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Dear Sir/Madam

**SDLT: non-UK resident surcharge consultation – response**

We are writing in response to the above consultation. Forsters is a law firm, specialising in advising clients from the private wealth, property and corporate sectors in all areas of work, including the acquisition and disposal of high-value residential property in the UK. We act for both UK and international clients. Our clients include trustees, companies and high and ultra-high net worth individuals, and their families.

We have set out our response to the consultation within the framework of the questions asked, and answered them where we are able to do so. However, we have not confined our comments to the specific questions asked.

**INTRODUCTORY POINTS**

We question the principle of the proposed non-resident SDLT surcharge, including what the Government hopes to achieve by its introduction, given the likely disadvantages. We also question the over-complex and yet simultaneously simplistic approach to its implementation. However, we will deal with the latter issue in our responses to the individual questions.

In the current economic climate, and with Brexit looming, does the Government really wish to deter non-UK residents investing in UK residential property in a market that is already stalling? While the rate of additional SDLT has been set at the seemingly reasonable rate of 1%, it is less likely to be the actual sums involved that deter investors as the impression of insularity and discrimination created by its introduction. At a time when the Government is outwardly assuring the world of its commitment to its position as a major global player and to encouraging inward investment, this surcharge appears petty and small-minded. It also sends a message of capriciousness to people in other countries who have previously viewed our political and legal systems as among the safest, stable, fairest and most reliable in the world and as a safe haven for both people and property. Continual changes to the taxation of real property over the last seven years has resulted in instability for both investors and

advisors and has put an undue pressure on conveyancers who do not necessarily have access to bespoke tax advice; thus increasing the risks of inadvertent non-compliance and professional negligence.

At the same time, it seems unlikely to achieve the purported aim of making housing more cost-effective for UK residents of low or average wealth. Furthermore, many developers who are committed to building affordable homes (including non-residents) buy speculative sites part way through a development and would be at risk of triggering this charge which will have an impact on their pricing models and potentially the number of affordable homes that they will build.

Foreigners are an easy target in the UK, and there is little political disadvantage onshore, in targeting them, financially or otherwise.

We note that there is no proposed date for implementation in the consultation, and we assume that is, at least partly, because the proposed charge is a clear breach of the principle of freedom of movement of persons, services and capital between EU countries.

Potentially, it is also an infringement of Article 14 of the European Convention on Human Rights on the prohibition of discrimination. This provides that the enjoyment of the rights and freedoms in the Convention (including that to the protection of property) shall be secured without discrimination on any ground including, among others, national or social origin, property, birth or other status, which was incorporated into UK law in the Human Rights Act 1998.

**QUESTION 1 – Do you have any views on the proposed SDLT residence test for non-UK resident individuals?**

**and**

**QUESTION 2 – Would you prefer to see a different residence test applied? If so, what test and why?**

With regard to the specific proposal for the residence test for non-UK resident individuals and questions 1 and 2 above, we appreciate that you are trying to make the test simple and easy to understand for clients and non-tax lawyers to understand, and for this reason are trying to avoid using the statutory residence test (SRT).

However, you will appreciate that this will mean that individuals who would be treated as UK resident for general tax purposes may be treated as non-UK resident for this purpose, and vice verso leading to confusion and potentially inadvertent non-compliance in respect of both SDLT and other taxes.

Some individuals who purchase UK residential property may already have to engage a tax specialist to assist them regarding the income, capital and other tax consequences of UK property ownership. They may already be using the SRT to calculate their tax status each year for other tax purposes. As such, they will have to seek further advice when testing their tax status under the proposed 183-day test for the purposes of the SDLT surcharge only. Inevitably, this will lead to confusion.

One option to deal with the concern over the complexity of the SRT where access to tax advice is not available would be to apply a de minimis cut off for the application of the surcharge. If the new surcharge applied only to properties of a value over £2 million, for example, it would be reasonable to expect a buyer to take advice on his or her residence status, or that the lawyer dealing with the conveyancing of such a property would advise his or her client of the need to do so.

Alternatively, if a de minimis test is not considered acceptable, and on the basis that some individuals may actually prefer to use the straightforward 183- day test, perhaps an option to elect for one test or the other could be offered? The option to elect between different methods of calculation is available in other areas of tax, eg. non-resident CGT, and it would seem to be fairer to tax payers to offer them the choice.

**QUESTION 3 - How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident individuals in England and Northern Ireland?**

We do not have sufficient knowledge of this area to comment – *does anyone have any views they would like us to share?*

**QUESTION 4 – Do you agree that a rate of 1% for the surcharge is set at the right level to balance between the government's objectives on home ownership and the UK remaining an open and dynamic economy?**

As discussed in our introductory paragraphs, it is our view that introducing such a charge at any level sends the wrong message to potential investors around the world. Assuming the charge is introduced despite this, anything higher than 1% would be rather unreasonable, given the already high rates of SDLT at the top level – it is worth bearing in mind that the maximum rate of SDLT on residential property in 2014 was 7%, and it is now 15% (albeit on a sliding scale). Adding a further 1% to reach 16% means that SDLT on residential property is now nearly at the same rate as standard rated VAT on commercial property – but of course, the latter is often a recoverable cost.

However, our concern, and the one that we hear expressed most often, is that 1% is simply a starter rate and that, like ATED rates and SDLT rates over the last few years, this rate will not remain at 1% for long. In order to allay the concerns of professionals and prospective investors, it would be helpful for the government to provide a commitment that the rate will not be raised in the future.

**QUESTION 5 – Do you have any views on the proposed company residence test for the surcharge?**

**and**

**QUESTION 6 – Would you prefer to see a different residence test applied? If so, what test and why?**

The proposed test for company residence seems sensible to us and there is no alternative test that we would prefer. As the consultation indicates at paragraph 3.7, the proposed rules are already familiar to and well understood by those who run companies and their professional advisers.

**QUESTION 7 – Do you have any views on non-UK resident individuals using UK resident companies to purchase residential properties?**

We can understand why the government is concerned that individual might choose to use a UK company to avoid the surcharge. However, given the government's purported aim of keeping the rules of the surcharge as simple as possible, it is worth noting that the introduction of the proposal for the additional test for close companies will increase its complexity. Perhaps an alternative would be to delay the introduction of this additional test, and to monitor subsequent levels of use of UK companies to purchase residential properties. In this way, it would be possible to establish whether the introduction of the additional test is justified, and whether there is a de minimis value below which the additional complexity outweighs any increased tax receipts.

On a separate issue, but one relating to SDLT on companies, the consultation emphasises the government's desire to avoid over-complexity. However, with the introduction of standard residential SDLT rates up to a maximum of 12%, the 3% higher rate charge for additional dwellings (HRAD) and now this proposed additional 1% rate for non-residents, the higher rate SDLT charge for properties over £500,000 acquired by non-natural persons (NNP) is a further complicating factor. Perhaps more importantly, it is no longer the deterrent it was originally intended to be.

The 15% charge was introduced because of a belief that non-residents were acquiring properties through corporate envelopes to avoid SDLT. Other changes in legislation, including ATED and non-resident CGT, have removed any tax advantages available to non-residents acquiring UK residential property though corporate envelopes and other NNPs. Accordingly, the SDLT regime should now be rationalised by applying the same rates of tax to all types of purchaser. Much in the same way as the recent rationalisation of the 2015NRCGT and ATEDCGT regimes has resulted in the abolition of ATEDCGT.

**QUESTION 8 – Do you have any views on the suitability of using the close company test as the basis for determining whether a company is under the control of non-UK resident persons?**

Given the additional complexity that will be introduced, it is vital that the test to be used is one that is already familiar to people running companies and to their advisors, in order to maintain a level of consistency

**QUESTION 9 – Do you have any views on applying the attribution of rights rules at section 451 CTA 2010 between persons of differing residence status?**

Our view on this issue is that any attribution of rights between persons of differing residence status should lead to an attribution of a proportion of the surcharge to non-resident participators only and calculated on the basis of their interest in the close company. As an example, if there are five participators with equal interests in a close company that acquires a property for £1 million, and two of the five participators are non-UK resident, the non-UK resident participators should each be liable to a one-fifth share of the £10,000 surcharge, ie. £2,000 each. The UK resident participators should not be liable to any part of the surcharge.

**QUESTION 10 – Do you have any views on potential problems that might arise when using the definition of control at section 450 CTA 2010?**

Section 450 and 451 CTA 2010 are complex tests that are not designed to be "snapshots". Further we have had the benefit of of reading the draft Stamp Taxes Practitioners Group (STPG) response to this consultation and we agree that the application of these rules could give rise to surprising and potentially unfair outcomes. For example as STPG note, " in the case of a close UK incorporated company owned by 4 brothers in equal shares, one of whom is resident abroad. It is possible under the rules in section 450 and 451 CTA 2010, to attribute the UK resident bothers' shares to the non-resident brother and to thereby treat the company as "controlled" by the non-resident brother. This would give rise to an unfair result, if, in fact the majority of the shareholders and directors are UK resident."

**QUESTION 11 – Do you have any views on whether any of the exemptions at s442 to s447 CTA 2010 should remain in place or be removed for the purposes of the surcharge?**

We consider that all the exemptions should remain in place. There is no obvious reason to remove any of them, and consistency in treatment between this surcharge and other taxes is vital to avoid increasing the complexity of the rules to which non-residents are subject.

**QUESTION 12 – Would you prefer to see a different test applied? If so, what test and why?**

No, the use of different tests should be avoided. Consistency and familiarity is vital. However, as noted above the additional rules for UK close companies with non-resident directors and shareholders should not be implemented.

**QUESTION 13 – Do you have any comments on the proposed treatment of partnerships as joint purchasers?**

The existing proposals for partnerships (as with other joint purchasers) are unfair and may lead to business distortion. The look-through test for partners that applies under other taxing regimes should be maintained. In the same way that we suggest at our response to question 9 for participators in close companies, if a partnership with one non-UK resident partner and one UK resident partner acquires a property for e.g. £1 million, the £10,000 surcharge should be paid on a proportionate basis, i.e. the non-UK resident partner should pay the share applicable to his interest (£5,000 or 50% of the surcharge) and the UK resident partner should not be liable to any part of the surcharge.

Otherwise, if the new rules provide that if there are one or more non-UK resident partners in a partnership, the entire surcharge is payable, this is likely to give rise to distortions where UK residents will avoid establishing partnerships with non-UK residents. We do not think that encouraging such behaviour is the aim of the proposed surcharge – we certainly hope that it is not.

**QUESTION 14 – Do you think there should be a different test applied for purchases by partnerships? If so, what test and why?**

Subject to our general view that the proposed surcharge should not be introduced in any form, we have suggested an alternative at question 13.

**QUESTION 15 – Do you have any views on the proposed SDLT treatment where the acquisition is made by a trust?**

The look-through treatment of bare trusts, and other trusts where there is a beneficiary with a lifetime right to occupy or to income seems sensible, subject to the same issue that we raise in question 13 with regard to partnerships and the need for a proportionate liability to the surcharge.

On the same basis as for partnerships, if there is more than one beneficiary and they differ in their residence status, the surcharge should be applied proportionately according to their respective interests in the property being acquired. Only the proportion of the surcharge applicable to non-resident beneficiaries should be payable.

Clearly, the issue of business distortion does not apply in this situation. However, it is manifestly unfair that the trust interest/income of a UK resident beneficiary should be effectively reduced by a liability to a surcharge that arises only because another beneficiary is resident outside the UK, a circumstance which is probably completely outside his or her control.

**QUESTION 16 – Do you agree that the Statutory Residence Test for individual trustees will work for SDLT if references to tax year are replaced by references to the 12-month period ending with the date of the transaction? If not, why not? What alternatives would you propose?**

Provided that the SRT rules are applied unchanged other than with regard to the relevant period (the 12-month period up to a transaction rather than a tax year), it should be quite possible to apply the SRT rules to determine the residence status of individual trustees for the purposes of the surcharge.

However, we question the logic of utilising this test for individual trustees and refusing to do so for all other individuals. If the SRT can be adapted to apply a different time period, and we agree that this should be possible, that is as true for individual and joint purchasers, and for trust beneficiaries as it is for individual trustees. For the purposes of consistency and fairness, the SRT should be available to all individuals whose residence status is to be tested for the purposes of the surcharge.

**QUESTION 17 – How will the proposed surcharge on residential properties affect purchase decisions of non-UK resident non-natural persons (companies, trusts and partnerships) in England and Northern Ireland?**

*As referred to above developers will see this as a an additional cost when buying partially constructed sites and an exemption from the definition of dwellings for site purchase that have not yet reached "golden brick" so that they may still with confidence rely upon commercial SDLT rates would be welcomed.*

**QUESTION 18 – Do you have any comments about the proposed reliefs from the surcharge?**

We question the restriction of reliefs for temporarily non-resident individuals to Crown employees. In our view, anyone who is living temporarily overseas, whether employed by the government or otherwise, should be entitled to the same relief. Alternatively, the period in which a refund may be claimed should be extended (discussed in our response to questions 20 and 21).

**QUESTION 19 – Are there any other categories of individual which you think the Government should consider providing a relief for and, if so, why?**

Anyone who is seconded to work abroad by a UK employer and who has been resident in the UK for a period of say 2 years before the property purchase and intends to become so tax resident when the secondment comes to an end should also be exempted from this surcharge. Or potentially be able to claim back the additional tax once they become UK tax resident.

**QUESTION 20 – Do you have any views on the proposed refunds available for those who have paid the surcharge?**

**and**

**QUESTION 21 – Do you have any views on the criteria the government is suggesting determining whether a purchaser would be eligible for a refund?**

While we welcome the availability of a refund for those who become UK resident in the 12 months following the date of an acquisition, it is our view that this should be based on the SRT (or it should be possible to elect for this test to apply as we suggested in our response to questions 1 and 2).

In addition, we consider that it would be fairer and more consistent with other taxes, if the period in which someone may receive a refund were to be extended. If an individual becomes resident abroad temporarily, under existing rules he or she can be taxed to income tax and/or CGT in respect of income accruing or gains realised during their period of absence if they cease to be non-resident within five years of their departure. For the sake of consistency and fairness, the same period should apply to those who are temporarily non-resident for the purposes of the surcharge. If an individual acquires a property during a period in which they are resident outside the UK, they should be entitled to a refund of that surcharge if they return to live in the UK within five years of their departure.

**QUESTION 22 – Do you have any views about how the reliefs will apply in relation to the surcharge?**

Our only comment on this section of the consultation relates to its application to collective enfranchisement. It is completely inappropriate that tenants in a block of flats should be treated as joint purchasers for the purposes of the residence rules, so that if one of the tenants is non-resident, the surcharge will apply to the entire transaction. Tenants have no control over the residence status of other tenants in their block, and should not be penalised for circumstances outside their control.

We have already discussed this issue in the context of partnerships, joint purchasers and the beneficiaries of trusts. If possible, the introduction of such a rule in the context of collective enfranchisement is even more egregious because tenants of a block of flats are likely to be total strangers, without even a business or familial relationship between themselves and possibly no knowledge of, let alone control over another tenant's residence status.

It is not impossible to imagine a situation in which tenants in a block of flats who were considering enfranchisement and became aware of the situation, might endeavour to discourage a non-resident individual from purchasing a flat in their block, or even encourage an existing tenant to sell in order to avoid paying the surcharge.

**QUESTION 23 – Do you have any views on the proposed treatment where there is an interaction between existing SDLT rules and the surcharge?**

In relation to this section and the interaction between other SDLT rules and the surcharge, again our view is that joint purchasers should only be liable to the surcharge on a proportionate basis in respect of their own residence status. This should apply equally to married couples and civil partners where one is UK resident and the other is not.

With regard to sole purchases of property by the UK resident spouse or partner of a non-UK resident individual, it is quite correct that the surcharge should not apply. We consider that this concept of separate taxation of spouses and civil partners should be revisited in the context of the higher rate for additional dwellings (HRAD).

We agree with the proposed approach to the application of NRSDLT in the context of spouses and civil partners, and so the approach to linked transactions seems heavy handed. Spouses and civil partners are connected with each other and yet it is not proposed that the residence status of one should taint the property acquisition of the other (quite correctly) where the Wife who is UK tax resident buys a property and her non-resident husband is not involved in the purchase.. Whereas if the Husband who is non-resident having moved to Frankfurt buys an investment property from the developer in London and his wife whose stayed in the UK buys an investment property in the same development from the developer with a 10% reduction because of her Husband's purchase then both purchases would be subject to NRSDLT. Both purchases whilst linked to one another under the SDLT rules are fundamentally still individual acquisitions of separate properties, and the residence status of one individual purchaser should not taint that of another.

**QUESTION 24 – Do you have any views on the proposed approach for administration and compliance for the surcharge above?**

It is our view that the test for establishing the residence status of an individual for the purposes of a refund should be the SRT or, alternatively, it should be possible for an individual to elect whether they wish to base their residence on the SRT or the proposed 183-day test.

We would also comment that if the government introduce the surcharge rules as proposed, so that the residence status of one individual taints an entire transaction, in relation to transactions involving partnerships, joint purchasers, certain trusts, collective enfranchisements and linked transactions, the administration of refunds may be significantly more complex for purchasers and their advisers than would otherwise be the case.

This is because it will not be clear if a refund is due until a significant period (up to 12 months) from the date of the relevant transaction. Unless the surcharge is paid in full by the non-resident individual in respect of any joint purchase etc, a potentially punitive result in relation to any joint acquisition, there will be a question as to how to ensure that the refund is distributed between all parties originally subject to it. This will require conveyancing solicitors and other advisers to ensure that provisions for any refund are provided for in the transaction documents and that they are able to contact any paying party 12 months or further into the future. While this may be possible, it adds another layer of complexity to transactions in relation to a surcharge that the government states it is aiming to keep simple. This is another reason for changing the rules to apply the surcharge on a proportionate basis.

**QUESTION 25 – Are there any other changes to the administration and compliance provisions in SDLT that the government should consider changing for the purposes of the surcharge?**

No immediate points.[

**CONCLUSION**

As we indicated in our introduction above, it is our view that the proposed surcharge is flawed as a concept and from an international political and investment perspective.

However, if the government decides to introduce the surcharge, the current proposals as they relate to any acquisition of UK residential property other than a sole purchase by persons have the potential to create significant unfairness where one or more of the persons involved are non-resident at the time of the transaction. In certain situations, this may lead to distortions of business practice. We would emphasise our view that if a non-resident surcharge is introduced, it should be imposed on a proportionate basis.

Furthermore, we are also greatly concerned by the undue complexity of the SDLT regime as a whole and the lack of consistency and strongly recommend:

1) The abolition of the flat rate NNP 15% regime as it is no longer fit for purpose;
2) NRSDLT would have a substantial threshold of, say, £2m to prevent undue compliance burdens for conveyancers;
3) Like HRAD and NNP it is made clear that NRSDLT doesn't apply to rental income;
4) Like HRAD an exemption for student accommodation;
5) A golden brick style exemption for developers.

We look forward to reading the outcome of this consultation in due course. We would be keen to be involved in any working groups or other forums established to consider the proposed surcharge arising from this or any future consultation.

**Yours faithfully**

**FORSTERS LLP**