

A consultation on an amendment to Land and Buildings Transaction Tax Group Relief

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INTRODUCTION

Purpose

1. The purpose of this consultation is to gather views from stakeholders on a draft Scottish Statutory Instrument, intended to amend the group relief provisions in Schedule 10 of the Land and Buildings Transaction Tax (Scotland) (Act) 2013 ('the Act').

Background

2. LBTT which replaced UK Stamp Duty Land Tax (SDLT) in Scotland from 1 April 2015, 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.

3. Schedule 10 of the Act makes provision for the availability of group relief. Subject to certain rules, this provides relief from LBTT for land transactions between companies within a group that would otherwise be chargeable to tax and on which tax would otherwise be payable (subsequently referred to in this consultation as a 'land transaction'). Such a land transaction can occur for various reasons, including e.g. to compartmentalise risk, to amalgamate business activities into a single subsidiary or in relation to considerations around the granting of a security.

4. 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 group. For tax avoidance purposes, there are strict conditions regarding eligibility for the relief and a targeted anti-avoidance rule in place that allows for claw back in certain instances.

5. On 28 December 2017, Revenue Scotland published a technical bulletin on LBTT setting out Revenue Scotland's 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 (transferee) but not the parent (transferor) 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.

6. Following consideration of this issue, the Cabinet Secretary for Finance and the Constitution announced on 6 March his intention to bring forward secondary legislation to make clear that group relief would be available where there is a land transaction within a corporate group structure and there is a relevant extant 'Share Pledge'.

7. In advance of that, and consistent with the Scottish Government's approach to taxation, this consultation seeks views on a proposed draft amendment to schedule 10 of the Act. Views are sought on the detail of the legislation to ensure that it delivers the intended effect and to allow for the impact of this planned change to be considered prior to introduction.

8. Any amendment of the Act through the use of secondary legislation can only apply prospectively. The Scottish Government is aware of the points raised by stakeholder organisations in this regard and will explore whether retrospective primary legislation would be a possible option.

CHAPTER 1: THE RATIONALE FOR CHANGE

9. LBTT legislation differs from SDLT in a number of areas, better aligning the legislation with Scots law and practices and ensuring appropriate reliefs and exemptions are applied in the Scottish context. Scottish Ministers have made clear they wish to take all reasonable steps to reduce the risk of avoidance of the devolved taxes, to foster a climate of tax compliance and help safeguard public finances. To minimise opportunities for avoidance, the Scottish approach also seeks to ensure that tax reliefs and exemptions are introduced only where they are supported by a strong evidence base.

10. When the Scottish Parliament considered and scrutinised the LBTT (Scotland) Bill, the Scottish Government's policy intention was that group relief would operate in a similar way to the relief for SDLT. This was to ensure that there is no competitive advantage or disadvantage created between Scotland and the rest of the UK, in this respect, and to ensure that Scotland remains an important and attractive place for companies to locate and invest in.

11. In the lead up to and following publication of Revenue Scotland's technical bulletin, stakeholders representing organisations with an interest in Scottish property assets have raised concerns about an inconsistency between SDLT and LBTT in terms of the treatment of share pledges and highlighted the potential negative ramifications for companies considering the case for investing in Scotland.

12. In particular, they have set out that share Pledges are a standard feature of banking arrangements within Scotland, routinely required by lenders, and that it would not be appropriate for tax legislation to "break" such standard practices. Stakeholders have also noted that the UK Government has accepted this and put relevant provisions in place across UK taxes (including Stamp Duty, Income Tax, Corporation Tax and Capital Gains Tax (SI 2013/234 art 7 wef 1 March 2013)).

13. Specifically for SDLT, legislative changes introduced in 2013 extended the availability of group relief to transactions between a parent company and subsidiary, where the parent company has granted security to a lender over shares in the subsidiary. Prior to this, the Scottish Government understands that HMRC had been operating an extra statutory concession (ESC) to allow for this, meaning that the relief would have been available in Scotland prior to the introduction of LBTT.

14. Having given this matter detailed consideration; the Scottish Government's intention is to address these concerns through legislative change. This recognises the original policy intention that LBTT group relief arrangements should operate in a similar way to SDLT and reflects the Scottish Government's commitment to ensure Scotland remains an attractive place to invest and do business. In addition, we are clear that making this change will not affect the stringent anti-avoidance provisions in place to discourage abuse of the relief.

15. The proposed change will make clear that land transactions can occur between corporate group members without incurring a charge to LBTT, regardless of whether a share pledge or analogous arrangement is in place. It will also ensure parity in tax treatment for LBTT with other types of corporate transactions in which there is a change in the legal form, rather than the substance, of ownership for example Acquisitions Relief available under schedule 11 of the Act.

CHAPTER 2: PROPOSED STATUTORY INSTRUMENT

16. A draft statutory instrument to give effect to the proposed change is set out for consideration at **Annex A**.

17. The draft instrument is intended to provide that group relief will be available if shares in a relevant subsidiary company are mortgaged by a legal or equitable charge, so long as the contingency allowing the mortgage to be called up does not arise. In addition, it is intended to give the same relief in the case of an arrangement in Scotland analogous to a pledge but with rights in shares or securities transferred to a creditor, subject to the creditor's obligation to retransfer the rights back to the debtor if certain conditions are met.

Question 1: 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? If not, please provide comment, providing any relevant suggestions for legislative amendment.

18. In addition to the General Anti-Avoidance Rule, Schedule 10 of the Act provides for a specific targeted anti avoidance rule. It is important to ensure that any amendment to the legislative arrangements for LBTT do not inadvertently introduce new opportunities to avoid tax or reduce the practical effectiveness of existing targeted arrangements.

Question 2: 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?

Question 3: Do you have any other comments, not covered by the previous questions, on the draft legislation in Annex A?

CHAPTER 3: TIMING

19. This consultation will run for an abbreviated period of 4 weeks from **19 March 2018** to **13 April 2018**, during which time the Scottish Government will engage actively with relevant stakeholders.

20. Following analysis of the consultation responses, the Scottish Government intends to lay a revised SSI for scrutiny by the Scottish Parliament.

CHAPTER 4: EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

21. The Scottish Government assessed the potential impacts of the Act on equal opportunities. These regulations, which stem from the powers in the Act, do not discriminate with respect to any of the protected characteristics (including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) either directly or indirectly.

Human rights

22. The legislation in Annex A does not infringe on or affect any subject areas of the European Convention on Human Rights (ECHR). These regulations have identified no differential impact on human rights or any impact on any individual's civil liberties.

Business Impacts

23. The legislation in Annex A will have no negative impact on Scottish businesses.

Privacy impacts

24. The legislation in Annex A will be subject to other legislation that prohibits, restricts access or relates to the disclosure of that information, for example the Data Protection Act 1998 or the Revenue Scotland and Tax Powers Act 2014. As a result, there are no privacy impacts resulting from this legislation.

Island communities

25. The legislation in Annex A has no identified differential impact on island and rural communities.

Local government

26. There are no additional responsibilities or costs to local authorities of this legislation.

Sustainable development

27. These regulations will have no impact on sustainable development.

<p>Question 4: 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?</p>

CHAPTER 5: RESPONDING TO THIS CONSULTATION

We are inviting responses to this consultation by 13 April 2018.

Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You view and respond to this consultation online at <https://consult.gov.scot/fiscal-responsibility/group-relief>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **13 April 2018**.

If you are unable to respond online, please complete the Respondent Information Form (see "Handling your Response" below) to:

LBTT Group Relief Consultation
Fiscal Responsibility Division
Scottish Government
3D North
Victoria Quay
Edinburgh
EH6 6QQ

Handling your response

If you respond using Citizen Space (<http://consult.scotland.gov.uk/>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form attached included in this document. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to lbtt.gr@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>)

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



A consultation on an amendment to Land and Buildings Transaction Tax Group Relief

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response. Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
 No

LIST OF CONSULTATION QUESTIONS

Question 1: 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? If not, please provide comment, providing any relevant suggestions for legislative amendment.

Question 2: 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?

Question 3: Do you have any other comments, not covered by the previous questions, on the draft legislation in Annex A?

Question 4: 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?

SCOTTISH STATUTORY INSTRUMENTS

2018 No.

LAND AND BUILDINGS TRANSACTION TAX**The Land and Buildings Transaction Tax (Group Relief Amendment)
(Scotland) Regulations 2018***Made* - - - - 2018*Coming into force* - - 2018

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 27(3)(b) of the Land and Buildings Transaction Tax (Scotland) Act 2013⁽¹⁾ and all other powers enabling them to do so.

In accordance with section 68(2)(c) of that Act, a draft of this instrument has been laid before, and approved by resolution of, the Scottish Parliament.

PART 1

General

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Land and Buildings Transaction Tax (Group Relief Amendment) (Scotland) Regulations 2018 and comes into force on [] 2018.

(2) In this Order “the Act” means the Land and Buildings Transaction Tax (Scotland) Act 2013.

PART 2

Group relief amendment

Amendment of the Act

2. Schedule 10 of the Act (group relief) is amended in terms of regulation 3

Amendment of schedule 10 the Act

3. In schedule 10 of the Act (group relief), after paragraph 3 (restrictions of availability of relief), insert—

“3A.— Certain mortgage arrangements not within paragraph 3

(1) Arrangements entered into by a company which, apart from this paragraph, would be arrangements to which paragraph 3 applies are not to be treated as such arrangements if—

(1) 2013 asp. 11.

(a) the arrangements are—

(i) in England and Wales, and Northern Ireland, a mortgage secured by way of shares or securities in the company, which on default or the happening of any other event allows the mortgagee to exercise its rights against the mortgagor; or

(ii) in Scotland any arrangement that is analogous to a pledge but with rights (not rights in security) in shares or securities transferred to a mortgagee subject to the mortgagee's obligation to retransfer the rights back to the mortgagor if certain conditions are met but which on default or the happening of any other event relieves the mortgagee of the obligation to retransfer the rights back to the mortgagor.

(b) the mortgagee—

(i) in England and Wales, and Northern Ireland, has not exercised its rights against the mortgagor or been in a position to exercise those rights against the mortgagor; or

(ii) in Scotland, subsequently has retransferred back rights in shares or securities to the mortgagor on certain conditions having been met but without the mortgagor's right to have the rights retransferred back having been lost at any stage.

(2) This paragraph does not apply if the mortgagee—

(a) possesses greater rights in respect of the shares or securities which are the subject of the mortgage than it requires to protect its interest as mortgagee, or

(b) could alone or together with connected persons dictate the terms or timing of the default or the happening of any event which allows it to exercise its rights against the mortgagor.

(3) For the purposes of sub-paragraph (2)(b) a mortgagee is not, by reason only of the mortgage, connected with a company whose shares or securities are the subject of the mortgage.

(4) In this paragraph—

“connected” has the same meaning as in section 1122 of the Corporation Tax Act 2010;

“mortgage” means—

(a) in England and Wales, and Northern Ireland, any legal or equitable charge, and

(b) in Scotland, any arrangement that is analogous to a pledge but with rights (not rights in security) in incorporeal moveables transferred to a creditor subject to the creditor's obligation to retransfer the rights back to the debtor if certain conditions are met.”;

“mortgagor” in Scotland means the debtor in respect of a mortgage; and

“mortgagee” in Scotland means the creditor in respect of a mortgage.

A member of the Scottish Government

St Andrew's House,
Edinburgh

2018

EXPLANATORY NOTE
(This note is not part of the Order)

These regulations amend the Land and Buildings Transaction Tax (Scotland) Act 2013 (“the Act”) to amend schedule 10 of the Act which provides for group relief. In terms of paragraph 3 of that schedule relief is not available if at the effective date there are in place arrangements by virtue of which a person or persons get control of or could obtain control of the buyer but not the seller. In terms of the amendment group relief is available if shares in the company are mortgaged by a legal or equitable charge provided the contingency allowing the mortgage to be called up does not arise. The amendment also gives the same relief in the case an arrangement in Scotland analogous to a pledge but with rights (not rights in security) in shares or securities transferred to a creditor subject to the creditor’s obligation to retransfer the rights back to the debtor if certain conditions are met, provided the rights are retransferred to the debtor without the debtor’s right to have the rights retransferred back having been lost at any stage.



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