

**EXTENDING THE TERM OF A LEASE AND THE SDLT CHARGE SITUATION**

The landlord may have granted a commercial lease to the tenant before SDLT was introduced on 1<sup>st</sup> December 2003 and stamp duty paid.

The lease may expire in September 2020.

If the parties now want to extend this so the lease expires in September 2030 what route should be adopted to mitigate SDLT?

**SDLT**

SDLT is payable on the acquisition of a chargeable interest by reference to the consideration paid for the same or deemed to be paid for the same (FA 2003 s.43(1), s48 and s50).

The consideration can be in the form of another land interest (s47).

**FIRST ROUTE: PUT AND CALL OPTIONS**

The parties can enter into put and call options enabling the tenant in the future to call for a reversionary lease of 10 years following the expiry of the extant lease with the landlord having the right also to put the same on the tenant if needs be.

**GRANT OF OPTIONS**

The grant of the options will result in the acquisition of chargeable interests (the options themselves are the chargeable interests acquired) but nominal consideration will be paid for the same so no SDLT will be payable on the grant of the options.

The 2 options are in reality exchanged so prima facie giving rise to 2 chargeable acquisitions but there is an exemption from charge in such cases in FA 2003 sch 4 para 5(5) (see also Stamp Duty Land Tax 3<sup>rd</sup> Edition 2009 Jordans 14.35).

**EXERCISE OF OPTION**

When an option is exercised and the lease is granted a charge to stamp duty land tax will arise *at that time (and not before)* by reference to the capitalised value of the rents payable under the new lease.

This is confirmed in BTL Stamp Duties Monroe and Nock (the leading text book in the area) 14B-250/3 thus:

The charge to tax will be deferred until such time as the option is exercised and the agreement for lease arising is substantially performed or the lease is granted

There are anti-avoidance provisions in FA 2003 Schedule 17A paragraph 5 which seek to link leases together where they follow on from one another pursuant to option rights but it is not felt they have any relevant application to this case as the options were not contained in the extant lease when it was granted.

It may be argued following the Ramsay approach (Ramsay v IRC [1981] STC 174 and 30 years of subsequent cases) to statutory interpretation that the put and call options amount to a present agreement to grant a lease. It is felt inter alia the necessary element of preordination (one of the requirements of the approach) is not present for that approach to be applied and the Tax Editor has not known HMRC to seek to apply Ramsay in such situations. Also if there is such an agreement for lease it cannot be said to be substantially performed until the extant lease expires by effluxion of time in 2020.

Also the SDLT general anti-avoidance provisions in FA 2003 ss 75A- 75C would not be applicable. This is not felt to be bandit country. See also the comment on the GAAR below.

### **SECOND ROUTE: IS THE REVERSIONARY INTEREST ROUTE A BETTER OPTION?**

Under this route the landlord would immediately grant a 10 year reversionary lease to take effect when the extant lease expires.

This is not an attractive option as the effective date for SDLT purposes is the date the reversionary lease is granted even though the lease takes effect from a future date.

SDLT is thus payable at the time of the grant (SDLTM17070). However, SDLT is only payable on the rents charged under the reversionary lease. This produces a better result than a surrender and regrant (see the fourth route below).

### **THIRD ROUTE: IS IT POSSIBLE TO JUST HAVE AN AGREEMENT TO GRANT THE REVERSIOARY LEASE?**

If the parties enter into an agreement now to grant a formal legal lease in 2020 the agreement is not a chargeable transaction (FA 2003 s44 (1)) and the normal rules will apply i.e. the agreement is not chargeable unless substantially performed. It will not be substantially performed until 2020.

In BTL Stamp Duties Monroe and Nock it is stated at 14B-250/4 thus:

There will not be a substantial performance of the agreement for the reversionary lease in respect of the tenant's occupation since this will be by reason of his right as tenant under the existing lease and not as some sort of licensee or tenant in respect of the agreement for the reversionary lease. In consequence not completing the agreement for the reversionary lease would enable the parties to postpone the charge to tax...

### **FOURTH ROUTE: SURRENDER AND REGRANT NOW**

This is not an attractive approach as SDLT will be charged now on the rents charged on the new lease with no "overlap relief" being available for the stamp duty (charged under the SA 1891 and FA 1999) paid on the grant of the extant lease. See FA 2003 Sched 17A para 9(4).

### **CONCLUSION**

The use of put and call options is an appropriate course to adopt although the agreement to grant a reversionary lease is a satisfactory alternative.

## **THINGS TO COME – THE GENERAL ANTI-ABUSE RULE (THE GAAR)**

The GAAR will come into effect when the Finance (No 2) Bill 2013 is passed into law.

It applies to “abusive tax arrangements.”

Arrangements are “tax arrangements” if it is reasonable to conclude that one of their main purposes is to avoid being liable for tax (tax includes SDLT) (see clauses 203 and 204).

The tax arrangement is “abusive” if it cannot reasonably be regarded as a reasonable course of action to take in relation to the relevant tax provisions considering inter alia (a) the aims behind the legislation and (b) whether the provision is sought to be avoided by “contrived or abnormal steps” and (c) whether the arrangements are intended to exploit any shortcomings in the tax provisions (clause 204(2)). Note if something is done which accords with established HMRC practice this would indicate it is not abusive (clause 204(5)).

In HMRC’s GAAR Guidance Note (approved by the GAAR Advisory Panel on 15/4/13) in D33 the panel considered it was not abusive to grant a reversionary lease to avoid the SDLT which would be payable if there was a surrender and regrant. See the fourth route and the second route above.

The panel did not comment on the other routes but for them to even consider such an innocuous route as the second route as possibly being within the ambit of a provision initially designed to stop complex artificial tax avoidance schemes does not bode well for the future of tax planning. Tax practitioners must adjust to the new environment not gradually but immediately the Finance Bill becomes law.

**PATRICK C SOARES**

1 May 2013

