

When is the *effective date* of a transaction and what does *substantial performance* mean?

Where there is a contract for a land transaction which is to be completed by conveyance, the effective date of the transaction is the date of completion. The purchaser is not regarded as entering into a land transaction simply because they have entered into a contract.

If, however, the purchaser, or any person connected to the purchaser:

- a) takes possession of the whole, or substantially the whole, of the subject matter of the contract or
- b) the purchaser pays or provides a substantial amount of the consideration, or the first payment of rent is paid or received the contract becomes substantially performed and the effective date of the transaction is brought forward to the date of substantial performance.

c) Finance Act 2003, section 44.

The principle behind these provision is that, once either party has received in substance and economic reality the benefit of what they bargained for, the SDLT liability becomes payable.

How is the contract substantially performed?

The legislation has been drafted widely. It is immaterial whether the purchaser takes possession under the contract or under a lease or licence of a temporary nature and there is no requirement that the purchaser has exclusive possession. This does therefore cause complications as the provisions do not address the differences between occupation and possession. The point here is that HMRC take the view that possession means occupation; the purchaser simply holds the keys to the door. The most obvious example of taking possession, in HMRC's view, would be where the purchaser occupies the whole of the property to undertake repairs or redecoration before completion. HMRC also take the view that a substantial amount of the consideration means 90% or more but there is no statutory reference on this percentage; there may be circumstances where a reasoned argument would mean substantial performance has not taken

place. Paying or receiving rent in relation to the subject matter will take precedence over any amount of the consideration being paid or actual possession occurring. The contract will therefore be substantially performed for investment properties if none of the consideration is paid, the purchaser has not occupied the property, but the first payment of rent has been received.

What compliance is involved?

A SDLT 1 will need to be submitted within 30 days of substantial performance and a further SDLT 1 will need to be submitted within 30 days of the subsequent completion date. The way the second SDLT 1 will be viewed by HMRC will depend on whether the transaction is freehold or leasehold although generally there is no further SDLT to pay on the completion. The position on completion does however depend on whether there have been any changes between the two SDLT return dates which results in a higher amount of SDLT needing to be paid. This could also impact leases where the rent review period falls outside the 5-year calculation period at the date of substantial performance but will need to be included in the NPV calculation at the completion date. If either SDLT 1 is filed late, interest and tax geared penalties could apply and even in circumstances where there is no additional SDLT due, a flat rate penalty of up to £200 will be levied.

How can we help you get it right?

Whether a contract is substantially performed is not as straight forward as it sounds. Uncertainties can arise on what is meant by substantially the whole of the subject matter being purchased and the amount of consideration being paid especially in the consideration includes rent. It can also create issues with pre-completion transactions and may invalidate that claim. There are also complications when a conditional contract is substantially performed but then not completed by conveyance because the conditions are not satisfied. There is however a refund mechanism available for these types of circumstance.

If you need help or advice on any of these circumstances please get in touch.