

4. Leases: the basics

4.1 Overview

The SDLT regime applying to leases is littered with complication and provides a compliance regime which is difficult for even the most experienced SDLT practitioners to fathom. It is welcome that the government started a process of simplification in the *Finance Act 2013*, abolishing the abnormal rent increase rules and simplifying the reporting requirements where a lease continues after the expiry of its fixed term. Changes to the rates of charge to SDLT in *Finance Bill 2016* have also removed a much misunderstood provision which disallowed the zero per cent band for a premium on non-residential property where rent reserved exceeded £1,000 per annum.

In simple terms, SDLT is calculated separately on the premium and rental consideration provided for the grant of a new lease. A one per cent charge is applied to the net present value of rents to the extent it exceeds £125,000 (residential) or £150,000 (commercial) in addition to the rates of charge shown at **2.4.2**, **2.4.3** and **2.4.4** being applied to any premium. *Finance Bill 2016* introduced a two per cent charge on rent for non-residential leases with a net present value exceeding £5 million. The charge on the rent and charge on the premium are added together and entered onto the land transaction return as the total charge to SDLT.

The following text considers the charge arising on the grant of a lease, looking in particular at important definitions and variants which affect the SDLT calculation.

4.2 Meaning of a lease

A lease is defined for SDLT purposes as:

- an interest or right in or over land for a term of years (whether fixed or periodic); or
- a tenancy at will or other interest or right in or over land terminable by notice at any time.

Ultimately whether an interest in land amounts to a lease is a legal issue turning on the grant of exclusive possession. The distinction between a lease and a licence is extremely important in the context of SDLT.

A licence is an exempt interest, and is therefore not chargeable to SDLT. The Stamp Office provides guidance on the definition of a licence in the context of timeshare accommodation, mobile homes, static caravans and houseboats. This guidance indicates that most timeshare agreements and mooring or pitching rights will be a form of personal contract constituting a licence to occupy and therefore not a chargeable interest. In particular, if a site operator has free access and can request a user to occupy a different part of a site, then the agreement is likely to be a licence.

Conversely, if “exclusive and complete occupation” of land or property for a defined period or periods is provided, the agreement may constitute a lease. Factors such as the name given to an agreement, defined short periods of exclusive occupation and multiple non-concurrent rights over the property will not necessarily prevent an agreement from being a lease.

Guidance for the higher rates of SDLT applying to additional properties (see 2.6) exempts caravans, houseboats and mobile homes on the basis that these assets are usually chattels and any payment for a plot is usually for a licence not chargeable to SDLT.

The expression “term of years” includes a term for less than one year, for exactly one year, for a fraction of a year, or from year to year.

Law: FA 2003, Sch. 17A, para. 1

Guidance: SDLTM 10022, 10023; *Stamp Duty Land Tax: higher rates for purchases of additional residential properties* – Guidance Note, para. 2:11

4.3 The term of a lease

4.3.1 Introduction

A key factor in the computation of SDLT is the term of a lease. The treatment of a lease for SDLT purposes differs depending on whether it is a lease for a definite or indefinite term.

A lease for a definite term is one whose term can be ascertained at the time of grant. This includes a lease with a defined end date or with a specific length of term from the date of grant.

A lease for an indefinite or periodic term is any lease for which the end date is not known at the time of grant.

Guidance: SDLTM 10035

4.3.2 *Commencement date*

The general rule for SDLT purposes is that the term of a lease commences on the later of:

- the contractual start date; or
- the date of grant.

This rule originates from *Bradshaw v Pawley* in which Sir Robert Megarry V-C held that “a lease cannot retrospectively vest an estate in land”. Therefore where a lease created a term of years which was expressed to begin earlier than the execution of the lease, the term did not commence until the date of execution. However, there was nothing to prevent the parties from defining the expiration of the term or other contractual provisions (e.g. increased rent) by reference to such a date.

For most calculations, the date of grant determines the effective date for SDLT purposes.

It is worth remembering that a term running from a date excludes that date.

Example

A lease with a term of ten years from 25 March 2015 begins on 26 March 2015 and ends on 25 March 2025. Conversely, a lease with a term of ten years from and including 25 March 2015 begins on 25 March 2015 and ends on 24 March 2025.

There are a couple of situations in which the term commencement date is relevant:

- when a lease is granted to a tenant who is holding over an SDLT lease, backdated to the end date of the previous lease (see 5.5); and

- rent reviews taking place in the final quarter of the fifth year of the term (see **4.8.5**)

Case: *Bradshaw & another v Pawley* [1980] 1 WLR 10

Guidance: SDLTM 14015

4.3.3 Leases for a fixed term and the effect of break clauses

A lease for a fixed term is one whose term can be ascertained at the date of grant (either from the wording of the lease or from an ancillary document such as an agreement for lease or certificate of practical completion).

Where a lease is granted for a fixed term, no account is taken of:

- any contingency as a result of which the lease may determine before the end of the fixed term; or
- any right of either party to determine the lease or renew it.

As a result, break clauses do not shorten the term of a lease, nor do options to renew extend the term of a lease.

Example

A lease is granted to Beatrice for a term of ten years with a contractual term from and including 1 April 2016. The lease is granted on 1 May 2016 and includes a break clause at year five.

The term of the lease will be nine years and 11 months with a term starting on 1 May 2016 (the date of grant) and ending on 31 March 2026 (the contractual end date). The break right at year five is ignored for the purposes of calculating the initial charge to SDLT.

Law: FA 2003, Sch. 17A, para. 2

Guidance: SDLTM 14015-14030

4.3.4 Leases that continue after a fixed term

A lease which continues beyond its fixed term either by agreement of the parties or by operation of law is treated for SDLT purposes as a lease for the fixed term plus one year. If the lease continues beyond the additional year, it will be treated as a lease for the fixed term plus two years and so on.

If any additional tax is due in respect of the extended lease, or if tax is due where none was payable previously, an SDLT return must be

submitted and tax paid 30 days after the period of extension (i.e. one year and 30 days after the expiry of the original lease). Where a new lease is granted within one year of the expiry of the original lease, the new lease is treated as if it were granted on the day following expiry of the original lease (see 5.5 below). In these circumstances no additional notification for the “growing lease” need be made.

Law: FA 2003, Sch. 17A, para. 3

4.3.5 *Leases of an indefinite term*

A lease for an indefinite term is any lease where the term of the lease cannot be ascertained from the wording of the lease or an ancillary document at the date of grant of the lease.

A periodic tenancy (i.e. a tenancy which continues until notice to terminate is given) and a lease for life are both leases of an indefinite term, as the actual end date is not ascertainable at the date of grant.

All leases for an indefinite term are initially treated for SDLT purposes as being for a fixed term of one year. If the lease continues after the end of the first year, it is treated as a lease for a fixed term of two years and so on. This treatment applies regardless of any other statutory provision deeming the lease to have a different term.

Law: FA 2003, Sch. 17A, para. 4

4.3.6 *Successive linked leases*

Where successive leases are granted of the same or substantially the same premises, between the same landlord and tenant, as part of a series of leases, a special rule applies. See 5.10 for the application of the linked transactions rule to leases which are part of a single scheme or arrangement.

The series of linked leases are treated as a single lease, granted at the time of the first lease, for a term equal to the aggregate of the terms of all the leases, in consideration of the rent payable under all of the leases.

Example

A three year lease is granted to Benedict on 1 January 2013 for a rent of £40,000 per annum and includes a right to renew for the same rent on expiry. On 1 January 2016 a new three year lease is granted on the same terms.

The two leases granted to Benedict are likely to be treated as successive linked leases (because the rent under the renewal lease was fixed under the terms of the original lease). If linked, SDLT should have been calculated as if a lease for six years had been granted in consideration of rent of £40,000 per annum on 1 January 2013. An adjustment will be required to the original return submitted, in accordance with the procedure at **13.4.11**.

The renewal of a lease will not be treated as a successive linked lease with the original lease if it can be shown to have been negotiated at arm's length with the earlier lease having expired naturally and the new lease having been granted with no compulsion to renew. This ultimately requires consideration of what was envisaged at the outset. An express option to renew, especially at favourable rent, normally means successive linked leases. Conversely, statutory rights to renew would not equate to compulsion.

Where an agreement for lease is substantially performed and a subsequent lease granted, or where the original lease in a series was granted before 1 December 2003, the successive linked lease rule does not apply. However, the "normal" linked transactions rule must still be considered to determine the correct rate of charge (e.g. if linked, the net present value of the pre-implementation lease should be aggregated with the net present value of the later lease to arrive at a total figure used to determine the correct SDLT rate).

Law: FA 2003, Sch. 17A, para. 5

Guidance: SDLTM 17035

4.4 Rates of charge

4.4.1 How to calculate SDLT on the grant of a new lease

The rates of charge and thresholds shown below apply to the net present value of the rents paid on the grant of a new lease. The charge on the net present value ("NPV") of rents operates on a slice,