SDLT residential rates: HMRC’s view on gardens sold separately and other areas of uncertainty

General Features

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The CIOT and the STPG have been working with HMRC to seek clarification of some aspects of the definition of residential property for SDLT.

The CIOT and the Stamp Taxes Practitioners Group have been working with HMRC to clarify certain aspects of the definition of residential property in FA 2003 section 116. The distinction between what is meant by residential versus non-residential or mixed property is now very significant given the disparity in rates between the categories.

The result of recent discussions is a summary of points arising from the meeting on 11 June 2018. This note has been agreed with HMRC and published on both the CIOT and STPG websites.

Some extracts are below but the full note should be considered.

Gardens sold separately

HMRC’s view is that if garden/grounds are sold separately from the dwelling, the acquisition by the purchaser will be treated as residential irrespective of whether that part of the garden/grounds has been fenced/walled off or otherwise made physically inaccessible to the vendor. However, a subsequent sale by the purchaser may be non-residential if there is no building within section 116(1) (a) on the plot at the effective date of the subsequent sale.

HMRC’s guidance will be updated to more fully reflect HMRC’s position.

Derelict or demolished dwelling

HMRC’s view is that if, at the effective date, there is no longer a section 116(1)(a) building that is used or suitable for use as a dwelling, or in the process of being constructed or adapted for such use, e.g. where the former dwelling is derelict or has been demolished, then it will follow that the garden/grounds are no longer residential.

When does the construction/adaptation process start?

In relation to ‘in the process of being constructed’ HMRC confirmed that there is no express ‘golden brick’ test or rule of thumb for SDLT. There needs to be ‘more than a hole in the ground’.

HMRC’s guidance on this aspect is under review.

The relevance of how a property is marketed

SDLTM00365 (fourth paragraph) reads ‘Where, at the effective date, an existing building is being adapted or marketed for, or restored to, domestic use, it is treated as residential property.’

HMRC acknowledge that the reference to marketing is misleading. The guidance will be amended to remove ‘marketed for’. ‘Marketed for’ is not part of the test albeit that any marketing material may form part of the indicators in considering whether or not a building is suitable for use as a dwelling. The test is use or suitability for use at the effective date.

Planning permission in itself does not determine whether a building is residential or non-residential unless implemented at the effective date.

Businesses/trades carried on at home

This area forms part of HMRC’s review of the current guidance.

For buildings containing areas used as a dwelling and areas used for business purposes, a distinction is drawn by HMRC between the scenario where certain rooms of a house are used for work purposes (the office at home example) and the scenario where the house is divided into separate areas which are used independently for residential and trade purposes (the house part converted into a surgery example).

In situations similar to the ‘home office’ example HMRC consider that the rooms used for office work remain suitable for use as part of the dwelling and that the dwelling overall remains in use as a dwelling. Therefore, the home office/study is not mixed use.

The ‘converted into a surgery’ example is more nuanced. HMRC consider that a building containing some areas used for business may still be used for and suitable for use as a dwelling depending on the degree of conversion required to turn the business areas back into residential areas and there would have to be a clear separation between the residential and non-residential areas.

A third scenario is commercial use of a property (other than the dwelling itself) or land that would otherwise form part of the garden or grounds. The question is whether an identifiable use precludes enjoyment of that part of the grounds. A paddock that is not used for anything else remains available for the enjoyment of the dwelling because there is no other identifiable use. A meadow that has been planted as a wild flower meadow as part of a grant scheme is still for the enjoyment of the occupants; there is no other identifiable use. On the other hand, a formal arrangement involving the granting of a lease or licence to graze the land is more likely to prevent the owner’s enjoyment of that land.

It will be necessary to weigh up all the factors in a particular case to establish whether or not an identifiable use precludes enjoyment by the occupier(s) of the dwelling.

Actual use at the effective date overrides past or future use. The intention of the purchaser is generally irrelevant (except in the case of the higher rates).

Section 116 (7) – The ‘six or more’ rule

In terms of the meaning of a ‘single transaction’ in the sub- section, HMRC’s view is that it means a single contract as opposed to a single land transaction. The fact that completion takes place at different times for different properties under a single contract does not affect the analysis. Therefore, the acquisition of six or more flats under one contract with completion at different times as the flats come on stream is a single transaction for section 116(7).

The following example was raised with HMRC: In practice a purchaser may enter into multiple identical contracts for several dwellings with completion occurring at different dates, perhaps as the dwellings become vacant. Completion therefore occurs on different dates. Multiple identical contracts avoid the conveyancing complexities. The multiple contracts form part of the same bargain or deal. A discount may be given for the multiple acquisitions. The purchaser cannot cherry pick the properties.

HMRC’s view is that where there is an overarching contract, that contract would form a single transaction for the purposes of section 116(7); the essence is whether there is a single contractual obligation to take six or more dwellings and in fact six or more are taken.