



Law Society  
of Scotland

# Consultation Response

## The Land and Buildings Transaction Tax (Green Freeports Relief) (Scotland) Order 2023

16 August 2023



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Tax Law sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament's Finance and Public Administration Committee's call for evidence on The Land and Buildings Transaction Tax (Green Freeports Relief) (Scotland) Order 2023.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## Questions

**Q1: To what extent do you consider that the provisions in this secondary legislation are necessary and will support the government objectives as set out above?**

We generally welcome the provisions of The Land and Buildings Transaction Tax (Green Freeports Relief) (Scotland) Order 2023 (the “SSI”) and consider that the SSI provides a welcome framework for providing LBTT relief in respect of qualifying non-residential transactions for Green Freeports.

**Q2: Full and partial relief are to be available for eligible transactions within the period beginning on 1 October 2023 and ending on 30 September 2028. To what extent is this timeframe appropriate?**

Paragraphs 2(1)(b) and 3(1)(b) provide that for LBTT Green Freeports Relief to be available, the effective date of the transaction must be within the period beginning on 1 October 2023 and ending on 30 September 2028. We would suggest that the LBTT relief should be available not from a fixed date but rather from the date the special tax site is formally designated, which is when the other tax reliefs are available. Otherwise, the LBTT Green Freeports Relief could be available from a different date from the other tax reliefs, which would be very confusing for taxpayers.

<sup>1</sup> [The Land and Buildings Transaction Tax \(Green Freeports Relief\) \(Scotland\) Order 2023 \(SSI 2023/Draft\) - Scottish Parliament - Citizen Space](#)

### **Q3: To what extent are the following parts of the schedule appropriate:**

- **the circumstances and conditions under which relief would be available;**
- **the key terms as defined in the schedule;**
- **the circumstances under which relief may be withdrawn;**
- **the provisions relating to cases involving alternative finance?**

Whilst we welcome and generally support the terms of the SSI, we have concerns in relation to the scope of the provisions on the use of land in a qualifying manner. In particular, we are concerned that, as currently drafted, the provisions could prejudice the availability of relief in the case of a developer who buys land which is to be developed by means of a forward funding structure. Such a deal structure is commonly used in commercial property development.

#### **Forward funding structures: background**

A forward funding structure would typically involve the following steps:

- (1) a developer acquires the land;
- (2) the developer obtains planning permission and signs a pre-let agreement with a prospective tenant, under which the developer agrees to build on the land and to grant a lease to the tenant once the building work is complete;
- (3) before development itself occurs, the developer sells the land to an investor, and undertakes to that investor to procure the completion of the building work;
- (4) the investor, which is now the owner of the land, grants the developer a licence to occupy the land, to allow the developer to complete the development works (at the cost of the investor); and
- (5) once the building work is completed, the lease is granted (at the behest of the developer) by the investor to the tenant.

There are a number of reasons why this structure is commonly used in commercial property development. A developer will bear development risk (and, as the corollary to that, in due course hope to benefit from development profit) by undertaking the activities noted above; and, having pieced together a successful development project, the developer will then (by means of forward funding structure) sell the development to an investor (such as a pension fund) which cannot accept development risk but which looks to benefit from long term rental income from the completed development. Forward funding is also tax efficient from the perspective of the investor which is acquiring the project, as they only pay LBTT (or, in England, Stamp Duty Land Tax) on the price for the bare land at the time when it acquires the land before construction work is undertaken, as opposed to the full developed value of the land with the benefit of a lease having been granted. More detail on this is contained in the worked examples below. This tax treatment has been confirmed by the courts and is accepted by both Revenue Scotland and HMRC.

### **Interaction with the provisions of the SSI**

We would draw attention to the requirement noted at paragraph 7(2)(d) of the new Schedule 16D (as inserted by the SSI), and to the clawback provisions included at paragraph 8 of Schedule 16D. Paragraph 7(2)(d) of the SSI states that land is not used in a qualifying manner to the extent that it is held (as stock of the business) for resale without development or redevelopment. Paragraph 8(1) states that the relief is withdrawn if, at any time during the control period, the land is not used exclusively in a qualifying manner.

It therefore appears there is a risk that, in the case of development by means of a forward funding structure, relief will not be available for the land purchase by the developer, because it intends to employ a forward funding structure and is therefore taken to be holding the land for resale *without development*. In addition, there could be a risk of clawback if the developer initially qualified for the LBTT relief because it intended to (physically) develop the land and sell the completed building, but then decided to proceed by way of a forward funding and sold the land to an investor before development commenced. This is because clawback could be triggered at the point when the developer sells the bare land to the investor, because at that point it is reselling the land without “development” (even though there will be contracts in place for the land development to occur subsequently).

It is our view that a developer who sells land after obtaining planning permission, finding a tenant for the completed development, entering into pre-let agreements with the tenant, and carrying out other work to promote the development is actually *developing* the land and so paragraph 7(2) should not apply.

We would suggest that the provisions should make it clear that these circumstances will still be treated as use of the land in a qualifying manner and will not fall within the carve-outs in paragraph 7(2). Likewise, we suggest that the drafting needs to make clear that where the purchase of land had initially qualified, the sale of the land to the investor in a forward funding structure will not trigger clawback.

Whilst our preference would be for the drafting of the SSI to reflect these points, we would also suggest that explicit guidance on the interpretation and scope of the term “develop” in the SSI is necessary. In particular, for such guidance to confirm that the nature of the development works carried out by the developer under the funding structure (whilst they have title to the land) – including undertaking site investigations, obtaining planning permission, procuring tenants, signing agreements for lease, and tendering for construction works – constitutes “development” and makes it eligible for relief, even though actual construction works on the land have not yet commenced. This approach would be consistent with, for example, the UK rules on what constitutes residential property development activities for the purposes of the Residential Property Developer Tax (Finance Act 2022 s.35) – as well as construction work, development is also taken to include such activities as design, seeking planning permission, marketing, managing, and any activities ancillary to any of those activities.

Without these points being clear, this will inhibit significant development projects on the green freeport tax site. Relatedly, there is a clear concern, given that such development/funding models are commonplace in commercial property development, that to exclude the developer

from being eligible for LBTT Green Freeports Relief would undermine the policy aim of promoting long-term investment in underdeveloped tax sites with economic potential and detracts significantly from the policy intention of providing relief from LBTT for development-related activity.

### **Worked Examples**

We have included below two worked examples as illustration of the points above.

#### **Scenario 1:**

A developer acquires land on a Green Freeport tax site for £2,000,000 plus VAT. The developer transfers the land to the investor for same price, before physical development works commence. The development costs following transfer of land to investor are £15,000,000.

A 15 year lease is agreed on the completed building with a rental value of £100,000 per annum plus VAT (where the tenant is using the property in the course of a commercial trade or profession).

With the benefit of green freeport relief being **available** for the forward funding aspects:

1. Purchase of land by developer – LBTT relief would be available.
2. Purchase of land by investor – LBTT relief would be available.
3. Development costs – these are outside the scope of LBTT.
4. Lease – LBTT relief would be available.

If green freeport relief is **not available** on the forward funding aspects, there is an LBTT cost to the developer of £108,500, either because: (a) the purchase of land by the developer will attract LBTT of £108,500 upon the purchase of the land, or (b) if Green Freeport relief was available on purchase of land by the developer, on the sale of the land to the investor, a clawback of LBTT of £108,500 would arise.

#### **Scenario 2:**

Assuming the same fact pattern as scenario one, but £1,000,000 of development cost has been undertaken on/in relation to the land before the land is transferred to the investor, and this amount is being reimbursed by the investor to the developer at the time of transfer of the land to the investor. This is a not uncommon scenario. The chargeable consideration for the purchase of the land by the investor is therefore now £3,000,000 plus VAT.

If green freeport relief is **not available** on the forward funding aspects – the analysis remains as above, with the developer continuing to be charged LBTT of £108,500 on their purchase price of £2,000,000 plus VAT.

### **Q4: What, if any, impacts (such as on equalities or the environment) could arise from the operation of this secondary legislation?**

We have no comments to make.

**Q5: Have you any other comments related to this secondary legislation?**

We would stress the need for the SSI to be accompanied by clear guidance and examples to assist taxpayers and their professional advisers. In particular, a sufficient lead-in period will be required to ensure that taxpayers are aware of the qualifying conditions in advance of the introduction of the relief.

**For further information, please contact:**

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