SDLT: non-UK resident surcharge consultation

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The ATT and CIOT have responded to a consultation proposing an additional 1% SDLT charge for non-resident purchasers of residential property in England and Northern Ireland, highlighting a number of areas where the policy may have unintended and adverse consequences.

Both the ATT and CIOT responded to the HMRC/HMT consultation *SDLT: non-UK resident surcharge consultation* which closed in May. The consultation proposes that non-residents purchasing residential property in England or Northern Ireland after April 2020 are charged an additional 1% SDLT. The objective of the measure, according to the consultation document, is to help control house price inflation and assist UK residents to get on the housing ladder.

ATT comments

The key practical difficulty with the proposed measure is that a test of residency – which is generally established for a given period – is now being added to a tax on a transaction, which takes place at a point in time. This requires the creation of a new residency test for SDLT purposes.

For an individual, since a residential property transaction could occur before residency is determined for the tax year, the proposal is to look at residency over an entirely different period – the 12 months ending with the effective date of the transaction for SDLT purposes. An individual who has spent less than 183 days in the UK during this 12-month period will be subject to the charge. The individual can then claim a refund if they are in the UK for 183 days or more in the 12 months following purchase.

The ATT response focused on the issues for individuals, expressing concerns that two residency tests will both introduce further complexity and cause confusion since it is possible that an individual could be resident for income tax purposes but not for SDLT purposes. In that case, we questioned whether it was reasonable that an individual who is resident for income purposes should pay the higher SDLT charge.

As they stand, the proposals will also have an impact beyond non-resident investors. The measure will affect couples who wish to purchase together in the UK but where one lives or works abroad. A couple who currently own a home in the UK, but where one party works abroad, will be affected if they move house and the non-resident spouse remains working overseas. While they could avoid the issue by buying only in the name of the resident spouse, this may not be practical for mortgage purposes, nor be the couple's desired outcome.

Individuals looking to return to the UK and who acquire property more than six months in advance of their return will also be unable to obtain a refund.

On the administrative side, it is proposed that refunds are claimed by amending the original SDLT return. The ATT suggested that individuals should be able to make a free-standing claim for a refund, consistent with the approach for making a reclaim of the repayment of the additional dwelling rate, to avoid further professional costs.

Finally, the ATT highlighted further unintended consequences for UK discretionary trusts where, if one of the trustees leaves the country on an extended holiday such that they fail the residency test for SDLT, the trust would be subject to the additional charge on any relevant purchases.

CIOT response

Given the stated policy intent, the CIOT suggests that the effect of recent SDLT changes to residential property should be evaluated as a precursor to introducing the new surcharge that will apply as an extra layer on top of those existing rates. In addition, a policy measure aimed at house price inflation should be considered in the context of other recent taxation changes affecting non-UK resident purchasers of residential property including the restriction on deductibility of interest, the introduction of non-resident CGT and the extension of the inheritance tax relevant property regime to non- UK companies owning residential property. The full impact of these measures has yet to be seen.

The CIOT reiterated that SDLT has become a highly complex tax that has been the subject of technical change in virtually every year since its introduction. The introduction of the higher rates in 2016 and first-time buyers' relief in 2018 compounded that complexity by requiring that, in the context of a transaction tax, decisions need to be made about the intended future use of the property being acquired, and now potentially about the residence of buyers. In terms of routine administration, the brunt of this complexity is borne by conveyancers.

The response also raised the possibility of these proposals being contrary to EU law. This is because the surcharge would mean that the SDLT rules treat non-UK residents differently to UK residents in respect of identical transactions involving residential property in England and Northern Ireland.

In respect of the new SDLT proposed residence test for individuals, the CIOT recognised that there is therefore some logic in adopting the simpler test but in order to address some of the inequities, the CIOT suggested two additional circumstances where buyers should be able to claim a refund of the surcharge; in cases where;

- an individual is UK resident under the SRT in the tax year in which the transaction occurs; and
- where an individual is resident for more than 183 days in any rolling 365-day period commencing 12 months before and ending 12 months after the transaction.

The consultation proposes that the SRT is used to determine residence of individual trustees but replacing references to the tax year with the period of 12 months to the transaction date. A rewrite of the SRT for an alternative 12-month period will be prohibitively complex. Therefore, on balance, the CIOT preferred the simpler 183-day test, as for individuals.

The proposed company residence test is based on incorporation or the location of central management and control. The test of central management or control is not easily applied at the effective date of the transaction. Alternative approaches might be to ascertain central management and control by reference to the current or preceding accounting period or by reference to the 12 months leading up to the transaction date.

It is proposed that, to ensure consistency of treatment between non-UK residents acquiring residential property directly and indirectly, a UK resident close company will also be liable to the surcharge. The response emphasised that the close company rules, although established, are extremely complex and difficult to apply by reference to a specific transaction date rather than an accounting period. Their application will require detailed tax advice and analysis within a 14 days filing period. Consequently, the objective of consistency needs to be balanced against the complexities of the application of the test and the consequences for the smooth operation of the conveyancing process.

It was noted that the government is considering an upfront relief for Crown employees who are on overseas postings. It is not clear why that relief should not apply equally to employees on fixed term secondment overseas in the private sector who are subject to UK income tax. In addition, an exemption for a transfer from one spouse or civil partner to another spouse or civil partner who is non-UK resident would be consistent with the wider tax code.

The need for SDLT refunds is effectively built into these proposals (in addition to the current need to reclaim SDLT for the higher rates) and will impose administrative burdens and costs on both taxpayers directly and upon HMRC systems and resourcing. These costs will need to be recognised and evaluated in the context of the case for introducing the surcharge.

The full CIOT response can be found on the CIOT website and the ATT response on the ATT website.