



Response from ICAS

Stamp Duty Land Tax: non-UK resident surcharge consultation

3 May 2019

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members.
2. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

3. ICAS welcomes the opportunity to contribute to the consultation "Stamp Duty Land Tax: non-UK resident surcharge consultation" issued by HMRC and H M Treasury on 11 February 2019.
4. We were pleased to attend the stakeholder consultation meeting with HMRC and HMT officials dealing with the consultation on 16 April. This response summarises and builds on our comments made during that meeting. We would be happy to have further discussions with HMRC about any of the matters raised in this response.
5. SDLT is already a complex tax. The regime for residential property has become more complex in recent years with changes including the introduction of the higher rates on additional dwellings and the introduction of first time buyers' relief.
6. Introducing a different residence test for individuals for the surcharge, instead of using the existing Statutory Residence Test, adds to complexity and is likely to cause confusion. Additionally, for partnerships and trusts some aspects of the proposals are likely to be very difficult to apply in practice and will impose a disproportionate administrative burden.
7. In our responses to the specific questions we have therefore suggested some changes to the proposals to address some of these issues.
8. Consideration should also perhaps be given to whether the government's objectives could be achieved without the introduction of the proposed surcharge. It is worth noting that the Scottish Government has apparently chosen not to impose a non-resident LBTT surcharge – but has instead increased the rate of the LBTT Additional Dwellings Supplement from 3% to 4%. We discuss this further in our response to Question 4 below.

Specific questions

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

9. In principle, we would prefer not to see the introduction of a new residence test for SDLT because this will add to complexity and is likely to cause confusion. It also raises the risk of unfair outcomes due to a mismatch between the SDLT surcharge test and the Statutory Residence Test (SRT) – with individuals potentially being non-resident for the purposes of paying the surcharge but then treated as resident for other tax purposes under the SRT.
10. The second automatic UK test under the SRT is relevant where the taxpayer has or had a home in the UK for all or part of the tax year, so the property subject to the SDLT surcharge could be the decisive factor in making the purchaser UK resident under the SRT, without necessarily (under the proposals outlined in the consultation) qualifying for a refund of the surcharge.
11. We appreciate that there would be difficulties in using the SRT for the purposes of the surcharge, for the reasons set out in paragraphs 2.7 and 2.8 of the consultation. If the SRT is not therefore used for the surcharge, we consider that the proposed approach set out in paragraph 2.3 of the consultation does meet the key requirement of being a relatively simple approach which can be used to determine residence at the date of the transaction.
12. If the 183 day test set out in paragraph 2.3 is adopted for SDLT, changes will need to be made to the conditions for obtaining a refund, to minimise the consequences of mismatches with the SRT; the

proposal in paragraph 2.5 does not go far enough. We discuss how this could be achieved in our response to Question 21 below.

13. Whilst the proposed test is relatively simple, the surcharge still adds to the complexity of SDLT on residential property. From 1 March 2019 conveyancers and taxpayers only have 14 days to file the SDLT return and pay any SDLT due; some internationally mobile individuals may struggle to establish their position in that time.
14. HMRC will need to ensure that the changes are communicated properly, ahead of the introduction of the surcharge, and will need to provide detailed guidance – including guidance on the evidence HMRC will expect individuals to keep, in order to demonstrate the number of days spent in the UK. We discuss this further in our response to Question 25 below.

Question 2: Would you prefer to see a different residence test applied? If so, what test and why?

15. See our response to Question 1.

Question 3: How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident individuals in England and Northern Ireland?

16. We have no comments on this question.

Question 4: Do you agree that a rate of 1% for the surcharge strikes the right balance between the government's objectives on home ownership and the UK remaining an open and dynamic economy?

17. We have no specific comments on the rate of the surcharge. However, it is inevitable that a charge targeted solely at non-UK residents risks giving the impression that the UK no longer welcomes foreign investment – and could potentially be challenged under EU law.
18. It is worth noting that the Scottish Government has apparently chosen not to impose a non-resident LBTT surcharge – but has instead increased the rate of the LBTT Additional Dwellings Supplement (ADS) from 3% to 4% as part of its drive “to protect opportunities for first-time buyers in Scotland”.
19. The objectives of the Scottish Government in increasing the ADS rate appear to be very similar to those of the UK Government in introducing the surcharge, ie to try to limit house price inflation. However, the use of the existing ADS means that the change is not specifically aimed at foreign investors – and also avoids the additional complexity of creating a new surcharge.

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

20. We agree with the proposal that the residence test for companies should be based on the existing tests for company residence in Chapter 3 of Part 2 CTA 2009. As paragraph 3.7 of the consultation notes these tests are long standing and will be familiar to companies and their advisers.
21. However, applying the tests (particularly central management and control) at the date of the transaction could present problems; it would be preferable to determine residence by reference to the accounting period in which the transaction takes place.
22. It is possible for companies to be dual resident in different jurisdictions – in some of these cases residence may therefore be determined under a tie-breaker provision in one of the UK's double tax treaties. This will cover taxes other than SDLT – often CT and IT. This raises the possibility of a mismatch between residence for the purposes of the SDLT surcharge and residence for other taxes (determined under a tie-breaker clause).
23. Where a tie-breaker clause is used to determine the company's residence for other taxes, we suggest that the company's residence so determined should also be used for the purposes of the SDLT surcharge.
24. Paragraph 3.8 of the consultation suggests that the residence of a Unit Trust (treated as a company for SDLT purposes) should be determined using the tests for trusts. We consider that it would be preferable to base the test on the location of management and control of the Unit Trust – in line with

s617 CTA 2010 which provides that the trustees of a unit trust should be treated as though the trustees were a UK resident company.

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

25. See our response to Question 5.

Question 7: Do you have any views on non-UK resident individuals using UK resident companies to purchase residential properties?

26. We question whether the proposed rules relating to UK resident companies with non-UK resident participators are necessary. Feedback we have received suggests that due to previous changes designed to deter individuals from holding residential property via companies (15% rate of SDLT and ATED) and the costs involved in setting up and running a company, it is unlikely that non-UK residents would incur the costs of setting up a UK company solely in order to avoid the 1% surcharge.

27. Paragraphs 3.21 to 3.23 note that other options were considered to deal with the purchase of residential property using UK companies but were rejected on the grounds that they were impractical or too onerous. However, we consider that the proposed use of the close company test and attribution of rights rules will also present considerable difficulties in practice.

Question 8: Do you have any views on the suitability of using the close company test as the basis for determining whether a company is under the control of non-UK resident persons?

28. See our response to Question 7.

Question 9: Do you have any views on applying the attribution of rights rules at section 451 CTA 2010 between persons of differing residence status?

29. See our response to Question 7.

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

30. See our response to Question 7.

Question 11: Do you have any views on whether any of the exemptions at S442 to S447 CTA 2010 should remain in place or be removed for the purposes of the surcharge?

31. It would be sensible for these exemptions to remain in place for the purposes of the surcharge.

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

32. See our response to Question 7.

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

33. The proposals for partnerships are not appropriate in their current form. Large partnerships of, say, 40 or 50 partners will be treated as non-resident for the purposes of the surcharge if one of the partners is non-resident. This is disproportionate and would not usually reflect the substance of the partnership.

34. We have received feedback that the proposed test will have a considerable impact on property investment partnerships; it is not easy to unwind such partnerships, nor is it easy for investors simply to leave the partnership (or potentially for the partnership to force non-resident investors to leave).

35. There will also be considerable practical difficulties for large partnerships in determining the residence of their partners, particularly where all, or many, of the partners are individuals.

36. Such partnerships are already likely to be aware of individual partners who are non-resident under the SRT because of the NRCGT filing requirements (meaning that in a property investment partnership, non-resident individuals will be asking the partnership to supply details of relevant

transactions within 30 days). However, as discussed above it seems unlikely that the SRT will be used for the SDLT surcharge.

37. The proposed new test for the SDLT surcharge will be onerous and potentially completely impractical for some large partnerships, which would need to ascertain details about days spent in the UK, from every individual partner at the date of every relevant purchase. In the case of a property investment partnership with 40 or 50 partners there could be as many as 40 purchases in a year.

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

38. Yes. We consider that any test for partnerships needs to be proportionate and to reflect the substance of the partnership.
39. One obvious option would be to provide that the partnership should be treated as UK resident if the majority of the partners are UK resident. If this were to be considered to be open to abuse, the threshold could be set higher – for example 75% of the partners should be UK resident.
40. This option would allow large partnerships to ignore small numbers of non-resident partners. However, in some cases it still might not reflect the substance of the partnership (for example, where a small number of non-resident partners had contributed more than 50% of partnership capital). There would also still potentially be an issue for some large partnerships arising from the need to check individual partners' residence status (based on the proposed SDLT day counting test rather than the SRT).
41. We suggest therefore that a better alternative would be to determine partnership residence by reference to the underlying entitlements of the partners. We do not believe this should be entitlement to profit shares, because these might change, or might not be determined until the partnership year end. We therefore suggest that entitlement should relate to capital contributions. A partnership would therefore be treated as UK resident if UK resident partners collectively had made more than 50% of capital contributions at the date of the relevant purchase.
42. In order to minimise the administrative burden, one possibility for determining the residence of partners who are individuals (in order to establish the residence of the partnership) would be to base it on their residence under the SRT at the end of the preceding tax year – this would then apply in determining the residence of the partnership for any transactions in the current tax year.
43. However, use of the proposed new SDLT residence test for individuals would be more feasible if the partnership only has to determine the residence of a majority of investors (based on their underlying entitlements) to establish its residence. We understand that in some property investment partnerships this would be possible because the partnership would only need to check the residence of the main investors (potentially fewer than 10) rather than of all 40 or 50 partners.
44. Smaller partnerships would also be likely to find this test easier to apply than the test proposed in the consultation. It should be relatively easy for a smaller partnership to determine its residence based on more than 50% of partners' entitlements, as outlined above - even using the new day counting test proposed for SDLT to determine the residence of partners who are individuals.

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

45. The general approach – looking through to the beneficiary – seems appropriate. However, we do not agree with the proposals for individual trustees – see our response to Question 16 below.

Question 16: Do you agree that the Statutory Residence Test for individual trustees will work for SDLT if references to tax year are replaced by references to the 12- month period ending with the date of the transaction? If not, why not? What alternatives would you propose?

46. No. As paragraph 3.42 of the consultation notes trustees and their advisers will largely already be familiar with the SRT. We do not see any need to introduce a different test for trustees – and it is hard to see how the existing tests could be adapted in the way that is suggested. This will increase complexity and cause confusion.

47. There would also be an administrative burden if trustees had to confirm their residence status using a test other than the SRT, whenever a transaction potentially subject to the SDLT surcharge occurs.
48. As an alternative we suggest that the residence of trustees (determined under the SRT) at the end of the previous tax year should be used for the purposes of the SDLT surcharge, for any purchases during the current tax year.

Question 17: How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident non-natural persons (companies, trusts and partnerships) in England and Northern Ireland?

49. We have no comments on this question.

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

50. We have no comments on this question.

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

51. Paragraphs 4.4 and 4.5 of the consultation note that the government is considering an upfront relief for Crown employees to cover members of the armed forces, diplomats and civil servants on overseas postings. Consideration should be given to a similar relief for employees in general who are sent on overseas secondments by their employers.

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

52. We agree with the aim set out in paragraph 4.7 of the consultation, that the surcharge should not act as a barrier to anybody coming to live and work in the UK. It seems inevitable, however, that payment of the surcharge upfront will act as a deterrent in some cases. The deterrent effect could be minimised by an effective system for refunds.
53. As set out in our response to Question 1, if the 183 day test set out in paragraph 2.3 is adopted, changes will need to be made to the conditions for obtaining a refund, to minimise the consequences of mismatches with the SRT. We discuss this in our response to Question 21 below.

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

54. The test set out in paragraph 4.8 of the consultation should be simple for individuals to understand and may be sufficient in many cases. However, to minimise the consequences of mismatches with the SRT there should be an additional option – which would permit a refund to be made where an individual who has paid the SDLT surcharge becomes resident under the SRT, either in the tax year of the property purchase or in the following tax year.
55. A similar approach should be adopted to joint purchasers covered by paragraph 4.11 of the consultation. A refund would be available provided all the purchasers either spent 183 days in the UK in the 12 months following the transaction or became resident under the SRT in the tax year of the purchase, or the following tax year.

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

56. The proposal for collective enfranchisement (in paragraph 5.15 of the consultation) is disproportionate. One non-UK resident tenant in a large block of flats would result in the surcharge being applied to the whole transaction, potentially acting as an obstacle to enfranchisement.
57. We suggest that in the circumstances set out in paragraph 5.15, ie purchaser acting as a nominee for the tenants, the application of the surcharge should be determined based on the residence status of the majority of the tenants.
58. We also envisage that there could be practical difficulties arising from the need to determine the residence status of the tenants.

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

59. We have no comments on this question.

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

60. We agree with the proposal to extend the time limit for amending SDLT returns by 12 months in order to permit claims for refunds to be made.

Question 25: Are there any other changes to the administrative and compliance provisions in SDLT that the government should consider changing for the purposes of the surcharge?

61. HMRC will need to provide detailed guidance to individuals on the evidence they will need to keep in order to prove the number of days spent in the UK. Individuals who have taken advice on their residence status for SRT purposes will be aware of the need to keep evidence and are likely to have discussed this with advisers. However, other purchasers will be disadvantaged unless guidance is provided by HMRC.

62. HMRC helplines will need to be adequately staffed and prepared to deal with increased numbers of queries arising from the proposed surcharge.