

**PROPERTY LAW TAX BULLETIN**

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**SDLT ON GIFTS AND WHEN LIABILITIES ARE TAKEN OVER**

**1. General Rule**

The general rule is SDLT is not payable on gifts because no consideration in money or money's worth will have been provided (FA 2003 Sch 4 para 1).

Note there is no SDLT exemption for transfers to a spouse but a gift to a spouse would not be chargeable in any event as no consideration will have been provided.

**Example I (gift of property to spouse: no mortgage involved)**

Miss X owns Greenacre (unencumbered by a mortgage). She marries Mr X and puts the property into joint names (as joint tenants or as tenants in common) out of natural love and affection. No SDLT is payable as she has made a gift to Mr X. The same SDLT position will have resulted even if she had not married Mr X.

## **2. Property subject to a mortgage**

### General rule

If a property is given away subject to a debt special rules apply. These are found in FA 2003 Schedule 4 para 8.

### No debt assumed or change in debt rights or obligations

If the property is mortgaged and is given away subject to the mortgage there is no liability to SDLT if the transferee does not assume any liability for the transferor's debt (FA 2003 Schedule 4 para 8(1)) and the rights and liabilities of any party in relation to the debt are not changed on the transfer of the property (FA 2003 Schedule 4 para 8(1A)).

### Example II (gift of whole to son: father keeps the mortgage)

Mr A gives Cedar Cottage to his son. It is subject to a mortgage to X Bank. Mr A keeps all the mortgage obligations and the bank does not put any new obligations on the son who takes the property subject to the mortgage: so if Mr A defaults the Bank may sell the property under its power of sale. There is no SDLT payable in the Tax Editor's opinion as this is clearly a gift to the son.

### Debt assumed by transferee or change in debt rights or obligations

If the transferee assumes any liability for the transferor's debt then SDLT may be payable (FA 2003 Schedule 4 para 8(1)) or if the rights and liabilities of any party in relation to the debt are changed on the transfer of the property then SDLT may be payable (FA 2003 Schedule 4 para 8(1A)).

### Example III (Spouse takes over half of mortgage)

Mr X has a property worth £500,000 and a mortgage debt of £400,000 and on marrying Miss Y he transfers to her half the property and 50% of the mortgage (£200,000). She pays SDLT on £200,000 (0% on £125,000 and 2% on 75,000). This is because she has assumed half of the debt.

Example IV (gift of share of property where there is an existing mortgage which transferee does not take over in whole or part (note the HMRC example set out below taken from their guidance appears to be incorrect)).

The HMRC guidance in this area is dated 13/1/2014 (Updated 12/12/17) and is entitled "SDLT: transfer ownership of land or property."

The following commentary and example appears:

### **You're given property as a gift**

If you get property as a gift you won't pay SDLT as long as there's no outstanding mortgage on it. But if you take over some or all of an existing mortgage, you'll pay SDLT if the value of the mortgage is over the [SDLT threshold](#).

### **Example**

A husband decides to transfer a half share in a property he owns to his wife. He doesn't take a cash payment for this share, but there's an outstanding mortgage on the property. The amount outstanding is more than the current threshold, so SDLT is payable, even if the husband keeps the mortgage. He must tell HMRC about the transaction. (Tax Editor's emphasis)

### Tax Editor's Comments on the HMRC guidance and example

The HMRC commentary before the example is clear – if the transferee “takes over some or all of an existing mortgage” then SDLT is payable.

If the transferor keeps the mortgage obligations no SDLT is payable in the Tax Editor's opinion. In the example if the wife does not take over any of the mortgage (i.e. “the husband keeps the mortgage”) and the rights and liabilities in relation to the debt obligation are not changed (note the mere transfer of a property subject to a mortgage will not result in a change in the debt rights and obligations (see FA 2003 Schedule 4 para 8(1A)) it is submitted no SDLT is payable. The transfer of the land subject to the mortgage where the husband remains liable for the

mortgage and the wife takes over no obligations will not it is submitted give rise to an SDLT liability – there is no assumption of a debt within FA 2003 Schedule 4 para 8 (1) (b) and there is no alteration of the debt rights and obligations within Schedule 4 para 89(1A). **The HMRC commentary contradicts the example given by HMRC.** If taxpayers are taking this view on a particular deal they should point this out to HMRC as their example seems to indicate the contrary.

### **3. Vesting property under a will or under the intestacy rules subject to a mortgage**

If property is vested in a devisee or other person under a will (or under the intestacy rules) no SDLT is payable even if the person takes it subject to an outstanding mortgage which that person is liable to pay off (FA 2003 Schedule 3 para 3A(2)).

### **4. Transfers to connected companies**

Gifts to connected companies can be deemed to be sales at market value for SDLT purposes (see FA 2003 ss53 and 54).

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