

Land and Buildings Transaction Tax: Amendment to Group Relief

**Analysis of responses and
Scottish Government Response**

June 2018



Scottish Government
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CONTENTS

Introduction	Page 3
Executive summary	Page 4
Question 1: Summary of responses	Page 4
Question 2: Summary of responses	Page 5
Question 3: Summary of responses	Page 6
Question 4: Summary of responses	Page 6
Scottish Government Response	Page 7
Annex A: List of Respondents	Page 8

Introduction

1. Land and Buildings Transaction Tax (LBTT) introduced by the Land and Buildings Transaction Tax (Scotland) (Act) 2013 ('the Act') replaced UK Stamp Duty Land Tax (SDLT) in Scotland from 1 April 2015. It is a tax applied to residential and non-residential land and buildings transactions (including non-residential leases) where there is an acquisition of a chargeable interest.
2. Schedule 10 of the Act makes provision for the availability of 'group relief'. Subject to certain rules, this provides relief from LBTT for transactions between companies within a corporate group that would otherwise be chargeable to tax and on which tax would be payable. The rationale for the relief is that there is no overall change in economic interest or benefit when a land transaction occurs between companies within the same corporate group.
3. On 28 December 2017, Revenue Scotland (RS) published a technical bulletin setting out their view that where there is a transfer of property within a corporate group and there is a relevant share pledge which means that the person holding the pledge could obtain control of the subsidiary but not the parent this is an 'arrangement' which, in accordance with paragraph 3 of schedule 10 of the Act, means that group relief would not be available and LBTT would be payable on the market value of the property transferred.
4. In light of stakeholder concerns about this, and following consideration of this issue, the Cabinet Secretary for Finance and the Constitution laid draft legislation in parliament on 17 May 2018 to make clear that group relief would be available in these types of transactions.
5. A consultation on a draft Scottish Statutory Instrument (SSI), intended to amend the group relief provisions in Schedule 10 of the Land and Buildings Transaction Tax (Scotland) (Act) 2013 ('the Act') to provide for this subsequently ran from 19 March to 13 April. This report presents an overview of findings from the analysis of responses to that consultation. In addition, it sets out the Scottish Government's response and provides detail of how we have amended the proposed draft legislation laid in parliament on 17 May 2018.
6. The Scottish Government would like to thank all respondents for their contributions.
7. Where granted permission, responses have been published in full on the Scottish Government Consultation Hub website.

EXECUTIVE SUMMARY

8. The consultation ran from 19 March to 13 April 2017. Twelve responses were received in total, of which seven were received online via Citizen Space and a further five received by email and post.

9. Two respondents wished for their personal identity and their organisation's answers to remain anonymous, while a further two respondents did not want their personal name published alongside their organisation's reply. A list of respondent organisations is available in **Annex A**.

10. The consultation set out four, primarily qualitative, questions and sought views on the proposed draft SSI.

11. All respondents responded to all four questions in the consultation, whilst half of them also provided feedback on the Citizen Space process. An analysis of the question specific replies follows the main findings summary below.

Main findings and themes

12. Respondents to the consultation were unanimously in favour of the Scottish Government amending the legislation for Group Relief in order to address the highlighted issue. There were however a number of specific comments on the Scottish Government's proposed approach to the amendment and the drafting of the statutory instrument. Key points raised by respondents included that:

- the draft legislation would **not** achieve an outcome equivalent to SDLT.
- equivalence of LBTT group relief with SDLT and LTT would be required.
- Scots Law terminology should be used for the SSI where appropriate.
- The SSI should provide relief in relation to relevant arrangements in jurisdictions anywhere in the world, and not just the UK.
- The proposed amendment should be made retrospective.

13. The Scottish Government's response to relevant issues identified in the consultation responses and its planned future approach is set out at the end of this document.

QUESTION 1 RESPONSES

15. The first question in the consultation asked; *"Do you agree that the draft instrument provided for in Annex A will achieve an outcome consistent with the equivalent group relief arrangements available under SDLT?"*

16. Two of the replies stated that the draft instrument would achieve a consistent outcome with SDLT. Of these, one respondent, KPMG, explained they did not believe amendment was required based on a view that the relevant security arrangements do not constitute "arrangements under which at some later time a

person could gain control of the buyer but not of the seller”. The fact that no specific provision was incorporated into the LBTT group relief legislation was considered not to be determinative in concluding that group relief should be denied in such circumstances. Of the remaining replies, eight expressed a shared view that:

- The draft SSI covered arrangements “analogous to a pledge” but in a way that suggested it did not cover actual share pledges.
- The draft SSI used English law terms and should be drafted using Scots law terms.
- The legislation should cover equivalent arrangements in jurisdictions outside of the UK.

17. Six respondents disagreed or objected to the “carve out” in the draft SSI that would result in the withdrawal of group relief if a lender was in position to exercise their rights in relation to a relevant security arrangement, regardless of whether or not they had done so or had any intention of doing so. One respondent explained “...we cannot see why group relief should be denied where a bank could have exercised its rights under security arrangements but did not exercise this right, as there will be situations where a bank need not exercise all enforcement options available to it. The SDLT provisions on group relief are not similarly limited”.

18. The Law Society of Scotland provided further commentary on this stating, “We do not understand why group relief should be denied in these circumstances...it could be extremely difficult in practice to identify situations where this had happened. Banks do not always use all the remedies available to them where there have been defaults...”

19. Separately, five respondents provided statements requesting retrospective application of the draft SSI to LBTT group relief in their replies to question one. Finally, two respondents highlighted the Moveable Transactions (Scotland) Bill and requested that the Scottish Government consider this and any potential future impact on LBTT group relief provisions.

QUESTION 2 RESPONSES

20. The second question: “Do you consider that the proposed amendment to the legislation will reduce the effectiveness of existing arrangements or result in any new areas of potential tax avoidance?” This received eleven “no” responses and a single “yes” response.

21. The respondent that considered the draft SSI could potentially reduce the effectiveness of existing arrangements explained that the lack of retrospective application of the draft SSI could increase areas of potential or further tax avoidance, but that if their suggestions were accepted there would be no additional risk of avoidance.

22. Respondents that commented in support of their position that the change would not create new opportunities for avoidance highlighted the targeted anti-avoidance provisions and broader General Anti-Avoidance Rule in place for LBTT and the experience of the relevant provisions in SDLT. With regard to this, KPMG

stated, “LBTT group relief only applies in specific circumstances where a number of conditions are met. In our experience the comparable provision in relation to SDLT group relief has not been used for tax avoidance purposes. We note that the LBTT legislation already contains a targeted anti-avoidance provision (LBTT(S)A 2013 Sch 10 para 8) and a general anti-avoidance rule (RSTPA 2014 Pt 5).” Alongside this, the Chartered Institute of Taxation noted that: “We do not think that the amendment will reduce the effectiveness of existing arrangements or result in new areas of potential tax avoidance. Rather, failure to make the amendment will mean that group relief is denied in common and wholly commercial circumstances, with adverse consequences for investment in Scottish property”.

QUESTION 3 RESPONSES

23. The third question was “Do you have any other comments, not covered by the previous questions, on the draft legislation in Annex A?” Eleven respondents commented on this question, with three of these referring to comments made previously.

24. Half of the replies to question three suggested that retrospective application of the draft SSI was required. With regard to this, the CIOT questioned why primary legislation had not been brought forward and sought clarity as to the position for any relevant past transactions where group relief had been claimed.

25. Similarly ICAS noted that “We believe this measure should be in primary legislation, and applied retrospectively, given that this was always the policy intention and that some groups have now been disadvantaged. There is a precedent for retroactive measures, in the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill currently in the Parliament. We trust that a similar process will apply here, with an act as soon as possible”. Other respondents provided similar comments, available in the published consultation responses on citizen space.

26. The other comments offered drafting suggestions for the SSI, intended to reflect points made in responses. One respondent pointed out a typographical error in the draft SSI.

QUESTION 4 RESPONSES

27. The fourth question in the consultation relating to the draft SSI was “Do you think that the legislation in Annex A will, in any way, impact upon equal opportunities, human rights, businesses, island communities, privacy and/or sustainable development in Scotland”? This question allowed respondents an opportunity to identify any aspect of the draft SSI that may affect impact assessments.

28. Three of the respondents to the consultation did not offer a reply to this question. Of the remaining responses, seven did not think the draft SSI would have an impact and two said they expected the draft SSI to have a positive impact. One respondent noted that the intention to ensure consistency between LBTT and SDLT in this area would have a positive impact on businesses, whilst another indicated that

it would allow for a level playing field. A number of responses to this question highlighted their views on the need for any change to be retrospective.

SCOTTISH GOVERNMENT RESPONSE

29. The Scottish Government would like to thank all those who responded to this consultation. The high level of detailed and technically informed responses along with the feedback and comments provided separately has helped to inform the Scottish Government's approach.

30. Having given due consideration to the consultation responses, the Scottish Government has made a number of changes to its proposed approach. These are set out below.

31. The Scottish Government has amended its approach on the circumstances in which group relief could be withdrawn. The draft legislation will provide that relief will not be lost in relation to standard "share pledge" type arrangements and other analogous arrangements, so long as any relevant right held by a lender in relation to that is not exercised. This is a development from the consultation position that relief would be lost if a lender was in a position to exercise their right in relation to a share pledge type arrangement, even if that right was not exercised. The revised position is consistent with the position in place for SDLT in England and Northern Ireland and Land Transaction Tax in Wales.

32. The Scottish Government has also amended the draft legislation in response to calls for the provisions to apply not just to relevant arrangements in the UK, but also to analogous arrangements under the law of a country or territory outside the UK. In addition, a number of other drafting changes have been made to address certain comments around terminology and the description of relevant arrangements.

34. The proposed legislation has not been amended to take account of the potential impact of any future Moveable Transactions (Scotland) Bill. The Scottish Government intends to consult on the Scottish Law Commissions report and will consider the points made in that context.

35. The Scottish Government's approach will otherwise be as set out in the consultation.

36. Following the results of this consultation, Scottish Ministers laid the draft legislation in the Scottish Parliament on 17 May 2018 to amend schedule 10 of LBTT(S)A 2013 to provide prospective availability of group relief in the relevant circumstances. Subject to the usual process of scrutiny and consideration by the Scottish Parliament, the relief will be available in relation to relevant transactions which occur on or after 30 June 2018.

ANNEX A

List of Respondents

1. Homes for Scotland
2. Pinsent Masons LLP
3. DWF LLP
4. KPMG LLP
5. Lloyds Banking Group
6. Scottish Property Federation
7. Brodies LLP
8. Chartered Institute of Taxation (CIOT)
9. Ernst & Young LLP
10. ICAS
11. Law Society Scotland
12. Dickson Minto W.S., Burness Paull LLP and DLA Piper Scotland LLP



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