STAMP DUTY LAND TAX: MIXED-PROPERTY PURCHASES AND MULTIPLE DWELLINGS RELIEF

CONSULTATION RESPONSE

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INTRODUCTION

The British Property Federation (BPF) represents the real estate sector, with members comprising a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

We note the background to the current consultation *Stamp Duty Land Tax: Mixed-Property Purchases and Multiple Dwellings Relief* (the Consultation) and understand why the Government is considering taking action to seek to counter the types of behaviour outlined in the Consultation. However, care is needed to ensure that any resulting legislative changes do not have unintended consequences, particularly in relation to commercial property transactions.

We therefore welcome the recognition by the Government of the need to ensure that changes to the rules relating to mixed-use property and multiple dwellings relief (MDR) are appropriately targeted. Given the high rates of SDLT that can apply to residential property, the mixed-property rules and MDR rules (whether separately or in combination) can play a significant role where a site and/or particular buildings includes residential property. It is imperative that any action taken to combat behaviours of individuals buying (primarily) residential property does not have adverse consequences for genuine commercial activity - and here we note the findings of HM Treasury's recent research on the responsiveness of commercial transactions to SDLT.

We therefore agree with the Government that this Consultation needs to start at Stage 1, and welcome the opportunity to contribute to developing a policy solution in this area.

We set out our responses to the specific questions below. In summary, our main points are:

- if the Government is to go ahead with changes to existing SDLT rules to limit the availability of the mixed-property rules and/or MDR, those changes need to be proportionate and appropriately targeted at the types of behaviours listed in the Consultation;

- the Government should ensure that commercial property transactions involving residential property are not adversely impacted by changes to SDLT brought in to counter the behaviour of certain individual purchasers. As recent HM Treasury research indicates, an increase in SDLT costs as a result of these measures risks dis-incentivising commercial property activity - particularly around mixed-use developments (such as in the build-to-rent sector); and

- the Consultation highlights the complexity within the existing SDLT rules that relate to residential property. That complexity creates uncertainty and adds cost. For this reason, businesses particularly

value the relative simplicity provided by the current mixed-property and MDR rules. We ask the Government to bear this in mind - and to try to avoid adding yet more complexity in this area.

BPF
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QUESTION 1 What do you see as the advantages and disadvantages of apportionment?

As a general matter, we note that apportionment should generally mean that property of a particular type (residential or non-residential) is subject to SDLT as it applies to that type. As a matter of principle (and policy) it is therefore easily understood.

However, we are concerned that the proposed method of apportionment (as set out in Annex A) could lead to business purchasers paying higher rates of SDLT on mixed-use transactions than is currently the case. Commercial transactions are not the target of the proposals set out in the Consultation, and yet the proposals would mean that business purchasers could have additional (and potentially material) SDLT costs on transactions that are not entered into to "game" the rules. We would question whether, by itself, apportionment would be an appropriate policy response to the issues identified in the Consultation given the potential adverse impact on commercial "mixed-property" transactions.

Although we welcome the confirmation that purchases that include six or more dwellings would continue to pay tax at the non-residential property rates on the whole of the purchase, not all commercial "mixed-use" transactions will be able to benefit from the "six or more" rule.

QUESTION 2 What are your views on how the mixed-property rules interact with the other aspects of SDLT?

The SDLT rules relating to residential property are complex (as is evident from the summary contained in Chapter 2), with one transaction potentially subject to several different charges to tax ("normal" SDLT, higher rates for additional dwellings (HRAD), the recent non-UK resident SDLT surcharge and/or the higher 15% "de-enveloping rate").

For commercial property businesses, the current mixed-property rules can provide simplicity and certainty as to SDLT. Treating mixed-property land as non-residential (and so applying commercial rates of SDLT) means that the complexities of the SDLT residential property rules simply do not apply. Further, the application of commercial (non-residential) SDLT rates may reduce what would otherwise potentially be a material "dry" frictional cost for commercial real estate businesses.

We therefore ask that further consideration be given to targeting any changes to the mixed-property rules to tackle the types of behaviour listed in 3.11 of the Consultation - in order that the impact on commercial property activities is limited. Although the Consultation is focused on the proposal to introduce apportionment (with 10 of the 15 questions on the mixed-property rules) we welcome the inclusion of question 13 in the Consultation and encourage the Government to be open to alternative ways of discouraging the types of "questionable claims" (including those not involving apportionment). In this context, see our response to question 11.

QUESTION 3 What issues would arise in particular for mixed-property purchases that included an MDR claim if apportionment was introduced?

We are concerned that, if the apportioned value is the value to be used when working out the average value within MDR, this would result a distortion of the true economics of the transaction and result in a higher SDLT charge for a transaction that is out-with the mischief that is discussed in the Consultation.

We are also concerned as to the suggestion that the changes will mean that HRAD will apply in circumstances in which it does not apply currently (we note here a reference to the government "expecting" HRAD to apply in section 3.17 of the Consultation, but without any commentary on why (or in what circumstances) the current position (as reflected in SDLTM09740) should change). The application of HRAD to purchases of properties in the build-to-rent sector could add material cost where, currently, HRAD will often not apply because there is a non-residential element (such as a local convenience store, restaurant or retail space) included within newly constructed blocks of flats which results in the purchase being mixed-use and eligible for MDR. We therefore ask that further consideration (and consultation) is given to the interaction of any proposed changes with HRAD where a purchase of mixed-use property involves an MDR Claim, particularly in the context of commercial activity (again noting the findings of HM Treasury's recent research on the responsiveness of commercial transactions to SDLT).

QUESTION 4 What impact would apportionment have on both individual and business purchasers of mixed-property?

We make no comment on the impact for individual purchasers of mixed-property.

For commercial property businesses, the introduction of apportionment with a view to taxing residential and non-residential elements separately (and potentially leading to a charge to HRAD on property currently outside its scope) could, in principle, have a significant impact.

First, SDLT costs will increase (particularly if HRAD becomes chargeable on transactions not currently within scope). We note here the recent research report published by HM Treasury ("Responsiveness of commercial transactions to Stamp Duty Land Tax", published 23 November 2021) suggested that, with a 1% increase in the effective tax rate led to a 11.7% change in commercial transactions, "commercial transactions are more responsive than previously thought and more responsive than residential transactions".

Given that the transactions that are the target of these proposals are predominately acquisitions by individuals of properties they intend to live in, and not commercial property transactions, we question whether increasing the SDLT a business purchaser pays on mixed-use property is proportionate (see also our response to question 2).

We acknowledge that the impact of apportionment on the amount of SDLT payable will of course be dependent on both the absolute and relative values of the residential element within the overall property. However, even where the residential element represents only a small proportion of the land being purchased (and so the financial impact of a higher SDLT charge on that element should not have a material impact overall), apportionment means that the business will have to engage with the complexities of residential SDLT, increasing its compliance burden (and potentially adding to its professional advice costs).

The reference to "in principle" above is because, in some cases, the "six or more" rule could apply (as referenced in section 3.18 of the Consultation) so non-residential rates would remain chargeable. However this would not always be the case - and in any event could result in a higher charge to SDLT than would be the case if an MDR claim could be made (for example, on an acquisition of a multi-flat built-to-rent property by an institutional investor where, as a result of target tenants being on moderate incomes, use of an "average" value means regard would be had to the residential bands - particularly at the lower levels - in working out SDLT due).

The Impact Assessment says that: "Any change is expected to have a negligible impact on businesses acquiring property and would impact those businesses which provide specialist tax advice to purchasers. One-off costs would include familiarisation with any changes, and could include upskilling, training staff and updating software to reflect any changes to the SDLT payable. There are not expected to be any continuing costs". We

agree that one-off costs would include the listed items, but do not agree that there would not be continuing costs. Further, for some business transactions, the impact of any additional SDLT may not be "negligible".

QUESTION 5 What impact would apportionment have on business transactions?

See response to question 4.

QUESTION 6 What impact would apportionment have on others involved in the purchase, such as tax practitioners, conveyancers and valuers?

It is likely that professional advice on SDLT would be needed in situations where currently no advice is needed as the SDLT position is clear. In all cases, the calculation of SDLT is likely to be more complex.

In addition, where the purchaser is borrowing to fund the acquisition, there may be additional costs because of the need to demonstrate to the lender that the correct amount of SDLT is being paid.

In relation to valuers, see response to question 7.

QUESTION 7 What would the impacts be on purchasers of having to value both the residential and non-residential elements of a purchase?

Most commercial property transactions will involve the prospective purchaser obtaining a Red Book valuation and as a result we would not generally expect the need to value residential and non-residential elements to have a material impact. However, to the extent that the SDLT rules/HMRC practice requires specific information to be provided above normal commercial practice or (with reference to our response to question 8) a second valuation on or about completion, there could be additional costs.

Valuation can involve an element of subjective judgement. If, as part of an enquiry, HMRC challenged the valuation used by a purchaser, there would be additional costs in negotiating with the Valuation Office (and those additional costs would not only include professional costs but also management time). This would not be relevant under existing rules.

Where the nature of the properties is essentially commercial (with any residential element supporting that commercial usage - e.g., pubs where living accommodation for the landlord is provided), we would question the necessity of apportioning - and whether a different approach could apply.

QUESTION 8 At what stage in a purchase could a purchaser expect to determine the relative values of the residential and non-residential elements of the property? For example, research, survey, consultation with a selling agent, or exchange.

In commercial transactions, valuation reports would generally be obtained in advance of exchange as they form the basis on which an offer is made.

The valuations would therefore be "as at" a date in advance of the effective date of the relevant land transaction. The commercial and residential property markets are different markets - and so an increase in residential values does not translate to an equivalent (or indeed any) increase in the other, such that the proportion each represents of the purchase price could vary between original valuation and effective date.

This raises the question as to whether HMRC would accept an apportionment based on values as at the date of the report (and not require "refreshing" as at the effective date) - this is an important consideration given that SDLT now has to be paid (and the land transaction filed) within 14 days of the effective date. Any update by a valuer would mean additional costs solely to comply with this SDLT provision particularly as in many cases, the parties would generally agree a single purchase price for the entirety of the property and not the constituent parts.

QUESTION 9 Do you agree that apportionment would discourage abuse and give more equitable outcomes in calculating SDLT?

We agree that this should be the outcome in relation to individuals purchasing property that is, in part, for their own use.

In relation to commercial property transactions, for the reasons set out above, we do not necessarily agree that the outcome would be "more equitable" given, in particular, that such transactions are not the target of these proposals.

QUESTION 10 Looking at the information in Annex A, do you have an alternative method of calculation for apportionment that would be effective in discouraging incorrect claims that the purchase of residential property is actually of mixed-property?

Annex A suggests that the apportionment method would mean that SDLT chargeable on the residential element should be calculated on the assumption that "that the whole consideration is for residential property" (Step 2).

Given the operation of the SDLT bands, we consider that this has the potential to give rise to inequitable results for commercial transactions, particularly where the residential element is only a small proportion of the land being acquired. A higher rate of SDLT than the residential property (on a standalone basis) merits would apply, with HRAD (if applicable) adding a further 3%.

Step 4 appears to provide an element of mitigation - but this is very limited. The illustrative example is very different to the purchase of a site that is being acquired for commercial development but has one or more dwellings on it. For example, assume overall consideration is £10m and there are two dwellings comprised in the site, one (A) valued at £120,000 and one (B) at £270,000. The effective rate of SDLT (at residential rates) payable on the (aggregate) consideration of £390,000 could be very different to that computed by reference to a £10m consideration (and HRAD would exacerbate the position).

We therefore consider that any apportionment should only require SDLT to be computed by reference to the actual consideration/value of the particular element (and not by reference to the whole): each should be treated as a separate transaction for SDLT purposes. Residential properties should not be pushed into higher rate bands by virtue only of their being mixed in a purchase with some commercial property. Similarly, each element should have access to the nil rate band applicable to that type of property. In our view, whilst SDLT differentiates between residential and commercial property, this approach more fully reflects the policy objective of "un-mixing" mixed-property by ensuring that SDLT applies by reference to each element of the mixed-use land. (We note that if HMRC considers that a purchaser is wrongly claiming that a part of what is being purchased is not non-residential, it can always enquire into the SDLT return - unlike the current position the residential element would be charged at residential rates.)

We consider this principle (of taxing the two types of property as if the subject-matter of separate transactions) should apply regardless of whether a threshold is adopted: in our view, the decision to "un-mix" a mixed-property transaction means that the SDLT rules should then respect the separation of the transaction into its component parts.

QUESTION 11 What would be the impact of allowing mixed-property treatment only for transactions that reach a particular threshold of non-residential property? What should such a threshold be and why?

We welcome the Government's suggestion of providing for a threshold (an effective gateway to mixed-property treatment) as an alternative.

The Consultation references a perceived risk that including a threshold "might not eliminate the misuse of the mixed-property rules as it would still incentivise purchasers and SDLT reclaim agents to claim that more than the required proportion of the purchase was non-residential" (section 3.23). Noting that any threshold will carry a risk of "planning" to be one side rather than the other (and here, SDLT is rife with thresholds), we suggest that, rather than view this risk as meaning "no gateway", the Government should instead combine a threshold with apportionment: this would mean that apportionment is only required where the threshold is not met. It may be that the Government can identify other ways of mitigating this perceived risk taking account of the information it has about individual taxpayer behaviour under the current system.

We consider the suggested threshold of 50% is too high. Although such a threshold should ensure that commercial property with ancillary residential property (for example, hotels with some apartments) should continue to access non-residential SDLT rates, there are other commercial transactions that could be excluded (noting that such are again out-with the mischief the Consultation says the Government is looking to tackle). We would ask that a lower threshold apply - taking account of mixed-use commercial property activity (e.g., build-to-rent and related retail/hospitality/leisure). The data that HMRC holds on claims (such as the examples given in the Consultation) should, we assume, allow HMRC to model the impact of particular levels of threshold to identify an appropriate minimum percentage of non-residential property that would exclude would anticipate the types of "questionable" mixed property claims referenced in the Consultation, whilst also preserving the current position for commercial transactions.

This type of combined approach should, in our view, mean the proposals are better targeted at those types of transaction set out in section 3.11 of the Consultation. By enabling many commercial property transactions to retain the current SDLT treatment, it would ensure that the proposals are, and are seen to be, more proportionate that the current "one-rule" for all approach suggests.

There may also be other mitigants of the risk the Government perceives if a threshold were to be adopted. These could include, for example a minimum value for the non-residential element (in addition to the threshold) or a "business use" test (similar to that suggested in relation to MDR). In addition, would a requirement as to the nature of the residential element be appropriate (given that the examples listed in section 3.11 of the Consultation suggest that these cases tend to arise where an individual acquiring a home in which they intend to occupy)?

QUESTION 12 What do you see as the advantages and disadvantages of allowing mixed-property treatment only where a minimum proportion of the consideration is in respect of non-residential land?

See response to question 11.

QUESTION 13 Do you have alternative proposals to the ones set out in this consultation which would be effective in discouraging incorrect claims that the purchase of residential property is actually of mixed-property?

In parallel to considering changes to the legislation, we would recommend that HMRC consider whether research and/or a taxpayer education and communications campaign could be used: this could inform taxpayers of the existence of the "reclaim agents" (and the likelihood of a successful challenge by HMRC) and any research into motivation to enter into these types of SDLT "planning" may assist in designing a proportionate policy response and/or any education campaign.

QUESTION 14 How do the rules for mixed-property feature in commercial decision making?

For property businesses, decisions to acquire property are influenced by their strategy and the expectation of making a suitable return (whether profit on sale for a trader or through rental income for a property investor).

SDLT is in this context a cost to the business, that would be taken into account when assessing the likely/projected return (and therefore viability) of a project. An increase in costs may render a proposed transaction uneconomic. It would be helpful to understand the basis on which the Government considers, as per its Impact Assessment, that any change would only have "a negligible impact on businesses acquiring property" and how, in making that assessment, it has had regard to the findings of the recent research report on the responsiveness of commercial transactions to SDLT (which we note, as set out in that report, is intended to provide the starting point for policy costings of new measures affecting commercial SDLT).

Alternatively the business may look to offload that cost to maintain its anticipated return: it might look to pay a slightly lower price for the property upfront (so that, overall, its acquisition costs remains close to where they would be at non-residential rates) or may simply look to recoup when it sells/rents out the property (though whether either option is possible will depend in practice on the then market conditions). We note that the Impact Assessment recognises that the cost may be passed on to the end-buyer (commenting that it does not consider the impact to be "significant"). It would similarly be helpful if the Government could provide more information as to the basis for this view.

In any event, the business needs certainty upfront as to the SDLT that will be payable in order to model its cashflows and returns, and assess the viability, of a project: with certainty enhanced by simplicity.

SDLT is just one element of tax and other costs a business takes into account when considering the viability of a project. Businesses that are "residential developers" within RPDT may also now need to model any additional 'corporation tax' due under RPDT on future profits. Therefore, in considering how to structure these proposals, and in particular the inclusion of any threshold or other exclusions, we ask that the Government consider the cumulative effect of the differing tax measures that impact commercial real estate activity, and not just look at SDLT in isolation.

QUESTION 15 What would be the impact of changes to the mixed-property rules for businesses that typically make purchases of both residential and non-residential land, for instance corner shops, bed and breakfasts, pubs? Please consider both change in the form of apportionment and a threshold.

See responses above generally.

In particular, for those businesses that currently look to mixed-property relief, the proposed changes would result in additional SDLT costs (which, assuming, HRAD is applicable, could be material), professional fees (in terms of advice) and compliance costs generally. A threshold or gateway should reduce the impact of the changes, but would not necessarily be available to all business property transactions. Further, there is a risk that the changes could disproportionately affect smaller property businesses who may not be able to access the "six or more" rule.

Smaller property businesses would be expected to buy smaller sites (with one or two properties - including the "shop with flat above" type property referenced in the Consultation) - we would anticipate are likely to be particularly impacted by these proposals.

QUESTIONS 16 - 18

What are respondents' views on the introduction of an intention test?

What are respondents' views on the application of the proposed three-year post transaction period?

What impacts would Option 1 have on businesses?

In general, an "all properties purchased for business use" test should mean that commercial property transactions continue to be able to access MDR.

However, we nevertheless consider that this option should not be taken forward. We consider an "all or nothing" test based on intention (that as a result needs to be accompanied by a clawback period), would add complexity to a relief that would apply to individual purchasers of property as well as businesses.

In addition there is a risk that some commercial developments would be excluded from MDR because of, say, caretaker accommodation being included in the property (and provided free of charge) even though the other flats are sold/let out and so the building is predominantly for commercial purposes. This could be a concern in particular for build-to-rent developments - so, for example, if one property out of a scheme of 100 failed a business use test, in our view, MDR should still be available for the other 99 units.

Further, it could mean that property that is genuinely acquired for business purposes (i.e., to let out) is charged to a higher amount of SDLT than now. New residential developments (particularly of flats) can often have one individual purchasing a number of properties in the same block: one to occupy and the others to let out. Under this proposal, additional SDLT would be paid by the buyer as a result of changes made to tackle the types of "unreasonable claim" that HMRC reference in section 5.3 of the Consultation - but in circumstances where the buyer's claim (for MDR for the flats to be let out) is not itself "unreasonable". This could deter some investors from acquiring properties given the additional cost for acquiring property to let out in a development that the investor also intends to reside in, affecting demand.

QUESTIONS 19 - 21

Do you foresee any issues with the proposed method of calculating the relief [as proposed in relation to Option 2]?

Are there any other types of property-related businesses purchasing residential property (and which support the aims of MDR) which should qualify for relief under Options 1 or 2?

What would be the impact of Options 1 and 2 on the structuring of commercial transactions involving the purchase of dwellings?

We consider that, if a "business use" condition were to be introduced to MDR, Option 2 is to be preferred to Option 1. In our view, Option 2 would allow MDR to continue to apply to commercial transactions whilst also protecting the Exchequer from the use of MDR in the types of circumstances set out in section 5.3 of the Consultation.

We query whether, if MDR is to be limited, the same 3 year clawback period should apply - although we note for business transactions, including the acquisition of flats to let out as per the example above (purchaser buying multiple properties in a single development), in practice the clawback would not generally be expected to be relevant.

In terms of administrative requirements, where clawback is relevant, a purchaser has 30 days to submit a return (a change of use differs from an initial purchase where the preparation and filing of a return in 14 days is more manageable given the involvement of advisers on the purchase itself). We also note in this context that the application of clawback under this option where say 5 properties are bought, and one changes use 2 years later, would involve re-calculating the SDLT on all properties (and so the calculation would not be a simple re-adjustment on 1 property only) and this needs to be factored into any reporting requirements. (Although the Consultation does not include a clawback example, the need to re-calculate for all properties is evident from the examples).

We agree that the business activities that "qualify" should be developing/redeveloping for sale and a property investment benefit - and recommend that the definitions of these types of "business use" mirror those used elsewhere in relation to SDLT (and ATED) for consistency and simplicity.

QUESTION 22 Does Option 3 introduce any other impacts on businesses?

As a general matter, our preference is for Option 2 over Option 3: Option 2 would provide relative simplicity on commercial property transactions and avoid the need to consider relative values of particular properties. Further the approach reflected in Option 3 would be a significant change to the calculation of SDLT for multi-dwelling purchases and that could itself lead to uncertainty until businesses become more familiar with this type of condition.

It is also possible that the adoption of a "subsidiary dwelling" rule could prevent MDR from applying to some transactions: for example, on a purchase of a number of flats in the same apartment block, it may be that no individual flat exceeds a third of the price attributable to the property as a whole - and so more SDLT would be payable than now. Again, this could deter some investors from acquiring properties to let out.

However we can see merit in Option 3 in the context of addressing the types of claim summarised in section 5.3 of the Consultation (although we note, that as it introduces a threshold, there would be the potential for purchasers to argue that relief is available based on valuation evidence - potentially leading to disputes).

Therefore we consider that the Government should consider an "either/or" approach of Option 2 and Option 3. Although this may add to complexity, this would ensure that commercial transactions can obtain MDR - and the subsidiary dwelling test would apply to non-business transactions and so allow MDR to apply where the facts support that claim (i.e., the "multiple" dwellings are separate dwellings in their own right).

QUESTION 23 What do you see as the advantages and disadvantages of each of the options set out above?

See responses to questions on the Options 1 to 3.

On Option 4, we note that it has the benefit of apparent simplicity but consider that increasing the minimum number of properties that count as multiple could disproportionately disadvantage smaller developers of housing. Further, as the Consultation itself highlights, there is a risk that it would not address the Government's concerns as to the misuse of MDR.

QUESTION 24 Are there any other solutions to the problem described above not covered by the options in this consultation and which would, in your view, tackle the problem more effectively and efficiently?

See response to question 13 (taxpayer education and communications strategy).

QUESTION 25 Would options 1, 2 and 4 have any material negative impact on the purchase of property which contains, for example, an annex which is intended to provide accommodation to an aged or vulnerable person, typically a relative? If so, would option 3, either alone or in combination with the other options, present a solution to this negative impact?

No comment.

QUESTION 26 How does MDR feature in commercial decision making?

See response to question 14 above: similar considerations apply. We note that, in practice, MDR is generally more relevant to commercial property transactions that the mixed-property rules (for example, if a business is acquiring a pub portfolio, MDR may be used in relation to the above-pub live in accommodation).

We also note that the interaction of MDR, HRAD and the "six or more rule" is complex, creating costs for purchasers (professional advice). We therefore ask that in considering any changes, the Government bears in mind the complexity already built into SDLT on residential property and seeks, as far as possible, to avoid adding yet more complexity with any of the changes now being contemplated. A rationalisation of all the different rules to create a single coherent charging structure would be welcome, rather than adding another Schedule(s) to Finance Act 2003 for a particular type of purchase/purchaser.

QUESTION 27 To what extent does the availability of MDR impact purchasing decisions where the six or more rule applies?

In many situations, particularly where the subject matter of the transaction is (lower value) dwellings, the availability of MDR (both by itself, but also when it can be claimed in conjunction with mixed-property treatment) can be significant, especially where there are large numbers of units which are the subject of a transaction. This follows on from the basis on which the charge to SDLT is calculated under each rule (noting here the impact for institutional investors acquiring build to rent properties targeted at those on moderate incomes).

QUESTION 28 To what extent does MDR currently impact on the supply of housing for both rental and purchase?

See responses to earlier questions.