ICAEW
REPRESENTATION 18/22

STAMP DUTY LAND TAX: MIXED-PROPERTY PURCHASES AND MULTIPLE DWELLINGS RELIEF

Issued 18 February 2022

ICAEW welcomes the opportunity to comment on the Stamp Duty Land Tax: Mixed-Property Purchases and Multiple Dwellings Relief consultation published by HMRC on 30 November 2021, a copy of which is available from this link.

This consultation serves to highlight that the stamp duty land tax (SDLT) code has become increasingly complicated as competing policy objectives have added new surcharges, altered rates, or added reliefs without taking a holistic review of the operation of the tax. The perceived mischiefs that this consultation seeks to address are legitimate ways that the rules currently operate that have arguably arisen from rules being changed or added without considering the wider SDLT code. There are many more situations where the SDLT rules operate in an unexpectedly unfair manner for certain taxpayers. If HMRC is seeking to fix unfairness in the system, these issues should also be reviewed. The implementation date for SDLT was 1 December 2003. As we approach the end of its second decade, we would suggest that a fundamental review of the tax should be undertaken.

In terms of the proposal to apply apportionment to mixed-property purchases, we consider that the steps for apportionment should be revisited.

Option 3 is our preferred approach for reforming multiple dwellings relief.

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This response of 18 February 2022 has been prepared by the ICAEW Tax Faculty.

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KEY POINTS

1. As expanded upon in our detailed responses below:
   - the steps for apportionment should be revisited; and
   - Option 3 is our preferred approach for reforming multiple dwellings relief (MDR).
2. We would also make the following general points. The SDLT code has become increasingly complicated as competing policy objectives have added new surcharges, altered rates, or added reliefs without taking a holistic review of the operation of the tax.
3. It should be noted that the perceived mischiefs that this consultation seeks to address are legitimate ways that the rules currently operate that have arguably arisen from rules being changed or added without considering the wider SDLT code.
4. The SDLT rules define residential property by reference to the term 'dwelling', but there is no statutory definition of the term 'dwelling'. While HMRC's guidance points to factors such as a building having its own postal address, gas, electricity, and water supplies and being registered as a separate dwelling for council tax purposes, these are not factors that the tribunals have considered significant in determining whether there is a separate dwelling.
5. The way that the rules interact and the lack of clarity of definitions has led to the unfortunate situation that some reclaim agents have sought to exploit fact patterns that support easily repeatable claims. Many of these claims will be valid as this is what the rules currently allow. Perceived incorrect claims may arise where those reclaim agents are aware that it is for the courts to decide whether there is a separate dwelling, or whether a property contains a non-residential element. Claims 'at the boundaries' are more likely to be repeated where it is perceived that other claims with similar facts have been 'accepted' by HMRC because they were processed without enquiry.
6. Tackling these behavioural issues should be a focus for the ongoing review of the tax advice market but this also requires HMRC systems (digital and human) to quickly identify when the tax system has created a repeatable claim (or reclaim) opportunity.
7. In the short term, HMRC (via solicitors and estate agents) might do more to raise the profile of this issue (until the law is changed) to deter taxpayers being taken in by the 'refund' letters and to encourage them to seek quality professional advice.
8. While we support the need for change to address this situation, most of the policy changes suggested will add tax costs (and possibly other costs) for groups of purchasers who are not the target of this consultation. We therefore request clear policy costings once the policies have been decided upon.
9. There are many more situations where the SDLT rules operate in an unexpectedly unfair manner for certain taxpayers (eg, HRAD; first-time buyers' relief; and the non-UK resident SDLT surcharge (NRSDLT)). If HMRC is seeking to fix unfairness in the system, these issues should also be reviewed.
10. The implementation date for SDLT was 1 December 2003. As we approach the end of its second decade, we would suggest that a fundamental review of the tax should be undertaken.

ANSWERS TO SPECIFIC QUESTIONS

Questions about mixed-property apportionment

Question 1 – What do you see as the advantages and disadvantages of apportionment?

11. The clear advantage is that many have been calling for apportionment of mixed property as a fairer representation of the underlying interests acquired.
12. The disadvantages include:
    - the complexity of calculation; and
    - fairness for business transactions involving an incidental purchase of a dwelling.

13. Further disadvantages are expanded upon in our responses below.

Question 2 – What are your views on how the mixed-property rules interact with the other aspects of SDLT?

14. The consultation states that the government expects that HRAD and NRSDLT would apply to the residential element of purchases.
15. The HRAD and NRSDLT rules will need careful review. For example, the relief for the replacement of the purchaser's only or main residence only applies currently where the main subject-matter of the transaction consists of a major interest in a single dwelling. We would hope that replacement of main residence relief would not be prejudiced by a transaction also including some non-residential land. The first example in Annex A uses the standard residential rates in the calculation so we would hope that any resulting legislation reflects this policy.
16. Any changes to the mixed-property rules should be accompanied by a thorough reform and simplification of other areas (eg, para 5 and 6, Sch 4ZA, Finance Act 2003 (FA 2003)).
17. Confirmation at paragraph 3.18 of the consultation document that purchases of six or more dwellings will continue to have the choice to pay tax at the non-residential rates is welcome. This should ensure that the change will not deter large investment-backed build-to-rent residential development projects. However, see also our answer to Question 27.

Question 3 – What issues would arise in particular for mixed-property purchases that included an MDR claim if apportionment was introduced?

18. In contrast to the comment above about large build-to-rent investment projects, the change will affect smaller scale build-to rent development projects involving a mixture of residential and non-residential property as the application of HRAD could significantly increase costs, even where MDR can be claimed.
19. See also answer below to Question 5.

Question 4 – What impact would apportionment have on both individual and business purchasers of mixed-property?

20. The proposed apportionment rule could operate unfairly if a modest dwelling is acquired together with high-value non-residential property. The examples in Annex A propose to apply apportionment differently if MDR is claimed. The example where MDR is claimed ringfences the value of the residential part and applies the residential rates only to that part of the consideration rather than the whole consideration. As a matter of fairness, the same approach to the apportionment calculation should apply regardless of whether a single dwelling or multiple dwellings are acquired.
21. For example, why should the treatment be different if a farm has a single farmhouse or a farmhouse and a cottage?

Example 1

22. Farmhouse value £750,000, farmland value £4.25m.
23. Using the standard mixed-property methodology in Annex A:
    - Step 1 – residential property 15%, non-residential 85%
    - Step 2 – calculate the tax on the assumption that the whole consideration is for residential property = £513,750 (at standard residential rates assuming it is the replacement of a main residence)
    - Step 3 – calculate the tax on the assumption that the whole consideration is for non-residential property = £239,500

- Step 4 – reduce the amount of tax produced in Steps 2 and 3 according to the percentage proportions of the consideration that is residential and non-residential (ie, £77,062 and £203,575)
- Step 5 – add the amounts produced by Step 4 together. Total tax payable = £280,637

Example 2

24. Farmhouse value £500,000, cottage value £250,000, farmland value £4.25m.
25. Using the mixed-property and MDR methodology in Annex A:
    - Step 1 – residential property 15%, non-residential 85%
    - Step 2 – calculate the tax for the dwellings using the MDR rules = £40,000 (assuming HRAD applies as subsidiary dwelling condition is not met as the cottage is not within the grounds of the farmhouse)
    - Step 3 – calculate the tax on the assumption that the whole consideration is for non-residential property = £239,500
    - Step 4 – reduce the amount of tax produced in Step 4 according to the percentage proportion that is non-residential (ie, £203,575)
    - Step 5 – add the amounts produced by Step 2 and Step 4 together. Total tax payable = £243,575.
26. The effective rate for the residential element in example 1 is almost 10.3% where the standard residential rates are used. The effective rate for the residential element in example 2 is 5.3% even though HRAD applies. What can be the policy reason for creating a better outcome simply because there are multiple dwellings?

Question 5 – What impact would apportionment have on business transactions?

27. Apportionment will inevitably increase SDLT costs for certain business transactions (eg, purchases of farms with farmhouses and purchases of business premises that habitually include employment-related accommodation).
28. The SDLT code already excludes certain transactions from the anti-enveloping rules in Sch 4A, FA 2003. For simplicity, these existing definitions could be used to exclude similar purchases from apportionment and treat them as non-residential. However, this may not be necessary if the residential element is ringfenced.

Question 6 – What impact would apportionment have on others involved in the purchase, such as tax practitioners, conveyancers and valuers?

29. There will inevitably be an increase in work for valuers to apportion the consideration. For other professionals, tax calculations will be more complex.
30. It would be helpful for HMRC to provide guidance on whether in simple cases (where there is no planning permission for change of use), it would be acceptable to base a land valuation on typical agricultural land values per acre.

Question 7 – What would the impacts be on purchasers of having to value both the residential and non-residential elements of a purchase?

31. The purchase price may already require apportionment for other reasons (eg, to calculate chargeable gains on an eventual disposal or to apportion values to assets for a business acquisition). Therefore, there may be a minimal impact for purchasers.
32. As above, it would be helpful if HMRC could set out whether it is acceptable for purchasers to self-assess their SDLT position based on publicly available information on values.

Question 8 – At what stage in a purchase could a purchaser expect to determine the relative values of the residential and non-residential elements of the property? For example, research, survey, consultation with a selling agent, or exchange.

33. As the SDLT return must be submitted within 14 days of the effective date, the valuation will need to be determined at a relatively early stage.
34. As the agent will be acting for the vendor rather than the purchaser, the purchaser may need to obtain an independent valuation unless HMRC can agree to the values being determined as set out in our answers to Questions 6 and 7 above.

Question 9 – Do you agree that apportionment would discourage abuse and give more equitable outcomes in calculating SDLT?

35. Yes, provided that the methodology for apportionment calculations is appropriate (see answer to Question 10 below).

Question 10 – Looking at the information in Annex A, do you have an alternative method of calculation for apportionment that would be effective in discouraging incorrect claims that the purchase of residential property is actually of mixed-property?

36. See answer to Question 4 above. We consider that there should be no difference in calculation method depending on whether apportionment is combined with an MDR claim. Therefore, we consider the steps should be:
    - Step 1 – work out the percentage proportions of the whole consideration attributable to residential property and to non-residential property.
    - Step 2 – calculate the tax on the dwellings using the proportion of the consideration attributable to the residential property (claiming MDR if appropriate).
    - Step 3 – calculate tax on the assumption that the whole consideration is for non-residential property.
    - Step 4 – reduce the amount of tax produced in Step 3 according to the percentage proportion of the whole consideration relating to the non-residential consideration in Step 1.
    - Step 5 – add the amounts produced by Step 2 and Step 4 together to get the total tax payable.
37. If this methodology is applied to Example 1 in our response to Question 4, the total SDLT reduces to £231,075 and the effective rate on the residential element is 3.7% (at standard residential rates).

Example 1

38. Farmhouse value £750,000, farmland value £4.25m.
39. Using our suggested methodology for apportionment:
    - Step 1 – residential property 15%, non-residential 85%
    - Step 2 – calculate the tax on the dwellings using the proportion of the consideration attributable to the residential property = £27,500 (at standard residential rates assuming it is the replacement of a main residence)
    - Step 3 – calculate the tax on the assumption that the whole consideration is for non-residential property = £239,500
    - Step 4 – reduce the amount of tax produced in Step 4 according to the percentage proportion that is non-residential (ie, £203,575)
    - Step 5 – add the amounts produced by Step 2 and Step 4 together. Total tax payable = £231,075

Question 11 – What would be the impact of allowing mixed-property treatment only for transactions that reach a particular threshold of non-residential property? What should such a threshold be and why?

40. A threshold could reduce complexity, but risks introducing another cliff-edge into the SDLT regime. However, there could be merit in applying this approach where the purchase of residential property is incidental to the purchase of a trading business.
41. Our main concern is that it is almost impossible to determine what an appropriate threshold might be. In an urban setting, there is no such thing as a typical parade of shops, for example. There will be differences in the number of floors above the retail units and the upper levels could be commercial, residential and change over time (subject to appropriate consent). Similarly, looking at rural locations, farms will vary in the mix of residential and non-residential property.
42. Overall, a threshold should not be required if the apportionment methodology set out in Question 10 is adopted.

Question 12 – What do you see as the advantages and disadvantages of allowing mixed-property treatment only where a minimum proportion of the consideration is in respect of non-residential land?

43. See answer to Question 11.

Question 13 – Do you have alternative proposals to the ones set out in this consultation which would be effective in discouraging incorrect claims that the purchase of residential property is actually of mixed-property?

44. See answers to Questions 5, 10 and 11.

Question 14 – How do the rules for mixed-property feature in commercial decision making?

45. For genuine business acquisitions, the mixed-property rules represent a welcome simplification as questions concerning the SDLT treatment are taken out of the equation. Therefore, any changes should not disadvantage businesses.

Question 15 – What would be the impact of changes to the mixed-property rules for businesses that typically make purchases of both residential and non-residential land, for instance corner shops, bed and breakfasts, pubs? Please consider both change in the form of apportionment and a threshold.

46. Bed and breakfasts may be treated as non-residential under the existing rules in s116(3)(f), FA 2003 as acquisitions of a hotel, inn or similar establishment are always non-residential. The *Stamp Duty Land Tax Manual* at SDLTM00375 states that a bed and breakfast establishment which has bathing facilities, telephone lines etc. installed in each room and is available all year round would be considered non-residential.
47. See our answer to Question 5 concerning how the impact of apportionment may be lessened for certain businesses if the approach to providing reliefs in other parts of the SDLT code were adopted.

Questions about Multiple Dwellings Relief

Option 1 – Allow MDR only where all the dwellings are purchased for a ‘qualifying business use’

Question 16 – What are respondents’ views on the introduction of an intention test?

48. We consider that an intention test will only be required for Options 1 and 2. It is not mentioned in respect of Option 3, and we consider that it would be inappropriate to apply an intention test for Option 3.

49. Presumably as it is described an as 'intention' test rather than 'usage' test, if there were delays in developing a property (for example, securing planning permission), but evidence supported the intention to develop and resell, there would be no clawback. Similarly, if a property was vacant despite being marketed as available for rent, that would be evidence of the intention to exploit as a source of rents.

Question 17 – What are respondents' views on the application of the proposed three-year post-transaction period?

50. A three-year look-back period is common within the SDLT code and already applies as a check that the number of dwellings remains the same for the purposes of MDR (for example, where a MDR claim is made for off-plan purchases). As with the current rules, the period should end early if the purchaser subsequently disposes the dwelling or dwellings as any subsequent change would be outside of their control.
51. However, we would note that any purposes tests and look-back periods create risks and uncertainties and should be avoided if there is an alternative policy approach. Given that HMRC is seeking to address an anomaly in the SDLT code that applies to residential purchases, this would appear overly burdensome for the standard homebuyer.

Question 18 – What impacts would Option 1 have on businesses?

52. While Option 1 may appear to have negligible effect on non-annex scenarios, there will inevitably be purchasers some who would be caught out by being unable to claim MDR (for example, a purchaser acquires a house with three cottages and intends to let the cottages but live in the house). The operation of the linked transaction rules might make it difficult to separate the purchases. A better alternative would be to ringfence the non-business acquisition and only permit an MDR claim for the business element, similar to Option 2.

Option 2 – Allow MDR only in respect of the dwellings purchased for a 'qualifying business use'

Question 19 – Do you foresee any issues with the proposed method of calculating the relief?

53. Yes. Applying SDLT to the non-qualifying dwelling as a proportion of the total SDLT that would be payable absent an MDR claim appears extremely complicated.
54. Based on the examples, it is assumed that the proposal is that the calculation is applied to the total consideration, but that the applicable rates are based on the non-qualifying dwelling itself. This means that where the purchaser is a non-natural person, HRAD would apply if the value of the non-qualifying dwelling was below £500,000 – otherwise the 15% anti-enveloping rate would apply.
55. In Example 5, it is accepted that when looking at the components of the transaction, the 15% anti-enveloping rate would not apply to the non-qualifying dwelling. However, if you were to attribute the entire consideration (£4m) to the non-qualifying dwelling, the 15% rate would apply. Careful thought would need to be given to priority rules required to achieve the desired outcome.
56. Unfortunately, the examples do not demonstrate the policy intention for Option 2 with respect to HRAD for individuals. At paragraph 5.16, it is mentioned that MDR would not be available for a dwelling that would be occupied by the purchaser. Under the current rules, there is no replacement of main residence relief where multiple dwellings are acquired in a single transaction. Clarity is required here.
57. If there was a mixed-property purchase that involved multiple dwellings, some of which were qualifying and some of which were non-qualifying, how would mixed-property apportionment work alongside the MDR calculation methodology proposed for Option 2?
58. Given the target of the change (which is MDR claims for properties that do not have sufficient separation to be separate dwellings), the questions raised, and complications highlighted by

our response to this question demonstrate that Options 1 and 2 are too complex for the real target of this consultation.

Question 20 – Are there any other types of property-related businesses purchasing residential property (and which support the aims of MDR) which should qualify for relief under Options 1 or 2?

59. We suggest that other exemptions in Sch 4A, FA 2003 should also apply if Options 1 and 2 were adopted. Based on Example 5, the proposal as it currently stands appears to be limited to something similar to para 5, Sch 4A, FA 2003. However, as noted in our response to Question 17, purposes tests and look-back periods create risks and uncertainties and should be avoided if there is an alternative policy approach.

Question 21 – What would be the impact of Options 1 and 2 on the structuring of commercial transactions involving the purchase of dwellings?

60. Options 1 and 2 would add significant complexity alongside the additional administration and compliance costs associated with monitoring eligibility for a three-year post-transaction period. These options will add significant uncertainty over the ultimate SDLT costs attaching to a transaction.

Option 3 – Restrict MDR by introducing a 'subsidiary dwelling' rule

Question 22 – does Option 3 introduce any other impacts on businesses?

61. Aside from the valuation point, we do not envisage any other issues for purchasers that are not individuals.

Questions about all the MDR Options

Question 23 – What do you see as the advantages and disadvantages of each of the options set out above?

62. Option 3 is our preferred solution. It deals with the perceived mischief by extending the existing subsidiary dwelling test in the HRAD rules to the MDR rules. This is arguably what should have been done when the subsidiary dwelling rule was first introduced to prevent MDR being claimed in circumstances where HRAD did not apply because the subsidiary dwelling test was met.
63. However, in applying the subsidiary dwelling test in a different context, care would be needed to ensure that it does not prevent MDR claims being made in non-annex scenarios (eg, a block of five flats each of equal value where none of them are more than a third of the total value).
64. We note that Example 6C in the consultation was amended on 14 February 2022 as it did not represent the manner that the rules currently operate where two (or more) dwellings are purchased in a transaction. As stated in HMRC's *Stamp Duty Land Tax Manual* at SDLTM09766, "A transaction involving more than one dwelling will either be liable to the higher rates of tax or it won't. The rules do not allow for a single transaction involving only residential property to be a combination of higher and normal residential rates."
65. However, as it might be possible to ensure that separate (but linked) transactions are entered into so that the replacement main residence might still qualify for non-HRAD rates, this example does highlight that taxpayers in slightly different situations can be treated differently by the currently rules. We would therefore support a change to achieve the outcome outlined in the original version of Example 6C. However, in doing so, thought would also need to be given to how MDR would be calculated (eg, should it be on a just and reasonable apportionment applying HRAD and not applying HRAD)?
66. Options 1 and 2 would add significant complexity and uncertainty for purchasers. Options 1, 2 and 4 also reinsert a barrier to small-scale investment in residential property. This is contrary to the policy background for MDR of promoting the supply of private rented housing.

Question 24 – Are there any other solutions to the problem described above not covered by the options in this consultation and which would, in your view, tackle the problem more effectively and efficiently?

67. We have not identified any other solutions.

Question 25 – Would options 1, 2 and 4 have any material negative impact on the purchase of property which contains, for example, an annex which is intended to provide accommodation to an aged or vulnerable person, typically a relative? If so, would option 3, either alone or in combination with the other options, present a solution to this negative impact?

68. The tax system should not be a barrier to families wishing to live together to support an aged or vulnerable person. Multi-generational living can work both ways (for example, the older generation assisting with childcare to enable the middle generation to work).
69. Some may seek to have sufficient space to live together without the barriers of separation that might create two separate dwellings. Depending on the level of care required, there may only be the need for a single kitchen, for example.
70. The SDLT outcome should be the same or similar regardless of whether there is a single dwelling that accommodates the needs of all or multiple dwellings where families prefer greater separation.
71. Option 3 will deliver this outcome in most circumstances but see our comments above in our answer to Question 23 concerning Example 6C in the consultation.
72. In situations where HRAD is payable (because the subsidiary dwelling rules does not apply), it is reasonable to expect that MDR would be available to offset the impact. However, under Options 1,2 and 4, MDR would cease to be available and would have a negative impact.
73. As agents are acting for the vendor and may be less likely to understand the SDLT rules, they may not alert buyers to the fact that the SDLT rules may operate differently owing to the nature of the property. Many residential property conveyancers now operate on a fixed-fee basis and will not offer SDLT advice. If the rules become over-complicated, the attractiveness of houses with annexes could be impaired and some transactions may stall or fail.
74. We would also observe that the fact that so many reclaims are made post-completion indicates that buyers of properties with annexes are oblivious to the current subsidiary dwelling rules. The risk of being subject to HRAD if the subsidiary dwelling condition is not met could be greater than the opportunity of making an MDR claim (where the slightly different MDR conditions are satisfied).

Questions concerning MDR more generally

Question 26 – How does MDR feature in commercial decision making?

75. We do not have sufficient evidence to answer this question.

Question 27 – To what extent does the availability of MDR impact purchasing decisions where the six or more rule applies?

76. MDR can in principle make a difference to the viability of build-to-rent schemes for lower cost housing if the effective rate of tax is 3% by claiming MDR rather than approaching 5% under the six or more rule.

Question 28 – To what extent does MDR currently impact on the supply of housing for both rental and purchase?

77. We do not have sufficient evidence to answer this question.

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APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).

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