Chartered Institute of Taxation

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**SDLT: increased rates for non-resident transactions- draft legislation**

**Response by the Chartered Institute of Taxation**

## 1 Introduction

1.1 Draft legislation for the introduction of a 2% Stamp Duty Land Tax (SDLT) surcharge for non-UK resident purchasers of residential property in England and Northern Ireland was published on 21 July 2020.[1]

1.2 The measure will be included in Finance Bill 2020-21. The consultation on the draft clauses is intended to make sure that the legislation works as the government intended. A consultation ran from 11 February 2019 to 6 May 2019. The CIOT's response to the consultation is at www.tax.org.uk/policy-technical/submissions/stamp-duty-land-tax-non-uk-resident-surcharge-ciot-response

1.3 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

1.4 Our stated objectives for the tax system include:

A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.

Greater simplicity and clarity, so people can understand how much tax they should be paying and why.

Greater certainty, so businesses and individuals can plan ahead with confidence.

A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).

Responsive and competent tax administration, with a minimum of bureaucracy.

[1] https://www.gov.uk/government/publications/new-rates-of-stamp-duty-land-tax-for-non-uk-residents-from-1-april-2021

## 2 Main recommendation

2.1 **We are very concerned that the non-UK control test based on the close company legislation in Chapter 2 of Part 10 of CTA 2010 (subject to modifications) is disproportionately complex. Many practitioners who are familiar with corporation tax consider that the close company rules are complex and difficult to interpret – and the proposed test for the non-resident surcharge adds further levels of complexity. Given that it is conveyancers, most of whom are not tax specialists, who will need to apply the tests there is a significant risk that the rules will not be understood or followed. For this reason, we recommend a simplified test based on the ultimate beneficial ownership (see paragraph 3 below).**

## 3 'Non-resident' in relation to a chargeable transaction: companies

3.1 Paragraph 7(3) of new Schedule 9A sets out the test for the application of the non-resident surcharge to a UK resident close company meeting the non-UK control test under paragraphs 9 and 10 subject to the exclusions in paragraph 11. The intention, according to the summary of responses, is to prevent non-UK residents using UK resident companies to circumvent the surcharge.[2] However, we understand from our members that clients wishing to purchase residential property in a company have, for some time, been advised to use UK incorporated and resident companies since it is now well established that there are no fiscal advantages in respect of UK tax in purchasing such properties in non-UK incorporated or resident companies. In other words, it is very unlikely that non-UK residents would be using UK resident companies to purchase residential property in order to 'circumvent' the 2% SDLT surcharge. A UK resident company may be the vehicle of choice, not to circumvent the surcharge but for reasons the government may wish to promote in accordance with its wider objectives such as ease of administration and compliance.

3.2 The original consultation indicated the inclusion of UK resident close companies in scope was to ensure consistency of treatment between non-UK residents acquiring property directly and those acquiring through UK-resident companies. We are concerned that the legislative mechanism adopted to achieve this intent, the non-UK control test based on the close company legislation in Chapter 2 of Part 10 of CTA 2010 (subject to modifications) is disproportionately complex. Many practitioners who are familiar with corporation tax consider that the close company rules are complex and difficult to interpret – and the proposed test for the non-resident surcharge adds further levels of complexity. Given that it is conveyancers, most of whom are not tax specialists, who will need to apply the tests there is a significant risk that the rules will not be understood or followed.

3.3 The proposed test, in particular the attribution of control between associated persons, can give highly complex results that depend on fine distinctions such as whether purchasers are married / in civil partnerships or buying with unmarried partners, or whether associated persons hold more or less than 5% interests in the company.

3.4 In addition, in some cases the application of the non- UK control test gives rise to potentially anomalous results that do not accord with the policy intent. For example, in the case of a purchasing company owned by five UK resident relatives and one non-resident unconnected person, the control test means the purchase by the company falls out of the surcharge because the attribution rules only operate by reference to connected

[2] See paragraph 2.4 Summary of responses https://www.gov.uk/government/consultations/stamp-duty-land-tax-non-uk-resident-surcharge-consultation

persons. On the other hand, a direct purchase by the same individuals would be subject to the surcharge as the one of the purchasers is a non-UK resident. The less than 5% de minimis in para 10(4) and (5) is also not available on a direct purchase, and although we would not suggest it is removed as it provides a welcome measure of simplification, it is not entirely consistent with the policy intent.

3.5 We recognise that it is difficult to provide a legislative test that ensures complete consistency of treatment between non-UK residents acquiring property directly and those acquiring through UK-resident companies and understand the policy behind the proposed test. However, for the purposes of the surcharge, our preference would be for a much simplified test providing that a UK company falls within the surcharge if, looking at the ultimate beneficial ownership, more than 50% of the company is beneficially owned (ie entitlement to more than 50% of any income or capital on distribution of assets) by non-UK residents – excluding non-resident spouses or civil partners of UK residents and Crown employees and their spouses or civil partners (plus any other relevant exceptions). The SDLT group relief provisions provide a model for tracing ownership in this way. Practitioners are relatively familiar with the principle of ultimate beneficial ownership of UK companies (for example in relation to the PSC register held by Companies House). We think this test would provide a very similar test to that proposed in the draft legislation (which is based on the close company rules) but with the benefit of much less complexity. We consider that adopting such an approach would greatly ease compliance without risking opening up routes for the non-resident surcharge to be avoided in circumstances in which it is intended to apply.

## 4 Determining the residence status of dual resident companies

4.1 The first condition for the charge under paragraph 7(2) is the company is not resident for the purposes of the Corporation Tax Acts (Chapter 3 Part 2 CTA 2009). It is not clear how the charge will operate to take into account a tiebreaker clause under a double tax treaty for a dual resident company.

4.2 For example, a company incorporated in the Netherlands has its central management and control exercised in the UK, it is therefore both UK resident for corporation tax purposes and resident in the Netherlands (as they adopt a residence test based on incorporation in addition to a management base test) under Dutch domestic law. It would be dual resident under art. 4(1) of the treaty. Unless agreement would be reached between the UK and the Netherlands competent authorities, the company would not be resident in either state for treaty purposes (art. 4(4)). It would be UK resident for corporation tax purposes and therefore the SDLT non-resident surcharge would not apply. However, what is the position if competent authorities subsequently agree (after the effective date) that the company was resident in the Netherlands for treaty purposes? Under section 18(3) CTA 2009, the company is non-UK resident. Please could HMRC confirm whether they would seek to revisit the transaction, and if so by what means.

It is noted that CTA 2009 section 18 can only make a company non-UK resident, agreement that it is UK resident for treaty purposes will not therefore be relevant to the non-resident surcharge.

## 5 Special rules for particular purchasers and transactions – spouses and civil partners

5.1 Where a non-resident spouse or civil partner of a UK resident individual buys a property with the UK resident individual, the non-resident surcharge does not apply. However, it is a requirement for both individuals to purchase the property. If the non-resident spouse or civil partner purchases on his or her own, the surcharge will apply. The consequence is that, where an individual is working overseas for a period that exceeds the 183-day test in paragraph 4 (perhaps working outside the UK during the week and returning at weekends - in more normal times) and wishes to purchase a home in which his or her spouse or civil partner will live, it will be subject to the surcharge. There may be good reasons why the property, although used as a family home, is only to be bought in the name of the individual working overseas. The policy reason behind this requirement for a joint purchase is not clear especially given that there is still the requirement the two individuals must be living together (as defined in ITA 2007 section 1011). It contrasts with the position for Crown employees where the exemption applies even if the spouse or civil partner of the Crown employee buys on their own.

5.2 We note there is no minimum ownership share required by the UK resident spouse or civil partner to fall within paragraph 12 and constitute a joint purchaser. Presumably a de minimis interest will be sufficient?

## 6 Special rules for particular purchasers and transactions – Alternative property finance

6.1 In relation to alternative finance arrangements, the SDLT code recognises that although the SDLT charge arises on the financial institution, it is the identity of the end purchaser that determines the SDLT treatment. Paragraph 16 provides this is the case where relief is claimed under FA 2003 however, it does not do so where relief under section 73 is claimed. We assume that this is an oversight that will be corrected.

## 7 Collective enfranchisement

7.1 There are two models of collective enfranchisement. Under one model, the property is purchased by the enfranchisement company (which is owned by the participating tenants) beneficially in its own right. In this case, assuming a UK company is used, the surcharge will only apply if the majority of the participating tenants (who will, therefore, control the company) are non-resident. However, under the alternative model, the purchasing company acts as nominee/bare trustee for the participating tenants. In these circumstances, if the subject matter of the transaction consists of or includes a reversionary interest which is subject to one or more leases with 21 years or less left to run and the participating tenants include a single non-resident purchaser, the whole transaction will be subject to the surcharge which may not accord with the wider policy intent of collective enfranchisement. Enfranchisement does not generally involve homes being put onto the market and so does not appear to overlap with the objectives of the surcharge. To the extent that collective enfranchisement falls outside the policy intent, we suggest provision could be made to disapply the surcharge where an acquisition falls within FA 2003 section 74.

7.2 There is very little guidance generally in relation to the tax effect of collective enfranchisement. Complex issues involving capital gains tax, corporation tax and income tax as well as SDLT can arise. We suggest these issues should be addressed in guidance more widely.

## 8 Power to modify – paragraph 22

8.1 Paragraph 22 includes a regulatory power to amend or modify Schedule 9A to prevent transactions from being non-resident transactions. COVID-19 has highlighted the need to respond to circumstances beyond an individual's control in relation to residence status. The ability to amend/modify is therefore helpful. However, we suggest paragraph 22 makes clear whether any such further regulation could be backdated otherwise there might be a technical concern about whether a regulation could be retrospective.

## 9 Guidance

9.1 It is important that detailed guidance is in place from April 2021 (and ideally before that date to allow for familiarisation and preparation) for taxpayers and advisers. As we note, the draft legislation as it stands includes the application of very complex concepts, such as the attribution of rights under the close company regime, that will be wholly unfamiliar to non-specialists particularly conveyancers; we suggest early consideration is given to formulating interactive tools to assist non-specialists in establishing liability for the surcharge. The guidance should also highlight traps for the unwary, to the extent these are retained in the final legislation, such as the requirement for both spouses/civil partners to be purchasers to fall within paragraph 12, and the different residence tests for individuals, partnerships, trustees and joint purchasers with a company.

9.2 We will be pleased to comment on draft guidance.

## 10 Acknowledgement of submission

10.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

## 11 The Chartered Institute of Taxation

11.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
15 September 2020