

Stamp duty land tax surcharge for non-residents

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INTRODUCTION

In the 2018 Budget the Chancellor announced that a surcharge on SDLT rates will be applied to acquisitions of residential property in England and Northern Ireland. The surcharge will apply to transactions on or after 1 April 2021.

OUTLINE OF THE RULES

The new SDLT surcharge will apply for acquisitions on or after 1 April 2021, subject to some transitional rules.

The legislation is outlined in Finance Act 2003, s 75ZA (which contains all the substantive provisions in relation to SDLT). The effect of this section is to add a 2% surcharge across the board for acquisitions of dwellings by non-residents. This means that the top rate of SDLT will be 17%.

Finance Act 2003, Schedule 9A sets out in detail what types of dwelling are caught, and what is meant by non-resident. It also introduces provisions in relation to the completion and amendment of land transaction returns.

It is important to note that the rules to determine residence for the purpose of the SDLT surcharge are not the same as the rules to determine whether an individual or company is resident in the UK for other tax purposes. An individual could be resident under the statutory residence test but still be treated as non-resident for the purposes of the SDLT surcharge.

WHAT IS A NON-RESIDENT TRANSACTION?

A non-resident transaction is one where:

- the purchaser is, or the purchasers include, a person who is non-resident (see below);
- the main subject-matter of the transaction consists of a major interest in a dwelling or dwellings (see below);
- the chargeable consideration for the transaction is £40,000 or more.

A major interest in a dwelling is a freehold interest or a leasehold interest that has more than 21 years to run, and which is not subject to a “relevant inferior interest”. A relevant inferior interest applies where the interest that is acquired is itself subject to a lease which has 21 years or more to run.

MEANING OF NON-RESIDENT INDIVIDUALS

BASIC RULE

The basic rule in relation to individuals sets out when an individual is UK resident. A non-resident is an individual who does not satisfy that test.

An individual is UK resident if the individual is present in the UK on at least 183 days during any continuous period of 365 days that falls within the ‘relevant period’. The ‘relevant period’ is the period starting 364 days before the relevant transaction and ending 365 days after the relevant transaction. An individual is present in the UK on any day when that individual is present in the UK at the end of that day.

This rule will allow individuals first coming to the UK to live to acquire a residence before arriving in the UK without incurring the surcharge (although they would have to pay the surcharge and later claim a repayment).

Where purchasers are spouses or civil partners living together, if one of the spouses or civil partners is UK resident and the other is not UK resident, the non-UK resident spouse will be treated as UK resident.

SPECIAL CASES

This basic rule does not apply if any of the ‘special cases’ applies. Where one of the ‘special cases’ set out in Conditions A to C applies there is a different rule to determine whether an individual is UK resident.

An individual is UK resident where any of the special cases applies if the individual is present in the UK on at least 183 days during the period beginning 364 days before the relevant transaction and ending with the date of the transaction. An individual is present in the UK on any day when that individual is present in the UK at the end of that day.

The ‘special cases’ are as follows:

Condition A is where the purchaser or purchasers include a company or a person acting as a trustee of a unit trust scheme.

Condition B is where the purchaser or purchasers include an individual who is entering into the transaction as a partner in a partnership (which includes a limited partnership and a limited liability partnership).

Condition C is where the purchaser or purchasers include an individual who is acting as a trustee of a settlement and under the terms of the settlement no beneficiary is entitled to occupy the dwelling or dwellings for life, or to income earned in respect of the dwelling or dwellings. Essentially, Condition C would apply in relation to any discretionary settlement.

If a beneficiary is entitled to occupy the dwelling under the terms of a settlement, the residence of the beneficiary rather than the residence of the trustee has to be considered in relation to the application of the surcharge.

CROWN EMPLOYEES

There are special rules for Crown employees, where days spent outside the UK for the purpose of performing activities in the course of that employment are treated as days present in the UK.

MEANING OF NON-RESIDENT COMPANIES

A company is non-resident if either of the following conditions is met.

- On the effective date of the transaction the company is not UK resident for corporation tax purposes.
- On the effective date of the transaction the company (although resident for corporation tax purposes):
 - o is a 'close company',
 - o meets the non-UK control test in relation to the transaction, and
 - o is not an open-ended investment company, a company UK REIT, or a company that is a member of a group UK REIT.

This means that a company could be UK resident for corporation tax purposes, but because it is controlled by non-residents it could become liable to the SDLT surcharge.

CLOSE COMPANY

Essentially, a close company for this purpose is a company which is under the control of five or fewer participators (basically shareholders and loan creditors), or is under the control of participators who are directors.

NON-UK CONTROL TEST

A company is a close company if it is under the control of non-resident participators, without limiting the number of such participators to five.

The definition of control for the purpose of these rules is complex and are designed to capture various levels of control.

Specific advice should be sought on this point, especially where there are complex arrangements in relation to the exercise of control.

WHAT IS A DWELLING?

A building or part of a building counts as a dwelling if it is used or suitable for use as a single dwelling, or it is in the process of being constructed or adapted for such use.

This would include garden or grounds or land that subsists for the benefit of the dwelling is to be taken as part of the dwelling. This would apply, for example, to a garage that is in a separate block.

An off-plan purchase is likely to be caught where the contract entered into is for the construction of a dwelling that does not currently exist.

Although the definition of residential property for general SDLT purposes includes, for example, residential accommodation for school pupils and members of the armed forces, this type of property is not counted as a dwelling for the purposes of the surcharge.

COMPLETION OF THE LAND TRANSACTION RETURN

If at the time the land transaction return has to be submitted, which is usually 14 days after the completion of the relevant transaction, any of the individuals cannot satisfy the UK residence test, the return has to be submitted on the basis that it is a non-resident transaction.

If the individual or individuals subsequently meet the UK-resident requirement the land transaction return can be amended at any time before the end of two years from the date of the relevant land transaction.

TRANSITIONAL RULES

The surcharge will apply to any relevant land transaction where the effective date is on or after 1 April 2021 (the "commencement date").

However, the surcharge will not apply to:

- a transaction effected in pursuance to a contract entered into and substantially performed before the commencement date, or
- most transactions that are entered into pursuant to a contract entered into before 11 March 2020. Where there is a variation to the contract after 11 March 2020, specific advice should be obtained.

CONCLUSION

Non-resident individuals or companies acquiring UK residential property will need to look carefully at the new rules in relation to the SDLT surcharge on non-resident transactions.

An individual could be resident in the UK for the purposes of the statutory residence test but be non-resident for the purposes of the SDLT surcharge.

A company could be resident in the UK for corporation tax purposes but be regarded as non-resident for the purposes of the surcharge.

Where a beneficiary is entitled to occupy the property under the terms of the settlement, the residence status of the beneficiary determines the application of the surcharge.

This means that whenever a non-resident is involved or implicated in the transaction the impact of the surcharge provisions will need to be considered. It is not sufficient simply to look at the immediate purchasers of the interest in land.

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Dixon Wilson
22 Chancery Lane
London
WC2A 1LS

T: +44 (0)20 7680 8100
F: +44 (0)20 7680 8101
DX: 51 LDE

www.dixonwilson.com
dw@dixonwilson.co.uk