Stamp Taxes on Share Consideration Rules

Response by the Chartered Institute of Taxation

1 Introduction

1.1 We refer to the consultation published on 7 November 2018 relating to Stamp Taxes on Shares Consideration Rules. We take this opportunity to comment on the various proposals to amend the rules relating to stamp taxes arising on consideration for share transactions considered in the consultation document.

1.2 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

1.3 Our stated objectives are for a tax system that include a legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences and greater simplicity and clarity, so people can understand how much tax they should be paying and why.

1.4 Currently, we are not clear as to the policy intention of the suggested changes to the rules, nor that there will not be unintended consequences arising from them, particularly the extension of the market value rule.

2 Executive summary

2.1 Neither the policy rationale behind, nor the intended targets of, the proposed extension of the market value rule to unlisted securities has been made clear. We would welcome some further discussion with HMRC around the types of arrangements involving connected parties being used to minimise Stamp Duty and SDRT that HMRC wishes to target as being avoidance before the rule is extended generally. It is likely that an extension to the market value rule will result in significant additional costs that are wholly disproportionate to the tax at stake in many cases. This result is particularly undesirable in circumstances where there is no avoidance motive for the transaction. The current vague description of policy rationale prevents designing a targeted rule so as to reduce the unintended consequences.

2.2 With regard to the other two proposals:

- aligning the definitions of consideration for Stamp Duty and SDRT; and
- aligning the rules on contingent, uncertain and unascertained consideration,
it would be useful to know how these proposed changes fit into the government’s aim of reforming, digitising and simplifying Stamp Duty generally.

2.3 It is not clear why the government is proposing these two non-core recommendations from the OTS report on ‘Stamp Duty on paper documents: a way forward to reform, digitise and simplify’ at this time. Although they may appear to be easy wins, the proposed increased alignment of the various stamp taxes regimes will not necessarily simplify them and will require significant legislation to implement. We would prefer to see a longer term plan towards more wholesale reform of stamp taxes and a road map to manage the transition. On their own, we are not convinced that the changes proposed will be of sufficient benefit to taxpayers or HMRC to justify the effort and cost of implementing them.

3 Extending the Market Value Rule

3.1 The policy rationale behind the proposed extension of the market value rule to unlisted securities is not clear. The consultation document confirms that the 2018 market value rule applying to listed securities was introduced to tackle contrived arrangements involving the transfer to companies to which the transferor is connected which avoided a Stamp Duty or SDRT charge. We understand that these arrangements were resulting in a loss of substantial amounts of tax for the Exchequer and thus had to be addressed.

3.2 However, although the consultation document references arrangements involving connected parties being used to minimise Stamp Duty and SDRT in relation to transfers of unlisted securities, there is no detail as to what these arrangements might be, nor why HMRC considers them to be objectionable and, therefore, avoidance which should be prevented. So far as we are aware, the most commonly occurring circumstances in relation to unlisted securities that this change would give rise to significant additional Stamp Duty or SDRT for are corporate reconstructions. As we discuss below in response to Question 3, it is not clear to us why the government would wish to impose a charge in these circumstances. To the extent that there are other arrangements being used in relation to unlisted companies, such as arrangements similar to the contrived arrangements involving the transfer of publically listed securities, we would welcome a discussion with HMRC to clarify its overall policy in this area and the intended targets before this proposed extension is introduced.

3.3 The extension of the 2018 market value rule to unlisted securities in respect of transactions between either only connected companies, or connected parties more generally, would, in our view, result in significant additional costs – for both taxpayers and HMRC. These costs would in many cases be wholly disproportionate to the tax at stake. This is particularly the case for transactions in respect of which there is no avoidance motive and more particularly the case for transactions involving individuals.

3.4 Q1: What would be the impact of extending the market value rule to all securities whether listed or unlisted?

3.5 The proposal to extend the market value rule to all securities would result in significant additional costs – for both taxpayers and HMRC - that would be, in most cases, wholly disproportionate to the tax at stake. It would also introduce unnecessary complexity into the stamping process for many low value transactions in respect of which there is no discernible avoidance motive.

3.6 We recognise that unlisted shares already have to be valued for a variety of tax purposes, but that valuation exercise often proves to be complicated and expensive. A particular issue with requiring a valuation for Stamp Duty and/or SDRT purposes is that if it applies to non-exempt, but low value transfers of shares
between connected parties, and particularly between individuals, the expense of obtaining a valuation will be excessive and disproportionate to the amount of Stamp Duty or SDRT at stake. For example, the adviser and valuation costs of confirming that a market value is (say) £2,000 rather than £5,000 would be significantly higher than the £15 difference in Stamp Duty or SDRT. A de minimis transaction size, below which the new rules do not apply, would ameliorate this problem. We suggest that this could operate on the basis that the new rule does not apply if the market value of the shares is reasonably considered to be within a parameter of less than x% more than a specified transaction value.

3.7 The consultation document does not consider how a system incorporating a requirement for a valuation would work in practice in order to fit in with the requirements of stamping in order to register a new legal owners of shares, particularly where there is a commercially driven timetable. For example, how will HMRC treat a valuation. Presumably, it will not have time to review this as part of an adjudication process. Thus would this become effectively self-assessment. The receipt of a stamped stock transfer form is supposed to provide certainty, but would it instead become open to challenge in the future on the basis of the valuation?

3.8 How would such a challenge, if the valuation is found to be incorrect and more Stamp Duty or SDRT payable, impact on the fact that Stamp Duty is paid by the buyer of shares to allow the company books to be written up. This means that it will be the buyer who is most concerned to rely on any valuation.

3.9 There will be a tension between the preferred result from a Stamp Duty and SDRT perspective and a capital gains perspective for the buyer – and, more generally, between a buyer and a seller. We would expect that HMRC would expect that the amount to be brought into account for both buyer and seller for capital gains tax purposes would be the same as the value used for Stamp Duty and/or SDRT purposes.

3.10 **Q2: What would be the impact on mergers and acquisitions?**

3.11 To the extent that the extension of the market value rule results in additional charges to Stamp Duty or SDRT, these costs will necessarily be taken into account in deciding whether or not a particular transaction makes commercial sense. In finely balanced transactions, the additional Stamp Duty or SDRT charge could result in the transaction not occurring. This could result in an investment being held by the current owner for longer, and he may not be prepared to put in the investment to grow the business in the way in which a buyer/new owner would, which is bad for the economy as a whole.

3.12 **Q3: Would there be particular impact on small or micro-businesses? What would be the impact on re-organisations of small family businesses. Please provide details of any one-off or on-going costs.**

3.13 The smaller the business and, therefore, the value of the shares, the more disproportionate the additional costs of obtaining a valuation etc will be to the tax at stake.

3.14 Corporate reconstructions, including re-organisations of family businesses, occur for a variety of reasons, including family succession and in preparation for a sale.

3.15 There are various reliefs from the Stamp Duty charges that would otherwise arise (FA 1986 sections 75 and 77) provided that the conditions for these reliefs can be met. Where the conditions cannot be met, and charges would otherwise arise, well known tax planning techniques are often used to mitigate these charges. These techniques, such as ‘swamping’, would seem to be a target of the proposed extension of the market value rule to unlisted companies. The use of these techniques has, we understand, become more prevalent since the introduction of FA 1986 section 77A which has narrowed the circumstances in which relief under FA 1986 section 77 can be obtained.
3.16 We would welcome a discussion with HMRC around the policy rationale of seeking to impose a Stamp Duty charge on corporate reconstructions. There is generally relief from other taxes, such as capital gains tax and corporation tax, which ensure that the transactions are tax neutral. It can also be said that any tax charges that do arise on a corporate reconstruction are generally ‘dry’ tax charges, in that no cash is generated by the transaction. As such it is a real cost to a business or shareholder. Further, in circumstances where the corporate reconstruction takes place in order to facilitate a sale of the business, there should be a Stamp Duty or SDRT charge on the subsequent sale.

3.17 We understand that FA 1986 section 77A was introduced in part to prevent avoidance of the Stamp Duty charge expected on a subsequent sale, as a result of packaging the business into an offshore company (the subsequent sale of which is not liable to Stamp Duty). Rather than extending the market value rule to counteract the techniques now being used, such as swamping, we wonder whether consideration could be given to counteracting the avoidance of Stamp Duty or SDRT on a sale following a corporate reconstruction more specifically after Brexit (and, therefore, once the EU rules around freedom of establishment no longer apply to the UK), by limiting the anti-avoidance provisions to offshore companies, while maintaining the availability of reliefs for pre-sale corporate reconstructions in a wholly UK context.

3.18 **Q4: What would be the impact of extending the market value rule to transfers to connected persons? In particular what would be the impact on individuals? Please provide details of any one-off or on-going costs.**

3.19 We cannot see any policy reason to extend the market value rule to connected persons other than companies, nor, in particular, to transactions involving individuals. The impacts would be predominantly ones of cost, to the extent that any additional charges to Stamp Duty or SDRT did arise. However, we would expect there to be so many exemptions, as noted below, and rightly so, such that the application of the extended rule will be so limited as to be disproportionate to its introduction.

3.20 **Q5: If the market value rule was extended to transfers to connected persons, what transactions do you consider should be carved-out? What would be the impacts if these transactions were caught by the measure?**

3.21 We would expect to see exceptions for the following:

a. Corporate reconstructions where there would otherwise be a ‘dry’ tax charge of the type discussed above
b. Transfers between spouses or civil partners (gifts inter vivos)
c. Transfers in connection with divorce or dissolution of a civil partnership
d. Transfers to trustees where the trustee is to hold the shares transferred in the course of a business carried on by it that consists of, or includes, the management of trusts
e. Transfers to trustees where the transferor is connected with the trustee only because of section 1122(6) of the Corporation Tax Act 2010
f. Transfers that are, or are part of, a distribution of the assets of a company (in addition to those made in a winding up)
g. Transfers on the vesting of property subject to a trust in the trustees of the trust on the appointment of a new trustee or in the continuing trustees on the retirement of a trustee
h. Transfers on succession of businesses
i. Transfers occurring as a result of operation of law.

3.22 However, this is not an exhaustive list and we suggest that one of the problems with this proposal is that it is unrealistic to draw up an exhaustive list of exceptions to address all the possible transactions that would
be caught by an extension of the market value rule to connected persons other than companies, but in respect of which it is not intended that a Stamp Duty or SDRT charge should arise.

4  **Alignment of Definitions of Consideration for Stamp Duty and SDRT**

4.1 **Q6: What would be the impacts of adopting ‘money or money’s worth’ for Stamp Duty as well as SDRT. Do you have a view as to the extent that payments other than cash, stock or marketable securities, and debt are currently used to purchase securities?**

4.2 We are not aware of any particular issues in practice arising from the difference between the definitions of consideration for Stamp Duty and SDRT. Generally, although different, the two definitions are well understood.

4.3 We recognise that the OTS suggested ‘a digitised stamp duty adopts the ‘money or money’s worth’ concept of consideration as its starting point’ (paragraph 3.5). However, this was a recommendation in the context of a broader reform of Stamp Duty – adopting the more modern concept of ‘money’s worth’ alongside a general modernisation of the Stamp Duty regime. We are not convinced that there would be any particular benefit in making this change in isolation from broader reform.

4.4 The OTS also noted that there would have to be specific rules and exemptions to ensure that current position is maintained for transactions that are currently not liable to a charge to Stamp Duty as a result of the narrower definition of consideration. It is not clear that any perceived benefit arising from an alignment of the definitions of consideration in terms of simplification justifies the work that would be required to ensure that the present position is preserved.

4.5 **Q7: Would there be any particular impact on individuals, small businesses or micro-businesses from adopting ‘money or money’s worth’ for Stamp Duty as well as SDRT. Please provide details of any expected costs.**

4.6 We are not aware of any particular impacts for individuals, small businesses or micro-businesses as distinct from larger businesses and other taxpayers.

4.7 **Q8: Do you consider there are specific exemptions which should be provided to protect the position of transactions where the SDRT charge is currently franked. If so, what are these transactions, how often do they arise and what would be the impacts of not protecting the position of these transactions?**

4.8 The OTS recommended (at paragraph 3.23 of their report) that ‘it would be advisable to work through all the types of transaction that rely on the current stamp duty definition of consideration.’ We agree that, unless, and this does not appear to be the case, the intention is to raise revenue from this change, exemptions should be provided for all transactions which are not currently chargeable to Stamp Duty, including those set out in paragraph 4.8 of the consultation document.

4.9 Examples of transactions which should be specifically exempted would also include, but not be limited to:

- In specie redemptions,
- In specie surrenders, and
- In specie contributions for the issuance of units that do not constitute ‘stock’ or ‘marketable securities’.
Aligning the Rules on Contingent, Uncertain and Unascertained Consideration

5.1 Q9: What are your views on adopting the SDRT approach to contingent, uncertain and unascertainable consideration for Stamp Duty? Would the need to determine the value of the ‘money’s worth’ part of the consideration as at the date of the transaction create significant burdens?

5.2 There is some advantage in the current system in that it generally provides certainty and allows parties to move on following a transaction. The existing rules for Stamp Duty while complicated are, in practice, well understood. However, it is also fair to say that buyers are often at best surprised to be required to pay Stamp Duty on consideration they may not pay (with no right of refund). This is particularly the case where the only reason for a stated cap is to comply with regulatory requirements, for example the listing rules.

5.3 We are not, however, in favour of a change to the SDRT approach to contingent, uncertain and unascertainable consideration as in our view, to do so would be inconsistent with the aim of simplifying or modernising Stamp Duty. Also the additional cost, subjectivity and uncertainty associated with estimating the money’s worth of the contingent consideration is not justifiable.

5.4 Q10: Would adopting the SDRT approach to contingent, uncertain and unascertainable consideration have particular impacts on smaller businesses and individuals? If so, what would these be?

5.5 We are not aware of any particular impacts individuals, small businesses or micro-businesses as distinct from larger businesses or other taxpayers.

5.6 Q11 What would be the benefits and impacts of adopting the current Stamp Duty treatment of contingent, uncertain and unascertainable consideration for SDRT? Would there be any particular impact on smaller businesses and individuals?

5.7 There would be limited benefit or impact of this approach as in the vast majority of SDRT transactions the amount of the consideration is certain at the time of the transaction. We would not favour a change along these lines.

5.8 Q12: What would be the benefits of adopting the Stamp Duty Land Tax (SDLT) approach to contingent, uncertain and unascertainable consideration?

5.9 On balance we would prefer to see the SDLT approach adopted for the purpose of Stamp Duty. This approach ensures that ultimately Stamp Duty or SDRT is paid on the amount of the actual consideration. It removes the need to estimate the value of contingent or uncertain consideration, which is a difficult and subjective valuation.

5.10 However, although there is a precedent for re-examining the sufficiency of stamping (under the wait-and-see principle), this usually takes place over a relatively short time period. The self-assessment scheme of SDLT is very different from the mechanics of stamping. Thus thought needs to be given as to how this approach could be adapted to fit in with the overall scheme of Stamp Duty.

Impact Assessment

6.1 We are surprised at some of the conclusions in the Impact Assessment for these proposals.

6.2 For example, the Impact Assessment says that the ‘Economic Impact’ will be minimal. It is not clear whether the reference to economic impact is to the expected impact for taxpayers or for HMRC. However, whether
intended to be reference to either or both, if no economic impact is expected – positive or negative – we wonder whether the changes are worth the effort that will be required to implement them.

6.3 We do not see how it can be the case that HMRC will not incur any costs implementing these changes. In particular, if the extension to the market value rule requires taxpayers to carry out further work on valuations and to submit additional information, surely HMRC will have more work to do to check it.

6.4 In addition, the extension of the market value rule to unlisted securities will mean that businesses, which are not classed as ‘large businesses’ will be affected and brought within scope. These businesses do not have access to a CRM and this will, therefore, put pressure on the facility for medium sized businesses to request a point of contact in relation to a particular transaction. This is already a real practical difficulty for these businesses and these changes are likely to lead to an increased demand on HMRC in this regard. We would also anticipate an increase in the number of group relief claims in respect of Stamp Duty as a result of the extension to the market value rule, which would be another resource issue for HMRC.

7 Acknowledgement of submission

7.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

8 The Chartered Institute of Taxation

8.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 18,500 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation

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