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TAMD 2023—Stamp taxes on shares modernisation

A consultation on proposals to modernise the stamp taxes on shares framework, including the introduction of a single self-assessed stamp tax on securities to replace stamp duty and stamp duty reserve tax, was published on Tax Administration and Maintenance Day (TAMD) on 27 April 2023. Ed Milliner (tax senior counsel) and Tanja Velling (tax PSL counsel), both of Slaughter and May, explore the detail of the proposed changes.

Base and scope

As is currently the case, the new tax would apply to equity securities and debt securities with equity-like features. The proposal is for the tax base to be captured in the material scope of the new tax, rather than having it apply to all debt securities in principle with an exclusion for those that do not have equity-like features (as is currently the case with the loan capital exemption). Provided that the material scope is properly designed, this should not represent a substantive change.

The new tax would replicate the geographical scope of stamp duty reserve tax (SDRT). This provides continuity, but it also imports existing problems—such as the question of where a digital share register is located. The government does not propose to clarify this point in legislation. The consultation states that the new tax would 'use whether shares are in a UK incorporated company or not as the key factor for whether they are in scope'. Would this mean a form of tiebreaker for cases where the share register location is unclear? In any event, it is welcome that a tax charge could no longer be triggered merely because a document relates to 'any matter or thing done or to be done, in any part of the United Kingdom' (section 14(4) of the Stamp Act 1891).

Consideration

The new tax would be chargeable on consideration in 'money or money's worth', again replicating the SDRT definition (which differs from stamp duty). To preserve continuity with the existing position, exemptions or reliefs are proposed where the consideration consists of an obligation to pay pension benefits or the issuance of a life insurance policy to prevent disruption to the pensions and insurance industries.

The new tax would move away from the somewhat capricious stamp duty contingency principle established under case law and the use of an estimate for SDRT (both of which operate on a 'once and for all' basis), and instead largely follow the more sophisticated rules

on contingent, uncertain and/or unascertained consideration for stamp duty land tax (SDLT). The result should be a fairer liability to tax, in the sense of it being more reflective of the economics of the transaction, albeit at the cost of greater complexity.

Charging point

As is currently the case for SDRT, the new tax would be charged on an agreement to transfer or (in the case of a conditional agreement) once it becomes unconditional.

The consultation does not discuss the known issue of unconditional contracts that are later cancelled. STSM142090 states that 'HMRC will not seek SDRT on an "agreement" to transfer chargeable securities if the transaction does not take place and is deleted before CREST settlement'. For the new tax, this concessionary practice should surely be put on a statutory footing, providing for a tax refund (and/or cancellation of the tax charge) where the agreement is rescinded or annulled.

An alternative approach would be to keep the basic charging point at completion (as is currently the case for stamp duty) with rules that bring it forward where effective economic ownership passes earlier. This structure would be consistent with SDLT rules on substantial performance and need not disturb the existing practice of SDRT being collected through CREST at the point of settlement.

Exemptions

Group relief would be retained with a possible clarification of the associated anti-avoidance provisions. One potential clarification could be in respect of third-party financing for an intra-group transfer. While using a general overdraft facility should not trigger section 27(3)(a) of the Finance Act 1967, it is unclear whether eg a specific facility would.

Reconstruction and acquisition reliefs will also be retained, again, with possible clarifications—one option for clarification could be the mirror register requirement and the extent to which the target company debt needs to be mirrored at the level of the acquiring company.

The consultation rebuffs requests for an extension of the territorial scope for the intermediary and stock lending and repo reliefs which would also be retained. But, given the direction of travel on the territorial requirements (rom April 2024, only financial institutions with a UK presence will be eligible to manage ISAs and Child Trust Funds) this can hardly be a surprise.

Administration

In respect of transactions settled through CREST, the existing regime for administration and collection of tax would apply. For other transactions, the purchaser would remain the liable party (as for stamp duty and SDRT generally), with reporting and payment being effected through a new online portal within 14 days from the charging point.

The stamp duty exemption for transactions under £1,000 will not be replicated, meaning that notification will be required even where the tax due is no more than a penny. It will also be required where an exemption or relief applies. The consultation itself acknowledges that taxpayers not realising they are liable to charge is a known issue in respect of SDRT which may result in 'a large amount of fixed penalties…that does not reflect the tax liability or the seriousness of the failure'.

The requirement for a stamped stock transfer form in order to update a company's register of members is arguably the most effective enforcement mechanism and will be replicated by a requirement to have sight of the Unique Transaction Reference Number before registering a transfer. As this will be generated automatically by the online portal, same day registration will become the norm—a welcome change.

What's next?

The introduction of a single, modern tax for share transfers is certainly welcome in principle; but given previous false starts, it is by no means a foregone conclusion that the reform will go ahead. The pandemic having put a stop to the arcane practice of physical stamping, the time is surely right for further modernisation of the process consistent with HMRC's push more generally towards digitalisation and risk-based compliance.

The consultation is open for comments until 22 June 2023. If the reform goes ahead, we can expect a separate consultation on the 1.5% charge and any draft legislation.

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