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## The Personal Tax Planning Review

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# STAMP DUTY: OVERKILL OR A DRAFTING ISSUE?

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As part of Kenneth Clarke's November efforts to reduce public borrowing, he announced a crackdown on tax avoidance to yield £2bn in the next three years; roughly £200 million of this, he estimated, will be raised in the form of additional stamp duties. However, there has been considerable backtracking by the Stamp Office from their initial interpretation of the Finance Bill provisions in The Notes on the Budget<sup>2</sup> ("The Notes") and there is currently expected a detailed response to the Law Society which it is anticipated will show a considerably modified approach to the legislation. This article considers the three areas of avoidance targeted by the Chancellor, and the likelihood of his success. The provisions discussed apply to instruments executed after 7th December 1993.

The estimate of likely yield seemed, in the experience of the authors, to be unrealistically pessimistic. For example, they have already been involved in a transaction where, in the light of how the Stamp Office initially sought and may still seek to apply some obscurely drafted legislation, the additional duty resulting from the Budget changes could exceed £2 million<sup>3</sup>. There would appear to be two possible explanations:

- (1) the legislation is far wider than merely attacking the mitigation arrangements as was intended. This seems from The Notes to have been the case. As will be shown later, areas not generally associated with avoidance, such as lease enfranchisements, may be hit, and hit hard, unless the parties draft their documentation with great care. In such circumstances, the Budget changes seem to run contrary to the use of stamp duty as a fiscal policy for stimulating the housing market, as was

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<sup>2</sup> Published 30th November 1993.

<sup>3</sup> Conversely, by introducing new charges of uncertain extent taxpayers have now become alerted to stamp duties and are giving more serious thought to the issue of seeking mitigation.

Norman Lamont's intention, less than a year ago, when he doubled the stamp duty threshold from £30,000 to £60,000<sup>4</sup>; and

- (2) the administrative costs of the changes will be out of all proportion to the tax raised. In 1985 voluntary disposition duty was abolished because the costs of valuations and administration by the Revenue equated with, if they did not exceed, the amount of tax raised; and furthermore, subsequent experience shows that the Share Valuation Division is reluctant to get involved in valuations where the prospective yield to the Revenue is only ½ per cent of the difference between the taxpayer's and the valuation division's assessments. In the case of land, the efforts of the District Valuer will produce the magnificent sum of 1 per cent of the higher value negotiated. As some simple transactions (for example, a lease variation) may now involve two valuations, the cost and likely delays will reduce the yield from the new charges. Taxpayers are frequently required to engage in hard bargaining for relatively small amounts of stamp duty, because settling at a higher figure may produce significant risks of higher liabilities to capital gains tax, corporation tax, and inheritance tax; and it remains to be seen how Customs & Excise will react when the valuations put forward by the District Valuer are greater than the values upon which the parties calculated the Value Added Tax. However, a certain amount of negotiation can be justified because whilst an instrument is being adjudicated (which includes valuation) the stamp duty is not payable and late stamping penalties do not accrue<sup>5</sup>.

The authors' view is that the charges are excessive and unreasonable, placing an undue burden on precise drafting, and will cause great inconvenience in practice. For example, there are likely to be great practical difficulties for mortgagees in taking security over registered land while a valuation is awaited.

### **Exchanges of interests in land**

#### *Pre Budget*

Exchanges of land or interests in land did not fall within the head of charge 'Conveyance or Transfer on sale', contained in Schedule 1 Stamp Act 1891, because 'on sale' requires a price in money, as was stated by Viscount Simonds

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<sup>4</sup> There was a period when the threshold was £250,000 for the same reason.

<sup>5</sup> s.12 Stamp Act 1891.

in *Littlewoods Mail Order Stores Ltd v IRC*<sup>6</sup>, a case which involved the exchange of a freehold property for a leasehold property:

'If stamp duty is to be assessed on the instrument as a "Conveyance or Transfer on sale" an extended meaning must be given to the words "on sale". For neither in form nor in substance is the exchange a sale according to ordinary legal terminology ..... There was no price in money paid or promised on one side or the other. On the contrary the consideration was expressed to be on the one side the conveyance of the fee simple, on the other the assignment of the lease.'

Sections 55 and 57 Stamp Act 1891 have the effect of including in the ambit of 'sale' for this head of charge consideration in the form of shares or debts.

Nevertheless, although property sold for consideration in the form of property was not a conveyance on sale, freehold exchanges fell within the head of charge 'Exchange or Excambion'. This head provided for a charge to a fixed duty of 50p in any case not falling within s.73 Stamp Act 1891; that section provided for any equality money exceeding £100 to be charged with the same ad valorem duty as a conveyance on sale for the same consideration, subject, in practice, to exemption where the equality payments did not exceed £60,000 and a certificate of value was included.

However, as Viscount Simonds also stated in his judgment above, 'Exchange or Excambion' only applies to freehold exchanges. Accordingly, where either freehold property was sold in return for leasehold property or two leaseholds exchanged, the instrument was stamped with the fixed duty of 50p as a 'Conveyance of any kind not hereinbefore mentioned'. Where in such a case, equality money was given, certain cases (see, e.g., *Routledge v McKay*<sup>7</sup>) suggested that such a transaction was a part sale, under s.4(b) Stamp Act 1891, with ad valorem duty chargeable on the money passing. However, because s.73 Stamp Act 1891 is a charging provision, there is for stamp duty purposes no such concept as a part sale. The Stamp Office never sought ad valorem duty in this situation and claimed only the 50p duty under the head 'Conveyance of a kind not hereinbefore mentioned', although the method of drafting of the relevant clause in the Finance Bill suggests that the current Stamp Office view is moving towards the mistaken notion of a "part sale".

This practice afforded significant planning opportunities: for example, a £1,000,000 freehold exchanged for a £10,000 leasehold plus £990,000 cash required only a 50p stamp.

<sup>6</sup> [1963] AC 135 at 151.

<sup>7</sup> [1954] 1 WLR 180.

It is this loophole that the Chancellor has attempted to close.

*The Finance Bill*<sup>8</sup>

Clause 239 provides, inter alia, as follows:

- (1) Where:-
  - (a) the consideration for the transfer or vesting of any estate or interest in land or **the grant<sup>9</sup> of any lease or tack<sup>10</sup>** consists of or includes any property, and
  - (b) for the purposes of stamp duty chargeable under or by reference to the heading 'Conveyance or Transfer on sale' in Schedule 1 to the Stamp Act 1891 no amount or value is, apart from this section, attributed to that property on that transfer, vesting or grant,

then, for those purposes, the consideration or, as the case may be, the consideration so far as relating to that property shall be taken to be the market value of the property immediately before the instrument in question is executed *and accordingly the instrument shall be charged with ad valorem duty under that heading*. [Added emphasis - see below]

- (3) Stamp duty shall not be chargeable under the heading 'Exchange or Excambion' in Schedule 1 to the Stamp Act 1891, and section 73 of that Act (exchange and partition or division) shall cease to apply to the exchange of property; and, accordingly, in that section the words from the first "upon" to "heritable property, or" and the words "exchange or" shall cease to have effect. Section 73 is, however, enlarged to apply to partitions of leasehold as well as freehold property where there is cash equality exceeding £100.

It appears from the sub-clauses set out above that the Chancellor has tried to attack this area of avoidance by making the value of land or an interest in land

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<sup>8</sup> References are to the Finance Bill as amended in Committee Stage.

<sup>9</sup> It is the Stamp Office view that "grant" applies to agreements for lease under s.75 Stamp Act 1891.

<sup>10</sup> The words in bold are a source of confusion. The sub-clause is concerned with conveyance on sale duty, a later sub-clause deals with "Lease or Tack duty". Leases are brought into the clause because lease premium duty is charged "by reference" to conveyance on sale duty. The double reference appears to be necessary to include land in the scope of chargeable premiums subject to s.77(1) Stamp Act 1891 considered later.



consideration within the head of charge 'Conveyance or Transfer on sale' where the property purchased is land or an interest in land<sup>11</sup>. Sub-clause (3) then takes future property exchanges outside of the head 'Exchange or Excambion' and s.73 as they are no longer required<sup>12</sup>. It must, however, be noted that although the charge applies only to the transfer or grant of an interest in land<sup>13</sup>, the charge applies to all property as consideration.

However, sub-clause (1) is not a charging provision but a technical provision: it provides a method of valuation 'for the purposes of stamp duty chargeable under or by reference to the heading "Conveyance or Transfer on sale" '. The clause does not contain a provision bringing such consideration within this head of charge, and accordingly, consideration in the form of property remains totally outside the head of charge. The defect in the original drafting of the clause was that it referred to certain considerations being ignored for the purposes of conveyance on sale duty, i.e., it works on the basis of a part sale, which as shown above, does not exist for stamp duty purposes. The words italicised were added to the Chancellor's Budget Resolution when this defect was noticed; however, it is arguable that, because they do not address the basic issue of a part sale, they are wholly ineffective. They merely seem to reiterate the fault by commencing with the words "and accordingly". This ineffectiveness allied to sub-clause (3), which effectively removes a freehold exchange of property from the heading 'Exchange or Excambion' and any equality money on such an exchange from s.73, should mean that such a transaction will now fall within 'Conveyance of any kind not hereinbefore mentioned', and as such only be chargeable with a 50p stamp.

As a counter to the above it could be argued that s.55 Stamp Act 1891 is also, strictly, a technical provision, yet it is effective as impliedly bringing consideration in the form of shares within the concept of a sale for the head 'Conveyance or Transfer on sale'. Lindley LJ in *John Foster & Sons Limited v IRC*<sup>14</sup> stated that:

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<sup>11</sup> Whether or not intentionally, this has been achieved by making the value of any property (presumably including, for example, goods, plant, machinery, etc) consideration within the head of charge 'Conveyance or Transfer on sale'.

<sup>12</sup> Section 73 Stamp Act 1891 continues to apply and has been extended to all partitions of land, not just freehold interests, where there is cash equality money. However, it must be noted that in the view of the Stamp Office a partition that is drafted in the form of mutual transfers of partial interests in undivided shares will be subject to two charges to ad valorem duty as an exchange under the new provisions.

<sup>13</sup> There is no specific definition of "land" for stamp duty purposes and the Interpretation Act 1979 does not apply to stamp duties.

<sup>14</sup> [1894] 1 QB 516 at 528.

"The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s.71 [now s.55] of the Act."

And AL Smith LJ in the same case stated:

"We must read the two sections together. Section 70 [now s.54] enacts that: "the term 'Conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then s.71 implies that it may be in consideration of any stock or marketable security."

Nevertheless, traditionally taxing acts have been strictly construed, and any ambiguity in a charging provision has been resolved in favour of the subject (see *Clifford v IRC*<sup>15</sup>). Further, the House of Lords has stated that where a statutory provision is based upon a misconception of what the law is, then the law remains as it was. For example, Lord Morris of Borth-y-Gest stated in *Davies Jenkins & Co Ltd v Davies*<sup>16</sup>:

"It is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law."

However, it is perhaps the words of Lord MacMillan, in the Privy Council case of *Straits Settlements Commissioner of Stamps v Oei Tjong Swan*<sup>17</sup>, which are most apposite to the new clause:

"It may well be that provisions dealing merely with the machinery of taxation ought not to be presumed to impose a charge, but statutes must be read as a whole and the language used in "so called" machinery sections may be called in aid for the interpretation of the charging sections."

### *Stamp Office Practice*

#### Exchanges and Mutual Transfers

In response to the Budget, the Stamp Office has published in The Notes its understanding of the new provisions. The comments of the Stamp Office in The Notes gave rise to considerable problems and further guidance on the proposed

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<sup>15</sup> [1896] 2 QB 187.

<sup>16</sup> [1967] 1 All ER 913 at 922.

<sup>17</sup> [1933] AC 378 at 389.

practice of the Stamp Office has been provided in a Press Release<sup>18</sup>. It must, however, be noted that notwithstanding the apparent modifications in practice the Stamp Office maintain their original position that *prima facie* an exchange of property is subject to a double charge to *ad valorem* stamp duty unless the instruments in question are strictly drafted<sup>19</sup> in a way to avoid the problem. Precisely what form of wording will succeed in satisfying the Stamp Office has not been officially disclosed, but certain possibilities are considered later in this article.

The Stamp Office view is that on the exchange of property A (valued at £100,000) for property B (valued at £50,000) plus £50,000 cash, duty will be charged:

- (1) on the transfer of property A, at 1 per cent on £100,000 (i.e., on the value of property B plus the cash); and
- (2) on the transfer of property B, at 1 per cent on £100,000 (i.e., the value of property A: all the consideration being attributed to property B).

Although this is understandable with regard to the purchase of property A, the purchaser of property B will effectively be charged *ad valorem* duty on the purchase of cash. In such a situation, the taxpayer should argue for an apportionment within s.58(1) Stamp Act 1891. However, although such an argument is clearly within the spirit of the section, it will, strictly, require the treatment of cash as property.

#### Part Exchanges and Cash Equality

The Press Release modifies the position set out in The Notes. Provided that the conveyance identifies that the consideration for the transfer of the cheaper property is part only of the value of the more expensive property then the stamp duty upon the transfer of the cheaper property is charged only upon the relevant proportion of the larger value. However, two points require notice:

- (1) if the documents do not provide for such an apportionment the stamp duty will be charged upon the transfer of the cheaper property upon the full value of the more expensive property; and
- (2) there will still be a double charge to *ad valorem* stamp duty upon such transactions even where the stamp duty is chargeable upon the lower amount.

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<sup>18</sup> Stamp Duty and Property Transactions, 19th April 1994.

<sup>19</sup> As the *Portman* case (1956) 35 ATC 349 shows, the drafting involved in the stamp duty planning must begin at the contract stage.

The Press Release carries with it the suggestion that this revised practice will apply only where cash figures are set forth in the documents.

In these circumstances, therefore, where the equality money on an exchange is of a significant amount it may be a wise precaution to draft the contract and to execute two conveyances as two sales as opposed to an exchange. In the example above, property A would be conveyed for £100,000 cash while property B would be conveyed for £50,000 cash. These payments could then be netted off requiring £50,000 to be paid to the vendor of property B. Clearly this method would save stamp duty on the £50,000 cash which would be payable above. Of course, the slightly greater legal fees as a result of two conveyances would have to be off-set against this saving.

However, it might be that a reverse of the well-known *Portman* trap<sup>20</sup> will be applied in such a situation by the Stamp Office. In that case, two contracts for cash sales of properties were completed by a deed of exchange. It was held that the deed was in substance not an exchange but a completion of the two cash sales, which were each dutiable as conveyances. Accordingly, parties contemplating a transaction as above, should not at any stage structure the transaction as an exchange. In the light of *Furniss v Dawson*<sup>21</sup> this would appear to be an even more significant risk, but it seems that, currently, provided that the values are justifiable they are likely to be accepted by the Stamp Office<sup>22</sup>.

#### Possible Drafting Points

It seems that the Stamp Office may be moving to the view that where Blackacre is conveyed to A "in consideration of the sum of £X to be satisfied by the transfer of Whiteacre", this is not such an exchange of properties as falls within the new charging provisions so far as the transfer of Whiteacre is concerned. The transfer may attract only the fixed duty of 50p whereas the transfer of Blackacre will bear ad valorem duty by reference to the value of Whiteacre. On the other hand, it seems that two charges to ad valorem stamp duty will be claimed where Blackacre is conveyed in consideration of the transfer of Whiteacre, and Whiteacre is conveyed in consideration of the transfer of Blackacre.

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<sup>20</sup> *Portman v IRC* (1956) 35 ATC 349.

<sup>21</sup> [1984] AC 474.

<sup>22</sup> As a cautionary note, the parties should not seek to mitigate stamp duty by artificial allocation of the prices. The Stamp Office might seek to argue that the cash prices allocated are a sham and not a bona fide attempt to arrive at a true value; however, more significantly, the parties would be involved in a fraud on the Revenue and their advisers may be guilty of professional misconduct. *Re Wragge* [1997] 1 Ch 796; *Saunders v Edwards* 1987] 1 WLR 1116; s.5 Stamp Act 1891.

There is the interesting intermediate area where Blackacre is conveyed in consideration of the transfer of Whiteacre, and Whiteacre is conveyed as consideration for or in satisfaction of the transfer of Blackacre. It seems to the authors that this should fall within the first approach and that the transfer of Whiteacre should bear only the fixed duty of 50p. Currently, however, it seems that this view is not accepted by the Stamp Office although it is difficult to see any distinction in principle. The decision by the Stamp Office not to adopt a sensible approach to this obvious hardship must, however, be a clear indication that notwithstanding the partial withdrawal represented by the acceptance of a possible drafting solution, the Stamp Office are clearly intending to apply these provisions as widely as they can get away with in the face of taxpayer opposition.

Clearly, this approach involves a fine semantic distinction and in the absence of publication by the Stamp Office of an acceptable form of words, there are bound to be many costly mishaps with the unfortunate draftsman (and his clients) feeling understandably aggrieved.

This Stamp Office view may be considered harsh especially since on mutual transfer of shares, where on strict analysis there are two sales (*J and P Coates Ltd v IRC*<sup>23</sup>), Stamp Office practice is to claim ad valorem duty on only one stock transfer form, the other form bearing only the fixed duty of 50p<sup>24</sup>.

#### Leases - Surrenders and Regrants

Another area, seemingly caught by the new provisions, is that of lease variation (operating as a surrender and regrant) or lease enfranchisement. *Doe d. Phillips v Phillips*<sup>25</sup> held that a surrender of a lease by the tenant in consideration of payment by the landlord is a conveyance on sale. Accordingly, since under Clause 239 the regrant of a new lease is to be treated as cash, it would seem that a surrender in consideration of a regrant will now be chargeable at 1 per cent on the market value of the new grant. Hence, a lease variation (operating as a surrender and regrant)<sup>26</sup> or a lease enfranchisement may now be dutiable, at the rate of 1 per cent, as follows:

- (1) with regard to the surrender, the market value of the new grant; and

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<sup>23</sup> [1897] 2 QBD 423.

<sup>24</sup> This also appears to be accepted in practice as being sufficient to avoid the double charge to stamp duty reserve tax.

<sup>25</sup> (1840) 11 A&E 796.

<sup>26</sup> unless it can be argued that where there is a surrender and regrant by operation of law the implied new grant is not consensual consideration for the surrender.

- (2) with regard to the new grant, on any cash being paid plus possibly the market value of the interest surrendered<sup>27</sup>.

Where the variation clearly takes the form of a surrender and regrant there would seem to be the possibility, however, that by drafting the grant of the new lease to be in satisfaction of the surrender of the old lease, ad valorem duty will only be payable on one half of the transaction. Without Stamp Office guidance the position is unclear<sup>28</sup>. Similarly, in the meantime, enfranchisement of a 50 year lease, of market value £70,000, for a 100 year lease, of market value £80,000, for a cash payment of £10,000 may result in a stamp duty liability of £1,600 which equates to duty of 16 per cent of the cash paid.

#### Partial Relief

One of the many obscurities of the Bill arises in this area. Section 77(1) of the Stamp Act 1891 provides that no duty is to be charged upon the grant of new lease upon any consideration consisting of a surrender of a lease of the same property. This does not appear to have been repealed but it is difficult to reconcile with the apparent inclusion of the grant of leases within Clause 239(1)(a). It is, however, arguable that it continues to apply to limit the duty charged upon a new lease in this situation; it is understood that the Stamp Office accept this argument. This means that it may be possible to avoid substantial charges to stamp duty where instead of taking a surrender and granting a new lease the parties merely agree to the grant of an overriding lease and the tenant merges the existing lease into the new lease. It seems that the Stamp Office accept that this is effective<sup>29</sup>. The provision does not apply where there is a surrender of a lease of property A as consideration for the grant of a lease of property B - a fairly routine exercise on a phased retail or industrial development. Clearly, with regard to commercial leases, stamp duty may now be the most significant cost of such a transaction, unless there is some acceptance by the Stamp Office that suitable drafting of consideration provisions in agreement can be effective to mitigate the hardship of these double charges<sup>30</sup>.

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<sup>27</sup> but see s.77(1) Stamp Act 1891 considered below.

<sup>28</sup> It may be possible to deal with the situation by adopting the form of drafting that may be effective in relation to exchanges, namely for the surrender to be granted for a cash sum to be satisfied by the grant of the new lease.

<sup>29</sup> It may be difficult to achieve this where the new lease is shorter than the existing lease.

<sup>30</sup> There will, of course, be interesting discussions in commercial negotiations on the form of the drafting since this could affect which of the parties bears the stamp duty.

### Valuation Issues

It should be noted that the Stamp Office's Budget response requires the taxpayer to provide evidence of the property's market value. It is unclear under what authority such request is made, since s.12 Stamp Act 1891 allows any person to require that the Commissioners express their opinion on the amount of duty payable. The requirement perhaps results from the length of delay involved in Stamp Office valuations giving sometimes significant cash flow advantages to the taxpayer. This delay was one of the reasons for the abolition of voluntary dispositions duty in 1985. In the past with regard to valuation issues, the Stamp Office has not necessarily accepted an arm's length price, on the basis of *Lap Shun Textiles Industrial Co v Collector of Stamp Revenue*<sup>31</sup> in which the Privy Council stated that such a price is merely evidence of market value and can be challenged. However, The Notes published by the Stamp Office following last November's Budget imply that an arm's length price will be accepted. The success of this practice will depend on the co-operation of the valuation division. It is perhaps worth noting that intentionally stating a false market value will be a fraud on the Revenue<sup>32</sup>. The problem of valuation remains in part. It seems that the Stamp Office will only act upon the parties' figures provided that these are supported by a professional valuation. This is an unrealistic attitude to adopt. It is most probable that in practice even though the parties may have obtained professional valuations those prepared for each party may have differed and the differences settled by commercial negotiation.

It is also required by the Stamp Office that because the legislation refers to the market value immediately before the execution of the instrument in question the professional valuation must have been made within a reasonable time before the instrument. This means that where there has been a delay between the contractual negotiations and the transfer or lease a new valuation may be required. Two valuations will be required for leases involved in property transfers or regrants where there is any interval between the agreement and the lease because both instruments are dutiable in their own right by reference to the values immediately before the execution of the relevant instrument.

There will also be valuation problems where there is a delay between contract and completion which arises where one of the parties is engaged in building works. For example, A agrees to surrender his lease of his existing premises to a developer for the grant of a lease of new premises elsewhere in the development. Subject to the drafting, the stamp duty payable upon the surrender of the old lease may depend upon the progress of the building works on the new premises. There will also be the problem of whether the agreement for the grant of the new lease

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<sup>31</sup> [1976] AC 536.

<sup>32</sup> see above footnote 22.



which attracts stamp duty upon the value of the old lease will have to take into account the discount in value arising because of the right of the existing tenant to remain in occupation pending the grant of the new lease.

Other problems stemming from the new wording include whether or not in determining a property's market value or rent (for example, on an exchange) value added tax should be included unless there is a covenant not to exercise the option to tax or the transaction is exempt; also, it seems that the market valuation should take place at completion as opposed to exchange of contracts. Accordingly, resting on the contract, where the consideration is in the form of property, will no longer provide any inflationary benefit, and may result in unexpected liabilities were the property's value to increase in real terms. Further, it should be noted that if a developer intends to rest on a contract before sub-selling the land, he is at risk of attracting duty on the value he adds to the property, should he subsequently exchange the property or need to do a transfer himself.

### **Unascertainable consideration**

#### *Pre Budget*

Stamp duties under the heads of charge "Conveyance or Transfer on sale" and "Lease or Tack" were chargeable on the amount or value of the consideration passing. Where a definite sum might have become payable dependent on a future contingency (for example, a successful planning application) stamp duty would be charged on this sum. Further, where this contingent sum was not fixed, stamp duty would still be charged so long as a maximum, minimum or basic figure (which might be adjusted) was stated. Furthermore, where the consideration passing had not been ascertained at the time of completion but was ascertainable at that time (e.g., from accounts still in preparation), the Stamp Office would delay stamping until such time as the consideration has been ascertained.

However, where there was neither a definite sum, nor a fixed peg upon which a claim could be based, the conveyance or lease only attracted a 50p stamp under the head of charge "Conveyance of any kind not hereinbefore mentioned"; similarly, a lease for an unascertainable rent was stamped with £2.00 under paragraph (4) of the head of charge "Lease or Tack". Clearly, this area offered significant possibilities for tax avoidance: a conveyance of property for consideration of market value the day after completion would have been stamped at 50p, while a lease for 50 years at a nominal rent incorporating a market value rent review clause after 2 years would have only attracted duty at the rate applicable to a 2 year lease (i.e., 1 per cent) plus a fixed duty of £2.00 for the remaining 48 years.



*The Finance Bill*

Clause 240 provides, inter alia, as follows:

- (1) Where, for the purposes of stamp duty chargeable under or by reference to the head "Conveyance or Transfer on sale" in Schedule 1 to the Stamp Act 1891, the consideration, or any part of the consideration, for -
  - (a) the transfer or vesting of any estate or interest in land, or
  - (b) the grant of any lease or tack,cannot, apart from this sub-section, be ascertained at the time the instrument in question is executed, the consideration for the transfer, vesting or granting shall for those purposes be taken to be the market value immediately before the instrument is executed of the estate or interest transferred or vested or, as the case may be, the lease or tack granted.
- (2) Where, for the purposes of stamp duty chargeable under paragraph (3) of the heading "Lease or Tack" in Schedule 1 to that Act, the rent, or any part of the rent, payable under any lease or tack cannot, apart from this sub-section, be ascertained at the time it is executed, the rent shall for those purposes be taken to be the market rent at that time<sup>33</sup>.

Sub-clause (3)(a) provides somewhat obscurely that consideration or rent is not to be regarded as unascertainable where a sum can be determined upon the basis that a future possible event may or may not happen.

The same problems with regard to valuation will exist as for exchanges above, including the possible need for two valuations where there is a dutiable agreement for lease or there is a significant delay between contract and completion.

On the basis that the clause is applied regardless of its deficiencies above, it should be noted that where any part of the consideration is unascertainable, market value will be imposed on the whole consideration. Therefore, when conveying property at an undervalue, any unascertainable component of consideration should be avoided.

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<sup>33</sup> Note that this modifies only the rent duty provisions of the Lease or Tack head of charge and not the premium provisions. A lease for a contingent premium may, therefore, escape this charge depending upon the effect of the charge to conveyance on sale duty under sub-clause (i).

*Stamp Office practice*

It is unclear how this new clause will co-exist with the Stamp Office's alleged contingency principle. For example, a 20 year lease at a rent of £1000 per annum with an upwards only rent review clause after 1 year would be chargeable under the contingency principle, because the lease contains a minimum figure (*Underground Electric Railways v IRC*<sup>34</sup>), as a 20 year lease at an average annual rent of £1000 (i.e., duty on the rent would be calculated at 2 per cent of £1000 - £20). However, if the right of the landlord to increase the rent at the rent review stage were to be considered as "part of the consideration", within sub-clause (1), then market value would be imposed for the calculation of stamp duty.

However, the Stamp Office have said that the contingency principle has not been superseded and that the new provisions will only operate only in those cases where the contingency principle does not produce any form of charge to stamp duty. This is apparently based upon the effect of sub-clause (3)(a) referred to above. In consequence, where in relation to a land transaction a contract provides for a maximum sum that may reduce, a minimum sum that may increase, or a prima facie starting figure that may go up or down, stamp duty will be charged by reference to the prima facie figure and the new rules as set out in the Budget will not apply. It is only where there would be either a 50p or a £2 fixed charge because the position is unascertainable that the market values and market rents become important. It would seem also that if the contingency principle does provide a stampable sum then this applies so that the new rules do not apply even if part of the consideration is unascertainable.

It is difficult to understand quite when the new rules will apply when part of the consideration is ascertained and part is unascertainable. The charging provisions in Clause 240(1) and (2) refer to the situation where part of the consideration or rent respectively cannot be ascertained. Almost by definition, where the consideration is unascertainable at least part of it must be uncertain. For example, where there is a rent with the normal upward reviews part of the rent is unascertainable. However, it seems that the Stamp Office will regard this as not falling within the new regime but dutiable upon the old rule as a minimum rent. There are, at present, considerable difficulties in determining how stamp duty will be calculated in situations such as the following:

- (1) a lease is granted for a rent of a specific amount, which is reviewable to a market rent whether greater or lesser than the initial rent, i.e., an upward and downward review. It seems that the Stamp Office may regard this as a case of a prima facie rent for the whole term equal to the initial

rent, although this would seem to be inconsistent with the current published practice in this area<sup>35</sup>;

- (2) a lease granted to a developer for a rent equal to a specified percentage of the development proceeds. It seems that the new rules will apply to charge duty upon the market rent because no rent is ascertainable. The position may differ if there is a guaranteed minimum rent reserved as well as a share of the rents because there is a prima facie ascertainable rent;
- (3) a lease granted for a reverse premium<sup>36</sup> where no rent is initially reserved for a fixed term with a review to market rent in due course.

In this situation it is difficult to see much scope for the new provision in most cases, if it is not to apply where a prima facie sum can be discovered under the application of the existing contingency principle<sup>37</sup>. It cannot be that sub-clause (3)(a) has the effect that where a prima facie consideration or rent for land is found this cancels out "part of the" consideration for real provisions, but it seems to come close to that. Some guidance is needed particularly in the areas of rent reviews and rent sharing arrangements indicating how these rules are to apply.

### **Written agreements to surrender leases**

#### *Pre Budget*

The head of charge "Surrender" in Schedule 1 to the Stamp Act 1891 imposes a fixed duty of 50p upon instruments of surrender which are not chargeable with duty as conveyances on sale. Where the surrender is made in consideration of a payment by the landlord, the instrument of surrender will be dutiable ad valorem as a conveyance on sale<sup>38</sup>.

However, where the lease was surrendered by operation of law on the basis of a written agreement (e.g., by returning the keys to the landlord) there was no instrument on which to pay duty. Although on occasions where the surrender was made in connection with the grant of new lease of the same or other premises, the Stamp Office sought to argue that the new lease was the instrument of surrender of the old lease which might have the effect of treating any reverse premium paid

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<sup>35</sup> See Monroe and Nock App. G-09

<sup>36</sup> In general, reverse premiums are not stampable.

<sup>37</sup> See *Monroe & Nock - Stamp Duties* 7th edition para 1-99

<sup>38</sup> Under the Finance Bill other forms of consideration may now attract stamp duty - see above.

for the grant of the new lease as stampable consideration for the surrender of the old lease. This view was considered to be wrong.

### *The Finance Bill*

Clause 241 provides, inter alia, as follows:

- (1) Where, in pursuance of any agreement, any lease is surrendered (or, in Scotland, renounced) at any time otherwise than by deed, the agreement shall be treated for the purposes of any duty chargeable under the Stamp Act 1891 as if it were a deed executed at that time effecting the surrender (or, as the case may be, renunciation).

Accordingly, it is now the situation that wherever either the agreement to surrender or the actual surrender is in writing for consideration, ad valorem stamp duty will be payable. However, it is understood that Clause 241 is not aimed at the well known stamp duty planning method of accepting a memorandum of contract terms in the form of a letter of offer by conduct, which would still seem to be applicable in cases other than business tenancies (see below). This method relies on the case of *Carlill v Carbolic Smoke Ball Co*<sup>39</sup>, whereby a written contract may be avoided as follows.

The landlord wishing to accept a surrender of the tenant's lease in consideration of the payment of £10,000, would produce a detailed offer letter to the tenant which could be accepted by conduct, as opposed to writing. Following acceptance of the offer, the tenant would then surrender the lease by operation of law. By this process there would be no instrument for stamp duty purposes<sup>40</sup>. However, such an arrangement would not produce a binding contract since s.2 Law of Property (Miscellaneous Provisions) Act 1989 requires such contracts to be made in writing.

Business tenants are given security of tenure by Part II Landlord and Tenant Act 1954 (as amended). This Act prevents a landlord from unilaterally bringing a lease to an end, without Court authorisation<sup>41</sup>. *Joseph v Joseph*<sup>42</sup> held that an agreement between landlord and tenant for a future surrender also required Court

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<sup>39</sup> [1892] 2 QB 484.

<sup>40</sup> The Land Registration Rules 1925; rule 316 SR&O 1925 No. 1093 exempts from stamp duty any statutory declaration prepared for Land Registry purposes, but other records might be dutiable such as receipts. There are on occasions problems of dealing with delapidations.

<sup>41</sup> section 38(4).

<sup>42</sup> [1966] 3 All ER 486.

authorisation under this Act. Accordingly, on the basis that before Court authorisation is given an agreement is ineffective it may be difficult for the Stamp Office to argue either that such authorisation itself creates a valid agreement or that before this time there was a conditional contract.

### *Stamp Office practice*

The Stamp Office have indicated in The Notes that the charge will apply to "any document evidencing the agreement or renunciation, whether or not it is a formal agreement or simply a letter outlining the terms of the procedure to be followed". There is no authority for this approach in the Finance Bill, which simply refers to agreements. It is a well established principle that memoranda evidencing oral agreements which it was always intended would be produced to provide evidence of those agreements were potentially stampable as written contracts under s.59 Stamp Act 1891<sup>43</sup>. However, these memoranda have to evidence a pre-existing oral contract. (On the basis of s.2 Law of Property (Miscellaneous Provisions) Act 1989 it is not possible to have an effective oral agreement to surrender and hence any memorandum would not be evidencing an effective agreement within the above principle). Accordingly, the Stamp Office's intended practice is wrong in law and should be resisted.

Unfortunately for the Stamp Office, while the possibility of surrender by operation of law exists, as opposed to by deed, it is likely that stamp duty will remain avoidable, and the new provisions of little practical effect unless the Land Registry are incited by the Stamp Office to conduct detailed investigations into every transaction where a surrender occurs.

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<sup>43</sup> see *Cohen and Moore v IRC* [1933] All E R 950.