



Law Society
of Scotland

Consultation response

The Land and Buildings Transaction Tax - Additional Dwelling Supplement: A call for evidence and views

March 2022



Introduction

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 respond to the Scottish Government's consultation on *The Land and Buildings Transaction Tax - Additional Dwelling Supplement: A call for evidence and views*¹. We have the following comments for consideration.

General comments

We welcome this consultation on Land and Buildings Transaction Tax (LBTT) Additional Dwelling Supplement (ADS). We have previously highlighted that there are a number of issues which have arisen with the application and implementation of the ADS which would benefit from resolution or clarification. A number of aspects of the existing legislation are unclear. It is important that the law is clear so that individuals can guide their conduct accordingly. We therefore encourage Scottish Government to use this opportunity to undertake a wide and detailed review of the operation of the ADS in Scotland with a view to improving the law.

In this context, the policy statements made at the time when the ADS was introduced refer to it as primarily affecting second homes and buy-to-let properties². While of course the ADS does affect such transactions, it also affects numbers of buyers of their first main residence where, for a number of reasons, such buyers may own, or be deemed to own, another dwelling. In addition, we consider that unfairness arises where one party of a couple who have separated comes to buy a new main residence but retains an interest in a dwelling where they may not have resided for some while (see further below).

Tax law is a fast-moving area of the law and changes are frequently needed to resolve unintended consequences or respond to tax and non-tax changes which impact Scotland and Scottish taxpayers. Limited changes have been made to the ADS since its introduction, for example by The Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018. We do not consider that the use of single-issue primary legislation is an efficient way of dealing with the changes that are required to maintain taxes, nor do we consider that the 2018 Act goes far enough to resolve the issues we identify with the ADS. We are therefore hopeful that this consultation will not be a one-off opportunity to amend the law concerning

¹ <https://consult.gov.scot/taxation-and-fiscal-sustainability/additional-dwelling-supplement/>

² For example, see Land and Buildings Transaction Tax (Amendment) (Scotland) Bill Policy Memorandum paragraphs 4 - 5 and Scotland's Spending Plans and Draft Budget 2016-17, pages 17 – 18.

the ADS as this will merit continual review over time. We welcomed the earlier work of the Devolved Taxes Legislation Working Group³ and look forward to seeing this Group re-established.

The law relating to the ADS is complex and nuanced, to a much greater extent than in relation to LBTT itself and its predecessors. In terms of the involvement of our membership, it is a tax which is mainly assessed by conveyancing solicitors on behalf of their clients, or indeed assessed by taxpayers themselves. The complexities surrounding the applicability of the ADS are such that we anticipate that there may be a small number of examples where the ADS has not, at least arguably, been correctly assessed and where specialist advice might have produced different results. We support steps being taken to simplify both the legislation and guidance in order to make it easier for taxpayers and their advisers to assess liability for the ADS – especially where as many as 20 - 25% of transactions are affected by the ADS.

While anecdotal, a number of our members are noting increasing prevalence of instances of the ADS pricing potential purchasers out of the property market as a result of the amount of anticipated tax due. This is particularly prevalent in areas with high property demand and prices, such as Edinburgh.

Consultation response

A. Timelines for the ADS

A1. Time taken to purchase a new main residence: 18-month window

1. Should the Scottish Government considering amending the length of time available to purchase a new main residence following the sale of a previous main residence from 18 months?

Yes.

2. If so, can you provide further explanation and/or evidence regarding the circumstances in which 18 months may not be appropriate?

We consider that there are a number of reasons to support an extension to the length of time available to purchase a new main residence.

The 18-month period differs from that under SDLT in England and LTT in Wales, with both of these taxes providing for a 36-month period for purchase. Our members have reported repeated instances of confusion for taxpayers due to the differing period in LBTT than under SDLT and LTT. The differing period for purchase of a new main residence creates an uneven playing field with England and Wales and although anecdotal, our members report multiple examples of this having the effect of discouraging purchasers from buying property in

³ <https://www.lawscot.org.uk/media/368638/20-03-27-tax-devolved-tax-working-group-interim-report.pdf>

Scotland, thereby in turn, suppressing the Scottish property market. We are not aware of such a significant difference in the property markets between Scotland and England & Wales that would be such as to justify a difference in the tax impacts.

In addition, there are a number of situations where it can take longer to purchase a property than 18 months:

Buoyant or suppressed property markets will have different impacts on the ability to purchase. The state of the property market is likely to be fairly temporary when compared to the operation of the tax system. We therefore consider that the tax system should operate in such a way that it can remain largely constant without unduly adverse impacts regardless of the buoyancy of the market.

The market is variable across the country at present, for example, with a shortage of properties in rural areas, significant competition for larger properties in Edinburgh and the Lothians, a decline in interest for flats, and a widespread downturn in the property market in other areas. 18 months is frequently too short a period for purchasers to find and successfully buy a suitable new property. In relation to new-build properties, it is common for there to be delays in building which may impact potential purchasers' ability to purchase a property within 18 months. The impacts of EU exit and Covid-19 have caused particular delays in the new-build sector.

It is common for property transactions to involve a series of participants (i.e. a chain of sellers and purchasers) which can cause delays, particularly due to delays or difficulties with finance. Our members report particular delays during the Covid-19 pandemic in obtaining funding. There can be particularly 'hard cases' which come about as a result of a chain which falls apart or is delayed, particularly when a relevant purchaser is running close to the end of the 18-month ADS period. In addition to an extension of this period, we also favour an exceptional circumstances provision as noted in our comments below.

Delays in obtaining confirmation following a death can cause delays in purchases where a sale cannot conclude until confirmation is obtained. There have been particular delays experienced during the pandemic due to the initial closure of Sheriff Courts in spring 2020 and subsequent impacts of backlogs and staff absences in managing business.

Other circumstances in which there may be particular difficulties in purchasing a new main residence within 18 months are:

- 1) for armed forces personnel or similar situations where it is some time before the individual knows where they are going to be based,
- 2) in the case of separating couples, where one party moves out but retains part ownership of the family home and does not have sufficient capital to purchase another property until the family home is sold or is required to hold a share in the family home for an extended period, and later buys a new main residence.

3. If the Scottish Government were to amend the length of time available to purchase a new main residence, what period of time should be considered and why?

We suggest that a period of 36 months should be considered for the reasons set out in our answer to Q2. A move to a 36-month period would bring LBTT into line with SDLT and LTT.

A2. Disposal of a previous main residence: 18-month window

4. Should the Scottish Government consider amending the length of time in which a previous main residence can be sold in order for a repayment of the ADS to be claimed?

Yes.

5. If so, can you provide further explanation and/or evidence where 18 months may not be appropriate?

The points narrated in our answer to Q2 are also relevant here. See our comments below also, particularly with regard to separating couples.

We are aware of circumstances where individuals downsizing or moving into retirement properties have had difficulties in selling their previous main residence due to a downturn in the property market in certain areas of the country.

In addition, we are aware that issues surrounding cladded properties are causing significant problems for individuals seeking to sell.

We consider an extended period as well as an exceptional circumstances provision would be an appropriate solution given the range of circumstances which are adversely impacted by an 18-month window.

6. If the Scottish Government were to amend the length of time available to dispose of the ownership of a main residence, what period of periods of time should be considered and why?

We suggest that a period of 36 months should be considered for the reasons set out in our answer to Q5. A move to a 36-month period would bring LBTT into line with SDLT and LTT.

B. Specific Scenarios

B1. Inherited Property

7. What circumstances and issues should the Scottish Government take into account in considering the treatment of low value interests in inherited properties for the purposes of LBTT?

We consider that the issues in connection with the ADS are as narrated in the consultation document. There can be particular difficulties where a beneficiary is purchasing their own property and inherits a share in property after the missives for the purchase of their own property have been signed.

We note that the question itself refers to LBTT rather than specifically to the ADS. For the avoidance of doubt, we remain firmly of the view that transfer of inherited property should remain an exempt transaction under Schedule 1 of the Land and Buildings Transaction Tax (Scotland) Act 2013.

It is not clear from the legislation at what point an inherited dwelling should be treated as being owned by the beneficiary. The legislation should be amended to make it clear from what point an inherited dwelling is treated as owned by the beneficiary.

8. Should the Scottish Government consider the introduction of a grace period along the lines of that in place for SDLT in respect of inherited property? If so, what arrangements should be considered?

We are supportive of the introduction of a grace period, however, suggest that this should be on a wider basis than that in place for SDLT. We suggest that a 3-year grace period be introduced with no restriction on the value or proportion of the share inherited. This would cover a wider range of circumstances than a grace period limited by share.

However, unfairness most obviously arises where the purchaser in a transaction has inherited only a small share of a dwelling. That could be cured, as could a number of other anomalies, if the £40,000 threshold for an "ownership interest" in a dwelling (Schedule 2A, paragraph 11(4)) was applied to an individual's actual share, rather than to the value of a dwelling as a whole.

As referred to above, there is some confusion over when an inherited dwelling is deemed to be owned by a beneficiary. Revenue Scotland guidance (para 10066) provides:-

"An inherited dwelling is to be counted as being owned by a beneficiary from the earlier of:

- (a) the date that the period of administration of the estate ends – generally, this is the date the residue of the estate has been ascertained, rather than when the executor has carried out all work in relation to the estate; and

(b) the date that the dwelling is transferred to the beneficiary – that is the date the executor grants a disposition or a docket transfer in favour of the beneficiary (whether or not registration of title is at a later date)."

While the second alternative seems accurate (with the substitution of "delivery" for the "grant" of the relevant document), we consider the first is vague and confusing. In no sense does a beneficiary become an "owner" of a property within the deceased's estate at the point when residue is ascertained – the beneficiaries would still at that point have to agree to any transfer to them; and more specifically the ascertainment of residue does not affect the ownership of any particular property, whether that property is within the residue or not.

Certainty could be achieved by a disregard of any property inherited on a death within a specified period before the completion of the transaction under consideration. We consider that 36 months would be a reasonable period for such disregard.

B2. Divorce or Separation

9. What circumstances and issues should the Scottish Government take into account in considering the tax treatment of a new property purchased following a divorce or separation, and why?

Where couples own a family property in joint names, the joint ownership rules continue to apply after divorce or separation. The joint ownership rules mean that each owner is treated as owning the whole of the house (see above for comment on the £40,000 ownership interest threshold).

This can cause particular difficulties in circumstances where:

- One party moves out of the jointly owned family home into rented accommodation and then seeks to purchase their own property prior to the sale of the jointly owned family home, or
- One party moves out of the jointly owned family home and moves in with another party.

In addition, in circumstances where a property is owned wholly by party A and they move out, leaving party B to reside in the property, any property which party A buys will result in paying the ADS despite the fact that party A is effectively and in practice replacing their main residence in such a purchase; however, any property that party B buys will not be caught by the ADS.

The rules on replacement of a main residence can be particularly challenging for couples who separate. The time periods which are demanded for buyers to replace their main residence do not reflect the realities of many separations; and this is relevant for the periods both before and after one of a separating couple purchase a new dwelling.

Thus, it is very common for the purchaser of a dwelling not to have resided in their previous main residence (with their partner) within the 18 months preceding their new purchase; and/or not to be able to dispose of their ownership interest in their previous main residence within the 18 months following their new purchase. Resolving property matters following separation can take a long time and separating couples understandably

have other priorities at what can be a very stressful time. Maintaining the ownership *status quo* following separation is often the chosen option for both the parties and any children of the relationship, even if the physical living circumstances of the separating couple have changed considerably.

The impacts of these circumstances may be considered particularly challenging in cases of domestic abuse where one party is seeking to remove themselves from the former matrimonial home and start afresh, or in the common situation where separating parties agree to retain title to a former matrimonial home in joint names until their children have grown up, particularly where one party is not in a financial position to buy-out the share of the other. Indeed, lenders will often insist on both parties retaining ownership and/or responsibility for the debt even where one party no longer resides in the property.

Tax legislation is generally framed so as not to treat divorcing and separating couples unfairly. There is a particular prejudice in circumstances where parties have taken title to the former matrimonial home in joint names. We consider that the ADS should be amended so that divorcing and separating couples are no longer treated as owning the former matrimonial home.

As ADS legislation puts cohabiting couples in the same position as their married or civil partnered contemporaries for many purposes, the same changes should apply where cohabiting couples separate.

10. Do you have views on the case for a more specific legislative amendment along the lines of that available in SDLT? If so, please provide further details.

We do not consider that this resolves the issues in relation to divorced or separated couples fully as the SDLT provision is very specific.

11. Separately, would increasing the length of time available to dispose of a main residence (see A2) assist in situations of divorce or separation?

We consider that this may assist in some cases, but it is unlikely to assist in all circumstances, particularly where parties agreed to keep the title to the main residence in joint names until children grow up or where parties continue to be married, albeit separated, for a number of years. Any such change will simply impose a new arbitrary time limit for circumstances where the policy intentions of ADS do not seem to require that it should be payable.

B3. Joint Buyers/Economic Unit Provisions

12. Are there other issues of concern regarding the treatment of joint buyers which the Scottish Government should consider? If so, can you provide further explanation and evidence regarding these?

The consultation document in this section deals primarily with situations arising from potential replacement of a main residence. However, the fundamental rule about joint buyers contained in paragraph 5 gives rise to considerable uncertainty and potential unfairness.

Ignoring the complexities and specialties of main residence replacement and deemed ownership by relatives, if an unrelated couple, not in a relationship, buy a property together and one of them only owns a small share of another dwelling (which has a total value above £40,000), then ADS is payable. But if the one who does not own the share in another dwelling purchases the new dwelling alone and then transfers it for no consideration to the other, then no ADS is payable. A partial solution to this, as suggested above, would be to apply the £40,000 threshold to the value of the interest in a dwelling, rather than to the dwelling as a whole.

We consider the other main issues are as narrated within the consultation document. There is a particular concern with the ADS provisions in this regard as the result is that there is a more favourable tax position for couples who live together before marrying or entering a civil partnership than those who do not. The anomalies and surprise to taxpayers that this position creates can now be seen in several Tribunal cases, where it is clear (and seemingly within the original policy of the legislation) that at least following the disposal of the second residence of a couple who had previously not lived together, recovery of ADS was anticipated.

The ultimate version of this can perhaps be seen in the recent case of *Ewan and Crawford v Revenue Scotland* [2022] FTSTC 3. This involved a couple who had each had their own residence before their joint purchase. One residence was disposed of on the day of their purchase and the other within the 18 months following. On that second disposal, repayment of ADS was claimed but refused, because only one of the joint buyers had gone on after the purchase to dispose of a main residence.

There are other examples of anomalies in the system, deriving directly from the need for couples to cohabit in at least one of previous main residences before purchase. This seems unfair and indeed couples before marriage may be prevented by their religion or culture from cohabiting before marriage. We consider that there is a risk of couples being prejudiced because of their beliefs, with consequent concerns in relation to human rights.

Revenue Scotland guidance on such transactions has been amended on various occasions, indicating the complexity and nuanced nature of the current legislation. It should not be; and an obvious, although incomplete, remedy to this aspect would be to remove any requirement for couples to cohabit prior to their relevant joint purchase.

13. Do you have any proposals as to how the legislation might be amended in response to these scenarios, in a way that would ensure consistency with the application of the ADS for an individual buyer?

We suggest that the legislation be amended to provide that a disposal may be of the main residence of either or both of the parties in order to allow the ADS to be reclaimed. At the very least, repayment of the ADS should be available in all circumstances where disposal of all previous main residences occupied by a couple occurs within the relevant period after the purchase transaction, as the current rules lead to anomalies entirely related to the timing of disposals, rather than the substantive fact of all apparently necessary disposals having taken place.

We consider that the SDLT provisions in this regard are clearer as they do not use the concept of cohabitees.

C. Transactions Involving Housing Providers

C1. Transactions involving Local Authorities – Affordable Housing

14. What circumstances and issues should the Scottish Government consider in assessing the case for a broader relief for local authorities where properties are acquired for affordable housing purposes, and why?

We are supportive of a relief for local authorities where properties are acquired in order to provide affordable homes. It is hard to see why the cost of affordable homes should be increased as a result of a local authority having to pay the ADS.

C2. Housing Co-operatives and other approaches

15. Are there grounds for the Scottish Government to consider the introduction of a relief from the ADS for housing co-operatives, or any other approaches intended to deliver housing which is affordable? Please provide further explanation and evidence regarding this.

Yes, we consider that there is merit in the introduction of a relief for housing co-operatives and other approaches intended to deliver affordable housing. It appears to be contrary to the underlying policy intention of the ADS to charge the additional amount on such provision.

D. Exceptional Circumstances

16. Is there a case for the Scottish Government to consider legislating for an exceptional circumstances provision along the lines discussed above?

Yes. An exceptional circumstances provision allows the tax system to respond to unexpected circumstances and we consider that there would be merit in this degree of flexibility in the tax.

17. If so, what circumstances should be considered, and on what grounds?

We consider that any such provision should be applied reasonably, and guidance produced setting out the kind of matters that could be covered. We suggest that such a provision apply in circumstances which are 'beyond the reasonable control of the taxpayer'. We do not consider that the provision should be limited to circumstances which are outwith the knowledge of the taxpayer because while a matter may be within knowledge, it may be outwith the taxpayer's control.

We note the recent judgement in the case of *Dr A Christie v Revenue Scotland* [2022] FTSTC 2 concerning a member of the armed forces. The taxpayer was unable to meet the requirements for a repayment of the ADS as the property in question had not been his main residence in the period of 18 months before purchase of the second property, as a result of a required posting abroad. We consider that an exceptional circumstances provision could accommodate such situations so as to ensure members of the armed forces are not disadvantaged by the ADS rules.

Another exceptional circumstance could arise where a contract for a purchase or more usually a sale has been concluded with an anticipated settlement date within any relevant time limit, but for unexpected reasons (and perhaps entirely because of new purchaser) the transaction does not settle at the time anticipated, leaving the taxpayer owning more than one dwelling at a time when they believed they had done all that they could not to be in that position.

Broader exceptional circumstances can be anticipated, such as disease or civil emergencies significantly impacting the market for residential properties.

Additional Questions

18. Is there any other issue regarding the operation of the ADS legislation which you would wish the Scottish Government to consider as part of the overall review? If so, please provide explanation and commentary on any available evidence about this.

We consider that the rules on replacing a main residence should be extended to cover the situation where the previous main residence was rented or otherwise not owned for whatever reason. This again fits with the policy of the legislation, in that the ADS should be aimed at the purchase of buy-to-let properties or second homes, not at situations where even the first purchase of a main residence can bring a charge to the ADS if

the purchaser owns or is deemed to own even a small share in another property. In effect, the legislation can be retrospective for such a purchaser, as ownership of the property other than the main residence may date from long before the introduction of the ADS. It can for well advised taxpayers lead to wholly unnecessary disposals of such interests before their purchase of a main residence.

Further clarification, although perhaps not by legislation, is required as to when bed and breakfast accommodation qualifies as a dwelling, in whole or in part. Such properties are particularly common in rural areas of Scotland; and the rules are not entirely clear on the purchase of such property itself; or the ownership of such property qualifying as a dwelling where another dwelling is being purchased.

Clarification is also required where potentially more than one dwelling is purchased in a single transaction. Where a main house with a 'granny flat' annex or basement flat is purchased, this counts (or can depending on the circumstances) as two dwellings and the ADS will be payable on both properties.

Even if replacement of main residence relief is available in relation to the main house, ADS will be payable on the "additional" dwelling. In relation to the Higher Rates of SDLT for Additional Dwellings (HRAD), a dependent property exemption has been introduced. The effect of that exemption is that if one of the dwellings is subsidiary to the other, it is not treated as a second dwelling for HRAD purposes. We suggest that a dependent property exemption should be introduced for LBTT so that the purchase of a small dwelling at the same time as a much larger one does not mean that the ADS is payable on both of the properties. It would be reasonable to tie such an exemption to multiple dwellings relief (MDR) – such that MDR was not available for the small dwelling where the exemption was relied upon.

We favour a change to the MDR rules. Currently, where a mixture of dwellings and non-residential property is being purchased, and the LBTT is calculated on the non-residential property. It is calculated as an apportionment of the total tax payable for the transaction - i.e., the LBTT and the ADS. This results in the ADS effectively being paid on the non-residential property and (because a claim for MDR does not reduce the overall ADS liability on residential property) causes the ADS to be payable at an effective rate of more than 4%. This could be easily resolved by tweaking the MDR rules so that the apportionment to non-residential property excludes any tax chargeable under schedule 2A.

We suggest that partnership property should be treated in the same way as that of a company or trust i.e. opaque for the purposes of the ADS. At present, under schedule 19 of the LBTT Act, partnerships are treated as tax transparent meaning that the partners are treated as owning any dwellings held in the partnership. This can and does lead to unintended consequences. For example, it is very common for farming families to own their farms – including workers' accommodation – via partnerships. This can and does result in family members, for example children who are granted a minor stake in the partnership, being subject to the ADS on the purchase of their first home as they are deemed to own the workers' accommodation.

Given the wide-reaching and complex nature of the tax, we note that there may be circumstances where arrangements exist that a buyer/taxpayer has no sight of and no potential to know about. This may affect taxpayers' and agents' ability to assess liability for the ADS.

We consider that there are other circumstances in which the current legislation is unclear:

- In circumstances where a previous main residence is destroyed, for example, by fire, does this need to be rebuilt before being sold, in order for the ADS to be reclaimed?
- In circumstances where a party intends to sell their previous main residence and dies before they do so, can the ADS be reclaimed?

19. Are there any other points you would wish to raise regarding the operation of the ADS in different parts of Scotland?

No.

20. The Scottish Government has a duty:

- **to eliminate discrimination, advance equality of opportunity and foster good relations between different people; and**
- **to have regard to the impact on island communities in carrying out its functions.**

21. Are there any issues relevant to the content of this consultation that you believe the Scottish Government should consider in order to assure performance of these duties?

See our comments at Q12. We have nothing further to add beyond our substantive comments above.

For further information, please contact:

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