Solicitor Guide

bellhowleyperrotton

The Five Mistakes Solicitors Make When Completing Their Clients' SDLT Return

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Why should you read this guide?

- You are a Managing Partner, Head of Department, Head of Compliance, Solicitor, Conveyancer, Legal Executive, Paralegal or Trainee responsible for a conveyancing workload, whether residential or commercial
- You regularly complete a clients SDLT 1 , even if you then send it to them to 'approve'
- You are concerned that completing the client's SDLT 1 on their behalf could constitute Tax Advice
- Your PI cover does not cover you to provide tax advice
- You are not qualified to provide tax advice

What will I learn?

- The five things you need to consider before completing the next SDLT 1 for a client
- Why you and your clients will benefit from the client receiving separate tax advice
- Why you shouldn't be trying to educate yourself in the complex vagaries of the SDLT legislation
- Why you should consider referring your clients to us at Bell Howley Perrotton to provide the tax advice

Mistake 1 - Inadvertently Giving the Advice

The SRA have published detailed guidance on the definition of 'tax adviser' under the Money Laundering, Terrorist Financing and Transfer of Funds (in- formation on the Payer) Regulations 2017 which is very broad.

There is a useful distinction between providing information and advice which hinges on whether the information is tailored to the 'tax-relevant circumstances of the client'. By providing a specifically drafted SDLT to the clients' own purchase, tax advice will be deemed to have been given. In addition to tax advice, the regulations also consider, 'assistance' and 'material aid'. Assistance is non-advisory services such as drawing up documents, and material aid includes making payments on your clients' behalf to HMRC. The SRA's view is that either individually or all of these component parts, constitute advising on SDLT. However, the SRA stops short of advising on whether law firms are in scope of the regulations and leave it to your own determination.

The impact on you and your practice goes to the question of your PI cover and whether you are deemed to be qualified to give this advice and whether you have also been authorised to give this advice.

The Regulations clearly state that if you are providing tax adviser services, you must notify the SRA using form FA10, FA10b or freelancer forms. All beneficial owners, officers and managers must be approved by the SRA if they are not already. If they have not been approved by the SRA or some other authorised supervisor there will be a breach of the regulations and such a breach is deemed to be a criminal offence.

You may choose to protect against the risk of when the rules apply by following your AML-compliant onboarding procedures and if you decide not to treat all work as being in scope, then you need to take steps to manage the boundary between non-regulated and regulated work, encapsulated within your policies and procedures.

For small to medium sized law practice this can prove uncomfortable territory as has been demonstrated in the flush of SRA fines for AML failings, the majority of which are historical. Importantly these historical breaches were not deliberate, the firms involved apologised unreservedly, co-operated fully, and there was no evidence of loss, damage or the firms involved represented a client involved in money laundering.

This is why we strongly advocate collaboration between ourselves and other law firms and their clients that we advise, so as to ensure absolute best practice is shared among the community.

When we provide the tax advice, there is a clear demarcation regarding who is providing the advice. You can undertake your due diligence on us to satisfy the SRA Handbook and this then means that you can rest assured that you are complying with your regulatory requirements as set out above.

https://www.sra.org.uk/solicitors/resources/money-laundering/tax-adviser-guidance

Mistake 2 - Giving Advice When You are Unqualified and Uninsured to do so

Because Solicitors may not see that they are giving tax advice by completing the SDLT 1, they fail to see the risk of any future claim should there have been an error in the contents of the document.

The reason for this is that the filing of the SDLT 1 is another step in an already complicated and time-consuming process which is so price sensitive that financial reward and recognition of the risk that has been undertaken seldom go hand in hand.

Saunders v Edwards 1987 2ALLER 651 is clear that liability extends to the client's professional advisers involved in the preparation of the documents.

Solicitors tend not to hold themselves out as Chartered Tax Advisers unless they have such a qualification and yet they rarely engage with external third parties during the course of a property transfer, which can sometimes have dire consequences.

Some Solicitors are prepared to spend much time and effort calculating what they believe to be the correct SDLT payable on a transaction, even though it is highly likely that their terms of engagement will quite clearly state that they are not insured or qualified to provide tax advice and that should the client need such advice then they should seek it independently.
But to simply rely on a disclaimer buried in the terms and conditions is unlikely to 'save' a firm from SRA scrutiny. Indeed, if clients are asked to confirm on whose advice the SDLT was completed they are very likely to state that it was the solicitor dealing, upon whom they have relied very heavily.

We recently acted for a firm of solicitors who having submitted the SDLT 1 on behalf of the client, became unsure about their own calculation and instructed us to provide them with formal advice to confirm the correct stamp duty that should have been payable.

It related to a matter where the solicitor had attempted to calculate the SDLT due in relation to a complicated staircasing matter. The transaction itself was not of an exceptionally high value, but the impact of getting the sum due wrong was, particularly as an error on an SDLT 1 must be corrected within 12 months.

The fee earner dealing had a much worse time explaining to the client why the SDLT 1 was being called into question than if they had simply explained to the client how complex the calculation can be and asked a qualified tax adviser to do it in the first place.
Why give yourself unnecessary stress and sleepless nights drafting a SDLT for a complex transaction, when we are qualified and insured to provide this advice and have the expertise to deal with even the most unusual transactions.

Matters we cover need not only be a vanilla purchase. Where clients ae staircasing and simultaneously completing on a sale, where shares are being distributed following an estate distribution, an offshore company is purchasing an uninhabitable property, a company is undergoing restructuring or a landlord is incorporating a property portfolio, we will quickly, accurately and efficiently provide the calculation that is required. Which means you are left to get on with your area of expertise and providing a highly skilled service to the clients.

Mistake 3 - Downloading free information and Relying on this to Provide Your Client with Tax Advice

Checking online simply reinforces the view that you are providing the advice. How are you verifying that you are getting the calculation right? Any calculation on the Government website is only as good as the information you are inputting. If you are unaware of the possibility about claiming a relief then the calculation will not be tailored to your clients' needs, but a generic calculation.

The Government website clearly states that upon completion of a conveyancing transaction "you must send a paper return if you're not represented by a solicitor, agent or legal conveyancer. Otherwise you can file your returns online." This sets the expectation amongst clients that their Solicitor will be completing the SDLT 1 on their behalf. They do not appreciate the nuances of compliance and regulatory bodies which means that irrespective of your letter of engagement, the client's expectation is that you are providing the advice.

Most solicitors are familiar with clients that have been informed by a google search and believe that within a few clicks the years of education, training and experience can be circumvented. By applying this same logic to providing SDLT advice you are adopting the same strategy except for a heavily regulated legal practice which is a high-risk strategy.

We have recently advised a client where their solicitor had initially calculated their SDLT based upon the transfer of six properties. Originally in the husband's sole name, the small portfolio of properties included a title that was being split and six new leases granted, with lending obtained for each new flat.

In contrast to Capital Gains Tax (CGT) and Inheritance Tax (IHT) there is no exemption for transactions between husband and wife or between civil partners. Gifts between spouses or civil partners are exempt on general principles for SDLT purposes, but this is not the case with gifts subject to a mortgage or other debt.

OTHER CONSIDERATIONS

In addition, attention must be paid to the 5% higher rate surcharge as with our clients the husband and wife had an interest in more than one property.

But don't forget, there are also different rates applicable to non-residential and mixed land.

In our scenario, the Solicitor had calculated the SDLT incorrectly. When we reviewed the history and the facts, we re-calculated the SDLT owing and were able to ensure that the SDLT 1 was correctly filed.

The worst thing you can do is spend time and effort calculating a client's SDLT that is either wrong or you are unable to verify, as the consequences for you and your firm will be significant if the client brings a claim.
We are on hand to provide tax advice to your clients and support for you and your clients which includes free training sessions to help you and your colleagues identify when the tax advice needs to be outsourced to a specialist.

Mistake 4 - Relying on Disclaimers

Relying on the disclaimer in your terms, that neither you or your firm provide tax advice, as sufficient evidence that the SDLT has been primarily calculated and the drafting approved by your clients, we believe is a high-risk strategy.

Over the years that we have been in the industry it has become very apparent that the regulated solicitor is becoming ever more constricted by a Regulator where the balance of power has become so skewed that leading counsel, Greg Treverton Jones are raising more concerns in articles in the Law Society Gazette.

Do not fall foul of the SRA regulations as set out above. If you are CQS accredited or seeking to become CQS accredited there are a number of SDLT requirements.

With the Law Society's ambition to "drive continuous improvement in best practice, client service and practice management" compliance is a must.

Nearly three years ago, The Law Society introduced changes to the 'Core Practice Management Standards', and whether or not you are CQS accredited, giving 'tax advice' has always been a red flag for law practices. Follow the link below and particularly 'Section 5: Risk Management' which under 5.15 states that Practices MUST have a policy in place in relation to SDLT. Such a policy MUST deal with 'First Time Buyer' and 'Major Interest in a Dwelling.'

As the Compliance Office (COLP) sitting at the heart of the practice's compliance, regulatory and governance arrangements, the responsibilities placed upon the individual in this position are many and varied.

The SRA have made statements confirming that the COLP or COFA is not getting thrown under a bus where there is lack of firm-wide compliance, but nonetheless regulatory action will be taken where they are deemed to have failed to meet their responsibilities. The Sword of Damocles hovering above your head is not blunted by The Law Society who reiterate that their position 'is NOT to give legal advice' and their suggestions on practice standards will not "provide a defence to complaints of misconduct".

We have a letter from the Practice Advice Service regarding the giving of tax advice matters on SDLT which refers you to the SRA regulations, but as with all the SRA regulations, the obligation is on you to navigate the rules and decide what is the best course of action. We believe that to do this collaboratively with other professionals gives you the best opportunity for protection.

The time is right to encourage collaboration in the industry across all departments in Firms, to ensure that through building relationships and sharing information we create a network of support to look out for and after members of the profession when it comes to the very thorny issue of when does the failure to give tax advice, become advice in itself.

https://www.lawsociety.org.uk/en/topics/firm-accreditations/conveyancing-quality-scheme/changes-to-cqs

We provide a review service for firms and their practice managers to take advantage of, which looks specifically at SDLT policies, disclaimers and terms and conditions.

Mistake 5 - Failing to Identify Reliefs and Calculating the Incorrect SDLT

Did you know that there are over 15 marginal SDLT rates and account needs to be taken of whether there is a first-time buyer, a second property purchase, a purchase by a company, a non-residential property, non-residents for tax purposes and what if any relief applies.

Clients purchase properties and buildings in all areas of the country and in all states of repair and disrepair. There are additional considerations which carry with them specific expert knowledge in how the SDLT will be calculated, such as:

- Staircasing and subsales
- Mixed use and commercial properties
- The grant of long leases to provide car parking

Parcels of land

- Derelict and uninhabitable properties
- Additional properties
- Properties bought by a company either on shore or offshore

Non-UK Resident Purchasers

For example, commercial rates for SDLT applies to a purchase of at least six dwellings in a single transaction or linked transactions. The availability of commercial rates results in the application of lower SDLT rates to the transaction and may represent a substantial saving.

Uninhabitable properties are measured by a very high bar when it comes to properties that qualify.Rats, asbestos and no connection to services will not mean a clients purchase automatically qualifies.

Where a client's purchase completes prior to the sale of their existing family home then it is appropriate to advise the client that the surcharge will be payable but that a claim for a refund must also be made as soon as their old main residence is sold. It is imperative that time limits for these claims are strictly adhered to, otherwise the window will close and the claim will be lost.

Despite the loss of MDR on 1st June 2024, there remains unscrupulous and unqualified claims companies in the market, willing to convince your client of an entitlement to a refund.

It is often easy to be blinkered by the obvious. Where a client was looking at buying a block of flats for redevelopment, they had initially been advised that this was a linked transaction.

Upon discussion with the client and once the survey and particulars were provided to us, it was clear that the properties were uninhabitable and therefore not suitable to be classed as dwellings.

As such the wrong residential SDLT had been applied to the original calculation; if they are not suitable to be used as dwellings then they had to be classed under the commercial rates. In addition, there was the surcharge to consider as the property was being purchased in the company name.

With a number of threads like this and the possibility of a number of reliefs or surcharges applied, it is essential to be clear about what reliefs "can" and "do" apply.

This last point is crucial. We had a client recently who disagreed with our tax assessment of the position. It was important to note that we must be careful not to skew the facts to fit the legislation and that we will calculate the tax due on the facts presented to us and upon our research.

The onus of proof is on the client NOT HMRC. In this instance we reviewed photographic evidence, the Land Registry and the Census to establish when an occupant had been registered at the property to ensure there was sufficient evidence to warrant a claim that the property had been empty for 20 years and was therefore derelict and uninhabitable. A dilapidated property does not necessarily mean it is precluded as a dwelling under the legislation.

By directing your client to an independent tax adviser you can ensure that the transaction and all component parts are considered carefully by an expert who will then calculate the correct SDLT for the transaction. We will provide detailed analysis so that it is clear why a relief can or cannot be claimed.

How Can You Avoid Making These Mistakes?

Firstly, let’s start a conversation...

We are keen to work with you and not in competition with you. By building trust we are seeking to have a long-term professional relationship with you, and we are aware that trust has to be built and not assumed. We would like to get to know you and you to get to know us.

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How do you satisfy the compliance criteria in relation to giving SDLT advice?

Outsourcing your risk in relation to tax advice for complex SDLT matters is an avenue worth exploring. It is your decision what you consider to be complex, but if any kind of relief is claimed or an additional rate charged, this is the point at which it gets complex, and your client gets “tax advice”.

As a firm, we specialise in providing complex tax advice and Simon Howley is a member of the Stamp Taxes Practitioners Group, is the sole author of the SDLT section of the RICS website and both Amanda and Simon write regularly for numerous tax publications we are in the unique position of being able to understand the position of Solicitors and providing the tax advice that is needed for your clients. Our advice will be covered by our insurance and will ensure that in terms of SDLT and your client you are providing the Client the best possible service standard.

Have you thought about the impact of the following on the SDLT calculation?

- Amicable separation rather than a formal separation order or divorce
- SDLT due on the granting of Leases and the overlap provisions.
- Residential properties with grazing land, stables, outbuildings, rights of way.
- Developers acquiring land via options
- Developers undertaking building works and so providing consideration in kind.
- Linked transactions via connected parties, same purchaser, and vendor, and transactions that are months apart which can trigger an SDLT return for an earlier transaction.
- 5% surcharge for individuals and corporates.
- 17% surcharge for corporates, subject to reliefs and exemptions
- Annual Tax on Enveloped Dwellings, and de-enveloping.
- Purchases via any type of trusts.
- Purchases by companies, general partnerships, and limited liability partnerships.
- SDLT issues with changes in property partnership profit ratios.
- Corporate structures and SDLT group relief.
- Chargeable consideration in debt, between spouses, and MDR relief.
- Unmarried couples with own property, buying first main residence.
- 2% non-residents surcharge.
- Uninhabitable properties.
- Properties bought from executors.
- Properties bought by chain-breaking property companies.
- Incorporations of property portfolios and s75A anti-avoidance.
- Group reconstruction reliefs for ad valorem stamp duty
- Non-UK residential purchasers

How Can Bell Howley Perrotton Help?

We engage directly with the client, so you are able to confirm on your PI application that tax advice is outsourced and for your CQS compliance, that your SDLT policy is clear and managed.

We are here to apply the right reliefs in the right circumstances, to ensure the calculation is accurate first time around, thereby protecting you and your insurance.

It is important to choose someone you can work well with and has the experience and knowledge to understand both the legal nature of the transaction and the manner in which the tax will be applied. At Bell Howley Perrotton LLP we can do both.

We will provide a fixed fee quote prior to instruction.

For general advice on SDLT matters our minimum charge is £350.00 plus VAT, with an average fee of around £475.00 plus VAT. Complex cases will be separately quoted for.

We will turn around the advice within 3 working days, quicker where necessary.

We will ONLY advise on the SDLT point, unless also instructed to deal with a CGT element. We are not regulated to undertake any reserved work including conveyancing transactions, we ARE regulated and insured to give Tax Advice.

We want to work with you and provide additional specialist support to enhance the service you are able to offer your clients and help you to stay compliant.

In addition, to yourselves, we as tax advisers are of course within the scope of the SRA regulations. Proceeds of crime and money laundering are rightly taken very seriously by government departments and regulators alike and it is therefore essential that compliance is a high priority to mitigate the perceived risks.

WHAT'S NEXT?

Now you have downloaded this guide you will feel better informed about the risks and therefore the benefits of getting in touch with us.

If you fancy a chat and a coffee please contact Amanda either by email amanda@bhptax.law or phone 07795 930659.

Who we are

Amanda Perrotton - Partner

Amanda is a solicitor with almost 30 years' experience, a full member of STEP (TEP) and a member of the Stamp Taxes Practitioners Group. She regularly advises clients and professional advisers where tax, property, trusts, family wealth and professional risk intersect, and is known for making difficult technical issues practical and understandable.

Simon Howley - Managing Partner and Chartered Tax Adviser

Simon is a Chartered Tax Adviser specialising in property and private-client tax matters.

His work includes SDLT, LTT and LBTT, company and partnership structures, incorporations, reliefs, exemptions and HMRC enquiries. His approach is direct, forensic and focused on giving clients and professional advisers a route they can use.