

## Taxation of high value residential real estate — Help! What can we do now?

21 NOVEMBER 2012

**CATEGORY:**  
ARTICLE

Consultation on the paper 'Ensuring the fair taxation of residential property transactions' has now closed and draft legislation is expected 'on or before' 11 December 2012. While the period of consultation is valuable to the drafting of legislation, it has left an extended period of uncertainty for homeowners, unsure how the new rules will apply, and the date of implementation, 6 April 2013, is now just months away.

Homeowners have a broad idea of how the rules will affect them, but with no detail available, advisers cannot say with certainty the extent to which existing structures will be taxed under the new regime, with the greatest area of uncertainty lying in the application of the proposed capital gains tax regime. Equally, advising on an appropriate structure for new purchases is fraught with all structures involving some form of compromise on tax optimisation.

What is clear is that many existing structures holding high-value residential property may bear additional, and often high, costs from 6 April 2013 and major decisions will need to be made and implemented in a very short time-frame.

What can we do now?

Uncertainty need not lead to inactivity. Information can be collated and preparatory steps taken to ensure that when the legislation is published a decision can be made as to whether a structure should be maintained or wound up. Preparation will enable that decision to be implemented swiftly, without unexpected delays and last minute hitches. Without preparation, the condensed time-frame may mean that it is not possible to implement the decision in the time available. Missing the 6 April 2013 deadline could be costly, both in terms of capital gains tax on a disposal triggered by unwinding a structure after that date, and also in terms of the ongoing annual charge to be imposed from 6 April 2013.

If the following information can be gathered, those holding high value residential property, and so potentially within the scope of the new regime, will be in a strong position and will be better able to effect a speedy response to the detail of the legislation.

The following areas should be considered further by anyone owning or managing a structure that is likely to fall within the scope of the rules, whether that be a trustee directly or indirectly holding UK residential property or an individual who owns a residential property holding company:

### Valuation

Establish the base cost of the property (which will include costs of purchase such as stamp duty or SDLT, property agent search fees, capital improvements, etc.) and the market value as at 1 April 2012.

### Tax status of shareholders, settlors and beneficiaries

Identify the current tax status of the shareholders of any directly held company and of the settlor and beneficiaries of any trust owning, directly or indirectly, high value residential property.

### Future plans

- What are the future plans for the property? Who will occupy the property? Will the property be rented to third party tenants? When will the property be sold – in the near future or is the intention to retain it in the long term?
- If possible alternative owners are individuals, what are the ages and states of health of those parties? Are the alternative owners married?

### The structure

- Establish how the structure was funded. For example, where the property is held by a company, how was that company funded? The tax consequences of unwinding the structure may differ depending on the mechanics adopted on the original purchase.
- Does the structure hold any other assets or investments?
- Have gains already been realised or income arisen within the property holding structure.
- Have any benefits been received by beneficiaries of the owning entity, including, in particular, rent-free accommodation? Can the value

of those benefits that may have been enjoyed be ascertained?

## Company due diligence

Where the property holding structure includes a non-trustee company, check the status of the owning company – are returns up to date and is the company in a position to liquidate at short notice? It is not unknown to find that long-standing corporate owners continue to have bearer shares! It is not always possible to liquidate a company with bearer shares and the registration of shares can be time consuming.

## Liquidation

To ensure that a liquidator is available to deal with the liquidation of a company, consider taking steps now to instruct a liquidator. If, as is expected, liquidators will be in great demand, early instruction will ensure that your liquidation will proceed on time.

## Up-to-date identification requirement

Up-to-date ID for both the holding structure and any individual or structure that is acquiring property from it will be required by UK professionals and is a requirement of the UK Land Registry. In order to save delays, check that ID held by professionals is up to date and, if not, check as to what information is required by them and the UK Land Registry. Lack of ID will delay a transaction.

## UK Land Registry compliant information for liquidation

UK Land Registry compliant information must be provided to prove that a company is in liquidation. The required information for a property holding company in liquidation will include:

- Certified copies of Court Orders or other documents being relied upon.
- The written opinion of a lawyer qualified to practice company law in the country of incorporation of the company as to the nature and effect of the process on the company and as to the powers of the liquidator or other persons representing the company, including the power to execute documents on behalf of the company.
- Certified copy translations will need to be supplied of any documents not in English.

## Title deeds

Title deeds to the property and all documents relevant to the property, e.g. landlord's consents, planning permissions, etc., should be located.

## Leasehold property – landlord's consent on a liquidation

Where a structure owns leasehold property, the terms of the lease should be checked to establish whether landlord's consent to a disposal of the leasehold interest is required. If it is, steps should be taken to establish what information the landlord will require for the acquiring individual/entity.

- If the property is acquired by an individual:
  - Will personal/professional/banking references be required, and if so, is the acquiring individual able to provide a UK bank reference?
- If the acquiring individual is non-UK resident, will they be required to provide:
  - a UK guarantor; or
  - a rent/service charge deposit (often totalling two/three years outgoings on the property)?
- If the property is being acquired by some other entity, will the landlord require:
  - a UK guarantor; or
  - a rent/service charge deposit (often totalling two/three years outgoings on the property)?
- Will the landlord require for the acquiring entity:
  - a rent deposit;
  - a deed of covenant.
- In order to ensure that the landlord deals with an application quickly, you should be prepared to pay the landlord's costs to deal with your request for licence to assign. The level of these costs should be established and your UK solicitor put in funds so that they may give a cost undertaking immediately once a decision to transfer a property has been taken.
- As with liquidators, landlords and their solicitors and lenders are likely to be very busy if many structures choose to liquidate and early instructions will help to ensure that your application is dealt with.
- Does the owning entity have a share in a management company? If so, the share certificate should be found and the procedure for transferring ownership to the acquiring individual/entity established.

## Borrowing

- If there is borrowing in the current structure, how will this be redeemed?
- Details of any current lender, relevant account numbers and the method by which the existing security will be discharged should be established and these details supplied to your UK solicitor.
- If new borrowing will be put in place, has a lender agreed to take security over assets other than the property? If so, what due diligence in relation to these assets will the lender require and how quickly can the lender's requirements be met?

- If it is suggested that, following liquidation, a charge will be given over the property, what due diligence requirements will the lender have and how quickly can they be satisfied?

#### Non-UK law advice

In many cases, you will need to consider whether non-UK law advice is required, and the earlier that such advice is requested/obtained the more certain the timing will be met.

#### Signatures

It may seem obvious, but, where there is time pressure in a transaction, check that all parties that are required to sign documents are available at the relevant times and make sure that Powers of Attorney in forms that are acceptable to the UK Land Registry are executed if required.

#### Continued corporate ownership

In some cases, it may be decided that the benefits of continued corporate ownership outweigh the downsides of the new regime. If that is the case, it may be appropriate to consider taking steps to achieve a rebasing of the property to current market value so as to minimise the impact of the new rules on a future sale.

#### Act now

These steps are simple and for the most part self-explanatory. However, delaying investigation of questions such as the need for landlord's consent to a transfer, for example, could make the difference between being able to unwind a structure before 5 April and staying out of the new regime and being wedded to an undesirable structure with no hope of a tax efficient exit.

For further information in relation to anything covered by this Stop Press, please speak to your usual Withers contact or Birungi Kawooya on 020 7597 6649 ([bnk@withersworldwide.com](mailto:bnk@withersworldwide.com)).

# Authors

## Christopher Groves

PARTNER | LONDON

Private client and tax

 +44 20 7597 6127

 [christopher.groves@withersworldwide.com](mailto:christopher.groves@withersworldwide.com)

## Henry Stuart

PARTNER | LONDON

Real estate

 +44 20 7597 6031

 [henry.stuart@withersworldwide.com](mailto:henry.stuart@withersworldwide.com)

## Matthew Woods

PARTNER | LONDON

Private client and tax

 +44 20 7597 6496

 [matthew.woods@withersworldwide.com](mailto:matthew.woods@withersworldwide.com)