



EXPLANATORY NOTES

Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016 (asp 11)

£6.00

LAND AND BUILDINGS TRANSACTION TAX (AMENDMENT) (SCOTLAND) ACT 2016

EXPLANATORY NOTES

INTRODUCTION

1. These Notes have been prepared by the Scottish Government in order to assist the reader of the Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016 (the “2016 Act”). They do not form part of the 2016 Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the 2016 Act. They are not, and are not meant to be, a comprehensive description of the 2016 Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The 2016 Act amends the Land and Buildings Transaction Tax (Scotland) Act 2013 (“the 2013 Act”). The 2013 Act imposes a tax on transactions involving the acquisition of chargeable interests in land in Scotland (for example, a standard house purchase) and the 2016 Act will increase the amount of tax for certain transactions. The tax is known as Land and Buildings Transaction Tax or LBTT and is sometimes referred to informally as “Stamp Duty”¹. LBTT is administered by Revenue Scotland, with assistance from the Registers of Scotland, under the Revenue Scotland and Tax Powers Act 2014 (“the 2014 Act”). LBTT is a self-assessed tax and registration of title can generally not be obtained unless a tax return has been made and arrangements satisfactory to Revenue Scotland have been made for payment of any tax.

4. Since being enacted in 2013, the 2013 Act has been amended by—

- paragraph 9 of schedule 4 to the 2014 Act;
- the Land and Buildings Transaction Tax (Qualifying Public or Educational Bodies) (Scotland) Amendment Order 2014;
- the Land and Buildings Transaction Tax (Addition and Modification of Reliefs) (Scotland) Order 2015; and
- the Land and Buildings Transaction Tax (Sub-sale Development Relief and Multiple Dwellings Relief) (Scotland) Order 2015.

¹ It is important to note however that, strictly, Stamp Duty is a separate and unrelated reserved tax administered by Her Majesty’s Revenue and Customs (HMRC).

5. Therefore the amendments provided for in the 2016 Act, as further described below, are additional to these amendments already in effect. The new amendments will be in force for 1 April 2016 for land transactions with an effective date on or after that date, unless missives were concluded before 28 January 2016 which was the date on which the Bill for the 2016 Act was published on the Scottish Parliament's website together with its accompanying documents.

6. Since the 2014 Act already contains all of the powers required for Revenue Scotland to administer the additional amount of tax provided for in the Act, and carry out compliance work, the 2016 Act makes only one consequential amendment to that Act (at section 2(2) of the Act). Part 5 of the 2014 Act, for example, sets out the Scottish General Anti-avoidance Rule and this would apply to tax avoidance concerning the additional tax.

THE 2016 ACT

Overview

7. The 2016 Act comprises 6 sections, of which section 1 is the principal measure, introducing a new schedule 2A into the 2013 Act. Within schedule 2A—

- Part 2 identifies the transactions to which schedule 2A applies,
- Part 3 sets out the additional amount of tax,
- Part 4 contains provision about the application of schedule 2A in relation to certain types of buyer,
- Part 5 provides for repayment of and relief from the additional amount of tax in certain cases,
- Part 6 contains special rules about the meaning of ownership of dwellings for the purposes of schedule 2A,
- Part 7 contains general provision including powers to modify schedule 2A.

8. The drafting approach employed means that for the most standard residential property transaction – where an individual or couple replace their main residence – the 2013 Act will apply exactly as it would in the absence of the 2016 Act, and therefore the main body of the 2013 Act is not substantively affected. Where the new provisions are in issue, tax agents will know to look to schedule 2A for all relevant provisions concerning the additional amount of tax.

9. For more general guidance on the 2013 Act, see the Explanatory Notes to that Act as passed² and Revenue Scotland's detailed legislative guidance for LBTT.³

² <http://www.legislation.gov.uk/asp/2013/11/notes/contents>

³ <https://www.revenue.scot/land-buildings-transaction-tax/guidance/lbtt-legislation-guidance>

Operation of additional tax provisions

Example: Operation of additional tax provisions in relation to a purchase of second home

Note: references to provisions of legislation are references to provisions of the 2013 Act as amended by the 2016 Act

Justin and Brenda, a married couple, purchased their first home in the later part of 2015 and the transaction was subject to LBTT. Justin and Brenda now propose to buy a second home for £105,000 in the later part of 2016, of which £5,000 is apportioned to moveables such as curtains. But for the additional amount of tax there would be no LBTT payable because relevant consideration of £100,000 (paragraph 4 of new schedule 2A) is within the nil rate band for residential property transactions⁴.

The additional amount applies because (i) the subject-matter of the transaction (section 61) consists of or includes the acquisition of ownership of a dwelling (Part 6 of schedule 5), (ii) at the end of the effective date (the tax point; section 63) Justin and Brenda own more than one dwelling, and (iii) Justin and Brenda are not replacing their existing home (paragraph 2 of new schedule 2A). Because Justin and Brenda are married, the additional tax applies irrespective of whether title to the original and new houses are in the name of both Justin and Brenda, or in the name of one or the other (paragraph 6 of new schedule 2A).

The additional amount of tax applicable is £3,000, being 3% of the relevant consideration (paragraph 4 of new schedule 2A). Therefore the total amount of LBTT payable is £3,000.

Were the chargeable consideration £200,000 for this second home purchase the calculation would be as follows:

Standard amount of LBTT payable

The first £145,000 falls within the nil rate band

The remaining £55,000 falls within the first tax band charged at 2%

The standard amount of LBTT payable is therefore £1,100

Additional amount of LBTT payable

The whole chargeable consideration of £200,000 is the “relevant consideration” and is charged at 3%

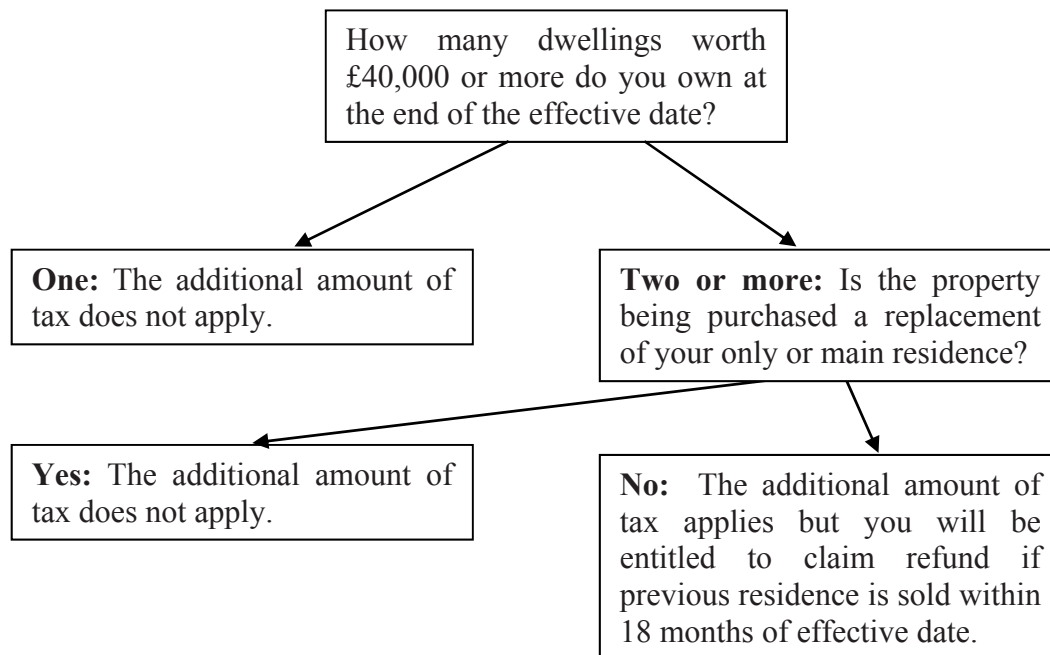
The additional amount of LBTT payable is therefore £6,000

Total amount of LBTT payable

The total amount of LBTT payable is the sum of the standard and additional amounts and is therefore £7,100

⁴ Revenue Scotland maintains an LBTT calculator at <https://www.revenue.scot/land-buildings-transaction-tax/calculator/lbtt-property-transactions-calculator>.

Diagram



COMMENTARY ON SECTIONS

Section 1 – Land and buildings transaction tax: second homes etc.

10. Section 1(2) of the 2016 Act inserts a new section 26A (additional amount: transactions relating to second homes etc.) into the 2013 Act. This new section will appear at the end of Part 3 of the 2013 Act (calculation of tax and reliefs) and will appear after sections 25 and 26 (which concern the amount of LBTT chargeable without reference to the additional tax), and before section 27 concerning reliefs. Section 26A simply introduces new schedule 2A (additional amount: transactions relating to second homes etc.) which is inserted by section 1(3) of the 2016 Act. The new schedule will appear after schedule 2 (chargeable consideration) and before schedule 3 (sale and leaseback relief; the first of a number of reliefs of general application to LBTT).

11. Because schedule 2A will form part of the 2013 Act, key concepts and defined terms applying throughout that Act will also apply to the schedule. There is, therefore, no need for the 2016 Act to repeat or re-enact these things. Key concepts are set out in Part 2 of the 2013 Act and defined terms are referenced in Part 7 and schedule 20, subject to the more specific provision in schedule 2A which is described below.

Part 1 of schedule 2A - Overview

Paragraph 1 of schedule 2A – Overview

12. Paragraph 1 provides an overview of new schedule 2A (see paragraph 8 of these Explanatory Notes above).

Part 2 of schedule 2A – Transactions to which this schedule applies

Paragraph 2 of schedule 2A – Transactions relating to second homes etc.

13. Paragraph 2 is relevant to the standard case where the buyer of a dwelling is an individual or couple. It applies where the subject-matter of a chargeable transaction consists of, or includes, the acquisition of ownership of a dwelling in Scotland. This would cover the standard purchase of a house or flat. “Ownership” in this context will often mean ordinary ownership but an extended meaning of ownership (covering, for example, liferents) is provided in Part 6 (ownership of dwellings). In the particular case of long leases, acquisitions of residential long leases are exempt from LBTT unless the lease is a “qualifying lease” (paragraph 3 of schedule 1 to the 2013 Act).

14. Paragraph 2 only applies if the relevant consideration (defined in paragraph 4, usually the purchase price) for the transaction is £40,000 or more. £40,000 is the notification threshold for acquisitions of the ownership of land under section 30(1)(b) of the 2013 Act. Where a second home in Scotland is bought for the bona fide sum of £35,000 there is no ordinary LBTT payable, nor is any additional tax payable. However, as mentioned, were the relevant consideration £45,000 the additional amount will be payable on the whole of the consideration including the first £40,000 (resulting in a tax charge of £1,350).

15. Paragraph 2 also only applies the additional tax in schedule 2A where at the end of the day that is the effective date of the transaction (the tax point; usually the date of settlement) the buyer owns more than one dwelling **and** the buyer is not replacing the buyer’s only or main residence. Therefore where the buyer is replacing their only or main residence the additional amount of tax does not apply even though they may own two or more dwellings at the end of the effective date.

16. The meaning of replacing the buyer’s only or main residence is provided in subparagraph (2). This requires the buyer to have sold their previous residence within the 18 months preceding the effective date **and** requires the buyer to intend to occupy the new residence as their only or main residence.

17. In cases where the buyer is replacing their main residence but the subject matter of the transaction involves the purchase of other dwellings, the supplement will be payable on the amount of consideration attributable to those other dwellings. That is, the supplement will be payable on the relevant consideration payable for the chargeable transaction, except for the amount attributable to the buyer’s new main residence. Paragraph 4 contains the rules for attributing consideration when the chargeable transaction involves the purchase of more than one dwelling and one of the dwellings purchased is to be a replacement main residence.

18. In most cases where paragraph 2 applies, the transaction will be a residential property transaction within the meaning of section 24(3) of the 2013 Act⁵. However, paragraph 2 potentially also applies in cases where the acquisition of a dwelling is taxed as a non-residential property transaction in terms of section 24(4) (so called “mixed” transactions). Where section 59(8) (the “six plus” rule for purchases of multiple dwellings) applies, paragraph 2 also potentially applies, though relief under paragraph 8A will be available.

19. Where it has not been possible to sell a previous main residence, but that happens within the 18 months following the effective date, paragraph 8 provides that repayment of the additional tax paid may be claimed.

20. Interpretative provisions of the 2013 Act relevant to paragraph 2—

“buyer”	section 7
“chargeable transaction”	section 15
“dwelling”	Part 6 of schedule 5
“effective date”	section 63
“relevant consideration”	paragraph 4 of schedule 2A
“subject-matter”	section 61
what counts as a dwelling owned/disposed of	Part 6 of schedule 2A.

21. “Only or main residence” is not a defined term and in most cases where there are multiple dwellings it will be straightforward to determine which is the main residence, for example where additional residences are clearly holiday homes. Revenue Scotland will publish guidance on the factors it will look to for the smaller number of cases that are less straightforward.

Paragraph 3 of schedule 2A – Transactions where buyer is a non-individual etc.

22. Paragraph 3 is relevant to less standard cases where the buyer of a dwelling is not an individual or couple⁶ purchasing for their domestic interests. It applies therefore to purchases by companies and sub-paragraph (2) concerns purchases by individuals acting as sole traders, if the sole or main activity of that business is the buying or investing in property.

⁵ Tables of rates and bands for residential and non-residential property transactions respectively are set out in the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015 (S.S.I. 2015/126).

⁶ The singular “individual” includes the plural “individuals” by virtue of section 22 of the Interpretation and Legislative Reform (Scotland) Act 2010.

23. When an individual buys a dwelling with the intention of renting it out, it will not necessarily be the case that this transaction is considered to be undertaken in the course of a business, the sole or main activity of which is buying or investing in property⁷. If an individual works away from home, for example in the armed forces, and buys their first residential home to rent out, at least initially, then the purchase made by that individual will not be within paragraph 3, unless there are other characteristics of the transaction, for example business accounts drawn up, or a business plan, that bring it within it. The transaction will therefore be relevant to paragraph 2, and if the individual does not own an existing dwelling, the supplement will not be payable.

24. However, if an individual does not own an existing dwelling and buys a dwelling through a business they run and the sole or main activity of the business is buying or investing in property, then the purchase will be relevant to paragraph 3 and so the supplement will be payable. For example, the individual's business could already own a number of non-residential properties and when that business purchases its first dwelling, the supplement will be payable on the purchase price.

25. Paragraph 3 of schedule 17 to the 2013 Act (chargeable interests treated as being held by partners etc.) applies to schedule 2A as it applies to the rest of the 2013 Act, where the buyer is a partnership within the meaning of paragraph 2 of schedule 17. Chargeable transactions where the purchaser is a partnership will, therefore, be relevant to paragraph 3 if they are made in the course of the business mentioned in paragraph 22, and if they are not made in the course of such a business, such purchases will be relevant to paragraph 2.

26. Purchases by trustees, unless a beneficiary of the trust has an interest in the dwelling bought (or, if more than one is bought in the same transaction, all of them) that is similar to that of an owner of the dwelling, will be relevant to paragraph 3. If the trust beneficiary does have an interest similar to that of an owner of the dwelling, that beneficiary will be treated as the buyer and (unless other conditions in paragraph 3 apply) the transaction will be relevant to paragraph 2.

27. As with paragraph 2, paragraph 3 only applies if the relevant consideration (usually the purchase price) for the transaction is £40,000 or more.

28. Also as with paragraph 2, the reference to "chargeable transaction" means that, where a transaction is exempt or where 100% relief applies, the transaction will not be subject to schedule 2A. For example, charities relief under schedule 13 to the 2013 Act provides for 100% relief.

29. The key difference from paragraph 2 is for cases that fall within paragraph 3 the additional amount of tax in schedule 2A is relevant even where the legal buyer only owns one dwelling at the end of the effective date. In other words, the replacement of main residence test is not relevant. This is principally for anti-avoidance reasons because if schedule 2A were to apply to individuals only there would be an incentive for individuals to purchase dwellings via a corporate "wrapper" or "envelope".

⁷ This definition is similar to the definition of "property investment partnership" in paragraph 31 of schedule 17 to the 2013 Act.

30. Interpretative provisions of the 2013 Act relevant to paragraph 3—
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|--------------------------|----------------------------|
| “buyer” | section 7 |
| “chargeable transaction” | section 15 |
| “dwelling” | Part 6 of schedule 5 |
| “relevant consideration” | paragraph 4 of schedule 2A |
| “subject-matter” | section 61. |

Part 3 of schedule 2A – The additional amount

Paragraph 4 of schedule 2A – The additional amount

31. Sections 25 and 26 of the 2013 Act provide for the general charge to LBTT being calculated on a “progressive” basis according to tables of rates and bands. There is a nil rate band which currently extends to £145,000, though transactions of £40,000 or above are “notifiable” and a tax return must be sent in to Revenue Scotland. As mentioned, that will continue to be the end of the matter for the most standard residential property transaction where an individual or couple purchase their main residence, (i.e. when they replace their existing one or buy their first one)

32. Where paragraph 2 or 3 of schedule 2A brings a transaction within schedule 2A an additional amount of tax is applied by paragraph 4, calculated on a “slab” basis. For “residential property transactions” this applies to the whole of the relevant consideration of the transaction, therefore the first £40,000 of consideration is relevant to the calculation. For such transactions between £40,000 and £145,000 this will mean that LBTT liability will be increased from nil. The applicable tax rate is 3%.

33. As mentioned, in some cases a transaction that is a “non-residential property transaction” will be within schedule 2A in which case sub-paragraph (3) of paragraph 4 introduces a new concept of “relevant consideration” which is the proportion of the chargeable consideration attributable to the dwellings and any subordinate real rights pertaining to the dwellings.

34. For chargeable transactions that involve the purchase of more than one dwelling, and one of the dwellings is a replacement main residence, the relevant consideration will be apportioned on a just and reasonable basis between the replacement main residence and the other dwellings purchased. The consideration attributable to the replacement main residence will not be subject to the supplement, whereas the consideration attributable to the other dwellings that form part of the chargeable consideration will be subject to the supplement.

35. Interpretative provisions of the 2013 Act relevant to paragraph 4—
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|--|---------------------------|
| “chargeable consideration” | section 17 and schedule 2 |
| “chargeable transaction” | section 15 |
| “non-residential property transaction” | sections 24(4) and 59(8) |
| “residential property transaction” | section 24(3). |

Part 4 of schedule 2A – Certain types of buyer

Paragraph 5 of schedule 2A – Joint buyers

36. Paragraph 5 – which is relevant to chargeable transactions - deals with the not uncommon case where a couple buy a dwelling. Where the couple each take a share of the ownership of the title they will be treated for the purposes of paragraph 2 of schedule 2A as if they 100% own the dwelling. Paragraph 12 of schedule 2A – which is relevant to existing ownership - is also relevant since it deems each person that is jointly entitled to the ownership of a dwelling to be the owner of the dwelling. The definition of “jointly entitled” covers common property in Scots law.

37. The same also applies to other cases where there are two or more buyers, in other words to cases where the jointly entitled persons are not a couple. For example, if siblings were to inherit equal shares in the ownership of a dwelling, each sibling would be treated as the 100% owner for the purposes of paragraph 2 of schedule 2A.

38. The effect of paragraph 5 of schedule 2A is that the conditions in paragraph 2(1)(c) and (d) and 3(1)(c) will be met if they are met in relation to any one of the joint buyers, even though they may not be met in relation to others. So if two people, A and B, who each currently own a dwelling which they occupy as their main residences, jointly buy a dwelling to move into as their new joint main residence and A sells his or her existing dwelling while B retains his or her existing dwelling to rent out, the additional amount is payable on the joint purchase because B is not replacing his or her main residence, even though A is. Similarly if one of the joint buyers is not an individual, then the conditions in paragraph 3(1)(c) will be met in the same way as if there was one buyer who was not an individual.

39. Interpretative provisions of the 2013 Act relevant to paragraph 5—

“buyer”	section 7
“chargeable transaction”	section 15
“jointly entitled”	section 65.

Paragraph 6 of schedule 2A – Spouses, civil partners, cohabitants and children

40. Amongst other things, paragraph 6 ensures that spouses (including same-sex spouses) are not treated differently according to how the titles for the couple’s property or properties are registered. For the purposes of paragraph 2 of schedule 2A, the same tax position will arise whether a first or second property is registered in one spouse’s name, in the other spouse’s, or jointly. Dwellings in the name of one spouse will count against the other for the purpose of determining whether the other partner owns more than one dwelling. Sub-paragraphs (2) and (3) disapply this rule where the couple have separated. Separation in this context does not require to be formal separation, of the types referenced in paragraphs 4 and 5 of schedule 1 to the 2013 Act, but such formal separation would be relevant evidence of practical separation.

41. Paragraph 6 treats civil partners in the same way as spouses and the same tax treatment is also afforded to cohabitants who are defined as persons living together as though married (and therefore this will include same-sex cohabitants). This is consistent with the approach taken in the Family Law (Scotland) Act 2006 and other Acts of the Scottish Parliament.

42. Further, paragraph 6 brings into consideration children of the buyer (or their partner) who are aged under 16 (the age of legal capacity in Scots law). This is to reflect that such a child's ownership of residential property is practically the responsibility of their parent(s), and as an anti-avoidance measure to disincentivise avoidance of the additional tax by artificially registering title in such a child's name.

43. Interpretative provisions of the 2013 Act relevant to paragraph 6—

“buyer”	section 7
“dwelling”	Part 6 of schedule 5
what counts as a dwelling owned	Part 6 of schedule 2A.

44. In Scots law, reference to a person's “child” includes reference to an adopted child by virtue of section 40 of the Adoption and Children (Scotland) Act 2007, and includes situations where parentage is determined by the Human Fertilisation and Embryology Act 2008. Marriages (including same-sex marriages) celebrated outside Scotland have equivalent legal status to Scottish marriages by virtue of section 38 of the Family Law (Scotland) Act 2006 (see also sections 212 to 218 of the Civil Partnership Act 2004 for the status of same-sex civil partnerships from outside the UK).

Paragraph 7 of schedule 2A – Trustees in certain trusts

45. Paragraph 7 concerns certain cases where the buyer is acting as a trustee of a settlement, which is a trust other than a bare trust. Currently for the purposes of LBTT, only the beneficiaries of bare trusts are treated as the buyer when a trustee enters into a land transaction. Paragraph 7 extends that treatment for the purposes of paragraph 2 of schedule 2A, so that certain other beneficiaries, namely those with substantial rights (rights to occupy a dwelling or right to income from it over a trust) are treated as the buyer in a chargeable transaction for the purpose of considering whether the conditions in paragraph 2(1)(c) and (cd) are met in relation to the transaction. Account also needs to be taken of paragraph 13 of schedule 2A which treats certain trust property as being owned by the beneficiary.

46. Interpretative provisions of the 2013 Act relevant to paragraph 7—

“buyer”	section 7
“chargeable transaction”	section 15
“dwelling”	Part 6 of schedule 5
“relevant interest”	paragraph 20(3) of schedule 2A
“settlement”	paragraph 20(1) of schedule 2A.

Part 5 of schedule 2A – Repayment of and relief from the additional amount

Paragraph 8 of schedule 2A – Repayment of additional amount in certain cases

47. Where additional tax has been paid by virtue of paragraph 2 of schedule 2A but the buyer is able to dispose of their former main residence within 18 months from the effective date, repayment may be claimed under paragraph 8. This may be relevant in cases such as the former residence being in England and, potentially through no fault of the vendor (who will be the buyer in the Scottish transaction), the “chain” has broken down and it proves difficult to sell the former main residence before buying the new Scottish main residence.

48. Paragraph 8 operates similarly to section 32 of the 2013 Act (less tax payable where contingency ceases or consideration ascertained) and repayment is claimed either by amending the land transaction return (within the amendment period which section 83(2) of the 2014 Act sets at 12 months) or by making a claim to Revenue Scotland under section 107 of the 2014 Act (where the amendment period has ended). Schedule 3 to the 2014 Act applies to claims made under section 107 of that Act.

49. Where it has been possible to sell the previous residence between the effective date and the date of submitting the LBTT return it will not be necessary to pay the additional amount of tax at that point.

50. In cases where:

- the chargeable transaction involves the purchase of more than one dwelling, and
- one of the dwellings bought is a new main residence, and
- the existing main residence is sold within 18 months of the chargeable transaction

The supplement will have been paid initially on the whole of the consideration paid for the chargeable transaction. A claim can be made for a repayment on the amount of the supplement paid that on a just and reasonable basis was apportioned to the ownership of the new main residence.

51. Interpretative provisions of the 2013 Act relevant to paragraph 8—

“buyer”	section 7
“chargeable transaction”	section 15
“dwelling”	Part 6 of schedule 5
“land transaction return”	section 65
“subject-matter”	section 61
what counts as a dwelling owned/disposed of	Part 6 of schedule 2A.

Paragraph 9 of schedule 2A – Relief for purchases of 6 or more dwellings

52. Paragraph 9 provides for 100% relief from the additional amount of tax for purchases of 6 or more dwellings in one transaction. The paragraph cross-references section 59(8) of the 2013 Act which treats such transactions as being the acquisition of non-residential property. Relief under paragraph 9 does not extend to the ordinary amount of LBTT, but multiple dwellings relief under schedule 5 to the 2013 Act will separately be claimable.

53. Interpretative provisions of the 2013 Act relevant to paragraph 9—
“chargeable transaction” section 15.

Paragraph 10 of schedule 2A – Relief: supplemental

54. Paragraph 10 sets out how relief under paragraph 9 is to be claimed. It is the same mechanism for claiming other LBTT reliefs in section 27(2) and (2A) of the 2013 Act.

Part 6 of schedule 2A – Ownership of dwellings

Paragraph 11 of schedule 2A – What counts as a dwelling owned by a person?

55. Paragraph 11 clarifies that dwellings situated outside Scotland are to be counted for the purposes of schedule 2A, in particular paragraph 2. This ensures that a buyer’s property holdings throughout the world are taken into account when considering if the additional amount is payable on the purchase of a dwelling in Scotland, and not only those in Scotland or the rest of the UK.

56. Paragraph 11 also provides that an ownership interest in a dwelling with a market value of less than £40,000 is disregarded. This is relevant to properties owned other than the property being purchased as part of the chargeable transaction. The relevant date for whether an ownership interest has a value of £40,000 is the effective date of the chargeable transaction. In the case where the buyer is not selling an existing dwelling or dwellings, for example where they are not replacing their only or main residence, they must make a reasonable estimate of the market value of the ownership interest. This will have to be an estimate since in these circumstances the dwelling or dwellings are not on the market. The market value includes the market value of subordinate real rights pertaining to the ownership interest.

57. In the case of certain trusts and proper liferents, the deemed ownership interest would not have a market value because it cannot be sold. In those cases, sub-paragraph (6) and (7) provide that it is the market value of the dwelling that is relevant, having no regard to the economic impact of the trust or liferent interest. Again, this will have to be a reasonable estimate.

58. Paragraph 11 also provides that if a dwelling has been subject to the additional amount because the purchase of it was relevant to paragraph 3, then the dwelling is not relevant to paragraph 2. So, for example, an individual has a sole trade business of property trading, and the additional amount has been paid on the purchase of a dwelling by that business then it is not counted as being owned by the individual for the purpose of paragraph 2. Similarly if such a business purchases a property outside of Scotland, and

that purchase would have been relevant to paragraph 3 had the dwelling been in Scotland, that property is not included as being owned by the individual for the purposes of paragraph 2.

59. Interpretative provisions of the 2013 Act relevant to Paragraph 11—
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|---------------------------------|------------------------|
| “dwelling” | Part 6 of schedule 5 |
| “market value” | section 62 |
| what counts as a dwelling owned | Part 6 of schedule 2A. |

Paragraph 12 of schedule 2A – Deemed ownership: cases where title is not yet registered etc.

60. In Scots law, a buyer does not own a property until the change of ownership is registered in the Land Register. The corollary is that the seller is not divested of the title until that point⁸.

61. Under the 2013 Act the tax point is known as the “effective date” and for a standard residential transaction is likely to be the date of settlement which is the date on which the buyer has paid the purchase price and receives the keys and a signed disposition from the buyer⁹. At this point the buyer will for practical purposes consider themselves to be the owner of the property (they will be able to move in) and the seller (who will no longer have keys) will consider themselves to no longer be the owner. Paragraph 12 treats the practical position as a deemed ownership – or non-ownership – for the purposes of schedule 2A, notwithstanding the technical position of Scots law. This is particularly relevant for the purposes of paragraph 2 of schedule 2A and the question of how many dwellings the buyer “owns” at the end of the effective date.

62. For properties situated in the rest of the UK the appropriate definitions from UK Stamp Duty Land Tax legislation are imported in sub-paragraph (4); and for properties outside of the UK the same concepts are applied across and to be read according to the prevailing law and practice there. For jurisdictions that follow the civil law there is likely to be similarity to Scots law in terms of registration being key to transferring ownership; and for jurisdictions that follow the common law there is likely to be a similarity to English law in terms of which equitable or beneficial interests can transfer at the point of completion.

63. Interpretative provisions of the 2013 Act relevant to Paragraph 12—
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|------------------|----------------------|
| “buyer” | section 7 |
| “dwelling” | Part 6 of schedule 5 |
| “effective date” | section 63 |
| “subject-matter” | section 61. |

⁸ Section 50 of the Land Registration (Scotland) Act 2002 states: "Registration of a valid disposition transfers ownership; An unregistered disposition does not transfer ownership."

⁹ E-conveyancing is not at the time of writing widely adopted so these Explanatory Notes describe the Scottish conveyancing process according to the traditional paper-based process.

64. “Seller” takes its common sense meaning here and therefore would mean “vendor” in legal systems where that is the prevailing terminology. “Settlement” also takes its common meaning for the purposes of paragraph 12, and not the meaning in paragraph 20(1).

Paragraph 13 of schedule 2A – Deemed ownership: beneficiaries under certain trusts

65. Paragraph 13 concerns beneficiaries under bare trusts and certain other settlements, which are trusts other than bare trusts. In the case of a bare trust and a settlement having a relevant interest (as defined in paragraph 20) in trust property comprising a dwelling, the beneficiary will be treated as the owner of the dwelling for the purposes of considering whether the additional amount of LBTT applies to a chargeable transaction.

66. Interpretative provisions of the 2013 Act relevant to Paragraph 13—

“bare trust”	paragraph 20(1) of schedule 2A
“dwelling”	Part 6 of schedule 5
“relevant interest”	paragraph 20(3) of schedule 2A
“settlement”	paragraph 20(1) of schedule 2A.

Paragraph 14 of schedule 2A – Deemed ownership: dwellings owned by trustees or personal representatives

67. Paragraph 14 provides that trustees and executors are not treated as owning dwellings in their care. But that does not affect that person being treated as owner for another reason – for example, where the person is a relevant beneficiary.

68. Interpretative provisions of the 2013 Act relevant to Paragraph 14—

“personal representative”	section 65.
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Paragraph 15 of schedule 2A – Deemed ownership: long leases

69. Paragraph 15 deems the tenant’s interest in a long lease (a lease of more than 20 years) to be ownership. The landlord’s interest is not treated as ownership. Long residential leases are very uncommon in Scots law but some are still in existence and are to be counted, including some which are not (for technical reasons) “qualifying leases” (as mentioned in paragraph 3 of schedule 1 to the 2013 Act). Long residential leases are much more common in England and Wales and similar legal systems where the tenant’s interest is known as “leasehold”. Read with paragraph 18(2) where appropriate it is paragraph 15 which brings leasehold title within the meaning of ownership in schedule 2A. Tenancies which are short but of indefinite duration, such as the private residential tenancy under the Private Housing (Tenancies) (Scotland) Bill, are not to be treated as long residential leases.

Paragraph 16 of schedule 2A – Deemed ownership: proper liferents

70. Liferent is a formal arrangement where the liferenter is given the effective ownership and use of property for their lifetime. Scots law recognises two forms of liferent – the more common type constituted via trust (which is within paragraph 11) and “proper” liferent which is dealt with in paragraph 16. The liferenter’s interest is treated as ownership and the original owner and fiar’s interests are not treated as ownership. The fiar is the person who will become owner on the liferenter’s death.

Paragraph 17 of schedule 2A – Deemed ownership: joint owners and owners of shares

71. Paragraph 17 – which considers existing ownership – is separate to paragraph 5 of schedule 2A – which is relevant to a chargeable transaction – and applies even when the new purchase does not involve joint ownership or shares, so looks at the ownership of existing properties when consideration of the additional amount of tax applies.

72. A person might own a share in existing residential property through a “shared ownership” scheme, for example an 80% share with the other share being owned by a public authority or developer. A person might also own a part share for other reasons. Paragraph 17 treats such persons as if they were the 100% owner.

73. Interpretative provisions of the 2013 Act relevant to Paragraph 17—

“dwelling”	Part 6 of schedule 5
“jointly entitled”	section 65.

Paragraph 18 of schedule 2A – Dwellings outside Scotland; what counts as “ownership”

74. Since schedule 2A takes a global view of a person’s property holdings, paragraph 18 maps the Scottish ownership interests to equivalent concepts in other jurisdictions. As mentioned, this has particular relevance to long residential leases which are uncommon in Scots law but are very common in England and Wales.

75. Interpretative provisions of the 2013 Act relevant to paragraph 18—

“dwelling”	Part 6 of schedule 5
what counts as a dwelling owned	Part 6 of schedule 2A.

Part 7 of schedule 2A – General provision

Paragraph 19 of schedule 2A – Power of Scottish Ministers to modify schedule

76. Paragraph 19 confers on the Scottish Ministers power to modify certain aspects of schedule 2A by order. Sub-paragraph (1) confers power to vary by order the 3% figure in paragraph 4(2) of schedule 2A. Any order is subject to the provisional affirmative procedure provided for in section 68(4) to (6A) of the 2013 Act¹⁰.

¹⁰ The provisional affirmative procedure is one of the less common Parliamentary procedures – see the Delegated Powers and Law Reform Committee’s explanation at:

77. Sub-paragraph (2) confers power to vary by order the £40,000 figures in paragraphs 2(1)(b), 3(1)(b) and 11(4). Any order is subject to the provisional affirmative procedure.

78. Sub-paragraph (3) confers power to make provision by order for or about relief from the additional amount, including provision adding, modifying or removing a relief. Any order under sub-paragraph (3) is subject to the affirmative procedure and may modify enactments other than schedule 2A.

79. Sub-paragraph (4) provides for regulation making power (subject to affirmative procedure) to modify—

Parts 2 and 4 (as regards partnerships and trusts, excepting paragraphs (2)(1)(b) and 3(1)(b) which are dealt with in paragraph 19(2));

Part 6 (except paragraph 11(4) which is dealt with in paragraph 19(2));
paragraph 20 (which sets out interpretative provisions).

Paragraph 20 of schedule 2A – Interpretation

80. Paragraph 20 sets out definitions for “bare trust”, “relevant consideration”, “settlement”, “dwelling” and “relevant interest”.

Section 2 – Consequential amendments

81. Section 2 of the 2016 Act makes amendments to the 2013 Act and the 2014 Act in consequence of the provisions of new schedule 2A described.

82. Subsection (1)(d) makes consequential amendments to multiple dwellings relief (MDR) in schedule 5 to the 2013 Act for cases to which schedule 2A applies. The existing rules for MDR are based on working out the average amount of tax due for each dwelling bought together in one transaction and multiplying this by the number of dwellings to get the tax due. This concept will not work for cases where multiple dwellings are bought in one transaction, and the supplement is payable on some but not all of the dwellings. For example if one of the dwellings bought is a replacement main residence but the others are not, the supplement will be part of the calculation of tax due in the MDR calculation for all but one of the dwellings which will mean there is no average amount of tax due that can be multiplied by the number of dwellings. Instead, the amendments made by subsection (1)(d) require the amount of tax due for each of the dwellings to be separately calculated then added together, rather than multiplying an average figure by the number of dwellings.

83. In the majority of cases this will produce the same result as using the existing formula in schedule 5 of the 2013 Act but the existing formula will not work when the supplement would be payable on some but not all dwellings purchased together.

84. A further change brought in by subsection (1)(d) ensures that when relief has been claimed under paragraph 9 of schedule 2A, the supplement is not included as part of the calculation when working out tax due when MDR has been claimed. ,

85. Another of the more significant amendments is in sub-section (2) which amends section 108(3) of the 2014 Act to provide for the legal consequences if an order increases liability to additional tax but that order is not approved by the Scottish Parliament.

Section 3 – Transitional provision: application of this Act

86. The amendments to the 2013 Act provided for in the 2016 Act do not apply to a chargeable transaction where the missives for the transaction were concluded before 28 January 2016, the date on which the Bill for the 2016 Act was published on the Scottish Parliament’s website together with its accompanying documents. Where missives have been concluded on or after 28 January 2016 the new provisions will apply if the effective date is on or after the principal commencement date for the 2016 Act.

87. Interpretative provisions of the 2013 Act relevant to section 3:

“chargeable transaction”	section 15
“contract”	section 65
“effective date”	section 63.

Section 4 – Ancillary provision

88. Section 4 confers on the Scottish Minister a power to make ancillary provision by regulations in connection with the 2016 Act. The regulations will be subject to negative procedure unless they involve textual amendments to primary legislation in which case affirmative procedure will apply. A comparable power already exists in section 67 of the 2013 Act.

Section 5 – Commencement

89. Sections 4 and 6 (short title) of the 2016 Act come into force on the day after Royal Assent. The other provisions of the Act (which would include section 1 inserting new schedule 2A) come into force on the same date or – if later – 1 April 2016. This date is referred to as the “principal commencement date” in the Explanatory Note to section 3 above.

PARLIAMENTARY HISTORY

90. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings. It also shows the dates on which Committee Reports and other papers relating to the 2016 Act were published, and references to those reports and other papers.

*These notes relate to the Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016
(asp 11) which received Royal Assent on 24 March 2016*

<i>Proceedings and Report</i>	<i>Reference</i>
Introduction	
Bill as Introduced, 27 January 2016	<u>Land and Buildings Transaction Tax (Amendment) (Scotland) Bill</u> SP Bill 85 – Session 4 (2016)
SPICe briefing on Bill as introduced, 2 February 2016	<u>SB 16-12</u>
Stage 1	
Finance Committee	
Wednesday 3 February 2016	<u>Official Report - 5th Meeting 2016 (Session 4)</u>
Delegated Powers and Law Reform Committee	
Tuesday 2 February 2016	<u>Official Report - 5th meeting 23016 (Session 4) columns 7-12</u>
Consideration by Parliament	
Stage 1 debate, 23 February 2016	<u>Official Report columns 87-105</u>
Stage 2	
Bill as amended at stage 2, 3 March 2016	<u>Land and Buildings Transaction Tax (Amendment) (Scotland) Bill</u> SP Bill 85A – Session 4 (2016)
Finance Committee	
Stage 2 debate, 3 March 2016	<u>Official Report, 8th Meeting 2016 (Session 4) columns 2-15</u>
Delegated Powers and Law Reform Committee	
Thursday 3 March 2016	<u>Official Report – 9th Meeting 2016 (Session 4)</u>
Stage 3	
Consideration by Parliament	
Stage 3 Debate, 8 March 2016	<u>Official Report – columns 8-31</u>
Bill as passed, 9 March 2016	<u>Land and Buildings Transaction Tax (Amendment) (Scotland) Bill</u> SP Bill 85B – Session 4 (2016)
Royal Assent, 24 March 2016	<u>Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016</u>

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