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SDLT multiple dwellings relief

Speed read

Multiple dwellings relief (MDR) reduces the amount of SDLT payable on the acquisition of two or more dwellings in a single transaction or in a series of linked transactions. Relief is given by calculating SDLT on the average price payable for the dwellings, multiplied by the number of dwellings. Relief may be clawed back if there is an 'event' within three years of the acquisition. Similar rules apply in Scotland and Wales for LBTT and LTT purposes (but no clawback within LTT). HMRC provides guidance on what constitutes a separate dwelling, and it has won all the recent cases on this point in the tax tribunal to date.

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The purpose of MDR

Multiple dwellings relief (MDR) was introduced by FA 2011 with a view to strengthening the demand for residential property and promoting the supply of private rented housing. This is achieved by way of a partial relief that reduces the amount of SDLT payable on the acquisition of two or more dwellings in a single transaction or in a series of linked transactions.

The SDLT legislation (relating to transactions carried out in England and Northern Ireland) is contained in FA 2003 s 58D and Sch 6B. The Scottish and Welsh equivalents of SDLT (land and buildings transaction tax and land transaction tax, respectively) have their own versions of MDR, and these are broadly similar to the SDLT relief. Any references to legislation, HMRC guidance, and case law in this article relate to SDLT, but we have noted most of the differences below.

The relief has proved to be popular and can give rise to significant SDLT savings. That said, it is apparent that relief is being claimed when it may not be available, and there have been a number of recent tribunal decisions that have highlighted the extent to which HMRC is actively enquiring into relief claims and the characteristics that must be present for relief to apply. The HMRC scrutiny has no doubt been driven by the increasing number of speculative refund claims being made after a land transaction return has been submitted.

It should be noted that relief must be claimed on a land transaction return (due within 14 days of the 'effective date') or an amendment of a return (FA 2003 s 58D(2)). A return can only be amended within 12 months after the filing date, so this limits the scope to make a retrospective claim for relief. Although an overpayment relief claim may be made where SDLT has been paid in error up to four years after a land transaction, this would not be available to make a late claim for MDR (see *Secure Service Ltd v HMRC* [2020] UKFTT 59).

When might MDR apply?

Typical examples of transactions where MDR may apply include the acquisition of: (i) a block of flats; (ii) a house and a self-contained annex, e.g. a 'granny flat'; (iii) a portfolio of houses; and (iv) a main house and other dwellings on the grounds (for example, accommodation used by staff).

For MDR to apply, the subject-matter of the transaction must consist of more than one 'dwelling'. A building or part of a building counts as a 'dwelling' for MDR purposes, as per the definition contained at FA 2003 Sch 6B para 7(2), where:

- it is used or suitable for use as a single dwelling, or
- it is in the process of being constructed or adapted for such use.

It also includes (under FA 2003 Sch 6B para 7(3)(4)):

- land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land); and
- land that subsists, or is to subsist, for the benefit of a dwelling.

The property must meet this definition at the 'effective date' of the transaction, which would usually be the date of completion, or it could be earlier if the relevant contract is 'substantially performed'. Substantial performance arises where more than 90% of the purchase price is paid or the purchaser takes possession of the land prior to completion.

Under FA 2003 Sch 6B para 7(5), MDR may also be available in respect of a transaction where: (i) the main subject-matter consists of a building (or a part of a building), that is to be constructed or adapted; and (ii) the construction or adaptation of the building, or the part, has not begun by the time the contract is substantially performed. This allows for relief for 'off-plan' purchases of dwellings that will be constructed under the contract that has been substantially performed.

Subject to a limited exception, the acquisition of a freehold (or head-lease) interest over dwellings cannot qualify for MDR where that interest is subject to a lease granted for an initial term of more than 21 years, because this would not be treated as an interest in the underlying dwellings (see FA 2003 Sch 6B para 2(6)).

There are certain specific instances where MDR is not available. For example, MDR cannot be claimed where SDLT relief would be available under FA 2003 Sch 7 (group relief, reconstruction or acquisition relief), or Sch 8 (charities relief). This ensures that the clawback rules under these reliefs cannot be circumvented. In addition, if a dwelling is subject to the 15% higher rate (acquisition of a dwelling for more than £500k by a 'non-natural person'), such a dwelling cannot be included in a claim for MDR.

How the relief works

The practical effect of MDR can be summarised as follows:

- Normally, where there is an acquisition of more than one dwelling, SDLT should be calculated on the aggregate purchase price for all the dwellings and by reference to the applicable rates.
- Where MDR applies in accordance with the provisions summarised above, SDLT is instead calculated on the average price payable for the dwellings (the total purchase price divided by the number of dwellings). This should factor in the higher rates (each rate is increased by 3% where there is an acquisition of dwellings by a company or 'additional dwellings' by an individual) or the 2% 'surcharge' for acquisitions by non-UK residents, where applicable.
- The amount of SDLT payable on the average price is then multiplied by the number of dwellings to result in an overall amount of tax payable, but the relief cannot reduce the amount of SDLT chargeable below 1% of the consideration attributable to the dwellings (in Scotland, the LBTT cannot be reduced to below 25% of the total amount of tax chargeable in relation to the dwellings in the absence of the relief).
- A saving arises where the average amount falls within the bands for lower SDLT rates when compared with the rates payable on the full price.

See the example (right).

Interaction with other SDLT rules

A claim for MDR can be made even where the acquisition would ordinarily be treated as non-residential for SDLT purposes.

Where more than six separate dwellings are acquired, the transaction would normally be treated as being non-residential (see FA 2003 s 116(7)). However, the purchaser would have the option to either treat the acquisition as being non-residential (where the maximum rate is currently 5%, which would be applied to the aggregate consideration) or to treat it as residential and to claim MDR on a land transaction return, where appropriate, if this would result in a lower amount of SDLT.

Where property is mixed use, the non-residential rates of SDLT should apply, but it is possible to 'carve out' the residential elements with a view to claiming MDR on the consideration attributable to the dwellings. Previously, HMRC took the view that the 3% higher rates surcharge should apply in such cases to the extent that MDR is claimed. However, in November 2020, HMRC changed its guidance in respect of when the 3% higher rates surcharge applies to mixed use property. HMRC's guidance at SDLTM09740 and example 4 at SDLTM29975 now confirm that where there is an acquisition of a mixed-use property and MDR is claimed in respect of the dwellings, the 3% surcharge does not apply as long as the non-residential element is not 'negligible or artificially contrived'. The reason for this change of policy is that, in principle, the surcharge should only apply to transactions that consist *wholly* of dwellings.

One example where this may be beneficial is the purchase of a row of shops with flats above: the SDLT could be calculated by reference to the non-residential rates in respect of the consideration attributed to the shops on a just and reasonable basis, and the residential rates with a claim for MDR in respect of the flats without applying the 3% surcharge. The resulting calculation should then be compared with the default position for mixed use land (the whole purchase price subject to the non-residential rates), and the purchaser can opt for the calculation that produces the lower total SDLT.

Example

A purchaser acquires the freehold interest in five separate dwellings for a total purchase price of £2m, and the usual rates of SDLT apply (rather than the temporary rates introduced as a covid-19 measure). The SDLT position would be as follows:

SDLT without claiming MDR: £213,750, calculated as follows:

Purchase price bands	Percentage rate (%)	SDLT due (£)
Up to 125,000	3	3,750
Above 125,000 and up to 250,000	5	6,250
Above 250,000 and up to 925,000	8	54,000
Above 925,000 and up to 1,500,000	13	74,750
Above 1,500,000+	15	75,000
	Total SDLT due	213,750

SDLT when claiming MDR: £110,000 calculated as follows:

Purchase price bands	Percentage rate (%)	SDLT due (£)
Up to 125,000	3	3,750
Above 125,000 and up to 250,000	5	6,250
Above 250,000 and up to 925,000	8	12,000
Above 925,000 and up to 1,500,000	13	0
Above 1,500,000+	15	0
	SDLT due on average price	22,000

The SDLT is calculated on the average purchase price of £400,000 (£2m/5). The SDLT on the average (£22,000) is then multiplied by the number of dwellings (five) to result in SDLT of £110,000, a saving of £103,750 compared with not claiming relief.

What constitutes a 'dwelling'?

HMRC's view is outlined at SDLTM00372:

> '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 … In most cases, there should be little difficulty in deciding whether or not particular premises are a dwelling. However, in more complex circumstances, it may be necessary to weigh up all the relevant factors to come to a balanced judgement.'

The guidance continues at SDLTM00410:

> 'Dwelling takes its everyday meaning (See SDLTM00370). It must be sufficiently self-contained to be considered a "single dwelling" … evidence will be needed to show that each "dwelling" in question is sufficiently independent to count as a separate dwelling in its own right.'

It is confirmed at SDLTM00415 that in HMRC's view: 'In considering whether or not a property includes one or more dwellings (and if so, how many) a wide range of factors come into consideration', 'no single factor is likely to be determinative by itself', and 'where a number of contrasting indicators exist, it may be necessary to weigh up the factors to come to a balanced judgement.'

HMRC's guidance continues to provide examples of the factors to be taken into account.

There has been a plethora of recent cases in tax tribunal on what constitutes a 'dwelling' for MDR purposes, and it should be noted that HMRC has consistently been successful in these cases to date.

Some key points arising from the decisions are summarised below:

- MDR was not available where an annex and main house were connected by a short, open corridor and there was no door fitting or any physical barrier in the doorway between the annex and the rest of the property, such that there was free access between the annex and the rest of the property. The FTT (as upheld by the UT) held that the annex and main house could only be used individually as dwellings if a very particular kind of relationship were to subsist between the occupants of the two parts. Without such a relationship – which would be the case where the occupant of the annex was a member of the general public – the main house and the annex would not be individually suitable for use as dwellings, due to the insufficiency of privacy and security for occupants of both parts. It was not enough that the position could be remedied by remedial work (e.g. fitting a lockable door) where such a door was not previously present (*Fiander v HMRC* [2021] UKUT 156).
- MDR was not available in respect of a property that was a detached house, to which changes had been made in 1969, including changes to the first floor to facilitate a 'grace and favour flat' (or annex). Even though the main dwelling and the annex had been used by different occupants as two separate dwellings for 50 years, with two separate doorbells and a series of internal lockable doors to ensure that the occupant of either dwelling could enjoy a private domestic existence, the FTT held that they were not suitable for use as separate dwellings, due to the insufficiency of privacy and security for the occupants of both the main house and the annex. In the eyes of an objective observer, the main house and annex would have been regarded as suitable for use as one single dwelling and not as two dwellings because the annex was accessed via a corridor to the main house from which several other rooms could also be accessed (*Doe v HMRC* [2021] UKFTT 17).
- If a granny flat does not have its own kitchen facilities and has insufficient privacy, it will not be a separate dwelling for MDR purposes (*Mobey v HMRC* [2021] UKFTT 122).
- If the facilities in an annex are unsafe and would not be capable of satisfying building regulations, the annex would not be suitable for use as a separate dwelling, and MDR would not be available (*Mullane v HMRC* [2021] UKFTT 119).
- Where an annex is a standalone building located in the garden of the main house but it can only be accessed by a gate or gap either side of the garage, alongside the main house and across the garden of the main house, there would not be a sufficient degree of privacy that would be acceptable to persons who were not known to the occupants of the main house, such that a reasonable person viewing the annex would not regard it as suitable for use as a dwelling. The lack of kitchen facilities was also a factor (*Mason v HMRC* [2021] UKFTT 271).
- It is not enough that part of the property is *capable* of being converted into a dwelling. The date of completion (the 'effective date' of the transaction) is the point in time that the physical attributes of the property are to be determined, and not a later point based upon any potential or proposed changes that could be made to the physical attributes of the property (*Partridge v HMRC* [2021] UKFTT 6).

Although some of the above cases were FTT decisions, which do not set a legal precedent, they are of persuasive value and will be used by HMRC to refuse a MDR claim, where appropriate.

Potential pitfalls

Where relief is available, it may be subject to claw-back if there is an 'event' within three years of the acquisition. There will be an event where the relevant property is converted to non-residential use or the number of dwellings is reduced (for example, where two dwellings are converted into one). The SDLT should be recalculated based on the whole of the consideration given for the subject-matter of the transaction and the number of dwellings that remain following the 'event'. Where further SDLT is due, the purchaser must submit a land transaction return and pay the additional tax within 30 days. There is a similar claw-back provision for LBTT (in Scotland) but not for LTT (in Wales).

HMRC has been very active in this area, and it is actively challenging transactions where it considers that there are not sufficient grounds to make a claim

Where does this leave us?

It is apparent from the HMRC guidance and case law that the residents of each dwelling must be able to live independently of the residents of the rest of the building/another building, and each dwelling must have its own independent access and domestic facilities, including its own front door, kitchen and bathroom. Privacy is another important factor.

When taking a view on whether there are separate dwellings, one should take into account a number of factors, including how the property is described in marketing materials, whether there are any legal restrictions on the separate use of the land, and whether each dwelling has its own council tax assessment and control of its own utilities. HMRC has been very active in this area, and it is actively challenging transactions where it is considers that there are not sufficient grounds to make a claim.

In our practical experience, HMRC will accept a claim for MDR and will pay refunds where sufficient evidence is provided to demonstrate that there are separate dwellings.

A purchaser should not be tempted to submit a claim (either on a land transaction return or by way of an amendment to a return) where the supporting grounds are weak, as can be seen by the tribunal decisions to date. If HMRC successfully challenges the SDLT treatment, the purchaser will be obliged to pay the additional SDLT, plus interest. HMRC also has the power to charge a penalty where there has been an under-declaration and the taxpayer has been 'careless' (such a penalty would likely be 15% to 30% of the underpaid tax, subject to mitigation). Therefore, it is extremely important to obtain as much evidence as possible to support a claim, and to take appropriate advice to demonstrate that the purchaser has taken reasonable care. ■