ICAEW
REPRESENTATION 49/19

STAMP DUTY LAND TAX NON UK RESIDENT SURCHARGE CONSULTATION

Issued 6 May 2019

ICAEW welcomes the opportunity to comment on the Stamp Duty Land Tax: non-UK resident surcharge consultation published by HMRC on 11 February 2019, a copy of which is available from this link.

This response of 6 May 2019 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

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EXECUTIVE SUMMARY

1. The policy objective is stated to be to help control house price inflation through a deterrent to property purchase by non-residents. We do not have access to any evidence suggesting that purchases by non UK residents are inflating property prices. Accepting this is so, it is not thought that the surcharge will particularly deter the purchase by foreign residents to any great degree. Rather it is considered that the surcharge will be an additional source of revenue to the Exchequer at the expense of greater complexity and cost to persons who are not the source of the perceived mischief. It is disappointing to see a further level of complexity to be introduced into an already incoherent and disjointed system. We suggest that government resource would be better directed at developing a unified, cogent and coherent code of property taxes rather than the succession of "bolt-on" measures introduced particularly in the last 7 years.
2. In terms of impact, the surcharge on a property worth £500,000 a further cost of £5,000 is in practical effect much more likely to be onerous than the £100,000 additional cost on a £10m property. It is far from welcoming if an individual is moving to the UK to live and work but is penalised on arrival for having lived elsewhere. We consider that in general the proposal as set out will impact in areas where it is not intended and will have little effect where the policy objective could be met.
3. We suggest that the proper identification of the concern here should be the key factor. We suspect that the residence status of the purchaser per se is not the problem but rather the acquisition of large property portfolios or property being acquired for development and onward sale. It seems illogical and discriminatory (even if we leave the EU) to refer only to the residence of the purchaser. It would seem more appropriate to target any measure carefully at e.g. foreign landlords with multiple properties rather than looking merely at the residence of the purchaser. We consider therefore that the points raised, for example, in chapter 6 are misplaced.
4. In any event we are concerned that the surcharge should be as simple as possible. This means using existing tests of residence and having a single applicable regime rather than a raft of new, complex legislation which is difficult to police. Practically, we suggest there should be a de minimis or base threshold of purchase price below which the surcharge will not apply to achieve more effective targeting and to ensure that the tax collection is as efficient as possible for both the Exchequer and tax payers.

DETAILED RESPONSES

Question 1: Do you have any views on the proposed SDLT residence test for non-UK resident individuals?

5. It is our view that the introduction of a new and completely different test of residence for tax purposes will confuse and complicate matters. Compliance will not be facilitated as individuals will not necessarily recognise themselves as not resident in the manner as described nor have the records to support their position. With no other comparison, it is difficult to see how HMRC will be able to police the matter effectively. What evidence would HMRC require to prove residence? Guidance will be needed to assist conveyance practitioners who in general will not be well versed in tax or residency matters.

Question 2: Would you prefer to see a different residence test applied? If so, what test and why?

6. We suggest that most individuals purchasing a house will know if they are UK tax resident and that therefore using the test of tax residence is the most consistent solution. It prevents the need for separate record keeping and will facilitate compliance. By way of example, the individual need provide only a copy of their UK payslip or UTR to demonstrate the point. This has the advantage of considering the residence position at the time of purchase without reference to a future date and is hence a simple, verifiable and enforceable system. It is

possible to be a UK tax resident with as few as 46 days of presence because an individual's only home is in the UK. It would seem inappropriate to surcharge the purchase of that only home by a person arbitrarily determined to be non-resident for SDLT purposes.

Question 3: How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident individuals in England and Northern Ireland?

7. Where individuals travel widely it is entirely possible that the UK is home and their permanent base but they will be penalised for an entirely normal lifestyle. It is likely that well advised individuals will simply defer the property acquisition until a point when they have been in the UK for 183 days and then resume their travelling. It is the less well advised or those whose employment position requires their absence from the UK who will be most heavily affected by this measure. This is clearly contrary to the policy objective.
8. We note the possibility of a refund if circumstances change but as has been clearly demonstrated by the second property surcharge, this pay and reclaim system is unwieldy and time consuming for HMRC and the purchaser with long delays before refunds are received in many cases. It is disappointing to see an extension of this process being introduced. We suggest that the simple test of UK tax residence at the point of completion would be more in line with the stated policy aim and reduce the need for the pay and reclaim system although it may still be required in a few exceptional cases.

Question 4: Do you agree that a rate of 1% for the surcharge strikes the right balance between the government's objectives on home ownership and the UK remaining an open and dynamic economy?

9. The impact of surcharges on SDLT is regressive in nature and the level will, in our opinion, be an additional cost which will prohibit "ordinary" people from buying houses on their return to the UK after working abroad or stop people purchasing property if they come to work here. The position of joint purchasers, where one spouse or member of a comparable relationship, has worked overseas while the other has remained in the UK, is also likely to have an excessive impact compared to the policy aim. The surcharge is unlikely to have any deterrent effect on the high value purchaser or high volume purchaser but rather be absorbed as a cost of business. For these reasons we are not sure this level of surcharge will achieve the stated policy aim.
10. The recent changes to SDLT have reduced the tax take as shown by the figures to 31 March 2019 but do not seem to have achieved the required aim of helping first time buyers onto the market – there appears to be less movement up the property ladder and so fewer first time buyer properties coming onto the market. Even if the government do not carry out a full review of property taxes they should at least make a proper assessment of the effect of all recent SDLT changes.

Question 5: Do you have any views on the proposed company residence test for the surcharge?

11. It is agreed that a given company will know if it is within the scope of corporation tax and thus UK resident. Companies are much less likely to change residence status than individuals but it is a simpler position. Under the proposals it will be possible for a company to be UK resident and paying corporation tax, controlled by a UK tax resident person paying direct UK taxes and yet subject to the SDLT surcharge as a non-resident. The directors of the company will not necessarily know the day to day movements of a given participator but it would be much easier to determine if the individual participator is UK tax resident or not.

Question 6: Would you prefer to see a different residence test applied? If so, what test and why?

12. The residence test should apply for the accounting period in which the property acquisition takes place rather than at a single point in time.

Question 7: Do you have any views on non-UK resident individuals using UK resident companies to purchase residential properties?

13. There is an implication in the question that any property purchase by a non-resident via a UK company must be for nefarious purposes. Government fails to recognise that in many jurisdictions property purchases are frequently undertaken through corporate vehicles. This facilitates joint ownership and inheritance particularly under forced heirship regimes where properties pass in small shares difficult to accommodate in the English and Scottish legal systems. Government also fails to recognise that there are circumstances in which it is not desirable to list an individual's name on the Land Registry for reasons of personal safety. Where real property is concerned it is entirely natural for individuals used to the corporate ownership structure to expect to use a UK limited company for the purchase. It is our experience that the UK's perception of the position comes as a surprise in many cases. It is difficult to see the objection to corporate ownership per se. It is financial crime and tax evasion which is the real concern but we do not believe that a small surcharge will deter such criminal behaviour.

Question 8: Do you have any views on the suitability of using the close company test as the basis for determining whether a company is under the control of non-UK resident persons?

14. The use of the close company test would seem to be the only realistic determinant of control by non – residents.

Question 9: Do you have any views on applying the attribution of rights rules at section 451 CTA 2010 between persons of differing residence status? AND Question 10: Do you have any views on potential problems which might arise when using the definition of control at section 450 CTA 2010?

15. In the close company context, the attribution of rights to determine control between persons of differing residence status can often prove to be circular. In this situation, unless it can be shown that outright control is from outside the UK, we suggest that the surcharge is dis-applied. We accept that if this route is followed there will need to be specific reference to indirect control to prevent manipulation.

Question 11: Do you have any views on whether any of the exemptions at S442 to S447 CTA 2010 should remain in place or be removed for the purposes of the surcharge?

16. We recommend they remain in place.

Question 12: Would you prefer to see a different test applied? If so, what test and why?

17. No.

Question 13: Do you have any comments on the proposed treatment of partnerships as joint purchasers? AND Question 14: Do you think there should be different test applied for purchases by partnerships? If so, what test and why?

18. We appreciate the problems of partnerships but we suggest there should be a distinction between a small private partnership in which all the partners are non-resident and a large quasi-corporate where only one partner is non-resident. Our previous comments on the difficulties of using a physical presence test where there is a separation between the executive function of the business and the ownership of it are particularly relevant here.
19. We question whether it could be possible to impute the close company rules for this purpose so if there are 5 or fewer controllers, the partnership is looked through to the natural persons behind it. In what we might term "open partnerships" one could look at whether there is a UK tax return prepared to determine the residence of the entity as a whole. Many property businesses are established as LLPs rather than companies and the use of the corporate

framework reflects that this is a technical rather than practical distinction in terms of the business behaviour that the government wishes to influence.

20. It is not uncommon for companies to be partners so layers of investigation may be needed to determine whether the 1% surcharge is in point. Practically, we wonder whether there is merit in a de minimis or base threshold of purchase price below which the surcharge will not apply to achieve more effective targeting and to ensure that the tax collection is as efficient as possible for both the Exchequer and the tax payers. Such a limit could be expressed as being £500,000 per property or where the current value of property owned directly or indirectly is in excess of £X where X is a realistic number – perhaps £2.5M? This de minimis would then have to apply to all purchasers and so the policy aim may not be achieved.

Question 15: Do you have any views on the proposed SDLT treatment where the acquisition is made by a trust?

21. As with partnerships, trusts present particular challenges. We do not object to the look through for interest in possession settlements in principle but there are some practical issues. In our experience not many non UK trusts are interest in possession. We agree that trustees will know if the trust is or is not UK resident and that in the context of the surcharge there would be no reason not to impose it on non-resident trusts.

22. We suggest that dealing with UK resident trusts on a look through basis may be more challenging. Interest in possession trusts are encountered much more frequently onshore but it is also the case that the interest in possession may be in a part of a fund with discretion held over the remainder. A second common situation is where there are a series of interests in possession where one life tenant is non-resident but a house is purchased for a second. It would not appear to us to be appropriate that the residency position of one beneficiary should adversely affect others. Finally, whilst recognising it is not entirely a sympathetic constituency, it is often the case that a trust is set up to provide for a young adult and the trustees may have less knowledge or control of that individual's movements. If the beneficiary accepts a secondment overseas for example this could have an unexpected impact on the trust funds and the decision the trustees need to make. Once again we return to the principle of tax residence for individuals being the most appropriate test. For these reasons we would recommend that the look through is not used for UK resident trusts.

Question 16: Do you agree that the Statutory Residence Test for individual trustees will work for SDLT if references to tax year are replaced by references to the 12-month period ending with the date of the transaction? If not, why not? What alternatives would you propose?

23. As stated previously, we see no reason to use a different test for trustees whether they are corporate or individual. This proposal is unnecessarily complicated when the existing rules are well understood and we see no purpose to the proposal. In our experience, the circumstance in which the residence status of a trust was unclear is extremely rare and in such a transitional period it would be very unlikely that the trust would be involved in any other transactions particularly such as the purchase of a property.

24. Trying to apply the SRT rules for a different 12 month period to the tax year could be costly and very difficult to do in practice.

Question 17: How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident non-natural persons (companies, trusts and partnerships) in England and Northern Ireland?

25. We refer to our response to question 4. When dealing with persons from a Non UK jurisdiction, one needs to look at the purpose and scale of their transaction. The inclusion of UK real property in the Inheritance tax rules for non UK entities has a much greater deterrent effect and will lead to an increased number of individual purchasers. If the objection to an individual purchaser is merely that he or she has lived overseas then so be it. If, as we see it,

the greater mischief is that large portfolios are being acquired by non UK residents or there is too much emphasis on the high end market then we do not see that a surcharge of this type will be seen as anything other than a cost of business. We do not believe that the complexity of the proposals in the consultation document are warranted or likely to be effective other than as a plain revenue raising measure.

Question 18: Do you have any comments about the proposed reliefs from the surcharge? AND Question 19: Are there any other categories of individual which you think the Government should consider providing a relief for and, if so, why? AND Question 20: Do you have any views on the proposed refunds available for those who have paid the surcharge? AND Question 21: Do you have any views on the criteria the government is suggesting determining whether a purchaser would be eligible for a refund? AND Question 22: Do you have any views about how the reliefs will apply in relation to the surcharge?

26. We have no further comments on reliefs other than we restate that we are in favour of a de minimis threshold (see para 4) to reduce administration and ensure that the complexity is encountered only where it is warranted. It also eliminates the need for a complicated reliefs mechanism. We find the 12 month basis period arbitrary and ineffective and following this through to a logical conclusion, using tax residence at the date of purchase eliminates any need for complicated pay and reclaim systems. It is not an easy thing to manipulate tax residence status and the consequences of doing so are legion and well beyond SDLT. It is probably much easier for the well advised and mobile wealthy to control presence in a rolling 12 month period so we consider the fears implicit in the proposals to be misplaced.
27. Any relief given to Crown employees subject to UK income tax should be extended to any type of employee working abroad but still liable to UK income tax.

Question 23: Do you have any views on the proposed treatment where there is an interaction between existing SDLT rules and the surcharge?

28. We remain unconvinced that the residence status of the purchaser is the issue. If as we believe, the acquisition of large property portfolios or property being acquired for development and onward sale is the concern then the relief in 6.2 and 6.3 seems, at best, ironic. Similarly the comments relating to joint purchasers are not well focussed. It is not an unheard of situation for one individual to take up a job overseas, save as much as possible and return to the UK to buy a house in which to settle with a partner and children. Mortgage affordability tests will often not permit the UK resident – assumed lower or non-earner to be the purchaser as suggested in 6.9. These proposals require that individual has to wait for twelve months to buy or incur an upfront cost and hope a refund comes through at some point in the future and we do not see the policy justification for this. A de minimis rule could at least mitigate the impact in this situation.

Question 24: Do you have any views on the proposed approach for administration and compliance for the surcharge above? AND Question 25: Are there any other changes to the administrative and compliance provisions in SDLT that the government should consider changing for the purposes of the surcharge?

29. We refer to our previous comments on the use of a de minimis threshold and a single point of test which eliminate much of the administration and compliance issues unless the size of the transaction warrants them.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).