in the United Kingdom [etc] ...". Although the CGT legislation is comfortable with the concept of residence in the United Kingdom for part only of a year of assessment (see s.2(1) TCGA 1992), it is clear from the context that s.9(3) posits physical presence in excess of 6 months rather than "residence" in excess of 6 months. For, if the relevant individual were resident in the United Kingdom at any time in the year of assessment, then s.9(3) would not fall to be applied to that individual in respect of that year of assessment, as s.2 would in any event apply by virtue of the residence<sup>6</sup>. In using "residence", rather than "physical presence", s.9(3) runs the risk of confusing a legal concept with a primary fact.

However, the main point to note about s.9(3) is that it is a *charging* provision. It is not concerned to provide whether for all CGT purposes an individual is "resident" in the United Kingdom in a given year of assessment.

Section 9(4) TCGA 1992 was inserted by Finance Act 1993, s.208(2),(4) with effect from the year of assessment 1993-94. Section 9(4) provides:

"The question whether for the purposes of subsection (3) above an individual is in the United Kingdom for some temporary purpose only and not with any view or intent to establish his residence there shall be decided without regard to any living accommodation available in the United Kingdom for his use."

Central to s.9(4) are the words "for the purposes of subsection (3) above". The purposes of s.9(3), althethey expressed in the plural in s.9(4), are restricted to ascertaining whether a charge to CGT should be imposed. Section 9(3) is not concerned to define "residence" for CGT purposes generally. This status is clear from the words of s.9(3). There being no ambiguity, obscurity or resulting absurdity, there is no scope for the application of *Pepper (Inspector of Taxes) v Hart*<sup>7</sup>.

Thus s.9(4) is irrelevant to the question of the residence of, for example, the settlor(s) for the purposes of s.87 TCGA 1992 ("**Attribution of gains to beneficiaries**"). See s.87(1). Such a question is wholly different from the

<sup>6</sup> However, it might be argued that a consequence of the words "if and only if" in s.9(3) is that, if the s.9(3) charge does not apply to "an individual who is in the United Kingdom for some temporary purpose only and not with any view or intent to establish his residence in the United Kingdom", then that individual will escape a charge (*i.e.*, also under s.2) even if he is *ordinarily* resident (but not resident) in the United Kingdom in the year of assessment of the United Kingdom presence for some temporary purpose etc.

<sup>7</sup> [1992] STC 898, HL.

question whether such person, who happens to be a s.87 settlor, is subject to the s.9(3) charge on gains accruing to him.