

self-certificate is complete and correct must be made by all the joint purchasers.<sup>895</sup>

Any formal notice issued by HMRC must be issued to all purchasers and will not be effective against any of them unless notice of it is given to each of them (provided their identity is known).

## **7.18. Application of SDLT to trusts and trustees**

(Section 105 and Schedule 16)

The general SDLT rules apply to trusts in conjunction with the special rules set out in Schedule 16. Trustees may be chargeable in the normal way when they acquire land and the beneficial interest<sup>896</sup> under a trust is a chargeable interest where the underlying property includes land. Trustees are treated as a continuing body of persons for SDLT purposes and so changes in the trustees are ignored where the trust continues<sup>897</sup>.

The SDLT legislation distinguishes between bare trusts and settlements (which are defined as trusts which are not bare trusts).

### **7.18.1. Bare trusts/nominee arrangements**

A 'bare trust' for SDLT purposes means 'a trust under which property is held by a person as trustee:

- (a) for a person who is absolutely entitled as against the trustee, or who would be so entitled but for being a minor or other person under a disability, or
  - (b) for two or more persons who are or would be jointly so entitled,
- and expressly includes a case in which a person holds property as nominee for another'.<sup>898</sup>

The references to a person being absolutely entitled to property as against the trustee are references to a case where the person has 'the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustee, to resort to the property for payment of duty, taxes, costs or other outgoings or to direct how the property is to be dealt with.'<sup>899</sup>

---

<sup>895</sup> Section 103(3) and (4)

<sup>896</sup> Other than an interest as the object of a discretionary power

<sup>897</sup> See SDLTM31745

<sup>898</sup> Paragraph 1(2) Schedule 16 This wording should be compared to the definition of 'absolutely entitled as against a trustee' in section 60(1) TCGA 1992:

"the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the property for payment of duty, taxes, costs or other outgoings, to direct how that property shall be dealt with."

<sup>899</sup> Paragraph 1(3) Schedule 16

## THE SDLT REGIME IN DETAIL

The general rule<sup>900</sup> is that where a person acquires a chargeable interest or an interest in a partnership as bare trustee, the SDLT legislation applies as if the interest were acquired by the beneficial owner - the acts of the trustee in relation to the chargeable interest are treated as if they were the acts of the person or persons for whom he is trustee.<sup>901</sup> In such a case, the beneficiaries are responsible for paying the SDLT.

The general rule does not apply in a case where the transaction is the grant of a lease to or by a nominee (not necessarily by or to the beneficial owner). Paragraphs 3(3) and 3(4) of Schedule 16<sup>902</sup> make such a transaction chargeable to SDLT as if the nominee was the purchaser or vendor of the whole interest (legal and beneficial) in the lease. This should not have any adverse consequences in the case of a grant to a nominee unless the nominee gives consideration for the grant. A group relief claim may be necessary where a lease is granted by one group company to a connected company as its nominee (so as to avoid a market value charge arising under section 53). Where a nominee takes a grant of a lease as bare trustee for a purchaser the nominee (and not the beneficial owner) will be responsible for filing the land transaction return and paying any SDLT due.

This rule applies to leases granted after 19 May 2005 (subject to transitional provisions) and is an anti-avoidance provision. It may cause problems in relation to the application of sale and leaseback relief under section 57A where the leaseback is to a nominee. Similar concerns may apply on a surrender and re-grant involving a nominee.<sup>903</sup>

Transfers of the mere legal title (other than the grant of a lease to a bare trustee) are not land transactions where the beneficial ownership remains with same person. Therefore, for example, where legal title to a partnership's real property is acquired by trustees this is not a land transaction and does not need to be self-certified.

### 7.18.2. Settlements

Where persons acquire a chargeable interest or an interest in a partnership as trustees of a settlement, they are treated for SDLT purposes as purchasers of the whole of the interest acquired (including the beneficial interest).<sup>904</sup> In such a

---

<sup>900</sup> In paragraph 3(1) Schedule 16

<sup>901</sup> Paragraph 3 Schedule 16 as amended by FA 2007 with effect from 19 July 2007

<sup>902</sup> Inserted by paragraph 11 Schedule 10 F(No. 2)A 2005 and applies to leases granted after 19 May 2005 – there are transitional provisions in paragraph 16(7) Schedule 10.

<sup>903</sup> Paragraphs 9 and 16 Schedule 17A

<sup>904</sup> Paragraph 4 Schedule 16 as amended by FA 2007 with effect from 19 July 2007

case, there is no second charge on a beneficiary with an interest in possession – the only charge is on the trustees.

For SDLT purposes the trustees of a settlement are treated as a single and continuing body of persons. It follows that for a continuing settlement a change in the composition of trustees is not a land transaction and a land transaction return should not be completed in respect of the change. Where such a change results in an application to the Land Registry, an explanatory letter should accompany the application unless it is obvious from the documents that they relate to such a change.<sup>905</sup>

### **7.18.3. Consideration for exercise of power of appointment or discretion**

(Paragraph 7 Schedule 16)

Where a chargeable interest is acquired by virtue of the exercise of a power of appointment or the exercise of a discretion vested in the trustees of a settlement, any consideration given by the person in whose favour the appointment was made is treated as consideration for the acquisition of the chargeable interest.

HMRC have indicated that this provision will have no application to normal trust transactions. It is intended to deal with the unusual case where a person pays trustees, or someone else, in order that the power or discretion may be exercised in their favour.<sup>906</sup>

### **7.18.4. Reallocation of trust property between beneficiaries**

(Paragraph 8 Schedule 16907)

For a long time it was HMRC's view that where trustees reallocated land between sub-funds (swapping land within sub-fund A for investments in sub-fund B), such transactions were to be treated as land transactions in respect of which SDLT was chargeable. This view was eventually abandoned in the case where the trustees were not required to have the consent of the relevant beneficiaries.

Paragraph 8, which applies from 20 July 2006, deals with the more difficult case of where a beneficiary's consent is required to the changes in investments within sub-funds of a single settlement. Paragraph 8 provides that, where a

---

<sup>905</sup> See SDLTM31745

<sup>906</sup> See SDLTM31760

<sup>907</sup> Inserted by section 165 FA 2006 in relation to any acquisition the effective date of which is on or after 19 July 2006.

beneficiary consents to no longer having an interest in one type of trust property and acquires an interest in other trust property which includes a chargeable interest in land, that consent does not of itself trigger a charge to SDLT; as the giving of consent does not constitute chargeable consideration for SDLT purposes. The limitation in paragraph 8 is without prejudice to other provisions such as paragraph 7 Schedule 16 (consideration for exercise of power or discretion).<sup>908</sup>

### **7.18.5. Removal of anti-avoidance rule – leases assigned by a nominee**

The anti-avoidance rule at paragraph 11 Schedule 17A charges the first assignments of certain leases that are not exempt from charge under any of the specified provisions<sup>909</sup> as if they are grants and prevents leases on which relief had been claimed being assigned to a third-party (instead of granted directly to the third-party) in order to avoid the SDLT charge. However, it was possible to sidestep these rules by granting a market rent lease to a nominee who would then assign the lease on to the third party. As the grant of a lease by a person to his nominee was not a land transaction for SDLT purposes (since the newly created leasehold interest was deemed to be held by the person for whom the nominee was a bare trustee), the result was that, although a lease had been created, no land transaction had taken place for SDLT purposes. On the assignment by the nominee to a third party the charge to SDLT on the rent payable under the lease would be avoided.

This route was closed with effect from 22 July 2004 by providing that where a lease was granted to a person as bare trustee of the grantor (with the result that the lease was treated as vested in the grantor by virtue of paragraph 3 Schedule 16 in its then form), then the first assignment of that lease that was not exempt under any of the specified provisions is treated for SDLT purposes as if it were the grant of a lease by the assignor (except where the assignee acquired the lease as bare trustee of the assignor).<sup>910</sup>

The amendments made by FA 2004 referred to above making the grant of a lease to or by a nominee chargeable to SDLT as if the nominee was the

---

<sup>908</sup> See 7.18.3 above

<sup>909</sup> The specified provisions are:

- (a) section 57A (sale and leaseback relief);
- (b) Part 1 or 2 Schedule 7 (group relief or reconstruction or acquisition relief);
- (c) section 66 (transfers involving public bodies);
- (d) Schedule 8 (charities relief)
- (e) any such regulations as are mentioned in section 123(3) (regulations reproducing in relation to SDLT the effect of enactments providing for exemption from stamp duty)

<sup>910</sup> Paragraph 11(2) Schedule 17A as re-enacted in amended form by Part 2 Schedule 39 FA 2004 - see also 7.18.1 above