SDLT surcharge on additional residential properties: Updated guidance of March 2017

On 24 March 2017, just ahead of the first anniversary of the SDLT 3% surcharge coming into force on 1 April 2016, HMRC updated their brief online guidance called "Guidance Stamp Duty Land Tax: buying an additional residential property" to include text on partnerships, trusts and inherited properties.

It is a curate's egg, helpful in parts, but with some mistakes and misleading comments. In this piece, Blake Morgan dissects the HMRC updated guidance piece by piece. This was first published on 31 May 2018. Since then HMRC have completely rewritten their .gov.uk guidance and it can be found here: Guidance Stamp Duty Land Tax: buying an additional residential property However many of the comments in this piece will still be of interest, so it has been updated to 18 November 2018 and left online.

£40,000 OR MORE

HMRC states: You may need to pay the higher rates of Stamp Duty Land Tax if you buy an additional residential property for more than £40,000.

Blake Morgan comments: This should say '£40,000 or more' rather than 'more than £40,000'. They had this right in the previous version of 30 August 2016, but something has gone wrong in the update of 24 March 2017.

WHEN THE HIGHER RATES APPLY

HMRC states: "Individuals and companies need to pay the higher rates when they buy an additional residential property in England, Wales or Northern Ireland. The higher rates apply even if your other residential properties are outside any of these countries."

Blake Morgan comments: But for companies the residential property does not need to be "additional". A company will normally pay the 3% surcharge even though it owns no other properties. Also Land Transaction Tax normally applies to purchases in Wales completing from 1 April 2018 and this has its own rules and is administered by the Welsh Revenue Authority.

HMRC states: "You'll also need to pay the higher rates if you don't own a residential property and buy at least two residential properties at the same time."

Blake Morgan comments: Usually this is right, but not always. See for example the section below about multiple properties in the same building or grounds.

IF YOU REPLACE YOUR MAIN HOME

HMRC states: "You won't have to pay the higher rates if you sell your main home on the same day you buy your new home."

Blake Morgan comments: Yes, but nor are the higher rates payable in many cases where a main home was sold before the purchase of the new home, even many years before. This area is one that causes much confusion in practice, so why could this not be made clearer here? The three year rules were not yet in force where the sale is before the purchase at the time of the publication of the guidance. See more in our previous blog on the topic. The three year rules are fully in force for completions occurring after 26 November 2018.

What the 30 August 2016 version of the guidance had said was less misleading: “You won’t pay the higher SDLT rates if the property you’re buying is replacing your main residence and that main residence has already been sold.”

Also the disposal of the previous main home does not have to be by way of sale for the replacement exception to be potentially available. It could also be a gift, or perhaps on divorce or separation.

It would have been even more helpful if HMRC would say that disposing of a “major interest” in a previous main residence can also be enough to trigger the replacement exception and explain what this means. Update for purchases completing on or after the Autumn Budget of 22 November 2017: For a disposal of a major interest to get a person within the replacement they now have to dispose of their entire interest in the previous main home.

HMRC states: "If you sell your main home after you purchase your new home you’ll need to pay the higher rate. You can claim a refund of the higher rates if your old home is sold within 3 years of buying your new home.

You can claim a refund by changing the original return or completing a SDLT repayment request form. This must be claimed within 3 months of the sale or 1 year of the filing date of the return, whichever comes later."

Blake Morgan comments: HMRC's fuller Guidance Note (from the end of March 2018 in the HRMC Manual) says at SDLTM09805 that if the following disposal happens before the date on which the land transaction return must be submitted for the purchase, then they accept that the land transaction return for the purchase can be completed as if the higher rates do not apply. This saves paying the surcharge and then seeking a refund straight away.

Update: The deadline for the application for a refund has been extended by the Budget on 29 October 2018. Previously could be as short as 3 months from the sale of the old property. The extension allows the application to be made up to 12 months from the sale of the old property, but only where the sale of the old property is on or after 29 October 2018.

PURCHASES THAT AREN’T CHARGED THE HIGHER RATES

HMRC states: "You won’t have to pay the higher rates on a new property if the chargeable consideration is less than £40,000.

You also won’t have to pay the higher rates if:

- *someone else holds a lease on the property with more than 21 years to run*
- *you purchase a lease that has less than 7 years to run.*

You won’t be charged the higher rates if your other residential properties meet either of the two criteria above or each have a value of less than £40,000 when you buy the new property."

Blake Morgan comments: This does not make clear that in a case where a person has a share in another property one looks at whether the value of the share is less than £40,000.

There is more about the lease with more than 21 years to run below under the heading “Trusts”.

MULTIPLE PROPERTIES IN THE SAME BUILDING OR GROUNDS

HMRC states: "Two or more properties bought together may be treated as one if:

- *they are in the same building or grounds*
- *the main property accounts for two-thirds of the total consideration."*

Blake Morgan comments: Yes, two thirds or more. There are many complicated issues here, including the availability of multiple dwellings relief. Read more about granny flat and annexes here.

OWNERSHIP OF THE PROPERTY – SPOUSES AND CIVIL PARTNERS

HMRC states: "You may be viewed as the owner of a property if it is owned by your spouse or civil partner.

This means if one of you already owns a property and the other person purchases another property, the purchase will be charged at the higher rates.

Spouses or civil partners that are permanently separated will not be treated in this way."

Blake Morgan comments: This is not what the legislation says! Sloppy language can lead to confusion.

The previous version of 30 August 2016 was not so misleading. It had said: “If you’re married or in a civil partnership, buying a property and your spouse or civil partner already owns a property you may still be liable to the higher rates. But you may be able (sic) claim a refund if they then go on to sell it.”

What the legislation says is that a spouse or civil partner is usually treated for surcharge purposes as a joint purchaser, even if they are not joining in the purchase. The effect can be quite different from the way it is described by HMRC in this guidance! See the two examples in the Appendix.

TRUSTS

HMRC states: "You’ll be treated as owning a property if you receive all the income from it and the proceeds from its sale even if you’re not the legal owner.

The beneficiary of a bare trust will be treated as the purchaser of a property.

The beneficiary will also be treated as the purchaser if the trust holds property and the beneficiary is entitled to:

- *to occupy the property for life*
- *receive income from the property*

When the beneficiary is under 18, the child’s parents are treated as the beneficiary"

Blake Morgan comments: It is not just the child’s parents who are treated as owning the property. A spouse or civil partner of the child’s parent is also caught, even though not the parent of the child, if living with the parent (whether or not the child is living there).

HMRC states: "The trustee will (sic) treated as the purchaser of the property if the trust:

- *is not a bare trust;*
- *does not give the beneficiary a right to occupy a property for life or receive income from it;*
- *purchases a property for over £40,000 that isn't subject to a lease of more than 21 years."*

Blake Morgan comments: The repeated negatives can make this hard to follow (as well as being wrong for a purchase at exactly £40,000). Perhaps it is easier to follow put like this:

"The trustee will be treated as the purchaser of the property if the trust is neither:

- a bare trust nor
- one that gives the beneficiary a right to occupy a property for life or receive income from it.

The surcharge will be due if such a trustee purchases a property for £40,000 or more that isn't subject to a lease with more than 21 years to run".

People get confused by the "subject to a lease with more than 21 years to run". They think that this is referring to long leasehold properties. It is not; it is referring to a case where the freehold or leasehold interest acquired is subject to a lease with over 21 years left. Perhaps the lease is held by another party, perhaps the buyer already held a lease and is buying in a superior interest.

COMPANIES AND PARTNERSHIPS

HMRC states: "Companies have to pay the higher rates when they buy any residential properties that are over £40,000 and aren't subject to a lease of more than 21 years."

Blake Morgan comments: It should read "£40,000 or more, not "over £40,000". The same point applies about "subject to a lease of more than 21 years" as is dealt with above.

HMRC states: "Where a trustee buys a property but a beneficiary does not receive any benefits from that property, the purchase is treated as if it were made by a company rather than an individual."

Blake Morgan comments: The actual test is worded in terms of whether a beneficiary is entitled to occupy the dwelling for life or to receive any income earned. So the beneficiary of a discretionary settlement might in practice receive some benefits, but that beneficiary has no entitlement, so a purchase by such a discretionary settlement is treated in a similar way to a purchase by a company.

INHERITED PROPERTIES

HMRC states: "If you inherit half or less of the major interest in a property in the 3 years before you make a purchase, and you don't already have an additional residential property, you won't pay the higher rates."

Blake Morgan comments: This is looking at whether the higher rates might be payable on a later purchase within three years of such an inheritance. There is rarely any SDLT on an inheritance itself, as no "chargeable consideration" is usually given for it. Read more about inherited properties here.

As an aside, this is a rare case where the interests of spouses and civil partners can be aggregated.

This article is intended for general information purposes only and does not constitute legal or professional advice. Advice should be sought before proceeding with any transaction.

FOR PROFESSIONAL ADVICE

Please contact Blake Morgan's SDLT expert, John Shallcross at john.shallcross@blakemorgan.co.uk or 023 8085 7469.

APPENDIX
Spouses and Civil Partners

Under the heading: “Ownership of the property, Spouses and civil partners”, HMRC use the “shorthand” of saying that a person may be viewed as the owner of a property if it is owned by their spouse or civil partner. What the legislation actually says is that a spouse or civil partner will often be treated as a joint purchaser of the property for surcharge purposes, even if they are not.

The results can be different as the following two examples show.

EXAMPLE 1 DAVID AND CAROLINE

David and Caroline are married. David solely owns two let properties worth well over £40,000 each and five years ago (before David and Caroline met) sold another house he owned and had lived in as his only residence. David has bought no property since that sale but has been living in rented accommodation, most recently with Caroline. Caroline owns no other properties. Caroline is now buying a house, it will be entirely hers, but they both will live in it as their only residence, with David retaining his two let properties. The purchase will complete before 27 November 2018.

The HMRC shorthand “You may be viewed as the owner of a property if it is owned by your spouse or civil partner” suggests that the surcharge will be due on Caroline’s purchase as David owns other properties.

But this is not how the surcharge works. The legislation requires us to treat both spouses as buyers, even if they are not. We then have to look at them individually as if they were buying on their own. If for either of them the surcharge would have been due, then it is due for the whole transaction.

Looking at Caroline on her own, she owns no other properties, so she would have escaped the surcharge. Looking at David on his own, he can benefit from the replacement exception. So the surcharge is not due on the purchase, despite the impression given by the amended guidance.

Note following the Autumn Budget 2017: If Caroline had never acquired a property before she might qualify for first time buyers’ relief in this situation. See more about first time buyers’ relief

EXAMPLE 2 ADAM AND EVE

Adam and Eve are married. They have been living in a house they pay rent on but are buying a house for them both to live in as their main residence (it matters not for surcharge purposes whether it is one of them or both of them who are buying). It will be the first time either of them has owned a property that they live in, though together they own in equal shares a holiday home in Spain that is now worth only £70,000. There are no other property interests that count against them for surcharge purposes.

The HMRC shorthand “You may be viewed as the owner of a property if it is owned by your spouse or civil partner” suggests that the surcharge will be due. The replacement exception is not available and together they own another property worth £40K or more.

But this is not how the surcharge works. The legislation requires us to treat spouses as buyers, even if they are not. We then have to look at them individually as if they were buying on their own. If for either of them the surcharge would have been due, then it is due for the whole transaction.

But looking at them individually the half share in the Spanish property does not count against either of them as it is worth less than £40,000. Despite what HMRC say, there is no provision in this context aggregating the shares of the spouses. So the surcharge is not due on the purchase, despite the impression given by the amended guidance.

In fact the surcharge would not have been due even if Adam and Eve were buying the new property as an investment (or for a relative to live in) rather than as their residence as there is no other property counting against them.

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SOUTHAMPTON

T: 023 8090 8090

F: 0844 620 3401

PORTSMOUTH

T: 023 9222 1122

F: 0844 620 3403

CARDIFF

T: 029 2038 5385

F: 029 2038 5300

LONDON

T: 020 7405 2000

F: 0844 620 6402

OXFORD

T: 01865 248607

F: 0844 620 3404

READING

T: 0118 955 3000

F: 0118 939 3210

E: info@blakemorgan.co.uk

www.blakemorgan.co.uk

BLAKE MORGAN