

SDLT increased rates for NR transactions

(Lecture P1215 – 14.13 minutes)

HMRC have recently published draft legislation, which will increase the rate of Stamp Duty Land Tax (SDLT), which is payable where the transaction involved residential property and the purchaser is a non-resident. This idea has been proposed before but it was announced at the time of the March 2020 Budget that the proposal would be effective from 2021. However, the draft provisions reveal that some current transactions may be caught. Of course, these are draft provisions and so may change before implementation.

The intention is to introduce a 2% SDLT surcharge on purchases of dwellings where the effective date of the transaction is on or after 1 April 2021. This is described as a 'non-resident transaction'. It is important to note that it adds 2% to all transactions, including those, which already attract the 3% 'second property' surcharge or the 15% ATED-linked charge. The maximum SDLT rate therefore becomes 17%.

The legislation is being inserted in FA2003 as Schedule 9A.

A 'non-resident transaction'

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

- 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);
- The purchase consists of a major interest in a dwelling or dwellings;
- The interest is not a leasehold interest with 21 years or less to run and is not subject to a relevant inferior interest; and
- The chargeable consideration is £40,000 or more.

What do we mean by "non-resident"?

Helpfully, the legislation states that an individual is non-resident if they are not UK resident but luckily this is clarified.

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. This seems like quite a complicated test.

Being present in the UK means the same as it does for the statutory residency test i.e. in the UK at midnight at the end of the day. There is an exception for anyone in Crown employment where they are 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).

There is an alternative way to be treated as UK resident for these purposes. 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:

- The purchaser is, or includes, a company or a person acting as a trustee of a unit trust scheme;
- The purchaser is, or includes, an individual who is entering into the transaction as a partner in a partnership;
- 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. an interest in possession settlement).

A company will be not resident for these purposes if it is 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.

A company meets the non-UK control test if it is a close company, which is under the control of participators who are non-resident (using the definition given in this legislation, not the statutory residency test). In dealing with this test, there are various amendments to the situations where you get attribution of rights of associates. This means you 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%;
- Loan creditors.

A company is an excluded company if it is an open-ended investment company, a REIT or a member of a group REIT.

Spouses or civil partners

Although the default position is that this is 'all-or-nothing' so that you are caught if one purchaser is not resident, this is not the case where you have spouses or civil partners jointly purchasing. If one is UK resident and one is not, then the surcharge will not apply. The conditions are that they are spouses or civil partners living together where neither is acting as trustee of a settlement.

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 also consider if the beneficiaries of the bare trust are non-resident.

Settlements

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.

Alternative property finance

If there is an alternative property finance transaction (e.g 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 now 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 is actually the exercise of an option or similar pre-emption right on or after 11 March 2020.

Contributed by Ros Martin