The City of London Law Society

4 College Hill
London EC4R 2RB
Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 - Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

SDLT Transfer of Rights Consultation
Stamp Taxes Team
HM Revenue & Customs
Room 1/38
100 Parliament Street
London
SW1A 2BQ

9 October 2012

By post and by email (budget2012.stamptaxes@hmrc.gsi.gov.uk)

Dear Sirs

Revenue Law Committee response to the 17 July 2012 Consultation Document High-risk areas of the tax code: The Stamp Duty Land Tax "transfer of rights" or "subsale" rules.

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Revenue Law Committee.

General comments

We are grateful for the opportunity to respond to the Consultation Document. We share HMRC's frustration with certain advisors who market and implement artificial 'subsale' schemes which clearly do not work. However, we do not agree that erroneous views taken by a minority of advisors is a good reason to add further conditions and/or restrictions to the current rules, as this will add unnecessary complexity for no benefit and at worst could adversely affect genuine commercial transactions.

Save for the 3 proposed changes referred to below, we think the current rules should be left as they are – we do not support either Option 1 or Option 2. In particular, we believe the suggestions for mini-TAARs in section 45 (paragraphs 4.4.1 and 4.12 for Options 1 and 2 respectively) to be "overkill".

Our proposed changes are as follows:

1. A Tax Law Rewrite-style redrafting of section 45, including splitting out "assignment", "subsale" and "onsale" cases.

   The current drafting of section 45 is, in our view, very unclear. As drafted, it can be difficult to advise on. This is apparent from the two reported cases on section 45, where half a page of tax legislation has been subject to tens of pages of judicial analysis on its true meaning.

   In our view any rewritten legislation should apply the existing policy of only one charge to SDLT in the following three typical "transfer of rights" cases:

   (a) **Assignment**: B's contract with A is formally assigned to C, whether or not for payment, and B steps out of the picture, potentially long before the underlying contract completes.

   Payment from C to B may arise in respect of any deposit paid by B to A and to the extent of any excess paid by C to B over the underlying contract price. C will pay the balance of the original contract price to A.

   (b) **Subsale**: B enters into a separate contract with C and on completion B directs that A conveys the property directly to C. Like (a) above, this may involve C making payments to both B and A.

   (c) **Onsale**: B completes his contract with A and immediately afterwards completes his contract with C. This will typically involve only C to B and B to A payments.

2. Recast the tailpiece to sub-section 45(3) (substantial performance or completion of "A-B" contract disregarded) as a complete exemption but require B to make a claim to HMRC for the exemption.

   This would allow HMRC to police claims and root out abusive transactions. This claim could be in a land transaction return completed by B or for simpler administration for taxpayers and HMRC in a new subsale exemption claim form submitted by B, containing details of the A-B and B-C transactions.

   In principle, we agree that it would be wrong to apply the full exemption where the consideration for the B-C transaction is substantially below the consideration for the A-B transaction, but for non-arm's length arrangements existing anti-avoidance mechanisms would deny exemption.

3. Put it beyond any doubt that section 75A applies for the purposes of section 45 (even though we think it is clear that this is already the case – see for example section 75A(3)(b)).

Why do we believe HMRC's proposed reforms are unnecessary?

We note that, like us, HMRC believe that most of these schemes do not work anyway (as noted in the TIA) and if the aim of the consultation is to stop such schemes being implemented in the first place (paragraph 1.7 of the Consultation Document) it is hard to see that adding additional conditions will have any impact. We believe that developments since the introduction of SDLT in 2003 and other proposed changes

mean that it is very unlikely that artificial 'subsale' schemes will continue to be promoted and to the extent there is further abuse this can be easily challenged using existing mechanisms. These developments include:

- The continuing development of 'purposive construction'/*Ramsay* in the courts, which has in nearly all cases defeated artificial and contrived schemes. In this regard we note the recent success of HMRC in *HMRC v Vardy Properties and Vardy Properties (Teeside) Limited* [2012] UKFTT 564 (TC) in which an attempted abuse of the subsale rules was defeated. We do though acknowledge that *DV3 RS Ltd Partnership v HMRC* [2011] UK FTT 138 (TC) is an example of a case where the Court has upheld an artificial subsale scheme contrary to the purpose of the legislation. This though may change on appeal and see our further comments on *DV3* below.

- The introduction of FA 2003 section 75A for transactions since December 2006. On its own this should defeat all artificial abuses of subsale relief. We note that HMRC refer to some advisors' views that section 75A may not apply to section 45. Although we do not share this view, as noted above, one change proposed in the Consultation Document that we do agree with is amending section 75A to put it beyond doubt that it does apply to subsales etc. We would note here too that section 75A would defeat any repeat of a *DV3*-type scheme.

- The Chancellor of the Exchequer's statement in Budget 2012 that schemes may be closed down retrospectively from 21 March 2012 in relation to residential property (although we would note here that the majority of our members are opposed to retrospective legislation as a matter of principle).

- The addition of SDLT to the DOTAS rules since many of the original schemes were implemented and the proposed improvement to the SDLT DOTAS rules.

- The proposed GAAR, which would clearly apply to the schemes referred to in the Consultation Document, assuming that such schemes were not first defeated by purposive construction or section 75A.

- The recent Solicitors Regulatory Authority statement advising solicitors about their professional standards in relation to such schemes.

- The changing attitude to aggressive tax avoidance at company board level has resulted in fewer advisors promoting schemes and an unwillingness by many corporates to implement such schemes.

With regard to these matters we question whether the subsale rules need amending at all? If there were to remain advisors who continue to peddle subsale schemes then if they were to ignore, for example, *Ramsay* or section 75A, they may likewise take deliberately erroneous views on, for example, any mini-TAAR added to section 75A. For any such remaining advisors we would recommend other methods to tackle abuse, for example:

- Reports to Professional Bodies, where relevant.

- Apply FSA misselling rules to boutiques offering such schemes.

- As suggested in the HMRC Consultation Document Lifting the Lid on Tax Avoidance Schemes, improving public information about tax avoidance and strengthening the DOTAS rules for promoters of SDLT schemes.

We note here again too, the Minister's statement referred to above which on its own should stop all further attempts at abusive schemes in the residential sector.

We therefore consider the proposals in Option 1 to be completely unnecessary. They would graft on further conditions and restrictions to a legislation that already needs simplifying and we doubt such changes would have the impact HMRC intend. Likewise, we do not favour Option 2 – an anti-avoidance condition is unlikely to add anything to *Ramsay*, section 75A and the proposed GAAR.

Below we set out the answers to the specific questions in the Consultation Document.

Q1. How common are the kinds of transaction described in paragraph 3.2 above, or other transactions that benefit from the transfer of rights rules in the same way? Are there alternative forms of transaction that could be used to prevent a charge on an intermediary who effectively acts as a conduit in a transaction?

These transactions or variants of these are relatively common. Other common transactions involve speculators who purchase land in the hope to make a "turn", sometimes involving contracts conditional on obtaining planning permission.

In some limited cases, it may be possible to use a nominee. SDLT group relief may also be available in limited cases, but there could be a clawback on the transferee leaving the group which would be inequitable for a true subsale.

Q2. What impact on the commercial and residential property sectors would result from any restriction of the benefits to B provided in the transfer of rights legislation or if the benefits were available in only certain of these transactions? Would restricting the benefits give rise to hardship or real difficulty, and produce inappropriate results?

Clearly, if subsale relief were not available for some or all of these types of transactions then there would be an inequitable double charge for what in essence is a single land transaction.

Q3. Do respondents think that this approach to the legislation would be sufficient to address commercial circumstances adequately and also be robust against attempts to exploit "subsale" transactions to avoid SDLT altogether?

As noted under our "General Comments" above, we do not think that restructuring subsale relief in the way envisaged under Option 1 will catch any abusive transactions which would not already be defeated by *Ramsay*, section 75A and the proposed GAAR. The main "credit" proposals in paragraph 4.3 are unduly cumbersome and we see no need for the additional proposed conditions in paragraph 4.4. The credit provisions would be messy in practice as B would need to obtain information from C, including establishing that C has paid the SDLT. Instead, we propose that section 45 remains unchanged but there be a new requirement for B to claim the exemption in the "tailpiece" to sub-section 43(3).

Q4. Do respondents consider that to meet the policy aims described above, this approach is preferable to the approach of the current section 45?

No, see above.

Q5. For what types of transfers of rights should the new relief be available? Would it be appropriate to limit it to only subsales, or to only subsales and assignments (see 4.4.1 above)?

There seems no legitimate reason to restrict section 45 by excluding assignments. Abuse of subsale relief appears to relate not to the types of transactions to which section 45(1)(b) refers ("assignment, subsale or other transaction") but rather the combining of subsale relief with another exemption or relief or perceived deficiencies of sub-section 45(3)(b) in relation to the computation of "consideration". Having said that, subsales (including onsales as described above) and assignments are what we regularly see in practice, so the deletion of "other transactions" may not result in hardship.

Q6. Should the requirement that the A to B and B to C transactions must occur at the same time and be in connection with each other be altered?

To avoid any potential narrow interpretation it might be more practical to refer to substantial performance or completion 'on the same day' instead of 'at the same time'.

Q7. Would the proposed rule where B and C are connected cause any hardship?

In principle this is not an unreasonable proposal, but it is likely that where transactions are structured artificially to drive down the consideration on the B-C transaction other mechanisms noted above could be used by HMRC to challenge a claim to subsale relief.

Q8. Is it appropriate that an SDLT charge could arise on B where land is sold on at a loss (see 4.6), and is it likely that cases of genuine and unreasonable hardship or commercial difficulty would arise due to this possibility?

This would be an unwelcome change to the rules and would not, for entirely commercial transactions, be an appropriate response to the intention outlined in the Consultation Document to stop abusive claims to subsale relief. It would also add further unnecessary complexity to the rules. Accordingly, our view is that such a change is not appropriate.

Q9. Do respondents consider that any of the conditions suggested above are unnecessary or should be changed? Are there any particular situations where a purpose-based anti-avoidance rule (see 4.4.2) would cause significant uncertainty?

As noted already, the suggested purpose based anti-avoidance rule (paragraph 4.4.2) would seem to add nothing to the existing rules on purposive construction, section 75A and the proposed GAAR. It would cause confusion and in our view it would be "overkill". In this regard, we also note that one goal of the proposed GAAR is to reduce the number of TAARs, so for that reason too the proposals in paragraph 4.4.2 seem inappropriate.

We see no reason for the inclusion of the condition in paragraph 4.4.3 – indeed it would prohibit relief in bullet 4 of paragraph 3.2. However, if the most egregious abuse of subsale relief is in the residential property sector there may be a case for the denial or further restriction of subsale relief in that sector. We have no experience or data on how often subsale relief is used in legitimate residential property transactions by individuals. On balance though, it does seem an unnecessary extra condition, for the reasons previously given under "General Comments" (in particular the Minister's statement on retrospective legislation in the residential property sector).

Q10. What would be the impact on individuals and businesses, in respect of the additional returns and claims for relief required under this approach?

Submitting a claim for the A-B transaction would not be particularly burdensome, but the additional conditions proposed in option 1 are, in our view, not necessary and have the potential to clog up already messy rules, make executing transactions more complicated and possibly deny relief for legitimate commercial transactions.

Q11. Do respondents consider that this option would adequately deal with avoidance using the transfer of rights rules and maintain current benefits of the rules to ensure one, but only one SDLT charge arises in transfer of rights transactions?

Option 2 is clearly preferable to option 1, but for the reasons already given, we do not agree that section 45 needs its own mini-TAAR. If section 75A were amended to put beyond doubt that it applies to section 45 and the GAAR comes in (as expected) then no changes would need to be made to section 45, save perhaps our suggestion that B is required to send a notice to HMRC to claim the exemption.

Q12. Do respondents see any difficulty in the way these rules, including the purpose, test would interact with section 75A?

We would need to see the drafting of any such proposed rule but as stated, we find it hard to see how such a rule would add anything to the existing HMRC armoury for fighting abuse.

Q13. Do respondents have any suggestions for improving this option, or for alternative approaches, bearing in mind the predominant aim of preventing opportunities for abuse?

As noted, we agree that section 75A could be clarified and B required to submit a notice to HMRC claiming exemption.

Also, to defeat schemes that rely on the relationship between B and C section 45 could contain a rule which provides that the deemed transaction which is subject to SDLT under the transfer of rights provisions is the A-C transaction.

Separately we note here that a subsale will normally prevent the A-C transaction qualifying as a transfer of a going concern for VAT purposes. This would increase the SDLT cost by 20 per cent. We see this as part of the wider issue of the inequity of SDLT being charged on the VAT element, which we believe should be reviewed.

Q14. Do you have any comments on the equality and other impacts of the proposed options?

None.

Yours faithfully

Bradley Phillips
Chair
The City of London Law Society Revenue Law Committee

THE CITY OF LONDON LAW SOCIETY
REVENUE LAW COMMITTEE

Individuals and firms represented on this committee are as follows.

B.S. Phillips (Herbert Smith Freehills LLP) (Chairman)

H. Barclay (Macfarlanes LLP)

C.N. Bates (Norton Rose LLP)

B. Coleman (Weil, Gotshall & Manges LLP)

D. Friel (Latham & Watkins LLP)

P.D. Hale (Simmons & Simmons LLP)

M.J. Hardwick (Linklaters LLP)

C. Hargreaves (Freshfields Bruckhaus Deringer)

K. Hughes (Lovells LLP)

N. Mace (Clifford Chance LLP)

G. Miles (Slaughter and May)

J. Scobie (Kirkland & Ellis LLP)

C.G. Vanderspar (Berwin Leighton Paisner)

S. Yates (Travers Smith LLP)

C. Yorke (Allen & Overy LLP)