



Surrender and Regrant of Agricultural Tenancies

Stamp Duty Land Tax

26 October 2019

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1 INTRODUCTION: STAMP DUTY LAND TAX (“SDLT”) ON CAPITAL VALUES AND ON RENT

In a surrender and regrant of an agricultural tenancy there could be:

- SDLT on the capital value of the old tenancy and/or the new tenancy
- SDLT on the capitalised rent due under the new tenancy.

Take as an example a 400 acre farm with a house. The freehold is worth say £3 million. The existing (“old”) tenancy and the replacement (“new”) tenancy could each be worth £800,000. Let us assume an annual rent of £20,000 per annum for the new tenancy.

If SDLT is chargeable on the market value of the old tenancy and the new tenancy then, on these figures, SDLT is due at sliced rates of up to 5%¹:

- The landlord would be liable for SDLT of £29,500
- The tenant would be liable for SDLT of £29,500.

The tax on the rent is of a lower order. If the new tenancy is an annual tenancy the “growing lease” treatment² applies. It means that there would, on these figures, be no need for a return until the eighth anniversary of the new tenancy.

A special relief³ for the surrender of the old tenancy / lease and the grant of the new tenancy / lease can apply to the capital values in a straightforward case. The relief does not apply to the net present value of rent.

2. WHAT IS A “STRAIGHTFORWARD” CASE?

In a straightforward case of a landlord and tenant agreeing to a replacement of an AHA agricultural tenancy one would expect “surrender and regrant” relief to apply to the capital values of the tenancies so that:

- The landlord does not pay SDLT on the capital value of the old tenancy surrendered (though if the landlord pays the tenant a sum to induce the tenant to surrender the old tenancy then the landlord would expect to pay SDLT on that sum).
- The tenant does not pay SDLT on the capital value of the new tenancy taken.

The tenant is left with the cost and administrative inconvenience of the growing lease treatment for SDLT on the rent.

Factors that will cause complications and a possible tax charge on the capital values include the following:

¹ The first £150,000 is free of SDLT, the next £100,000 is taxed at 2% and the remainder at 5%. SDLT at non-residential rate on transactions for over £250,000 can be calculated as 5% of the price less £10,500.

² See section 5 of this paper.

³ This relief requires the parties to the surrender of the old tenancy / lease to be the same as the parties to the grant of the new tenancy / lease, but does not require the property surrendered to be the same as the property in the new lease.

1. The new tenancy is to be taken in the name of a tenant who holds it on trust for another. For example the tenancy is held for two parents, a son and a daughter, but only the parents are named as tenants on the new tenancy (see example A⁴).
2. The tenant is a company and the company is "connected" to the landlord (see example B).
3. The tenant is a partnership and the landlord is or used to be a partner, or is a person "connected" to such a partner (see example C).
4. In cases where an old AHA tenancy is being replaced with a new farm business tenancy but the tenant surrendering the old tenancy is a different person from the tenant taking the new tenancy (see example D).
5. In cases where an old AHA tenancy is being replaced with a new farm business tenancy but the tenant taking the new tenancy is not only the tenant giving up the old tenancy but a new joint tenant as well (see example E).

3. STRAIGHTFORWARD CASE, SURRENDER AND REGRANT RELIEF

Assuming that none of the complicating factors referred to above apply then the main concern, as to SDLT on the capital value of the old tenancy and the new tenancy, is dealt with by the relief in FA03/Sch17A/para16. This says:

"Where a lease is granted in consideration of the surrender of an existing lease between the same parties-

(a) the grant of the new lease does not count as chargeable consideration for the surrender and

(b) the surrender does not count as chargeable consideration for the grant of the new lease.

Paragraph 5 (exchanges) of Schedule 4 (chargeable consideration) does not apply in such a case."

Note that this relief will apply even if there are differences in the land covered by the old tenancy and the new tenancy. So far as this relief is concerned the two tenancies could be of completely different areas⁵. The terms and conditions of the two tenancies do not need to be similar for the para 16 relief to apply.

Do note the requirement for the relief that the parties are the "same". There is no extension provided for "connected parties".

- Where the new tenancy is to have AHA protection the parties need to be the same for landlord and tenant reasons.

⁴ At section 6 of this paper.

⁵ There are landlord and tenant issues if the new tenancy is to be an AHA tenancy, but an FBT could be of a different area and there is no issue on that account with surrender and regrant relief.

- Where the new tenancy is to be an FBT the identity of the parties does not matter for landlord and tenant purposes, but it does matter for this para 16 relief.
- Note the odd provisions for cases where a tenancy is granted by a landlord as a “bare trustee” or to a tenant as a “bare trustee”. It is the bare trustee who is then the “party” for SDLT purposes. See example A.

The relief covers the capital value, but not the SDLT on the capitalised value of the rent, nor any payment or other consideration by one party to the other for the transaction.

4. STRAIGHTFORWARD CASE, COMPLIANCE

Where the surrender and regrant relief is available there will normally be no need for:

- the landlord to make a land transaction return for his “acquisition” of the old tenancy
- the tenant to make a land transaction return for his “acquisition” of the new tenancy at the outset.

A return would be needed within 14 days of the transaction if for example:

- there is a balancing payment between the parties of over £40,000
- the new tenancy is granted for a fixed term of 7 years or more with a rent of over £1,000 pa⁶
- the rent is high enough for SDLT to be due⁷.

5. STRAIGHTFORWARD CASE, GROWING LEASE TREATMENT AND OVERLAP RELIEF

Growing lease treatment

The tenant needs to consider the “Net Present Value” (the capitalised value of the rents) on each anniversary of the new tenancy where this is an annual tenancy⁸.

- on the grant of the new tenancy it is treated as a lease for one year
- on the first anniversary of the tenancy it is treated as a lease for two years
- and so on.

A return is not needed for the rental element until the NPV reaches £150,000. After that a “top up” amount of tax and a further return will be needed each year that the tenancy continues.

On the example of the new tenancy at a rent of £20,000 a year:

- The first return will be needed on the eighth anniversary (when there is deemed to be a 9 year lease).

⁶ An ascertainable rent at any time in the term of over £1,000.

⁷ For example over £155,250 per annum for an annual tenancy, or the tenancy term is longer (e.g. a 5 year term at a rent of £50,000).

⁸ FA03/Sch17A/para4.

- Even on the 15th anniversary, when the tenancy is treated as a 16 year lease, the net present value comes to £241,882 giving SDLT of only £918.

Overlap relief

The relief can apply where the new tenancy is of substantially the same premises as in the old tenancy (or of a larger area including the old premises or substantially all of them⁹).

In practice for surrenders and regrants of agricultural tenancies overlap relief (under FA03/Sch17A/para9) is unlikely to apply or give much of a saving.

- In this context it will be unusual for the old tenancy to have been subject to SDLT. The old tenancy would have been subject to SDLT only if it was granted after 1 December 2003. Such an "old" tenancy would allow the landlord to qualify for 100% APR without needing a fresh tenancy. Only if the old tenancy was subject to SDLT can credit be given when assessing SDLT on the rent for the new tenancy for the rent already taxed on the old tenancy.
- Also if the old tenancy was an annual tenancy, this will not give much of a benefit (as not more than a year's rent will gain credit).

Suggestions have been made in this context¹⁰ that credit could be due for the stamp duty (that is the old stamp duty rather than SDLT) paid under the old tenancy. This relies on a provision in FA03/Sch19/para5(2). HMRC do not accept this¹¹ and other sources confirm that overlap relief only applies if stamp duty land tax (rather than stamp duty) was paid on the old tenancy.

Linked lease treatment

Unless the freehold has been transferred to an unconnected person since the grant of the old tenancy, it is possible that the new tenancy could be treated as linked¹² to the old tenancy. Where the old tenancy was before the introduction of SDLT¹³ this would result in the loss of part of the available nil rate band¹⁴. The linked lease treatment is not dealt with further here.

6. EXAMPLE A: NEW TENANCY TO BE HELD ON BARE TRUST

In this example the new tenancy is to be taken in the name of two parents who hold it on a bare trust for themselves, a son and a daughter. A problem can arise in matching up the parties for SDLT purposes to the surrender and the regrant in order to qualify for the para 16 relief.

The "normal" rule for SDLT is that one looks through the bare trust to the beneficial owners and treats them as the party to the transaction. There is an exception however for the grant of a tenancy after 19 May 2005.

For tenancies granted after 19 May 2005 the wording of FA03/Sch16/para 3 is:

⁹ Confirmed by HMRC in SDLTM16010.

¹⁰ See for example the CAAV paper "Surrender and Regrant of Agricultural Tenancies: A Review of Issues" of June 2011.

¹¹ See for example SDLTM16010.

¹² FA03/s108.

¹³ 1 December 2003.

¹⁴ SDLTM17060.

(1) Subject to sub-paragraph (2), where a person acquires a chargeable interest or an interest in a partnership as bare trustee, this Part applies as if the interest were vested in, and the acts of the trustee in relation to it were the acts of, the person or persons for whom he is trustee.

(2) Sub-paragraph (1) does not apply in relation to the grant of a lease.

(3) Where a lease is granted to a person as bare trustee, he is treated for the purposes of this Part, as it applies in relation to the grant of the lease, as purchaser of the whole of the interest acquired.

(4) Where a lease is granted by a person as bare trustee, he is to be treated for the purposes of this Part, as it applies in relation to the grant of the lease, as vendor of the whole of the interest disposed of.

In order to obtain the surrender and regrant relief under paragraph 16 one needs the old tenant and the new tenant to be the same, presumably that is after applying the FA03/Sch16/para3 provisions.

Take a case where the old tenancy was held by mother and father on trust for the mother, father, son and daughter. The surrender is treated for SDLT purposes as made by all four of them (the beneficial owners). The new tenancy, if granted to the mother and father on trust for all four of them would be treated as granted to the mother and father. The new tenancy would not¹⁵ be between the same "parties" for SDLT purposes, so the para 16 relief would not be available.

It might be that a prior assignment of the old tenancy to the beneficial owners (with the new tenancy then being granted to the beneficial owners) would be advisable to satisfy AHA requirements and to achieve the para 16 relief.

Note that there can be a similar problem if the landlord's interest is held on a bare trust, but a similar solution could apply (a prior transfer of the reversion to the beneficial owners).

7. EXAMPLE B: TAME COMPANY TENANT

If the tenant is a company, then a new tenancy from a landlord who is a "connected person" is deemed to be taken at a premium equal to the market value of the new tenancy¹⁶. The landlord will be connected if he controls the company. It does not help the tenant company that the para 16 surrender and regrant treatment applies¹⁷.

If the new tenancy has a capital value of £800,000 the SDLT due from the company tenant on the deemed premium is £29,500, there is also SDLT on the NPV of the rent.

Group relief would not be available if the landlord is an individual or individuals, rather than a group company.

¹⁵ Although the 1993 Court of Appeal case of Marshall v Kerr discusses the limits of statutory assumptions where they would produce unjust or absurd results.

¹⁶ Finance Act 2003 / section 53.

¹⁷ It is not thought that assistance is gained from the closing words of s53(4) "But this section has effect subject to any other provision affording exemption or relief from stamp duty land tax." This wording helps where, having established that there is "chargeable consideration" there is a relief. The surrender and regrant relief is different in nature, providing that the usual "exchange" rules do not apply.

8. EXAMPLE C: TAME PARTNERSHIP TENANT

Consider a case where the tenancy is held as an asset of a farming partnership. If the landlord is or was a partner or a person connected to such a partner, the rules as set above (governed by the exchange provisions and the para 16 relief) are superseded by the particular and peculiar partnership provisions¹⁸.

The surrender and regrant is treated as follows:

- the surrender of the old tenancy is treated as an asset taken out of the partnership (para 18 charge)
- the grant of the new tenancy is treated as an asset going into the partnership (para 10 charge).

Often in a family structure the landlord will be "connected" to all of the other partners who share in the income profits.

The peculiar Sum of the Lower Proportions ("SLP") rules could give 100% off the net present value and the capital value, meaning there is no tax to pay. Points to watch are:

- If there is a corporate partner. One often cannot use their income profits share in the SLP calculation.
- The odd paragraph 17 charge if shares in the partnership change after the new tenancy is granted to the partnership, the change being in accordance with a prior arrangement.
- Paragraph 17A means that if money is taken out by the partner (which can even be by a loan repayment) within three years of the new tenancy being granted to the partnership there is an SDLT charge.

9. EXAMPLE D: REPLACEMENT FBT TO DIFFERENT TENANTS (TRIANGULAR EXCHANGE)

In order for the new tenancy to be an AHA tenancy, the new tenant has to be same as the old tenant. One could see an AHA tenancy replaced by an FBT, sometimes with entirely different (though connected) tenants. For example:

- the old tenancy is held by father and mother
- the new FBT is to be granted to the son and daughter.

The Sch17A/para16 relief for surrender and regrant does not work as the surrender and regrant are not between "the same parties". It is not enough for this relief that the outgoing tenant and incoming tenant are connected parties.

¹⁸ In Finance Act 2003 / Schedule 15.

"Triangular" land exchange

We could describe this transaction as being "triangular" with the landlord taking a surrender of the old tenancy from the father and mother and the same landlord granting the new FBT to the son and daughter.

We have to look at how the "exchange" provisions operate to impose a market value charge. FA03/Section 47 refers to FA03/Sch4/para5 for the cases where market value applies:

"This paragraph applies to determine the chargeable consideration where one or more land transactions are entered into by a person as purchaser (alone or jointly) wholly or partly in consideration of one or more other land transactions being entered into by him (alone or jointly) as vendor.¹⁹"

One has to look at each "purchaser" and see if he is also a "vendor". Oddly in this case the para 5 exchange rules:

- Do apply to the landlord taking the surrender. The landlord acts both as a "purchaser" and as a "vendor". He will be hit with a market value charge on the higher of value of the old tenancy and of the new tenancy.
- Do not apply to the son and daughter taking the new tenancy (as neither of them act as "vendor" in the surrender). The son and daughter therefore are not caught by the para 5 market value charge.

The son and daughter are unlikely to be better off though, as they will be assessed to SDLT on normal principles. As they are "connected" to the father and mother, the market value of the old tenancy given up by the father and mother will count as chargeable consideration for the new tenancy taken by the son and daughter. The son and daughter would also be taxed on the NPV of the rents in the normal way.

10. EXAMPLE E: REPLACEMENT FBT TO JOINT TENANTS (ALONE OR JOINTLY WORDING)

One sometimes sees AHA tenancies replaced by an FBT with further tenants. For example:

- the old tenancy is held by father and mother
- the new FBT is to be granted to father, mother and son.

This means that the paragraph 16 relief for surrender and regrant does not work as the surrender and regrant are not between "the same parties". It is not enough for this relief that the outgoing tenant and incoming tenant are connected parties.

On the face it²⁰, the "exchange" rules might appear to impose a market value charge on both of:

- the landlord taking the surrender of the old tenancy

¹⁹ For more on this, especially the "alone or jointly" wording, see section 10 of this paper.

²⁰ For a caveat to this see below under the heading "Land exchange rules where joint tenants are added".

- the father, mother and son taking the new tenancy.

If both tenancies are valued at £800,000 then they pay £29,500 each. (The exchange rules require the higher value to be taken.)

Possible solutions to this trap are:

- The father and mother take the tenancy, but ensure that the son can inherit the tenancy.
- Take the tenancy in the names of the father and mother as bare trustees for father, mother and son. This exploits the FA03/Sch16/para3 provision referred to in example A²¹.

Land exchange rules where joint tenants are added

There is an oddity about the land exchange rules which might not be of great practical importance in this context, but is worth mentioning for completeness. This arises out of the "alone or jointly" wording which appears twice in FA03/Sch4/para5 (as set out in section 9 of this paper). On its face this would suggest that the exchange of land rules, imposing market value on each leg of the transaction, should apply where the son is being added to the new tenancy. One reading of the legislation would be that the father and mother act as the "vendor" for the surrender and they act "jointly" with the son as the "purchaser" in taking the new tenancy.

The "alone or jointly" wording was discussed with HMRC at a Working Together Steering Group meeting on 5 September 2019²². HMRC indicated a provisional view that they give a narrow meaning to the "alone or jointly" words in para 5. Their view was that the same entity (whether a person alone or joint purchasers) had to act both as purchaser and as vendor for that party to be caught by the land exchange rules.

On the basis of this view (which a number of commentators²³ support) the SDLT analysis of this transaction would be similar to that in Section 9 of this paper:

- That there is a "triangular land exchange".
- The landlord does act as purchaser and as vendor and so is caught by the market value land exchange rules for the acquisition by taking the surrender.
- The new tenant is not caught by the land exchange rules, but the outcome is similar as the "chargeable consideration" for the acquisition of the new tenancy is the surrender by connected persons of the old tenancy so one takes the market value of that.
- Surrender and regrant relief does not help as the parties do not match.

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²¹ Though there are risks in using deeming provisions.

²² In the context of an example of A and B who jointly owned a building granting a long lease of some floors of the building to A and granting another long lease of the other floors of the building to B.

²³ Including Paul Clark.

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