Stamp Duty Land Tax and partnerships

Stamp Duty Land Tax (SDLT) was introduced by the 2003 Finance Act, and largely replaced the antiquated Stamp Duty (which still used some legislation dating back to 1891!) as far as transactions involving land were concerned.

One might have hoped that as SDLT was a new tax, it would be much clearer than the dusty old Stamp Duty. Unfortunately, despite having a clean slate to start with, the result is an unholy mess and a situation where no-one, not even leading barristers who specialise in the subject, can offer you absolute certainty about how some transactions will be charged to SDLT.

The problem is a piece of anti-avoidance legislation (sections 75 A, B and C of FA 2003), which though designed to catch "abusive" artificial transactions, has ended up making it impossible to understand what the rules are.

The anti-avoidance rule says that if there is an underlying transaction that can be perceived (for example, A sells land to B), and there are other transactions involved which have the effect of reducing the amount of SDLT payable, these are ignored and SDLT is instead charged on the "notional transaction" of A selling to B.

There are special rules covering land transactions and partnerships. Essentially, these say that if a person transfers land into a partnership, then SDLT is only payable to the extent that the underlying ownership of the land changes. If before and after the transfer the land is owned by the person transferring it and by persons "connected" with him, then no SDLT is due.

The practical effect of this is that if Mr A transfers land into a partnership of which he is a member, and the other partners are all his close relatives – say his wife and his daughter – then no SDLT is payable.

Similar rules apply where a partnership transfers land to a limited company – provided all the shareholders of the company are the same as the partners in the partnership, or are "connected" with them, no SDLT is payable. Were it not for this rule, SDLT would be payable on the market value of the land transferred to the company.

These helpful rules are in Schedule 15 to the 2003 Finance Act – and I should warn you that my description of them above greatly over-simplifies a fearsomely complex piece of legislation.

Until 2010, it was generally felt that the draconian rules of section 75A did not apply to transactions with partnerships like those described above, because Schedule 15 contained the rules for taxing such transactions, so the "notional transaction" was taxed according to Schedule 15.

This led to some schemes to avoid SDLT, and so to counter these, section 55 of the 2010 Finance Act amended section 75C by inserting the words "nothing in Part 3 of Schedule 15 applies to the notional transaction under section 75A". (I apologise if you are getting a headache with all these statutory references – we're nearly finished!).

The problem is that as a result of this amendment, you cannot be sure whether or not Schedule 15 applies, or whether those words inserted into section 75C mean that all the special rules for partnerships are ignored and, for example, a transfer of land from a partnership to a limited company will always be taxed on the market value of the land. When the 2010 Finance Act was introduced, it was said that the purpose of section 55 was to stop these avoidance schemes, but there is nothing in the legislation to restrict its operation to such schemes – no "motive test" as it is called.

Those who call for more anti-avoidance legislation should reflect on the SDLT problems caused by anti-avoidance rules. Producing dangerous uncertainty for those engaged in innocent transactions is too high a price to pay for stopping a few clever people from engaging in "abusive" avoidance schemes.

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