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Stamp Duty Land Tax : Law and Practice

by

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Chapter 2

INTEREST, PENALTIES AND OFFENCES

2.1 Interest

Interest is payable on the amount of any unpaid SDLT after 30 days from the effective date of the transaction. In the case of the withdrawal of group relief, reconstruction or acquisition relief or charities relief giving rise to tax, interest is charged after 30 days following the disqualifying event. In the case of tax deferred under s 90 FA 2003 (see 34 Contingent and Uncertain Consideration) interest is charged after 30 days from when the deferred payment is due: s 87 FA 2003. However, where contingent, uncertain consideration is not deferred under s 90 FA 2003, interest on any tax that becomes payable under s 80 FA 2003 (adjustment where the contingency ceases or consideration becomes ascertained) runs from the effective date of the transaction: s 87(5) FA 2003. An amount of tax lodged with the Inland Revenue in respect of the tax will reduce the interest payable accordingly: s 87(6) FA 2003.

Penalties carry interest from the date they are determined until payment: s 88 FA 2003. Interest is charged at the rate applicable under s 178 FA 1989. A repayment of SDLT (including an amount lodged under s 87(6) FA 2003) carries interest at the rate applicable under s 178 FA 1989 between the payment of the tax and the repayment (unless it is a payment made in consequence of a court order or judgment of a court having power to allow interest on the payment). Any such interest paid is not income for tax purposes: s 89 FA 2003.

2.2 Penalties

2.2.1 Flat-rate Penalties

A purchaser who fails to deliver a land transaction return by the due date is liable to a penalty of £100 if the land transaction return is delivered within three months after the due date and £200 in any other case: para 3 Sch 10 FA 2003. This penalty is charged whether or not SDLT is payable.

2.2.2 Tax-geared Penalties

A purchaser who is required to deliver a land transaction return in respect of a chargeable transaction and fails to do so within twelve months of the filing date is liable to a tax-geared penalty: para 4 Sch 10 FA 2003. The penalty is an amount not exceeding the amount of tax chargeable in respect of the transaction. This penalty is in addition to any flat-rate penalty under 2.2.1.

2.2.3 Daily Penalties

If it appears that a purchaser required to deliver a land transaction return in respect of a chargeable transaction has failed to do so and that the filing date has passed, the Inland Revenue may issue a notice to him requiring delivery of the return. The notice issued to the purchaser should give details of the transaction to which the notice relates and the period for complying with the notice, which must not be less than 30 days from the date of issue of the notice. If the purchaser does not comply with the notice within the specified period an application can be made to either the General or Special Commissioners for a direction under para 5(3) Sch 10 FA 2003 for an order imposing a daily penalty. The penalty imposed must not exceed £60 per day.

2.2.4 Incorrect or Uncorrected Returns

A purchaser who fraudulently or negligently delivers an incorrect return or discovers that he has delivered an incorrect return (which was not fraudulent or negligent) and who does not remedy the error without

unreasonable delay (in practice taken to be within nine months of the delivery of the return), is liable to a tax-related penalty. In both cases the tax-geared penalty is based on the tax understated, that is the difference between the amount of tax correctly payable for the transaction and the amount that would have been payable on the incorrect return: para 8 Sch 10 FA 2003. In these cases IR Stamp Taxes may also consider imposing a penalty on any professional adviser involved with the return under s 96 FA 2003 (see 2.2.8).

2.2.5 Failure to Produce Documents

A person who fails to comply with a notice to produce documents is liable for an initial penalty of £50 and if the failure continues after this penalty is imposed, a daily penalty of either £30 (if determined by an Officer of the Board) or £150 (if determined by a court): para 16 Sch 10 FA 2003.

2.2.6 Failure to Keep and Preserve Records

A purchaser has a duty under para 9 Sch 10 FA 2003 to keep and preserve records for six years from the effective date of the transaction or if later the end of any enquiry. The records required to be kept and preserved under this paragraph include relevant instruments relating to the transaction, in particular, any contract or conveyance, and any supporting maps, plans or similar documents and records of relevant payments, receipts and financial arrangements. The preservation of the relevant information instead of the original records is sufficient. A penalty up to £3000 may be charged for each failure to keep or to preserve adequate records in respect of a land transaction return: para 11 Sch 10 FA 2003. In practice penalties are only sought in serious cases such as where records have been deliberately destroyed to obstruct an enquiry or where there has been a history of serious record-keeping failures.

2.2.7 Failure to Deliver a Document or to Provide Information

A person required by a notice under Sch 13 FA 2003 to deliver a document, provide information or make a document available for inspection and who fails to comply is liable to a penalty not exceeding £300. If the failure continues a further penalty not exceeding £60 per day arises. A person who is required by a notice under Parts 1,2 or 3 of Sch 13 to deliver a document, provide information or make a document

available for inspection and who fraudulently or negligently delivers, provides or makes available any incorrect document or information is liable to a penalty not exceeding £3,000: s 93 FA 2003.

2.2.8 Assisting in the Incorrect Completion of a Return

A person who assists in or induces the preparation or delivery of any information, land transaction return or other documents which they know will be (or are likely to be) used for tax purposes and also knows them to be incorrect, is liable to a penalty not exceeding £3000: s 96 FA 2003.

2.2.9 Time Limits for Penalties

The general time limit for the determination of penalties is 6 years after the penalty was incurred or in the case of daily penalties, began to be incurred. In the case of a tax-geared penalty the time limit is 3 years after the tax on which it is based was finally determined: para 8 Sch 14 FA 2003. In the case of the penalty for assisting in the incorrect completion of a return (see 2.2.8) the time limit is 20 years.

2.2.10 Notices and Appeals

A notice of determination of a penalty under para 2 Sch 14 FA 2003 must be served on the person liable to the penalty who will normally be the purchaser. The notice must state the date on which the notice was issued and the time within which an appeal against determination should be made which is 30 days from the date of issue. The determination cannot be altered unless the Inland Revenue decides it is excessive or an appeal against the determination is upheld. If a person liable to a penalty has died a penalty determination which could have been made on the deceased may be made instead on his personal representatives and shall be a debt due from and payable out of the deceased's estate: para 4 Sch 14 FA 2003. Where, in the opinion of the Board, the liability of any person for a penalty arises by reason of the fraud of that, or any other person, proceedings for the penalty may be instituted before the High Court. In Scotland, such proceedings would be held before the Court of Session as the Court of Exchequer there: para 7 Sch 14 FA 2003.

An appeal against a penalty determination lies to the General or the Special Commissioners within 30 days of the issue of the notice of determination. The appeal must be made in writing to the officer of the Board who made the determination. The notice of appeal must specify the grounds of appeal but any hearing is not limited to those grounds. On appeal the Commissioners may set the determination aside, confirm it, or modify the amount. A further appeal lies to the High Court or, in Scotland, to the Court of Session as the Court of Exchequer in Scotland: paras 5 and 6 Sch 14 FA 2003.

2.3 Offences

S 95 FA 2003 creates the statutory criminal offence of a person being knowingly concerned in the fraudulent evasion of SDLT by him or any other person. If found guilty the person is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both) and on conviction on indictment to imprisonment for a term not exceeding seven years or a fine (or both). This section is based on and largely copies s 144 FA 2000 which was introduced to make prosecution of PAYE and NIC fraud involving payment of wages by cash in hand without deducting tax more effective. When that provision was introduced into the Finance Bill 2000 at a late stage unease was expressed about the imprecision inherent in the phrases 'knowingly concerned' and 'fraudulent evasion'. In response the Paymaster General explained the use of these phrases as follows:

'I will deal with the important point about the words "knowingly" and "fraudulent evasion" ... My officials will smile when they hear this, but initially I said to them, "Surely evasion is fraud", and asked why it needed to be qualified as "fraudulent evasion". I have received assurances which I will pass on to the Committee. The juxtaposition of the words "knowingly" and "fraudulent evasion" reinforces exactly which offences the provision is aimed at.

Let us take the question of someone who is knowingly concerned in the evasion of income tax. I want to make it clear that it is not enough for this purpose to show that a person should have suspected that someone was evading tax. The person must have knowledge and involvement in the fraud. For example, he could help someone evade tax by the helping to produce false business records.

People may ask why we have put the words "fraudulent" and "evasion" together. I am reliably informed by people who know better than I do

that, in English usage, "to evade" can mean to dodge, without any dishonest intent. Although "evasion" has come to imply dishonesty in the context of tax, the Bill needs to be drafted tightly. "Fraudulent" may not appear to add much to "evasion", but the expression "fraudulent evasion" is well precedented and subject to interpretation by the courts.' (HC Official Report, Standing Committee H, 29 June 2000, col 1010.)

Therefore the phrase 'knowingly concerned' requires knowledge of (rather than mere suspicion) and involvement in the evasion of tax, and the phrase 'fraudulent evasion' requires proof of dishonest intent. In relation to tax planning, assurances were sought as to the meaning of 'evasion' and in particular whether those involved in tax avoidance schemes might be charged with the commission of this offence where the scheme was adjudged to have failed on technical grounds. In this respect the Paymaster General said:

'No one could be convicted as a matter of general law unless it was proved that he or she had a dishonest intention..'

The Right Hon. Member for Wells asked about tax advisers who gave advice on avoidance schemes that failed. A failed scheme whose details are not hidden from the Revenue amounts not to tax evasion, but to tax planning ... The Government may not like some of that planning and may legislate against it, but, as it is not hidden, it does not fall within the remit of the measure ...

... avoidance is not evasion; there are separate laws to deal with the latter. The Right Hon. Gentleman asked when avoidance became evasion. Unless he can give an example, I cannot think of such an eventuality.' (HC Official Report, Standing Committee H, 29 June 2000, cols 1012 and 1013.)

Further guidance has been issued in Inland Revenue Tax Bulletin, Issue 49 (October 2000) to the effect that those persons who advise on what turn out to be fiscally ineffective tax avoidance schemes are only likely to be charged with the offence where dishonesty is involved. In the opinion of the Inland Revenue such dishonesty may be evident where those involved in a scheme 'are not merely relying on the intrinsic technical soundness of the arrangements actually put in place to reduce their liability, but also on concealment of the true facts from the inspector'. The Inland Revenue would not expect a criminal offence to have been committed where there is no concealment of the facts and there is a 'respectable technical case'. Thus a critical question in determining whether a prosecution will occur is likely to be whether there has been 'concealment of the true facts'. However, this phrase gives rise to its own uncertainty given that 'concealment' can occur in different ways ranging

from deliberate covering up of facts through partial disclosure of accurate information which conveys a misleading impression to failure to appreciate (and therefore disclose) that certain information would be considered relevant by the Inland Revenue. Given the guidance available, however, it seems that in any case where the technical merits of a tax mitigation structure involving SDLT are open to different interpretations the safest course of action will be to disclose all material facts to IR Stamp Taxes and argue the case on technical merit rather than risk an allegation that facts were concealed if a prosecution under s 95 FA 2003 is to be safely ruled out.