

# *SDLT on leases: beyond the fifth anniversary*



The SDLT regime has been in place for just over five years. Leases granted after 1 December 2003 (and not pursuant to an agreement made on or before 10 July 2003) have been subject to the tax. The fifth anniversary of a lease which came under the regime could bring with it an obligation to re-assess the amount of tax you paid and to submit a further SDLT return.

## **SDLT – the basics**

SDLT on a lease is assessed by reference to any premium paid and the amount of rent payable. The tenant under an SDLT lease must pay the relevant percentage of any premium (up to 4% depending on the amount of the premium) and 1% of the Net Present Value ("NPV") of the rent payable over the term of the lease.

It would be unusual for the annual rent for the whole term to be known on day one, so in order to calculate the NPV a number of assumptions must be made. Where the rent is uncertain (perhaps due to a rent review within the first five years, or because the rent is turnover-based), it must be estimated. The highest rent payable in any twelve month period within the first five years is taken for SDLT purposes to be the annual rent for the rest of the term.

Where the actual rent payable differs from the estimate made on day one, HMRC requires tenants to make a second SDLT return.

## **Rent changing within the first 5 years**

The rent may change because a rent review occurs within the first five years of the lease or because the rent is wholly or partially linked to turnover. If this is the case, a second SDLT return must be made within 30 days of either the end of the fifth year of the lease, or the date on which the total rent payable in the first five years is known with certainty, if sooner.

## **Abnormal increases**

It is more usual for a rent review to occur on the fifth anniversary of the term. Any increase in rent after the fifth anniversary technically escapes the requirement to file a second return. HMRC was concerned that parties may structure rental payments so that the rent is kept low in the first five years (attracting a lower charge to SDLT) and then increased exponentially. HMRC term this an "abnormal increase" and "abnormal" is defined as an increase of more than 20 per cent per year the lease has been in place. Where such an arrangement occurs and the rent is subject to an abnormal increase at any time after the first five years, the increase in rent is treated as if it were the grant of a new lease with rent equal to the increase. Within 30 days of any abnormal rent increase, the tenant will have to file a second SDLT return.

*Revisit the terms of your lease and the original SDLT return to see if any changes would now require you to file another return.*

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## Variation

Where a sufficiently significant variation is made to a lease, for example varying the demise or term, this can give rise to a surrender and re-grant of the lease. The re-granted lease is treated as a separate transaction for SDLT purposes and a further return must be made (again within 30 days of the variation). In this situation, the surrender and re-grant are not treated as consideration for one another for SDLT purposes.

The rent under the re-granted lease will still potentially give rise to an SDLT charge. However, provided the original lease was subject to SDLT, overlap relief will generally be available to reduce the taxable rent on the new lease by the amount of rent brought into account for SDLT purposes on the old one.

Any variation for which the tenant pays consideration (such as a reduction in rent) is treated as the acquisition of a chargeable interest by the tenant, and taxed accordingly.

## Assignees

When a lease is assigned, the assignee becomes responsible for any continuing liabilities for SDLT under the lease. Prior to assignment, the assignor's responses to pre-contract enquiries should have flushed out the necessary information about the amount of SDLT originally paid and the basis on which it was calculated.

## Holding over

If you hold over at the end of a lease that enjoys security of tenure under the Landlord & Tenant Act 1954 but which was originally subject to stamp duty, no SDLT will be payable. If you hold over under an SDLT lease, the "growing lease" rules apply, treating the original lease as if it were a year longer than first thought and requiring a new return on that basis. If the holding over period goes beyond a year, then a further extra year is retrospectively added to the lease term, and so on.

## What should I do now?

It is possible, for example if your rent is linked to turnover, that you may be entitled to a refund plus interest if your original estimate of rent was an over-estimate. On the other hand, if you have more SDLT to pay, you must do this. If you do, you will also be charged interest from the date of grant of the original lease.

It would be advisable to revisit the terms of your lease and SDLT return to see if any changes in the level of rent would now require you to file another return. If you are unsure whether you have further tax to pay, or require assistance in completing a new SDLT return, please contact Julian Bass, Simon Yates or your usual contact at Travers Smith.



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