



Law Society
of Scotland

Consultation Response

Land and Buildings Transaction Tax: Proposed Legislation for Green Freeports Relief

19 May 2023



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 consider and respond to the Scottish Government consultation *Land and Buildings Transaction Tax: Proposed Legislation for Green Freeports Relief*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

Overall, we welcome the Scottish Government's proposed legislative provisions for Land and Building Transaction Tax ("**LBTT**") relief in respect of Green Freeports and agree in principle with the proposals. However, as commented below there are several areas that, in our view, require amendment before the changes take effect.²

In particular, we would suggest as a priority that the current drafting requires changing to ensure that a purchase of property by a developer can benefit from LBTT Green Freeports Relief where the developer's intention is to fund the development of the property using a forward funding structure, which would involve the developer selling the property to an investor before development starts, and the investor then paying for the development of the building in stages as construction takes place.

More generally, we would stress that the legislative amendments will need 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 well in advance of the introduction of the relief.

We would welcome the opportunity to review and comment on any redrafted proposed legislation arising from this consultation, whether based on our comments or otherwise. If it would be helpful to discuss any of these points further, we would be pleased to do so.

¹ <https://consult.gov.scot/taxation-and-fiscal-sustainability/lbtt-proposed-relief-for-green-freeports/>

² We have no specific comments in addition to our general comments in respect of questions 3, 4, 7-29, and 32.

Qualifying Green Freeport Land

Questions

1. Do you agree that the provisions as drafted work as intended?

1.1. No. See our response to question 2.

2. If not, what amendments would you propose to the draft legislation and on what basis?

Effect of the wording “to the extent that”

- 2.1. We note that paragraph 6(1) of the new Schedule 16D of the Land Buildings Transaction Tax (Scotland) Act 2013 (as inserted by the draft SSI) provides that transaction land is qualifying green freeport land “to the extent that” on the effective date of the transaction it is situated in a green freeport tax site and the buyer intends it to be used exclusively in a qualifying manner.
- 2.2. As currently drafted, the inclusion of the words “to the extent that” may cause uncertainty as to the application of the relief in relation to land which is partially within and partially outside a green freeport tax site.
- 2.3. We understand that the policy intention is that land which situated outwith a green freeport tax site can only qualify for relief if it does so under paragraph 2 (i.e. where at least 90% of the chargeable consideration is attributable to qualifying green freeport land). We note that this would reflect the position under the SDLT Freeport guidance, which states in SDLTM 20250 that relief for land outside a tax site will only be available if the transaction meets the test for 100% relief (see SDLTM20280).
- 2.4. If the inclusion of the wording “to the extent that” is intended to qualify paragraph 6(1)(b) – i.e. that the buyer intends the land to be used exclusively in a qualifying manner – then it would be clearer for the wording to be moved from paragraph 6(1) to paragraph 6(1)(b).

Finance (No 2) Bill changes to introduce "special tax sites" in place of "freeport tax sites"

- 2.5. Clauses 330, 331, and Schedule 23 of the Finance (No. 2) Bill amend section 113 of the Finance Act 2021 to include investment zones as well as freeports, and to replace the term "freeport tax site" with "special tax site", which includes special tax sites within both freeports and investment zones.
- 2.6. If the Finance (No. 2) Bill is enacted as drafted, we understand that the references in paragraph 6(2) of the new Schedule 16D will require amendment as follows (or in a similar vein):-

- (2) In this schedule, “green freeport tax site” means an area in Scotland which is situated in a freeport and has been designated as a ~~freeport-special~~ tax site under section 113 of the Finance Act 2021 (designation of ~~freeport-special~~ tax sites).

- 2.7. 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 July 2023 and ending on 30 June 2028. We understand that the 1 July 2023 start date is

expected to be changed to 1 October 2023 to allow sufficient time for the precise location of the special tax sites within the Scottish Green Freeports to be agreed, and for the special tax sites to be designated under section 113 of the Finance Act 2021 (as amended). 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.

Qualifying manner

Questions

5. Do you agree that the provisions as drafted work as intended?

5.1. No.

6. If not, what amendments would you propose to the draft legislation and on what basis?

Impact on transactions using a forward funding structure

6.1. 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.

6.2. For context, 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.

6.3. In particular, we would draw attention to the requirement noted at paragraph 2.16(d) of the consultation paper (and included at paragraph 7(2)(d) of the new Schedule 16D), and to the clawback provisions referred to in paragraph 4 of the consultation paper (and included at paragraph 8 of new Schedule 16D). In the draft SSI, paragraph 7(2)(d) 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.

6.4. 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 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 development to occur subsequently).
- 6.5. 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) would not apply.
- 6.6. We would suggest that the provisions need to 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.
- 6.7. 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.
- 6.8. 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.
- 6.9. Further, we understand that similar concerns are being raised in relation to the equivalent tax treatment under the SDLT regime. While this point may not have been reflected in the equivalent SDLT freeports relief, we can anticipate that this will be a live issue, and (the issue having been identified within the context of the LBTT relief) the opportunity should be taken for it to be properly addressed.

Definition of Excluded Rents

- 6.10. We note that paragraph 5 of new Schedule 16D defines “excluded rents” by reference to classes 2 to 6 in the table in section 605(2) of the Corporation Tax Act 2010, which are as follows:-

<i>“Class 2</i>	<i>Rent in respect of an electric-line wayleave.</i>
<i>Class 3</i>	<i>Rent in respect of the siting of a pipeline for gas.</i>
<i>Class 4</i>	<i>Rent in respect of the siting of a pipeline for oil.</i>

- Class 5 Rent in respect of the siting of a mast or similar structure designed for use in a mobile telephone network or other system of electronic communication.*
- Class 6 Rent in respect of the siting of a wind turbine.”*

6.11. Our view is that it would be appropriate for the new Schedule 16D to specifically include the above wording, rather than a cross reference to the Corporation Tax Act 2010. The benefits of doing so would include greater control over the definition of “excluded rents” in the future, given that the Corporation Tax Act 2010 could be amended. Further, doing so may also improve the accessibility of the legislation, given that many practitioners dealing with LBTT Green Freeports Relief will not have ready access to other tax legislation.

Lease assignments outwith the relief period

Questions

30. Do you agree that the provisions as drafted work as intended to treat the assignment of a lease, against which relief has been claimed, as the grant of a lease?

- 30.1. Yes, however we consider that there is potential for confusion between the wording of the consultation paper and the effect of the legislative change.
- 30.2. We note that paragraph 4.19 of the consultation paper indicates that where a lease was subject to LBTT Green Freeports Relief when granted, the assignment of that lease after the date relief ceases to be available will be treated as the grant of a new lease.
- 30.3. The proposed amendment to Schedule 19, paragraph 27(3), of the Land Buildings Transaction Tax (Scotland) Act 2013 means that the assignment of a lease in relation to which LBTT Green Freeports Relief was available when granted would also be treated as the grant of a new lease if the assignment took place before the date relief ceases to be available, but where LBTT Green Freeports Relief is not available on the assignment – e.g. because the assignee did not intend to use the property for a qualifying purpose.
- 30.4. We understand that the legislative effect reflects the Scottish Government’s policy intention – i.e. that an assignment of a lease that was subject to LBTT Green Freeports Relief when granted will be treated as the grant of a new lease for the purposes of the Schedule 16D if it is assigned when relief is not available on the assignment – although we would recommend that the supporting guidance and literature makes this clear to avoid confusion with the possible interpretation of paragraph 4.19 of the consultation paper.

31. If not, what amendments would you propose to the draft legislation and on what basis?

- 31.1. Not applicable.

For further information, please contact:

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