Analysis
2011 review
Stamp taxes

SPEED READ **The notable developments this year have been: the judgment in the first SDLT avoidance case to reach the tribunals resulting in a victory for the taxpayer; the change to the rules on how SDLT applies to property exchanges and the current uncertainty this creates where VAT is involved; the new relief for acquisitions of two or more dwellings which is intended to bring the rate of SDLT into line with what it would have been on an individual sale of each dwelling; the new time limits for SDLT discovery assessments; and an important change in HMRC's published approach to the interpretation of the SDLT GAAR in FA 2003 s 75A.**

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Five key developments of 2011 concerning stamp taxes are as follows:

1. The *DV3* case

DV3 RS Limited Partnership v HMRC [2011] SFTD 531 is the first case involving an SDLT avoidance scheme to come before the tax tribunals. The case involved the purchase of the Dickens and Jones store in Regent Street in 2006 for £65m. Calling the seller A and the purchaser B, B would normally have paid SDLT of £2.6m on its acquisition from A. However B used a sub-sale into partnership scheme to reduce the SDLT to nil. The scheme worked by B completing its purchase from A and immediately selling the property into a partnership (C) of which it and some associated companies were the partners. Under the relevant SDLT rules the sale from A to B would be disregarded if it completed at the same time as the completion of the B to C sub-sale. The sub-sale from B to C took advantage of the SDLT partnership rules which can reduce the SDLT to nil where the seller or persons connected with it are partners in the partnership buying the property. Result: no SDLT on either leg of the transaction.

> **An aggressive SDLT avoidance scheme can succeed despite HMRC's published views in Spotlights**

The Tribunal held that because B was a partner in C there was nothing to prevent the partnership rules applying to C's acquisition from B and hence no SDLT arose on C's acquisition. This, said the Tribunal, was unaffected by the fact that B had simultaneously acquired the property from A using another provision which removed the SDLT on that transaction.

Why it matters: Although the transaction in this case occurred just before the introduction of the SDLT GAAR in the form of FA 2003 s 75A, HMRC argued the case on the literal meaning of the statutory language without recourse to the *Ramsay* principle of positive purposive statutory interpretation. This case shows that an aggressive SDLT avoidance scheme can succeed despite HMRC's published views in *Spotlights* and elsewhere that such schemes are technically flawed. Permission has been granted for an appeal.

2. Property exchanges, SDLT and VAT post-FA 2011

Before FA 2011 where an exchange of land involved a freehold or a lease each party paid SDLT based on the market value of the land they acquired. FA 2011 changed this by charging SDLT on the value of what is given for the land acquired, if that is greater than the market value of the land acquired.

Although in SDLT 'market value' does not include VAT (HMRC practice explained in its *Stamp Duty Land Tax Manual* at SDLTM 04140), 'chargeable consideration' does include VAT chargeable 'in respect of the transaction': FA 2003 Sch 4 para 2. Hence in applying the 'greater of test' you take the market value (ignoring any VAT) of what is received and compare that with the value of what was given but including any VAT chargeable in respect of the transaction. The inclusion of VAT in the computation can be confusing because VAT may be charged on the property being acquired as well as on the property being given in exchange as consideration. Which amount of VAT do you include or indeed should both amounts be included?

HMRC's published guidance on the point seems cryptic:

'Budget 2011 change: Following the changes to the exchanges rules in the Budget, the point is of less significance although it may still be relevant in a small number of cases. In addition to the market value of the interest acquired (which will not include VAT), you must now also look at what was given. The chargeable consideration determined by looking at what was given does include any VAT paid. This means that the policy on exchanges is consistent with other transactions where VAT is paid.'

Why it matters: HMRC did not supply a worked example so how does the new rule work? To make sense of this we can take an exchange of properties where both are standard rated supplies and each party has agreed to pay VAT on top of the exchange transaction to the other. A is transferring to B land worth 100 on which 20 VAT is chargeable and in exchange B is transferring to A land worth 90 on which 18 VAT is chargeable. Applying the amended exchange rule B is receiving land with a market value (excluding VAT) of 100 but he is giving A chargeable consideration consisting of land worth 90 plus (as deemed by FA 2003 Sch 4 para 2) the VAT chargeable 'in respect of the transaction'. One might think that the VAT to be taken into account here is the 18 VAT chargeable

on the land B transfers to A. However it seems that 'the transaction' here must be B's acquisition as purchaser (since that it what is being taxed) hence the VAT to be taken into account and added to the 90 value given by B to A will be the VAT chargeable on the supply by A to B, ie 20. To work out the SDLT on the exchange you take the 100 value received by B and compare it with the 90 value given by B as consideration plus the 20 VAT chargeable on the 100, ie 110. B therefore pays SDLT on the 110 and not the 100. Strictly speaking the 18 VAT charged by B on the transfer of the land worth 90 to A should also be added to the 110 because the chargeable consideration given by B includes any VAT and so the SDLT should be calculated on 130. It is to be hoped that HMRC may not insist on going that far but in the absence of any clear published guidance from HMRC it is not possible to be definte.

3. New relief for acquisition of multiple dwellings

FA 2011 introduced a new relief for the acquisition of two or more dwellings in one transaction or a series of linked transactions. In simple terms the relief is found by dividing the total consideration for the dwellings by the number of dwellings acquired to produce an average price. The rate of SDLT is then based on that average price instead of on the total consideration but cannot be less than 1%.

For example if 8 flats are bought for £1m then £1m ÷ 8 = £125,000 average price. £125,000 would normally attract the nil rate but the minimum rate is 1%. Therefore SDLT of £10,000 is payable instead of the £40,000 that would otherwise be due at 4% on £1m.

Why it matters: The relief is intended to increase demand for investment in residential property by reducing the rate of SDLT on the purchase of multiple residential properties so that it approximates to the rate that would have been charged had the properties been purchased individually. The relief should not be overlooked by advisers when acting for clients making bulk purchases of apartments in distressed residential projects.

4. Discovery assessments

Since 1 April 2011 the time limits for the issue of a discovery assessment have been changed. This change also applies to transactions which occurred before this date. Such an assessment may not be made more than four years after the effective date of the transaction, but this is increased to six years for carelessness and 20 years in the case of a loss of tax:

- brought about deliberately by the taxpayer;
- attributable to a failure to deliver a return; or
- attributable to a failure to comply with a requirement to notify an SDLT avoidance scheme which must be disclosed under the DOTAS rules.

Why it matters: HMRC has increased the number of enquiries they are making into transactions making use of avoidance schemes using their new information powers in FA 2008 Sch 36. These powers have few effective time limits on their operation and so the taxpayer has to rely on the time limits for issuing discovery assessments. With the reduction in the general time limit from six to four years from 1 April 2011 there has been a flurry of discovery assessments issued in order to protect HMRC's assessing position in relation to previous transactions just under four years old which would have fallen out of account under the new rules.

Section 75A can be notoriously difficult to deal with

5. FA 2003 s 75A

The latest official guidance on the interpretation and application of the SDLT GAAR in s 75A was published by HMRC on 28 February 2011. One significant difference between the latest guidance and earlier versions is the statement in the latest guidance that: '*Section 75A is an anti-avoidance provision. HMRC therefore takes the view that it applies only where there is avoidance of tax. On this basis, HMRC will not seek to apply s 75A where it considers transactions have already been taxed appropriately.*'

Section 75A can be notoriously difficult to deal with in a situation where there are a series of commercially driven property and related transactions but the end result is that less than the theoretical maximum SDLT is payable due to the way in which the transaction has been structured. Taking a literal approach to the section means that it will often apply in such situations.

Why it matters: Whatever the statement quoted above means it is nevertheless an indication for advisers that a mechanical approach to the application of the GAAR may not always be appropriate and that a purposive approach can now be adopted. Such a purposive approach can lead to the conclusion that the section should not apply to a particular transaction even if on a tick-the-box approach it will do.

What's ahead in 2012?

With all the recent publicity in *The Times* and elsewhere about SDLT avoidance by wealthy non-doms using offshore companies to shelter expensive properties from SDLT, it would be surprising if HMRC was not revisiting plans shelved in 2003 to introduce SDLT on the sale of the shares in property owning special purpose companies. A rise in the top rate of SDLT on residential properties from the current 5% might also be on the cards. ■

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