IR MODERNISES APPROACH TO TOP-RATE STAMP DUTY COLLECTION

Inland Revenue proposals that would make it more difficult to avoid paying top-rate stamp duty on property transactions could also hinder M&A activity and discriminate against small property companies. But the final rules for what it calls the "modernised stamp duty regime" have yet to be published.

Property transactions worth £500,000 or more are normally subject to stamp duty at the rate of 4%, but the property industry has often used special purpose vehicles (SPVs) as property-owning shells to effect transfers, since share sales only attract stamp duty at a rate of 0.5%.

In April 2002, the Inland Revenue published a consultative document with a view to modernising the stamp duty regime and shutting down the opportunities for avoidance. Draft legislation covering only England and Wales was published in November 2002 (laws for Scotland and Northern Ireland are still being developed), and the consultation period for these more specific proposals has just ended. However, law firm Hammonds says that the draft didn't cover importance issues, such as reliefs and anti-avoidance measures.

More details are expected in the Budget on 9 April. The final legislation is expected to be published this summer as part of the Finance Bill (although additional secondary legislation will be necessary) and is likely to come into effect by the end of this year.

Law firm Trowers & Hamlins says that the higher level of stamp duty is likely to cover the following:

- Companies and partnerships whose assets consist primarily of property (ie, at least 70%)
- The purchase of 30% or more of the shares in an SPV

The firm says that, as the proposals stand at present, there is no distinction made between an SPV and any other property company. The Revenue may try to exclude shares in listed property companies from the scope of the 4% duty, but that would put private property companies at "a serious and unfair disadvantage", the firm says. Alternatively, any exemption granted for property companies over a certain size (so as to exempt genuine property companies as opposed to SPVs) could give unfair advantage to larger corporations.

Trowers & Hamlins explains that without any Revenue action to distinguish between property companies and SPVs, M&A activity "will be harder to undertake".

Three main issues

The government says in its November 2002 draft legislation consultation paper that the purpose of the proposals is three-fold:

1. Fairness The government is concerned about the extent to which "artificial arrangements" are being used to avoid stamp duty on commercial property transactions and that this is unfair to "the compliant majority", particularly small businesses and home buyers.

2. E-business The government wants a regime amenable to electronic conveyancing.

3. Modernisation To create a stamp duty framework that is "in line with more modern taxes" and which looks at the substance of transactions.

The government is proposing a streamlined 'process now, check later' system, taking a risk-based approach for selecting cases for further enquiry as it already does with corporation tax for example (see 'Files and smiles', *Financial Director* March 2003). There will be a fixed enquiry window – a period of time (not yet decided) in which the Revenue will be able to instigate an enquiry without giving any reason. After that period, it will only be able to do so if it discovers new information that leads the Revenue to believe more tax is due. After six years, there must be evidence of fraud or negligence.

Hammonds explains that purchasers will need to keep all supporting documentation for six years or risk a fine of up to £3,000 per property transaction.

The firm also says that the proposed new stamp duty would apply regardless of the residency of the parties to the transaction. The onus will be on the purchaser to notify the Stamp Office of the Inland Revenue within 30 days that an appropriate transaction has taken place. Failure to do so will result in a flat-rate £200 fine; delay of more than a year will result in a penalty up to the value of the tax due.

One anti-avoidance issue the Revenue has identified is transactions which never actually go to completion; hence, are never normally subject to stamp duty but which are left "resting on contract". In such cases, the buyer might enjoy economic benefits; ie "the keys to the door" and the right to occupy, or the vendor receives substantially all of the sales proceeds (perhaps 90%).

SPVs and PFIs

The draft legislation contains a Clause 8 with the title "Transactions relating indirectly to land" but with no further details other than to say the clause is a marker to show where the laws relating to indirect interests in land might appear in the statute. This is identified by Hammonds as the section where SPV legislation would be inserted.

The Revenue has consulted and is now considering how PFI deals might be affected by the proposals. In a PFI arrangement, an NHS Trust might, say, lease land to a service provider in exchange for the construction of a new hospital on that land, with the building then being leased back to the Trust while additional services are provided by the service provider – the consideration being a unitary charge. Whether the services count as part of the consideration for stamp duty purposes will depend on how the deal is structured and whether fair market values are paid in the various components of the contract.

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Useful links

- **The draft legislation and explanatory notes can be found at www.inland revenue.gov.uk/consult_ new/explanatory_notes.pdf and .../clauses_and_ schedules.pdf**
- **Trowers & Hamlins is at www.trowers.com**
- **Hammonds is at www.hammonds.com**