
The Personal Tax Review

SOME THOUGHTS ON STAMP DUTY IN THE NEW REGIME

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Introduction

As from the 1st October 1999 the rates of stamp duty for conveyances on sale and lease premiums² are:³

Consideration not exceeding:	rate
£60,000	Nil
£250,000	1.00%
£500,000	2.50%
Over £500,000	3.50%

For rents the rate of stamp duty are:

Term of lease	Percentage of average rent
Up to 7 years	1%
7+ to 35 years	2%
35+ to 100 years	12%
100 years +	24%

The stamp duty is calculated upon the amount of the consideration or rent including actual and potential Value Added Tax.⁴

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² Subject in certain cases to a maximum rent of £600 per annum.

³ The rates are rounded up to the next £5 as from 1st October 1999.

⁴ *Glenrothes Development Corporation v IRC* [1994] STC 74.

Certificate of value

It is necessary to insert a certificate of value stating that the consideration does not exceed the relevant threshold in order to obtain the benefit of the rates below 3.50% of the amount or value of the consideration.

Transitional arrangements.

The new rates do not apply where the conveyance (or lease) is executed pursuant to a contract⁵ entered into prior to the specified dates. In practice the old rates have been applied where the instrument was executed pursuant to a conditional contract or agreement for lease but, although on previous occasions the old rates have been applied where the instrument was executed pursuant to an option entered into prior to that date but not exercised until after that date the Stamp Office do not at present grant the lower, older rates.

The Fixed Duties

These are increased to £5 in all cases, including those leases formerly subject to the fixed stamp duty of £2, for instruments executed on or after 1st October 1999. Many of these are instruments which are capable of being transfers on sale if there is appropriate consideration. The main categories of instruments subject to the fixed stamp duty are:⁶

Conveyance or transfer not on sale. This is a matter of whether there is consideration and the nature of the consideration⁷ and this test of the nature of the

⁵ Which has to be in writing for land transactions - Law of Property (Miscellaneous Provisions) Act 1989 section 2.

⁶ Finance Act 1999 Schedule 13.

⁷ The consideration which brings an instrument into charge to ad valorem stamp duty as a "conveyance or transfer on sale" includes:
transfers:
for cash;
for a price left outstanding as a debt;
in satisfaction of a debt;
subject to a mortgage;
in consideration of the assumption of liabilities of the vendor;
the granting of an annuity;
in consideration of the issues of shares;
the issue of loan stock or debentures;
the issue of units in a unit trust scheme; and
where the subject matter of the transaction is land, by way of exchange for any other form of property, such as a property exchange.

consideration for ad valorem stamp duty applies to other heads of fixed stamp duty. The type of instrument affected by this head includes:

Gifts

Change of trustee

Mortgages

Divorce arrangements

Variation of wills and trusts

Dividends in specie

Change of nominee

Declarations of trust when not on sale⁸

Release or renunciation not on sale. Not all releases even when made for cash fall into ad valorem stamp duty such as a release of a debt⁹;

Partitions where there is no equality money; but unless carefully drafted a partition may involve an exchange of interests in land which may be dutiable as a sale;

Duplicates and counterparts provided that, except in the case of counterpart leases, there is an instrument that has been stamped as an original. For these purposes a copy such as a photocopy is not a duplicate and is not subject to any stamp duty;

Surrenders not on sale. A surrender of a lease by a tenant to the landlord in consideration of a payment by the landlord is dutiable as a conveyance on sale; but only the fixed stamp duty is payable where the instrument effects a surrender made in return for a payment by the tenant to the landlord;

Leases not subject to ad valorem stamp duty.

⁸ *Chesterfield Brewery v IRC* [1899] 2 QB 7.

⁹ *Cormack's Trustees v IRC* [1924] SC 819.

Exemptions from the fixed stamp duty

Many of these instruments which attract the fixed duty as conveyances not on sale are exempt from all stamp duty and the need for adjudication if appropriately certified pursuant to Stamp Duty (Exempt Instrument) Regulations 1987.¹⁰ These exemptions include:

Appointing trustees and/or vesting property;

Transfer of property to specific legatee or residuary beneficiary under a will;

Appropriations of property on intestacy;

Transfer to beneficiary under a trust who did not acquire his interest by purchase;

Certain transfers in connection with divorce and separation;

Certain distributions by liquidators to the members of the company;

Gifts;

Transfers pursuant to certain variations of estates;

Declarations of trust in insurance policies.

It is important to note that many of these exemptions from the fixed stamp duty on conveyances are reflected by "flags" in CREST where the transfer relates to listed securities which are to be transferred by means of that system. This is important since certain of these types of transaction may have consideration in money's worth which attracts a full charge to stamp duty reserve tax even though exempt from stamp duty. In many cases it may be necessary to execute a stock transfer form in order to obtain a duly stamped transfer which cancels the charge to stamp duty reserve tax and so provides an indirect exemption from that tax in these types of situation. The use of the appropriate flags, where available, within CREST avoids the need to rematerialise the securities which would otherwise be necessary. However, the CREST flags do not cover every situation where the stamp duty is limited to £5 or is nil such as for intra-group transfers within section 42 of the Finance Act 1930 and appropriate planning and paperwork are essential in order to avoid an unnecessary charge to stamp duty reserve tax.

¹⁰ Stamp Duty (Exempt Instruments) Regulations 1987 SI 1987 No. 516.

Structuring the Transaction

It is possible to mitigate the stamp duty cost by planning the transaction since the Stamp Office are very much concerned with the form of the transaction and the conveyancing mechanics adopted. One basic technique is to avoid a sale or to devise a consideration which attracts a limited amount of stamp duty.

Illustration

A wishes to transfer his house in the United Kingdom into an offshore company:

He transfers the house in consideration of the issue of shares; stamp duty is payable upon the market value of the shares;¹¹

The company is formed with 98 issued shares and the house is transferred for the issue of 2 shares: stamp duty is charged upon the market value of the two shares (i.e. broadly 2% of the company);

He sells the house for a price below market value; stamp duty is charged upon the price;¹²

He sells the house for a loan note for market value; the stamp duty is charged upon the face value of the note;¹³

He transfers the house for a convertible loan note for £100 convertible into 100 shares having a market value equal to the value of the house;¹⁴ stamp duty is charged upon the £100 not the share value (subject to Ramsay and planning);¹⁵

¹¹ Stamp Act 1891 section 55(1).

¹² Finance Act 1985 section 85.

¹³ Stamp Act 1891 section 55(2).

¹⁴ But note the valuation trap in *Battle v IRC* "a small premium on the subscribers" shares may be necessary.

¹⁵ Stamp Act 1891 section 55(2).

The New Compliance Regime

Voluntary tax and incentives to stamp.

Stamp duty is not directly enforceable and the pressures to stamp are indirect; namely:-

Penalties for late presentation of documents for stamping;

Interest for late payment of the stamp duty;

Registration of title to land, shares, patents etc. requires properly stamped documents;

Insufficiently stamped instruments are strictly inadmissible in evidence;¹⁶ and

Avoiding Stamp Duty Reserve Tax penalties.

The new compliance package is designed to strengthen certain of these pressures in several ways.

Late payment interest.

Where stamp duty is not paid within 30 days after execution of the document, including where the instrument has been executed, or an amount of stamp duty is not deposited with the Stamp Office there is an interest charge until the stamp duty is paid. Where the instrument is an agreement for lease the interest runs from the earlier of 6 months after execution or 30 days after grant of the lease. The interest¹⁷ does not apply to the fixed stamp duty of £5, although such instruments are potentially liable to late presentation penalties. Where the instrument is an agreement for lease the interest runs from the earlier of 6 months after execution or 30 days after grant of the lease. No interest is payable where the amount is less than £25. Both payments are to be ignored for other tax purposes.

The rate of interest payable is 7.5% on tax paid late and 3% on tax repaid. The amount of interest is rounded down to the next £5. Clearly this difference in the

¹⁶ Stamp Act 1891 section 14(4).

¹⁷ The rates of interest in relation to late payment and repayment of stamp duty reserve tax have been similarly adjusted.

rates is a factor to be taken into account when deciding whether to deposit an amount on account of the stamp duty where there is likely to be a significant delay in determining the final stamp duty bill because, for example, there is a need for a valuation of shares or land or information relevant for determining the amount of stamp duty such as completion accounts will not be available for some time. The fact that the Stamp Office are responsible for the delay in fixing the amount of stamp duty or have, as happens from time to time, lost the file does not prevent the interest charge from running. There is a point to note in relation to how the new interest regime is to apply in the context of the revised practice for Transfers of Businesses as Going Concerns.¹⁸ Where the Value Added Tax is eventually payable and the additional stamp duty falls due the Stamp Office take the view that the late payment interest is mandatory and so will apply to the delayed payment of the additional stamp duty. This seems to be correct in law but is a little harsh since the delay is not due to the default of the taxpayer but the deficiencies in the rules for computing stamp duty and the complexities of Value Added Tax.

Late stamping penalties

The basic position after 1st October 1999 is that where the instrument is presented for stamping more than 30 days after execution in addition to the liability of interest there is a further penalty depending upon the length of the delay:

Where the instrument is presented after the relevant thirty days but within 12 months after the end of the thirty day period there is a penalty of the lower of £300 or a sum equal to the stamp duty;

Where the instrument is presented more than 12 months after the end of the thirty day period the penalty is the higher of £300 or the amount of the stamp duty;

These penalties also apply to instruments subject only to the fixed stamp duty of £5.

The Stamp Office have published guidelines on the mitigation of all late stamping penalties during the first twelve month period and of penalties thereafter where the stamp duty does not exceed £5,000.

¹⁸

Law Society Gazette January 1999.

Execution offshore

Where the instrument is executed offshore the time for penalties but not interest runs from 30 days after it is brought into the United Kingdom.

A new stamp.

Where interest and or penalties are paid these have to be denoted upon the face of the instrument which takes the form of the new "DPIT" stamp denoting the stamp duty, the interest and the penalty.

Mitigation of Penalties and Appeals

The charge to late payment interest is mandatory and cannot be reduced even where the delays in dealing with the calculation of the stamp duty is the fault of the Stamp Office; the taxpayer has to make his best estimate of the stamp duty and deposit this with the Stamp Office in order to reduce the interest chargeable in due course.¹⁹

The Stamp Office have power to mitigate the late presentation penalties and have published guidelines on the mitigation of all late stamping penalties during the first twelve month period, where the maximum is £300, and of the mitigation of penalties thereafter where the stamp duty does not exceed £5,000.

Regulations have been issued dealing with appeals against the penalties imposed and against the Stamp Office's decision that there is no reasonable excuse for the delay so that no penalty should be chargeable. An appeal may only be made on payment of the stamp duty, penalty and interest. The appeal must be made within thirty days of the notice of the decision on the adjudication being given. The basic right of appeal is to the Special Commissioners where the only issue is the imposition or amount of the penalty. The notice of appeal must specify the grounds for the appeal but the Special Commissioners may allow the appellant to raise other grounds in support of the appeal if they are satisfied that the omission to include the ground in the notice of appeal was not wilful or unreasonable.

¹⁹

There are complicated rules and practices concerned with the interaction of the compliance regimes for stamp duty on stock transfer forms and stamp duty reserve tax upon contracts. These practices are in the course of being revised and are to be published in the forthcoming Stamp Office Practice Manual which will require close study on this issue but, basically, it appears that the Stamp Office are unlikely to pursue stamp duty reserve tax penalties and interest where the stamp duty is deposited in good time and is eventually paid upon the relevant stock transfer form.

On the appeal the Special Commissioners may cancel, reduce or increase the penalty. There is a right of appeal by the person penalised to the High Court or the Court of Session which can cancel, reduce or increase the penalty.

An appeal against the imposition or the amount of a penalty where there is also an appeal on the substantive issue of the liability to stamp duty and/or the amount of such stamp duty lies as part of the Case Stated procedure to the High Court or the Court of Session. The Court can deal with the repayment of stamp duty penalties in the appeal.

Special Situations

Execution offshore

Where the instrument is executed offshore the time for penalties but not interest runs from 30 days after it is brought into the United Kingdom.

Penalties and leases and agreements for leases

A lease and the agreement for lease bears the full range of penalties of potential double duty and late payment interest of 7.5 per cent pursuant to sections 15, 15A and 15B of the Stamp Act 1891.²⁰

Possible mitigation of penalties for late stamping

(a) *The relief*

Where an agreement for lease is presented for stamping at the same time as the lease granted pursuant to and in conformity with it and the appropriate duty is paid on the agreement of the lease then for the purposes of calculating penalties the agreement for lease is treated as having been executed at the time when the lease was executed.²¹ In other words, in general, the agreement for lease will not attract penalties provided that:

it is presented for stamping together with the lease, and

both are presented within 30 days after the execution of the lease.

²⁰ Stamp Act 1891 section 15 (as amended).

²¹ Finance Act 1994 section 240 and 240A.

The conditions are cumulative but provided these conditions are met there will be no late payment interest or late stamping penalty upon the agreement for lease. This suggests that there may be cash flow advantages in delaying the actual grant of the lease and relying for as long as is convenient upon the agreement for lease. There are, however, certain difficulties in this situation:-

(b) *The problems*

There are various points to watch in this apparently simple act of generosity:

the normal penalty rules apply where the documents are presented more than 30 days after the date of the execution of the lease. In such a case it seems that the penalties on the agreement for lease will be calculated by reference to the date when the lease was executed - provided that the two instruments are presented together.

the agreement for lease remains dutiable in full so that, for example, if it attracts a higher rate of duty than the lease as in the illustration above there is still no credit or refund in respect of the higher level of duty. The fact that the actual lease has been granted and the precise rent may be known is not taken into account in computing the stamp duty payable upon the agreement for lease or in determining the market value and market rent of the premises which remains to be determined as at the date when the agreement for lease came into existence;

the mitigation of penalties only applies where the lease is actually granted. If for any reason the parties execute the agreement for lease and do not grant the lease but at some time it becomes necessary to stamp the agreement for lease this provision will not apply since there cannot be a simultaneous presentation of the agreement for lease and the lease itself. There is, therefore, an incentive to generate a lease at a time when the agreement may need stamping because that by itself will avoid the penalties on the agreement for lease. This may arise, for example, where the parties rely upon the agreement for lease and the landlord wishes to sue for arrears of rent or breach of covenant or one of the parties is suing for specific performance of the agreement to grant the lease.²² This will, of course, not always be possible, such as where there is a conditional agreement for lease which does not become effective because conditions

²²

Stamp Act 1891 section 14 provides that an unstamped document is not admissible in evidence in litigation.

are not satisfied. This will remain subject to penalties as from 30 days after its execution.

Denoting Stamps and Conveyancing Issues

These are stamps that indicate that an instrument that might be expected to bear duty is duly stamped by reason of the duty having been paid on another document - e.g. a duplicate or counterpart, or a conveyance where the contract falls within Finance Act 1999 Schedule 13 paragraph 7. A transfer of an interest in land which is made subject to an agreement for lease must have a stamp denoting that the agreement for lease has been duly stamped.²³ This has become more important in practice pursuant to the Finance Act 1994²⁴ which now requires that a lease must bear a stamp denoting that the agreement for lease to which the lease gives effect has borne the appropriate stamp duty or that there is r.o written agreement attracting stamp duty.

Counterpart leases

There is, however, one important difference between a counterpart or duplicate lease and other duplicate or counterpart instruments. Normally a counterpart or duplicate is dutiable with the maximum duty of £5 only if the original instrument is duly stamped,²⁵ but this does not apply to a counterpart lease which is dutiable only with the £5 duty notwithstanding that the lease itself is unstamped or insufficiently stamped although this may be of increasingly less practical benefit because of the need to pay full *ad valorem* stamp duty upon any written agreement for lease.

Disposals of Reversionary Interests

Dealings in reversionary interests which are subject to agreements for lease for a term exceeding 35 years may require to show that the agreement for lease is duly stamped,²⁶ and a purchaser of a freehold or head leasehold interest that is

²³ See Finance Act 1985 section 111(2).

²⁴ Section 240A.

²⁵ Finance Act 1999 Schedule 13 paragraph 19.

²⁶ Section 111 of the Finance Act 1984.

encumbered, with a lease or agreement for lease is entitled to insist that the lease, tenancy or agreement is duly stamped.²⁷ The cost of such stamping falls on the vendor. Where the prospective purchaser of the freehold reversion requisitions details of the stamp duty paid on the lease or tenancy or agreement for a term not exceeding 35 years if there is a stamp on the instrument in question which appears to be adequate the purchaser is required to be satisfied by this, unless he can produce reasonable evidence in support of the allegations that the instrument is insufficiently stamped.²⁸ In the case of a reversion that is subject to an agreement lease for a term exceeding 35 years, section 111(2)(a) of the Finance Act 1984 provides that the assignment of the lease is not to be duly stamped unless it bears a stamp under section 11 of the Stamp Act 1891 denoting that the duty has been paid on the agreement for lease.

Similarly, where the purchaser is being granted a lease which is subject to an existing agreement for lease for a term exceeding 35 years, the lease will not be duly stamped unless it bears a stamp under section 11 of the Stamp Act 1891 denoting that the duty has been paid on the agreement for lease.

Contracts now under penalty.

There has been a long standing practice of not stamping contracts because they were of short duration and were unlikely to be needed for any relevant purpose such as litigation or registration of title. Moreover, even in those cases where they are subject to stamp duty the previous late stamping penalty was only 5%. However, this relaxed regime has been dramatically changed by the new compliance package as the Stamp Office are delighted to point out in their recent leaflets. The area of contracts subject to ad valorem stamp duty is now an important topic:

Leases

Agreements for lease are dutiable, even when conditional and the special penalty regime for these has been considered above.

Sales

The main area will be in relation to those contracts which are subject to stamp duty under the sale head of charge. It was established by the decision in *IRC v*

²⁷ *Coleman v Coleman* (1898) 79 LT 66; *Smith v Wyley* (1852) 16 Jur 1136.

²⁸ *Re Weir and Pitt's Contract* [1911] 55 Sol J 536.

*Angus*²⁹ that a contract is not a conveyance for the purposes of stamp duty even though it may have the effect of passing the equitable interest to the purchaser or create some form of trust relationship.³⁰ In consequence, as a basic proposition a contract is not subject to stamp duty but this is, as with all generalisations, subject to qualification.

Contract not a conveyance-drafting

However, it is necessary to construe the wording of the instrument carefully in order to discover whether it does operate as a conveyance.³¹ It is also established that a contract does not become a conveyance even though the parties do not intend to complete³² and, in the case of land, the purchaser proposes to enter into possession and acquires title under the Limitation Acts.³³ The position is, however, complicated by the fact that the meaning of a "conveyance" for stamp duty purposes is wider than its normal meaning. For stamp duty purposes a conveyance may be described, broadly, as any instrument where by effective control of property is transferred to another. An instrument remains dutiable as a conveyance on sale even though the equitable interest may have passed on the exchange of contracts³⁴. Conversely a contract is not a conveyance even though the equitable interest may pass thereunder³⁵ although it may be a matter of drafting whether the instrument does operate to convey property.³⁶ It can include:

²⁹ (1889) 23 QBD 579.

³⁰ The position differs in Scotland where there do not appear to be real rights arising under a contract only personal rights, *Sharpe v Woolwich* *The Times*, March 26th 1997.

³¹ See, for example, *Peter Bone Ltd v IRC* [1995] STC 921.

³² *Ingram v IRC* [1985] STC 835.

³³ On the possibility of acquiring possessory title in these circumstances see *Bridges v Mees* [1957] 2 All ER 577.

³⁴ *Oughtred v IRC* [1960] AC 206.

³⁵ *IRC v Angus* (1889) 23 QBD 579 but see Stamp Act 1891 section 59.

³⁶ See *Peter Bone Ltd v IRC* [1995] STC where it was not necessary to decide whether the instrument was a contract or a conveyance but there were words of conveyance contained in it.

- a written direction by the beneficial owner to a nominee to hold the property on trust for another;³⁷
- a letter requiring a party to a contract to perform in favour of another;³⁸
- an Act of Parliament;³⁹
- a court order;⁴⁰
- a written memorandum of a transaction;⁴¹
- a receipt;⁴²
- a declaration of trust;⁴³ certain powers of attorney if given to the purchaser⁴⁴ - this may be inconvenient since, whilst a power of attorney

³⁷ *Re Tyler's Fund Trusts* [1967] 3 All ER 389; *Fisher v Calvert* (1879) 27 WR 301; *Re McArdle* [1951] 1 All ER 905.

³⁸ See *Letts v IRC* [1957] 1 WLR 201.

³⁹ *Great Western Railway v IRC* [1894] 1 QB 507 for the procedure for stamping in such cases; see Finance Act 1895 section 12.

⁴⁰ *Sun Alliance Insurance Ltd v IRC* [1972] Ch 133 - a case involving a scheme of arrangement under the Companies Act 1985, where the order vested the property instead of merely sanctioning the scheme. It appears to be the practice of the Registrar of Companies to request an opinion from the Stamp Office on the possible liability of the order to stamp duty; for orders under the Variation of Trusts Act 1958 the position was formerly *Thorn v IRC* [1976] 2 All ER 622 Practice Note [1966] 1 WLR 235 but following the abolition of voluntary disposition duty see Practice Direction (No3) [1989] 3 All ER 96.

⁴¹ *Horsfall v Hey* (1848) 2 Exch 778 - *Fleetwood Hesketh v IRC* [1936] 1 KB 351.

⁴² *Garnett v IRC* (1899) 81 LT 633.

⁴³ *Chesterfield Brewery v IRC* [1899] 2 QB 7; *Peter Bone Ltd v IRC* [1995] STC 921.

⁴⁴ *Diplock v Hammond* (1854) 5 De GM & G 320 but not if given to any other person see *Roddick v Gandell* (1852) 1 De GM & G 763. The argument was raised by the Stamp Office in the 1970s when stamp duties changed on 1st August and powers of attorney were used to delay completion until after the rate was reduced. The original argument was that all powers of attorney were dutiable as conveyances. This was subsequently narrowed to those which were "irrevocable" and so, in effect, operated as a form of equitable assignment. The Stamp Office argument is, in many situations, vulnerable to the point based upon Stamp Act 1891 sections 58(3) and 61(2), that the taxpayer can nominate the principal instrument subject to stamp duty, where there is a subsequent conveyance to the donee of the power. However,

given to the purchaser is protected against revocation or termination, this is not necessarily the case of powers given to other parties;⁴⁵

- certain releases of interests in property;⁴⁶ and
- surrender of certain interests in property such as a surrender of a lease.

Deemed conveyance

Notwithstanding the width of the definition and the manner in which it has been applied in certain cases there are also statutory provisions which deem certain instruments to be conveyances:

- Section 60 of the Stamp Act 1891 provides that where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.
- A purchase of own shares by a company pursuant to section 162 of the Companies Act 1985 does not involve a conveyance since no property vests in the company prior to the cancellation of the shares.⁴⁷ Section 66 of the Finance Act 1986 provides:
 - (1) This section applies where a company purchases its own shares under section 162 of the Companies Act 1985 or Article 47 of the Companies (Northern Ireland) Order 1982.

the use of such powers of attorney can adversely affect the availability of subsale relief.

⁴⁵ Powers of Attorney Act 1971 section 4.

⁴⁶ See *Bold v IRC* (1877) 4R (Court of Session) 592.

⁴⁷ Notwithstanding the technical point the Stamp Office in practice grant exemption from conveyance on sale duty pursuant to Finance Act 1930 section 42 (as amended) which requires beneficial ownership to vest in the transferee.

- (2) The return which relates to the shares purchased and is delivered to the registrar of companies under section 169 of that Act or, as the case may be, Article 53 of that Order shall be charged with stamp duty, and treated for all purposes of the Stamp Act 1891, as if it were an instrument transferring the shares on sale to the company in pursuance of the contract (or contracts) of purchase concerned.
- (3) Subject to subsection (4) below, this section applies to any return under section 169 of the Companies Act 1985 or Article 53 of the Companies (Northern Ireland) Order 1982, which is delivered to the registrar of companies on or after the day of The Stock Exchange reforms.

This charge does not apply to other forms of cancellation of share capital such as redemption⁴⁸ or reduction of share capital.⁴⁹

Finance Act 1999 Schedule 13 paragraph 7

What is now Finance Act 1999 Schedule 13 paragraph 7⁵⁰ was designed to counteract the possibility of mitigating stamp duty in certain cases by relying solely on contract. This section imposes sale duty on two categories of contract as though they were conveyances.

Conditional contracts

The charge under Finance Act 1999 Schedule 13 paragraph 7 extends to conditional contracts but by reason of paragraph (9) thereof any duty may be recovered if the conditions are not satisfied or if the contract is subsequently rescinded or annulled or cannot be performed for any reason.⁵¹ A conveyance

⁴⁸ It must not, however, be thought that it is easy to avoid the charge under Finance Act 1986 section 66 by converting the shares in question into redeemable shares. Such shares can only be created at the time of issue - Companies Act 1985 section 159 - any attempt to convert existing shares into redeemable shares is ineffective - see *Re St James Court Estate* [1944] Ch 6.

⁴⁹ Pursuant to Companies Act 1985 section 135.

⁵⁰ Formerly Stamp Act 1891 section 59.

⁵¹ On arrangements "subject to contract" see *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, *Winn v Bull* (1877) 7 Ch D 29 but compare *Branca v Cobarro* [1947] 2 All ER 101.

executed pursuant to a conditional contract is dutiable⁵² unless it is an escrow arrangement;⁵³ and if dutiable there is no refund of the duty upon the conveyance if the conditions are not satisfied and the agreement terminates.

The charge applies to:

- (a) agreements for the sale of equitable interests;⁵⁴ and
- (b) contracts for the sale of all other property except legal title to:
 - (i) land;
 - (ii) property situate out of the United Kingdom;
 - (iii) goods, wares or merchandise;⁵⁵
 - (iv) stock or marketable securities;⁵⁶ or

⁵² *Ridge Nominees Ltd v IRC* [1962] Ch 376.

⁵³ See *Terrapin International v IRC* [1976] 2 All ER 461 and see paragraph 1.7.3.

⁵⁴ Apparently wherever situated - see *Farmer v IRC* [1898] 2 QB 141.

⁵⁵ The issue of goods etc is now of considerable importance because:

no stamp duty is payable upon the sale of goods unless the parties somehow draft themselves into an unnecessary "conveyance" of goods; and

when considering the entitlement to use a certificate of value for the nil or reduced rates of stamp duty for property other shares and marketable securities that form part of the consideration which is attributable to goods etc can be ignored.

This will make the question of fixtures or chattels one of great practical significance. This will in turn make the significance of the test of the purpose of affixation of equipment to the land which is relevant in determining whether a chattel has become a fixture one of importance.

⁵⁶ But note the possible charge to stamp duty reserve tax pursuant to Finance Act 1986 section 87. The scope for relying solely on an unstamped contract in relation to agreements for the transfer of shares and other company securities has been severely restricted by the introduction of Stamp Duty Reserve Tax by section 87 of the Finance Act 1986, which imposes a charge to tax at the rate of 0.5 per cent of the amount of consideration where an agreement for the transfer of shares is not followed by a duly stamped instrument of transfer within certain specified periods.

- (v) ships or interests in ships.

These issues are important in practice since section 88 of the Companies Act 1985 indirectly enforces this head of charge by requiring the contract or particulars thereof to be filed with the Companies Registry “duly stamped”.

Equitable interests

Before a contract is dutiable under limb (a) above there must be either a situation under which:

- (i) the vendor has only the equitable interest available for sale (e.g. a life interest under a settlement); or
- (ii) the agreement provides that the vendor is only required to grant and the purchaser is only entitled to call for an equitable interest in the property.⁵⁷

It is, therefore, a question of construction of the contract in each particular case to discover whether all that is being sold is the equitable interest, but the mere fact that the parties do not intend to take a conveyance does not make the contract one for the sale of an equitable interest.

Example

A has contracted to sell land to B Limited in consideration of the issue of shares. B Limited contracts to sell the land to its associated company C Limited. No stamp duty is payable upon either agreement even though there is an intention of dealing with the matter by way of sub-sale.⁵⁸

It is, however, easy to fall within the Finance Act 1999 Schedule 13 paragraph 7 charge. For example, whilst orthodox⁵⁹ subsale arrangements escape the charge because they relate to the legal title to shares, the charge under Finance Act 1999 Schedule 13 paragraph 7 applies to contracts for the sale of the benefit of

⁵⁷ *West London Syndicate v IRC* [1898] 2 QB 507 at page 512; *Peter Bone Ltd v IRC* [1995] STC 921.

⁵⁸ *Ingram v IRC* [1985] STC 835 - and see Stamp Act 1891 section 58(4).

⁵⁹ For an unorthodox subsale see *Peter Bone Ltd v IRC* [1995] STC 921.

agreements relating to land such as agreements to assign contracts to purchase land agreements to assign licences or similar interests in land.⁶⁰

Example

B Limited agrees to sell an interest in the land to C Limited, to take the conveyance from A Limited and to declare itself a trustee for the benefit of itself and C Limited. This agreement will be dutiable as a contract for the sale of an equitable interest within Finance Act 1999 Schedule 13 paragraph 7.⁶¹

As above except that B Limited contracts to sell the benefit of its agreement with A to C Limited. This arrangement, being for the sale of the benefit of a contract, is within Finance Act 1999 Schedule 13 paragraph 7 and is, *prima facie*, dutiable.

Peter Bone Ltd v IRC⁶² and subsale relief

This was an essentially straightforward case where the decision in favour of the Stamp Office was inevitable in the context of existing principles although these had been under attack by the Stamp Office in the cases relating to building works such as *The Prudential Assurance Co Ltd v IRC⁶³* as considered above. It was not necessary for any new ground to be broken and the judgment had merely to restate the point that had for all practical purposes been settled by the decisions in *Chesterfield Brewery v IRC⁶⁴* and *West London Syndicate v IRC⁶⁵* *Ingram v IRC⁶⁶* and the *Prudential* case.⁶⁷

⁶⁰ *Western Abyssinia v IRC* 14 ATC 286.

⁶¹ *Chesterfield Brewery Company v IRC* [1899] 2 QB 7; *Peter Bone Ltd v IRC* [1995] STC 921.

⁶² [1995] STC 921.

⁶³ [1992] STC 863.

⁶⁴ [1899] 2 QB 7.

⁶⁵ [1898] 2 QB 507.

⁶⁶ [1985] STC 835.

⁶⁷ [1992] STC 863.

This case involved a proposal to incorporate a business by transferring the assets of a partnership to a company in consideration of the issue of shares;⁶⁸ stamp duty would be chargeable under the head "Conveyance or Transfer on Sale"⁶⁹ in relation to the filing of the return of allotments in respect of those assets which are chargeable at the contract for sale stage pursuant to Finance Act 1999 Schedule 13 paragraph 7.

It is now provided by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 that contracts relating to interests in land must be made in writing otherwise they are void.⁷⁰ Notwithstanding this need for writing, normally, there is no charge upon a contract for the sale of land since Finance Act 1999 Schedule 13 paragraph 7 specifically does not apply to the sale of legal interests in land.⁷¹ This is dealt with in most standard conditions of sale by requiring the vendor to deliver a duly executed conveyance or Land Registry Transfer at completion to the purchaser or as he may direct. The power to direct is usually required to enable the purchaser to deal with subsales to third parties. It is, however, vital that the contract between A and B should not fall into charge pursuant to Finance Act 1999 Schedule 13 paragraph 7 which charges *ad valorem* stamp duty upon,

⁶⁸ This normally involves a certain amount of difficulty with stamp duty mitigation because of the provisions of section 88 of the Companies Act 1985 which require that the return of allotments which is to be filed relating to the consideration shares must be accompanied either by a duly stamped contract or written particulars thereof on Form 88(3) "duly stamped". The requirement for a return of allotments does not apply to unlimited companies so that it may be able to apply mitigation techniques notwithstanding that the company is to be reregistered as limited pursuant to Companies Act 1985 Section 51.

⁶⁹ See *J&P Coats Ltd v IRC* [1897] 1 QB 778.

⁷⁰ For an illustration as of what is required to be an adequate written contract see *First Post Homes Ltd v Johnson* [1995] 4 All ER 355 which also indicates that the old doctrine of part performance has been abolished by the Law of Property (Miscellaneous Provisions) Act 1989 section 2. This may give rise to problems in Scotland where the equitable interest and the constructive trust is not known in the same form as in England see *Sharp v Woolwich* (1996) HL see also the Requirement for Writing (Scotland) Act 1995.

⁷¹ Special problems arise in relation to shares held as part of the business because of the principal charge to Stamp Duty Reserve Tax pursuant to Finance Act 1986 Section 87.

inter alia, written contracts for the sale of equitable interests in land.⁷² In the *Peter Bone Ltd* case,⁷³ the assets to be transferred to the company included land but it was contemplated that the company would not retain the partnership land which would be subsold shortly after incorporation,⁷⁴ and the arrangement was that the partners would not formally transfer the land to the company but in due course would transfer the property to the subpurchaser at the direction of the company. In accordance with this intention the contract was drafted in a particular way stating in effect that the purchaser was not entitled to call for a conveyance and that the vendor would hold the property on trust for the purchaser until such times as the purchaser nominated a sub-purchaser to whom the property was to be conveyed. The arrangement between the parties was, therefore, a classic sub-sale arrangement but the contract was drafted in a somewhat unusual fashion.⁷⁵ In response to enquiries from the Stamp Office the parties restated that their intention had been to deal with the matter by way of subsale. Even if admissible in evidence⁷⁶, the statement of intention would not, it seems, have assisted the parties as such it merely reinforced the position that the

⁷² The section also applies to contracts for the sale of intellectual and other intangible properties situated in the United Kingdom, a point that is of some significance in relation to *Re: Brown and Root McDermott Fabricators Limited's Application* [1996] STC 483 which is considered below but where the point on the stampability of the agreement was not raised. Nor was this point raised by the Stamp Office in *Parinv v (Hatfield) Ltd v IRC* [1996] STC 933. It is, perhaps understandable that the parties to the litigation in *Re Brown and Root McDermott Fabricators Limited's application* [1996] STC 483 may not have focused on this point but it is surprising that, having litigated the point successfully in *Peter Bone v IRC* [1995] STC 921 the Stamp Office may have focused on the wrong documentation in *Parinv (Hatfield) Ltd v IRC* [1996] STC 933 in the context of Stamp Act 1891 section 59(3).

⁷³ [1995] STC 921.

⁷⁴ It would appear to have been necessary to include the land in the sale in order to obtain capital gains tax roll-over relief pursuant to Taxation of Chargeable Gains Act 1992 section 162.

⁷⁵ It is sometimes necessary to make this power for the purchaser to direct a transfer to a third party a specific condition when incorporating any of the standard conditions of sale which vary from edition to edition and do not always include the power to direct a subsale but limit the conveyance solely to the purchaser.

⁷⁶ On the question of extrinsic evidence in relation to its construction of documents see later, the point is vital to the decision in *Brown and Root McDermott Fabricators Limited's Application* [1996] STC 483 where the correct approach was adopted, and *Parinv (Hatfield) Ltd v IRC* [1996] STC 933 where the judge appears to have played fast and loose with the rules and introduced a new principle into the already complex rules of evidence (affirmed [1998] STC 326).

agreement was not to be followed by a conveyance and the purchaser was to receive only the equitable interest. The Stamp Office took the view that because the land was to be held upon trust for the company which did not have a right to call for the transfer of the legal title to itself but merely to direct a transfer to a third party subpurchaser the contract was dutiable either as a contract for the sale of an equitable interest in land within section 59(1) of the Stamp Act 1891 or as a conveyance on sale of the equitable interest by reason of the trust expressly arising under the agreement within decisions such as *Chesterfield Brewery v IRC*.⁷⁷ The High Court agreed with the Stamp Office analysis,⁷⁸ finding it unnecessary to determine finally whether the document was a conveyance or merely a contract; the resulting stamp duty was the same on either view.⁷⁹

- UK situs intangibles

The charge to stamp duty upon written contracts pursuant to Finance Act 1999 Schedule 13 paragraph 7 also extends to agreements relating to the sale of *inter alia* where this is situate in the United Kingdom such as being registered here:

- debts, unless exempt as loan capital or non-marketable securities;
- goodwill;
- leasehold fixtures;
- intellectual property.

⁷⁷ [1899] 2 QB 7.

⁷⁸ Not every such declaration of trust arrangement would bring Finance Act 1999 Schedule 13 paragraph 7 into operation. For example, where the declaration of trust operated as a default arrangement and charging provisions do not apply. For example, where there was a contract for the sale of a lease which required the consent of the landlord (for the effect of such a provision see *Warmington v Miller* [1973] 2 All ER 372) a provision stating that if at completion the landlord's consent had not been obtained the vendor would hold the lease temporarily upon trust for the assignee until such time as the consent was forthcoming was not subject to charge see for example *West London Syndicate v IRC* [1898] 2 QB 507.

⁷⁹ The point is, however of vital importance in relation to any case related to sub sale relief, since the absence of a conveyance is a necessary condition for the relief and affects the availability of the relief for stampable contracts pursuant to Finance Act 1999 Schedule 13 paragraph 7 (2), a point overlooked by the judge.

Jurisdiction and Execution Offshore

The general jurisdictional basis of stamp duties differs from all other taxes and an understanding of these rules can offer the opportunity of avoiding or postponing the payment of stamp duty in many situations. The extension of the new late payment interest charge to documents executed offshore with effect from thirty days after execution rather than, as with the penalty regime, thirty days after receipt in the United Kingdom, suggests that a review of whether, and, if so, when it may be appropriate to execute offshore will now be appropriate. Certain heads of charge, such as bearer instruments, have their own particular rules,⁸⁰ but apart from such cases section 14(4) of the Stamp Act 1891, in effect, provides that an instrument falling within a head of charge is liable to duty on one of three grounds:

- (a) *if the instrument is executed⁸¹ in the United Kingdom*

This applies wherever the property that is the subject matter of the transaction may be situate so that a transfer or agreement for lease⁸² of foreign land executed in the United Kingdom attracts stamp duty. Where foreign property is involved there is every reason for arranging for the execution of the document outside the United Kingdom since this may either take the document outside the charge to stamp duty subject to the two following rules or, at least, postpone the time when the stamp duty will become payable; or

- (b) *if the instrument relates to property situate in the United Kingdom*

This applies wherever the instrument in question is executed. One item of property situate in the United Kingdom is sufficient to bring all of the documentation into charge to stamp duty, there being no exemption for foreign property (apart from the limited exclusion for certain foreign property in the case of contracts for sale dutiable pursuant to Finance Act 1999 Schedule 13 paragraph 7). This applies whether the United Kingdom property is the property being

⁸⁰ Finance Act 1999 Schedule 15 paragraph 1.

⁸¹ On the meaning of "execution" see Stamp Act 1891 section 122(1) and (1A) (as amended)

⁸² But not agreements for the sale of foreign property other than equitable interests which is specifically excluded from the charge to stamp duty imposed by Finance Act 1999 Schedule 13 paragraph 7.

acquired or leased or is the consideration such as shares being issued by a United Kingdom incorporated company.⁸³

(c) *If the instrument relates to any matters or things done or to be done in the United Kingdom*

It was stated in *IRC v Maple*⁸⁴ that these are words of the widest meaning and they may bring many documents into charge to stamp duty. In that case it was held that a conveyance of French land to an English company in consideration of the issue of shares was liable to conveyance duty. The instrument fell within both paragraph (b) and (c) since:

- (i) it related to something to be done in the United Kingdom namely the provision of the consideration;⁸⁵ and
- (ii) it related to United Kingdom property ie. the issue of shares on a register in this country.

This will bring into charge:

- transactions where the consideration is provided in the United Kingdom such as payment or indebtedness by a United Kingdom company. However, the mere transmission of funds from the United Kingdom to a bank or place of payment outside the United Kingdom does not, of itself, bring the transaction into charge;
- the whole of the transaction even where there is only a small amount of United Kingdom property;
- transactions where there are United Kingdom reference points such as LIBOR; and

⁸³ *Maples (Paris) Ltd v IRC* [1908] AC 22.

⁸⁴ [1908] AC 22; see also *Faber v IRC* [1936] 1 All ER 617.

⁸⁵ Submissions to the jurisdiction of the United Kingdom courts or the production of the document in evidence does not of itself, make the instrument dutiable: see *Gilchrist v Herbert* (1872) 26 LT 381.

- in the view of the Stamp Office transactions approved in the United Kingdom such as where the contract is conditional on shareholder consent.

Execution offshore is, therefore, beneficial where the transaction does not have a relevant connection with the United Kingdom notwithstanding that for other tax purposes the parties may be resident in this country. There are, however, limits to the benefits in execution offshore. These limitations include:

- a contract for the sale of the legal interest in shares or loan stocks does not attract stamp duty⁸⁶ but will attract a charge to Stamp Duty Reserve Tax which now applies to non-residents;⁸⁷
- the subsequent transfer of the land and the shares will attract stamp duty;
- the execution offshore does not offer a guaranteed permanent stamp duty mitigation since the document may be required onshore by the parties in litigation⁸⁸ or in disputes with the Inland Revenue;
- although there is no obligation to produce documents to the Stamp Office transfer of legal title to certain property such as land, shares and certain intellectual property can be effected only by registration in the United Kingdom⁸⁹ which can be obtained only by production of a duly stamped document⁹⁰, and in certain cases⁹¹ there is a time limit for registration otherwise adverse consequences may flow.

⁸⁶ See Finance Act 1999 Schedule 13 paragraph 7.

⁸⁷ Finance Act 1996 section 187.

⁸⁸ Stamp Act 1891 section 14(4); *Re Brown and Root MacDermott Fabricators Limiteds Application* [1996] STC 483 but compare the absence of stamp duty invalidity in *Brown and Root Technology Ltd v Sun Life and London Assurance Ltd*, *The Times* January 27th 1997.

⁸⁹ *Brown and Root Technology Ltd v Sun Life and London Assurance Ltd* *The Times* January 27th 1997.

⁹⁰ Stamp Act 1891 section 17 but see *Nisbet v Shepherd* [1994] 1 BCLC 300; *International Credit v Adham* [1994] 1 BCLC 66 registration of unstamped transfer passes title.

⁹¹ See, for example, Land Registration Act 1997.

Long division

Careful planning of the documentation may achieve some degree of stamp duty planning when executing offshore. A document can only be stamped by reference to what it achieves; the Stamp Office cannot impress the stamp duty chargeable upon one document which is properly chargeable upon another document even where the documents are related and form part of the same transaction⁹².

Where there is a single conveyance of the entire property by one instrument the entire transaction will be dutiable even in respect of the foreign property but by structuring the document in an appropriate way it may be possible to reduce the amount of stamp duty payable. For example, by assigning the United Kingdom property in a separate instrument from the foreign property transfer it is usually possible to obtain registration of title in the United Kingdom paying duty only upon those assets and, in practice, avoiding the charge on the foreign assets.

Documentary Tax*Need for a "conveyance" or "contract"*

Stamp duty is a tax on instruments not on transactions.⁹³ Therefore, to the extent that a transaction can be carried out without the production of a document no charge to stamp duty will arise. Thus a written offer accepted by conduct is not a stampable arrangement.⁹⁴ Conversely, a written acceptance of an oral offer would be dutiable,⁹⁵ and in certain circumstances a written memorandum of an effective oral transaction may be a dutiable conveyance.⁹⁶

⁹² See *International Power v IRC* (1933) 12 ATC 413.

⁹³ See eg. *IRC v Angus* (1889) 23 QBD 579 at page, 589.

⁹⁴ See *Carlill v Carbolic Smokeball Company* [1892] 2 QB 484.

⁹⁵ *Hegarty v Milne* (1854) 14 CB 627.

⁹⁶ *Horsfall v Hey* (1848) 2 Exch 778.

Need for writing

In some cases the general law requires the production of a written instrument for a transaction to be performed effectively, and such instruments although obligatory under statute are nevertheless subject to stamp duty. These include:

- (i) many forms of land transaction are required to be in writing or by deed by reason of various provisions of the Law of Property Act 1925⁹⁷ but note the limits to these provisions such as the possibility of orally creating a lease for a term not exceeding three years provided that it takes effect in possession and is of the best rent possible without the taking of a fine;⁹⁸ and
- (ii) section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 requires contracts relating to land to be made in writing.⁹⁹

Unnecessary instruments

Where a transaction is carried out by a written instrument duty becomes payable even though a written instrument was not necessary. Title to goods passes by delivery but if the parties execute a conveyance or an absolute bill of sale duty will become payable;¹⁰⁰ inappropriate wording in the contract may produce a conveyance of the goods.¹⁰¹

⁹⁷ E.g. sections 52 and 53(1)(c) and most leases, but see section 54(1).

⁹⁸ Law of Property Act 1925 section 54(2).

⁹⁹ This has recently been applied to equitable mortgages and to variation of land contracts *McAusland v Uncan Laurne Ltd* [1997] 1 WLR 38. On land options see *Spiro v Glencrown* [1991] 2 WLR 931.

¹⁰⁰ *Eastbourne Corporation v Attorney General* [1906] AC 155.

¹⁰¹ *Commissioner of Stamps v Queensland Meat* [1917] AC 624.

Drafting and Structuring Issues

The drafting of the documentation may attract an unnecessary charge to stamp duty as in *Peter Bone Ltd v IRC*,¹⁰² and the drafting of documents relating to land has become extremely important after the Finance Act 1994. This is particularly so in relation to transactions involving land because of the width of the charging provisions in the Finance Act 1994 which extend well beyond the exchange of freehold for freehold.

Example

X Ltd is assembling a site for development. The local authority has agreed to co-operate upon the basis that it acquires the freehold interests and will grant long head leases to X Ltd (in each case the *prima facie* charges to stamp duty may be modified by the drafting):

- (a) A plc agrees to transfer its freehold interest in plot 1 in consideration of the grant of a long lease at a peppercorn rent of plot 2. Prima facie, the transfer of the freehold is dutiable *ad valorem* upon the market value of the lease; the lease is dutiable *ad valorem* upon a premium of the value of the freehold land transferred.¹⁰³
- (b) B Ltd agrees to surrender its lease of plot 3 in consideration of the transfer of the freehold of plot 4. Prima facie, the transfer of the freehold is dutiable *ad valorem* upon the market value, if any, of the lease of plot 3; the surrender of the lease if in writing and not by operation of law¹⁰⁴ is dutiable *ad valorem* upon the market value of the freehold.

¹⁰² [1995] STC 921; note also the implications for this type of drafting in *Spectros International plc v Maddern* [1997] STC 114.

¹⁰³ Stamp Act 1891 section 77(1) does not apply because the lease back does not relate to the same land.

¹⁰⁴ Note the effect of Finance Act 1994 section 243 on the written agreement to surrender a lease in this situation. There may also be a question whether the Stamp Office might wish to claim stamp duty in respect of the surrender upon the freehold transfer but see *Oughtred v IRC* [1958] 1 All ER 252 on recitals.

- (c) X Ltd transfers and surrenders all the freehold and leasehold interests assembled to the local authority in consideration of the head lease back. The view of the Stamp Office is that the transfers and surrenders to the local authority are dutiable upon the market value of the leaseback and the leaseback has a stampable premium equal to the market value of the interests transferred and surrendered.

Problems

Drafting

- Plan the drafting early - the Portman issue and the contract

It seems that the basic starting point of the documentation is the wording of the consideration clause in the initial contract. In *Portman v IRC*¹⁰⁵ the parties entered into two contracts for the sale of properties for cash sums. Completion took the form of a single deed of exchange. It was held that the deed was in substance not an exchange but a completion of two sales for cash and attracted two charges to conveyance on sale duty. This case has hitherto been regarded as a stamp duty trap but although the drafting of the contract as two cash sales will remain dutiable as two sales, the case remains as a warning that where the parties do not wish to bear double *ad valorem* stamp duty the wording of the contract is possibly as significant as the form of the final deed; it is at least equally important. Parties contemplating exchanges should structure their initial contracts not as an exchange but as single sales.¹⁰⁶

Prima facie, the effect of the provision in relation to mutual transfers of land, is to treat the transfer of each parcel of land as being made for a notional cash sum

¹⁰⁵ (1956) 35 ATC 349.

¹⁰⁶ Note that contrary views to those expressed on the *Portman* case (1956) 35 ATC 349 can be found in *Re Duke of Westminster's Settled Estates* [1921] 1 Ch 585 at page 595 - not cited in *Portman*. *Cottingham v Central Land Board* (1957) 8 P & CR 339 suggests that a mutual variation of the original 'cash' contracts substituting a single contract for mutual transfer may be effective. The possible implications for dates of disposal of capital gains tax within Taxation of Chargeable Gains Act 1992 section 28 and the timing and nature of the receipt and 'payments' for other taxes may require investigation but note that *Morris v Barron* [1918] AC 1 draws a distinction between a variation and a rescission followed by a new contract which may be important for determining whether the original contract survives for fixing the disposal date.

equal to the market value of the property received plus any cash equality payment. The same issue arises when land is transferred in return for the grant of a lease whether of the same land or other land where the relative property is treated as "cash" consideration for the transfer and the lease premium, *prima facie* there is an *ad valorem* charge upon both the transfer and the lease. This is clearly the initial thinking of the Stamp Office as is evidenced by their Notes on the Finance Bill.¹⁰⁷

This approach does seem to be a little harsh, particularly given that for many years there has been a similar problem in relation to exchanges of shares but there has been a practice of seeking only one charge to *ad valorem* stamp duty and stamping the other share transfer £5. There has been no formal statement that the double charge will not be levied but there does seem to be a suggestion that if the instruments are properly drafted there may be only one *ad valorem* charge and a £5 duty upon the other instruments. It would seem that it may be necessary to express the transaction as an agreement to transfer or the actual transfer of Blackacre in consideration of the sum of £x to be satisfied by the transfer of Whiteacre. It seems that the Stamp Office may be modifying their views and that as far as they are concerned the "single sale" treatment will only be conceded where there is also a cash equality payment. The wording may need to be based around "£X to be satisfied by the transfer of Whiteacre and the payment of £Y". The wording of the provisions relating to the disposal of Whiteacre will in consequence need to be carefully drafted. It seems that such wording will be regarded as producing *ad valorem* stamp duty at the appropriate rate by reference upon the transfer of Blackacre and £5 fixed duty upon the transfer of Whiteacre.¹⁰⁸

¹⁰⁷

See Monroe and Nock - Appendix G-026.

¹⁰⁸See *Connell v Begej* [1993] 39 EG 123 for the view that such a form of wording is a single sale rather than a double exchange. It would seem that the specified cash sum should be a justifiable estimate of the market value of the relevant property - Stamp Act 1891 section 5.

Illustration

A agrees to transfer Blackacre "in consideration of the sum of £x to be satisfied by the transfer of Whiteacre" plus the payment of a sum of money,¹⁰⁹ if any.¹¹⁰ The Stamp Office have indicated in the Inland Revenue Tax Bulletin for August 1995 that where this wording appears the transaction¹¹¹ can be regarded as a single sale rather than a double exchange.¹¹² There is a further consequence and drafting issue of how to deal with the conveyance of Whiteacre. Presumably this will need to take the form of a transfer "in satisfaction of" B's obligation.¹¹³ To refer to the transfer as being in consideration of the transfer of Blackacre would presumably immediately raise the risk of the double charge to *ad valorem* stamp duty.

● *The need for a cash balance*

As discussed above it had long been accepted that for stamp duty purposes there was no such concept as a part exchange/part sale. If the consideration provided for the transfer of the property was in part cash and part land the instrument was not dutiable as a sale.¹¹⁴ The Tax Bulletin indicates that the single sale treatment is available only where there is both a transfer of property and the payment of cash. A simple exchange of two or more properties of equal value will not be regarded

¹⁰⁹ It is considered that this sum should not be expressed as being paid by way of equality since this implies an exchange which may be used by the Stamp Office to impose the double charge upon the two market values.

¹¹⁰ A similar arrangement could be adopted for arrangement involving leases such as an agreement to transfer Blackacre "in consideration of the sum of £x to be satisfied by the grant of a lease of Whiteacre in the form of the draft annexed hereto".

¹¹¹ See *Connell v Begej* [1993] 39 EG 123; *Re Bradford Investments* [1991] BCLC 688. See the extract from Hansard. Monroe and Nock Appendix J.

¹¹² As indicated above there may need to be a cash equality payment.

¹¹³ It is thought that Stamp Act 1891 section 57 would not be a problem since the original agreement does not give rise to a debt; there is no obligation to pay cash which is satisfied by the transfer or lease of the property. However, this analysis is not entirely consistent with the treatment of the basic transaction as a single sale.

¹¹⁴ See "*The Scope for the Reform of Stamp Duties*"; the point does not seem to have been taken in cases such as *Routledge v McKay* [1954] 1 WLR 615 and the current Stamp Office team appear to be unaware of this publication of theirs.

as a single sale notwithstanding that the agreement is drafted in the terms discussed above. Fortunately, in exchanges it is rare for the properties on each side to be of precisely the same value and some cash adjustment will, in practice, almost always be required.¹¹⁵ The present position must depend entirely upon the drafting and merely to refer to cash sums may not be sufficient such as where the parties merely refer to agreed values rather than a price.

Land Registry Transfer drafting

It is, presumably, necessary to carry this drafting fiction through from the contract to the conveyances at completion since *Coren v Keighley*¹¹⁶ indicates that inappropriate wording may affect the tax result. This should refer to Whiteacre being transferred in satisfaction of the consideration obligation in some way.

The final transfer may need to work around the wording:

“In consideration of the satisfaction of the obligations in the agreement dated by the transfer of Whiteacre and the payment of £Y by B, the transfer and receipt whereof A hereby acknowledges...”

This should not, however, be expressed as being in satisfaction of the obligation to pay the cash sum since this may operate to bring section 57 of the Stamp Act 1891 into operation.¹¹⁷

¹¹⁵ This is, of course, a separate issue from the techniques for dealing with Value Added Tax which may arise upon land exchanges.

¹¹⁶ 48 TC 370.

¹¹⁷ Note the analysis of Stamp Act 1891 section 57 in Inland Revenue Tax Bulletin August 1995.