

# DBULLETIN

## Payment of Deposits under Golden Brick Agreements

In their Business Brief 36/09, HMRC have confirmed that deposits paid on a property sale that are released to the seller before contractual completion are part payment for the anticipated property sale and so the same VAT treatment will apply as applies to the property sale.

This is good news for grant funded RSLs purchasing partially completed dwellings from developers under golden brick development agreements.

Where a developer sells completed dwellings to an RSL, the developer pays up front for the land and associated costs and has to wait until after it has completed the construction of the dwellings before the RSL pays the consideration for them. The RSL has to pay a price which includes the developer's holding costs of providing finance for the purchase of the land and the development up to the point where the land is transferred to the RSL. If the developer sells bare land to the RSL before constructing the dwellings for the RSL the RSL would be able to negotiate a lower overall price for the land and dwellings because it would not have to pay the developer for its holding costs. An RSL purchasing with grant funding would also be in a better position in this case as it would be able to draw down the grant on the purchase of the land.

But a sale of bare land may have adverse VAT effects. If on a sale of land the developer does not exercise an option to tax for VAT then the developer

will make an exempt supply of the land to the RSL. This will mean that the developer will not be able to recover the VAT that it may have incurred on its purchase of the land and any associated fees. If the developer opts to tax the land then the RSL has to pay VAT on the price and, if the RSL's intention is to use the dwellings for rented housing, the RSL will not be able to recover that VAT as the VAT relates to intended exempt supplies.

However, the developer can make a zero rated supply of the land to the RSL (and thus recover its related input tax) if the supply is the first grant of a major interest in the land by the developer and the developer is in the course of constructing dwellings on the land. A major interest is the grant of a freehold or a lease of over 21 years. HMRC agree that a developer is in the course of constructing dwellings on land when the works have progressed beyond the foundation stage and the construction is out of the ground. This is known as 'golden brick'. Thus when the construction reaches golden brick the developer can transfer the freehold of the land and partially completed dwellings to the RSL as a zero rated supply.

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Notwithstanding the golden brick transfer, the developer will still incur the costs of holding the land and financing the works to reach golden brick. These costs could be avoided to the extent that the RSL pays a deposit on exchange of contracts on terms that the deposit is released to the developer. But if a deposit on a land sale is paid to a developer or his solicitor as agent, and released to the developer, a tax point for VAT purposes occurs in respect of that part of the price which arises on the date of payment of the deposit.

Under the golden brick arrangement the land is still bare land at contractual exchange so to date there has been a perceived risk that if an RSL pays a deposit as agent before the commencement of construction, a tax point would be triggered not in relation to the zero rated supply (as golden brick stage would not then have been achieved), but instead to a supply of opted bare land and therefore subject to VAT. For this reason, deposits under golden brick arrangements have generally been held as stakeholder and not released until practical

completion at golden brick stage.

What HMRC have now made clear in their Business Brief 36/09 is that if a deposit is paid by the RSL and released to the developer on exchange of contracts, provided that it is clear from the contract that what will be supplied at completion will be partly completed dwellings (i.e. the works will have progressed beyond golden brick), the deposit is part payment for the grant or supply that will occur at the time of completion. It follows that the VAT liability of the deposit is determined by the anticipated nature of that supply and that zero rating will apply if the conditions for zero rating will be satisfied at the time of completion.

This will mean that in a situation where the RSL may have grant to cover the land cost, the RSL would be in a position to draw down that grant at exchange of unconditional contracts and pay the land cost to the developer by way of a deposit, thus avoiding paying the developer's holding costs for the land up to golden brick stage.

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