



ICAS response to the HM Treasury consultation

‘Higher rates of Stamp Duty Land Tax (SDLT)
on purchases of additional residential properties’

1 February 2016

About ICAS

1. The following submission has been prepared by the ICAS Tax Committee. This Committee, with its five technical sub-Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 20,000 members working across the UK and internationally. Our members work in all fields – predominantly across the private and not for profit sectors.

General Comments

2. ICAS welcomes the opportunity to comment on the HM Treasury consultation Higher rates of Stamp Duty Land Tax (SDLT) on purchases of additional residential properties, issued on 28 December 2015.
3. The proposals for higher rates of SDLT on additional residential properties are likely to add to the considerable complexity which already exists around the taxation of residential property purchases.
4. In these proposals little consideration appears to have been given to aligning definitions and exemptions across different taxes. Looking solely at the SDLT regime itself there were already complications in determining the rates applicable to residential property, for example the multiple dwellings relief or the possibility of applying non-residential rates on purchases of 6 or more properties; the current proposals compound these. This does not sit well with the government's aim to simplify the tax system.
5. There may also be unintended consequences. Landlords affected by these proposals and other forthcoming changes to the treatment of property, such as the restriction of interest relief for unincorporated property businesses, may seek to increase rents. In the short term, blockages may be created in the housing market.
6. The proposed implementation date of April 2016 leaves limited time for consultation to ensure that the new rules are properly thought through and any exemptions targeted in a way which will support the government's aim of increasing the housing supply. It is also hard to see that the proposed new system for refunds can be designed and built before April so that it is functioning properly when large numbers of claims for refunds become part of the SDLT regime.

Specific questions

Question 1: Are there any difficult circumstances involving family breakdown which mean that treating married couples and civil partners as one unit until they are separated is not appropriate? If there are, how would you suggest those circumstances are treated?

7. Some aspects of the consultation proposals are similar to the approach used for the CGT main residence relief but there are some differences which are likely to lead to unnecessary complexity and uncertainty. For the purposes of the SDLT higher rates it appears that married couples and civil partners will cease to be treated as one unit from the date of separation under a court order or by formal deed of separation. Therefore if an additional property is acquired as part of the separation process prior to the 'date of separation' it will be subject to the higher SDLT rates. It would be sensible for the rules to mirror the CGT rules so that the couple would be treated as separate individuals in the tax year following separation.

Question 2: Do you agree that, where property is purchased jointly, if any of the purchasers in a transaction are purchasing an additional residential property and not replacing a main residence, the higher rates should apply to the whole transaction value? If not, how would you suggest the government treats joint purchasers?

8. As the consultation notes this is a simple approach to joint purchasers. However it is also clearly unfair to those purchasers in a joint transaction who do not already own a residential property. It may be a deterrent factor for some individuals who are buying with assistance from a family member, where the family member already owns another property. The family member's contribution to the joint purchase may be relatively small but the entire value of the transaction will be subject to the higher rates. This would appear to conflict with one of the stated aims of the changes which is to help first time buyers. A fairer approach would be to charge the higher rate only on the proportion relating to the purchaser(s) who already owned another property.

Question 3: For the first stage of the test for determining whether a purchaser is replacing an only or main residence, does considering previously disposed of property in the way presented above cause practical difficulties or hardship in particular cases?

9. As noted in the response to Question 1 there are some areas in the proposals where the rules for the higher SDLT rates differ from the CGT treatment leading to unnecessary complexity and uncertainty. For CGT purposes where an individual or a married couple/civil partnership own more than one residence an election can be made for one of the properties to be treated as the main residence. Such an election for SDLT is specifically ruled out in paragraph 2.8 of the consultation because 'it would be open to abuse'. It is unclear why the scope for abuse is considered to be greater than for CGT, particularly if the rules provided that any election would apply for both CGT and SDLT purposes.
10. The assertion in paragraph 2.8 that in most cases the position will be clear may be correct but without the possibility of an election for SDLT purposes uncertainty and the possibility for disputes will be introduced. An individual might own a property in the town where they work and another home in the countryside. Using the factors noted in the consultation, which are similar to those used for determining the main residence for CGT, there could be indicators pointing to either property being the main residence. For CGT this could be resolved by an election; for SDLT, when one of the properties is disposed of, it may be unclear whether it is the main residence which has been disposed of or not. This will cause uncertainty and give the potential for a dispute with HMRC.
11. There may be even greater uncertainty for married couples and civil partners. The consultation gives a very straightforward example of a married couple owning two properties, one of which is convenient for their work and their children's school and where they spend most of their time, and a holiday home which they visit occasionally. It is clear that the first property will be their main residence. However it could be much harder to determine where they own two residences, one of which is convenient for one spouse's workplace in town and where that spouse spends considerable time. The other property could be out of town and close to the other spouse's workplace and/or the children's school. The factors to be considered might point to the first property as the main residence for one spouse but to the second for the other. Again for CGT this could be resolved by an election but for SDLT it could lead to uncertainty and potential disputes.
12. We suggest that the possibility of an election for one property to be treated as the main residence should be reconsidered with the election determining the position for both CGT and SDLT.

Question 4: For the second stage of the test, do you agree that the rule should require the purchaser to intend to use the newly purchased property as their only or main residence?

13. See our response to Question 3. The consultation gives examples where the position is clear cut. As noted in our response to Question 3 it may sometimes be very unclear, especially for married couples or civil partners, whether the property disposed of was the

main residence. It follows that there may be similar problems determining whether the new property is a replacement main residence or not.

Question 5: Do you agree that 18 months is a reasonable length of time to allow purchasers a period between sale of a previous main residence and purchase of a new main residence that allows someone to claim they are replacing their only or main residence and therefore not pay the higher rates of SDLT?

14. In general 18 months is likely to be a reasonable period. We can however envisage difficulties where the sale of the previous residence is delayed by unexpected factors which arise after a commitment to buy the new residence has been made, for example, planning blight or flooding. Is there scope to allow an extension of the period in exceptional circumstances? Looking at capital gains tax private residence relief, ESC D49 suggests a possible approach. It allows relief in certain circumstances for a delay in taking up residence, for a period up to 12 months, but allows for the 12 month period to be extended to 24 months where there are good reasons which are outside the individual's control. For additional SDLT purposes the standard period within which the previous main residence has to be disposed of would be 18 months but with a possible extension to, say, 24 or 36 months in cases where sale of the previous residence was delayed due to circumstances beyond the individual's control.
15. There may be a case for a transitional rule for those who owned a main residence and, say, a holiday home and had already sold their main residence before the announcement of the proposed higher rates of SDLT in the Autumn Statement ie at a time when they did not know that there would be an 18 month period to purchase a new main residence to avoid the higher rates. Instead of the 18 month period beginning on the date of the sale of the previous residence it could begin from either the date of the Autumn Statement or from 1 April 2016.
16. We also envisage that there may be an adverse impact on some internationally mobile workers. A worker might be on an overseas assignment for, say, three years. Before leaving they sell their main residence but retain a rental property (on which, under the new regime, they will have paid the additional rate of SDLT). Whilst abroad they live in employer provided accommodation. On their return they buy a new main residence but because the gap is more than 18 months and they still own the rental property they will be liable to pay the additional rate of SDLT. Could an extension to the 18 month period to acquire the new main residence be permitted where the delay arises from a work related assignment?

Question 6: Do you agree there should be a refund mechanism in place for those who sell their previous main residence up to 18 months after the purchase of a new main residence? Are there any other cases where a refund of the additional SDLT paid should be given?

17. We can see the logic behind the proposal to make purchasers pay the higher rate of SDLT and then claim a refund when the previous main residence is sold. It would be unrealistic to defer collection of the additional SDLT until 18 months has elapsed. It is however likely to place considerable strain on some purchasers, especially where the delay in the sale arises unexpectedly perhaps due to the last minute breakdown of a chain. There could be significant cash flow issues for purchasers already taking on bridging loans and fees. There could also be problems where the previous residence unexpectedly becomes difficult to sell quickly (for example due to flooding) as noted in our response to Question 5 above.
18. The consultation document notes that currently the number of refunds of SDLT is small. A new online system is proposed – with consultation on the design of the refund process. We are concerned that it will be very challenging to have this process in place in time for the introduction of the higher rates from 1 April 2016, particularly as other major IT projects are currently being undertaken by HMRC. As noted above some purchasers are likely to have cash flow problems so it is important that the refund system works effectively, with refunds made promptly, right from the start.

Question 7: Can you suggest any other actions the government could take to mitigate the cash flow impact on those who only temporarily own two residential properties?

19. As the consultation document notes it is likely to be burdensome for individuals to pay the higher rate of SDLT and then claim a refund where the two properties are only held for a short period of time. The consultation suggests that the vast majority of residential property transactions will not pay the higher rates of SDLT but the risk that the higher rate could apply will affect many transactions involving chains, which could break down at a late stage meaning that the sale of the old residence and purchase of the new one cannot take place on the same day. It could adversely impact on borrowers' ability to obtain finance if lenders are concerned about the risk. Insurance against the risk might become available but at additional cost.
20. The proposal to allow the normal rates of SDLT to be paid as long as the previous main residence has been sold by the time the SDLT return is filed is likely to be of limited assistance. Firstly the government has already proposed that the time limit for filing the returns will be reduced to 14 days from the current 30. Secondly mortgage lenders are unlikely to accept any delay in filing the SDLT return so many purchasers will be unable to benefit. One possible alternative option would be to establish the liability to the additional SDLT but to allow purchasers to request deferral of payment for a limited period – perhaps 30 days to tie in with the current SDLT filing limit. The deferred SDLT would be due for payment at the end of the period if the previous property had not been sold by that date.

Question 8: Are there any other situations regarding main residences which require further consideration?

Question 9: Would there be a benefit to a significant number of purchasers if the test for whether someone owns one, or more than one, residential properties, were undertaken at the time of submitting the SDLT return, rather than at the end of the day of the transaction?

21. See the response to Question 7.

Question 10: Do you agree with the government's proposed approach to considering property owned anywhere in the world when determining whether the higher rates of SDLT will be due?

22. This may be an issue for some internationally mobile workers coming to work in the UK. They might wish to retain their residence in their home country to return to after the UK assignment. If they then purchase a property in the UK, which is occupied as their main residence whilst they are working in the UK, it will be a second property and subject to the additional rates of SDLT. This may be an intentional policy decision by the government but could present problems for companies making use of internationally mobile employees.

Question 11: Do you agree with the proposed treatment of furnished holiday lets?

23. Yes.

Question 12: Are there any other cases which the government should consider?

Question 13: Do you agree that an exemption should be available to individual investors as well as all non-natural persons? Alternatively, is there evidence to suggest any exemption should be limited to only certain types of purchaser? If so, which types of purchaser?

24. In view of the forthcoming changes to the rules on interest deductions for property businesses (which do not apply to companies) it is perhaps unlikely that there will be many bulk purchases of 15 properties or more by an individual investor in future. An individual investor might however already hold 15 properties in a portfolio; if they

purchased an additional individual property this could be in competition with first time buyers as noted in the consultation. This might suggest that if the exemption is framed around the bulk purchase of 15 or more properties in one transaction the inclusion of individual investors would make little difference but if it is based on a portfolio approach the conclusion could be different. We do not have any evidence on which to base a more detailed answer but it is not clear to us how the portfolio approach would assist with the aim of increasing housing supply.

25. The ATED rules include an exemption for property developers but none appears to be contemplated for SDLT, unless a developer qualifies for the proposed bulk purchase exemption. Multiple dwellings relief might assist developers in some cases, as set out in Example 37 in the consultation. However we are unsure whether this approach and the lack of an exemption will support the aim of increasing housing supply. We assume that the government will be discussing the precise framing of any exemptions with property developers to ensure that it does.

Question 14: Do you think that either the bulk purchase of at least 15 residential properties or a portfolio test where a purchaser must own at least 15 residential properties are appropriate criteria for the exemption? Which would be better targeted?

26. See the response to Question 13.

Question 15: Are there better alternative or additional tests that could be used to better target an exemption and fulfil the government's wider housing objectives?

27. See the response to Question 13.

Question 16: Are there any other issues or factors the government should take into account in designing an exemption from the higher rates?

Question 17: Do any specific kinds of collective investment vehicle or other non-individuals need to be treated differently to companies?

Question 18: Do you agree with the proposed treatment of trusts, including the higher rates of SDLT applying to trusts purchasing residential property except where a purchase is a first property or replacement of a main residence for a beneficiary?

Question 19: Do you think that purchasers are more likely to give accurate answers to main residence questions if HMRC provides specific questions for the conveyancer to ask the purchaser?

28. Where the circumstances are straightforward, as in the examples given in the consultation, it may assist conveyancers to have some specific questions to ask but as stated in the consultation the ultimate responsibility remains with the purchaser. As noted in the responses to questions 3 and 4 it may not always be easy to determine whether a property is a main residence or not, particularly in the absence of any option to make an election. Where there is considerable uncertainty purchasers may want some form of clearance from HMRC to avoid the risk of possible substantial penalties and interest if they reach the wrong conclusion.

Question 20: Would a formal declaration by the purchaser that the answers to any such questions are accurate help to increase compliance without creating undue burdens for conveyancers? How do you think such a declaration should work?

29. See the responses to questions 3, 4 and 19. There would need to be a mechanism for dealing with genuine uncertainty about whether a property was a main residence or not.

Question 21: Besides normal publicly available guidance, are there any additional products that HMRC can provide to help purchasers understand what rates of tax they will be paying on a planned purchase?

30. Given the complexity of the rules which will apply, it is hard to see that purchasers contemplating anything other than a straightforward sale of their main residence and replacement with a new main residence will be able to avoid taking advice. Even in these straightforward cases advice may be needed on financing because of the risk that the higher rate will apply if the sale of the previous residence and purchase of the new one cannot be completed on the same day.