It is common knowledge that a Stamp Duty Land Tax (SDLT) return must be filed by a tenant within 30 days of the "effective date" of a land transaction. This is usually the date of completion of the lease. However, in certain circumstances, the effective date can arise earlier such as where a tenant moves into the premises to carry out fit out works or develop the land.

Once you are in occupation under a lease and your SDLT return has been filed and any SDLT paid, it is easy to think that your obligations with regard to SDLT have been complied with.

However, this is not always the case. The requirement to file a future SDLT return and pay additional tax will potentially arise where the rent due under the lease is uncertain or is subject to review within the first five years of the term.

**Calculating SDLT on uncertain rent (including turnover rent)**

The SDLT payable on the rent passing under a lease is calculated by reference to the net present value (NPV) of such rent over the term of the lease. The NPV is generally calculated according to the highest annual rent payable in the first five years of the term. This is simple to determine where the rent in the lease is fixed.

Yet, in some situations the rent for the first five years will not be certain at the effective date.

This may be because:

- the rent (or an element of it or a royalty payment treated as rent) is based on the turnover of the tenant's business (which is common in a number of business sectors such as retail, pubs, renewable energy and aggregates); and/or

- the lease provides for a rent review in the first five years of the term. Although rent review adjustments based solely on RPI (but not RPI plus a percentage) can be ignored for these purposes.

**Reasonable estimate of uncertain rent (including turnover rent)**

In both cases, the tenant will need to make a reasonable estimate of the rent payable in those first five years. This will need to be revisited once the actual rent payable becomes known.

The SDLT initially payable by the tenant will be calculated by reference to this reasonable estimate and will be included in the SDLT return.

As SDLT is a self-assessed tax with the tenant declaring in the SDLT return submitted to HMRC that the information is correct and complete, it is important for the tenant to be able to justify how the estimate has been determined (ideally retaining evidence in case of any HMRC enquiry).

**Reviewing the rent paid and recalculating the SDLT liability**

Where the SDLT has been calculated by reference to a reasonable estimate of the rent, the tenant is obligated to review this estimate against the rent that they have actually paid or which becomes certain. The estimate must be reviewed on the earlier of:

- the end of the fifth year of the term of the lease (or on the expiry of the lease if sooner); or
• the date when the rent payable in the first five years can be ascertained, for example on the agreement or determination of a rent review within the first five years.

HMRC acknowledges that, for turnover leases, it is unlikely that the rent will be known at the five year review date (or, if earlier, the end of the term), as there is likely to be a delay between that date and the date the turnover amount can be finalised. In such circumstances, HMRC requires a further return at the review date and another return when the rent is finally known.

If the actual amount of rent payable exceeds the estimate then a revised return should be made to HMRC by the tenant (by way of letter to the Birmingham Stamp Office) within 30 days of the review date together with any additional tax due. A SDLT form is not required unless this is the first time the lease has been notified to HMRC.

It may seem onerous for the tenant to undertake such a review, but tenants can benefit. If the estimate was higher than the actual rent paid, the tenant will be entitled to make a claim (by way of letter to HMRC) for a refund of the overpaid tax.

Interest on additional SDLT

Interest is payable on any additional tax due to HMRC and this is calculated from the filing date of the lease ie 30 days after the effective date of the lease. Interest on overpaid tax due to the tenant is calculated from the date it was originally paid. The revised tax should be calculated as at the effective date of the original lease, regardless of any change to:

• tax rates and thresholds since the original effective date;
• the term of the lease; and
• the VAT treatment.

Interest charged on the underpayment of SDLT acts as an incentive to the tenant to submit realistic estimates of the likely rents when they calculate the upfront SDLT cost.

Furthermore, some tenants may want to choose to overestimate to ensure that no further tax will become payable (and that no interest will be incurred). Conversely, where a low estimate can be justified, tenants may wish to benefit from the cash flow advantage of paying a small amount of SDLT upfront and delaying any future tax cost until such time as the actual rent needs to be reviewed (but with an increased amount of interest).

Failure to notify when the rent becomes known

If the tenant inadvertently fails to notify and/or pay additional SDLT when due then interest will continue to run. The tenant will also be liable for penalties.

The late delivery of a SDLT return incurs a flat-rate penalty of £100 if the return is delivered within three months of when it should have been delivered or £200 if delivered after three months.

In addition, if a return is more than 12 months late, there is a tax-related penalty of up to the amount of the tax due.

If the tenant becomes aware that a return is required to be filed with HMRC and that additional SDLT is due to HMRC and deliberately does not to pay such tax, then the tenant will be evading its tax liability. This could potentially incur criminal liability.

Assignments of leases with turnover rents

If a turnover lease is assigned before the time when the rent becomes certain, the obligation to make further returns and pay additional tax falls on the assignee.

Thus, an incoming tenant on a lease assignment should:

• determine whether any future SDLT will be payable (possibly seeking an indemnity for such risk from the assignor);
ensure that they either obtain (at the time of the assignment) or at least have the right to obtain the information submitted to HMRC by the assignor in respect of the grant of the lease; and

understand the basis on which the NPV (and thus the SDLT) was calculated.

**Will anyone find out if the rent payments are not reviewed?**

SDLT is a self-assessed tax so the onus is on the tenant to determine its liability to tax, pay any tax due in a timely manner and file correct and complete tax returns. A tenant cannot ignore its compliance obligations regarding to SDLT. To do so would be negligent at best, and fraudulent at worst.

In addition, it is common for any buyer of a property portfolio or property company to undertake an element of real estate tax due diligence (such as relating to VAT, SDLT, capital allowances etc). It is usual for SDLT non-compliance issues to be flagged as part of that process.

In particular, the Commercial Property Standard Enquiries (CPSEs) commonly raised by buyers in respect of property transfers include specific enquiries regarding the SDLT implications of lease assignments such as:

23.2 **Is there a potential or outstanding obligation to make an additional land transaction return to HMRC as a result of any of the following occurring during the first five years from the date of grant of the lease:**

(a) the settlement or determination of any rent reviews or any other provision for varying the rent; or

(b) the settlement or determination of any contingent, uncertain or unascertained rents and variable rents.

Best practice dictates that the tenant under a turnover lease should diarise the fifth anniversary of its lease (or such earlier date as may be relevant), undertake a review of the rent actually paid compared against the estimated rent on which SDLT was paid and notify HMRC accordingly together with paying any additional tax.

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