

New Rate of Stamp Duty Land Tax (SDLT) for Non-UK Residents

September 17, 2020

Following on from the announcement in the 2018 Budget, from 1 April 2021 non-UK resident purchasers of residential property in England and Northern Ireland will be subject to a new higher rate of SDLT of 2 percentage points above the rate that applies to purchases made by UK residents. This 2 percent increase will apply to freehold and leasehold purchases. Clients should note that the residency test for individuals included in the proposed new legislation is a different test from the statutory residency test used to determine UK residency for other tax purposes. Clients considered to be UK residents under the statutory residence test will not automatically be UK residents (and so outside the 2 percent increase) for the purposes of the new SDLT rate.

There are transitional rules where exchange or substantial performance of a contract occurs prior to 1 April 2021, but completion takes place following that date.

'Non-Resident' Transactions

In order for the 2 percent increase to apply, the property transaction in question must be a 'non-resident transaction'. The transaction must therefore:

- have a purchaser, or, if there are multiple purchasers, at least one purchaser who is non-resident in relation to the transaction;
- mainly consist of a major interest in dwelling(s), which in the case of a lease has more than 21 years to run, and is not subject to a relevant inferior interest; and
- have a consideration of £40,000 or more.

Determining the Residency of Individuals

An individual is non-resident if they are not UK resident in relation to the transaction. The legislation goes on to provide guidance as to how to ascertain whether an individual is UK resident (and therefore not 'non-resident' in relation to the transaction). The residence of an individual in relation to a transaction is determined by looking at a period of a year either side of the effective date of the transaction. If, within this 2-year period (the 'relevant period'), the individual is present in the UK on at least 183 days within a continuous 365-day period, then the individual will be UK resident in relation to the transaction.

For example, say the effective date of the transaction (which is likely to be completion or substantial performance) is 1 January 2023. The relevant period starts on 2 January 2022 and ends on (and including) 1 January 2024. An individual present in the UK from 1 February 2022 to 20 August 2022 is present for a 200-day period within 365-day period and, therefore, the individual is a UK resident for the purposes of SDLT rates. If, however, the individual is present in the UK from 1 February 2022 to 1 July 2022, and then from 1 February 2023 to 1 July 2023, the individual will not be treated as UK resident, despite having been present in the UK for 300 days, as the individual has not been present for 183 days in a continuous 365-day period. It is important to note that while an individual may be UK resident for a tax year, it is possible that the individual may still be 'non-resident' in relation to the transaction in question, and so be subject to the 2 percent increase.

The relevant period is truncated for certain individual purchasers to the period 364 days prior to the effective date of the transaction up to the effective date of the transaction. These purchasers include trustees, partners in a partnership and companies (where there is more than one purchaser and one purchaser is a company).

Individuals who are employed under the Crown in employment of a public nature are subject to special rules in calculating their presence in the UK.

Determining the Residency of Companies

A separate test applies when assessing whether companies are 'non-resident' for the purposes of the SDLT increase. The company in question must on the effective date of the transaction:

- not be UK resident for the purposes of the UK corporation tax acts; or
- be a close company which meets the non-UK control test and is not excluded.

The non-UK control test modifies the classic close company definition in UK tax law. Generally, a UK-resident company is a close company where it is controlled by five or fewer participators – being broadly persons who hold equity or debt interest in the company – or is under the control of participators who are also directors. The non-UK control test removes the 'five or fewer' cap from the close company definition, but stipulates that participators must be non-resident themselves. Certain exceptions to the general close company rules are also made for partners in a partnership, spouses/civil partners, and where a participator has a *de minimis* (broadly, less than 5 percent) interest in a company. Excluded companies include open-ended investment companies (e.g., an open-ended fund), UK real estate investment trusts (REITs) and UK REIT group members.

Determining the Residency of Spouses, Civil Partners and Trusts

Additional rules in the new legislation include clarification that if spouses/civil partners are entering into a transaction together, with one individual being UK resident and one being non-resident, then both will be considered UK resident for SDLT purposes (provided they live together). In the case of trusts, the legislation generally looks through to the residency status of the beneficiary of the trust in the case of a bare trust, or a beneficiary who is entitled to occupy or receive rent in the case of a settlement, despite the trustee being the purchasers.

Clients should take care when assessing whether they may fall within the additional 2 percent rate for SDLT purposes, as the discussion above shows the complexities of the tax analysis. As already noted, residency status arising under the statutory residence test may not be the same as under this new legislation.

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9/15/20