



BrookStreet des Roches LLP



## Real Estate briefing

### Stamp duty land tax and rent reviews

On 1 December 2008 it will be the fifth anniversary of the changeover from stamp duty to stamp duty land tax ("SDLT"). We thought that now may be a good time to provide a reminder of the implications of rent reviews in SDLT leases.

Under the old stamp duty regime, once your lease had been stamped you didn't need to give any further thought to your tax liability. Unfortunately, the position for SDLT leases is a lot more complicated. Depending on when the rent review takes place and how much your rent goes up by, you may find that you have further tax to pay. If you don't pay the amount due by the required time limit you will be liable to fines and interest charges.

#### **Leases with a rent review *during* the first five years of the term**

It is common to see leases with rent reviews at five-yearly intervals, but you may well have a lease with a review before the end of the first five years. If you do have a lease with an earlier rent review, this should have been taken into account when you (or the original tenant) calculated the SDLT payable following lease grant.

At the end of the fifth year of the term or, if earlier, once the rent review is settled (so that you know the actual rent for the first five years) you will need to make a further calculation using the actual figures. This will be necessary even if you didn't need to complete an SDLT return or pay any SDLT when the lease was granted, as the increase in rent may make you liable even if you were not before.

If any additional tax is payable you need to complete a further tax return and send the additional tax due (plus interest on it from the date of lease grant) within 30 days of the earlier of either the end of the fifth year of the term or the date on which the rent becomes certain. If you find that too much tax was paid at lease grant, you will be able to claim a refund (with interest).

#### **Leases with a rent review *after* the first five years of the term**

For the majority of leases, the first rent review will take place on or after the fifth anniversary of the start of the term. This means that there will be no rent review during the first five years of the term (though this is subject to the question of when the term actually starts which is considered below).

Where a rent review takes place after the first five years, the general rule is that this is ignored for SDLT purposes. However there is an exception to this where an "abnormal" increase occurs. There is a calculation for determining whether an increase is "abnormal" but it is effectively an annual rent increase of about 20% or more.

If at review there is an "abnormal" increase in your rent, you will have to make a further tax return and pay the increased SDLT due.

#### **Leases with a rent review *five years after the term commencement date***

The most common rent review provision in a lease is one which fixes rent reviews to take place on the fifth anniversaries of the term commencement date. At first glance this does not seem to cause any problems as the first rent review is not taking place during the first five years of the term. However, the fifth year of the term may well be calculated differently under the lease than it is for SDLT purposes.

A lease will usually define the "commencement date". This may be the date on which the lease is actually completed, but it is often backdated to the previous quarter day (or even earlier in some cases). This is most often the case where, for example, you have a lease of a floor in an office block or a unit in a shopping centre. Having the same rent review date in all of the leases makes them easier for the landlord to administer. This

means that a lease may have been completed, for example, on 1 March 2004, but with a term commencement date of 25 December 2003. The fifth year rent review will take place on 25 December 2008.

However, for SDLT purposes, the term is calculated by reference to the date on which the lease is actually granted, so the end of the fifth year of the term of this lease will be 28 February 2009. This means that the first rent review actually falls within the first five years of the term. The way in which the legislation was originally drafted would have meant that the review on 25 December would have counted as a review in the first five years, requiring a recalculation and possible further tax return and payment.

This problem has now been mostly remedied by a useful carve out which says that where a rent review falls five years after a date that is within three months before the SDLT start date, the rent review can be ignored. The effect of this carve out is to mean that the vast majority of rent reviews taking place on the fifth anniversary of the term commencement date can be ignored, so long as there is no abnormal rent increase.

That said, you should still check your lease carefully: if you have a fifth year rent review and the term commencement date is in fact *more* than three months before the lease was actually granted, even if only by a few days, this rent review should have been taken into account when completing your first tax return and a further return and payment may be required at review.

### **Further advice and information**

It is your responsibility as the tenant under a lease to check whether you need to make a further tax return and to keep a note of the dates of any reviews; we cannot take responsibility for this.

However, we would be very happy to advise you on any issues which arise for a particular lease. This would be at a fee based on our agreed rates.

**BrookStreet des Roches LLP**  
**June 2008**



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