RECENT DEVELOPMENTS IN STAMP DUTY LAND TAX FOR COMMERCIAL TRANSACTIONS

by Michael Thomas

Arguably the most significant development in relation to SDLT is the continued absence of any litigation. HMRC have indicated that they are now looking to take a more aggressive stance against what they perceive as SDLT avoidance. Notably, they have stated in the June 2010 Spotlight on Tax Avoidance that they intend to challenge SDLT schemes which seek to exploit sub-sale relief. These statements have been backed up with action in the form of an increasing number of enquiries into SDLT matters, which have been made in a more pro-active way. Nevertheless, no judgment has yet been handed down by the Tax Tribunal although at least one hearing is thought to be fairly imminent.

In contrast to the continued lack of SDLT litigation, yet more legislative action has been taken to combat SDLT planning. Specifically, the changes made to the s.75A FA 2003 general anti-avoidance rule by the first Finance Act 2010 have effectively killed off a number of SDLT planning arrangements involving partnerships. The amendment to s.75C(8) is only the latest in a long line of changes to the SDLT code which have been introduced in order to counter perceived tax avoidance.

The result of all this is that there is a very striking contrast between the impressive arsenal of SDLT anti-avoidance weaponry at HMRC's disposal and the fact that, for whatever reasons, it has not yet chosen to actually deploy this weaponry. Views may differ as to what, if any, SDLT planning of general application remains available. Nevertheless, what is indisputable is that trying to save SDLT through any kind of arrangement which might be labelled planning is a very difficult exercise. In particular, this is so because HMRC has a wide-ranging general anti-avoidance rule at its disposal in the shape of s.75A. Section 75A has of course been in force since December 2006 and has yet to be deployed before a court. Why has HMRC been so slow to litigate in relation to SDLT? This is a question which only they can answer but one explanation is a general hangover from the days of stamp duty, where litigation was extremely rare, principally because that tax, unlike SDLT, was not directly enforceable. A second reason may be that SDLT initially far exceeded the amount of revenue which it was scheduled to raise, owing to a combination of the recent property boom together with its direct enforceability – so that there was no perceived loss of tax. A third factor may be the rotation of personnel into and out of the Stamp Office.

The mismatch between the weapons at HMRC's disposal and its non-deployment of them is a serious cause for concern. As a general proposition, it is a bad thing to have tax rules on the statute book which are then not applied. To paraphrase Walton J, taxpayers should be taxed by statute and not untaxed either by a formal concession or by HMRC not applying the law. There is a real danger that taxpayers may have been lulled into a false sense of security and that comparative inaction on the part of HMRC has been mistaken for approval. Taking the specific example of schemes relying on sub-sale relief, it was clear when s.75A was first introduced (in 2006) that it was intended to kill off these schemes, because s.75A(3) specifically lists a sub-sale as the kind of scheme transaction to which s.75A is meant to apply. In 2007 HMRC issued technical guidance which indicated that sub-sale

schemes were caught by s.75A. It is therefore quite startling that HMRC has taken another three years before re-emphasising the point in its Spotlight of June 2010. The resulting situation is bad news for all concerned. Some taxpayers are almost certainly going to be hit with unforeseen assessments, whilst HMRC is most unlikely to make a full recovery of all the tax which it claims is due. Of course HMRC will say is that taxpayers who undertake aggressive schemes cannot complain if they end up being challenged and having to pay tax, and that is a valid point. However, this does not detract from the fact that the resulting situation is unsatisfactory.

Meanwhile, there are a significant number of difficult issues in relation to SDLT on which views may differ. In particular, there is uncertainty as to where the boundaries of the anti-avoidance rules – and s.75A in particular – lie. My firm view is that s.75A has to be interpreted purposively in the same way as every other statutory provision, and therefore its scope is limited to doing down SDLT planning arrangements which are perceived as abusive. However, not all commentators share this view. Moreover, even if it is accepted that s.75A only operates against abusive arrangements, what is abusive is inherently a subjective question and views will diverge.

The uncertainties surrounding s.75A are perhaps best illustrated with an example. Suppose that a farm is being divided up within a family. One of the next generation ("A") is acquiring land from his parents and his brother, which he will farm on his own account. SDLT is saved on these purchases by A establishing a new farming partnership together with his wife and buying the land into that vehicle rather than in his own name. There is a concern that if the new partnership has been set up partly in order to save SDLT in this way – by taking advantage of the partnerships' code in Schedule 15 FA 2003, then the creation of that vehicle is a scheme transaction and s.75A applies to override the favourable treatment contained in the partnerships code. My view is that s.75A does not operate to override the partnerships code in this situation. However, others may not agree, and it is not difficult to think of more marginal cases where the risk of a successful attack from HMRC is higher.

Turning now to what might be done in order to minimise the SDLT which is payable on commercial transactions, the starting point must be to thoroughly examine the prospective deal in order to establish whether there is a straightforward way in which SDLT might be saved. In other words, the best kind of SDLT planning involves bespoke arrangements. In my experience it is surprising how often it is possible to mitigate the SDLT charge in situations (other than where land is simply sold between unconnected parties for cash) without the need for any kind of aggressive planning arrangements. By definition, what is possible will depend upon the nature of the individual transaction. However, it is possible to state certain factors which are worth looking out for as indicators that some sort of saving may be available. These include the following:

(i) the absence of a cash purchase price;

(ii) the transaction taking place between connected parties;

(iii) the vendor having an ongoing relationship with the property;

(iv) the vendor taking a leaseback of the property (although note that this is also a potential elephant trap);

(v) either the vendor or the purchaser being a partnership, especially where the parties are already connected; and

(vi) the consideration being provided in the form of building works.

If more than one of the above factors is present then scope for saving tax is more likely to be present. Moreover, in some cases it may be possible to create the opportunity for bespoke planning through the parties adapting their commercial deals slightly. For example, if a developer is able to provide consideration in works rather than cash, then it can take advantage of the building works exemption in paragraph 10 Schedule 4 FA 2003. In my experience, the current economic climate has tended to push landowners and developers into exactly the kind of joint ventures which are efficient for SDLT purposes.

In conclusion, we live in interesting times where SDLT is concerned. The most significant development which is awaited is the promised litigation from HMRC. It is undoubtedly a question of when rather than if this happens, and one of the cases which is on its way to the Tribunal must surely be heard in the near future. The next question is the amount of challenges which HMRC brings and how hard it is prepared to push them. However, there is always a lag time, even where HMRC is minded to litigate aggressively, because the wheels of litigation take time to turn. In the meantime, advisers have difficult calls to make in trying to ascertain the limits of the SDLT charging provisions and especially s.75A. In particular, there is uncertainty as to where the distinction between acceptable tax mitigation and abusive schemes which fall foul of s.75A or other provisions in the SDLT code lies. Ultimately, this can only be decided by the courts, but it is not difficult to imagine a number of marginal cases. From a practical perspective, it is suggested that the best approach for advisers is to try and find solutions that produce a tax saving which flows from the particular commercial deal which has been reached between the parties and enables them to take advantage of a particular provision within the SDLT code.