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SDLT: NON-UK RESIDENT SURCHARGE CONSULTATION

Response by Association of Taxation Technicians

1 Introduction

- 1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the HM Treasury and HMRC consultation document ('the Consultation') issued on 11 February 2019¹.
- 1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.
- 1.3 The objective of the measure, as stated in the consultation, is to help control house price inflation and assist UK residents to get on the housing ladder. The Consultation reports that there is evidence that foreign buyers are pushing up house prices, but no further details of this evidence are provided and it is not stated whether this is due to overseas purchase for investment purposes or purchase for residential purposes. In the latter case, presumably a refund would be available to any individual subsequently becoming UK resident. Based on notes of the consultation meeting of 3 April which have been shared with us by the CIOT, we understand that the objective was clarified as reducing demand from non-resident investors.
- 1.4 Our concern is that the proposals as drafted will have an impact beyond non-resident investors, and will affect families already living in the UK where one of the purchasers works abroad, as well as situations where individuals are seeking to return to the UK and wish to make plans more than six months in advance. We have highlighted such examples at 4.4 and 4.8. There are also unintended consequences for trusts where trustees go abroad for a long period, which we have discussed at 3.13.
- 1.5 A number of our members agree with the statement in the opening of the Consultation, that the primary method of tackling affordability of home ownership would be to build more properties in the right places.
- 1.6 We also have concerns about the additional costs and bureaucracy that the charge will create for HMRC, particularly in monitoring and assessing entitlement to refunds.
- 1.7 Our response is set out as follows:

Section 2: The surcharge for individuals

¹ <https://www.gov.uk/government/consultations/stamp-duty-land-tax-non-uk-resident-surcharge-consultation>

Section 3: The surcharge for non-natural persons

Section 4: Reliefs and refunds from the surcharge

Section 5: Existing SDLT reliefs and other SDLT rules and the surcharge

Section 6: Administration and compliance of the surcharge

Section 7: Contact details

1.8 We have not completed the additional survey at Annex A as it was not appropriate for us to do so.

2 The surcharge for individuals

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

2.2 The key practical difficulty with the new proposal is that a test of residency – which is generally established for a given period – is now being added to a tax on a transaction, which takes place at a point in time.

2.3 The existing statutory residency test (SRT) which will, to varying degrees, be familiar to non-residents is, for income tax and other purposes, generally established on a tax year basis. Based on day-counting and other connections to the UK, including whether or not the individual has been resident in previous tax years, it may, in some cases, not be determined until the very end, or even after, the tax year. Since a residential property transaction could occur before residency is determined for the tax year of purchase, the proposal is to look at residency over an entirely different period – the 12 months ending with the effective date of the transaction for SDLT purposes. An individual who has spent less than 183 days in the UK during this 12-month period will be subject to the additional 1% charge.

2.4 On balance, this test is probably the best way to resolve the conflict between the requirement to have a determination of residency at the transaction date, and the fact that residency for the tax year could be unknown at the date of transaction. However, it is not an ideal solution, and the new test will cause confusion by creating two residency tests for individuals - one for income tax/CGT purposes, and one for SDLT purposes, based on two different time periods and, effectively, two sets of day-counting rules.

2.5 The existence of two tests will create perceived unfairness, as there will be a number of individuals who may be resident for income tax purposes (as it is not always necessary to be resident for 183 days or more for income tax purposes) but who may not be resident for SDLT purposes. These individuals will need to pay a higher SDLT charge despite being subject to UK income tax and capital gains tax.

2.6 Assuming that the Government adopts the existing day-counting tests to establish whether or not the 183 days are met, then in general, an individual is present if they are physically in the UK at midnight. However, there are exclusions for:

- Passengers in transit
- Exceptional circumstances
- Regular visitors to the UK (where individuals are deemed to have a higher day-count)

Is the intention to retain these complexities for the SDLT test? While not including them will be simpler, it introduces more complexity for those who are maintaining day-counts for income tax purposes by further

distinguishing the two tests. This increases the probability that individuals will need to seek professional advice to establish liability to the surcharge.

- 2.7 The Consultation states at paragraph 2.7 that the Government recognises that most people buying homes will not use a professional tax adviser. We would question how many solicitors would be willing, as part of their conveyancing work, to establish the individual's residency for SDLT purposes. We understand that a number of solicitors already exclude the provision of tax advice from their conveyancing services. We expect that many conveyancing solicitors may advise clients to seek separate tax advice on their position which will increase costs of advice for non-resident, or potentially non-resident, individuals.
- 2.8 Residency for a tax year is established on a fixed period – 6 April to 5 April each year. When establishing residency for a transaction, it is possible that the effective date of transaction could change and may not, in some circumstances, be fixed until very close –or even on- the effective transaction date. Where individuals are on the boundary of achieving 183 days in the previous 12 months, they could find themselves falling within the 1% surcharge at very short notice.
- 2.9 One solution might be to fix the period being reviewed to the 12 months ending with the month-end before the transaction occurs. This would allow the date of transaction to move within a month without affecting the SDLT position. We acknowledge that this is not a perfect solution and could make matters more difficult for individuals where the transaction date is close to the end of the month.
- 2.10 **Question 2: Would you prefer to see a different residence test applied? If so, what test and why?**
- 2.11 In order to deal with situations where individuals could be resident for income tax purposes but not necessarily for SDLT purposes, we think that the test of residency should be expanded so that an individual is considered resident (and not liable to the surcharge) if either:
- (i) They have spent 183 days in the UK in the 12 months prior to the surcharge; or
 - (ii) The individual was tax-resident for income tax/CGT purposes in the tax year of purchase.

We appreciate that it would be necessary under (ii) for the individual to pay the 1% upfront and subsequently reclaim the surcharge after the end of the tax year, when their residency position for income tax can be confirmed.

- 2.12 At 4.5 the Consultation states that the Government is considering introducing an upfront relief for Crown employees who are subject to UK tax. This suggests that the Government already considers the payment of UK income tax to be relevant to the position. Adding the additional test at (ii) above would be consistent with a principle that those subject to UK income tax are entitled to the same SDLT rates as other UK taxpayers.
- 2.13 A simpler test, which would not require an additional residency test for SDLT purposes, might be to ask whether or not an individual who has been non-resident in the tax year prior to purchase intends to return to the UK and occupy the property as their main residence within a given period of time. By looking at the existing residency test in the previous year there would be no need for a separate day-counting exercise for SDLT. Individuals purchasing without an intention to occupy (i.e. for investment purposes) would be subject to the surcharge.
- 2.14 While we appreciate that intention tests can be hard to monitor, intention tests already occur elsewhere in SDLT legislation, for example in the case of first time buyers' relief. As it is, testing an individual's residency over a period of 365 days in the run up to a transaction will require a large amount of historical evidence. An intention test could easily be satisfied where the individual has, in fact, gone on to occupy the property. It may

even be possible to highlight cases where occupation has not happened by comparing council tax records to SDLT returns. In this case, the onus would be on the purchaser to demonstrate that they intended to occupy.

- 2.15 For joint ownership, the surcharge would only apply where none of the purchasers intended to occupy the property as their main residence. This would address the issues discussed further below where one spouse is working abroad while the other remains in the UK.
- 2.16 **Question 3: How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident individuals in England and Northern Ireland?**
- 2.17 The introduction of the surcharge (and the limited availability of refunds- see section 4 below) may influence the timing of purchase for non-resident individuals. Members report that returning expats often seek to start the process of acquiring a property well in advance of their actual return as it can take a long time to find the right property suitable for their needs. If they are uncertain that they can return for 183 days or more within the 12 months following the purchase, then they may consider deferring purchase until closer to their date of return.
- 2.18 In the short-term, if the contention is that non-UK individuals are pushing up prices, the problem could be exacerbated in the run up to 6 April 2020 as purchasers seek to complete acquisitions before the introduction of the surcharge.
- 2.19 **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?**
- 2.20 While we do not express an opinion on the rate of charge itself, members did express concerns that a charge specifically aimed at non-residents may not create a favourable impression of the UK tax system.

3 The surcharge for non-natural persons

3.1 Companies:

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

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

- 3.2 It is proposed that the surcharge will also apply to non-natural persons including companies, partnerships and trusts. For companies, the surcharge will apply to non-UK resident companies and certain UK-resident close companies with non-resident owners.
- 3.3 We broadly agree that using the existing company residency rules makes sense. Companies should be familiar with these rules and, unlike individuals, residency is significantly less likely to vary from year to year. However, clarity will be needed over whether the surcharge will apply if either:
- (i) The company is dual resident; or
 - (ii) Residency is determined under a tax treaty rather than the domestic rules.
- 3.4 **Question 7: Do you have any views on non-UK resident individuals using UK resident companies to purchase residential properties?**

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?

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?

Question 10: Do you have any views on potential problems which might arise when using the definition of control at section 450 CTA 2010?

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?

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

3.5 The proposal to 'look through' UK resident close companies to see if they have non-UK resident participators has presumably been proposed to prevent the creation of a UK company to avoid the surcharge. However, consideration should be given to 'carve outs' or exclusions to ensure that the measure is targeted more tightly at those situations. There may be genuine trading purposes for the purchase of residential property by a close company – for example for employees to live in or for redevelopment purposes. Provided a UK resident company has a bona fide trade-related purpose for the purchase of a property it should not be subject to the surcharge merely because it happens to have overseas investors.

3.6 Partnerships

Question 13: Do you have any comments on the proposed treatment of partnerships as joint purchasers?

Question 14: Do you think there should be different test applied for purchases by partnerships? If so, what test and why?

3.7 It is proposed that where a property is purchased by a partnership then, as for joint owners, the residency of each individual partner needs to be considered, based on their days in or out of the country in the previous 12 months. If any one of the owners fails the test, then the surcharge will apply.

3.8 For large partnerships, this test could be onerous. We suggest that it may be appropriate to include carve outs - as for the UK resident close company above - so that the surcharge only applies where:

- The majority of partners are non-resident. To determine the majority in this case, one approach would be to consider the capital interest of the partners in the property being acquired. Where more than 50% of the capital interest is held by non-resident partners, the surcharge should apply.
- The partnership is not purchasing the property for use in its trade.

Under the current proposals it only requires one of the partners to fail the residency test to taint the position for all of the partners.

3.9 Trusts

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

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?

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?

- 3.10 The proposals are broadly that interest in possession (IIP) and bare trusts will apply look-through provisions to consider the residency of the underlying individual. As before, we suggest that in addition to the 183-day test, where the individual can establish UK residency for income tax for the tax year of purchase, a refund should be available after the end of the tax year of purchase.
- 3.11 Where the trust is a relevant property trust, then the trust residency will be based on the residency of the trustees, with the adapted test establishing residency by considering their residency in the 12 months prior to the purchase.
- 3.12 Given that, unlike individuals, trusts do not change residency on a regular basis and that care is often taken to ensure that the trust either is, or is not, UK resident from one year to the next, we suggest that for trusts it is sufficient to base the residency for the surcharge on the trustee's reasonable expectation of residency for the tax year for income tax purposes, rather than require a new test to be carried out on each of the trustees. In general, most trusts will retain the same residency from year to year and active planning, often involving a change in the trustees is required, if the trust wishes to change residency. A trust should therefore be able to make a reasonable judgment of its expected residency for the year even early in the tax year.
- 3.13 Under the current proposals, if one trustee chooses to sail around the world for eight of twelve months prior to a property purchase, even if the trust's UK residency for income tax is unaffected (either because the trustee does not lose their UK residency or the majority of remaining trustees are UK resident), the trust will find itself subject to the surcharge. Again, this is another example where the measure extends beyond the mischief which it is intended to tackle.

4 Reliefs and refunds from the surcharge

4.1 Reliefs:

Question 18: Do you have any comments about the proposed reliefs from the surcharge?

Question 19: Are there any other categories of individual which you think the Government should consider providing a relief for and, if so, why?

- 4.2 The sole relief proposed is an upfront relief for Crown employees subject to UK income tax. We have proposed at 2.11 above that other individuals subject to UK income tax should also be entitled, if not to an upfront relief, at least to a refund, once they have established UK tax residency for the tax year of purchase.
- 4.3 Consideration could also be given to relief for volunteer development workers who carry out voluntary work for certain organisations overseas. The definition of these workers already exists for Class 2 purposes.
- 4.4 Any couple who own their property jointly and where one spouse works outside the UK who wish to move home and continue to own their home jointly will be subject to the surcharge. They will be unable to obtain a refund unless the spouse returns to the UK. ***The measure will therefore affect couples who already hold property in the UK, not just those returning to the UK.***

4.5 We suggest a relief should be available to joint owners of property where one is UK resident and the other is only unable to occupy because they are working abroad on a full-time basis. We have expanded this below in section 4.8

4.6 Refunds

Question 20: Do you have any views on the proposed refunds available for those who have paid the surcharge?

Question 21: Do you have any views on the criteria the government is suggesting determining whether a purchaser would be eligible for a refund?

4.7 The current proposal is that an individual or individuals can make a refund claim if:

- They spend 183 days or more in the UK in the 12 months following the transaction date.
- For a joint purchase, all the purchasers must be individuals and spend 183 days or more in the UK after the transaction date.

4.8 A couple acquiring a main residence in the UK which they purchase jointly will *both* have to return to the UK for 183 days or more in the following twelve months to obtain a refund. Where one party is delayed abroad for work or other reasons, or wishes to continue working abroad, the couple will not be able to obtain a refund of SDLT.

4.9 We have already suggested that a refund should be possible if the individual is UK resident in the tax year of purchase for income tax purposes and that a relief should be available where a property is purchased jointly, and one of the joint purchasers is non-UK resident as they are working abroad on a full-time basis. This would tackle the issue for those returning from working abroad in stages, as well as the position for couples where one wishes to remain working abroad.

4.10 Situations such as this suggest that the effect of the new surcharge is too broad, and has unintended consequences beyond that required to tackle the intended mischief. The Consultation states that there is evidence that non-residents are pushing up house prices for residents. However, it is not clear if this is because non-residents are purchasing for investment purposes or for residential purposes. If they purchase for residential purposes then they will, presumably, be entitled to recover the extra SDLT if the 183-day test is met in the next 12 months. It will not be recoverable on a property acquired as an investment. But the measure also catches a couple owning property in the UK where one of the couple works abroad unless they change their ownership so that only the UK resident purchases the property. For many couples this may either be unacceptable as they wish to own property jointly, or impractical if the income-earning partner for mortgage purposes is the partner working abroad.

4.11 Our members have also raised concerns that the time limit in which the individual must return to the UK to obtain a refund is too short. It can take a significant amount of time for individuals to relocate back to the UK and find a suitable property. Timing the acquisition so that they can move back and meet the 183-day test may not be possible. It may also be for a couple that only one can return – the other could be held up by work. We suggest that a longer period is needed for an individual to re-establish residency.

4.12 Potential extended refund triggers might include:

- Acquiring UK-residency for income tax purposes at some point in the following three tax years.
- Being UK resident for income tax purposes for three of the five years following the purchase.

- 4.13 We note that Section 4.9 of the Consultation indicates that a refund will not be available where a UK resident close company is liable to the surcharge as a result of having non-UK resident participators who subsequently become UK resident. We can see no clear policy rationale for this. If both the company and its participators are UK resident following the purchase, then any income or gains generated on the property will be subject to tax both when arising in the company and when distributed to the participators. It is therefore unclear what this proposal is intended to achieve.

5 Existing SDLT reliefs and other SDLT rules and the surcharge

5.1 Question 22: Do you have any views about how the reliefs will apply in relation to the surcharge?

- 5.2 The surcharge will apply even if the purchaser is eligible for first-time buyer's relief. Given that entitlement for first time buyers relief is available only to those who intend to occupy the property as their only or main residence, it is perhaps counter-intuitive to allow a more significant relief on the basis of *an intention* to occupy, but deny a refund of the 1% surcharge until the individual has proved that they have been UK resident for at least 183 days out of the following 12 months.

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

- 5.4 We are not responding to this question.

6 Administration and compliance of the surcharge

6.1 Question 24: Do you have any views on the proposed approach for administration and compliance for the surcharge above?

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?

- 6.2 We agree that it will be necessary to allow additional time beyond the 12-month window after the transaction date to allow people time to reclaim the surcharge when they have met the 183-day test. Where the position is clear, we presume that it will be possible to amend the return earlier – i.e. at the first point that the 183 days residency is met.
- 6.3 The intention is to recover the surcharge by amending the SDLT return. In members' experience, most individual purchasers will rely on their solicitor to prepare the SDLT return on their behalf. They will not necessarily be in a position to amend a return, and going back to the original solicitor to make the amendment may well incur further costs, reducing the value of the refund.
- 6.4 We suggest that individuals should be able to make a free-standing claim for a refund as a stand-alone claim, with the form available on GOV.UK and via the Personal Tax Account. This would be consistent with the approach for making a reclaim of the repayment of the higher rates of SDLT².

² <https://www.gov.uk/government/publications/stamp-duty-land-tax-apply-for-a-repayment-of-the-higher-rates-for-additional-properties>

7 Contact details

- 7.1 We would be pleased to join in any discussion relating to this Consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Helen Thornley on 07773 087125 or hthornley@att.org.uk.

The Association of Taxation Technicians

8 Note

- 8.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has more than 9,000 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.