

SDLT**BLACK AND WHITE, OR
(50) SHADES OF GREY?**

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I am often asked by friends, colleagues and clients for property tax advice. The UK has built up a wonderfully complicated set of tax rules governing land, requiring parties to be alert to several taxes and to structure around substantial tax inefficiencies. A single deal alone could see different aspects liable to each of five different VAT treatments. Life would be simpler if the law was always clear cut – black and white. Unfortunately, it rarely is. With HNW investments or landed estates in mind, the proper analysis of a few grey areas could result in potentially significant savings.

SDLT is a transaction tax paid by purchasers of chargeable land interests, implemented in 2003 to replace a stamp duty charge which was too often circumvented. There are different rates for residential and commercial land, with dramatic increases in residential SDLT rates over recent years.

Ten years ago, the top rate of SDLT was 5%. Today it is 17%.

It is becoming increasingly important to ensure you and your clients do not pay more than is legally required.



Is all the land residential?

SDLT rates for expensive residential land are materially higher than SDLT rates for expensive commercial land. Purchases of mixed land – land with both residential and commercial elements - attract the commercial rates resulting in material savings when applied to purchases of a large estate (a house with substantial grounds) if part of the land is commercial.

With a large estate, you might think part of the land is clearly not residential – perhaps there are meadows, stables or woodland? There is no clear test for whether land is either commercial or residential and HMRC take a narrow view. HMRC has clarified, as a result of industry consultation, that land has to be excluded from the use of the owner to be commercial. For instance, via a farm tenancy or grazing licence.

Given the SDLT saving possible, HMRC do not accept this easily. A residential site including a public footpath is insufficient to qualify a sale for the commercial SDLT rates for example. There has, however, been a recent taxpayer tribunal win on this subject. In October 2022 Gary Withers successfully appealed HMRC's closure notice, almost halving his SDLT bill, saving £98,000. The property in question included 39 acres of gardens, fields and woodlands. Alone this would not qualify for the commercial rates as HMRC would see the land as for the enjoyment of the dwelling. However, large parts of the land were subject to a grazing licence and rewilding scheme. Whilst HMRC argued the land was still part of the grounds of the dwelling, noting the nominal income, the tribunal found in Mr Withers' favour.

Careful analysis of the land being bought might lead to a substantial saving - it is a case of weighing different factors as opposed to following a precise test.



Multiple dwellings relief (MDR): offers more than is immediately apparent

Many might be familiar with the premise of MDR. If the property being acquired includes more than one dwelling, the SDLT is calculated on the price divided by the number of dwellings (subject to meeting the 1% de minimis) then multiplying the answer by the number of dwellings. As SDLT is calculated in bands this allows the lower-rate bands to be applied multiple times, generating potentially material savings. This can benefit larger acquisitions, often there might be a "main house" along with separate (and typically smaller) "granny flats" or annexes. There are a number of rules to be wary of here, including ensuring each dwelling has its own privacy. Accommodation on the top floor of a large dwelling for a nanny, for example, will rarely qualify as separate.

There are already a material number of articles on this, along with businesses whose sole trade is to retrospectively seek out this claim. Less well known is the added efficiency where a property comprising both commercial land and multiple dwellings is acquired. The rules prevent the 3% SDLT surcharge applying to those multiple dwellings, even where the purchaser is a company.

Example

A client purchases a tower block as an investment, comprising 20 flats above two commercial ground floor units. The price is £5,000,000. That is apportioned £300,000 to the commercial units and £4,700,000 to the flats.

There are multiple ways SDLT can be calculated here:

1. As the property is "mixed", it is acceptable to use the commercial rates of SDLT. That would result in £239,500 SDLT, considerably better than the residential rates which could attract a liability more than double this. Often a buyer might think this is the only or best result.
2. MDR in respect of the residential elements can be claimed with commercial SDLT rates applying on the remainder. In this case, the calculation would be:

Residential:

Average price per dwelling
(£4,700,000/20): £235,000

Total SDLT per dwelling* (1% SDLT (as de minimis applies) x £235,000): £2,350

Total - Combined total SDLT on dwellings (£2,350 x 20): £47,000

*excluding any 3% surcharge which may apply

Commercial:

Total SDLT (commercial rate) due on purchase price: £239,500

Total - Apportionment to commercial element ((£300,000 x £5,000,000) x £239,500) £14,370

Total SDLT Liability: £61,730

If the 3% SDLT surcharge applied, the total SDLT due would be £155,370. When the 3% surcharge was introduced, HMRC's manuals stated it always applied in these scenarios, but they rewrote their guidance after a successful challenge.

It is questionable whether the current law was ever intended to allow the £61,370 result, but at present, this method is explicitly accepted by HMRC (see SDLT M09740). And HMRC can provide clearance to remove any risk.

Additional grey elements here include deciding if the commercial element is "negligible", or if the purchase comprises a single "transaction".



Apportionment of consideration

Sometimes the purchase is of more than just land and buildings, it might include curtains, carpets, white goods, paintings, furniture etc (known as "chattels").

These can be excluded from the amount subjected to SDLT. An estate could have a material amount of such chattels, some less obvious than others. Determining what is a "chattel" can be difficult in borderline cases, but a careful assessment can save material amounts of SDLT.

