SDLT Issues

Personal tax

16 December 2015

The CIOT’s engagement with HMRC on behalf of members in respect of SDLT

The CIOT is represented on two HMRC stakeholder forums concerned with SDLT. The SDLT Working Together Forum (this forum also includes the Annual Tax on Enveloped Dwellings (ATED)) meets quarterly; its objective is to identify and find solutions for significant operational issues with SDLT and ATED. A second forum, the SDLT Technical Forum, upon which the CIOT is also represented, aims to examine significant technical issues with SDLT that are hampering commercial transactions. We welcome issues from members that fall into either category that we can raise with HMRC on members’ behalf. In future issues we will report back on issues raised by members. Two current issues are considered below.

Partnerships – An unintuitive exist charge (FA 2003 Schedule 15 Para 17A)

The anti-avoidance provisions of paragraph 17A impose a charge to SDLT if, during the three years after a transfer of land to a partnership the transferor or a partner connected with the transferor either:

- Makes a withdrawal of money or money's worth from the partnership (other than income profit) or
- reduces their interest in the partnership share; or
- ceases to be a partner.

A withdrawal of money or money's worth would include the withdrawal of capital from the capital account and the repayment (to any extent) of a partner's loan.

The Office of Tax Simplification’s interim report on partnerships had this to say on para 17A:

> 6.79 One *point raised on more than one occasion was the different approaches on selling property between partners and partnerships. There could be an entry charge but there could also be an exit charge. The latter seems to be the effect of paragraph 17A sch 15 Finance Act 2003 and has no time limit. It is therefore necessary for advisers to warn of this even though it does not seem to be applied by HMRC. This is in fact an anti-avoidance provision which is nonetheless capable of catching commercial transactions. It was suggested that paragraph 17A is, in fact, redundant in the light of later anti-avoidance legislation in s75A Finance Act 2003, and could be disposed of.*

The interim report may be found here.

Para 17A potentially gives rise to double taxation, where, for example, a property is transferred into a partnership , the partnership sells the property to a third party (on which SDLT is paid) and the partners withdraw the proceeds within a three year period, the withdrawal is treated as a land transaction and SDLT is due. The occasion of the death of a partner or divorce could also trigger the charge. Questions arise around its operation where land is transferred in tranches potentially creating new three year periods.

The CIOT understands that HMRC are considering the para 17A as part of their work on the OTS recommendations. If members have particular instances of this provision causing difficulties, we would like to hear of them.

The Exchange Provisions (Finance Act 2003 Scedule 4 Para 5)

For SDLT purposes where interests in property are exchanged, there are two land transactions. Finance Act 2011 made significant changes to the SDLT exchange provisions. It introduced a ‘higher of’ test for determining the chargeable consideration if the subject-matter of any of the relevant transactions is a major interest in land. Prior to the change, assuming that one of the interests transferred is a major interest, SDLT was charged on the market value of the interest acquired by each purchaser. For transactions with an effective date on or after 24 March 2011 (subject to transitional provisions), SDLT is charged on the higher of the market value of the subject matter of the transaction or the value of the consideration given by the buyer.

It is understood that the intention behind the FA 2011 change was to prevent the manufacturing of an exchange of interests to take advantage of the cap at market value in circumstances that would otherwise take place as a cash sale for a higher amount. However the changes gave rise to inequitable results particularly where there is an exchange of interests between connected parties for no other consideration other than the interest transferred. In recognition that this change would give rise to unfair results HMRC confirmed in guidance that the new provisions are not expected to change the SDLT payable on transactions 'on innocuous transactions (other than some involving VAT)' and provide examples at SDLTM04020a.The difficulty in practice is a recurring one of whether, and to what extent, it is possible to rely on the guidance in a situation where the strict terms of the legislation imposes a charge that is ameliorated by guidance ('taxed by law, untaxed by concession').

We would welcome examples in practice from members of the situations where the operation of the SDLT exchange rules give rise to problems in practice, particularly where it is necessary to rely on the terms of the guidance to mitigate what appears to be an unintended consequence of the strict application of the law. Please send all comments to the CIOT technical officer dealing with the CIOT's response to HMRC's review, Kate Willis at kwillis@ciot.org.uk.

Definition of residential property and the meaning of a dwelling for SDLT purposes

Background

In June of this year, the CIOT wrote to HMT to reiterate the case for considering residential property taxes holistically as it has been a long-held concern of the CIOT that when piecemeal changes or reforms are made to one aspect of property taxation without adequate consideration of the operation of inter-related taxes, the consequences are invariably undue complexity, disproportionate costs of collection for business, unintuitive results and, occasionally, a failure to achieve policy objectives. Our letter was followed by a meeting in July with the HMT policy advisers responsible for residential property taxes policy.

Residential property definitions

One aspect of this overall goal is to consider the definitions of residential property across the taxes with the ultimate aim of achieving greater core consistency in definitions of residential property across the board. Currently there are subtly different definitions of residential property for SDLT, ATED, FA 2004 Schedule 29A (investment-regulated pensions), CGT, CGT-related ATED, Business Investment Relief for non-domiciliaries, capital allowances, VAT and no doubt other areas. Subtle variations between definitions of residential property depending upon the tax or context make it difficult to discern the underlying policy and set traps for the unwary.

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We have therefore welcomed a recent initiative by HMRC Stamp Taxes to undertake a project to invite input from practitioners on the current issues surrounding the main statutory definition of residential property for SDLT purposes in FA 2003 section 116, and the associated HMRC guidance. The section 116 definition begins by defining residential property as meaning ‘a building that is used or suitable for use as a dwelling, or is the process of being constructed or adapted for such use,’(FA 2003 section 116(1)(a)). Some of the existing guidance in the HMRC SDLT manual on the meaning of ‘use as a dwelling’ relates to the now withdrawn Disadvantaged Area Relief and generally the guidance is not always easy to follow or comprehensive. In addition there is further guidance on the meaning of a dwelling in other contexts and for other taxes (for example in HMRC’s Capital Allowances manual at CA11520 and VAT Information Note 02/14). It is not always clear to what extent there is a read across from guidance for other taxes that may have a different policy intent.

The CIOT will be responding to the invitation from HMRC to identify problems encountered in practice with the definitions of residential property for SDLT and specific circumstances that cause uncertainty. In addition views are sought on the current guidance in the SDLT manual to identify areas of the manual that are unclear, misleading or need further development. Please send all comments to the CIOT technical officer dealing with the CIOT’s response to HMRC’s review, Kate Willis at kwillis@ciot.org.uk by 15 December. There is a relatively short period to formulate our response so any comments however brief are very welcome.