

1.1. Land transactions – the trigger

SDLT is levied on 'land transactions'. This is deceptively simple.

A 'land transaction' is defined in section 43 as the 'acquisition' of a 'chargeable interest'.

1.1.1. Chargeable interests

(Section 48)

A chargeable interest is defined in section 48 as:

- any estate, interest, right or power in or over land situated in the UK
- the benefit of any obligation, restriction or condition which affects the value of such an estate, interest, right or power

A chargeable interest includes an equitable interest as well as a legal interest in land. A commonhold interest is a chargeable interest¹ as is a power of appointment over land. Chargeable interests also include interests, rights or powers in or over land as well as estates in or over land, such as easements, profits à prendre and rentcharges. Wayleaves (the right to put pipes or cables over another's land) are contractual rights and not interests in land. Common examples of easements are rights of way, rights of light, and rights of support. Examples of profits à prendre are pasture rights and rights to hunt or fish.

A rentcharge is a sum of money, payable either annually or biannually, which is a charge on land. A rentcharge is usually created in a conveyance or transfer. The party selling the land reserves an annual rent payable to him and his successors in title, which is charged on the land sold. A rentcharge is usually perpetual but can also be for a term of years (terminable). A rentcharge can affect freehold or leasehold estates. If it affects a leasehold estate it will always be terminable².

Where a major interest in land is acquired together with a interest or right pertaining to it, that is treated as one land transaction.³ The acquisition of freehold land with the benefit of a restrictive covenant preventing development on adjoining land would be an example of this.

'Land' includes buildings and structures and land covered by water.⁴

The 'UK' means England, Wales, Scotland and Northern Ireland.⁵ The boundary of 'land situated in the UK' is the low-water mark of the coastline of the UK.⁶ It does not cover the bed of the territorial sea but piers, jetties and similar structures attached to the UK as defined are part of the UK for this purpose.⁷

The benefit of an obligation, restriction or condition is a chargeable interest provided that it affects the value of an estate, interest, right or power in or over land in the UK. Hence the grant, assignment, variation or release of such an obligation, restriction or condition for

¹ See SDLTM00285

² See Land Registry Practice Guide 56 at paragraph 2.1

³ Section 43(6) A 'major interest' is defined in section 117(2) (in relation to England and Wales) as a fee simple absolute or a term of years absolute at law or in equity. The definitions applying to Scotland and Northern Ireland are in section 117(3) and (4) respectively.

⁴ Section 121

⁵ Schedule 1 Interpretation Act 1978.

⁶ *Argyll & Bute DC v. Secretary of State for Scotland* [1976] S.C. 248

⁷ See judgement of Technology and Construction Court in *Staveley Industries t/a EI WHS v. Odebrecht Oil and Gas Services* (2001) in which it was held that structures which are, or are to be founded in the seabed below the low water mark are not structures forming part of the land.

consideration is a land transaction. An example would be the grant or release of a covenant which did not amount to an equitable interest in land because it did not run with the land of the covenantor in equity.

Certain interests are exempted from being chargeable interests by section 48(2). Currently these are:

- a security interest⁸
- a tenancy at will⁹
- an advowson¹⁰, franchise¹¹ or manor¹²
- a licence to use or occupy land¹³

FA 2007 provides¹⁴ that where a financial institution has provided an alternative property finance product falling within the scope of sections 71A, 72 or 72A any subsequent dealing in the interest held by the institution or in any interest derived from it, will be exempt from SDLT. The new provision will apply where the effective date of the dealing is on or after 22 March 2007.

The Treasury has a general power to make regulations exempting other interests from being chargeable interests.¹⁵

1.1.2. What is meant by the 'acquisition' of a chargeable interest?

If an interest is not a chargeable interest there is no obligation to make a land transaction return in respect of its acquisition. Where a chargeable interest is acquired, there is a land transaction for SDLT purposes.¹⁶

Section 43(2) provides that there will be a land transaction however the acquisition is effected - whether by act of the parties, court order or operation of law. This means that the acquisition need not be contractual or involve formal documentation – the surrender of a lease by operation of law would be an 'acquisition' for this purpose.

Her Majesty's Revenue & Customs (HMRC) have confirmed that the vesting of property on registration of a society under the Industrial and Provident Societies Act 1965¹⁷ is not a land transaction and so no SDLT is chargeable.¹⁸

⁸ Defined as any interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation (section 48 (3)).

⁹ Paragraph 1 Schedule 17A (introduced by FA 2004) includes a tenancy at will in the definition of 'lease' however the express exclusion in section 48(2)(c)(i) should override this and keep tenancies at will outside the SDLT regime.

¹⁰ An advowson is the right in perpetuity to present a new vicar to a parish.

¹¹ A franchise is defined as a grant from the Crown, such as the right to hold a market or fair or take tolls (section 48(3)).

¹² A manor is the interest held by a lord of the manor.

¹³ But allowing entry onto land pursuant to a licence may amount to 'substantial performance' of a contract and trigger a charge to SDLT under section 44 –see 1.3 below.

¹⁴ By inserting section 73B (Exempt interests) in FA 2003 with effect from 22 March 2007

¹⁵ No regulations have been made to date.

¹⁶ A deed of rectification may result in the acquisition of a chargeable interest by a party to it – see examples at SDLTM00305.

¹⁷ On registration any property previously vested in any person on trust for the society becomes vested in the society.

¹⁸ SDLTM31610

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Section 43(3) provides that 'acquisition' includes the creation, surrender, release or variation of a chargeable interest, with the person who benefits from the creation, surrender,¹⁹ release or variation being the person making the acquisition and the other party being the person making the disposal. This ties in with section 43(4) which provides that references to the 'purchaser' and 'vendor', in relation to a land transaction, are to 'the person acquiring and the person disposing of the subject-matter of the transaction'.²⁰

So the grant of a right of way or entry into a restrictive covenant will be the creation of a chargeable interest and in such a case the SDLT charge will fall on the person entitled to the interest created. The release of a restrictive covenant (resulting in an owner of land being able to do something which the covenant would have prohibited) will give rise to the acquisition of a chargeable interest and the SDLT charge will fall on the person who benefits from the release.

SDLTM00270 confirms that 'acquisition' does not include the case where an interest is reserved or excepted from a conveyance to a third party by the transferor²¹, even where a reservation operates, for conveyancing purposes, as a re-grant.

The variation of a lease is treated as an acquisition and disposal where it takes effect as, or is treated for SDLT purposes as, the grant of a new lease or the provisions of paragraph 15A Schedule 17A apply.²² If the lease was varied within the first five years to increase the rent (which would be treated as the grant of a new lease by reason of paragraph 13 Schedule 17A) or to extend the term or increase the extent of the premises (which takes effect in law as a surrender and re-grant) this variation could therefore give rise to an SDLT charge. Paragraph 15A applies to treat reductions in rent or term and any other variation of a lease for consideration (other than an increase in rent) as acquisitions of chargeable interests.

The exercise of a break clause in a lease is not the acquisition of a chargeable interest because it does not cause a surrender or release of the interest²³.

1.1.3. Effective date

(Section 119²⁴)

The effective date of a transaction is important as it is the date from which the 30 which the rate of tax applicable to the transaction is to be determined as well as the date at which the applicability of various of the reliefs from SDLT is tested.

The 'effective date' of a transaction is determined in accordance with section 44 and is normally the date that the land transaction is completed. There are exceptions to this:

¹⁹ The 'purchaser' would be the landlord (as he is acquiring the chargeable interest which is the subject of the land transaction) even when he is paid by the tenant to accept the surrender. In the case of a reverse premium paid on surrender there will be no 'chargeable consideration' so no SDLT will be due. The reverse surrender will fall within paragraph 1 Schedule 3 and will not be notifiable.

²⁰ These expressions apply even if there is no consideration for a transaction but a person cannot be a purchaser unless he has given consideration for a transaction or is a 'party to' it (section 43(5)).

²¹ For example, the reservation of easements or covenants on a sale of the freehold.

²² Section 43(d) as amended by section 297(2) FA 2004 in relation to transactions with an effective date on or after 22 July 2004.

²³ *Pennel v Payne CA* [1995] 2 All ER 592 as expressly approved in *Barrett v Morgan* HL [2000] 2 AC 264

²⁴ As amended by F(No.2)A 2005 to allow HMRC to prescribe an alternative date to completion by regulations

- 1) Where a contract has been made and is 'substantially performed' without being completed the effective date is the date on which the contract is substantially performed.²⁵
- 2) Where a land transaction consists of the grant of an option or a right of pre-emption the effective date is the date on which such rights are acquired, not when they are exercised;²⁶ and
- 3) The special rules for the effective date in:
 - section 44A(3) (contract providing for conveyance to third party)
 - section 45A(8) (contract providing for conveyance to third party: effect of transfer of rights)
 - paragraph 12A(2) Schedule 17A (agreement for lease substantially performed without being completed)
 - paragraph 12B(3) Schedule 17A (assignment of agreement for lease occurring after agreement substantially performed), and paragraph 19(3) Schedule 17A (missives of let etc in Scotland followed by substantial performance).

1.2. SDLT on conveyancing contracts and completions

While an SDLT charge will arise whether or not the acquisition is effected by an instrument, section 44 makes special provision for the application of SDLT where there is a contract²⁷ which is to be completed by a conveyance²⁸ to effect the land transaction.

A land transaction in which exchange of contracts is followed by completion by conveyance is taxed as a single land transaction, with the 'effective date' being completion (section 44(3)). In such a case, entering into the contract is not regarded as entering into a land transaction (section 44(2)).

1.3. Substantial performance – the charge to SDLT – no more 'resting on contract'

(Section 44 and paragraph 12A Schedule 17A)

Where there is an exchange of contracts under which a land transaction is to be completed by a conveyance and the contract is 'substantially performed' without at that time being completed,²⁹ the contract is treated as if it were the land transaction provided for in the contract with the date of substantial performance as the effective date (section 44(4)). There are therefore potentially two land transactions in such a case – the first being substantial performance and the second being the conveyance. This rule also applies to conditional contracts.

The inclusion of substantial performance as the trigger for a deemed land transaction in these circumstances is intended to prevent a form of avoidance common under the old stamp duty regime, known as 'resting on contract', where parties would exchange contracts, the purchaser taking possession under the contract, and defer completion for a long period thus avoiding stamp duty until such time as completion occurred. In the period between contract and completion the vendor would hold the legal title as trustee for the buyer and often the legal title would end up directly or indirectly under the purchaser's control. Resting on contract for stamp duty purposes no longer achieved savings with effect from 25 July 2002 in

²⁵ Section 44(4)

²⁶ Section 46(3)

²⁷ 'Contract' for the purposes of section 44 includes any agreement (section 44(10)).

²⁸ 'Conveyance' for the purposes of section 44 includes any instrument (section 44(10)).

²⁹ Completion for the purposes of section 44 means 'completion of the land transaction proposed, between the same parties, in substantial conformity with the contract' (section 49(10)).

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cases where the consideration exceeded £10 million as it was counteracted by section 115 FA 2002, yet the device continued in a variety of different forms.

‘Substantially performed’ means that either the purchaser or a person ‘connected with’ the purchaser³⁰ ‘takes possession’ of the whole or substantially the whole of the ‘subject matter’ of the contract (the ‘taking possession test’) or a ‘substantial amount’ of the consideration is paid or provided (the ‘payment test’).³¹

Suppose that a contract is substantially performed before it is completed by a conveyance. Substantial performance would be a notifiable transaction which will trigger the liability both to submit a land transaction return and to pay any SDLT due. The contract is subsequently completed. It may be thought that there are no further compliance obligations, especially if no further consideration is paid. However, both the contract and completion of it are notifiable transactions, although SDLT is due on completion only to the extent (if any) that the SDLT chargeable on completion exceeds the SDLT paid on the contract (section 44(8)).

It should therefore not be assumed that where no further consideration is due (and no more SDLT payable) there are no more compliance obligations. A land transaction return must nevertheless be delivered or the penalty provisions for failure to submit a return may bite.

If the contract is substantially performed before completion and there is a subsequent conveyance, SDLT is payable on the conveyance only to the extent that it exceeds the SDLT on the contract – in other words, SDLT is chargeable only once on the same consideration³². As section 44(4) deems the contract which is substantially performed to be the transaction provided for in the contract, the charge on substantial performance will always be on the entire consideration payable under the contract leaving nothing further to be charged on completion, unless the purchaser gives additional consideration not provided for in the contract, or the conditions for a relief are fulfilled at the time of substantial performance but not at completion.

Notification: substantial performance followed by completion

There are different HMRC practices for dealing with cases where a further land transaction return needs to be made because an agreement or contract that has been previously notified on substantial performance needs to be notified again on completion³³.

If the agreement is for the transfer of a freehold or the assignment of an existing lease, the completion land transaction return (form SDLT1) should be sent to Birmingham Stamp Office with a covering letter and a copy of the original land transaction return relating to substantial performance.

If the agreement is for the grant of a new lease, the grant of the new lease is treated as a completely separate transaction from the notional lease (notification on substantial performance), using the surrender and re-grant mechanism with overlap relief. A Code L

³⁰ Section 44(5)(a) as amended by paragraph 1 of the Schedule to the Stamp Duty and Stamp Duty Land Tax (Variation of the Finance Act 2003) (No. 2) Regulations 2003 (SI 2003/2816) The Stamp Duty and Stamp Duty Land Tax (Variation of the Finance Act 2003) (No. 2) Regulations 2003 were revoked by paragraph 14(2) Schedule 39 FA 2004 and in this respect replaced in the same form by Part 2 Schedule 39 with effect for any transaction of which the effective date is on or after 22 July 2004. The section 839 ICTA definition of ‘connected’ applies (see SDLT Glossary in Section Nine).

³¹ Section 44(5)(b) (based on the wording in section 115 FA 2002 which referred to ‘the whole, or substantially the whole, of the intended consideration [having] been paid or transferred’).

³² Section 44(8)(b)

³³ See ‘Where to send your SDLT paper work’ available at <http://www.hmrc.gov.uk/so/mctu.htm>

SDLT1 and SDLT4 need to be submitted in the normal way; either by submitting online or if using paper forms, to the Rapid Data Capture Centre, Netherton.

If overlap relief resulted in nil rent being entered on the grant of lease, and there was no additional premium over and above what had been notified in the notional lease, there would be the grant of a lease for no chargeable consideration. This means a SDLT60 could be used for the grant.

1.3.1. Substantial performance – the taking possession test

It is not clear whether ‘possession’ in this context bears its technical land law meaning (extended where necessary by the specific provisions of the SDLT legislation) or its every day meaning. On balance, giving ‘possession’ a technical meaning would seem the more appropriate; in the words of Lord Hoffmann in *MacNiven v. Westmoreland Investments Limited*,³⁴ it ‘is a purely legal concept – a commercial man, asked what it means would say ‘You had better ask a lawyer’. However, subsequent decisions of the courts, notably *Barclays Mercantile Business Finance v. Mawson* and *Scottish Provident Institution v. Revenue and Customs Commissioners* have moved away from Lord Hoffman’s ‘legal/commercial’ dichotomy as a valuable distinction in giving words a meaning.

‘Taking possession’ is obviously not the same as having an entitlement to possession nor is it the same as being ‘in possession’.³⁵ Whether a person has taken possession will be a question of fact. In *Marsden v. Miller and Others* [1992], a case which turned on whether the plaintiff had ever had possession of certain disputed land, the Court of Appeal expressed the test in the following way:

‘It is well-established that in order to obtain or retain possession of land both a mental element and a factual element are requisite. The factual element must involve an appropriate degree of physical control. The mental element, the so-called *animus possidendi*, must consist of an intention to take possession to the exclusion of all others.’³⁶

If the landowner retains control over the premises in a manner inconsistent with the purchaser’s right to possession (for example, by requiring a purchaser to make detailed access arrangements with the landlord’s building contractor, who is still carrying on works elsewhere in the building) the purchaser’s presence in the premises would not amount to ‘possession’ and consequently would not be substantial performance.

If the purchaser is already in possession before the date of the contract, for example, as a sitting tenant or licensee, then he does not ‘take’ possession under that contract so this would not amount to substantial performance of the contract.³⁷

Simply going onto the land would not amount to taking possession for this purpose. However, section 44(6) provides that it is immaterial whether possession is taken under the contract or under a lease or licence of a temporary nature. To trigger a charge, the possession taken must be of the chargeable interest which is to be acquired under the contract. A purchaser of, say, a 21 year lease of vacant land who enters onto that land for the purpose of carrying out fitting-out works pursuant to a licence would not normally be regarded as having taken ‘possession’ of the leasehold interest as his possession in such a case is not to the

³⁴ [2001] UKHL 6, [2001] 1 AC 311

³⁵ In *Wallrock v. Equity and Law Life Assurance Society* [1941] 2 KB 82 the Court of Appeal remarked that ‘in the absence of a clear context, the words ‘take possession’ are suitable only to the case of physical things.’

³⁶ 64 PCR [1992] at page 242-3

³⁷ See SDLTM07900

exclusion of the rights of the legal owner, rather it is pursuant to the licence. The effect of section 44(6) is therefore unclear.

The possession must be of 'the whole or substantially the whole' of the 'subject-matter' of the land transaction. The subject-matter of the land transaction is defined in section 43(6) as the chargeable interest acquired (the 'main subject matter') together with any interest or right appurtenant or pertaining to it that is acquired with it and it is possession of this interest (and not the land subject to it) which must be taken by the purchaser or a person connected with him to constitute substantial performance.

'Possession' includes the receipt of rents and profits or the right to receive them.³⁸ Therefore in the case of a land transaction involving the reversion to a tenancy, an entitlement to receive rent before completion, provided that it related to the whole or substantially the whole of the interest acquired, would amount to possession. In this respect condition 5.2.2(e) of the Standard Conditions of Sale³⁹ may give rise to a problem as it is in the following terms:

Occupation by buyer

5.2. The buyer is a licensee and not a tenant. The terms of the licence are that the buyer:...

5.2.2....

(e) is entitled to any rents and profits from any part of the property which he does not occupy."

Conversely, the payment of rent before completion of the contract would, in the case of a land transaction which consisted of the grant of a lease,⁴⁰ trigger a charge to SDLT under the payment test of substantial performance (see below). This is distinct from the taking possession test, for example, where an agreement for lease allowed the tenant to enter the property before the grant of the lease under a licence but required him to pay a licence fee. This may amount to substantial performance under the taking possession test.

The example given in the HMRC Stamp Duty Land Tax Manual ('SDLTM') is not particularly illuminating:⁴¹

"Contracts and substantial performance: Purchaser takes possession FA03/S44(5)(a)

A contract will be substantially performed where the purchaser obtains 'the keys to the door' and is entitled to occupy the property (however this is documented) or when the purchaser of a building that is let becomes entitled to receive the rents. "

1.3.2. Substantial performance – the payment test

A 'substantial amount of the consideration is paid or provided':

- if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;
- if rent is the only consideration, when the first payment of rent is made;
- if the consideration includes both rent and other consideration, when the whole or substantially the whole of the consideration other than rent is paid or provided or the first payment of rent is made.

(section 44(7))

³⁸ Section 44(6). This wording follows the wording of section 205(1)(xix) Law of Property Act 1925.

³⁹ 4th Edition

⁴⁰ I.e. in a case where the rent was all or part of the 'chargeable consideration' for the land transaction (which in the case of an assignment it would not be).

⁴¹ SDLTM07900

SDLTM07950 gives HMRC's view of what 'the whole or substantially the whole' means for the purposes of section 44(7):

'Substantially the whole means an amount equal to or greater than 90% of the total consideration due under the contract unless the circumstances of the transaction are such that in substance the whole of the consideration has been paid or provided.

Such a case might be an arrangement where a contract dated January 2004 provides for the purchase of a property with a market value of £10 million and provides for payment of £15 million with £10 million payable now and the balance in 2099'.

The intention is, in part, to prevent the payment of a deposit which is normally 10% of the purchase price in the case of a residential transaction, triggering a charge on the contract.

1.3.3. Substantial performance – the charge

If the provisions of section 44(4) and (5) are read together with the associated definitions, the charging provision in relation to a contract which is performed before it is completed is as follows:

"If before a contract or agreement for the land transaction has been completed between the same parties and in substantial conformity with its terms:

- 1) the purchaser or any person connected with the purchaser takes possession of the whole or substantially the whole of the chargeable interest to be acquired by that contract or agreement; or
- 2) in a case where none of the consideration for the land transaction is rent, the whole or substantially the whole of the consideration is paid or provided; or
- 3) in a case where rent is the only consideration, the first payment of rent is made; or
- 4) in a case where the consideration includes both rent and other consideration:
 - a) the whole or substantially the whole of the consideration other than rent is paid or provided; or
 - b) the first payment of rent is made
 whichever happens first

then the contract or agreement is treated for SDLT purposes as if it were the land transaction provided for in the contract."

Substantial performance - effective date

The effective date of the transaction is the date when the contract is substantially performed and this may result in an obligation to file a land transaction return and pay any SDLT before the date of completion.

Where the contract is later completed, both the contract which has been substantially performed and the subsequent conveyance are 'notifiable', and further SDLT may be payable to the extent that the SDLT chargeable on completion is greater than that paid on the earlier effective date (section 44(8)). This rule also applies where there is a part subsale, in relation to the part which is not sub-sold, as if that part were the subject of a separate contract.

Where an exchange takes place and is taxed under section 44(4) as a result of substantial performance, but the contract is rescinded or annulled or its terms are not, for any other reason, carried into effect then the appropriate proportion of any SDLT levied is to be refunded (section 44(9)). In order to obtain the refund it is necessary to make a claim by amending the land transaction return made in respect of the substantial performance of the contract. However, this can only be done within 13 months of the effective date.

1.3.4. Substantial performance – agreement for lease

(Paragraph 12A Schedule 17A):

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An agreement for lease does not give rise to a charge to SDLT unless the agreement is substantially performed before the lease is granted. Similar rules to those in section 44 apply to prevent 'resting on contract' in the case of agreements for lease.

Where an agreement for lease is entered into and is 'substantially performed'⁴² without at that time being completed, a notional lease is deemed to have been granted, in accordance with the agreement, for a term beginning on the date on which the agreement for lease was substantially performed. The end of the term of the notional lease is the date when the actual lease will end, if that is known. If the term of the actual lease is unknown (for example, because it will be ten years from the date of completion of the actual lease), then the notional lease is to be treated as a lease for an indefinite term and the rules in paragraph 4 of Schedule 17A will apply⁴³. The deemed grant may give rise to an obligation to submit a land transaction return.

Where a lease is later granted in pursuance of the agreement which has earlier been substantially performed, this is treated for the purposes of paragraph 9 Schedule 17A (overlap relief on surrender and re-grant) as a surrender and re-grant and overlap relief is available⁴⁴. From 19 July 2006⁴⁵, the agreement for lease and the lease executed pursuant to it are not within the successive linked leases provisions⁴⁶.

On the grant of an actual lease pursuant to a substantially performed agreement for lease, Box 17 on the land transaction return ('start date as specified in lease') should show the start date of the actual lease. Box 20 ('annual starting rent') should show the full rent payable under the actual lease and not simply the amount left after deducting the rent declared on the land transaction return for the notional lease. As neither Box 17 nor Box 20 is used to compute the NPV⁴⁷ this will not affect the charge to SDLT which will take into account overlap relief.

The question arises whether any premium for the lease might be taxed twice – once as a premium for the notional lease and again as a premium for the actual lease. The draft lease chapter of the SDLT Manual (April 2007 version) states⁴⁸:

"In cases where a premium is payable, the premium is only subject to tax once. It is a question of fact whether the premium was paid as consideration for entering into the agreement or as consideration for the lease being granted. The purchaser must report the transaction accordingly"

There are provisions similar to those in section 44(9) to deal with annulments and rescissions of the agreement for lease

1.3.5. Contract providing for conveyance to a third party

(Section 44A)⁴⁹

⁴² This has the same meaning as in section 44.

⁴³ See **Error! Reference source not found.** below

⁴⁴ See 1.8 below and see also examples in the draft lease chapter of the SDLT Manual (April 2007) at SDLTM17015 and SDLTM17020

⁴⁵ The date from which the provision (in section 12A(3) Schedule 17A) was amended by paragraph 4 Schedule 25 FA 2006

⁴⁶ In paragraph 5 Schedule 17A – see **Error! Reference source not found.** below

⁴⁷ The NPV (Net Present Value) calculation is considered in detail at **Error! Reference source not found.** below. Broadly, the rent payable under a lease is taxed by reference to the NPV of each yearly amount of rent that will become payable under the lease if it runs its full course.

⁴⁸ At SDLTM17010

The charge to SDLT extends to transactions where a purchaser, typically a developer, enters into a contract requiring the vendor to convey the property to a third party at the purchaser's direction. If there is substantial performance of that contract before it is completed then a charge to SDLT arises and the original purchaser is liable for the tax.

Section 44A provides:

- 1) Where a contract is entered into under which one party (A) is to convey a chargeable interest 'at the direction or request' of the other party (B) to:
 - (a) a third party (C) or
 - (b) either to B or C
 (a 'section 44A contract'); and
 - 2) that section 44A contract is substantially performed,
- then B is treated as having acquired a chargeable interest and, accordingly, as having entered into a land transaction, the effective date of which is the date the section 44A contract is substantially performed.

A section 44A contract is not in itself a land transaction but is charged to SDLT only when it is substantially performed (in the same way as a contract which is to be completed by a conveyance to B). Entry onto the land by B pursuant to the section 44A contract would amount to substantial performance. It is the consideration given or to be given by B that is charged to SDLT once substantial performance occurs.

The substantial performance rule in section 44 is disapplied (except for the purposes of determining *when* substantial performance has occurred⁵⁰) in relation to a section 44A contract unless that contract is completed by a conveyance to B (and not by a conveyance direct to C at the direction of B)⁵¹. In practice the disapplication of section 44 in such a case makes no difference as the charge under section 44A operates in the same way. Unlike section 44, section 44A continues to apply if the contract provides for A to grant leases and is not affected by paragraph 12A of Schedule 17A.⁵²

If all or part of the land is in fact conveyed to B under the section 44A contract, section 44 applies so that a charge to SDLT arises on the earlier of substantial performance or completion⁵³. Section 44 also applies to a contract between B and C which is to be completed by a conveyance from A to C.

There are provisions (similar to those in section 44(9)) dealing with repayment of SDLT in a case when a section 44A contract is rescinded or annulled after substantial performance has taken place.

'Contract' and 'conveyance' are defined in the same manner as in section 44.

Substantial performance of a section 44A contract gives rise to a duty to notify the land transaction.

To avoid a liability for SDLT under section 44A, a developer must ensure that the contract is a genuine building contract and that he is not entitled or committed to direct the landowner to

⁴⁹ Inserted by paragraph 4 Schedule 39 FA 2004 and applies in relation to any contract entered into after 17 March 2004.

⁵⁰ Section 44A(5)

⁵¹ Section 44A (4)-(6)

⁵² See 1.3.4 above

⁵³ Section 44A(6)

sell to nominated third parties. In practice this may be difficult, as landowners will want the developer to have the responsibility for finding purchasers and may want the developer to undertake to buy the development or any part of it which is unsold after a specified time.

Examples:

- 1) A contracts with B that B will build a residential development on land owned by A and market the development. A agrees to transfer the residential units to purchasers found by B in exchange for consideration of £1 million. B pays a deposit of £100,000 to A. B goes into possession of the land and begins the development. At this point, B will be chargeable to SDLT on £1 million, being the amount payable to A. Once the development is completed A transfers the residential units to the purchasers nominated by B. Each residential purchaser to whom A makes a transfer will also be liable for SDLT on his acquisition.
- 2) A contracts with B that B will build a residential development on land owned by A and receive a fee equal to his development costs plus a profit share. A is to market the development and transfer the completed units to the purchasers it identifies. B is not liable for SDLT on his fee as he is merely acting as contractor. Each purchaser to whom A makes a transfer will be liable for SDLT on his acquisition.

Relief on assignment or subsale of a section 44A contract

Section 45A gives relief from a double charge to SDLT where a section 44A contract is the subject of a transfer of rights before it is substantially performed. Section 45A is dealt with at 1.4.4 below.

Background to introduction of section 44A

A 'building licence' structure was a fairly standard arrangement in contracts to sell commercial property and was seen as avoidance by HMRC. The explanatory notes to the Finance Bill 2004 set out the purpose behind what became section 44A as follows:

"Paragraph 4 makes provision for where a contract (a 'section 44A contract') is entered into whereby one party to the contract (B) has the right to direct a conveyance to himself or to a third party (C). An example is a development agreement where the developer has the right to enter on the land and build on it and then direct the conveyance of the completed plots. The new provisions put it beyond doubt that such a contract is charged to SDLT when it is substantially performed (in the same way as a contract which is to be completed by a conveyance to B (a 'section 44 contract')). They also ensure that it is the consideration that is given or is to be given by B that is charged to SDLT once substantial performance occurs."

The Financial Secretary to the Treasury made the following statement during the Finance Bill 2004 Committee Stage debate in the House of Commons on 26 April 2004⁵⁴:

"... new section 44A is there to ensure that SDLT is not avoided, especially in commercial transactions, by disguising what is in substance the purchase of land for development as a non-land transaction, often described as a 'building licence' ...

Concern has been expressed about the interaction between new section 44A and existing section 44, dealing with contracts to be completed by a conveyance. I reassure the hon. Gentleman that section 44 remains the primary charging section where contracts for land transactions are substantially performed. In particular, the fact that a normal contract for sale includes a provision permitting the contracting purchaser to nominate someone else to take the conveyance does not take the contract out of section 44 into section 44A.

⁵⁴ Hansard 28 April 2004 : Cols 915 to 916

The hon. Gentleman mentioned the fact that section 44A may catch a contractor. I believe that it will not. It should not catch a person who genuinely acts only as an agent.”

Before the introduction of SDLT, a typical transaction between a developer and a landowner would be carried out pursuant to a development agreement under which the developer had the right to enter on the land and develop it (as licensee) and then have the completed development conveyed to himself or as he directed. The price payable to the landowner would normally include a share of the developer’s profit. The land was developed and once a purchaser was found the developer directed the landowner to transfer the land direct to the purchaser. Stamp duty was chargeable on the price paid by the purchaser.

After the introduction of SDLT the above structure would give rise to a double charge to tax – the developer would be liable for SDLT on the price paid to the landowner and the purchaser would be liable for SDLT on the price he paid for the acquisition of the completed development.⁵⁵ To avoid this result, and in the absence of section 44A, the transaction could be restructured as the grant by the landowner of a non-exclusive licence to the developer to go onto land to construct a development for £x (the developer’s profit) – this would not be a land transaction for SDLT purposes so £x would not be chargeable to SDLT. The landowner would then sell to a purchaser found by the developer (or the developer would sell as the landowner’s agent) and SDLT would be payable on the sale price. A double charge to SDLT on £x would have been avoided and SDLT deferred until the development was sold.

By inserting section 44A HMRC wished to eliminate a grey area where building agreements could have been outside the scope of SDLT so section 44A imposes a charge where section 44 would not (or might not). The Minister’s reassurance set out above can be taken to mean that where section 44 and section 44A might both apply, section 44 will take precedence.

1.4. Subsales and assignments of rights under contracts

(Sections 44, 45 and 45A)

A subsale is where there is a contract for the sale of land, but before the contract is completed, the same land is sold on (possibly more than once) and the land is transferred by the original vendor directly to a sub-purchaser or to the ultimate sub-purchaser. The same result can be achieved by the purchaser assigning his rights under the original contract to a third party.⁵⁶

Under the old stamp duty regime, duty was charged on a subsale by reference only to the price paid by the sub-purchaser or ultimate sub-purchaser who took a conveyance.⁵⁷ Under the SDLT regime, all the transactions in a subsale chain are in principle chargeable. However provided that the original contract is not substantially performed or completed other than as part of the subsale the relieving provisions of section 45 (which are discussed in detail below) apply.

The basic rule for SDLT purposes is that if A contracts to sell land to B, and B contracts by way of subsale with (or assigns his contract with A to) C then, provided that the A/B contract has not been substantially performed, the transfer to C is the only land transaction for SDLT purposes, and SDLT is payable by C by reference to the consideration paid by C to A and/or B.

⁵⁵ Subsale relief is not available as the developer substantially performed the contract before the transfer of the land to the purchaser – see 1.4 below.

⁵⁶ In such a case, the original contract remains in existence and the original purchaser retains the burden of it vis-à-vis the original seller.

⁵⁷ By reason of section 58(4) and 58(5) Stamp Act 1891 unless the consideration under the contract exceeded £10 million (section 115 FA 2002).

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Where the A/B transaction is relieved there is no need to file a land transaction return (and claim relief) in respect of it – it is only necessary to file a land transaction return for the transfer to C. This is borne out by the Land Registry internal guidance⁵⁸:

“2.10 Subsales

If you are processing a subsale, you need not concern yourself with the intervening transaction.

For example, [A] enters into a contract to sell land to [B]; the contract is not substantially performed and [B] either assigns the benefit of that contract to [C] or enters into a sub-contract to sell the land to [C]. On completion, the land is transferred from [A] to [C]. There is only need for one SDLT certificate (which, in this example, could show either [A] or [B] as the vendor, with [C] being shown as the purchaser).

The position is the same if the first contract is for the grant of the lease and the second is for the assignment of that lease.

It is not essential that only one transfer be used (in the example above, the parties being [A] and [C]). Two transfers, or a lease and transfer, can be used, provided they take effect at the same time.”

HMRC have confirmed that a double conveyance structure can also qualify for relief under section 45⁵⁹ (and therefore generate only one charge to SDLT⁶⁰), where the A/B contract is completed by the transfer to B, followed immediately⁶¹ by the completion of the B/C contract by the transfer to C, provided that there is no prior act of substantial performance by B⁶². This might be of use where B does not wish A to know the price at which he has sold on to C or that he has sold on to C at all.

Where a subsale is effected by a double conveyance C will need to submit the SDLT certificate (in respect of the transfer to him) to the Land Registry together with the two transfers and confirm that the conditions for relief under section 45 apply (i.e. that the sale and subsale were completed ‘simultaneously’). The Land Registry accepts applications on this basis.

1.4.1. Subsales and assignments of rights: the provisions in detail

Section 45 applies where:

- 1) a contract⁶³ for a land transaction (the ‘original contract’) is entered into which is to be completed by a conveyance,⁶⁴
- 2) there is an assignment, subsale or other transaction (a ‘transfer of rights’) which relates to all or part of the subject matter of the original contract as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him; and

⁵⁸ NP6

⁵⁹ In spite of the fact that section 45(1)(b) requires that a person other than the original purchaser (C) ‘becomes entitled to call for a conveyance to him’.

⁶⁰ This would not have been the case under the old stamp duty regime when completion by an intermediate purchaser would have been fatal to a claim for subsale relief.

⁶¹ Section 45(3) requires the original contract to be completed ‘at the same time as and in connection with’ the substantial performance or completion of the secondary contract.

⁶² See SDLTM1080

⁶³ ‘Contract’ for the purposes of section 45 includes any agreement (section 45(7)).

⁶⁴ ‘Conveyance’ for the purposes of section 45 includes any instrument (section 45(7)).

3) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.⁶⁵

Where these conditions are satisfied, the 'transferee'⁶⁶ is not regarded as entering into a land transaction by reason of the transfer of rights but section 44 has effect in accordance with section 45. Section 45(3) provides that section 44 is to apply as if there were a contract for a land transaction (a 'secondary contract') under which:

- 1) the transferee is the purchaser; and
- 2) the consideration for the transaction is:
 - (a) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person 'connected' with him,⁶⁷ and
 - (b) the consideration given for the transfer of rights.

The actual contract giving rise to the transfer of rights (the B/C contract) is then ignored as it is superseded by the deemed secondary contract.

Where section 45(3) applies, substantial performance or completion of the original contract (the A/B contract) 'at the same time as, and in connection with', the substantial performance or completion of the deemed secondary contract will be disregarded – in such a case, the provision is a relieving one. However, if, before completion or substantial performance of the transfer of rights, the original contract is substantially performed (for example, by the original purchaser (B) going into possession) then SDLT is chargeable in respect of the original contract (and the transfer of rights) and no relief is available. The relief can also apply where there is a chain of subsales or assignments.⁶⁸

Although section 45(3) deems there to be a secondary contract under which the transferee is the purchaser it does not identify the vendor under that contract.⁶⁹ For the purposes of the relief for transfer between associated companies *only*⁷⁰ the vendor under the secondary contract is deemed to be the original purchaser (A) but for all other purposes, references to the vendor mean either the vendor under the original contract or the transferor.⁷¹

The provision⁷² that the consideration for the deemed acquisition by the sub-purchaser includes not only the consideration given by him but also any consideration under the original contract given by a person connected with him prevents the avoidance of SDLT through the subsale by the original purchaser at a loss to a connected person (see Example 3 below).

⁶⁵ See 1.4.5 below.

⁶⁶ There is no definition of 'transferee' in the provisions but it is taken to mean the person to whom a 'transfer of rights' (as defined) is made – there may, therefore, be more than one transferee

⁶⁷ The definition in section 839 ICTA applies – the section is reproduced in full in Section Nine.

⁶⁸ Section 45(4)

⁶⁹ It would therefore seem open to the transferee to show either A or B as the seller on the land transaction return and it is Land Registry practice to accept this.

⁷⁰ See 1.4.3 below

⁷¹ Section 45(5A)(b)

⁷² In section 45(3)(b)(i)

Examples - subsale:⁷³

- 1) A contracts to sell land to B for £650,000 and B pays A a deposit of £65,000. B contracts by way of subsale with (or assigns his contract with A to) C, an unconnected third party, for £680,000 and receives a deposit of £68,000. C then completes the original contract in B's place and pays A the balance of £585,000 due under that contract and B the balance of £27,000 due to him. A conveys the land to C. The acquisition by C is the only land transaction for SDLT purposes, and SDLT is payable by C by reference to the consideration paid by C, £680,000.
- 2) A contracts to sell land to B for £650,000 and B pays A a deposit of £65,000. The property market weakens and B runs into financial difficulties forcing him to sub-sell the land at a loss to C, an unconnected third party, for £600,000. C pays B a deposit of £60,000. C then pays B the balance of £540,000 and A conveys the land to C (after B has paid A the outstanding sum of £585,000 pursuant to the A/B contract). The acquisition by C is the only land transaction for SDLT purposes, and SDLT is payable by C by reference to the consideration paid by C, £600,000, notwithstanding that A has received £650,000.
- 3) The facts are as in Example 2 but B and C are connected. The acquisition by C is the only land transaction for SDLT purposes, and SDLT is payable by C by reference to the consideration given by B and C, to A, £650,000.

Section 45(3) was amended by F(No. 2)A 2005⁷⁴ to except from its relieving effect any case where the secondary contract gives rise to a transaction that is exempt from SDLT by virtue of section 73(3) (alternative property finance: land sold to financial institution and resold to individual).

Where there are successive transfer of rights, the provisions of section 45(3) apply to each such transfer and the substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as and in connection with the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights will be disregarded.

1.4.2. Subsale of part

Section 45(3) applies where there is a contract for the sale of land between A and B, B sub-sells or assigns to C and the sale to C is completed by a transfer from A without earlier substantial performance of the contract between A and B. In such a case there is no charge to SDLT on the A/B transaction. Section 45(5)⁷⁵ clarifies how this relief works when only part of the land subject to the A/B contract is transferred to C (after subsale or assignment by B) by deeming there to be two separate A/B contracts, one relating to the part transferred to C and one to the balance of the subject matter of the original contract. The price due under the original contract is then apportioned between the sub-sold part and the balance of the land subject to the original contract and the relief applies where appropriate. No basis for the apportionment is laid down but the examples in SDLTM01110a apportion the original price on the basis of area.

The rule in section 44(8) which prevents a further charge on the later completion of a contract which has been substantially performed (except to the extent that the tax chargeable on completion exceeds the tax chargeable on substantial performance) can also apply where there is a partial subsale. In such a case, section 45(5)(a) provides that section 44(8)(b) applies as if the reference to the amount of tax chargeable on the contract was a reference to an

⁷³ There are other examples of the operation of the rules at SDLTM01090a and SDLTM01110a.

⁷⁴ Section 49 and paragraph 2 Schedule 10 with effect for any transaction with an effective date after 19 May 2005.

⁷⁵ As amended by paragraph 5 Schedule 39 FA 2004 with effect for any transfer of rights occurring after 17 March 2004.

'appropriate proportion' of that amount⁷⁶. This is an anti-avoidance provision designed to stop the exploitation of subsale relief in respect of part of the land by allocating a disproportionate amount of the consideration to the sub-sold portion of the land and not completing in relation to the balance..

Example – subsale of part⁷⁷ :

A contracts to sell 10 acres of land to B for £650,000 and B pays A a deposit of £65,000. B contracts to sub-sell 2.5 acres of the land to C, an unconnected third party, for £250,000 and receives a deposit of £25,000. C then pays B the balance of £225,000 due to him, and B pays A the balance of £585,000 due under the original contract. A conveys the land directly to B as to the 7.5 acres and to C as to the 2.5 acres. The original contract between A and B is treated as two A/B contracts, one in relation to 7.5 acres at a price of £487,500 and the second in relation to 2.5 acres at a price of £162,5000. SDLT is payable by B by reference to the price paid by B for 7.5 acres, £487,500 and by C by reference to the consideration paid by C for 2.5 acres, £250,000. The linked transactions rules⁷⁸ do not apply as B and C are not connected.

1.4.3. Subsals and corporate groups

Where the parties to a transfer of rights are part of the same corporate group then the sub-purchaser or assignee (C) cannot claim group relief⁷⁹ in respect of that transaction.

The reason for not allowing group relief in this situation (on the B/C transaction) is that the transfer of rights provisions would present an avoidance opportunity where B and C were members of the same group, enabling the land to be transferred from A into the B/C group without payment of SDLT. The intra group transfer from B to C could have been used as a way of 'franking' the tax on the first leg of the transaction with the result that there would have been no SDLT charge for B, as the completion of the A/B contract by means of the transfer from A and B's payment of the outstanding purchase price would be disregarded by virtue of section 45(3). There would be no SDLT for C because group relief was claimed on the basis that the 'vendor' was B and not A.

Section 45(5A) therefore provides that, for the purposes of group relief, references to the 'vendor' are to be read as references to the vendor under the original contract (A) and not the selling group member (B).⁸⁰

Examples – subsals involving group companies:

1) A contracts to sell land to B Limited for £650,000 and B Limited pays A a deposit of £65,000. B Limited contracts by way of subsale with (or assigns his contract with A to) C Limited, a company in the B Limited group, for £680,000 and receives a deposit of £68,000. C Limited then completes the original contract in B Limited's place and pays A the balance of £585,000 due under that contract and B Limited the balance of £27,000. A conveys the land to C Limited. The acquisition by C Limited is the only land transaction

⁷⁶ 'Appropriate proportion' is not defined but apportioning the tax on the basis of area would be consistent with the approach taken by HMRC in other cases where the phrase is used but not defined – see examples at SDLTM01110a

⁷⁷ There are other examples of the operation of the rules at SDLTM01110a.

⁷⁸ See **Error! Reference source not found.** below

⁷⁹ Section 45(5A) inserted by paragraph 5 Schedule 39 FA 2004 with effect for any transfer of rights occurring after 17 March 2004

⁸⁰ Inserted by paragraph 5(4) Schedule 39 FA 2004 with effect for any transfer of rights occurring after 17 March 2004

for SDLT purposes, and SDLT is payable by C Limited by reference to the consideration paid by C Limited, £680,000.

- 2) The facts are as in Example 1 but B Limited enters into possession of the land before completion in order to begin work on the land. A month later A transfers the land direct to C Limited and C Limited pays. In this case there will be a two SDLT charges – the first on the A/B Limited transaction (as the A/B contract will have been substantially performed other than by a conveyance to C Limited) and the second on the B Limited/C Limited transaction (which will be deemed to take place at market value⁸¹ and which will not benefit from group relief⁸²). The double charge could have been avoided by B Limited completing the original contract and then transferring the land to C Limited (as C Limited could then claim group relief) or by B Limited delaying entry onto the land until after A had transferred the land to C Limited (when subsale relief would be available)

1.4.4. Contract providing for conveyance to third party: effect of transfer of rights

(Section 45A⁸³)

Where there is a 'section 44A contract'⁸⁴ and there is an assignment or other transaction in respect of all or part of the subject matter of that contract (the 'transfer of rights') with the result that another person (D) becomes entitled to exercise any of B's rights under the original contract, the transfer of rights (the B/D transaction) is not, of itself, chargeable. Section 44A applies in such a case as if:

- 1) D had entered into a contract with A (the 'secondary contract') in the same terms as the A/B contract: and
- 2) the consideration under the secondary contract were:
 - (a) so much of the consideration under the original contract as is referable to the transfer of rights and is to be given by D (or a person connected with D); and
 - (b) the consideration for the transfer of rights.

The substantial performance of the A/B contract is disregarded if it occurs 'at the same time as and in connection' with substantial performance of the secondary contract or it occurs after the transfer of rights.

In contrast to section 45, the definition of 'transfer of rights' in section 45A does not expressly include a subsale. However the Explanatory Notes to the Finance Bill 2004 state that section 45A is intended to make 'provision similar to that for section 44 contracts in section 45' and there seems to be no reason in principle why subsales of section 44A contracts should be excluded.

As with section 44A, section 45A applies to successive transfers of rights in relation to all or part of the original subject matter. There are similar provisions relating a transfer of rights in relation to part of the land⁸⁵ and also preventing D claiming group relief in respect of the B/D transaction.⁸⁶

⁸¹ As B Limited and C Limited are connected companies and section 53 applies

⁸² Because of section 45(5A)

⁸³ Inserted by paragraph 5 Schedule 39 FA 2004 with effect for any transfer of rights taking place after 17 March 2004

⁸⁴ A section 44A contract is one under which one party (A) is to convey a chargeable interest 'at the direction or request' of the other party (B) to a third party (C) or either to B or C – see 1.3.5 above.

⁸⁵ In section 45A(7)

⁸⁶ In section 45A(9)

Example of the operation of section 45A:

A contracts with B under which B will build a residential development on land owned by A and market the development. A agrees to transfer the homes to purchasers found by B in exchange for consideration of £1 million. B pays a deposit of £100,000 to A. Before the A/B contract is substantially completed B assigns his rights under it to C Limited, a development company, for £200,000. C Limited goes into possession and begins the development. C Limited will be chargeable to SDLT on £1.1 million, being the £200,000 paid to B and the £900,000 paid to A. No SDLT is payable by B. Each purchaser (to whom A makes a transfer) will also be liable for SDLT on his acquisition.

1.4.5. Assignment of agreement for lease

(Paragraph 12B Schedule 17A)

Paragraph 12B applies to the exclusion of section 45 where the interest of a lessee under an agreement for lease is assigned. The effect is however the same as if section 45 applied.

If the assignment occurs before substantial performance of the agreement for lease then section 44 has effect as if the contract (the agreement for lease) were with the assignee and not the assignor (the 'notional contract'). Any consideration for entering into the assignment will be treated as consideration for the notional contract in addition to the consideration due under the agreement for lease.

If the assignment occurs after substantial performance (which would itself have triggered an effective date for an SDLT charge) then the assignment is treated as a separate land transaction, that is to say, it is treated as an assignment of a notional lease, the effective date of which is the date of the assignment. The grant of the lease to the assignee will then be treated as the surrender by the assignee of the notional lease in exchange for the grant of the actual lease which is treated as a re-grant for SDLT purposes.⁸⁷

Paragraph 12B applies to each assignment where there are successive assignments.

1.5. Assignment of lease treated as grant of lease(Paragraph 11 Schedule 17A)⁸⁸

If the grant of a lease is exempt from charge as a result of certain specified provisions (listed below) then the first assignment of that lease that is not exempt under any of the same provisions and in relation to which the assignee does not acquire the lease as bare trustee of the assignor is treated for SDLT purposes as if it were the grant of a lease by the assignor. This is an anti-avoidance rule intended to prevent reliefs being used as a conduit to pass the lease on tax-free to a purchaser who would not be entitled to the relief if the lease were granted directly.

The specified provisions are:

- (a) section 57A (sale and leaseback arrangements – see **Error! Reference source not found.** below);
- (b) Part 1 or 2 Schedule 7 (group relief or reconstruction or acquisition relief – see **Error! Reference source not found.** below);
- (c) section 66 (transfers involving public bodies – see **Error! Reference source not found.** below);
- (d) Schedule 8 (charities relief – see **Error! Reference source not found.** below);

⁸⁷ See 1.3.4 above.

⁸⁸ As re-enacted in amended form by Part 2 Schedule 39 to FA 2004 with effect for transactions with an effective date on or after 22 July 2004 and as amended by F(No.2)A 2005 with effect from 20 May 2005 (subject to transitional provisions)

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(e) any such regulations as are mentioned in section 123(3) (regulations reproducing in relation to SDLT the effect of enactments providing for exemption from stamp duty).⁸⁹

Paragraph 11 does not apply where the lease was exempted from stamp duty by equivalent provisions.

Where paragraph 11 applies, the first assignment is treated for SDLT purposes as a grant of a lease to the assignee for a term equal to the unexpired term of the original lease, and on the same terms as those on which the assignee holds that lease after the assignment. Tax is then payable by the assignee in the normal way on the deemed grant (in addition to the charge on any actual consideration given for the assignment). The provisions of paragraph 12 of Schedule 17A (assignment of lease: responsibility of assignee for returns etc.) dealt with at **Error! Reference source not found.** below will not apply.

The provision does not apply where the relief in question is group relief, reconstruction or acquisition relief or charities relief and the relief is withdrawn as a result of a disqualifying event occurring before the effective date of the assignment of the original lease, so that tax has been paid on the original grant before the assignment takes place.

A 'disqualifying event' means:

- (a) in relation to the withdrawal of group relief, the purchaser ceasing to be a member of the same group as the vendor within the meaning of paragraph 3(1)(a) Schedule 7⁹⁰;
- (b) in relation to the withdrawal of reconstruction or acquisition relief, the change of control of the acquiring company mentioned in paragraph 9(1)(a) Schedule 7 or the event mentioned in paragraph 11(1)(a) or (2)(a) Schedule 7;
- (c) in relation to the withdrawal of charities relief, a disqualifying event as defined in paragraph 2(3) Schedule 8.

As there is no time limit on the application of paragraph 11 it could cause problems for an unwary assignee where the chargeable assignment is a long time after the original transaction on which relief was claimed.

1.6. Chargeable transactions

(Section 49 and Schedule 3).

Every land transaction is a chargeable transaction unless it is exempted from charge. Identifying chargeable transactions is important because the SDLT charge bites on the chargeable consideration for a chargeable transaction.

Schedule 3 exempts from charge:

- transactions where there is no chargeable consideration,
- grants of leases by housing associations,
- transactions in connection with divorce,
- assents and appropriations by personal representatives, and
- the variation of testamentary dispositions.

Each of these is discussed in more detail at 1.6.1 to 1.6.5 below. The Treasury has power to add further exemptions by regulation. Certain other transactions are not subject to SDLT by virtue of the provisions relating to reliefs.⁹¹

⁸⁹ No regulations have been made to date.

⁹⁰ Taking into account the effect, if any, of paragraph 4A Schedule 7 – see paragraph 11(5)(a) as amended by F(No.2)A 2005 where the effective date of the relevant transaction (within the meaning of paragraphs 3 or 4A Schedule 7) is after 19 May 2005

⁹¹ See **Error! Reference source not found.** below

Where the transaction is exempted from charge under Schedule 3 it does not have to be notified on the land transaction return but self-certification is required (see **Error! Reference source not found.** below). The exemptions from charge in Schedule 3 mirror some of the categories for exemption from fixed duty by certification set out in the Stamp Duty (Exempt Instruments) Regulations 1987.⁹² There are no fixed duties under SDLT.

1.6.1. Transactions for no chargeable consideration

(Paragraph 1 Schedule 3)

Land transactions for which there is no chargeable consideration are exempt from SDLT. Gifts, dispositions of property to beneficiaries under a trust in accordance with the terms of that trust, and most acquisitions by operation of law are exempt from the charge to SDLT pursuant to this provision. Distributions in specie fall within this provision provided that there is no consideration (such as the giving of an indemnity)⁹³.

Where the disposition is deemed to be for a consideration equal to the market value of the interest acquired, the exemption in paragraph 1 Schedule 3 is disapplied.⁹⁴ The exemption is also disapplied where the provisions of paragraphs 10, 14, 17 and 18 of Schedule 15 apply.⁹⁵

1.6.2. Grants of certain leases by registered social landlords

(Paragraph 2 Schedule 3)

Where a 'registered social landlord' grants a lease which is either an indefinite term or terminable by notice of a month or less to one or more individuals, that transaction is exempt from the charge to SDLT. The exemption only applies if the lease is granted pursuant to arrangements entered into between the registered social landlord and a housing authority whereby the landlord provides accommodation for individuals nominated by the authority.

A 'registered social landlord' is defined in section 121 as:

- in England and Wales, a body registered as a social landlord in a register maintained under section 1(1) of the Housing Act 1996;
- in Scotland, a body registered in the register maintained under section 57 of the Housing (Scotland) Act 2001;
- in Northern Ireland, a housing association registered in the register maintained under article 14 of the Housing (Northern Ireland) Order 1992.⁹⁶

Housing authority is defined⁹⁷ as:

⁹² SI 1985/7516

⁹³ See *Laird Group v. IRC* [2003] STC 1358 per Lord Millett at paragraph 37:

"[37] Once realised the assets of a company in liquidation are a distributable fund in the hands of the liquidator, who no longer needs funds with which to carry on its undertaking. After the creditors have been paid and the amounts credited as paid up on the shares have been repaid, the balance is distributable to the ordinary shareholders because it belongs to them, subject only to the liquidator's discretion to retain sufficient funds in his hands to enable him to complete the winding up. The distribution of the undistributed profits of a company in liquidation to its shareholders is not a transaction relating to securities because neither the shares themselves nor the rights attached to them are affected by a payment which merely gives effect to the shareholders' rights; they receive only what is already theirs. Distributions are made to shareholders in respect of the shares, but the shares of the individual shareholder are nothing more than the measure of the proportion of the total which is due to him."

⁹⁴ Section 53(4)

⁹⁵ Paragraph 25 Schedule 15. These provisions apply to partnership transactions – see **Error! Reference source not found.** below.

⁹⁶ SI 1992/1725 (NI 15)

⁹⁷ Paragraph 2(3) Schedule 3

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- (a) in England and Wales, a principal council within the meaning of the Local Government Act 1972 or the Common Council of the City of London
- (b) in Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994
- (c) in Northern Ireland, the Department for Social Development in Northern Ireland, or the Northern Ireland Housing Executive

1.6.3. Transactions in connection with divorce

(Paragraph 3 Schedule 3)

A transaction between one party to a marriage and the other is exempt from the charge to SDLT if it is effected:

- 1) in pursuance of an order of a court made on granting in respect of the parties a decree of divorce, nullity of marriage or judicial separation;
- 2) in pursuance of an order of a court made in connection with the dissolution or annulment of the marriage, or the parties' judicial separation, at any time after the granting of such a decree;
- 3) in pursuance of:
 - a) an order of a court made at any time under section 22A, 23A or 24A of the Matrimonial Causes Act 1973 or
 - b) an incidental order of a court made under section 8(2) of the Family Law (Scotland) Act 1985 by virtue of section 14(1) of that Act; or
- 4) at any time in pursuance of an agreement of the parties made in contemplation or otherwise in connection with the dissolution or annulment of the marriage, their judicial separation or the making of a separation order in respect of them.

With effect from 5 December 2005 this exemption was extended to include transfers between civil partners in connection with the dissolution or annulment of a civil partnership or the legal separation of the civil partners.⁹⁸

1.6.4. Assents and appropriations by personal representatives

(Paragraph 3A Schedule 3)⁹⁹

The acquisition of property by a person in or towards satisfaction of his entitlement under or in relation to the will of a deceased person or on intestacy is exempt from the charge to SDLT. The exemption applies even if consideration is given by a beneficiary in the form of the assumption of 'secured debt'.

'Secured debt' is defined in paragraph 3A(4) as debt which was secured on the property immediately after the death of the deceased (for example, a mortgage not paid off on death). 'Debt' means an obligation whether certain or contingent, to pay a sum of money either immediately or at a future date.

Where the beneficiary gives any other form of consideration, then the transaction is both notifiable and chargeable. In such a case, the chargeable consideration is to be determined without including any secured debt assumed.¹⁰⁰

⁹⁸ A new paragraph 3A was included in Schedule 3 by regulation 174 Tax and Civil Partnership Regulations 2005 (SI 2005/3229).

⁹⁹ Inserted by section 300 FA 2004 and deemed always to have had effect.

¹⁰⁰ Paragraph 8A(1) Schedule 4 as inserted by section 301(2), 301(5) and 301(7) FA 2004 and deemed always to have had effect

SDLT and inheritance tax planning schemes

There is a potential charge to SDLT which could affect planning strategies currently used to minimise inheritance tax on the death of a surviving spouse. The schemes work by the surviving spouse providing 'funds' to set up a nil-rate band discretionary trust in the deceased spouse's estate, in return for receiving the deceased's share of the family home. The 'funds' are provided by the surviving spouse giving an IOU equal to the amount of the nil-rate band (the 'debt scheme') or by the executors creating a charge (the 'charge scheme') over the assets in the residuary estate, including the share in the family home, in return for payment on demand from the surviving spouse of a sum equal to the nil-rate band for inheritance tax purposes.

Paragraph 3A does not apply to exempt a land transaction if the person acquiring the property gives any consideration for it, other than the assumption of secured debt. Whether the exemption applies would depend, for the debt scheme, on whether the IOU by the surviving spouse represented the assumption of secured debt. If not, SDLT could arise on an assent by the executors vesting the deceased spouse's interest in the family home in the surviving spouse.

Under paragraph 8 Schedule 4, the assumption of a personal liability by a person to whom land is transferred is chargeable consideration for SDLT purposes. HMRC's view is that it is not legally possible for a surviving spouse to receive the interest in the family home which is subject to the charge, without assuming personal liability for the debt secured by the charge. If so, in the case of the charge scheme, the assent would be chargeable to SDLT, unless it could be argued that the secured debt exemption applied. The difficulty is that in most cases, the charge is not secured immediately after the death of the deceased.

HMRC's views on the SDLT treatment of the commonest examples of such schemes is set out at SDLTM04045

- 1) The nil-rate band discretionary trustees accept the surviving spouse's or civil partner's promise to pay in satisfaction of the pecuniary legacy and in consideration of that promise land is transferred to the surviving spouse or civil partner.

The promise to pay is chargeable consideration for SDLT purposes.

- 2) The nil-rate band discretionary trustees accept the personal representatives' promise to pay in satisfaction of the pecuniary legacy and land is transferred to the surviving spouse or civil partner in consideration of the spouse or civil partner accepting liability for the promise.

The acceptance of liability for the promise is chargeable consideration for SDLT purposes. The amount of chargeable consideration is the amount promised, not exceeding the market value of the land transferred.

- 3) Land is transferred to the surviving spouse or civil partner and the spouse or civil partner charges the property with payment of the amount of the pecuniary legacy. The nil-rate band discretionary trustees accept this charge in satisfaction of the pecuniary legacy.

The charge is money's worth and so is chargeable consideration for SDLT purposes

- 4) The personal representatives charge land with the payment of the pecuniary legacy. The personal representatives and nil-rate band discretionary trustees also agree that the trustees have no right to enforce payment of the amount of the legacy personally against the owner of the land for the time being. The nil-rate band discretionary trustees accept this charge in satisfaction of the legacy. The property is transferred to the surviving spouse or civil partner subject to the charge.

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There is no chargeable consideration for SDLT purposes provided that there is no change in the rights or liabilities of any person in relation to the debt secured by the charge.

1.6.5. Variations of testamentary dispositions etc.

(Paragraph 4 Schedule 3)¹⁰¹

A transaction following a person's death which varies a disposition (whether effected by will, under the law relating to intestacy, or otherwise) of property of which the deceased was competent to dispose, is exempt from the charge to SDLT if the following conditions are met:

- 1) the transaction is carried out within the period of two years after a person's death
- 2) no consideration in money or money's worth other than the making of a variation of another such disposition is given for it.

Where any other form of consideration is given the transaction is both notifiable and chargeable. In such a case, the chargeable consideration is to be determined without including any consideration consisting of the making of a variation of another such disposition.¹⁰² This means that both the variation and the vesting of the deceased's asset in the substituted beneficiary are exempt from the charge to SDLT.

This exemption mirrors the relief from inheritance tax in section 142(3) IHTA 1984.

Where no consideration is given the transaction will be exempt under paragraph 1 Schedule 3.

1.7. Chargeable consideration

(Section 50 and Schedule 4)

Unless the deemed market value rule applies (see section 1.7.12 below), the chargeable consideration is:

- the consideration given¹⁰³ by the purchaser or a person 'connected with' the purchaser
- directly or indirectly
- in money or money's worth
- for the 'subject-matter' of the land transaction

and is inclusive of any VAT chargeable in respect of the land transaction.¹⁰⁴

There are special rules in Schedules 5 and 17A which apply to determine the SDLT charge where the chargeable consideration consists of or includes rent (see **Error! Reference source not found.** below).

A peppercorn is not regarded as chargeable consideration (either as rent or premium).¹⁰⁵

The payment by the buyer, or a person connected with him, of the vendor's costs would normally be chargeable consideration.¹⁰⁶

¹⁰¹ As amended by section 301(1) and 301(7) FA 2004 and deemed always to have had effect

¹⁰² Paragraph 8A(2) Schedule 4 as inserted by section 301(2), 301(5) and 301(7) FA 2004 and deemed always to have had effect.

¹⁰³ 'Consideration' involves the principle of reciprocity or mutuality of contractual obligations (*Glenrothes Development Corporation v. IRC* [1994] STC 74).

¹⁰⁴ Paragraphs 1 and 2 Schedule 4. The definition of 'connected' in section 839 ICTA applies.

¹⁰⁵ SDLTM11010 (April 2007 draft)

¹⁰⁶ Unless one of the exclusions discussed at 1.7.9 below applies or a separate supply to the buyer is arranged – for example, considering or supplying draft documentation, especially if undertaking given to pay costs whether or not the transaction does proceed

The 'subject-matter' of a land transaction is defined in section 43(6) as the chargeable interest acquired together with any interest or right appurtenant or pertaining to it that is acquired with it.

The definition of chargeable consideration is important as SDLT is payable on the full amount of the chargeable consideration within 30 days of the effective date even if payment of all or part of it is to be made at a later date (paragraph 3 Schedule 4).

1.7.1. **Consideration - effect of VAT**¹⁰⁷ (Paragraph 2 Schedule 4)

Chargeable consideration includes any VAT payable in respect of a land transaction.¹⁰⁸ Where an election to waive the exemption from VAT takes effect after the effective date of a transaction, any VAT that subsequently becomes payable does not constitute chargeable consideration.

VAT payable in respect of rent but which is not reserved as rent will not be rent for SDLT purposes and, as for stamp duty, will be taxed as consideration other than rent. Accordingly, the total VAT payable over the term of the lease will be chargeable, except where the lease exceeds 12 years, when the amount charge will be limited to the total of the 12 highest annual payments by reason of section 52¹⁰⁹.

If, following an HMRC ruling, it is confirmed that VAT is chargeable in respect of a land transaction and the purchaser has not included the VAT element of the purchase price in their SDLT1, the purchaser will be required to amend their land transaction return under the provisions of paragraph 6 Schedule 10. Any additional SDLT due on the VAT element should be accounted for with their amendment.

Alternatively if as a result of HMRC's ruling it is confirmed that VAT is not chargeable in respect of a transaction and the purchaser had included the VAT element of the purchase price in his SDLT1, the purchaser will be required to amend their land transaction return under the provisions of paragraph 6 Schedule 10 and request a refund of the overpaid SDLT.

1.7.2. **Apportionment of consideration** (Paragraph 4 Schedule 4)

The legislation allows for an apportionment to be made on a 'just and reasonable' basis where consideration is attributable:

- to two or more land transactions
- in part to a land transaction and in part to another matter
- in part to matters making it chargeable and in part in part to matters that are not (such as chattels)

Where there is, in substance, one bargain, any consideration given is to be treated as attributable to all elements of the bargain even in a case where separate consideration has been given for different elements or where there are separate transactions in respect of different elements of the bargain.

Fixtures and chattels

The same general legal principles which applied in relation to chattels for stamp duty purposes also apply to SDLT. For an item to be regarded as a fixture or part of the land

¹⁰⁷ See SDLTM03800

¹⁰⁸ This means that the effective date of SDLT is increased even where the VAT is recoverable – for example the 4% rate increases to an effective rate of 4.7%.

¹⁰⁹ See 1.7.11 below

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(chargeable to SDLT), as opposed to a chattel or personal property (not chargeable), the item must, normally, be annexed to the property. The issue then turns on the degree and purpose of the annexation, with greater emphasis being placed (in the more recent cases) on purpose. Where a purchaser agrees to buy a property for a price which includes an amount properly attributed to chattels, that amount will not be charged to SDLT.

A sale of growing crops may be a sale of either an interest in land or of chattels. If the sale is of the crop when growing, it may nevertheless be a sale of chattels if the crop is cultivated (*fructus industriales*), whether the crops are in a state of maturity or not.¹¹⁰

Where a price is paid partly for a land transaction and partly for a non-land transaction such as the purchase of chattels, and the price is apportioned on a just and reasonable basis, as provided for in Schedule 4 paragraph 4, the apportionment of the purchase price may well be one of the aspects of the SDLT1 into which HMRC will make enquiries. They may also make enquiries into cases where a deduction has been made for chattels to confirm that those items properly fall within the definition of chattels.¹¹¹

The following are, however, confirmed as being items that will normally be regarded as chattels:¹¹²

- carpets (fitted or otherwise)
- curtains and blinds
- free standing furniture
- kitchen white goods
- electric and gas fires (provided that they can be removed by disconnection from the power supply without causing damage to the property)
- light shades and fittings (unless recessed)

On the other hand, the following will not normally be regarded as chattels:

- fitted kitchen units, cupboards and sinks
- Agas and wall mounted ovens
- fitted bathroom sanitary ware
- central heating systems
- intruder alarm systems

Externally any plants, shrubs or trees growing in the soil form part of the land and are not regarded as chattels. A deduction would, however, be possible for amounts properly apportioned to any plants growing in pots or containers.

The same principles apply when considering the purchase of industrial or commercial property where the sale may also involve the acquisition of plant, machinery or equipment. An apportionment for capital allowances will not necessarily be acceptable for SDLT purposes.

Goodwill

The exclusion of goodwill from the charge to stamp duty by section 116 FA 2002 does not apply to SDLT therefore if the goodwill is an inherent part of a land transaction it will be chargeable. In other cases the goodwill will not and an apportionment will be necessary.

¹¹⁰ *Duppa v Mayo* (1669) 1 Wms Saunders 275; *Marshall v Green* (1875) 1CPD 35. See Halsbury's Laws Vol 1(2) at paragraph 706

¹¹¹ SDLTM4010

¹¹² SDLTM4010

In *Whiteman Smith Motor Co. Ltd v. Chaplin*¹¹³ Maugham LJ described inherent goodwill as follows:¹¹⁴

“The only kind of goodwill which can be in addition to the value of the premises in the hands of the landlord is that kind which has become attached to the premises, irrespective of their position, and which would naturally be reflected in a higher rent payable by a person carrying on a similar business. It may be greatly diminished if the tenant is able to obtain premises in the neighbourhood ... Whilst it is obvious that profits due to the reputation of the proprietor or to the personal skill or ability of the persons or the assistants employed in the business must be excluded, it should be pointed out that there is not necessarily any such goodwill as that referred to in the last paragraph, even if the personal goodwill is excluded, since that which surveyors and referees sometimes call adherent goodwill ... may be largely or wholly due to the custom of persons who come to the premises simply because of their proximity, or because they lie on a line of route which the customers frequent. If the term ‘adherent goodwill’ is used, it is essential to define it. I shall use the phrase, ‘net adherent goodwill’ as meaning the goodwill, if any, which will remain attached to the premises, not including the ‘site goodwill’, that is irrespective of customers who would come to a new tenant, starting a new business, simply because of their convenient situation. In a sentence it is important not to confuse site goodwill, which is inherent, with net adherent goodwill.”

The SDLTM¹¹⁵ refers to the classification of goodwill into three categories set out in HMRC’s Capital Gains Manual.¹¹⁶ However, this classification was criticised by the Special Commissioner in *Balloon Promotions Ltd and Others v. Wilson*¹¹⁷ as ‘over-analytical’. Issues relating to the categorisation of goodwill, or the valuation of goodwill where an apportionment is required, should be referred to the Valuation Office Agency.¹¹⁸

Goodwill which is sold as part of a business sale is likely to be outside the SDLT charge as it will attach to the business rather than the land. However in *Morvic Pty Ltd and Another v Commissioner of State Revenue*¹¹⁹ the taxpayer entered into two contracts to purchase a motel business. One contract was in respect of the land and improvements and the other was for the acquisition of the business, including the goodwill. It was held that the benefit of almost all the goodwill of the business was necessarily transferred upon acquisition of the land leaving the business sale contract was largely redundant. Hence the goodwill under the sale of business contract was assessable together with the conveyance of the land.

Goodwill:- completing the SDLT forms

The guidance notes on completing the SDLT forms read as follows¹²⁰:

“A payment for goodwill that is part of the land is part of the chargeable consideration for SDLT purposes. The price paid for this goodwill should be included in the figure

¹¹³ [1934] 2 KB 34

¹¹⁴ At page 38

¹¹⁵ At SDLTM04005

¹¹⁶ At CG60803 to CG68046

¹¹⁷ SPC 524, [2006] STC (SCD) 167

¹¹⁸ See SDLTM04005

¹¹⁹ [2002] ATC 4459 (an Australian case)

¹²⁰ SDLT6 (Online version - updated to August 2007) at page 33

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shown at question 10 of the SDLT1 where code A, F or O has been entered at question 2.”

Where the land transaction is part of the sale of a business, non-chargeable goodwill should be indicated on form SDLT4 in Box 1 and the amount of the consideration for the sale of the business apportioned to it entered.

1.7.3. Exchanges

(Paragraph 5 Schedule 4)

The legislation specifies how chargeable consideration is to be calculated where land has been exchanged (see 1.9.3 below).

1.7.4. Partition or division

(Paragraph 6 Schedule 4)

Where there is a partition or division of a jointly owned land, the share of the interest held by the purchaser immediately before the partition or division does not count as chargeable consideration for the interest received as a result of the partition¹²¹. In effect, the SDLT charge is limited to an balancing payment¹²².

1.7.5. Consideration - release or assumption of a debt¹²³

(Paragraph 8 Schedule 4)

Where there is the release or assumption of a debt (or the transfer of a property subject to a debt) the debt can constitute chargeable consideration. However a mere increase in the borrowing secured on a property will not have SDLT consequences. There is no assumption of a debt in a case where the debt is inherent in or runs with the property, such as a liability for chancel repairs.

Where the consideration for a land transaction consists in whole or in part of:

- 1) the satisfaction or release of debt due to the purchaser or owed by the vendor (paragraph 8(1)(a)); or
- 2) the assumption of ‘existing debt’ by the purchaser (paragraph 8(1)(b)), the amount of debt satisfied, released or assumed is taken to be the whole or, as the case may be, part of the chargeable consideration for the transaction.

The provision will only not apply in the case of the transfer of property subject to a mortgage if there is neither a release of the vendor (falling within paragraph 8(1)(a)) nor an assumption of liability by the purchaser (falling within paragraph 8(1)(b)).

If the effect would be that the amount of the consideration exceeded the market value of the subject matter of the transaction, the amount of the consideration is treated as limited to that value. This is a change from the position under the stamp duty rules.

‘Debt’ means an obligation, whether certain or contingent, to pay a sum of money either immediately or at a future date.

‘Existing debt’ means debt created or arising before the effective date of, and otherwise than in connection with, the transaction. The taking on of new debt by the purchaser, for the purpose of funding the transaction, is not consideration.

¹²¹ This is discussed in more detail at 1.9.2 below

¹²² See example at SDLTM04030a

¹²³ See SDLTM04040 and SDLTM04040a

References to the amount of a debt are to the principal amount payable or, as the case may be, to the total of the principal amounts payable, together with the amount of any interest that has accrued due on or before the effective date of the transaction. Any principal or interest that has been paid off at the effective date, however, is not 'payable' at that date.

Where:

- 1) debt is secured on the property immediately before and after the land transaction; and
- 2) the rights or liabilities of any party in relation to that debt are changed as a result of or in connection with the transaction,

there is taken to be an assumption of debt by the purchaser falling within paragraph 8(1)(b).¹²⁴ This is an anti-avoidance provision intended to prevent parties temporarily paying off secured debt before property is transferred and reinstating it immediately afterwards.

If there are two or more purchasers or vendors with undivided shares in the property the amount of secured debt treated as assumed is determined on the basis that the proportion of the amount owed by a person corresponds to the share that they own in the property subject to the debt.¹²⁵ For this purpose tenants in common are treated as owning the property in equal shares.¹²⁶

The statutory rules apply even where lenders have required joint and several liability for existing debt.¹²⁷

Examples – release or assumption of a debt:

- 1) Property is transferred by A to the ownership of A and B in equal shares subject to a subsisting mortgage and B assumes liability for all or part of the debt. Notwithstanding B's actual liability B is treated as assuming debt equal to 50% of the amount owing (because he is treated as owing none before the transaction and 50% after it).¹²⁸
- 2) Property is owned by A and B in 70:30 shares and is transferred to the sole ownership of B subject to a subsisting mortgage. Assuming A is released from the debt or B agrees to indemnify A there is an assumption of debt by B, B is treated as assuming debt equal to 70% of the amount owing (because he is treated as owing 30% before the transfer and 100% after it).¹²⁹

Although the rules in paragraph 8(1A) to 8(1C) were said to be introduced (in FA 2004) to mirror the law and practice for stamp duty¹³⁰, they are much wider. The legislation provides that there is an assumption of debt by the purchaser when the 'rights or liabilities' of any party to the transaction in relation to the debt are changed as a result of or in connection with the land transaction. The provision could apply not only where B gives a personal covenant but also where A is released from his personal covenant to creditors, or where B agrees to indemnify A for any liability (other than in respect of a breach of an obligation owed by the

¹²⁴ Paragraph 8(1A) Schedule 4 (introduced by section 301 FA 2004 with effect for any transaction the effective date of which is on or after 22 July 2004).

¹²⁵ Paragraph 8(1B) Schedule 4 (introduced by section 301 FA 2004 with effect for any transaction the effective date of which is on or after 22 July 2004).

¹²⁶ Paragraph 8(1C) Schedule 4 (introduced by section 301 FA 2004 with effect for any transaction the effective date of which is on or after 22 July 2004).

¹²⁷ Confirmed at SDLTM04040

¹²⁸ Paragraph 8(1B) Schedule 4

¹²⁹ Ibid

¹³⁰ See Revenue Press Release of 13 July 2004, 'Stamp Duty Land Tax – transfers of property subject to a debt and variations of testamentary dispositions' for background to the changes

vendor to a third party in relation to the subject-matter of the transaction¹³¹). This could give rise to problems as it could apply in cases where the lender requires commercial changes to a secured loan on the arm's length transfer of the property to which it relates.

The acquisition of property by the beneficiary of a will, or a person entitled under intestacy, including a case where consideration is given by a beneficiary in the form of the assumption of 'secured debt', is exempt from SDLT.¹³²

1.7.6. Consideration - carrying out of works
(Paragraph 10 Schedule 4)

The general rule is that if the carrying out of any works to enhance the value of land (not necessarily the land being acquired) forms part of the consideration for a land transaction, an amount equal to the open market value of those works is taken into account as chargeable consideration for SDLT purposes. This will not apply where the obligation to do the works is inherent in the property acquired, such as an obligation to carry out works pursuant to a planning obligation.

The works need not be carried out on the land which is being sold so, for example, infrastructure works carried out by the purchaser on the seller's land, even if necessary for construction work on the land sold, could give rise to an increased SDLT charge if those works were consideration. Another example where the value of the works would be caught would be where a developer acquires land from a local authority for development and agrees to construct a building on other land owned by the local authority.

Relief for certain works not carried out by the vendor

Paragraph 10 Schedule 4 disapplies the general rule (and so the works are not chargeable consideration) to the extent that three conditions are met. It gives relief in respect of work done pursuant to building leases and certain other works.

The first condition is that the works are carried out after the 'effective date'. This condition prevents relief being available for works carried out before the earlier of substantial performance or completion.

Where there are two notifiable transactions in relation to a land transaction (the first being the contract or agreement and the second being the transaction effected on completion or the grant or execution of a lease), the first condition is treated as met in relation to the second transaction if it was met in relation to the first.¹³³ An example of this would be where there is a contract for the sale of land to a developer to be completed on satisfactory completion of works by the developer, and the developer takes possession before he carries out the works. In such a case, the subsequent completion of the sale after the date the works have been completed is also a notifiable transaction by virtue of section 44(8).

The second condition is that the works are carried out on land acquired or to be acquired under the land transaction or on other land held by the purchaser¹³⁴ or a person connected

¹³¹ Specifically excluded from chargeable consideration by paragraph 16 Schedule 4

¹³² Section 49 and Schedule 3 – see 1.6.4 above

¹³³ Paragraph 10(2A) Schedule 4

¹³⁴ Section 43(4) provides that references to the 'purchaser' and 'vendor', in relation to a land transaction, are to 'the person acquiring and the person disposing of the subject-matter of the transaction'. These expressions apply even if there is no consideration for a transaction but a person cannot be a purchaser unless he has given consideration for a transaction or is a 'party to' it (section 43(5)).

with him. For this purpose a major interest in the land must be acquired.¹³⁵ This condition will be fulfilled in the case of a building lease but will create difficulties where developers merely have the right to direct the conveyance to third parties and who never acquire a major interest in the land which is developed by agreement between the vendor and the developer. Works done on the vendor's or a third party's land are excluded from the relief by this condition.

The third requirement is that it is not a condition of the transaction that the works are carried out by the vendor or a person connected with him. This condition excludes sale-and-build contracts from relief under paragraph 10 but does not mean that works under such contracts will necessarily be chargeable consideration for a land transaction (see below).

The provisions of paragraph 10 are subject to the rules in paragraph 17 Schedule 4 in relation to PFI transactions (see **Error! Reference source not found.** below).

Works carried out by the vendor – sale-and-build

The SDLT legislation does not deal specifically with the case where a landowner enters into an agreement to sell land and also agrees to build on that land at the purchaser's expense.

The question to be determined is whether the transaction is a single contract for the sale of land with a completed building on it or two separate contracts, one for a sale of the land and the other for the carrying-out of the works. If it is the latter, the price paid for the building works,¹³⁶ is not subject to SDLT as it is not consideration for a land transaction. If it is the former, the total amount paid will be chargeable consideration for a single land transaction (land with completed building). The provisions of paragraph 10 Schedule 4 will not affect the position in either case as the paragraph applies only where the whole or part of the consideration for a land transaction 'consists of' the carrying out of works.

The treatment of sale-and-build contracts for stamp duty purposes was considered in the *Prudential Case*¹³⁷ and the principles established in that case apply for SDLT purposes. The facts were that Prudential entered into a sale agreement with two companies (the developers) whereby Prudential agreed to buy a freehold interest in certain land from the developers. On the same day, Prudential and the developers entered into a development agreement. The terms of that agreement provided for the development of offices on the property by the developers in return for which Prudential agreed to pay the developers certain specified building costs. By a deed of transfer of the same date the developers transferred to Prudential the land agreed to be sold. At the date of the transfer, a substantial part of the construction work had already been carried out but there was a considerable amount still to be done.

The sale agreement and the development agreement were negotiated together and were executed simultaneously. There was no intention on the part of either party that one agreement should be entered into unless both were entered into, nor was there any practical possibility of this happening.

HMRC assessed Prudential to stamp duty by reference to the total amount of consideration payable for the sale of the land and all the building works, whether completed or uncompleted at the date of the transfer. They contended that there was a single contract of sale contained in two instruments (the sale agreement and the development agreement) by

¹³⁵ Paragraph 10(3)(a) Schedule 4. A 'major interest' is defined in section 117(2) (in relation to England and Wales) as a fee simple absolute or a term of years absolute at law or in equity. The definitions applying to Scotland and Northern Ireland are in section 117(3) and (4) respectively.

¹³⁶ Arrived where necessary at by apportionment of the consideration for both contracts on a just and reasonable basis as required by paragraph 4 Schedule 4

¹³⁷ *Prudential Assurance Co. Ltd v. IRC* [1992] STC 863

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which Prudential agreed to buy from the developers the land together with the completed office development.

Prudential appealed against that assessment contending that there were two separate contracts, one relating to the sale of land and the other to the building works, and that stamp duty was payable only in respect of the consideration for the sale of the land and the building works completed at the date of the deed of transfer.

The question before the court was to identify the subject-matter of the sale. HMRC's argument in this regard was rejected by the court:

"In the present case the sale agreement and the development agreement and, indeed, the transfer were all part of one transaction in the sense that together they comprised a single package or bargain. ...Clearly the end result intended by the parties was that the land, previously belonging to the developers, would become the property of the taxpayer company together with the new buildings being constructed by the developers. The commercial object of the transaction was that the taxpayer company would acquire a development being carried out for it by the developers with funds provided by the taxpayer company.

... I am unable to characterise the transaction by which that end result was sought to be achieved as a sale of the land with finished buildings thereon. ...

Let me take a simple analogy. A builder agrees to sell an empty plot of land, with immediate completion. At the same time and as part of the same transaction the builder agrees to construct a house on the land for the buyer over the next few months. The Crown's argument involves the proposition that such a transaction is to be characterised as a sale of land and a completed house. That cannot be correct. In many cases a builder will not be prepared to part with title to the land until he has been paid in full both for the land and for the house he has agreed to erect, and the buyer will not be prepared to pay for the land until the house has been finished. Then the conveyance, which will be of the completed house, will attract stamp duty on the overall price. But the transaction negotiated and agreed may be a different one. The builder may be prepared, or may want, to sell and convey the land outright to the buyer before he has carried out the building work and been paid for it; the buyer may be prepared, or may want, to complete his purchase of the land at once and for the future rely on the builder's agreement to build the house. If the transaction takes that form it cannot accurately be described as a sale of a completed house. It is a sale of a plot of land, coupled with an agreement to build. The rights of the parties, and the remedies available to them, are different in the two cases. In the latter case, although commercially there is only one transaction, the price payable for the building works is not properly attributable to the sale of the land. The two contracts form part of one transaction at their inception, but in their performance they are independent of each other. Completion of the sale of the land is not dependent on, or geared to, the due completion of the building works. The sale is of the plot of land at the agreed price, and the consideration payable by the buyer for the subsequent building work is in return for those works and not for the sale of the land.

In my view the present case stands on all fours with the latter example."¹³⁸

Based on the reasoning in the *Prudential Case* it is not necessary that there are two different documents for the cost of the works to escape a charge to SDLT provided that it is clear that there are two independent contracts, one for the sale of the land and the other for the building works.

However HMRC's published view on the matter is as follows:¹³⁹

¹³⁸ Nicholls V-C at pages 868 to 869

“SDLT—sale of land with associated construction, &c, contract

We have been asked how to determine the chargeable consideration for Stamp Duty Land Tax purposes where V agrees to sell land to P and V also agrees to carry out work (commonly works of construction, improvement or repair) on the land sold. Our view is that the decision in *Prudential Assurance Co Ltd v. IRC* applies for the purposes of Stamp Duty Land Tax as it does for stamp duty. This is because the basis of the decision was the identification of the subject matter of the transaction and this is as relevant for Stamp Duty Land Tax as it is for stamp duty.

It follows that SP8/93 will be applied for Stamp Duty Land Tax as it was for stamp duty. The paragraphs on ‘contracts already entered into’ and ‘procedure for submitting documents’ are, however, not relevant to Stamp Duty Land Tax.

Where, however, the sale of land and the construction, &c, contract are in substance one bargain (as they were in the *Prudential* case) there must be a just and reasonable apportionment of the total consideration given for all elements of the bargain in order to arrive at the chargeable consideration for Stamp Duty Land Tax purposes.¹⁴⁰

This view is now reflected at SDLTM04015.

The relevant parts of SP8/93¹⁴¹ provide:

“1. Two Transactions/Two Contracts

Where the purchaser or lessee is entitled under the terms of a contract to a conveyance or lease of land alone in consideration of the purchase price or rent of the site and a second genuine contract for building works is entered into as a separate transaction, the ad valorem duty on the conveyance or lease will be determined by the amount of the purchase price or rent which the purchaser or lessee is obliged to pay under the terms of the first contract. In these circumstances it does not matter whether any building work has commenced at the date of the conveyance or lease. The consideration chargeable to ad valorem duty will still be only that passing for the land.

2. One Transaction/Two Contracts

Where there is one transaction between the parties but this is implemented by two contracts, one for the sale or lease of the building plot and one for the building works themselves, the amount of ad valorem duty charged on the instrument will depend on the amount of the consideration, which in turn will depend on whether those contracts can be shown to be genuinely independent of each other.

- i. If the two contracts are so interlocked that they cannot be said to be genuinely capable of independent completion (and in particular where if default occurs on either contract, the other is then not enforceable) ad valorem duty will be charged on the total consideration for the land and buildings, whether completed or not, as if the parties had entered into only one contract.
- ii. If the two contracts are shown to be genuinely independent of each other, ad valorem duty will be charged by reference to the consideration paid or payable for the land and any building works on that land at the date of execution of the instrument. It follows that,

¹³⁹ On 5 April 2004

¹⁴⁰ This is HMRC’s gloss on the *Prudential decision* – in that case the apportionment made by the parties in the two agreements was accepted by the court. HMRC are referring to the provisions of paragraph 4(3) Schedule 4 which provide for an apportionment on a just and reasonable basis where there is one ‘bargain’

¹⁴¹ 12 July 1993

where the instrument is executed after the building works are completed, ad valorem duty will be charged on the consideration for the land and the completed building(s)."

1.7.7. Consideration - provision of services

(Paragraph 11 Schedule 4)

If the provision of services by or on behalf of the purchaser (other than carrying out of works under the conditions outlined above) forms all or part of the consideration for a land transaction, those services constitute chargeable consideration. The value of that consideration is taken to be the amount that would have to be paid in the open market to obtain the services.

In PFI transactions the provisions of paragraph 11 are subject to the rules in paragraph 17 Schedule 4 (see **Error! Reference source not found.** below).

1.7.8. Land transaction entered into by reason of employment

(Paragraph 12 Schedule 4)

If an employer provides an employee with accommodation, the SDLT treatment will depend on the income tax status of the transaction. The legislation is not helpfully drafted, referring to a 'purchaser' whereas in fact there will be no actual 'purchase' at all, but an arrangement where an employee pays a rent below the market rate (or pays nothing) for accommodation provided by his employer¹⁴². The provisions do not apply where an employee occupies by reason of a licence (not a lease) as giving an employee a licence to occupy is not a land transaction.

Taxable benefit under ITEPA 2003

The legislation states that where a land transaction is entered into by reason of the purchaser's employment, or that of a person 'connected with' him,¹⁴³ and gives rise to a charge to income tax as a taxable benefit under Part 3 of Chapter 5 of ITEPA 2003, and either:

- no rent is payable, or
- any rent payable is less than the cash equivalent of the benefit,

then the purchaser is treated as paying rent equal to the 'cash equivalent' for the purpose of the SDLT charge.

A charge to income tax arises under Part 3 of Chapter 5 of ITEPA 2003, broadly, where any living accommodation is provided for any period during or comprising a tax year to an employee, or to members of his family or household, by his employer. The 'cash equivalent' is treated as earnings for that year unless it is provided in the normal course of domestic, family and personal relationships, or by a local authority under its usual terms for council tenants who are not employees.

A charge to income tax similarly arises where the accommodation is provided by someone other than the employer but 'by reason of' the employment.

The 'cash equivalent' of the provision of accommodation for a period is the 'rental value' of the accommodation for that period less any sum made good by the employee to the person at whose cost the accommodation is provided (normally the employer) and attributable to that provision. The 'rental value' is calculated by reference to an annual rent equal to the annual

¹⁴² See section 43(4) which provides that references to the 'purchaser' and 'vendor', in relation to a land transaction, are to 'the person acquiring and the person disposing of the subject-matter of the transaction'. These expressions apply even if there is no consideration for the transaction but a person is not treated as a 'purchaser' unless he has given consideration for or is a party to the transaction.

¹⁴³ For example, a transfer to an employee's pension fund. The test of 'connected' is that in section 839 ICTA

value of the property ascertained under section 110 ITEPA 2003, which for UK property is equivalent to the gross rateable value. Alternatively, if the person at whose cost the accommodation is provided pays actual rent for the whole or part of the period at an annual rate greater than the annual value, then that actual rent is the rental value for the period (or part).

No taxable benefit under ITEPA 2003

If the transaction would give rise to a charge to income tax but for the provisions of section 99 ITEPA 2003 (accommodation provided is necessary for the proper performance of duties e.g. a flat on-site for a school caretaker), the consideration for SDLT purposes is the actual consideration (if any).

In any other case, (that is, where the land transaction is entered into 'by reason of the purchaser's employment' but the provisions of Chapter 5 of ITEPA 2003 do not give rise to a charge (other than by reason of section 99 ITEPA 2003)), for example, where the employee pays rent equal to or in excess of the cash equivalent of the benefit, the land transaction in question will be treated as taking place at market value at the effective date.

1.7.9. Exclusions from chargeable consideration

The following are specifically excluded from chargeable consideration:

- (a) the giving of an indemnity by the purchaser to the vendor in respect of a breach of an obligation owed by the vendor to a third party in relation to the subject-matter of the transaction - for example, an indemnity against restrictive covenants on the title to the land - and any payment made under such an indemnity (paragraph 16 Schedule 4);
- (b) the liability for, or agreement to pay, or payment of, inheritance tax by the purchaser in respect of a land transaction that is a transfer of value within section 3 IHTA 1984 or is a disposition, effected by will or under the law of intestacy, of a chargeable interest comprised in the estate of a person immediately before his death (paragraph 16A Schedule 4¹⁴⁴);
- (c) the liability for, or agreement to pay, or payment of, CGT by the purchaser in respect of a land transaction under which the chargeable interest is acquired otherwise than by a bargain made at arm's length, or is treated by section 18 TCGA 1992¹⁴⁵ as so acquired, unless, disregarding that liability or payment, there is chargeable consideration for the transaction (paragraph 16B Schedule 4¹⁴⁶);
- (d) costs borne by the purchaser under section 9(4) of the Leasehold Reform Act 1967 or section 33 of the Leasehold Reform, Housing and Urban Development Act 1993 (costs of enfranchisement) (paragraph 16C Schedule 4¹⁴⁷);
- (e) a reverse premium on the grant, assignment or surrender of a lease (paragraph 18 Schedule 17A);
- (f) the assumption by an assignee of a lease of the obligation to pay rent or to perform the tenant's undertakings under that lease (paragraph 17 Schedule 17A);
- (g) undertakings by a tenant on the grant of a lease to:
 - (1) repair, maintain or insure the demised premises (paragraph 10(1)(a) Schedule 17A)
 - (2) pay any amount in respect of services, repairs, maintenance, insurance or the landlord's costs of management (paragraph 10(1)(b) Schedule 17A);

¹⁴⁴ Inserted by the SDLT (Amendment to the Finance Act 2003) Regulations 2006 (SI 2006/875) in relation to land transactions with an effective date on or after 12 April 2006.

¹⁴⁵ Section 18 TCGA 1992 applies where there are transactions between connected persons.

¹⁴⁶ See footnote 144.

¹⁴⁷ See footnote 144.

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- (h) any obligation undertaken by a tenant on the grant of a lease that is not such as to affect the rent that a tenant would be prepared to pay in the open market – i.e. ordinary tenant's covenants in a lease (paragraph 10(1)(c) Schedule 17A);
- (i) any guarantee of the payment of rent or the performance of any other obligation of the tenant under the lease (paragraph 10(1)(d) Schedule 17A)
- (j) any penal rent or increased rent in the nature of a penal rent payable in respect of any breach of the obligations of a tenant under the lease (paragraph 10(1)(e) Schedule 17A;
- (k) any liability of the tenant for costs under section 14(2) of the Leasehold Reform Act 1967 or section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 (costs to be borne by person exercising statutory right to be granted lease) (paragraph 10(1)(f) Schedule 17A¹⁴⁸);
- (l) any other obligation of the tenant to bear the landlord's reasonable costs or expenses of or incidental to the grant of a lease (paragraph 10(1)(g) Schedule 17A¹⁴⁹);
- (m) any obligation under the lease to transfer to the landlord, on the termination of the lease, payment entitlements granted to the tenant under the single payment scheme¹⁵⁰ in respect of land subject to the lease (paragraph 10(h) Schedule 17A¹⁵¹);
- (n) any payment made to discharge any of the obligations referred to in (g) to (m) above (paragraph 10(2) Schedule 17A). This would cover compensation for breach of covenant, such as a dilapidations payment;
- (o) the release of any obligation referred to in (c) to (h) above in relation to the surrender of a lease (paragraph 10(3) Schedule 17A); and
- (p) Where the trustees of a settlement reallocate trust property which consists of chargeable interests, the fact that the beneficiary gives consent to the reallocation does not mean that there is chargeable consideration for the acquisition by him (paragraph 8 Schedule 16¹⁵²).

SDLTM03710 indicates that costs under section 23 Compulsory Purchase Act 1965 and compensation for disturbance and other matters not directly based on the value of land under section 5(6) Land Compensation Act 1961 are not chargeable consideration.

1.7.10. Consideration - contingencies, uncertain or unascertained consideration and adjustments

(Sections 51 and 80)

Where some or all of the consideration for a transaction is contingent¹⁵³, for example, a sum which is payable only if planning permission is obtained within a stated period, section 51 provides that the consideration for SDLT purposes is calculated on the assumption that the outcome of the contingency will be that the consideration is payable or does not cease to be payable, as the case may be. The amount of chargeable consideration is to be determined without any discount for the postponement of the right to receive it.¹⁵⁴

¹⁴⁸ Inserted by the SDLT (Amendment to the Finance Act 2003) Regulations 2006 (SI 2006/875) in relation to land transactions with an effective date on or after 12 April 2006.

¹⁴⁹ See footnote 148

¹⁵⁰ Support for farmers in pursuance of Title III of Council Regulation No 1782/2003

¹⁵¹ See footnote 148

¹⁵² Inserted by section 165 FA 2006 in relation to any acquisition the effective date of which is on or after 19 July 2006 – see **Error! Reference source not found.** below

¹⁵³ Defined in section 51(3) as to be paid (or provided) or to cease to be paid (or provided) if some uncertain future event occurs.

¹⁵⁴ Paragraph 3 Schedule 4

An adjustment is made (under section 80) if the contingency occurs or it becomes clear that it will not occur. In addition, if the contingent element is or may be payable more than six months after the effective date, an application can be made to defer payment of the SDLT on the contingent element of the consideration.¹⁵⁵

Section 51 further provides that where the consideration is uncertain¹⁵⁶ or unascertained¹⁵⁷ at the date of the transaction, for example, where there is an uplift to the consideration based on future increases in the market value of the land (commonly called 'overage'), a 'reasonable estimate' must be made and SDLT paid on that basis.¹⁵⁸ If it were not for section 51 SDLT could be avoided or deferred by ensuring that the consideration cannot be calculated at the time of the land transaction.

If the uncertain element of the consideration is, or may be, payable more than six months after the effective date, an application can be made to defer payment of the SDLT on that element of the consideration. No deferral is possible where the consideration is unascertained or contingent.

When the contingency occurs (or it becomes clear that the contingency will not occur) or the amount payable becomes known, the SDLT consequences of the transaction must be reconsidered.¹⁵⁹ This liability remains even where the original purchaser has disposed of the land.¹⁶⁰

If the effect of the reconsideration is that the transaction becomes notifiable or chargeable or SDLT or additional SDLT is payable then the purchaser must file a land transaction return within 30 days. Interest will run from the effective date of the transaction under section 87 so if the original estimate was an under-estimate, interest will be due.

In accordance with the legislation in force until 19 July 2007 the return had to be accompanied by any tax payable. Legislation was introduced in FA 2007 (taking effect from Royal Assent) amending section 80 so that payment of any SDLT due no longer has to accompany the land transaction return¹⁶¹. The tax is still payable by the filing date for the return.

Where a land transaction return was submitted in respect of the transaction, a further return should be made, in the form of a letter which should state the amendment required to the original land transaction return¹⁶². The further return and any payment of tax should be sent to the Complex Transaction Unit:

Upper Fifth Floor, Royal Exchange
Exchange Street

¹⁵⁵ Pursuant to section 90 - for deferral applications see **Error! Reference source not found.** below.

¹⁵⁶ Defined in section 51(3) as where its amount or value is dependent on 'uncertain future events'. This would cover an amount which is to be paid only if a future event occurs and which is to be calculated by reference to that event. As the amount is unascertainable at the effective date the consideration is uncertain (and not contingent) for the purposes of section 51.

¹⁵⁷ I.e. the amount can be established in theory but this has not yet been done, for example, a price linked to completion accounts which have yet to be drawn up or to acreage which has not yet been measured.

¹⁵⁸ The obtaining of a professional valuation supporting the estimate may be advisable where the costs of doing so would not be disproportionate.

¹⁵⁹ Section 80(1)

¹⁶⁰ Unless the original purchaser is no longer liable to pay the contingent consideration in such circumstances

¹⁶¹ Section 80(2)(d) repealed by section 80 FA 2007 with effect from 19 July 2007

¹⁶² See SDLTM50300

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Manchester
M2 7EB
DX 719821 Manchester 2
Fax: 0161 834 3350

If the effect of the reconsideration is that SDLT has been overpaid it is repaid on a claim being made either by an amendment of the land transaction return or, if more than 12 months from the filing date have elapsed, by making a claim to HMRC.¹⁶³ The amended return or letter of claim should be sent to

Customer Service Office
Birmingham Stamp Office
9th Floor City Centre House
30 Union Street
Birmingham
B2 4AR
DX: 15001 Birmingham 1

The envelope and any letter should be marked 'SDLT'.

Interest may be payable by HMRC, subject to the terms of any successful deferral application.

F(No.2)A 2005 introduced changes to the rules on contingent consideration where there is consideration for the grant or assignment of a lease in the form of a loan or deposit.¹⁶⁴ Sub-paragraph (4A) was inserted in section 80¹⁶⁵ precluding claims for adjustment of the consideration under section 80(4) where:

- 1) there is full or partial repayment of any loan or deposit treated as consideration under paragraph 18A; or
- 2) there is any refund of the consideration for the grant of a lease or assignment of a lease and that refund is contingent on the determination or assignment of the lease or on the grant of a chargeable interest out of the lease.

Variable or uncertain rent¹⁶⁶

Paragraph 7 Schedule 17A deals with cases where rent is variable or uncertain. Where the rent is contingent, uncertain or unascertained, paragraph 7 applies section 51(1) and 51(2) to determine the amount brought into the charge as rent. The provisions of section 80 (adjustment where contingency ceases or consideration is ascertained) do not apply to consideration in the form of rent - similar provisions in paragraph 8 Schedule 17A apply instead.

1.7.11. Chargeable consideration - annuities (Section 52)

Where land transaction is entered into in return for an annuity of a particular type, section 52 provides that the first 12 years of payments only are aggregated and SDLT calculated by reference to that amount. .

¹⁶³ Section 80(4) as amended by section 299(4) FA 2004 with effect from 22 July 2004

¹⁶⁴ See **Error! Reference source not found.** below

¹⁶⁵ By paragraph 15 Schedule 10 F(No. 2)A 2005 in relation to transactions with an effective date after 19 May 2005, subject to transitional provisions in paragraph 16(7) Schedule 10

¹⁶⁶ See **Error! Reference source not found.** below

'Annuity' for the purposes of section 52 includes any consideration (other than rent) which is paid or provided periodically¹⁶⁷. The section applies to an annuity which is:

- payable for life
- payable in perpetuity
- payable for an indefinite period
- payable for a definite period exceeding 12 years

Where payments under such an annuity vary, the 12 highest annual payments are taken. Adjustments by reference to the retail price index ('RPI') are ignored.

Where necessary the amount of any payment is determined by reference to section 51 (contingent, uncertain or unascertained consideration¹⁶⁸) but no adjustment can be made under section 80 when a contingency or uncertain consideration becomes known.. Deferral of tax under section 90 is not available¹⁶⁹.

Section 52 would, for example, apply to determine the consideration in the case of an equity release scheme where an individual sells property to a life insurance company in exchange for the right to live in the property until his death and an annuity for life.

VAT payable in respect of rent but which is not reserved as rent will not be rent for SDLT purposes and, as for stamp duty, will be taxed as consideration other than rent. Accordingly, where the lease exceeds 12 years, section 52 will apply to limit the amount chargeable to the total of the 12 highest annual payments.

1.7.12. Chargeable consideration - deemed market value rule¹⁷⁰ (Sections 53 and 54)

Section 53 provides that where the purchaser¹⁷¹ is a company;¹⁷² and either:

- 1) the vendor is treated as 'connected' with the purchaser for SDLT purposes (using the test of connection in section 839 ICTA),¹⁷³ or
- 2) some or all of the consideration for the land transaction consists of the issue of shares, stock or securities in a company with which the vendor is connected,

then the land transaction will be treated as having taken place for not less than the market value of the property transferred (or, in the case of an acquisition which is the grant of a lease at a rent, the rent)¹⁷⁴ even if there would otherwise be no chargeable consideration.¹⁷⁵ Section 53 therefore operates to increase the chargeable consideration in such a case and would take

¹⁶⁷ For the meaning of periodically see *Blendett v IRC*, *Quietlece v IRC* [1984] STC 95 (CA)

¹⁶⁸ See 1.7.10 above

¹⁶⁹ See **Error! Reference source not found.** below

¹⁷⁰ A similar rule applied for stamp duty purposes – see section 119 FA 2000

¹⁷¹ Section 43(4) provides that references to the 'purchaser' and 'vendor', in relation to a land transaction, are to 'the person acquiring and the person disposing of the subject-matter of the transaction'. These expressions apply even if there is no consideration for a transaction but a person cannot be a purchaser unless he has given consideration for a transaction or is a party to it (section 43(5)).

¹⁷² 'Company' means any body corporate (section 53(3)) and a unit trust scheme is treated as a company for this purpose

¹⁷³ See SDLT Glossary in Section Nine for the full text of section 839

¹⁷⁴ Section 53(1A) inserted by section 297(4) FA 2004 in relation to transactions of which the effective date is on or after 22 July 2004

¹⁷⁵ Section 53(4)

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the transaction outside the scope of the exemption in paragraph 1 Schedule 3 (transactions where there is no chargeable consideration - see section 1.6.1 above). Other exemptions or reliefs may apply to eliminate or reduce the SDLT charge.

The reason for the deemed market value rule is to prevent avoidance of SDLT by the transfer of property to a connected company for no consideration or at an under-value and then selling the shares in that company to the purchaser, incurring a liability to stamp duty or SDLT of 0.5% (which could be avoided altogether if a foreign company was used) rather than a charge to SDLT at up to 4%. However, the rule can apply to ordinary commercial transactions, such as the incorporation of a business.

'Market value' is to be determined in accordance with the capital gains tax rules in sections 272 to 274 TCGA 1992¹⁷⁶ and is, broadly, the price that might be expected to be obtained on a sale on the open market. There is no indication in the legislation of whether or how encumbrances (which would reduce the value of the interest transferred) should be taken into account.

The deemed market value rule is subject to three exceptions laid down in section 54. The exceptions apply where:

- 1) the transferee company holds the property as trustee as part of a trust management business; or
- 2) the transferee company holds the property as trustee and the vendor is connected to the company only in his capacity as trustee of a settlement; or
- 3) the vendor is a company transferring the property by way of a distribution of the assets of the company (whether as part of a winding up or not) unless the 'subject matter of the transaction'¹⁷⁷ or an interest from which that interest is derived has been the subject of a claim by the vendor for group relief in the three years immediately preceding the effective date of the acquisition by the transferee company.

On an exchange of non-major interests in land involving a connected company it is HMRC's view that the rules in section 53 override the provisions of paragraph 5(4) Schedule 4.¹⁷⁸

It is not HMRC's intention that the third exception above (set out in section 54(4)) should be prevented from applying where a group relief claim was made by the vendor but that relief was clawed back under paragraph 3 Schedule 7 either at the time of or before the effective date of the transaction to which the market value rule would otherwise apply.¹⁷⁹ Broadly, the clawback applies where within three years of an intra-group transaction to which group relief applied, the purchaser company leaves the group.

The exclusion from the third exception is aimed at preventing a type of 'envelope' trick which could otherwise be used to avoid the SDLT charge. If any of the exceptions apply SDLT will only be charged on the actual chargeable consideration, if any.

Transfers of legal title to corporate nominees are not excluded from the deemed market value rule. The stamp duty exceptions in relation to the transfer of land to connected companies where one party was a bare nominee for the other¹⁸⁰ have not been reproduced for SDLT purposes, but it is understood that HMRC accept that the market value of such an interest is

¹⁷⁶ Section 118

¹⁷⁷ Defined in section 43(6) as a reference to the chargeable interest acquired together with any interest or right appurtenant or pertaining to it that is acquired with it.

¹⁷⁸ See Tax Journal Issue No. 862 (20 November 2006) at page 19

¹⁷⁹ See SDLTM30220

¹⁸⁰ Section 120 FA 2000

nominal and transfers of the bare legal title will therefore fall within the nil-rate band. Such a transaction will be notifiable pursuant to section 77.

Where a lease is granted to a nominee, paragraph 3 of Schedule 16 provides that the nominee is to be treated as the purchaser of the whole interest. The deemed market value rule is, in principle, applicable in such a case.

1.8. Surrender and re-grant

(Paragraphs 9 and 16 Schedule 17A)¹⁸¹

The old stamp duty relief on the surrender and re-grant of leases is carried over for SDLT purposes in paragraph 16 Schedule 17A. The surrender of a lease is not treated as chargeable consideration for the grant of the new lease between the same parties. Accordingly, the charge to SDLT is calculated on the consideration (premium and/or rent) under the new lease, ignoring the value of the lease that is surrendered. Where the relief applies, the SDLT provisions relating to exchanges (discussed at 1.9 below) are disapplied¹⁸².

HMRC have confirmed their view that the relief can apply to part.¹⁸³

Care should be taken to ensure that the re-grant is not to a nominee (even where the nominee has surrendered the old lease) as, in such a case, the provisions of paragraph 3(3) Schedule 16 will apply and the re-grant will be treated for SDLT purposes as made to the nominee and not to the party who has surrendered the lease. In such a case the relief would not be available.

1.8.1. Overlap relief¹⁸⁴

In addition 'overlap relief' is given in relation to the rent under the new lease in any of the following circumstances:

- 1) the new lease is of 'the same or substantially the same' premises as the old lease¹⁸⁵; or
- 2) the tenant under a lease of premises to which Part 2 of the Landlord and Tenant Act 1954 applies makes a request for a new tenancy which is duly executed; or
- 3) on termination of a head lease a sub-tenant is granted a new lease of the same or substantially the same premises in pursuance of an order of the court on a claim for relief against re-entry on forfeiture or in pursuance of a contractual entitlement in the event of the head lease being terminated; or
- 4) a person who has guaranteed the obligations of the lessee under a lease is granted a lease of the same or substantially the same premises in pursuance of the guarantee.

There are five examples of the operation of overlap relief in the draft lease chapter of the SDLT Manual (April 2007) starting at SDLTM16015.

A specific relief (similar to overlap relief) is available where a backdated lease is granted to a tenant who is holding over after his lease has terminated¹⁸⁶.

¹⁸¹ As amended by paragraph 11 Schedule 39 FA 2004 in relation to transactions the effective date of which is after 17 March 2004

¹⁸² By paragraph 16 Schedule 17A

¹⁸³ See Tax Journal Issue 862 (20 November 2006) at page 20

¹⁸⁴ Paragraph 9 Schedule 17A as amended

¹⁸⁵ It is understood that HMRC interpret this to allow overlap relief where the leaseback is of premises which *include* the same or substantially the same premises and that SDLTM will be amended to reflect this interpretation.

¹⁸⁶ **Paragraph 9A Schedule 17A discussed at 'Backdated lease granted to tenant holding over' in section Error! Reference source not found. below**

Claiming overlap relief

Overlap relief is not a relief which is claimed by checking yes in Box 4 ('Are you claiming relief') on the land transaction return (form SDLT1)¹⁸⁷. The starting rent inserted in Box 20 should be the actual starting rent for the new lease without reduction.

For the purposes of calculating the NPV¹⁸⁸, to be included in Box 23 the rent under the new lease in respect of any 'overlap period' is treated as reduced by the amount of the rent payable under the old lease in respect of the same period. The 'overlap period' is the period between the date of grant of the new lease and what would have been the expiry date of the term of the old lease had it not been terminated. The rent payable under the old lease is the amount that was taken into account in determining the SDLT chargeable in respect of the acquisition of the old lease. There is therefore no overlap relief for stamp duty paid under the old regime nor is there overlap relief if the rent under the first lease was relieved from SDLT.

If the effect of applying the relief in respect of the overlap period is to reduce the taxable rent under the lease to nil, no land transaction return is required. If the lease requires registration at the Land Registry it can be self-certified on form SDLT60 as a lease made for no chargeable consideration.

1.9. Exchange relief abolished

(Section 47 and paragraph 5 Schedule 4)

Under the old stamp duty regime, where properties were exchanged and equality money paid, stamp duty was chargeable only by reference to the value of the more expensive property and was paid by the person acquiring the more expensive property.¹⁸⁹ This relief was not carried over into SDLT and the general rule is that tax is charged on each leg of an exchange as a separate transaction.

The only vestige of the stamp duty exchange relief is in paragraphs 1 and 2 of Schedule 6A which provide relief for various exchanges involving residential property. For the details of this relief see section **Error! Reference source not found.** below.

1.9.1. Exchanges – the provisions in detail

Section 47 provides that where a land transaction is entered into by a purchaser (alone or jointly) wholly or partly 'in consideration of' another land transaction being entered into by him (alone or jointly) as vendor, each transaction is taxed as if it were distinct and separate from the other. Each purchaser must complete a separate land transaction return for his transaction. A reservation or exception from a grant does not turn a sale into an exchange¹⁹⁰.

Section 47(2) provides that a transaction is treated as entered into by the purchaser wholly or partly in consideration of another land transaction being entered into by him as vendor in any case where an obligation to give consideration for a land transaction that a person enters into

¹⁸⁷ See SDLTM17015 in the draft lease chapter of the SDLT Manual (April 2007)

¹⁸⁸ The NPV (Net Present Value) calculation is considered in detail at **Error! Reference source not found.** below. Broadly, the rent payable under the lease is taxed by reference to the NPV of each yearly amount of rent that will become payable under the lease if it runs its full course.

¹⁸⁹ For stamp duty purposes a transaction could often be structured as a sale of the more expensive property for a consideration consisting of the other property plus a cash amount. Where a transaction was properly documented as a single sale in that way, section 241 FA 1994 did not apply and the transfer of the consideration property was chargeable only to £5 fixed duty as a 'conveyance of any other kind'. This was because there was no 'sale' of the consideration property.

¹⁹⁰ See SDLTM00270

as purchaser is met wholly or partly by way of that person entering into another transaction as vendor. This catches the case where an exchange is structured as a sale.

HMRC's view of the operation of the provisions is extremely wide¹⁹¹ Section 47 can apply even though the parties are not identical and its application should be considered wherever parties to a transaction each acquire interests in or rights over land. Exchanges are always governed by section 47 even where additional consideration other than the entering into another land transaction is present.

Although each leg of an exchange is treated as a separate land transaction by reason of section 47(1), HMRC's view¹⁹² was that they were linked transactions where the parties were 'connected' with each other so that the values had to be aggregated in order to ascertain the appropriate rate of SDLT¹⁹³. For example, if land worth £220,000 was exchanged between connected parties for land worth £330,000, SDLT would be due at 4% on £520,000.

Legislation was introduced in FA 2007 to provide that where an exchange of property takes place between connected persons, the two legs are not linked with each other for determining the rate of SDLT. The provision¹⁹⁴ applies to any land transaction which is part of an exchange taking place on or 19 July 2007.¹⁹⁵ This change means that, if land worth £220,000 is exchanged between connected parties for land worth £330,000 the two properties are treated separately, so SDLT is due at 1% on the property worth £220,000 and 3% on the other.

Section 47 would cover a surrender and re-grant and in a case where the relief provided by paragraph 16 of Schedule 17¹⁹⁶ is not available, the transaction will be taxed as an exchange'

The exchange provisions do not apply where an exchange or a sale and leaseback takes place which involves certain public bodies¹⁹⁷.

Conversion of a lease into a commonhold unit is not an exchange because as the lease is extinguished by operation of law under section 9(3)(f) of the Commonhold and Leasehold Reform Act 2002 the lease is not exchanged for the commonhold unit.¹⁹⁸

1.9.2. Exchanges – application of the rules to partitions¹⁹⁹

(Paragraph 6 Schedule 4)

In principle section 47 also covers partitions. A partition involves jointly owned land where there is the acquisition of a chargeable interest in exchange for the giving up of another. However SDLT will not be chargeable on a simple partition where property is divided according to the parties existing entitlements because of the rule in paragraph 6 of Schedule 4 that 'the share of the interest held by the purchaser before the partition or division does not count as chargeable consideration'.

¹⁹¹ See article in HMRC SDLT Technical News Issue 5 (August 2007) which is to be incorporated in SDLTM and which gives guidance on HMRC's interpretation of 'in consideration of' in section 45

¹⁹² See Example 3 at SDLTM04020a

¹⁹³ By reason of section 108 – see **Error! Reference source not found.** below.

¹⁹⁴ Section 76(1) and (3) FA 2007 amending section 47(1) with effect from 19 July 2007

¹⁹⁵ The date of Royal Assent to FA 2007

¹⁹⁶ See 1.8 above

¹⁹⁷ Paragraph 17 Schedule 4 - see **Error! Reference source not found.** below

¹⁹⁸ See SDLTM00285 for guidance on the SDLT treatment of commonholds

¹⁹⁹ See example at SDLTM04030a

The reason for this provision was explained by the Chief Secretary to the Treasury as follows:

“A and B are joint owners of two properties. They agree to split ownership, so that A is left as sole owner of one property and B sole owner of the other. That is an example of partition and will be familiar to a number of Committee members opposite and behind me. Paragraph 6 is a relieving provision that operates in such a situation, since paragraph 5 on exchanges, ... could lead to a higher charge²⁰⁰.”

The terms of paragraph 6 of Schedule 4 are unclear but the intention appears to be to leave out of account the interest given up by each party to the partition (rather than merely excluding it as consideration) so that the acquisition resulting from the partition is not ‘in consequence of’ a disposal and the exchanges rules therefore do not apply. In effect the charge to SDLT is limited to any balancing payment.

1.9.3. Exchanges – chargeable consideration (Paragraph 5 Schedule 4)

These rules are expressly disapplied in relation to partitions to which paragraph 6 applies by paragraph 5(6). The linked transactions rules do not apply²⁰¹.

Exchange involving a major interest in land

If either leg of the exchange involves a ‘major interest’²⁰² the amount of the consideration for each transaction is taken to be the market value of the subject matter acquired by the purchaser and, if the acquisition is the grant of a lease at a rent, the rent payable.²⁰³

Exchange not involving a major interest in land

Exchanges where neither leg involves a major interest the amount of the consideration for each transaction is taken to be only any consideration other than the disposal or disposals given in exchange for the acquisition (for example, any equality money).²⁰⁴ On an exchange of non-major interests in land involving a connected company it is HMRC’s view that the rules in section 53 override the provisions of paragraph 5(4) Schedule 4.²⁰⁵

The following examples are taken from SDLTM04020a:

Example One:

Mr. Blue has a house with a market value of £600,000. Mrs. White has a house with a market value of £700,000. They exchange with Mr Blue paying Mrs. White £100,000.
The chargeable consideration on the acquisition by Mr Blue is £700,000.
The chargeable consideration on the acquisition by Mrs. White is £600,000.

Example Two:

Mr Brown has a piece of freehold land with a market value of £500,000. He exchanges this with Mrs. Green who grants him a 50 year lease over office premises at an annual rent. No premium is paid.

²⁰⁰ Hansard, Standing Committee B, 5 June 2003 am, Col 374

²⁰¹ Section 47(1) as amended by FA2007 with effect in relation to a set of land transactions if the effective date of any of them is on or after 19 July 2007.

²⁰² Defined in section 117(2) (in relation to England and Wales) as a fee simple absolute or a term of years absolute at law or in equity. The definitions applying to Scotland and Northern Ireland are in section 117(3) and (4) respectively.

²⁰³ Paragraph 5(3) Schedule 4

²⁰⁴ Paragraph 5(4) and 5(5) Schedule 4

²⁰⁵ See Tax Journal Issue No. 862 (20 November 2006) at page 19.

The chargeable consideration on the acquisition by Mr Brown is the NPV of the rent payable under the 50 year lease.

The chargeable consideration on the acquisition by Mrs. Green is £500,000.

1.10. Options and rights of pre-emption

(Section 46)

Section 46 prevents avoidance of SDLT through the use of options. One stamp duty avoidance scheme provided for the majority of the value of land, and, thus, the majority of the consideration, to be allocated to option premium, while the balance was paid for the land subject to the option on its exercise. Stamp duty was not paid on the consideration for the option as, although the option document was liable to stamp duty, it would be executed and held offshore. It is only necessary to consider the provisions of section 46 where the grant of an option or right of pre-emption would not otherwise be chargeable.

Section 46(1)(a) provides that the acquisition²⁰⁶ of an option binding the grantor to enter into a land transaction²⁰⁷ is itself a land transaction distinct from any land transaction resulting from the exercise of the option. Therefore, both the grant and exercise of such an option may be chargeable to SDLT.

The effective date of the transaction constituted by the acquisition²⁰⁸ of the option is the date on which the option or right is acquired, as opposed to when it becomes exercisable.²⁰⁹ Where the option is exercised between the original parties to the grant (or parties connected with them), the exercise and grant of the option will form a series of transactions to which section 108 (linked transactions) will apply, meaning that the grant and exercise of the option are treated as a single transaction in determining the rate of SDLT applicable to the consideration for the acquisition of the land, and any SDLT or additional SDLT payable in respect of the earlier grant.²¹⁰

In determining the rate of SDLT on the price paid for the option, any sum payable on later exercise will not be taken into account as until exercise there will be no series of transactions to bring section 108 in point.

SDLT on the land transaction that would arise on the option being exercised is chargeable if and when the option is exercised. Once granted, the option is itself a chargeable interest and SDLT may therefore arise on its assignment, variation or release.

*Example:*²¹¹

On 1 January 2005, Mr Smith is granted an option by Mrs Jones to buy her house for £200,000 on or before 31 December 2005. Mr Smith paid Mrs Jones £70,000 for the grant of the option. Mr Smith exercises the option on 1 December 2005.

²⁰⁶ An 'acquisition' includes a 'grant' but for SDLT purposes the transaction is considered from the point of view of the acquirer who is liable for the tax

²⁰⁷ Including a case where the grantor must either enter a land transaction or discharge his obligations under the option 'in some other way' – section 46(2)

²⁰⁸ Or 'grant' – see footnote 206

²⁰⁹ Section 46(3)

²¹⁰ A return or an additional return may be due in respect of the grant – section 81A (see **Error! Reference source not found.** below).

²¹¹ Taken from SDLTM1300a

Although the purchase of the option by Mr Smith is a land transaction in its own right as the consideration is below the 1% threshold for SDLT, a land transaction return is not required on the grant of the option. The exercise of the option on 1 December 2005 constitutes a separate land transaction from the grant of the option. Once the option is exercised, Mr Smith must lodge two land transaction returns, one for the grant of the option²¹² and one for the exercise of the option.²¹³ The effective date of both these land transactions is the date of completion of the sale of the house to Mr Smith or, if earlier, the date of substantial performance.

Section 46(1)(b) provides that the acquisition of a right of pre-emption over land (preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction) is itself a land transaction. Once granted the right of pre-emption is a chargeable interest and SDLT may therefore arise on its assignment, variation or release. The effective date of the transaction constituted by the acquisition of a right of pre-emption is the date on which the right is acquired and not when it becomes exercisable.²¹⁴

An option or pre-emption right is not a 'major interest'²¹⁵, so the acquisition is not notifiable unless tax is chargeable or would be chargeable but for a relief.²¹⁶ The fact that the acquisition and the exercise are linked may mean that the acquisition becomes notifiable.

Section 46(4) provides that section 46 does not apply 'to so much of an option or right of pre-emption as constitutes or forms part of a land transaction apart from this section'. The special rules in section 46 therefore only apply where the general SDLT charging provisions do not. A call option in relation to land is an interest in land and is a chargeable interest within the meaning of section 48. However, as a put option relating to land is a personal right against the grantor it would not be within the charge to SDLT in the absence of section 46.

²¹² Showing £70,000 at Box 10, £270,000 at Box 13 and £2100 (SDLT at 3% rate) at Box 14

²¹³ Showing £200,000 at Box 10, £270,000 at Box 13 and £6000 (SDLT at 3% rate) at Box 14

²¹⁴ Section 46(2)

²¹⁵ A 'major interest' is defined in section 117(2) (in relation to England and Wales) as a fee simple absolute or a term of years absolute at law or in equity. The definitions applying to Scotland and Northern Ireland are in section 117(3) and (4) respectively.

²¹⁶ Section 79(4)