

## THE SDLT REGIME IN DETAIL

SDLT is chargeable on a notional land transaction, the consideration being the total consideration given or received.

There is no clearance mechanism although it may be possible to use the COP 10 procedure nor is there a tax avoidance motive test.

### 5.2.1. The detail of the SDLT GAAR

The SDLT GAAR in section 75A applies where the following three requirements are met:

- (1) one person (V) disposes of a 'chargeable interest'<sup>757</sup> and another person (P) acquires either it or a chargeable interest deriving from it,
- (2) a number of transactions (including the disposal and acquisition referred to in (1)) are involved in connection with the disposal and acquisition (the 'scheme transactions'), and
- (3) the sum of the amounts of SDLT payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V (the 'tax-saving test').

There is no requirement that, in order for section 75A to apply, the acquisition by P referred to in (1) be from V directly.

An interest in a property investment partnership is treated as a chargeable interest for the purposes of section 75A. Where V or P is a partnership the provisions in Part 3 of Schedule 15 apply as they would to the transfer of a chargeable interest into or out of a partnership<sup>758</sup>.

The result of the SDLT GAAR applying is that the individual scheme transactions are disregarded for SDLT purposes and there is instead a notional transaction by which P acquires V's chargeable interest (which was the subject matter of the disposal by V) by P and the chargeable consideration for that notional transaction is the 'notional consideration'. Any SDLT paid in respect of a land transaction which is to be disregarded is taken to have been paid in respect of the notional transaction<sup>759</sup>.

'Transaction' is defined to include<sup>760</sup>:

- a non-land transaction;
- an agreement, offer or undertaking not to take specified action;

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<sup>757</sup> As defined in section 46

<sup>758</sup> Section 75C(8)

<sup>759</sup> Section 75C(10)

<sup>760</sup> Section 75A(2)

- any kind of arrangement whether or not it could otherwise be described as a transaction;
- a transaction which takes place after the acquisition by P of the chargeable interest;
- the exercise of a right to terminate a lease or to take some other action;
- an agreement not to exercise a right to terminate a lease or to take some other action; and
- the variation of a right to terminate a lease or to take some other action

### *Scheme transactions*

The second requirement for section 75A to apply is that there are ‘scheme transactions’ which are a number of transactions (including the disposal and acquisition) involved in connection with the disposal by V and acquisition by P.

Section 75A(3), unusually, gives examples of ‘scheme transactions’:

- the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;
- a sub-sale to a third person;
- the grant of a lease to a third person subject to a right to terminate.

The HMRC guidance<sup>761</sup> in relation to when a number of transactions will be ‘involved in connection with’ a disposal and acquisition and result in there being scheme transactions is as follows:

“The phrase ‘involved in connection with’ implies that there must be some connection between the disposal and acquisition on the one hand and the transactions on the other which goes beyond the fact that a number of transactions happen in chronological order, and that they affect the same property. In particular it is unlikely that (except on a transfer of rights) section 75A can apply to a disposal by V and an acquisition by P where neither P nor his associates nor his advisers have had any involvement in or any connection with transactions other than the one by which P acquired the property, and neither P nor his associates obtains any SDLT benefit from the way in which the acquisition is effected. However section 75A will apply where the acquisition by P is effected by a ‘transfer of rights’ within the meaning of section 45, for example a sub-sale. So if V agrees to sell to X and X agrees to sell on to P section 75A applies to the disposal by V and the acquisition by P whether or not P or his associates or his advisers had any involvement in or connection with the V–X contract. Section 75A(1)(b) refers to the scheme transactions as being ‘involved in connection with’ the disposal and acquisition. Thus scheme transactions need not necessarily be

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<sup>761</sup> See SDLT Technical News Issue 5 (August 2007)

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connected with each other. For example, if V agrees to sell to X and X agrees to sell to P the two transactions are 'involved in connection with' the disposal by V and the acquisition by P even if V is unaware of the sale on by X."

The HMRC guidance<sup>762</sup> gives the following examples of where section 75A would not apply because there are no scheme transactions:

- 1) V sells two properties at arm's length to third party purchasers N1 and N2. At some later stage, and in transactions which are not connected in any way with the purchases by N1 and N2, P buys both properties at arm's length.

Section 75A does not apply as regards the disposal by V and the acquisition by P.

- 2) V grants a long lease to X. At a later stage, and in a transaction which is not connected in any way with the grant of the lease, X assigns the lease to an unconnected third party P. P exercises a statutory right of enfranchisement.

Section 75A does not apply as regards the disposal by V and the acquisition by P.

- 3) V grants an option to purchase land to X. At a later stage, and in a transaction which is not connected in any way with the grant of the option, X assigns the benefit of the option to an unconnected third party P. P exercises the option.

Section 75A does not apply as regards the disposal by V and the acquisition by P.

- 4) V agrees to sell land to H. H agrees to sell on to his spouse W. These transactions are completed at the same time. At a later stage W sells on to an unconnected third party P.

Section 75A does not apply as regards the disposal by V and the acquisition by P (although section 75A will apply as regards the disposal by V and the acquisition by W).

- 5) V agrees to sell land to P. P agrees to sell on to C. The transactions are completed at the same time.

Section 75A does not apply as regards the disposal by V and the acquisition by P (although section 75A will apply as regards the disposal by V and the acquisition by C). The sale on to C is not 'involved in

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<sup>762</sup> See SDLT Technical News Issue 5 (August 2007)

connection with' the disposal by V and the acquisition by P because it does not in any way affect the nature of the interest acquired by P.

The HMRC guidance<sup>763</sup> gives the following examples of where section 75A would apply because there are scheme transactions:

- (1) V grants a 999-year lease to N for no premium and a peppercorn rent. V assigns the freehold reversion to P for a nominal sum. P pays N £X in consideration of N's agreement to vary the lease by the insertion of a provision giving the landlord the right to terminate the lease for no payment. P exercises the right to terminate.
- (2) V grants a 999-year lease to N for no premium and a peppercorn rent. The lease includes a right for the landlord to terminate the lease on payment of £X to the tenant. V assigns the freehold reversion to P for a nominal sum. P exercises the right to terminate and pays N £X.
- (3) V grants a 999-year lease to P for no premium and a peppercorn rent. The lease gives the landlord a right to terminate it within 14 days of the date of grant. P offers to pay V £X if V allows the 14 days to elapse without exercising the right to terminate. V does so (an example of a scheme transaction which occurs after the acquisition of the chargeable interest by P).
- (4) V agrees to sell property to N for £10 million. N agrees to sub-sell the property to P. Both transactions are completed at the same time. (See the note above on the application of section 75A where an acquisition is effected by means of a 'transfer of rights').
- (5) V agrees to sell property to N Ltd for £10 million. N Ltd declares a dividend in favour of P, its sole shareholder, the dividend to consist of the property and to be paid at the same time as completion of the V–N Ltd contract. The contract is completed and the property transferred to P.

A transfer of shares or securities (or units in a unit trust) is ignored for the purposes of section 75A if it would otherwise be the first of a series of scheme transactions (and several such transfers are likewise ignored if they all precede any other scheme transaction)<sup>764</sup>.

#### *The notional transaction*

The chargeable consideration for the notional transaction for the purposes of applying the tax-saving test and for taxing a notional transaction to which section 75A applies (the 'notional consideration') is the largest amount (or aggregate amount):

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<sup>763</sup> Ibid

<sup>764</sup> Section 75C(1)

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- (1) given by or on behalf of any one person by way of consideration for the scheme transactions, or
- (2) received by or on behalf of V (or a person 'connected with' V<sup>765</sup>) by way of consideration for the scheme transactions<sup>766</sup>.

An amount given or received partly in respect of the chargeable interest acquired by P and partly in respect of another chargeable interest is to be determined on a just and reasonable apportionment. Consideration includes monies worth.

In calculating the notional consideration the consideration properly attributable to 'incidental' transactions is disregarded<sup>767</sup>. Incidental transactions are those that are merely incidental to the disposal by V and the acquisition by P.

A transaction is not incidental to the transfer of the chargeable interest from V to P:

- (1) if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected,
- (2) if the transfer of the chargeable interest is conditional on the completion of the transaction, or
- (3) if it is one of the examples listed in section 75A(3).

A transaction may, subject to (1) to (3) above, be incidental if or in so far as it is undertaken only for a purpose relating to:

- (1) the construction of a building on property to which the chargeable interest relates,
- (2) the sale or supply of anything other than land, or
- (3) a loan to P secured by a mortgage, or any other provision of finance to enable P, or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from V to P.

Reference to the transfer of a chargeable interest from V to P includes a reference to a disposal by V of an interest acquired by P.

The effective date of the notional transaction is the last date of completion for the scheme transactions, or if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed<sup>768</sup>.

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<sup>765</sup> Applying the test in section 839 ICTA 1988

<sup>766</sup> Section 75A(5) – there are examples of how the notional consideration is calculated in the guidance in SDLT Technical News Issue 5 (August 2007).

<sup>767</sup> Section 75B

<sup>768</sup> Section 75A(6)

The notional transaction attracts any relief which it would attract if it were an actual land transaction<sup>769</sup>. In addition the consideration attributable to any scheme transaction which would qualify for relief under section 60, 61, 63, 64, 65, 66, 67, 69, 71, 74 or 75, or Schedules 6A or 8, is disregarded in calculating the notional consideration<sup>770</sup>. Some reliefs involve a number of transactions where the tax-saving test will almost certainly be satisfied. Accordingly, section 75A is disapplied where the tax-saving test is satisfied by reason only of sections 71A to 73 (alternative property finance) or a provision in Schedule 9 (right to buy, shared ownership leases, etc).

If any of the scheme transactions is entered into for the purposes of or in connection with the transfer of an undertaking or part of an undertaking for the purposes of paragraphs 7 or 8 of Schedule 7 (reconstruction and acquisition relief) then the notional transaction is also deemed to be entered into for such purposes or in such connection<sup>771</sup>. This enables the notional transaction to qualify for reconstruction or acquisition relief if the other conditions for availability of relief are satisfied.

The notional transaction will be subject to the market value rule in section 53 if P is a company connected with V<sup>772</sup>.

If part of the consideration for the notional transaction is a land transaction entered into by V as purchaser, or by P as vendor, then the market value rules in paragraph 5 of Schedule 4 will apply<sup>773</sup>.

### **5.2.2. The transitional provisions<sup>774</sup>**

As explained above, section 75A exists in two versions. The first was introduced by The Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006<sup>775</sup> from 2 p.m. on 6 December 2006 (the 'relevant time'). The second was introduced by section 71 FA 2007 (which also introduced supplementary provision in sections 75B and 75C).

The FA 2007 provisions have effect in respect of disposals and acquisitions if the disposal takes place on or after 6 December 2006, and all the scheme

<sup>769</sup> Section 75C(2)

<sup>770</sup> Section 75C(4)

<sup>771</sup> Section 75C(3)

<sup>772</sup> Section 75C(6)

<sup>773</sup> Section 75C(7)

<sup>774</sup> Section 75C (3) FA 2007 which retains the transitional provisions in paragraph 1 of the Schedule to SI 2006/3237

<sup>775</sup> SI 2006/3237.