STEP
ADVISING FAMILIES ACROSS GENERATIONS

STEP comments on the draft legislation published on 21 July 2020 in relation to the 2% Stamp Duty Land Tax (SDLT) surcharge for non-UK resident purchasers of residential property in England and Northern Ireland

About us

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

Today we have over 22,000 members in over 100 countries and over 8,000 members in the UK. Our membership is drawn from a range of professions, including lawyers, accountants and other specialists. Our members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members.

We take a leading role in explaining our members' views and expertise to governments, tax authorities, regulators and the public. We work with governments and regulatory authorities to examine the likely impact of any proposed changes, providing technical advice and support and responding to consultations.

Response

We welcome the opportunity to comment on the draft legislation published on 21 July 2020 in relation to the 2% Stamp Duty Land Tax (SDLT) surcharge for non-UK resident purchasers of residential property in England and Northern Ireland.

As before, our comments are limited to issues regarding the proposed test of residence to be used for individuals, participators in UK close companies and trustees and we leave it to others to comment on the further aspects.

We welcome simplicity and note the government's explanation behind introducing a new test for individual residence is to create such simplicity. We are concerned, however, that the draft legislation in fact creates complexity by introducing a further set of complex rules for individuals and their advisers to familiarise themselves with and which, as drafted, could give rise to some anomalous outcomes.

We acknowledge that the consultation is closed and in particular that the policy decision has been made to introduce new standalone tests for the purpose of this surcharge, rather than adopt the statutory residence test which was our preference. Given the draft legislation introduces new and complex matters, we would welcome detailed guidance prior to 1 April 2021 to ensure that taxpayers and their advisers can familiarise themselves with the new rules. We would be happy to comment on draft guidance prior to release.

Non-resident in relation to a chargeable transaction: individuals

The test determines residence by reference to whether an individual is present in the UK at the end of the day. We assume that this effectively means "at midnight", in line with the established principle set out in the statutory residence test.

The test looks both at the 364 day period before the acquisition as well as the 365 days after (para 4 (2)). This could lead to counter-intuitive results whereby an individual acquires a UK dwelling towards the start of a tax year in which they spend no time whatsoever in the UK but are nevertheless considered UK resident at the point of acquisition – and thus outside the scope of the surcharge - due to having been present in the UK (at the end of the day) on at least 183 days of the previous 364. Likewise it appears that an individual who has never spent any time in the UK whatsoever can acquire a UK dwelling before coming here and be outside the scope of the surcharge provided they subsequently spend at least 183 days in the UK over the following 365 day period. It would be helpful if draft guidance could contain examples to illustrate this.

Notwithstanding the above, complexity arises from the fact that the latter part of the test (i.e. looking forwards 365 days – para 4 (2) (b))) does not apply in all circumstances. Specifically, where any of cases A to C in para 5 apply, the relevant period refers only to the 364 days leading up to the relevant transaction, and not the following 365 day period.

We note the specific carve out in para 5 for trusts where a beneficiary is entitled to live in the property for life or who has an income entitlement from the dwelling. Again, guidance would be helpful to assist trustees, individuals and their advisers in understanding and applying the new rules.

In the case of married couples or civil partners, where only one party is UK resident, the surcharge will apply unless one party falls within the provisions for Crown Employees (para 6) or is co-purchasing with their UK resident spouse/civil partner. In the latter case, the legislation does not specify whether the two individuals' interests in the purchased property needs to be equal shares for the surcharge to not apply and our inference is that it does not.

There will often be good reasons why a non-resident spouse purchases a UK home in their sole name and this new rule creates a potential trap for those who do not take specialist advice. Again, we believe clear guidance and examples are needed to help individuals make an informed decision prior to entering a transaction since they may not appreciate the nuances of this rule when making what for many will be a material purchase.

Non-resident in relation to a chargeable transaction: companies

The tests relating to company residence, control and attribution appear complex and we see potential challenges in ensuring purchasers and their advisers apply these tests correctly. We highlight some key observations below.

If the purpose of the draft legislation is to prevent situations whereby non-UK resident individuals may otherwise circumvent the surcharge by acquiring a UK dwelling through a UK resident company, the register of persons with significant control ("PSC") may provide a simple way of determining ultimate beneficial ownership without the need for new complex texts. There are many well-rehearsed, good reasons why a purchaser may use a UK resident company, including simplicity.

Para 9 is complex and, together with the attribution tests in para 10 could lead to anomalous and potentially unfair results (see below). A simpler approach that applies a test of beneficial ownership may suitably address any potential avoidance the government is intending to target.

Broadly, depending on how the shareholders are connected, the draft legislation appears to make it possible for a single non-UK resident with an otherwise small direct shareholding to cause a company with a number of UK shareholders to be within the surcharge. More generally, to the extent that a UK investor is to invest alongside non-UK investors, such UK investors may be penalised and, in effect, suffer SDLT because they have invested with non-UK residents. It is not uncommon for the final set of investors to be concluded upon relatively late during a property acquisition and there may be circumstances in which the residency of a particular investor is uncertain for a variety of reasons. Until such uncertainty is resolved, the validity of the SDLT return cannot be confirmed, which is only exacerbated by the relatively short filing deadline.

Supplementary provision

Para 20 states what counts as a dwelling for the purpose of the surcharge. There are multiple definitions of "dwelling" across the taxes act and much like our comments on residence (in our previous submission), we believe that this could lead to many individuals making potentially costly mistakes by simply not understanding how each of the different tests interact. The pressure on conveyancers to know these rules and make purchasers aware of their obligations should not be understated.

Submitted by STEP UK Technical Committee
dated 16 September 2020