3.3 What is residential property?

3.3.1 Introduction

Where a transaction consists entirely of residential property the rates in table A of FA 2003, s. 55 (shown at **3.2.1**) apply.

Transactions within the table A rates of charge also potentially attract the surcharge rates of SDLT (see **3.5, 3.6** and **3.9**).

3.3.2 Residential property defined

An extensive definition of the meaning of residential property is provided in FA 2003, s. 116 (originally introduced for the purposes of the now-abolished disadvantaged areas relief). The definition includes:

- any building that is suitable for use as a dwelling, or is in the process of being constructed or adapted for such use;
- land that is or forms part of the garden or grounds of such a building; and
- any interest in or right over land that subsists for the benefit of a building within either of the above categories.

Specifically, s. 116(2) provides that the following uses of a building count as residential:

- residential accommodation for school pupils;
- residential accommodation for students (except for halls of residence);
- residential accommodation for members of the armed forces; and
- an institution that is the sole or main residence of at least 90% of its residents and does not fall within s. 116(3).

Non-residential property is anything that is not entirely residential property. In particular, the following are specifically treated as non-residential for SDLT purposes:

- halls of residence;
- hospitals;
- prisons;

- hotels;
- homes providing residential accommodation for children; and
- a home or other institution providing residential accommodation with personal care for persons in need by reason of old age, disablement, dependence on drugs or alcohol, or mental disorder.

Law: FA 2003, s. 116
Guidance: SDLTM 00365

3.3.3 Dwelling

Chapter 14 contains a summary of case law relevant to the definition of dwelling, to which cross-reference is recommended.

A key constituent to determining whether a transaction comprises residential property is establishing if a building falls within FA 2003 s. 116(1)(a) as "a building that is used or suitable for use as a dwelling".

"Dwelling" is not defined in s. 116.

Schedule 42A, para. 18 attempts a definition of dwelling for the purposes of the additional rate SDLT and there are similar definitions for the 15% slab rate, multiple dwellings relief and the non-resident surcharge, albeit all of these definitions state in a circular fashion that "a building or part of a building counts as a dwelling if it is used or suitable for use as a single dwelling".

The start point is establishing that the transaction includes a building – this requires a structure with a sufficient degree of permanence. Specific guidance is provided in the SDLT manual (SDLTM 10023) regarding mobile homes, caravans and houseboats. The degree of permanence and annexation to the land is of key importance in determining whether the structure comprises moveable property (a chattel) or a fixture/building within the charge to SDLT.

Section 116(6) specifies that a "building" includes part of a building. Where a single building is sold in separate parts, the legislation and definitions can be applied separately to each part.

The Oxford English Dictionary definition of dwelling is "a house, flat or other place of residence".

Stamp Office guidance states:

> " 'Dwelling' takes its everyday meaning: a building, or a part of a building that affords those who use it the facilities required for day-to-day private domestic existence and a sufficient degree of permanence."

Facilities required for day-to-day private domestic existence are generally considered to require a sleeping area, bathroom and kitchen facilities. Independent access rights with a reasonable degree of privacy, and the ability to secure the area of domestic occupation, are matters of some importance in cases where a dwelling forms only part of a building.

Law: FA 2003, s. 116; Sch. 4A, para. 7; Sch. 6B, para. 7; Sch. 9A, para. 20; Sch. 42A, para. 18

Cases: *Fiander and Brower v HMRC* [2021] UKUT 156 (TCC); *Hyman and Goodfellow v HMRC* [2022] EWCA Civ 185

Guidance: SDLTM 00371-00377, 00425

3.3.4 Suitable for use

In the vast majority of transactions, the use of a building as a dwelling should be obvious.

The legislation requires a test to be applied on the effective date of a transaction. However, the extension of the legislation to consider whether a building is suitable for use as a dwelling allows the past use of a building to be considered. In general, if the last use of a building was as a dwelling then it will be taken to be suitable for use as a dwelling in the absence of evidence to the contrary.

3.3.5 Process of being constructed or adapted for such use

The definition of a residential property extends beyond a building in use or suitable for use as a dwelling to something which "is in the process of being constructed or adapted for such use".

HMRC acknowledge that this is the only category where intended or anticipated use is relevant. At SDLTM 00420, HMRC state:

> "In a situation where the building is in the process of being constructed or adapted, the configuration of the property when the works are completed will determine how many separate 'single dwellings' there are."

The process of construction or adaptation must be physically underway on the effective date of the transaction. This is generally taken to mean that conversion works or construction works must be happening; planning permission in and of itself is not sufficient, but can be a strong indicator of whether a building is residential property when coupled with works being carried out. The absence of a building or structure at all (only bare ground), even where coupled with intent and planning permission, was held to be insufficient by the FTT in *Ladson Preston* (see **14.3.4**).

Properties that are being constructed are considered to meet the test at the point where building works on top of the foundations have begun (i.e. this must be the case on the effective date). It appears to be accepted that as long as there are "bricks above ground" for a transaction involving multiple units then the test of process of construction is satisfied even though construction of each individual dwelling may not have physically commenced.

Law: FA 2003, s. 116(1)
Case: *Ladson Preston Ltd & Anor v HMRC* [2021] UKFTT 251 (TC)
Guidance: SDLTM 00400, 00420

3.3.6 Garden or grounds

Land which forms part of the garden or grounds of a building within s. 116(a) (as set out at **3.3.3 to 3.3.5** above) is specifically included within the definition of residential property. To determine the status of land, it is therefore first necessary to establish whether a building of which the land forms part of the grounds is a dwelling.

If there is no dwelling, no building suitable for use as a dwelling or no structure in the process of being constructed or adapted for use as a dwelling, the associated land is not residential property.

Where land is garden or grounds, it will be residential property even if the land is sold separately from the building. There is no need to examine further the way that land is used once it has been established as garden or grounds.

Stamp Office guidance suggests that historic or habitual use of land is relevant to establish its relationship to the building; future use and the purchaser's intentions are not relevant.

A balanced judgement must be formed considering whether land forms part of the garden or grounds of a building. Relevant factors include:

- Use of the land on the effective date – where land is being exploited on a regular basis for commercial purposes, in particular where a third-party agreement (lease or licence) is in place to provide for such commercial exploitation, it is unlikely to be garden or grounds. In *Brandbros*, entry into a commercial lease of a garage on the effective date of purchase of a terraced property with garage was not sufficient to render the nature of the purchase mixed use.
- Layout of land and outbuildings – this requires consideration of whether the land and any outbuildings are more suitable for domestic enjoyment or for business/ commercial exploitation.
- Geographical factors – the proximity and accessibility of land to a dwelling and the extent or size of land in relation to the building are relevant factors.
- Legal factors and constraints – planning consent or restrictions and private law matters must be taken into account, albeit longstanding use in breach of planning or legal restrictions will be given greater weight to determine whether land is ground or gardens than the theoretical or legal requirements and conditions.

The case of *Myles Till* contains a useful analysis of an approach to defining "garden or grounds". In the first instance the Oxford English Dictionary is quoted:

> "an enclosed portion of land of considerable extent surrounding or attached to a dwelling house or other building serving chiefly for ornament or decoration".

Then in applying the relevant legislation:

> "One must … look at the use or function of the adjoining land to decide if its character answers to the statutory wording in s. 116(1) – in particular, is the land grounds "of" a building whose defining characteristic is its "use" as a dwelling? The emphasised words indicate that the use or function of adjoining land itself must support the use of the building

> concerned as a dwelling. For the commonly owned adjoining land to be "grounds" it must be functionally an appendage to the dwelling, rather than having a self-standing function."

Further case law, in particular the Court of Appeal decision in *Hyman*, has considered the rationale in *Myles Till* and the SDLT manual guidance. In short, actual use that is evidenced by agreement or historical/habitual use for commercial purposes is the most important determinant for establishing that land is *not* grounds or gardens. See **14.2.4** and **14.2.5**.

Specifically, land can still be garden or grounds for SDLT even if of such a size that for CGT purposes it would be said not to be required for the reasonable enjoyment of the dwelling (and therefore not comprising garden or grounds for principal private residence relief).

Law: FA 2003, s. 116(1), (6)
Cases: *Myles Till v HMRC* [2020] UKFTT 127 (TC); *Brandbros v HMRC* [2021] UKFTT 157 (TC); *Hyman and Goodfellow v HMRC* [2022] EWCA Civ 185
Guidance: SDLTM 00400-00480

3.3.7 Six or more rule

Any single transaction involving the acquisition of a major interest in six or more residential properties is deemed a non-residential transaction. The Stamp Office considers that there should be a single contract for all six or more dwelling interests, or at least an overarching contract.

However, this rule is disregarded where a claim for multiple dwellings relief is made (see **10.12**), meaning that a purchaser can choose whether to apply multiple dwellings relief or accept the SDLT charge calculated on non-residential rates.

Law: FA 2003, s. 116(7)
Guidance: SDLTM 00365