



Law Society  
of Scotland

# Consultation Response

## An amendment to Land and Buildings Transaction Tax Group Relief

April 2018



## 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.

Our Tax Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation on an amendment to Land and Buildings Transaction Tax (LBTT) Group Relief.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## Consultation questions

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### **Question 1: Do you agree that the draft instrument will achieve an outcome consistent with the equivalent group relief arrangements available under SDLT?**

No. Although we welcome the intent of the draft instrument, we have concerns over its effectiveness and elements of the drafting.

#### **Jurisdictions**

The draft instrument only addresses security arrangements under Scots law and under the law of England and Wales. We believe it should also cover security arrangements in relation to other jurisdictions. This would allow LBTT group relief to apply where there are security arrangements similar to a share pledge, whatever the residence of the company in question, the source of the borrowing, or the legislation which applies to the security arrangements.

#### **Types of security**

The draft instrument only appears to include arrangements 'analogous to a pledge'. This issue could be addressed by broadening the application to include share pledges, arrangements analogous to a pledge, and any right in security over shares. This would ensure that all relevant arrangements were captured, and

<sup>1</sup> Scottish Government, [A consultation on an amendment to Land and Buildings Transaction Tax Group Relief](#) (2018)

would be flexible enough to cope with changes in law and practice, for example the Scottish Law Commission's proposal for a new statutory pledge that could be applied to incorporeal moveable property.<sup>2</sup>

New paragraph 3A(1)(b)(i) of Schedule 10 appears to suggest that the carve-out will not apply if there have been circumstances in which a bank could have exercised its rights under the security arrangement but did not. We do not understand why group relief should be denied in these circumstances. In addition, it could be extremely difficult in practice to identify situations where this had happened. Banks do not always use all remedies available to them where there have been defaults, but will choose the most appropriate course of action in the circumstances.

Similarly, new paragraph 3A(1)(b)(i) of Schedule 10 appears to suggest that the carve-out will only apply if the bank has transferred the shares back to the borrower. This would suggest that the carve-out for share pledges will only be available once the share pledge has been removed, which would not in fact achieve the purpose of providing relief in situations where a share pledge or similar security is in place.

## **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?**

No. The types of transaction that this relief would apply to are normal business transactions and do not have a higher risk of tax avoidance. Share pledges form part of most security packages. This means that any company or group of companies which has external borrowings is likely to have granted share pledges. Granting share pledges is not the exception, it is the normal rule. The new measures will simply provide for relief in situations comparable to those permitted under the SDLT regime, and in line with the intention of the Scottish Government and the expectations of clients and advisors in Scottish transactions. The existing arrangements in place to counter tax avoidance will continue to adequately safeguard the system.

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

### **Terminology**

We do not think it is appropriate for the types of situations which are addressed by the draft instrument to be defined in terms of English law, in particular by using the term 'mortgage'. We believe that these

<sup>2</sup> Scottish Law Commission, *Report on Moveable Transactions, Volume 2: Security over Moveable Property*, SCOT LAW COM No 249 (December 2017)

amendments to the LBTT legislation should be drafted using Scots law definitions, particularly given the Scottish Government's clear objective of aligning the LBTT legislation with Scots law and practices.

## Retrospectivity

We very much welcome the introduction of the instrument to deal with future transactions and we are grateful that the Scottish Government has listened to the many representations that we and others have made in this regard.

We believe it is very important, however, for such changes to have effect from the introduction of LBTT. As the consultation paper points out, this cannot be achieved through secondary legislation, and primary legislation is needed to make the change apply to all transactions since the introduction of LBTT.

We are aware from our members that group relief has been claimed on a number of intergroup transfers in the time since LBTT was introduced. These were situations where share pledges had been granted. Share pledges are a common part of many security packages. In all of these cases taxpayers have claimed group relief as it was not initially appreciated that the LBTT legislation denied group relief in that situation.

If the LBTT legislation is only amended for transactions which take place after the SI comes into effect, what is the position of those taxpayers who carried out transactions before the amendment proposed by the draft instrument takes effect and who have claimed LBTT group relief?

This problem could affect a significant number of taxpayers who have claimed group relief since LBTT was introduced.

If the LBTT legislation is not changed retrospectively, taxpayers who have undertaken intergroup transfers of property and claimed group relief where there are share pledges in place will face tax charges, penalties and interest. The tax charges could be significant, as the value of property transferred intergroup can often be very significant. This does not seem a fair or appropriate way to treat taxpayers given the acknowledgment that when LBTT was introduced "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".<sup>3</sup>

It seems clear that the Scottish Government's policy intention is, and has been, that LBTT group relief should be available for intercompany transfers even where share pledges have been granted. The issue is the LBTT legislation which applies to transactions with an effective date between 1 April 2015 and the date the proposed instrument would take effect does not reflect the policy intention of the Scottish Government.

<sup>3</sup> Scottish Government, A consultation on an amendment to Land and Buildings Transaction Tax Group Relief, paragraph 10 (March 2018)

The obvious remedy therefore appears to be to amend the legislation with retrospective effect so that it reflects the policy intention of the Scottish Government and the expectations of taxpayers.

We fully understand and accept that the introduction of retrospective legislation has to be considered carefully. It is clearly important that taxpayers can organise their affairs based on the legislation in force at the time. Introducing retrospective tax legislation that would disadvantage taxpayers can generally only be justified where it is being introduced to counter tax avoidance.

The position is quite different where tax legislation with retrospective effect actually benefits taxpayers. Retrospective tax legislation of this kind is not uncommon. Tax legislation is often complex, and where unintended consequences of tax legislation are identified, a common approach by governments is to introduce revised provisions which are deemed always to have effect.

We believe this is the situation here. If the LBTT legislation is amended with retrospective effect, this will only benefit taxpayers. There are no taxpayers who would be disadvantaged by a retrospective change to the LBTT group relief provisions so as to allow LBTT group relief to be claimed where a company has granted a share pledge to a bank, or entered into equivalent security arrangements.

The Scottish Government has already made retrospective changes to the LBTT legislation. A new relief from the Additional Dwelling Supplement (ADS) for couples replacing their main residence where the previous main residence was only owned by one of them was introduced by statutory instrument last year.<sup>4</sup> The Scottish Government has now introduced primary legislation to give retrospective effect to the relief so that it is available from 1 April 2016 when the ADS was brought in.<sup>5</sup> The LBTT Bill to give retrospective effect to the ADS relief is currently going through the Scottish Parliament. The Scottish Government rightly appreciated that not giving retrospective effect to the change would be unfair to those taxpayers who had purchased houses before the legislative change was made by the statutory instrument. This is a good example of the use of retrospective legislation where it benefits the taxpayer.

If the LBTT legislation is not amended retrospectively through primary legislation, this will in fact amount to unfair treatment of those taxpayers who have transferred Scottish property intergroup since the introduction of LBTT, on the understanding that relief would be available in similar terms to that provided for under SDLT. We would therefore urge the Scottish Government to commit to introducing primary legislation to give retrospective effect to the changes proposed in the draft instrument.

We fully understand and appreciate that there are many demands on parliamentary time, and that it may take some time before such retrospective legislation would be able to be introduced. If the Scottish Government could confirm that it is committed to introducing retrospective legislation to correct the

<sup>4</sup> The Land and Buildings Transaction Tax (Additional Amount -Second Homes Main Residence Relief) (Scotland) Order 2017

<sup>5</sup> Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill 2018



problem, however, those taxpayers who have already carried out transactions would no longer face the threat of a claim for unpaid LBTT, interest and penalties.

**Question 4: Do you think that the legislation will, in any way, impact upon equal opportunities, human rights, businesses, island communities, privacy and/or sustainable development in Scotland?**

We have no comments on this question.



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