



Pre-Budget Report '06

“Ashes to Ashes...” SDLT Avoidance

For those who relish the minor footnotes of fiscal history, the Pre-Budget report represented the first time that Gordon Brown had announced anti-avoidance legislation for stamp duty land tax in a Pre-Budget report. What we have is legislation which operates on a 'one size fits all' basis and, so broad is the drafting, it can only be taken as an attempt to cover off SDLT avoidance strategies which may not have been originally contemplated by the anti-avoidance legislation.

The Schemes

What is clear, particularly from the technical notes accompanying the legislation, is that HM Revenue & Customs had in their sights two SDLT mitigation arrangements which were being increasingly used prior to 6 December. These were:

- the sub-sale route used on inter-spousal, or other 'connected' persons, transactions (usually but not invariably in the context of high value residential acquisitions). The arrangements worked where parties were commercially connected and the deemed market value provisions did not apply; and
- the lease termination and other strategies where all, effectively, of the vendor's proceeds were taken in a form which did not amount to consideration for what was defined as a "land transaction" e.g. the payment to exercise a break clause in a lease.

The Legislation

The anti-avoidance legislation, which took effect from 2.00 p.m. on Wednesday 6 December, operates by providing that if:

- a person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest derived from it;
- a “number of transactions are involved in connection with the disposal and acquisition (‘the scheme transactions’)”; and
- the total SDLT payable in respect of all of the scheme transactions is less than that which would be payable on a “notional” land transaction between V and P but assuming that no scheme transactions had been entered into;

then the SDLT is chargeable by reference to the maximum sum paid under any of the scheme transactions whether or not they are chargeable land transactions.

The legislation operates by ignoring the scheme transactions (very broadly defined on a non-exhaustive basis) and a straightforward sale, unencumbered by any of the scheme transactions, is deemed to have taken place with the SDLT calculated by reference to the maximum sum payable in respect of any of the transactions.

The Effect

For example, in the case of arrangements where V sells the freehold to P (for a nominal amount) subject to a 999 year lease where V was the beneficial (but not the legal) owner of the 999 year lease and what was paid by P was a sum to exercise a break clause, under the new legislation the exercise of the break clause, in analysing the SDLT nature of the transaction, will be ignored and SDLT will be chargeable by reference to the amount paid to exercise the break clause irrespective of whether this is a land transaction or not (the better view being that it is not).

In addition the legislation catches, “sub-sale” and related transactions in cases where, e.g. there was a contract between A and B and B and C with the two contracts completing simultaneously but with the B to C contract being for a consideration far smaller than the A to B contract (and B and C having some commercial emotional blood or other tie). Under the new legislation SDLT is chargeable on the A to B consideration notwithstanding that the existing sub-sale legislation would impose SDLT only on the B to C transaction. While, given the one size fits all approach, the legislation does not, quite as precisely as is ideal, target this type of transaction, the technical notes leave one in no doubt that this is one of the intended schemes at which the legislation is aimed.

The Future

Increasingly, ‘eleventh hour’ SDLT mitigation strategies have been nullified by anti-avoidance legislation. In the future, emphasis will need to be placed on longer term structuring of property ownership to minimise SDLT on the ultimate sale. In particular, providing for property ownership, from the start, through special purpose vehicles, particularly non-UK resident SPVs may still offer a way of ensuring SDLT efficient transactions in property although the direct tax, particularly chargeable gains, implications of disposing and acquiring SPVs will need to be addressed.

Likewise, HMRC have not moved away from their long stated position on developments where, in appropriate circumstances, provided there are genuinely two non-interdependent contractual arrangements, SDLT may only be payable on the bare land value and not on the cost of carrying out work.

It is worth noting that, particularly given the very broad nature of the anti-avoidance legislation, there is no motive test: the possibly unfair implication being that if there are scheme transactions inevitably the parties must be up to no good. This may not always be the case (e.g. a sub-sale where the intermediate party, B, offloads a property to C for less than B is paying for genuine commercial reasons, would still mean that C would be liable to SDLT by reference to what B paid and not what it is actually paying).

Partnerships

There has been an amendment to the basis on which SDLT is calculated in relation to contributions of interest in land to partnerships by partners. Pre-6 December it would have been possible to create partnerships using non-grouped but associated companies whose interests would be aggregated with that of a property contributing partner thereby reducing (if not eliminating) SDLT payable on the contribution of land to the partnership. Such companies could be sold (but with the partnership remaining) as a means of reducing SDLT on sale. Now the interests of associated, but non-group, companies are to be ignored, thereby closing off this route.

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