

Stamping on foreigners

Marc Selby discusses the proposal to introduce a higher rate of stamp duty land tax for foreign buyers of UK residential property.

Under pressure to respond to Labour's housing agenda, Prime Minister Theresa May told the Conservative Party conference: 'Foreign buyers looking to snap up homes in the UK will face a higher stamp duty rate.' Her announcement stated that the additional revenue would support schemes in the government's rough sleeping strategy.

The announcement was somewhat vague on detail and the government's press release did not specify the higher rate that would be charged, although a surcharge of 1% to 3% has been indicated. However, the proposal is intended clearly to increase the rate of stamp duty land tax (SDLT) chargeable for those affected by the change and the additional charge is to apply to those acquiring 'homes'; in other words, dwellings. The surcharge is to be levied in addition to the SDLT now chargeable, including the higher rate that applies for additional dwellings. However, it is unclear to whom the charge will apply.

The press release announcing the proposal refers to 'foreign buyers' and to 'individuals and companies not paying tax in the UK'. The proposal is to be implemented after consultation, which may clarify the government's objectives as well as how they are to be achieved.

Millennials and others struggling to climb on to the housing ladder may consider foreigners purchasing dwellings to be easy and justifiable targets for higher SDLT charges. However, the UK's tax system for those acquiring, owning and disposing of residential property must now be the world's most complex,

Key points

- Foreign buyers of UK residential property will be subject to a higher stamp duty rate.
- The revenue will support the government's rough sleeping strategy.
- The announcement raises questions on liability, properties and the persons chargeable.
- The rules on the taxation of UK property are already complex and are likely to become even more so.
- It seems that foreign ownership of UK property is already reducing, so is the proposal necessary?



and the government's proposal, if implemented, will add yet further complication and compliance to the byzantine legislation on the SDLT treatment for buyers.

The further complication to the SDLT legislation will, no doubt, be considered in the proposed consultation, which, I would suggest, should address three questions:

- Who will be liable for the additional charge?
- What property will be subject to the additional charge?
- When will the additional charge be introduced?

Who will be liable?

The government's press release refers to 'foreign buyers', which leads to further questions. First, will liability for the additional charge be based on the buyer's residence status? If so, would this be determined by applying the (highly complex) statutory residence test if the purchaser is an individual or the tests for corporate residence should the purchaser be a company?

Second, if the purchaser is a company, it should be noted that those incorporated outside the UK can be UK resident. Conversely, UK incorporated companies can be non-UK resident under the terms of a double tax convention. In any event, there have been substantial changes to the UK tax legislation applying to corporate entities that hold UK residential property. Two stand out: the introduction of the non-resident capital gains tax charge and the removal from excluded property treatment for inheritance tax of non-UK companies owned by non-domiciliaries holding UK residential property. As a result, the UK company has now become the vehicle of choice for non-resident purchasers wishing to acquire UK residential property in a corporate entity.

Third, the press release refers to 'individuals and companies not paying tax in the UK'. It is assumed,

therefore, that the additional rate will not be based on the buyer's nationality or domicile. In practice, it may be easier to formulate and apply a UK taxpayer test rather than a residence test. However, is it to be assumed that companies and individuals with a UK tax reference number (or, in the case of individuals, a UK National Insurance number) are UK taxpayers? And what if the buyer is not a UK taxpayer when the purchase is completed, but is acquiring a residential property that it proposes to use in a business on which it expects to be or become a UK taxpayer?

Alternatively, what about an individual who, after completion, is intending to live in the property and enter taxable employment in the UK? At present, a buyer must submit an SDLT return and pay the duty within 30 days of the effective date of the transaction (to be reduced to 14 days from 1 March 2019). Since SDLT is a self-assessed tax, would it suffice if the return were amended to add a simple declaration that the buyer is or intends to become a UK taxpayer?

Property subject to the additional charge

The press release refers to 'homes in the UK' but SDLT no longer applies to Scotland and Wales, which have their own property transaction taxes. So will the proposal apply only to homes in England and Northern Ireland?

If the additional charge is to apply to homes, the next question is whether it will apply only to dwellings that are subject to the 'residential' SDLT rates mentioned in FA 2003, s 55? If so, the additional rate will apply neither to dwellings that are subject to the non-residential or mixed rates (which, in the latter case, would include 'mixed-use' property) nor to those treated as non-residential for SDLT. An example of the latter is when six or more dwellings are the subject of a single transaction (FA 2003, s 116(7)). Alternatively, will there be a new definition of 'residential property' for this additional charge?

When will the additional charge be introduced?

It is clear from the press release that the additional charge is intended to raise additional tax revenue from non-UK residents or non-UK taxpayers. Undoubtedly, this will breach the non-discrimination principles under EU law. Two issues arise here.

- Will the introduction of the additional charge be deferred until Brexit, including the expiry of any transition period?
- Alternatively, will the additional charge be introduced before Brexit on the basis that it would apply to non-EU foreigners so that it would not breach the EC non-discrimination principles, but then be extended to apply to EU nationals post-Brexit?

Will the proposal be effective?

The government's proposal to impose a higher rate of SDLT on foreigners acquiring homes is predicated on the basis

that such transactions are prevalent and the measure will raise revenue for a worthy cause. Further, it will 'help make UK homes more affordable for British residents and those paying taxes in the country as they build a new life here'. These assumptions should be robustly tested, preferably before the proposed consultation opens.

A House of Commons briefing paper published in July 2017, *Foreign Investment in UK Residential Property* (tinyurl.com/HoC-7356), concluded:

'The BBC has reported (2017) a drop in the number of overseas landlords in the UK, citing Countrywide, an agency that lets 90,000 properties. Countrywide has reportedly said that 5% of UK homes have overseas owners compared with 12% in 2010. London has seen a fall in foreign landlords, according to the agency, from 26% to 11%. Taxation changes, are attributed with causing this reduction.'

It would be surprising if there had not been a further decline in the proportion of non-UK residents – certainly non-UK companies – acquiring residential property in the UK.

Conclusion

The proposed additional charge will require HMRC to devote significant time and resources on an already stretched budget. The department will have to manage the consultation, prepare and publish guidance for conveyancers and property lawyers who will need to understand and advise clients on the new rules, redesign SDLT returns to enable the new rules to be applied, and police transactions to ensure that the additional charge is paid.

The additional charge should not be implemented unless further research is undertaken to establish that foreign buyers of UK homes are distorting the residential property market. If they are, what is the extent of this problem and is the additional charge likely to generate enough revenue to meet the government's stated objective? It would be futile to add further complication and compliance – for HMRC as well as taxpayers and their advisers – to resolve a problem that might be perceived for the sake of political expediency, but which does not exist. ●

Author details

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Planning point

Those advising clients from overseas who may be seeking to buy UK property in the near future should make them aware of possible forthcoming SDLT changes.

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