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Works of Art and the Remittance Basis

Bringing a Work of Art into the UK

In general, where a UK resident non-domiciled individual brings an asset into the UK that derives from foreign income or gains (arising after the individual became UK resident), this triggers a taxable remittance of the foreign income or gains, unless the asset qualifies as 'exempt'. Exempt assets can be brought to the UK without giving rise to a taxable remittance.

A work of art can be an exempt asset in three circumstances:

a) It is brought to the UK for repair, so long as, for the whole period it is in the UK, it is undergoing repair or restoration, or it is in transit or storage pending or following repair.

b) It is brought to the UK for public display at a qualifying museum or art gallery (or other premises approved by HMRC such as auction houses) for a maximum period of two years.

c) It is brought to the UK temporarily, that is, for a period not exceeding 275 days. This is in addition to periods covered by the repair or the public access rule.

Provided one of the above requirements is met, there is no taxable remittance at the time the artwork is brought into the UK.

If any of the above conditions cease to be met whilst the artwork is in the UK, the artwork ceases to be an exempt asset and is treated as remitted to the UK at that time, and the foreign income and gains from which the artwork derives will become taxable at that point.

If the artwork is sold whilst in the UK, the foreign income and gains used to purchase the asset would usually be treated as remitted to the UK at that point. However, no taxable remittance will arise provided all of the following conditions are met:

1. The asset must not be sold to a relevant person (broadly, a spouse, civil partner, minor child or grandchild).

2. The sale must be made on commercial arm's length terms.

3. After the sale has taken place no relevant person must have an interest in the asset or be able to benefit from the asset.

4. The whole of the disposal proceeds (less agency fees and other disposal costs) must be 'released' (made available to the taxpayer) by the first anniversary of 5 January following the tax year in which sale takes place (the final deadline). As an example, for a sale taking place in August 2017 the proceeds must be released by 5 January 2019.

5. Within 45 days of the date on which the sale proceeds are released, they must be taken offshore, unless they are used to make an investment in the UK which qualifies for a relief from the remittance charge (e.g. a business that qualifies for Business Investment Relief) and a claim is made within the relevant time limit. Where the proceeds are paid in instalments, each instalment must be taken offshore within 45 days of that instalment being released.

6. The sale must not be part of a scheme with a tax avoidance motive.

7. If any sale proceeds are released in the 45 days ending with the final deadline (see 4. above), they must be taken offshore before the final deadline.

Selling a Work of Art whilst UK Resident

Capital Gain or Trade?

The characteristics of the transaction will determine whether the profit on sale is considered to be a capital gain or a trading transaction.

Taxation as a Capital Gain

A capital gain arising on an asset situated in the UK is chargeable to capital gains tax (at a top rate of 20%) if the seller is UK resident.

However, the gain arising on the disposal of an exempt asset (such as a work of art) that was brought into the UK for sale will be regarded as a non-UK gain provided the proceeds are removed from the UK (or reinvested in a qualifying investment) within 45 days. The gain will only be taxed in the UK if the proceeds are later brought back to the UK or otherwise used or enjoyed in the UK.

A capital gain arising on an asset situated outside the UK at the time of sale is taxable on the remittance basis if the seller is a UK resident non-domiciliary.

Taxation as a Trading Transaction

There is no definition in the legislation as to what constitutes a 'trade' although section 989 Income Taxes Act 2007 provides that '*trade includes any venture in the nature of a trade'.*

The factors that HMRC will take into account when determining whether a trade activity has taken place are called 'badges' of trade.

Badges of Trade

1) **Profit seeking motive**
   Was the artwork purchased purely to sell on at a profit? An intention to make a profit supports trading, but by itself may not be conclusive.

2) **Number of transactions**
Have there been any previous transactions and if so, at what intervals? Systematic and repeated transactions will support a trade, although case law has determined that a single isolated transaction can amount to the carrying on of a trade.

3) **Nature of the asset**
Did it provide personal enjoyment, e.g. was it on display in the individual's home? This would indicate purchase for investment purposes.

4) **Existence of similar trading transactions**
Transactions that are similar to those of an existing trade carried on by the seller may themselves be trading.

5) **Changes to the asset**
Was the artwork repaired, restored or improved to make it more easily saleable or saleable at a greater profit? This would indicate a trading transaction.

6) **The way the sale was carried out**
What was the reason for the sale? (e.g. to raise cash for something specific, or were the operations involved in the sale similar, and carried on in the same way, as those which are characteristic of ordinary trading in artwork?)

7) **Source of finance**
Was money borrowed to purchase the artwork? If so, did the piece have to be sold to repay the loan, i.e. was the purchase undertaken in the expectation that the artwork would be paid for out of the proceeds of sale. This would support a trade.

8) **Interval of time between purchase and sale**
An intention to resell an asset shortly after purchase will support trading. However, an asset, which is to be held indefinitely, for enjoyment or investment, is less likely to be the subject of a trade.

9) **Method of acquisition**
An asset that is acquired by inheritance, or as a gift, is less likely to be the subject of trade.

It is not necessary for a transaction to have all of the 'badges' in order to be regarded as a trading transaction, and some badges will carry greater weight than others, depending on the specific circumstances. Indeed, in some cases the existence of one single badge can be enough.

The position will depend on all the facts and circumstances of each transaction, although regular purchase and sale of artwork that has been held for only a short period of time is likely to be regarded as trading.

If the sale is considered to be part of a trade, the profit will be taxed as income at rates of up to 45% if the seller is UK resident at the time of sale. It is not possible to separate profits arising from a UK resident

individual's trade into UK activities and overseas activities. The entire trade is deemed to have a UK source and this means that the remittance basis of taxation cannot apply to any profits generated overseas.

Where it is anticipated that the regular sales of artwork will take place outside the UK, it may be preferable to establish a non-UK company to carry out the purchase and sale so that the non-UK profits can be 'ring-fenced' and subject to tax on the remittance basis. This is a complex area and further advice should be taken as various anti-avoidance provisions will need to be considered.

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