

SDLT Section 116 FA 2003

Summary of points arising from the meeting on 11 June 2018

Attendees:

HMRC

STPG and CIOT representatives

Welsh Revenue Authority and Revenue Scotland

SDLT issues discussed

1 S116(1)(b) - Gardens and Grounds

1.1 Gardens sold separately from their 'current' sub-para. (a) dwelling

HMRC's firm view is that where land within section 116(1)(b) or (c) is sold separately (without the dwelling), the land remains residential. In other words, section 116(1)(a), (b) and (c) are considered independently. This position has always been their policy position under the predecessor stamp duty provisions and in relation to SDLT.

HMRC's view is that if garden/grounds are sold separately from the dwelling, the acquisition by the purchaser will be treated as residential irrespective of whether that part of the garden/grounds has been fenced/walled off or otherwise made physically inaccessible to the vendor. However, a subsequent sale by the purchaser may be non-residential if there is no building within section 116(1) (a) on the plot at the effective date of the subsequent sale.

HMRC's guidance will be updated to more fully reflect HMRC's position.

1.2 Status of gardens and grounds of former sub-para. (a) dwelling

HMRC's view is that if, at the effective date, there is no longer a section 116(1)(a) building that is used or suitable for use as a dwelling, or in the process of being constructed or adapted for such use, e.g. where the former dwelling is derelict or has been demolished, then it will follow that the garden/grounds are no longer residential.

2 S116 (1)(a) – When does the construction/adaptation process start?

In relation to 'in the process of being constructed' HMRC confirmed that there is no express 'golden brick' test or rule of thumb for SDLT. There needs to be 'more than a hole in the ground'.

HMRC's guidance on this aspect is under review.

2.1 One dwelling

Works have to have begun otherwise it is only bare land, and as such non-residential.

2.2 Multiple dwellings

The test above is applied separately/individually to each dwelling being sold. For MDR works must have commenced on all dwellings that will form part of the MDR claim. If works have not commenced on the site for a particular dwelling the classification for that part will depend on what was originally purchased, residential or non-residential.

2.3 Mixed development

For a block that comprises, say, retail shops on the ground floor and flats above, the start of works on the block is sufficient for both the residential and non-residential elements.

2.4 Bare land

As above, works have to have begun otherwise it is only bare land, and as such non-residential and MDR would not be available

It was noted that the distinction between 'off-plan' and bare land with planning permission causes some confusion among taxpayers and non-specialist advisers. It would be helpful if the guidance addressed the distinction (where applicable in the legislation including for MDR) between:

- the acquisition of bare land with planning permission but without an obligation to build a dwelling, and
- an off-plan purchase where the subject - matter of the contract is a dwelling that is to be constructed but construction has not started at the point the contract is substantially performed.

3 'Marketed for'

3.1 SDLTM00365 (fourth paragraph) still reads "Where, at the effective date, an existing building is being adapted or *marketed for*, or restored to, domestic use, it is treated as residential property."

HMRC acknowledge that the reference to marketing is misleading. The guidance will be amended to remove 'marketed for'. 'Marketed for' is not part of the test albeit that any marketing material may form part of the indicators in considering whether or not a building is suitable for use as a dwelling. The test is use or suitability for use at the effective date.

Planning permission in itself does not determine whether a building is residential or non-residential unless implemented at the effective date.

4 Relevance of legally-enforceable restrictions

4.1 Existence or absence of planning permissions and conditions

4.2 private law restrictions (e.g. restrictive covenants)

HMRC note that private/public legal conditions that restrict residential usage in some way are a factor or indicator that may point towards non-residential but that physical characteristics of a building that indicate suitability for use as a dwelling weigh on the other side of the scales.

The degree of restriction can vary, for example holiday accommodation may, at one end of the spectrum, have very limited occupation rights, or at the other end, a minimal exclusion such as one month a year, but in other respects the building is physically suitable for use as a dwelling. The degree of permanence of the structure is a further factor.

In terms of physical attributes pointing to residential in nature, again HMRC consider the indicators such as a kitchen, bathroom, lockable front door. HMRC recognise that examples in the guidance would be helpful, however examples cannot be comprehensive and a slight variation might tip the balance.

Representatives thought that generic examples, such as serviced accommodation would still be helpful, especially those that HMRC have considered in previous clearances.

These issues are also of particular relevance for accommodation occupied by students.

Student and holiday accommodation will be areas of focus for HMRC in reviewing their current guidance (see further point 10 below).

5 Relevance of Non-Domestic Rates/Council Tax

As above, the incidence of Council Tax/ rates is an indicator to be weighed up in the round.

6 Businesses/trades carried on at home.

This area forms part of HMRC's review of the current guidance.

For buildings containing areas used as a dwelling and areas used for business purposes, a distinction is drawn by HMRC between the scenario where certain rooms of a house are used for work purposes (the office at home example) and the scenario where the house is divided into separate areas which are used independently for residential and trade purposes (the house part converted into a surgery example).

In situations similar to the 'home office' example HMRC consider that the rooms used for office work remain suitable for use as part of the dwelling and that the dwelling overall remains in use as a dwelling. Therefore, the home office/study is not mixed use.

The 'converted into a surgery' example is more nuanced. HMRC consider that a building containing some areas used for business may still be used for and suitable for use as a dwelling depending on the degree of conversion required to turn the business areas back into residential areas and there would have to be a clear separation between the residential and non-residential areas.

A third scenario is commercial use of a property (other than the dwelling itself) or land that would otherwise form part of the garden or grounds. The question is whether an identifiable use precludes enjoyment of that part of the grounds. A paddock that is not used for anything else remains available for the enjoyment of the dwelling because there is no other identifiable use. A meadow that has been planted as a wild flower meadow as part of a grant scheme is still for the enjoyment of the occupants; there is no other identifiable use. On the other hand, a formal arrangement involving the granting of a lease or licence to graze the land is more likely to prevent the owner's enjoyment of that land.

It will be necessary to weigh up all the factors in a particular case to establish whether or not an identifiable use precludes enjoyment by the occupier(s) of the dwelling.

Actual use at the effective date overrides past or future use. The intention of the purchaser is generally irrelevant (except in the case of the higher rates).

7 Holiday lettings - Relevance of planning permissions/conditions

Factors mentioned at 4, 5 and 6 may be relevant here. Planning permission and legal restrictions are a factor in assessing suitability for use but are not necessarily determinative.

Whether something is a fixture or a chattel and the degree of annexation test remains relevant to whether it is land in the first place.

8 Derelict buildings

Irrespective of previous use, a building that is no longer used as a dwelling or suitable for use as a dwelling falls outside section 116(1)(a). It is recognised that there is an element of subjectivity in what constitutes dereliction such that a building is no longer habitable. HMRC will consider expanding their guidance to indicate the factors to be considered although a factor taken alone will not be determinative.

9 Section.116 (7) - The 'six or more' rule

In terms of the meaning of a 'single transaction' in the sub-section, HMRC's view is that it means a single contract as opposed to a single land transaction. The fact that completion takes place at different times for different properties under a single contract does not affect the analysis. Therefore, the acquisition of six or more flats under one contract with completion at different times as the flats come on stream is a single transaction for section 116(7).

The following example was raised with HMRC: In practice a purchaser may enter into multiple identical contracts for several dwellings with completion occurring at different dates, perhaps as the dwellings become vacant. Completion therefore occurs on different dates. Multiple identical contracts avoid the conveyancing complexities. The multiple contracts form part of the same bargain or deal. A discount may be given for the multiple acquisitions. The purchaser cannot cherry pick the properties

HMRC's view is that where there is an overarching contract, that contract would form a single transaction for the purposes of section 116(7); the essence is whether there is a single contractual obligation to take six or more dwellings and in fact six or more are taken.

10 The distinction between serviced apartments and hotels, and between assisted living units and care homes, and student accommodation.

In general terms HMRC considers that each case has to be assessed on its own facts considering multiple indicators. HMRC are undertaking a review of their guidance in these areas. HMRC acknowledge that the nature of housing in these areas is evolving. HMRC may be able to draw on actual clearance requests for examples in the guidance. However, HMRC would welcome generic examples in practice to draw out the indicators that should be considered.

The original disadvantaged areas guidance that included a series of indicators is not current guidance.

A further area that is evolving is 'build to rent' developments that involve communal living areas and therefore less of the conventional indicators of a dwelling eg kitchens. ¹

¹ In all these areas the question arises of what constitutes a separate dwelling – a question that is fundamental to various aspects of the SDLT code (section 116, MDR and the higher rate etc). However, this meeting was confined to consideration of section 116 definitions only.