

FB 2021-22 - Residential property developer tax

(Lecture B1295 – 14.27 minutes)

As announced in February 2021, the government will introduce a new tax from April 2022 on the profits that companies and corporate groups derive from UK residential property development activities.

This is intended to ensure that the largest developers make a fair contribution to help pay for building safety remediation and is one of a package of measures specifically designed to enable the Government to raise funds to deal with unsafe cladding in high-rise buildings.

The legislation is in Clauses 32 – 52 and Schedules 7, 8 and 9 of the Finance Bill. It applies for accounting periods beginning on or after 1 April 2022, with any company having a normal accounting period straddling that date deemed to have separate periods with the second period starting on 1 April 2022. Anti-forestalling provisions apply if it is thought that profits have been accelerated as a result of an arrangement made on or after 29 April 2021 which was designed to avoid the new tax.

The tax is to be called 'Residential Property Developer Tax' or RPDT. The rate of this tax will be 4% and it will be charged on the 'residential property developer profits' to the extent that they exceed the 'developer's allowance'. The tax will be charged and collected as if it is corporation tax. All enactments applying generally to corporation tax will therefore apply to the RPDT too. This includes powers and rights in relation to returns, assessment, collection and payment of tax, appeals, general administration, penalties and interest on unpaid tax. RPDT is included within provisions for quarterly instalment payments and group payment arrangements.

If a sum is being paid which represents the RPDT, HMRC must be notified in writing of the amount of the payment. The company which must notify is the RP developer or the relevant company if there is a group payment arrangement.

Residential Property Developer

A company is a 'residential property developer' if:

- It carries on residential property development activities; or
- It (either alone or with other companies which are members of the same group) has a substantial interest (broadly, 10% or more) in a relevant joint venture company.

This will not include non-profit housing companies which is defined as non-profit registered providers of social housing and registered social landlords (or a wholly-owned subsidiary of one of these).

There is an exit charge when a company ceases to be a non-profit housing company without having distributed all of its assets to another non-profit housing company or companies. The charge is based on the profits made in the four years up to the date it ceases to be a non-profit housing company.

Residential property development activities

Residential property development activities are those which are carried on by the company in connection with land in the UK in which the company has an interest and for the purposes of, or in connection with, the development of residential property.

The legislation specifies that activities to be treated as in connection with development of residential property include dealing in residential property, designing it, seeking planning permission in relation to it, constructing or adapting it, marketing it, managing it or any activities which are ancillary to these.

A company can also be caught if it had an interest in land which it ceases to hold but it undertakes activities of designing, seeking planning, constructing or adapting the land (or activities ancillary to these) which were planned or anticipated at the time they ceased to have an interest as long as those activities do not relate solely with areas of land which do not constitute residential property.

An interest in land is defined in the same terms as applies for Stamp Duty Land Tax (and other stamp taxes) being 'an estate, interest, right or power in or over land' or the benefit of any obligation, restriction or condition affecting the value of those. Most commonly this will be freehold or leasehold interests. However, this legislation only applies where that land forms part of the trading stock of the company or any related company (being a 75% group company or relevant JV company) where the trade includes activities for the purposes of or in connection with the development of residential property. Security interests or licences to use land are excluded interests for these purposes.

Residential property

This means a building or part of a building that is designed, adapted or is in the process of being constructed or adapted for use as a dwelling plus land that forms the garden or grounds of such a building. The legislation also includes an interest in or right over land which subsists for the benefit of the dwelling and land for which planning permission is being sought such that it will fall within any of the previous definitions.

Residential property does not include: anything which is to be used as a home providing residential accommodation for children or any person with personal care needs for any reason; residential accommodation for members of the armed forces or emergency services (including those working in hospitals); hospitals or hospices; temporary sheltered accommodation; prisons or similar; hotels, inns or similar; monasteries, nunneries or similar; or student accommodation (where it is reasonable to suppose that it will be occupied by students for at least 165 days p.a.).

Profits or losses

The RPD profits or losses for an accounting period are calculated as:

$$A + B - C - D - E$$

Where:

A is the adjusted trading profits/losses for the accounting period

B is the joint venture profits/losses attributable to the developer

C is the amount of allowable RPDT loss relief given for the period

D is the amount of allowable RPDT group relief claimed for the period

E is the amount of allowable RPDT group relief for carried forward losses claimed for the accounting period.

Each of these terms is then defined.

Adjusted trading profits and losses mean the profits and losses for corporation tax purposes ignoring:

- Profits other than those relating to RPD activities (apportioned on a just and reasonable basis);
- Profits of a charitable trade;
- Any amounts of loss relief, group relief or group relief for carried forward losses;
- Any credits or debits brought into account in relation to loan relationships or derivatives.

Attributable joint venture profits and losses are profits and losses attributable to the RP developer from a relevant joint venture company. Profits are only included in the calculation for the RP developer where they fall below the JV company's RPDT allowance for the period so that the JV company is not itself suffering the RPDT on those profits. The amount allocated is the percentage of the JV profits which the RP developer is entitled to with apportionment if the accounting periods are not co-terminus.

A relevant joint venture company for these purposes is a company which is a RP developer or the member of a same group as an RP developer which is not a 75% subsidiary of another company and where there are five or fewer persons who between them hold 75% or more of the ordinary share capital or (if the company does not have share capital) are beneficially entitled to 75% or more of the profits available for distribution to equity holders. In determining the application of the 'five or fewer persons' test members of the same group are treated as the same person.

JV profits or losses are only attributed to an RP developer if they have a substantial interest in the JV company. A substantial interest means that the RP developer owns at least 10% of the ordinary share capital of the JV or (if the JV company does not have share capital), is beneficially entitled to at least 10% of the profits of the JV that are available for distribution to equity holders of the JV.

Losses are only attributed if a joint election is made between the RP developer and the relevant JV company; the election needs to be made within 2 years from the end of the accounting period of the RP developer. Losses of the JV company which are attributed to the RP developer are not available to be carried forward or surrendered by the JV company. Any payment made by the RP to the JV company is ignored in determining each company's adjusted trading profit or loss.

There are then provisions for RPDT loss relief, RPDT group relief and RPDT group relief for carried forward losses.

The group relief provisions mirror those applying for general corporation tax purposes, but relate solely to RDPT.

There is a limitation on the amount of carried forward losses that can be set off against the profits of a later period for RPDT purposes ('C' and 'E' in the above formula). This means that the carried

forward losses do not reduce profits above the annual 'developer's allowance' by more than 50%, similar to the way that the normal loss restriction works.

There is an allowance below which the RPDT is not payable. This 'developer's allowance' is £25m for a 12-month accounting period and this is allocated between group members where the RP developer is a member of a group, with particular rules existing for the allocation where the accounting periods are not co-terminus.

If no allocation is made because there is not a member of the group which has been nominated as the allocating member, the allowance is divided by the number of companies within charge to corporation tax that are members of the group to which the RP developer belongs.

Various administrative provisions exist for the allowance allocation process.

There are complex rules applying where an excluded body holds a substantial interest in a relevant JV company. An excluded body would be one that is not chargeable to corporation tax such as a sovereign wealth fund or pension fund.

The JV company's allowance is reduced by the relevant percentage, being the interest held by the excluded body but an exempt member will then be able to allocate its own annual allowance to its JV interests, up to the amount that has been reduced. The excluded body will have to submit a notional allowance statement.

No deduction is available for corporation tax purposes for RPDT paid. The transfer pricing provisions apply in relation to the calculation of profits arising from RPD activities.