Will history repeat itself?

Indirect Tax | Personal tax



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Simon Howley considers the complexities of the stamp duty land tax and asks whether they could be open to abuse

Key Points

What is the issue?

The stamp duty land tax has become an ever more complex, much abused and confusing tax where the cost of making an error can be very expensive – for both the client and the adviser.

What does it mean for me?

When the effective date of the purchase of a dwelling in England or Northern Ireland, by a non-resident buyer, is on or after 1 April 2021, it may be subject to a 2% SDLT surcharge. This is in addition to the normal and higher rates of SDLT.

What can I take away?

The 2% non-resident charge is yet another piece of disproportionately complex legislation, particularly in relation to close company legislation and the non-UK control test.

Stamp duty land tax (SDLT), being a mechanically transactional tax by nature, should in theory be a relatively simple tax to understand and apply. However, since it was introduced by the Finance Act 2003, it has become an ever more complex, much abused and confusing tax where the cost of making an error can be very expensive – for both the client and the adviser.

You only have to look at the number of SDLT refund internet firms that have popped up over the past five years and the increasing number of solicitors and conveyancing firms now completely outsourcing the SDLT advisory side of property transactions. The regulatory risk of getting it wrong is just far too great!

Roll forward to the present day, and we have an extra segment of complexity to add to the SDLT Battenberg cake – the 2% surcharge for non-resident buyers of dwellings.

When the effective date of the purchase of a dwelling in England or Northern Ireland, by a non-resident buyer, is on or after 1 April 2021, it may be subject to a 2% SDLT surcharge. This is in addition to the normal and higher rates of SDLT, capped at 17%, but it does or should not apply to the following scenarios:

- the acquisition of mixed-use property or non-residential property; and
- the acquisition of six or more dwellings, as this would be treated as a non-residential transaction (assuming multiple dwellings relief is not claimed).

However, where the transaction in question involves the acquisition of both residential and non-residential property, and multiple dwellings relief is claimed,

then the 2% surcharge will apply when calculating the SDLT for the dwellings. It was becoming common practice for wealthy overseas individuals buying in central London to be blatantly marketed a small commercial property wrapped up within their multi-million pound residential property purchase, in an attempt to secure the lower non-residential SDLT rates.

So, when is the 2% surcharge for non-resident buyers actually triggered? If all of the following conditions are satisfied, then it is a ‘non-resident transaction’:

- the buyer (or at least one of the buyers) is non-resident;
- a major interest in a dwelling or, dwellings and other property, is purchased;
- the major interest is not a lease with an unexpired term of seven years or less; andthe chargeable consideration is at least £40,000 or, if the consideration includes rent, the rent must be at least £1,000.

So far, so good, but what exactly is a non-resident buyer. It will come as no surprise to the reader to discover that there are separate rules defining non-resident buyers which apply to individuals, companies, partnerships and unit trusts, and additional rules to determine who the buyer is in relation to trusts and alternative property finance transactions. The complexity is mind boggling!

I simply do not have the space in this article to cover all of the different scenarios or the complexity of the rules, so I will attempt to broadly cover the salient points applicable to individuals and companies only.

Individuals

There are two tests for determining the residence of an individual for SDLT: a basic rule and a special rule.

Under the basic rule, an individual is UK resident if they are present in the UK for at least 183 days in a continuous 365 day period. The period begins with the day that is 364 days before the effective date and ending with the day that is 365 days after the effective date. So, if an individual is non-resident at the effective date, the 2% surcharge will be payable, but they could claim back a refund of the 2% surcharge should they become UK resident in the relevant period.

The basic rule does not apply if the special rule applies; and where there are multiple buyers, the 365 day period needs to be applied to each individual

separately. It only takes one of the buyers to fail the test for the surcharge to be triggered.

Under the special rule, an individual is treated as UK resident if they are present in the UK on at least 183 days during the period commencing with the day that is 364 days before the effective date of the transaction. This test only looks at the position on the effective date, and not at the residency of the individual thereafter.

HMRC states in its manuals that it recognises that buyers are unlikely to keep detailed notes of their presence in the UK on a day-to-day basis. Accordingly, HMRC will consider the following information when determining whether or not an individual was present in the UK or not:

- credit card or bank statements that detail the place of expenditure;
- work diaries, timesheets, etc.;
- mobile phone bills indicating a person's location;
- utility bills that demonstrate a person's location; and
- membership and usage of clubs (for example, sports, health or social clubs).

HMRC has confirmed that it will take a pragmatic approach where possible, considering the taxpayer's individual circumstances. Days spent in the whole of the UK count for the purposes of the residency test, not just days spent in England or Northern Ireland.

Where there are two or more buyers of a dwelling who are (or include) spouses or civil partners, of whom one is UK resident and the other non-resident, then the non-resident spouse will be treated as UK resident for the purposes of the 2% surcharge if they are both entitled to an interest in the property; and if at the effective date they are married and living together.

Companies

For the purposes of the 2% surcharge, a company is non-resident if, on the effective date:

- the company is not UK resident for the purposes of corporation tax; or
- the company is UK resident for the purposes of corporation tax, but it is a close company and meets the non-UK control test in relation to the transaction.

The basic rule is that a company is UK resident for corporation tax purposes if either it is incorporated in the UK; or if its central management and control are in the UK. HMRC's SDLT manual states that 'a company is resident in the UK for the purposes of corporation tax if it is incorporated in the UK, or the central management and control of its business is in the UK'.

For the purposes of the 2% surcharge, a company is a close company if it is a close company within the meaning set out in the Corporation Tax Act 2010; i.e. it is controlled by five or fewer participators, or it is controlled by participators who are also directors, etc. When determining whether a company is close, the rights of other people should be attributed to a participator, including the rights of controlled companies and associates (for example, relatives and partners).

When applying the close company test for the 2% surcharge, the following rights and powers are attributed to a participator:

- those that the participator is entitled to acquire at a future date or will, at a future date, be entitled to acquire;
- those held by another person on behalf of the participator, and any rights and powers that another person may exercise on behalf of the participator or according to their direction;
- those held by a company that is controlled by the participator (and the participator's associates); and
- those held by any associate of the participator.

'Associate' includes the relatives or partners of a participator and the trustees of any settlement to which the participator is a settlor. 'Relatives' are defined as spouses, civil partners, parents, remoter forebears, children, remoter issues and siblings.

Now we have the bare bones of the rules, let's look at some examples of the rules in practice.

Sole purchaser

Fabienne lives in Spain. She purchases a 160 year leasehold interest in a residential property in England on 1 June 2022 for £400,000. Between 2 June 2022 and 1 June 2023, Fabienne spent 200 days in the UK. She is therefore UK resident in relation to the transaction under the basic rule. However, the SDLT return for this transaction must be submitted to HMRC by 15 June 2022.

At the date of submission, Fabienne has spent less than 183 days in the UK; therefore the purchase is treated as a non-resident transaction and the SDLT return is completed on the basis that the surcharge is due.

Once Fabienne satisfies the residence requirement under the basic rule after the effective date of the transaction, she will be able to amend the SDLT return and apply for a refund of the 2% surcharge paid.

Joint purchasers

Donnacha, Niall and John live in New Zealand. They jointly purchase a freehold residential property in Northern Ireland on 1 June 2025 for £850,000.

Between 2 June 2024 and 1 June 2025, Donnacha spent 183 days in the UK, and is therefore UK resident in relation to the transaction under the basic rule. Between 2 June 2025 and 1 June 2026, Niall spent 183 days in the UK. He is also therefore UK resident under the basic rule. Between 1 August 2024 and 31 July 2025, John spent 275 days in the UK. He is also therefore UK resident under the basic rule. As all three purchasers are UK resident in relation to the transaction under the basic rule, the purchase will not be liable to the surcharge.

However, the SDLT return for the transaction must be submitted to HMRC by 15 June 2025. At the date of submission, Niall has spent less than 183 days in the UK; therefore not all three purchasers are UK resident in relation to the transaction on the date of submission.

The SDLT return must therefore be prepared on the assumption that the purchasers are non-UK resident.

As all of the conditions in the special rules are met in relation to the transaction on the date of submission, the purchase is treated as a non-resident transaction and the SDLT return is completed on the basis that the surcharge is due. Once Niall satisfies the residence requirement under the basic rule after the effective date of the transaction, the SDLT return can be amended and a refund of the 2% surcharge claimed.

Company purchaser

X Ltd is a UK incorporated family investment company buying a UK dwelling. The shares (all ordinary shares) in the company are owned by Mary (90%) and her

daughter (10%). Mary lives in the UK. The daughter is at university in Canada and has not been in the UK for more than a year. The company is non-UK resident for the purposes of the 2% surcharge.

Although the company is incorporated in the UK, it is non-UK resident if it is a close company that meets the non-UK control test. The company is a close company because it is under the control of five or fewer participators; and when considering whether the company is under non-UK control, the residence of the shareholders is determined according to the special rule.

Under this rule, Mary is UK resident but the daughter in Canada is not UK resident. While Mary holds 90% of the shares it is necessary to attribute her rights and powers to the daughter in Canada. This results in the daughter being treated as controlling 100% of the company. As she is non-UK resident, the company is treated as under non-UK control.

In summary

The above are just a few examples of how the rules work in practice and HMRC has published further examples in its guidance manuals. However, a detailed reading of the legislation will be essential before any advice is given in this area.

The 2% non-resident charge is yet another piece of disproportionately complex legislation, particularly in relation to close company legislation and the non-UK control test. It will no doubt be abused by some corporate purchases attempting to insert, fraudulently, contrived nominee arrangements in an attempt to get around the special rule. Only time will tell, but history has a habit of repeating itself when it comes to property taxes.