

## STEP AGM

### Paper on Stamp Duty Legislation in 2007

FA 07 contained a number of stamp duty provisions, two of which are reviewed in this paper, i.e. an amendment to the conditions attaching to first time purchaser relief, the introduction of wide-ranging anti-avoidance legislation geared towards preventing developers acquiring, developing and selling on land without a stamp duty cost.

The "developers" anti-avoidance provision is dormant pending the introduction of a Ministerial Order, which to date has not been introduced.

FA (No2) 07 converted the existing first time purchaser relief to an exemption.

#### 1.0 First Time Purchaser Relief (S. 92B SDCA 99)

Initially first time purchaser relief was a reduction in stamp duty rates available to taxpayers who were acquiring their first residence. Between 02 December 2004 and 31 March 2007, a first time purchaser was liable to a lower rate of stamp duty, and a purchase price of €317,500 or less did not incur a charge to stamp duty at all. After the 2007 election campaign the government introduced FA (No. 2) 07 which provides an exemption from stamp duty for first time purchasers of residential property.

Revenue state in their guide to first time purchaser relief that a Floor Area Compliance Certificate is required for properties of less than 125 square metres. The full rate of stamp duty applies in the absence of such a certificate. Revenue seems not to require the certificate when the property being purchased has a floor area greater than 125 square metres.

FA (No. 2) 07 was signed into law on 9 July 2007 but takes effect from 31 March 2007. The Revenue published forms for retrospective claims covering first time purchasers who paid stamp duty after 31 March 2007 and these are available online at [www.revenue.ie/leaflets/ftb\\_stampdutyguide.pdf](http://www.revenue.ie/leaflets/ftb_stampdutyguide.pdf).

##### 1.1 What conditions must be fulfilled?

There are two main criteria for the relief:-

- the claimant must be a "first time purchaser" as defined and
- must give a certificate in a form prescribed by Revenue.

The relevant certificates are Certificates 6 & 7B set out in Revenue Leaflet SD10A (and included for completeness at the end of this paper).

The relief applies to large new properties and other properties with the exception of properties which meet the 'floor area' requirement (i.e. 38-125 square metres). However it only applies to dwellinghouses and apartments so it would not cover sites.

If there is more than one purchaser the relief is only available if every one of them is a first time purchaser.

In addition to this, the property that is being purchased must be occupied as the purchaser's principal private residence for the relevant period, i.e. for the first 5 years after it is bought or until it is sold.

Where there is more than one purchaser it is enough that the property be the principal private residence of one of them for the 5 years. Alternatively, the property must be the principal private residence of a person "*in right of the purchaser*" (or of at least one of them, where there is more than one) for the 5 years.

### *1.2 Who is a first time purchaser?*

A first time purchaser is someone who has never bought or built a house or apartment anywhere, in whole or in part, whether on his own or not. The legislation is not restricted to Ireland so the purchase or building of a dwelling abroad will prevent a claim for relief.

Any acquisition of a house or apartment, in whole or in part, resulting from a voluntary disposition counts as a purchase so a person who has received a gift of a dwelling cannot claim relief on a later purchase.

The inheritance of a property will not prevent the beneficiary being a first time purchaser on a later purchase.

Any acquisition of a leasehold interest by way of grant or assignment, held for less than a year, does not count as a purchase so the standard private residential lease of 12 months will not prevent a tenant qualifying for relief on a later purchase. It should be noted that the legislation specifically refers to a lease of less than one year so if a landlord wanted for some reason to sign a private lease with a slightly longer term (say 18 months) the tenant loses the option of claiming first time purchasers relief.

If a person has previously bought a property in a fiduciary capacity, then this does count as a purchase. Therefore a trustee buying a residence for a beneficiary can later claim relief on a purchase in his own right.

### *1.3 Clawback*

Under the terms of the relief the purchaser can derive rent or payment in the nature of rent from renting part of the property if he remains in occupation. However if the purchaser receives rent (other than rent for part of the property while he is in occupation) the receipt will trigger a clawback.

The clawback is a sum equal to the stamp duty that would have been paid had the relief (or post F(no2)A07 the exemption) not been available at the time of purchase.

### *1.4 Law Society Recommended Form*

A clawback of first time purchaser relief may arise if rent is obtained from the letting of the house or apartment during the period of 5 years from the date of the conveyance or transfer, other than under the rent-a-room scheme.

The clawback is the stamp duty that would have been paid had relief not been available. and becomes payable on the date of that rent is first received from the property. As the clawback is in the form of a penalty payable by the purchaser who originally obtained the benefit there is no need to re-present the original instrument for stamping.

Interest accrues on the clawback amount at the rate of 0.0273% per day from the date of first receipt of rent and any person receiving rent must inform Revenue within 6 months after first receipt of the rent. There is a notification of clawback form available on the Revenue website ([www.revenue.ie/forms/clawba1.pdf](http://www.revenue.ie/forms/clawba1.pdf)).

The Law Society Tax Committee recommends getting a client to sign a form setting out his intentions when acquiring the property, as support for the certificates in the deed.

March 2006 Gazette – Taxation Committee Practice Note

The committee recommends that solicitors obtain written instructions from clients confirming their entitlement to first-time purchaser's relief and owner occupier relief, and also confirmation from the client that the client understands the implications of receiving rent from the property within the first five years of ownership, other than under a permitted rent-a-room scheme, or failing to have it occupied as a main residence. The simple questionnaire (see below) may be considered by practitioners for use and retention on the file. It is not intended as a substitute for comprehensive advice.

STAMP DUTY ENQUIRY FORM

*(to be completed by each purchaser)*

First-time purchaser: Yes/No

- Do you intend to claim first-time purchaser's relief?
- Have you ever purchased or built on your own behalf a house, or do you, or have you had, an interest in a house (either in Ireland or abroad)?
- Do you, or does anyone on your behalf, intend to reside in this house as a principal private residence for a minimum of five years?
- Do you intend to charge rent within the first five years of ownership, other than under a permitted rent-a-room scheme?

Owner occupier:

- Do you, or does anyone on your behalf, intend to reside in this house as a principal private residence for a minimum of five years?
- Do you intend to charge rent within the first five years of ownership, other than under a permitted rent-a-room scheme?

Dated:

Signed:

Name:

## 2.0 What is the Rent-a-Room Scheme?

The owner of a house which is his sole or main residence can let a room or rooms in the house as residential accommodation, and if the gross rent received (including any sums paid for food, laundry or similar goods and services) does not exceed €7,620 "Rent-a-Room Relief" under S 216A TCA 1997 may be claimed and the income is exempt from income tax.

The receipt of rent which is exempt under this section will not trigger a clawback of the reliefs that depend on the purchaser being an owner occupier of the property.

However it should be noted that the stamp duty legislation does not link into the income tax relief but refers instead to the receipt of rent when the owner is no longer in occupation.

The income tax cap of €7,620 does not apply for stamp duty purposes and any level of rent may be received without affecting the relief provided that the owner remains in occupation and is renting part of the property.

## 3.0 Changes under FA07: FTP Relief after a Separation or Divorce

The relief originally only applied to divorced and separated people if the other spouse remained in the old family home up to the date the new house was purchased. In practice this condition proved onerous for spouses and FA 07 relaxed this restriction.

S. 92B (8a) (introduced by FA 07) provides the old family home only needs to be occupied by the spouse of the claimant up to the date of the divorce or separation decree.

Under current rules a divorced or separated spouse becomes "reborn" as a first time purchaser if the following conditions can be met.

- The spouse claiming relief must not be beneficially entitled to any dwellinghouse other than the old family home.
- The old family home must still be occupied at the date of the divorce or decree of separation by the ex-/spouse as the main residence.
- The ex-/spouse must be beneficially entitled to an interest in that property (either before the divorce/separation decree, or as a result of it).
- The spouse who is now claiming first time purchasers relief must not be beneficially entitled to any interest in the old family home.

S. 92B (8aa) now extends the relief to spouses who buy a new property before the divorce or separation. If someone bought a house on the date of divorce/separation or within the 6 months prior to this, he can still qualify as a first time purchaser, provided this purchase was made in anticipation of the divorce/separation, and that immediately before the divorce/separation the person buying the property was not beneficially entitled

to an interest in any property other than the old family home and the new property he has just purchased.

#### 4.0 Points to Note:

1. A person who takes a small new house that does not have a floor area certificate is not eligible for this relief.
2. The legislation “wipes the slate clean” for married couples who divorce. If the couple each bought a house in 1990 and they sell them to buy a house together in 2000 when they marry they would no longer be first time purchasers under S.92B on the family home or any later purchases.

However if they then separate and obtain a separation /divorce order, and remain in the family home until after the decree, and the wife then leaves she would (under the wording of S92B) qualify again for first time purchasers relief on a new purchase.

3. A married couple who divorce/separate but remain in the old home until after the divorce / separation order would both be eligible for relief on a new purchase.
4. Trustees will only get relief in limited circumstances (public subscription trusts) but it should be available for legal nominees of a bare trust.
5. Someone who rents part of the property when in occupation (essentially the “rent a room” scenario will not suffer a clawback. It is not necessary to meet the rent a room conditions – the stamp duty legislation only refers to rental of part while in occupation. The rental cap of €7,620 that applies to the rent a room scheme does not affect the relief – there is no rent cap for stamp duty.
6. A person who is seconded abroad within the 5 year “*relevant period*” and has to rent the house will lose first time purchasers relief due to receipt of rent while he is no longer in occupation of the property.

The provision about someone else occupying the property “*in right of the purchaser*” might operate as a saver if a family member or other person is left behind in the house, but this restricts the ability to rent and in many cases persons seconded abroad have no family, or very young families.

7. The Revenue responses in the published FAQs appear to go beyond the strict legislative provisions. In essence it appears that if there is any possibility that a gift or other economic support may be given (so that a beneficial interest may be taken by a person other than the person named on title) relief will be refused by Revenue.
8. Inheritance and building – the inheritance of a property does not prevent a person being a first time purchaser on a later purchase. However the building of a residence does prevent a person qualifying. It would follow that the inheritance of a site on which the beneficiary builds a residence would prevent that beneficiary qualifying for first time purchaser relief in the future.

9. First time purchasers who buy sites and build are not entitled to relief on the acquisition (as the site is not a dwellinghouse or apartment) and cannot claim first time purchasers relief on a later purchase as the building of the dwelling means they are no longer a first time purchaser.

## **5.0 Developers' Anti Avoidance Proposals:**

Prior to the FA07 the Revenue carried out a survey of developers and construction companies in an attempt to quantify the likely stamp duty avoided as a result of the tax planning options available to developers to avoid stamp duty on property acquired to develop with a view to resale.

Following the survey FA07 introduced anti-avoidance measures designed to close off any such tax planning and the Act been now been passed so the measures are law, but are only due to come into effect when a Ministerial Order is passed. The Ministerial Order will apply "*on such day or days as the Minister for Finance may by order appoint and different days may be appointed for different purposes or different provisions*". So far, the Minister has failed to introduce an Order.

It is unusual for anti-avoidance legislation to be signed in this way immediately allowing the announcement, to prevent taxpayers planning to avoid the anti-avoidance provision.

The FA07 changes relate to the following:

1. Contracts for Sale
2. Agreements for lease; and
3. Licenses

### *5.1 Contracts for Sale*

S 46 SDCA provides that there is no stamp duty for a person who acquires a property under a contract for sale and then sub-sells to another person before having obtained a conveyance. The sub-purchaser pays stamp duty on the deed

A contract to sell land to B. Before any conveyance is signed B contracts to sell on to C. A and B then join to convey the land to C. C is liable to pay stamp duty on the conveyance to him, and B (who generally receives a profit on the subsale) never has to take title, and has no stamp duty.

Developers can use sub sales to acquire develop and sell on land without paying stamp duty. The developer buys land, develops it and then sells on the developed units. The sub-purchasers, buy the developed units, and pay the stamp duty.

Finance Act 2007 introduced S, S31A SDCA 1999 which provides that if:-

- a person enters into a contract for the sale of an estate or interest in Irish land, and
- a payment or payments amount to at least 25% of the consideration has been paid to, or at the direction of the vendor, and

- a conveyance or transfer is not presented to Revenue for stamping within 30 days

the contract shall be chargeable with ad valorem duty as if it were a conveyance.

S.31 A (2) provides that where stamp duty has been paid on a contract any conveyance in respect of that contract will not be liable to duty.

## 5.2 Licences

A licence is not an interest in land so the grant of a licence is not a conveyance on sale. A licence constitutes permission to go on to someone else's land without acquiring an interest in the land.

A landowner can grant a licence enter upon the land and to develop it. A licence fee which may be as high as the market value of the land may be paid at the outset.

On completion of the development, the landowner will convey the title to the developer or to his nominees (i.e. the sub-purchasers).

FA07 provides that if:-

- a landowner enters into an agreement with another person under which that other person is entitled to enter onto the land to develop the land; and
- the landowner receives a payment which amounts to at least 25% of the market value of the land (otherwise than as consideration for the land);

then within 30 days the agreement shall be chargeable with stamp duty, as if it were a conveyance of the land.

## 5.3 Agreements for more than 35 Years Charged as Leases

### (i) Less than 35 Years

S.50 SDCA deals with agreements for lease for less than 35 years. Such leases are stampable in the same way as a lease.

### (ii) Greater than 35 Years

As there is no legislative provision covering agreement for lease for greater than 35 years it follows that they are not liable to stamp duty.

Agreements for lease are being used by developers, who can arrange matters so that the developer does not take possession of the property and the ultimate purchasers take leases directly from the landowner and sign construction contracts with the construction company.

FA07 introduces S 50A which provides that: an agreement for a lease for any term exceeding 35 years, shall be charged with the same duty as if it were an actual lease made for the term and consideration mentioned in the agreement once 25% or more of the consideration has been paid.

#### 5.4 30 Day Time Limit

The amendment in respect of contracts for sale refers to the contract or agreement becoming stampable within 30 days “...of the first time such a conveyance or transfer made in conformity with the contract or agreement and executed by the parties...”. This definition is drafted very broadly and does not give a definitive date from which the 30 days are to run. The most likely interpretation is that stamp duty is payable within 30 days from the first time the 25% consideration threshold is breached.

#### 5.5 Dormant Legislation

It should also be noted that resting on contract, licence agreements, and agreements to lease are still effective as the new provisions do not take effect until the Ministerial Order is signed. It is possible that the new provisions will take effect “retrospectively” (i.e. will date back to the day the FA07 came into effect, or the date on which the proposed anti-avoidance was announced).

If an Order is made in the future consideration might be given to:-

- (i) Payment of an amount less than 25% of the total purchase consideration
- (ii) Agreeing with a vendor to wait two years or so (or as long as the development takes) before receiving the proceeds of the sale.

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#### *SD10(A) Revenue Certificates Required in Deeds*

##### *First Time Purchaser Certificates (S 92B)*

*Certificate 6: “It is hereby certified that the purchaser/each of the purchasers is a first time purchaser as defined in section 92B(1) (residential property first time purchaser relief) of the Stamp Duties Consolidation Act 1999.”*

*Certificate 7B “It is hereby certified that the purchaser/one or more of the purchasers/a person or persons in right of the purchaser/a person or persons in right of one or more of the purchasers will occupy the dwellinghouse/ apartment as his/her/their only or principal place of residence for the period specified in section 92B(3)(b)(ii) (residential property first time purchaser relief) of the Stamp Duties Consolidation Act 1999, and that no person (other than a person who, while in such occupation, derives rent or payment in the nature of rent in consideration for the provision, on or after 6 April 2001, of furnished residential accommodation in part of the dwellinghouse/apartment concerned or other than by virtue of a title prior to that of the purchaser) will derive any rent or payment in the nature of rent for the use of the dwellinghouse/apartment or any part of it during that period.”*