



Briefing

Real Estate Development Tax Planning



February 2016

SDLT - Sub-Sales and Forward Funding

General principles

As a general principle, stamp duty land tax (“**SDLT**”) is charged to the buyer on the total purchase price for a land transaction, which will usually include both the price paid for the land and for any buildings on it.

The liability to pay SDLT arises on completion of the transaction or when that transaction is “substantially performed”. A contract will be substantially performed when the buyer pays all or substantially all (usually taken to mean 90%) of the consideration due; begins to pay rent; or takes possession of the whole or substantially the whole of the property.

These two principles can create pitfalls for the buyer but also afford certain tax planning opportunities. In this article, we have briefly outlined two common situations where relief may be available.

Sub-sales

There will often be commercial or financial reasons for a property transaction to occur in stages by way of an initial sale to an intermediate buyer and second sale to the final buyer. However, where a property is transferred twice in the course of the transaction, there is likely to be a double charge to tax unless relief is available.

Sub-sale relief is intended to prevent this double tax charge. In a typical sub-sale transaction, the seller will enter into a contract to sell to the intermediate buyer (the “**First Contract**”) but, before the transfer actually takes place, the intermediate buyer will contract to sell the property on to the final buyer (“**Second Contract**”). The seller will then transfer the property directly to the final buyer. Provided that the First Contract is not substantially performed, no SDLT charge will arise on that contract. SDLT will only be chargeable on the actual transfer of the property to the final buyer under the Second Contract. It is also possible to structure sub-sales so that there are two transfers – one from the seller to the intermediate buyer and the second from the intermediate buyer to the final buyer. This may be necessary where there are concerns over disclosing the final transfer or details of it to the seller.

For sub-sale relief to be available, it is important to structure the transaction to ensure that the First Contract is not substantially performed before the Second Contract is entered into. If the

intermediate buyer begins occupying the property or pays over 90% of the consideration due before entering into the Second Contract sub-sale relief is likely to be denied. Timing is, therefore, crucial here.

Sub-sale relief is not available where the sub-sale forms part of tax avoidance arrangements and may be limited where the parties are connected.

Contracts for sale of land and construction works

As mentioned above, SDLT is charged on the total purchase price, which will include the amount paid for any buildings on a site. This can be an issue for developers looking to ‘forward fund’ a development.

It is therefore sensible tax planning to ensure that in the case of a ‘forward fund’ SDLT is only paid on the land value and not the value of the construction works. To achieve this it is possible (with careful structuring) for a buyer to purchase land from a developer and to then enter into a separate contract at the same time with the developer to undertake construction works on that land. How is SDLT calculated in these circumstances?

Where it is not possible to distinguish the agreement for sale of the land from that for the construction work because the two are so interlinked, HMRC’s view is that SDLT should be charged on the full value of the contract, including the construction works, whether or not the work is completed when the land is purchased. This can be a disaster for developers and buyers as schemes can quickly become unviable due to the extra SDLT charge.

However, in many cases it will be possible to structure such arrangements so that SDLT is payable only on the purchase price of the land and any buildings on it at the time it is transferred and not on the consideration paid for future construction work on the land. This follows the decision in *Prudential Assurance Co Ltd v IRC [1992]*. The *Prudential* approach is well established and HMRC have confirmed that they consider it to be effective SDLT planning. Where the *Prudential* treatment applies, the purchase price must be apportioned between the price paid for the land and under the construction contract on a just and reasonable basis.

Even where *Prudential* does apply, the timing of the sale of the land is important because SDLT will be payable on the amount paid for buildings constructed or partially constructed at the time the sale completes. If the sale can be completed before substantial building work takes place (which may not always be possible for commercial reasons), this can reduce SDLT liability.

Conclusion

Sub-sales and the Prudential approach are just two common examples of how the structure of a transaction can lead to tax planning opportunities. The timing of the steps in the transaction and practical issues, such as when development work will begin or when a buyer takes up occupation, will often impact the SDLT position and should ideally be considered at the outset.

Contact



Nigel Popplewell

Partner

+44(0)117 902 2782

nigel.popplewell@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out in the 'Who we are' section of the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2016. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.