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SDLT Schemes: The Good, The Bad and The Ugly

By Sanjay Mehta

The Chancellor had previously warned that he would "not hesitate to move swiftly, without notice and retrospectively" to counter aggressive and widely marketed Stamp Duty Land Tax (SDLT) schemes. Last week, when announcing retrospective SDLT legislation to counter subsale schemes, he may have attracted applause from parental coaches everywhere by showing that he was willing to "follow through." This advisory reviews some of the practical implications raised by this development.

Don't Look Back in Anger

Essentially, the subsale schemes involve an original purchaser who:

1. contracts to acquire land (often residential);
2. then enters into an onward sale agreement with a second purchaser, subject to completion being delayed for up to 125 years; and
3. remains in possession.

SDLT was not thought to be payable because subsale relief applied (resulting in the first contract being ignored for SDLT purposes) and the purchase amount under the onward sale agreement was below the SDLT threshold.

However, the new rules will now retrospectively deny subsale relief in relation to transactions which have been substantially performed on or after 21 March 2012 (i.e., the date of Budget 2012, when the Chancellor issued his threat). Where the new rules apply, the original purchaser will need to pay SDLT (and backdated interest) and submit an SDLT return (or an amended return) before 30 September 2013. A more comprehensive rewrite of the subsale rules in Finance Bill 2013 will ultimately supersede these new rules.

For the Avoidance of Doubt?

In general, even if a tax scheme is countered by a change to the relevant legislation, HM Revenue and Customs (HMRC) will also argue that the scheme does not work under existing law (without amendment). HMRC considers these (and most other) subsale schemes to be ineffective under the current rules but, in line with its common practice, it has stated that the new rules simply ensure that this is "put beyond doubt."

No doubt most of the arguments HMRC may consider will be well-known to SDLT scheme participants, including the General Anti-Abuse Rule (GAAR) being introduced this year (as regards future schemes), Section 75A of the Finance Act 2003 (the SDLT mini-GAAR) and, of course, the *Ramsay* argument (or, in modern parlance, the purposive interpretation).

Is Silence Golden?

Without awareness of tax schemes, it is difficult for HMRC to effectively police the tax code. The new requirement to submit an SDLT return under the amended subsale rules provides a good example of how HMRC will bring schemes onto its radar screen.

The level of disclosure in an SDLT or tax return often requires a balancing act: detailed disclosure of the precise arrangements (and applicable tax rules) helps to achieve certainty and finality once the enquiry window closes, but the disclosure may prompt an early enquiry; vague disclosure may give temporary comfort (no immediate enquiry) but will leave the door open to a "discovery assessment" several years later. Until relatively recently, many had taken the view (especially in the realms of SDLT) that no disclosure was necessary. However, the mood has now significantly changed as the courts have largely favoured HMRC when it has sought to re-open returns.

A promoted scheme (including most SDLT schemes) will often be given a reference number under the Disclosure of Tax Avoidance Schemes (DOTAS) rules, which then needs to be recorded in the SDLT or tax return of a taxpayer that uses the scheme. HMRC will no doubt continue to use the DOTAS rules to track down widely marketed schemes and legislate accordingly (and, in the most egregious cases, retrospectively). On each occasion, HMRC will remind taxpayers that the rules are working. The DOTAS rules have grown in scope every year since their introduction in 2004. Last year, changes were made to catch a greater array of SDLT schemes—in particular, subsale schemes.

The new legislation serves as a timely prompt for participants in SDLT planning to refresh their view of transactions previously undertaken and the adequacy of earlier reporting of those transactions. In addition to any potential exposure to SDLT, any applicable penalties may be capable of mitigation if matters are now handled appropriately. For some taxpayers, an updated assessment of reputational issues and risk profile may also be agenda items.

Separating the Wheat from the Chaff

When dealing with an HMRC enquiry or investigation into a previous scheme or transaction, a scheme participant must first *objectively* assess the strength of its position and then determine a strategy accordingly. Allied with this analysis will be a thorough review of the facts, documents and supporting evidence—including an analysis of whether particular items are disclosable or benefit from the shield of legal professional privilege (which the *Prudential* case has recently confirmed does not extend to accountants).

It is fair to say that SDLT schemes in recent years could now be viewed as ranging from the robust to the weak. There may be several reasons for this, including the perceived strength of the technical analysis (some types of tax planning will "date" faster than others), the quality and commerciality of transaction execution and compliance with any post-completion structural requirements. In some cases, taxpayers have been comforted by the fact that they were simply part of a very large community of participants in SDLT schemes—ironically, the same fact that has prompted the Chancellor's attack on those schemes.

Buyer Beware

The well-known maxim "buyer beware" applies as much to the "purchase" of an SDLT scheme (in some cases, for a fee) as it does to the related purchase of real estate.

Until recently, commercial organisations and their advisers generally only discussed the risk of a change in tax law in terms of prospective changes, for example:

- Where a transaction had been structured so that it did not involve a particular taxable event (for example, a land transaction attracting SDLT), the transaction could have either been thwarted or needed to be restructured if the rules were changed prior to completion. In some cases, the perceived threat of an imminent change could lead to an accelerated completion.
- Where the transaction had relied on the normal accrual of a particular tax relief (for example, in the areas of capital allowances and loan relationships), a rule change during the accrual period could significantly reduce the tax relief derived from the transaction.

However, recent instances of retrospective tax legislation may now be a game-changer. At the very least, this new trend will further test the appetite for risk among users of tax schemes. As regards the real estate sector, the Chancellor's retrospective attack on subsale schemes must surely now mean that the days of SDLT schemes are numbered.

There are suggestions in the Protocol published in Budget 2011 and the DOTAS guidance that retrospective legislation will only be used exceptionally and will generally only look back to an objectively justifiable date. Only time will tell whether this is the case. However, it is clear that retrospective rules have now evolved from a theoretical discussion point to the reality of the statute book, and they are here to stay.

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