THE TERRITORIAL SCOPE OF UK STAMP DUTY

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There has been a renewed increase in interest in United Kingdom Stamp Duty in recent years among taxpayers, Parliament and the Revenue. This no doubt because the rates, now up to 4% for transfers of freehold land, give the Revenue and the Exchequer a further incentive to collect the duty and the taxpayer a significant reason to make arrangements that will not attract it in the first place. The Revenue's interest is illustrated by the recent and ongoing case of *BMBF (No 24) v IRC* [2002] STC 1450[2] and by a change of practice in certain areas, sometimes marked by publication of bulletins and announcements. Taxpayers have shown their interest by the increased use of certain schemes[3] which Parliament in turn has sought to block by specific provisions.[4]

This article focuses on the territorial scope of Stamp Duty. A new tax has been proposed to replace stamp duty altogether for transactions relating to land in the UK. The Revenue has published draft Finance Bill clauses covering this new tax, and explanatory notes, for consultation. The measures are likely to be introduced this year and will radically alter the way in which UK land transactions are taxed. The comments below will still apply to land outside the UK and assets other than land wherever situate.

Many of the heads under which Stamp Duty is charged contain no express territorial limitation. For example, there is nothing to restrict the conveyance on sale charge under FA 1999, Schedule 13, paragraph 1 to land or other property in the UK. It is worth noting, however, that some provisions do contain an express limitation including:

- the charge on contracts or agreements for the sale of an estate or interest in property under FA 1999, Schedule 13, paragraph 7(1)(b) (which does not

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2 Reported as *Delta Finance Newco v IRC* [2002] STC (SCD) before the Special Commissioners.

3 E.g. "Resting on contract" that is to say relying on the contract for the sale and purchase of land without completion.

4 E.g. Finance Act 2002, section 115 which introduces a charge on agreements for the sale of land where the consideration is over £10 million. This is introduced specifically to prevent deferring stamp duty by resting on contract in those cases.

apply to "property of any description situate outside the United Kingdom");

- the transfer of certain bearer shares under FA 1999, Schedule 15; and
- the charge on contracts or agreements for the sale of land where the consideration exceeds £10 million in FA 2002, s.115, which is expressly limited to "land in the United Kingdom".

For practical purposes, however, a territorial limitation arises from the nature of the principal sanction imposed for failing to stamp a document. This is Stamp Act 1891, section 14(4) which prevents the production of an unstamped document in evidence[5] if it is "executed in any part of the United Kingdom, or relat[es], wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom". The "United Kingdom" for these purposes means England, Scotland, Wales and Northern Ireland. It does not include the Channel Islands or the Isle of Man, nor the "territorial sea" of the United Kingdom (as it does for certain tax purposes under FA 1973, section 38). There are thus three groups of instruments[6] that, if required as evidence in the UK, need to be stamped:

- documents executed in the UK;
- documents relating to UK situate property;
- documents relating to things done or to be done in the UK.

A document will be caught if it falls within any one of the categories. For example, a conveyance of UK land is caught even if executed outside the UK.

If a document is executed in the UK (and falls within a head of charge), it is stampable even if it has no other connection with the country. For example, in *In re Wright and the Commissioners of Inland Revenue* 11 Exch 458 (or 146 ER 911), conveyances of Australian land were held liable to duty[7]. The answer to the question whether a document is executed in the UK may not be quite as one would expect[8]. What constitutes execution depends on the type of instrument involved. A deed is validly executed by an individual if and only if it is signed by him in the presence of a witness (or at his direction and in his presence by two witnesses) and delivered as

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5 The effects of this are considered in more detail below.

6 Stamp Duty applies to instruments. The new tax, as currently drafted, will apply to transactions whether or not effected by instrument.

7 The report does not reveal why the deed was presented for stamping.

8 The related question of *when* a document is executed is not considered in this article. It involves the express provision in Stamp Act 1891, s.122(1A) by which a deed shall be treated as executed when delivered or, if delivered subject to conditions, when the conditions are fulfilled. For consideration of the question when a document is executed or "made" as a matter of general law, see *The Dating of a Document* by JG Monroe in [1960] BTR 180. For consideration of the question when a document first requires stamping, see Monroe and Nock *The Law of Stamp Duties* 7th edition 1-167 to 173.

a deed by the individual or a person authorised to do so by him.[9] For other instruments,[10] Stamp Act 1891, s.122(1) provides expressly that "executed" means signed. If a document requires to be signed by two parties it will, strictly, have been "executed" by both of them and, if the signatures are given in different countries, will have been executed partly in one place and partly in another.[11] However, it is established that an instrument is not "executed" for the purpose of establishing whether the document may be produced in evidence[12] until effective, which may not be until the last of several signatures. On this basis it may be possible to argue that a document signed first in the UK by one party but not becoming effective until signed by the other party outside the UK is not "executed" in the UK.[13] Clearly, however, it would be far safer to avoid the issue by ensuring that all signatures and any delivery takes place outside the UK.

Whether property is situated in the UK is a familiar question of private international law[14]. Some uncontroversial points may be made:

- Tangible assets, including land, physically in the UK are situated in the UK.

- Shares in UK registered companies are generally situated in the UK and shares in non-UK registered companies are situated abroad (except bearer shares which are situated where physically located).

- A *chose in action* is usually situated where it may be enforced. Thus, a simple debt is enforceable and therefore situated where the debtor resides (*English, Scottish and Australian Bank Ltd v IRC* [1932] AC 238). On the other hand, a specialty debt (one created by deed) is situated where it is physically to be found.

It should also be noted that this second category is not limited to the selling or leasing of property but covers any instrument that "relates to" property in the UK. This certainly covers a situation in which UK property is provided as consideration for a

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9 See the Law of Property (Miscellaneous Provisions) Act 1989, s.1(3). There is no longer any requirement that a deed executed by an individual be sealed.

10 The section refers to instruments "not under seal" and, in light of LP(MP)A 1989, s.1(3) noted above would *prima facie* apply also to deeds executed by individuals. Section 122(1A) referred to at note 8 provides a separate rule for determining *when* a deed (whether or not under seal) is executed but does not expressly apply for determining *where*. It is not clear whether the Stamp Office would argue that a deed would have been "executed".

11 See for example *IRC v Mullers Margarine Ltd* [1901] AC 217 at 229 per Lord Brampton. In this case, it was also held that the agreement was "made" in England because it became complete and effective in England.

12 See *Sinclair v IRC* 24 TC 399 per Lord Norman at 444. In this case, documents had been signed by one party but retained by the other unsigned. His Lordship held that the document could "obviously" be produced and relied upon unstamped because it was inchoate.

13 The Stamp Office certainly accepts that penalties do not run in this situation until the instrument is brought back into the UK: see Stamp Taxes Manual 3.36.

14 The subject is covered in detail in Dicey & Morris *The Conflict of Laws* 12th ed ch 22.

sale effected abroad, even if the UK property could itself be transferred without a separate stampable document,[15] and may go further than this. For example, if a contract made in France provided that certain French property was to be transferred "within thirty days after the transfer of" UK property, that contract would arguably "relate to" UK property. This point has yet to be tested.

The final category, covering things done or to be done in the UK, is perhaps the broadest and its scope is well illustrated by *CIR v Maple & Co (Paris) Ltd* [1908] AC 22. In that case, the House of Lords held that a transfer of French property executed and effected in France by an English company which transferred property to another English company in return for an issue of shares was liable to UK stamp duty. It was a conveyance on sale and related at least to something to be done in England (namely registration of the shares) and probably to property situate in England (namely the share capital of the issuing company). The same reasoning was applied in *Oscar Faber v CIR* [1936] 1 All ER 617 in which an agreement executed in Canada for the issue of shares in a Canadian company in return for nine tenths of the income derived by Mr Faber from the exercise of his profession in the UK was held to relate to things to be done in the UK and was therefore liable to *ad valorem* duty.[16]

If a document falls within any of the categories listed above, the principal sanction is that by SA 1891, s.14(4) it cannot be relied upon in evidence before a non-criminal court in the United Kingdom or used for any other purpose whatsoever. This includes use before the Special Commissioners and the VAT and Duties Tribunal, and this point was taken by the Revenue in the *BMBF No 24* case referred to above. The prohibition extends to copies of the document[17] but does not prevent the taxpayer seeking to prove *beneficial* ownership without relying on any stampable documents. This is what the appellant sought to do in *BMBF No 24*. It was unsuccessful before the Special Commissioners but successful in the High Court, although that decision is under appeal.

The Revenue is entitled to rely on copies of unstamped documents to determine the duty on related instruments. In *Parinv (Hatfield) Ltd v IRC*, the transferor had executed an agreement for sale of UK property and declaration of trust offshore. These instruments were not stamped. The transferor also executed a transfer which the appellant transferee wished to stamp. The transfer recited the agreement and the declaration of trust and that the appellant, as absolute beneficial owner, had called for the transfer. The appellant delivered copies of the unstamped agreement and declaration of trust to the Revenue when the transfer was submitted for adjudication. The Revenue argued that the transfer amounted to a conveyance on sale and that the copies of the other documents provided evidence of the consideration paid. The appellant contended, *inter alia*, that the copies were inadmissible for that purpose. The Court of Appeal disagreed.[18]

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15 See *IRC v Maple & Co (Paris) Ltd*, considered below.

16 The report does not reveal why the deed was submitted for stamping.

17 See *Parinv (Hatfield) Ltd v IRC* [1996] STC 933 at 940-1 (the taxpayer did not appeal on this point, though other matters were dealt with by the Court of Appeal at [1998] STC 305).

18 See the judgment of the Court of Appeal referred to in note 17 above at 311j-313d .

As noted above, a document relating to UK property is stampable even if executed offshore and interest now runs from thirty days after execution regardless of where this takes place (SA 1891, s.15A). If, but only if, the instrument "involves" UK land to any extent, the same is true of penalties (SA 1891, s.15B). It should be noted that *prima facie* this applies even if the instrument also relates to other transactions and it may therefore be advisable to execute separate instruments relating to UK land and other transactions. It would not be safe to rely on SA 1891, s.4(a) which provides that an instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument for each matter. This only applies "unless express provision to the contrary is made", and s.15B appears to contain such provision.

Late stamping penalties can still be avoided for other types of transaction by executing and keeping the relevant instrument or instruments (including any counter parts or duplicates) offshore. There is nothing improper in doing this. Nor is there anything improper in the parties agreeing to keep documents offshore, although the very wide provisions of Stamp Act 1891, s.117 must be borne in mind. This section renders void any "condition of sale framed with the view of precluding objection ... upon the ground of insufficiency or absence of stamp ... and every contract, arrangement or undertaking for assuming the liability on account of absence or insufficiency of stamp upon such instrument or indemnifying against such liability, absence or insufficiency". An agreement that the parties should keep the instrument offshore and that the purchaser (who would otherwise pay the duty) would indemnify the seller for any loss would clearly be caught by this. Any indemnities or stamp duty covenants should be very carefully drafted and the party likely to rely on them should consider whether the benefit to them of stamp duty avoidance/deferral is worth the risk that the indemnity will be void.

Although UK stamp duty has a surprisingly broad territorial scope in theory, it is much more restricted in practice. Transfers of UK land will generally have to be stamped if the transfer is to be registered.[19] Instruments that do not relate to UK property or dealings can be relied on in any event before UK courts and need not be stamped providing care is taken not to execute them in the UK. Other documents relating to property or actions in the UK will be stampable in theory but need only be stamped if required for UK litigation. In any event, since failure to stamp timeously is in no way criminal, the only penalty is financial and the burden of this may, with careful drafting, be shared between the parties.

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[19] Although a transfer is still effective once registered even if insufficiently stamped.