Taking forward a Scottish Land and Buildings Transaction Tax

30 August 2012
Introduction

We are pleased to have this opportunity to respond to the Scottish Government’s consultation document entitled ‘Taking forward a Scottish Land and Buildings Transaction Tax’ published on 7 June 2012.

Our answers to your consultation questions are as follows:

**QUESTION 1 – TAX STRUCTURE:**

Do you agree with the Scottish Government’s view that the Land and Buildings Transaction Tax should be structured progressively?

Comments

We agree with the suggestion that the Land and Buildings Transaction Tax (LBTT) should be structured progressively.

The ‘slab’ structure of Stamp Duty Land Tax has encouraged inappropriate manipulation of prices at each threshold, with prices for land and buildings commonly depressed artificially and the balance of consideration attributed (sometimes to an unjustified extent) to furnishings etc. By contrast, a progressive structure should minimise such distortions.

If LBTT was charged at a single rate of 7.5% on transactions above £180,000, as suggested in Annex B of your consultation paper, the successive thresholds would be removed and purchasers would no longer have any incentive to mis-state the true consideration for land and buildings.

We note the differences between two alternative sets of progressive tax rates shown at Scenarios 1 and 2 in Appendix B. These are based on differing assumptions regarding the starting threshold and tax rates. The way the LBTT is seen by taxpayers is likely to depend largely on the number of perceived ‘winners’ and ‘losers’.

Raising the starting threshold to £180,000, as suggested, should help first time buyers and other purchasers of lower value properties, and thus promote greater activity in the Scottish housing market. On the other hand, there might be a risk that at higher price levels, where the charge to LBTT would be higher than the pre-existing charge to SDLT, this could have a further detrimental effect of the upper end of the Scottish housing market, where property sales are slow and mortgage deals are even slower. This might have an exaggerated impact in border towns, where the overall cost of buying a property in Scotland might seem unattractive compared with English properties nearby. In general, significant increases in tax on higher value properties could discourage wealthier and more mobile taxpayers from settling in Scotland from England and further afield. These are political issues on which it is not our role to comment further.

**QUESTION 2 – SUPPORTING SCOTTISH GOVERNMENT PRIORITIES:**

Do you think that the Land and Buildings Transaction Tax should be amended in future to support key Scottish Government priorities? If yes, what objectives should changes focus on and what would be the best way of doing this?

Comments

We appreciate that the Scottish Government might wish to make future adjustments to the LBTT rates and reliefs to achieve economic and social objectives. We are concerned that the introduction of additional reliefs, while providing effective incentives for desired taxpayer behaviour, could also add unwelcome complexity to the LBTT regime. In general we would prefer to see the raising of revenue for Government as the key priority, and special reliefs being introduced only in exceptional circumstances.
If fiscal incentives were to be considered in spite of the risk of additional complexity, the Government might wish to encourage economic growth and increased employment, at least if the economy had not returned to full strength by 2015, by offering some relief from LBTT to residential property developers. This might take the form of an exemption from LBTT or a reduced rate if certain developments were undertaken within particular timeframes, or a deferral of LBTT due by property developers on their acquisitions until such time as they dispose of the developed properties in question.

QUESTION 3 – EXEMPTIONS:
Do you agree that the proposed transaction categories should be exempt from Land and Buildings Transaction Tax, and that for these specific transactions no LBTT return should need to be submitted?

Comments
We agree with the broad strategy that pre-existing exemptions from SDLT should be replicated under the LBTT regime, and that compliance burdens should be minimised by dispensing with the requirement to submit LBTT returns wherever this can be done.

QUESTION 4 – COMPULSORY PURCHASE ORDER RELIEF:
Do you agree with the proposal that the Compulsory Purchase Order relief should be expanded in Scotland to allow local authorities to benefit from the relief where they compulsorily purchase an empty home for onward sale?

Comments
We agree that the pre-existing SDLT relief for CPOs by local authorities should be extended as proposed. We cannot understand why this should not be applied also to other bodies with CPO powers, and perhaps this should be considered.

QUESTION 5 – RIGHT TO BUY / SHARED OWNERSHIP RELIEFS:
Do you agree with the proposal not to provide a Right to Buy or Shared Ownership relief for the Land and Buildings Transaction Tax, on the basis that these reliefs are not needed in Scotland?

Comments
We agree with the arguments put forward to the effect that neither of these reliefs is required under LBTT.

QUESTION 6 – PROPOSED RELIEFS:
Do you agree with the proposed list of reliefs? Please comment on any reliefs which you think should be abolished, amended or added and give reasons.

Comments
We agree that all the SDLT reliefs listed in paragraph 4.13 of the consultation document should be carried forward into the LBTT regime.

Scottish businesses should be able to operate on a level playing field with their competitors in the rest of the UK, so it is vital that Scottish legislation under devolved tax powers does not conflict with related or complementary UK tax legislation in areas such as business transfers and schemes of reconstruction. We believe therefore that the following additional
reliefs, currently available under SDLT, should also apply for LBTT purposes:

- **Reconstruction relief:** This relief, under *Finance Act 2003, Schedule 7, paragraph 7(1)*, allows land and buildings to be transferred between two companies, as part of a transfer of an undertaking in exchange for shares, where there is no change of ownership, without any charge to SDLT arising.

- **Acquisition relief:** This relief, under *Finance Act 2003, Schedule 7, paragraph 8(1)*, can reduce an SDLT charge to 0.5% in certain specific circumstances. Although it is not generally claimed on transfers of land between companies in the same group, it can be relevant to transfers between unconnected persons provided certain specific conditions are met.

Although not provided by existing SDLT legislation, we believe that new reliefs should be introduced to exempt transfers of land on ‘incorporation’ or ‘disincorporation’ of an existing business, where there is no change of ultimate ownership. There is already a range of direct tax reliefs designed to facilitate the transfer of a trade from a sole trader or partnership to a company, and HM Treasury has been consulting on the possibility of new reliefs to mirror these on ‘disincorporation’ – i.e. on transfer of a company’s trade to an unincorporated sole trader or partnership.

**QUESTION 7 – RESIDENTIAL LEASES:**

Do you agree that residential leases of 20 years or less in length should be exempt from Land and Buildings Transaction Tax in Scotland and that no LBTT return should be required?

**Comments**

Given the low level of SDLT revenue from residential leases in Scotland and the trend for this to reduce further, we agree with the proposal to exempt residential leases of 20 years or less from LBTT.

**QUESTION 8 – CALCULATION OF TAX PAYMENTS FOR COMMERCIAL LEASES:**

What proposals would you make to ensure that the calculation of tax payments due on commercial leases is better aligned with Scots law and practices?

**Comments**

Calculation of SDLT on commercial leases is complex, and imposes significant compliance burdens on taxpayers. We agree that the calculation of LBTT on commercial leases should be better aligned with Scots Law and related practices. At the same time, efforts should be made to develop a simpler approach to computing the tax due.

**QUESTION 9 – TARGETED ANTI-AVOIDANCE RULES:**

Do you agree that anti-avoidance measures as described in paragraphs 6.1 and 6.2 should be put in place for the Land and Buildings Transaction Tax, along the lines of those included in UK SDLT legislation?

**Comments**

We support the view that taxpayers should pay the right tax at the right time. Anti-avoidance measures are an appropriate part of the design of a tax system to ensure the tax is efficient and effective for the Government and fair on taxpayers.

The nature of the anti-avoidance measures that will be needed depends on the entirety of design of the LBTT regime. We believe this should have the following elements:

1. A clear Government policy statement at the outset on anti-avoidance, to give clarity
and certainty to all taxpayers on where 'the line in the sand is drawn', supported by
detailed guidance including practical examples. This should aim to clarify
treatment where, for example, taxpayers have different choices afforded by
legislation and commercial practice (such as whether to buy land or a company
owning that land), or when transactions will be considered 'abusive' in terms of tax
outcomes, and what the legislative consequences for each will be. This will be
important in establishing property market expectations and in creating an attractive
commercial environment, as well as generating a sense of fairness among property
buyers.

(2) The structure of LBTT should incorporate only the necessary minimum of rate
differences, reliefs or exemptions, each of which might otherwise either stimulate
attempts to achieve a lower tax outcome or be exploited in practice in unintended
ways.

(3) The LBTT legislation should be ‘good legislation’ – clearly written in terms of
setting out specifically what it aims to do. Underlying this, we see it as crucial for
there to be an early release of draft legislation for consultation. This is the first tax
legislation which the Scottish Parliament will consider. For this reason it is
especially important that appropriate efforts are made to establish fundamental
principles which can be followed, not only in developing LBTT but also laying down
a foundation for future Scottish tax legislation. Wide consultation on the drafting
should contribute to a better outcome for all.

(4) There should be an experienced and effective compliance and enforcement
operation within the tax authority (presumably Revenue Scotland, but still to be
established) to deliver clarity to taxpayers on tax outcomes and monitor and
challenge tax avoidance activity. This will act as a disincentive to unacceptable
avoidance, as well as supporting tax compliance and providing the Government
with an understanding of property market activity data to inform future changes to
the legislation.

LBTT is to be a transaction based tax on a particular type of asset, so anti-avoidance
provisions introduced do not necessarily establish a precedent for other taxes of different
scope. For LBTT, one or more targeted anti-avoidance rules ('TAARs') might be
appropriate in circumstances where a particular mischief was identified as an avoidance
risk.

The new higher rate of SDLT on high value residential properties in 'enveloped' structures
might be a precedent for one such TAAR, if the policy direction saw fit, but it is
questionable whether it would be required since there is little evidence of enveloping
residential properties with a view to avoiding SDLT. That decision might depend on the
eventual structure and rate of LBTT: if more transactions in Scotland were to attract LBTT
at higher rates of tax than the SDLT currently levied (as shown in the illustrative rates in
Annex B of your consultation paper), the need for such an anti-avoidance provision might
increase as purchasers at higher price levels might be more inclined to try to avoid that
higher tax charge. The implications for taxpayers of falling foul of the TAAR also need to
be considered.

The behavioural consequences of any new thresholds need to be considered. For
example, a threshold of £2,000,000 or above for a higher rate of LBTT on high value
properties would probably result in a cluster of transactions at £1,999,999, and likewise a
limit of £1,000,000 would give a peak at £999,999. Distinctions between LBTT rates
applying to residential, non-residential and mixed use properties might increase claims for
properties to be categorised so as to attract the lower rates.

We consider the existing SDLT anti-avoidance provisions contained in Finance Act 2003,
sections 75A–75C to be flawed; the drafting is too vague and too ill defined to be of any
practical use. These provisions should not be copied over into LBTT in their present form.
Instead, fresh consideration should be given to specific anti-avoidance measures required
for LBTT, given the structure of the new tax. Once the structure and main options for the
tax are determined by Ministers, we would be happy to engage in more detailed discussions to identify workable measures.

**QUESTION 10 – GENERAL ANTI-AVOIDANCE RULES:**

Do you think that a more general anti-avoidance rule should be put in place instead of or in addition to the proposed targeted anti-avoidance rules to help ensure that Land and Buildings Transaction Tax and other Scottish taxes due are paid?

**Comments**

This response should be read with our general comments at Question 9 above. Here we use the acronym ‘GAAR’ to refer collectively to General Anti-Abuse Rules and General Anti-Avoidance Rules.

We have engaged in work undertaken at a UK level with the General Anti-Avoidance Study Group led by Graham Aaronson QC, which resulted in his recommendation for a General Anti-Abuse Rule to sit alongside existing UK anti-avoidance provisions. We support his recommendations but we have a number of reservations regarding the UK Government’s proposals, which are the subject of ongoing consultations at present.

An early decision for the Scottish Government is whether to build on Graham Aaronson’s work and seek a GAAR of some kind. Given the currently inconclusive state of the consultations on a UK GAAR and the relative inexperience of the Scottish Government in fiscal administration, we think it would be premature to introduce a Scottish GAAR. It would be better to await the outcome of the UK consultation, and review how the UK GAAR operates in practice, before any decision is made about such a measure in Scotland.

In the meantime the limited tax powers devolved to the Scottish Parliament would seem to afford themselves better to specific TAARs where these are considered necessary. The tax regime for Scottish companies operating across the UK is going to become more complicated as a result of devolved tax powers, and our strong preference is for the additional complexity and compliance burdens to be kept to a minimum.

TAARs might be identified by reference to specific ‘hallmarks’. An example of such a hallmark might be where the value of the property transferred was markedly different from the value on which tax was paid, without any wider commercial or business justification.

Whilst recognising that the Scottish Government plans to conduct key consultations on a GAAR and other tax management provisions later this year, we would encourage the Government to study the effectiveness and practicalities of provisions aimed to counter avoidance of similar taxes, not only in the UK but also in other countries, looking at the problems and practical consequences arising from these, in considering a way forward.

**QUESTION 11 – ONLINE PAYMENTS:**

Do you agree that a new online system should be designed to allow for simultaneous submission of an LBTT return, payment of any tax due and registration of title to the land or property in the Land Register?

**Comments**

Yes. However, we are concerned that to date only some 4% of SDLT returns in Scotland have been submitted through the Automated Registration of Title to Land (ARTL). What would be required is a robust online system that could be used by all taxpayers and their agents.

With other professional accountancy and tax bodies, we at ICAS have worked closely with HMRC on strategic aspects of the design and implementation of their online services, looking at these from the perspective of tax agents and other users. We understand the
importance of taking into account the requirements of prospective users at an early stage in the design of such systems, and we know the difficulties of delivering these against tight timescales and budgetary constraints imposed. The time and resources needed should not be underestimated.

QUESTION 12 – COMPULSORY ONLINE PAYMENTS:
Do you agree that all LBTT returns should be submitted online or should there be an opportunity to submit paper returns?

Comments
In principle we are opposed to the imposition of mandatory online filing on ordinary taxpayers, since it can impact unfairly on vulnerable sectors of the population and on those in remote areas with poor broadband access. However, LBTT (like SDLT) will be accounted for almost exclusively by solicitors and large businesses, and we think it reasonable to expect them to file online in almost all cases.

We recommend that a facility for paper returns should be made available, and that these should be accepted in all cases where there is a reasonable excuse for not filing online. For this purpose ‘reasonable excuse’ should be interpreted widely, and should automatically extend to all cases where LBTT returns are being submitted by anyone other than solicitors and large businesses.

QUESTION 13 – LINKING TAX PAYMENT TO REGISTRATION OF TITLE:
Do you agree that Land and Buildings Transaction Tax must be paid before title to the land or property can be registered in the Land Register or the Register of Sasines or before a document or deed is registered in the Books of Council and Session?

Comments
We are not opposed to a requirement that LBTT should be paid before the new title is registered. This would help the Scottish Government to avoid loss of revenue through unpaid taxes, which is proving to be a significant problem across most taxes levied by the UK Government. It would be no different, essentially, from the normal commercial requirement that the price would have to be paid to the vendor before possession is granted to the purchaser.

QUESTION 14 – PARTNERSHIPS AND TRUSTS:
Do you agree that the Land and Buildings Transaction Tax (Scotland) Bill should be aligned to Scots Law and practices in respect of the treatment of Partnerships and Trusts? If so, what measures would you propose?

Comments
We agree that LBTT should be aligned to Scots Law and related practices with regard to the treatment of partnerships and trusts.

The SDLT provisions of Finance Act 2003, Schedule 15, relating to partnerships, were developed as anti-avoidance measures to combat abuse of partnerships in avoiding SDLT, and they are so complex as to be virtually unworkable in practice. It is imperative that clearer legislation is developed to deal with partnership aspects of LBTT.

Some of the current difficulties arise from the fact that the SDLT rules treat partnerships as transparent for tax purposes. We suggest that the Scottish Government examines the
feasibility of basing the LBTT regime on the premise that a partnership should be treated instead as a separate legal entity for tax purposes, recognising that this is the way a Scottish partnership is treated under the Partnership Act 1890, section 4(2).

QUESTION 15 – BUSINESS AND REGULATORY IMPACT ASSESSMENT:

Do you have any comments on the draft Business and Regulatory Impact Assessment?

Comments

As noted in our response to Question 9 above, we would expect behavioural consequences in response to any step changes in tax rates, whether for residential, non-residential or mixed properties, or for higher value properties. The LBTT rates are also likely to affect market prices.

QUESTION 16 – EQUALITIES IMPACT ASSESSMENT:

Do you have any comments on the draft Equalities Impact Assessment?

Comments

As mentioned in our response to Question 12 above, we are concerned that mandatory online filing could have an adverse impact on certain members of the community. In general, a requirement to file tax returns online could place onerous burdens on the elderly, those who are not computer literate, and those in remote areas with poor broadband access. We think this should not be an issue with LBTT so long as the tax authority is willing to accept a reasonable excuse in cases where tax returns are filed on paper. However, we would be strongly opposed to mandatory online filing for other taxes that might have a direct impact on ordinary taxpayers such as individuals and small businesses, and we would ask that the Scottish Government bear this in mind as it extends its fiscal reach.

QUESTION 17 – OTHER COMMENTS:

Do you have any other comments in relation to legislation for the Land and Buildings Transaction Tax, which are not covered by your responses to any of the other questions listed above?

Comments

One key issue identified during discussions has been the lack of transitional provisions identified. For example, where leases have been entered into under SDLT and a recalculation of tax may be required at a later date, it is unclear how this would be addressed if that date falls under the LBTT regime. Other scenarios, where transactions are set up under the SDLT regime and not completed until after the introduction of LBTT, may also need to be considered.

We are also concerned at the prospect of the UK Government imposing its new annual charge on ‘enveloped’ high value residential properties with effect from 1 April 2013, if the Scottish Government is to have responsibility for taxing land transactions in Scotland. We suggest that the Scottish Government should press for autonomy in this area by calling for the UK Government to remove the annual charge from Scottish properties with effect from 1 April 2015.

As a general point of principle and in the interests of fairness, we suggest that the Scottish Government should consider levying LBTT on the VAT-exclusive price of land or buildings in cases where the property is subject to VAT. This would help to create a level playing field and avoid ‘a tax on a tax’. 
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