



Law Society  
of Scotland

# Consultation Response

## Comments on Proposed LBTT Bill

October 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Tax Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Government's request for comments on the proposal for a Land and Buildings Transaction Tax (LBTT) Bill. The Sub-committee has the following comments to put forward for consideration.

## General Comments

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We welcome the proposal to give retrospective effect to the Land and Buildings Transaction Tax (Additional Amount -Second Homes Main Residence Relief) (Scotland) Order 2017 (the ADS SI) issued earlier in the year. The ADS SI addresses one of the most common "unintended consequences" of the ADS legislation.

We believe the scope of the LBTT Bill 2017 should be extended so that it includes a number of other LBTT issues which need urgent attention. Otherwise, the LBTT Bill risks missing the opportunity to deal with changes to LBTT which are urgently required.

We understand that the scope of the LBTT Bill needs to be set out clearly in the accompanying documentation, and the scope cannot therefore be changed once the Bill has been introduced to the Parliament. We would therefore urge the Scottish Government to give urgent consideration to extending the scope of the Bill.

The provisions which we believe need to be included as a matter of great urgency in the LBTT Bill 2017 involve amendments to allow LBTT group relief to be granted where share pledges are in place. In addition we would like to see amendments to remove the LBTT charge on the in specie transfer of properties between pension funds, as set out in parts 1 and 2 below.

We therefore call upon the Scottish Government to extend the scope of the Bill to include these issues.

If that is not achievable in the Bill which is about to be introduced to the Scottish Parliament, we call upon the Scottish Government to:-

- issue a statement indicating that legislation will be introduced to give effect to the necessary changes, so that taxpayers can proceed with transactions that are currently stalled;
- make the necessary changes by Statutory Instrument (though it is appreciated that this could not have retrospective effect);
- bring forward legislation as soon as possible to address with these issues with retrospective effect.

In addition, we consider that some additional ADS changes as set out in part 3 below would further improve the Bill.

We also believe it is important to introduce a Seeding relief for Property Authorised Investment Funds (PAIFs) and Co-ownership Authorised Contractual Schemes (CASCs) as is the case in the UK to ensure that transactions in Scotland are not disadvantaged.

## Group Relief and Share Pledges

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Revenue Scotland have recently issued a formal opinion to a taxpayer which indicates that LBTT group relief is not available on the transfer of property from a parent company to its subsidiary or between fellow subsidiary companies where there is a share pledge in place over the shares in the transferee company.

This means that LBTT is payable on the market value of the property transferred. This is a matter of very great concern to many companies not only in the property sector but also in other all other sectors with property in Scotland. We understand that it is also acting as a disincentive to investment in Scotland.

It would appear that this issue has arisen because specific wording to make it clear that share pledges do not affect group relief, which was introduced into the equivalent SDLT legislation at about the time that the LBTT legislation was being introduced into the Parliament, was not included in the LBTT group relief legislation, probably in error.

The policy intent of the Scottish government when LBTT was introduced was to include LBTT group relief to facilitate the movement of property between members of a group.

Share pledges are a very common form of security and are routinely required by lenders. The types of transactions involved are also routine, and include, for example:-

- a company being asked by a its bank to transfer some businesses/properties to subsidiary companies in order to reduce or compartmentalise risk
- a developer transferring property which is to be developed at a later stage from one company to another so that security can be granted by the first company over the remainder of the property

- a company deciding to amalgamate some business activities so that they are carried out through a single subsidiary.

An amendment to the LBTT legislation is required to ensure that LBTT group relief is available where there is a share pledge in place so that normal commercial transactions within groups of companies can be carried out without an LBTT charge, as is the case in the rest of the UK.

This change to the legislation needs to be retrospective, ie going back to the introduction of LBTT. This is because many transactions have been carried out since the introduction of LBTT where group relief has been claimed but according to Revenue Scotland's recent opinion is not due. The amendment therefore needs to be made by primary legislation.

We have previously provided a proposed draft amendment to the LBTT legislation which could be included in the LBTT Bill which is to be brought before the Parliament later this year, and a further copy of this is attached for ease.

We would be happy to assist the Scottish Government and Revenue Scotland in any way possible in relation to any such amendment.

If the Scottish Government is minded to make the necessary amendments in this area, and could issue a statement to that effect, that would allow taxpayers to proceed with a considerable number of transactions which have been brought to a halt because of the spectre of a significant LBTT charge on an intercompany transaction.

## In specie pension fund transfers

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Revenue Scotland have indicated that in their view a transfer of properties from one pension fund to another attracts an LBTT charge on the market value of the property transferred (see Revenue Scotland Technical Bulletin October 2016.<sup>1</sup> This is said to be because the assumption of liability to pay pensions to the pension scheme members is said to be the assumption of debt, which is consideration for LBTT purposes.

The approach of Revenue Scotland is different from that of HMRC in relation to similar drafting in the SDLT legislation. HMRC accept that there is no SDLT charge on in specie pension fund transfers.

Revenue Scotland appear to take the view that an LBTT charge arises not only on the transfer of land from one pension fund to another but also where there is a change of pension fund trustee. This could arise where an individual changes the provider of their SIPP.

<sup>1</sup> <https://www.revenue.scot/sites/default/files/LBTT%20Technical%20Update%20-%2016%20October%202016.pdf>

We are sure that it is not the Scottish Government's intention to levy LBTT charges on pension fund mergers or similar transactions, nor on the decision by an individual to change their SIPP provider. This simply reduces the funds available to provide pensions on retirement.

An amendment is therefore required to the LBTT legislation to ensure that no LBTT is payable in these circumstances. Again this legislation needs to be retrospective, going back to the introduction of LBTT. This is to address the many transactions which have already taken place where no LBTT was paid, but Revenue Scotland's view appears to be that LBTT is payable.

## **Additional Dwelling Supplement (ADS) issues**

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As mentioned above, the Society welcomes the ADS SI issued earlier in the year which it addresses one of the most common "unintended consequences" of the ADS legislation. We welcome the proposal to retrospectively amend the ADS legislation so that the new relief applies to transactions previously carried out.

We believe that the ADS SI does not deal with all of the issues, however. We are enclosing a list of additional issues which have been identified by our members which we believe should also be addressed through legislation.

## **Seeding relief for Property Authorised Investment Funds (PAIFs) and Co-ownership Authorised Contractual Schemes (CASCs)**

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The UK Government introduced a seeding relief for PAIFs and CASCs as well as specific rules to deal with the operation of CASCs in Finance Act 2016.

The aim of the relief was to remove a 4% entry charge on setting up PAIFs will mean investors have more opportunity to invest in real estate and diversify their portfolios over the long-term

There is no equivalent relief in LBTT. This means that there is not a level playing field between Scotland and the rest of the UK as a result of which some investment houses and pension funds have taken a decision not to invest in Scotland.

We urge the Scottish Government to consider this issue as soon as possible. We appreciate that introducing a relief of this nature is not straight forward, and consideration has to be given to ensuring that there are adequate anti-avoidance measures. We are also aware that there are some issues with the SDLT PAIFs and CASCs relief which should not be replicated in an LBTT relief. A formal consultation on a seeding relief for PAIFs and CASCs and appropriate LBTT rules for PAIFs would appear to be the best way forward.



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