

## **SDLT for non-resident transactions (Lecture P1253 – 16.30 minutes)**

Clause 88 and Schedule 16 inserts Schedule 9A into FA2003, which will add a 2% SDLT surcharge to purchases of dwellings where the transaction is a 'non-resident transaction'. It is important to note that it adds 2% to all the rate bands applicable to the following:

- Purchase of residential property
- Higher rate transaction where the 3% supplement applies
- the 15% ATED-linked charge
- the tax chargeable in relation to rent on residential property
- Acquisitions by first-time buyers
- The rate payable on exercise of collective rights by tenants of flats

The impact of the legislation will be an increased cost of £2,000 in SDLT for every £100,000 of consideration for the transaction.

### **A 'non-resident transaction'**

A transaction is a non-resident transaction if it meets all of the following conditions:

1. The purchaser is, or includes, a person who is non-resident (note, as with the current 3% supplement that this is an 'all-or-nothing' charge – if one party to the transaction is caught then the whole transaction is caught);
2. The purchase consists of a major interest in a dwelling or dwellings, including an undivided share in a major interest;
3. The interest is not a leasehold interest with 7 years or less to run and is not subject to a relevant inferior interest; and
4. The chargeable consideration is £40,000 or more or where the chargeable consideration consists of or includes rent, the chargeable consideration other than rent is £40,000 or more or the annual rent is £1,000 or more.

### **What do we mean by non-resident?**

#### *Individuals*

The basic rule is that if an individual is present in the UK on at least 183 days during any continuous period of 365 days falling within the relevant period, then they are treated as UK resident. The relevant period starts 364 days before the effective date of the transaction and ends 365 days after the effective date of the transaction. In effect, there is a two-year period with the effective date in the middle and you have to be in the UK for 183 days in any continuous 365-day period within that two years.

#### Example

Nigella is not tax resident in the UK when buying a house in London on 1 September 2022. However, since 2 September 2021, she has spent 200 days in the UK and is therefore treated as UK resident for SDLT purposes.

If the individual is married or in a civil partnership, then as long as neither is acting as a trustee of a settlement, then if one party is treated as UK resident then both of them are.

#### Example

Continuing the above example, Nigella is buying the property with her wife, Amber. Amber has spent no time in the UK during the 12 months up to the date of the purchase, but the transaction is not liable to the 2% supplement as the UK-resident condition is met by Nigella.

It is clear from the above rules that it is possible to meet the conditions after the purchase but even if it can be assumed that is going to happen, Individuals have to pay the surcharge upfront and then are able to claim a refund of the 2% surcharge once they can show that the residency condition is met.

Being present in the UK means the same as it does for the statutory residency test, i.e. being in the UK at midnight at the end of the day. Although Stamp Duty Land Tax applies only in England and Northern Ireland, it is the whole of the UK which is considered when judging whether someone is resident.

Anyone in Crown employment is treated as present in the UK at the end of a day where they are present in a country outside the UK for the purpose of performing activities in the course of their Crown employment or they are the spouse or civil partner of such a person (as long as they are living with that person). This effectively exempts them from the 2% surcharge if they purchase a UK residential property while abroad on Crown duties for long periods of time.

#### Example (taken from the HMRC manuals)

Marcel is a member of the British Army. Between 1 January 2025 and 1 January 2028, Marcel is deployed in Cyprus. Marcel is accompanied by his wife, Rebekah. During this period, neither of them spend any time in the UK.

On 31 August 2026, Rebekah purchases a freehold residential property in England for £900,000. The residence test set out in para. 4 of Schedule 16 applies to determine whether Rebekah is treated as UK resident. Although Rebekah has not spent any time in the UK during the relevant time period, throughout that period she was living with Marcel who was in Crown employment and in Cyprus for the purposes of performing activities in the course of his employment for the British Army.

Rebekah is treated as UK resident in relation to the transaction.

There is an alternative mechanism for determining residence for the purposes of these provisions. If you are in the UK on at least 183 days during the period that begins with the day that is 364 days before the effective date of the transaction and ends with the effective date, then you are UK resident if you meet any of the following conditions:

- A. The purchaser is, or includes, a company or a person acting as a trustee of a unit trust scheme
- B. The purchaser is, or includes, an individual who is entering into the transaction as a partner in a partnership
- C. The purchaser is, or includes, an individual who is acting as a trustee of a settlement as long as no individual is entitled to occupy the property or the income from the property automatically (i.e. it is not an interest in possession settlement).

This test is only looking at the period before the date and so it follows that if you fall within one of these scenarios but do not meet the UK residency test so you are treated as non-resident for these purposes, it is not possible to claim a refund of the surcharge if you meet the residency condition after the event.

#### Example (from HMRC manuals)

Camille and Joshua are the partners at Rousseau's LLP. They are neither married nor civil partners to each other. Rousseau's purchases a freehold residential property in England on 1 June 2025 for £600,000. Condition B of the above condition applies.

Between 2 June 2024 and 1 June 2025, Camille spent 200 days in the UK. She is therefore UK resident in relation to the transaction.

Between 2 June 2024 and 1 June 2025, Joshua spent 150 days in the UK. Between 2 June 2025 and 1 June 2026, Joshua spent 200 days in the UK. Under the basic rule, Joshua would be UK resident in relation to the transaction. However, as one of the above conditions apply, the alternative definition must be used.

As Joshua is non-UK resident in relation to the transaction, and the purchase is a "non-resident transaction" as all of the remaining conditions are also met.

#### *Partnerships*

Partners in a business partnership buying a residential property together are treated as joint buyers so the residency of each partner needs to be considered.

#### *Companies*

A company will be not resident for these purposes if they are not UK resident for the purposes of the Corporation Taxes Acts or if it is a close company (whether or not it is UK resident) which is controlled outside the UK and is not an excluded company.

Clearly, a company which is incorporated in the UK or which has central control and management in the UK will automatically be treated as UK resident and avoid the 2% surcharge. Where a company is dual resident, and there is a tie-breaker clause in the relevant double tax treaty such that the company is 'treaty non-resident' in the UK, then it is treated as not resident for the purposes of these provisions.

A company meets the non-UK control test if it is a close company which is under the control of any number of participators who are non-resident (using the definition given in this legislation, not the statutory residency test). Various other statutory provisions are ignored:

- S444 CTA 2010 condition A is treated as omitted, so a close company controlled by another company which is not a close company can be caught by these provisions
- S446 CTA 2010 is omitted so that a close company can include quoted companies in which the public owns 35% or more of the voting power.
- A participator who is a general partner in a limited partnership is not included as a relevant participator for this test as long as they have entitlement to more than 1% of the assets of the company.

Additionally, in dealing with this test, there are various amendments to the situations where rights of associates are normally attributed. For this purpose, we do not attribute the rights of:

- Partners
- Spouses and civil partners living together where one is UK resident
- Rights of a company where an individual's interest is less than 5% (of the share capital, voting rights, income from a distribution, and assets in a winding up)
- Loan creditors.

A company is an excluded company if it is a property authorised investment fund (PAIF), a body corporate that is a 51% subsidiary of a PAIF, a UK REIT or a member of a group UK REIT.

#### Example 1

Francine and Justine each own 50% of the share capital in West Workshops Ltd (WWL), a UK resident company for the purposes of Corporation Tax. It is not an excluded company.

WWL purchases a freehold residential property and it is necessary to determine if the company is not resident for SDLT purposes. It is UK resident for tax purposes but we need to consider the close company provisions.

WWL is a close company as it is under the control of two participators. Are Francine and Justine relevant participators?

At the point of purchase, Francine has spent 200 days in the UK in the previous 364 days but Justine has spent just 15 days in the UK in the same period. Justine is a relevant participator as she is not resident under the particular provisions.

As Justine owns only 50% of the share capital, she does not control WWL. The company is therefore not under the control of relevant participators in relation to the transaction, and the non-UK control test is not met. Hence, the purchase is not liable to the surcharge.

#### Example 2

West Workshops Cheltenham Ltd (WWCL) is a UK resident company for the purposes of Corporation Tax and it is not an excluded company.

The company purchases a residential property in England.

The share capital of WWCL Ltd is held as follows:

- 40% – WWL;
- 40% – West Workshops Hong Kong Ltd (WWHKL); and
- 20% – West Workshops Sweden Ltd (WWSL).

WWCL is a close company as it is under the control of any two or more of its participators.

We know from the above example that WWL does not meet the non-UK control test so is not a relevant participator in WWCL. We need to look at WWHKL and WWSL.

WWHKL is a UK resident company and not excluded. Its share capital is held equally by three brothers, only one of which meets the conditions to be UK resident in the 364-day period up to the date of the transaction. The company is therefore under the control of non-resident participators and meets the non-UK control test. WWHKL is therefore a relevant participator of WWCL in relation to the transaction.

WWSL is under the control of two sisters each of whom own 50% of the shares. It is a close company. It is not an excluded company. One sister is UK resident and one sister is not UK resident. As they are associates, we can attribute the rights of one to another which means that the company can be controlled by a non-resident participator and meets the non-UK control test.

Together, WWHKL and WWSL control WWCL and so WWCL is under the control of relevant participators in relation to the transaction. WWCL meets the non-UK control test and will be non-resident for the purposes of the transaction.

### Particular situations

#### *Bare trusts*

Normally bare trust arrangements are ignored for SDLT purposes so that the bare trustee is ignored and any transaction is treated as being undertaken by the beneficiaries. The exception is where a lease is granted to a bare trustee.

Where this happens, the question of whether the purchaser is non-resident must consider if the beneficiaries of the bare trust are non-resident and the situation of the bare trustee is ignored.

#### *Settlements*

Subject to the provisions outlined above regarding bare trusts, trusts are treated as non-UK resident if any trustee is a non-UK resident under the SDLT residence rules.

However, if there is a settlement where the beneficiary is entitled to occupy the dwelling for life or have any income earned in respect of the dwelling (so basically an interest in possession trust), any question as to whether this is a non-resident transaction must take account of the residence of the beneficiary.

### Example

Daria is a trustee of the Larsson family trust. One of her children is a beneficiary of the trust and is to attend university in London. Daria uses funds from the trust to purchase a property in the capital for her son to live in whilst he is studying. He has no right to occupy the property under the terms of the trust or to any income derived from the property. It is the residency status of Daria which will be relevant in determining if this is a non-resident transaction.

#### *Alternative property finance*

If there is an alternative property finance transaction (such as a transaction involving Islamic financing), the question of whether this is a non-resident transaction must also consider if the person who is the ultimate beneficiary of the arrangement is non-resident.

### *Substantial performance and then completion*

Although SDLT liability can crystallise on substantial performance rather than on completion, where that happens there is actually another potential charge on completion. Normally there is no additional SDLT to pay. If this happens, the completion will only be a non-resident transaction if the earlier notifiable transaction (i.e. the substantial performance) was also a non-resident transaction.

### *Land transaction returns*

If it is necessary to determine if someone is not resident but they have not met the conditions at the filing date to be treated as resident, the return must be completed on the assumption that they will not meet the conditions. The return can be amended if they do subsequently meet the conditions. The time limit for the amendment is two years beginning with the day after the effective date of the transaction.

### **What is a dwelling?**

A building or part of a building is a dwelling if it is used or suitable for use as a single dwelling or in the process of being constructed or adapted as such. Land that is occupied or enjoyed with a dwelling is taken to be part of that dwelling but would not be a dwelling if sold separately. This is the same definition as we are familiar with for other SDLT purposes.

### **Commencement provisions**

The provisions apply to any transaction where the effective date is on or after 1 April 2021. This means that contracts being entered into in March 2021 could be potentially caught by this.

However, if the contract was entered into before 11 March 2020 it will not be caught unless

- there is a variation of that contract, or
- it is assigned on or after 11 March 2020, or
- it is the exercise of an option or similar pre-emption right on or after 11 March 2020.