

Draft Regulations laid before the Scottish Parliament under section 41(1) of the Non-Domestic Rates (Scotland) Act 2020 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2023 No.

RATING AND VALUATION

The Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023

Made - - - - 2023
Coming into force - - 1st April 2023

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 37(1) of the Non-Domestic Rates (Scotland) Act 2020⁽¹⁾ (“the 2020 Act”) and all other powers enabling them to do so.

In accordance with section 41(1) of the 2020 Act, a draft of these Regulations have been laid before and approved by resolution of the Scottish Parliament.

In accordance with section 41(2), (4) and (5) of the 2020 Act the Scottish Ministers have consulted such persons appearing to them to represent the interests of local authorities and assessors as the Scottish Ministers considered appropriate, together with such other persons as they considered appropriate, have notified the Scottish Parliament about the consultation, and have had regard to representations received.

PART 1

Introductory and interpretation

Citation and commencement

1. These Regulations may be cited as the Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023 and come into force on 1 April 2023.

Interpretation

2. In these Regulations—

(1) 2020 asp 4.

“assessor” means an assessor or a depute assessor appointed under section 27(2) of the Local Government etc. (Scotland) Act 1994(2),

“close relative” means a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-daughter, brother, sister, or the partner of any such person,

“electronic communication” has the meaning given in section 15(1) of the Electronic Communications Act 2000(3),

“net annual value” has the meaning given in section 6(8) of the Valuation and Rating (Scotland) Act 1956(4),

“occupier” has the meaning given in section 379 of the Local Government (Scotland) Act 1947(5),

“owner” has the meaning given in section 379 of the Local Government (Scotland) Act 1947,

“partner”, in relation to a person, means—

- (a) the husband or wife or civil partner of that person, or
- (b) if the person is living together with another person as if they were a married couple or civil partners, that other person,

“rateable value” means—

- (a) the amount ascertained in accordance with section 6(9) of the Valuation and Rating (Scotland) Act 1956(6), or
- (b) where the lands and heritages fall within a class which is prescribed by an order under section 6(1) of the Local Government (Scotland) Act 1975(7) (valuation by formula of certain lands and heritages), the amount calculated in accordance with that Order,

“relief” means any reduction or remittal of the amount payable as non-domestic rates provided for in regulations made under section 153 of the Local Government etc. (Scotland) Act 1994(8), and

“the 2020 Act” means the Non-Domestic Rates (Scotland) Act 2020(9).

Sending notices by means of electronic communication

3. Any notice sent under these Regulations may be sent by electronic communication where—
 - (a) the recipient has previously agreed to information concerning liability to non-domestic rates being sent by electronic communication, and
 - (b) the notice—
 - (i) is capable of being accessed by the recipient,
 - (ii) makes the information it contains available to the recipient to no lesser an extent than it would be if sent as a document in printed form, and
 - (iii) is sufficiently permanent to be used for subsequent reference.

(2) 1994 c. 39.

(3) 2000 c. 7. Section 15(1) was amended by paragraph 158 of schedule 17 of the Communications Act 2003 (c. 21).

(4) 1956 c. 60. Section 6(8) was amended by section 76(2)(a) of the Land Reform (Scotland) Act 2016 (asp 18) and by section 34 and schedule 6 of the Abolition of Domestic Rates Etc. (Scotland) Act 1987 (c. 47).

(5) 1947 c. 43.

(6) 1956 c. 60. Section 6(9) was amended by section 10(1) and schedule 3 of the Local Government (Financial Provisions) (Scotland) Act 1963 (c. 12) and section 34 and schedule 6 of the Abolition of Domestic Rates Etc. (Scotland) Act 1987 (c. 47).

(7) 1975 c. 30. Section 6(1) was substituted by section 137 and paragraph 11 of Part II of schedule 12 of the Local Government Finance Act 1988 (c. 41) and amended by paragraph 42 of schedule 13 of the Local Government Finance Act 1992 (c. 14).

(8) 1994 c. 39. Section 153 was amended by section 67 of the Climate Change (Scotland) Act 2009 (asp 12), section 15(2) and (3) of the Non-Domestic Rates (Scotland) Act 2020 and paragraph 7(2) of schedule 4(6) of the Coronavirus (Scotland) Act 2020 (asp 10).

(9) 2020 asp 4.

PART 2

Treatment of owners as liable to pay non-domestic rates

Circumstances in which owners must be treated as liable for non-domestic rates

4.—(1) This regulation applies where—

- (a) non-domestic rates are payable in respect of lands and heritages and,
- (b) by virtue of a tenancy or other arrangement entered into on or after 1 April 2023, the occupier of those lands and heritages would, but for this regulation, be liable to pay non-domestic rates in respect of them.

(2) Subject to regulation 5(3), a local authority must treat the owner of lands and heritages as liable to pay non-domestic rates in respect of them where the local authority is satisfied, in all the circumstances, that the tenancy or other arrangement—

- (a) has as its main purpose, or one of its main purposes, the gaining of an advantage within the meaning of section 38 of the 2020 Act, and
- (b) is an artificial non-domestic rates avoidance arrangement within the meaning of sections 39 and 40 of the 2020 Act.

(3) In determining whether the condition in paragraph (2)(a) is met, the local authority may have regard to the amount of non-domestic rates that would have been payable in respect of the lands and heritages in the absence of the tenancy or other arrangement.

(4) A local authority may only be satisfied that the condition in paragraph (2)(b) is met where a tenancy or other arrangement was entered into on or after 1 April 2023 and at least one of the following applies—

- (a) the tenancy or other arrangement on the basis of which the lands and heritages are occupied is considered not to be on a commercial basis (see paragraph (6)),
- (b) the body liable to pay non-domestic rates in respect of the lands and heritages has been, or has begun the process of being, wound up voluntarily under the Insolvency Act 1986⁽¹⁰⁾ within 12 months of the date on which the lands and heritages first became occupied under the relevant tenancy or other arrangement, and—
 - (i) the lands and heritages continue to be occupied, including by a person or body other than the body which has entered the tenancy or other arrangement, or
 - (ii) the body which has the liability is in receipt of a form of relief from liability to non-domestic rates under section 153 of the Local Government etc. (Scotland) Act 1994 or section 4(2) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962⁽¹¹⁾,
- (c) the occupier of the lands and heritages—
 - (i) fails to provide the name of a person who is liable for payment of the rates, or who is so liable on behalf of the occupier,
 - (ii) names as the person liable for payment of the rates, or liable on behalf of the occupier, a person who has no connection to the operation taking place on the lands and heritages,

⁽¹⁰⁾ 1986 c. 45.

⁽¹¹⁾ 1962 c. 9. Section 4(2) was amended by sections 5 and 13 and schedule 4 of the Local Government (Miscellaneous Provisions) (Scotland) Act 1981 (c. 23), section 5 of the Local Government and Planning (Scotland) Act 1982 (c. 43), section 137 and schedule 12 of the Local Government Finance Act 1988 (c. 43) and section 98(2) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 10).

- (iii) names as the person liable for payment of the rates, or liable on behalf of the occupier, a person who is an employee or a contractor of the owner of the lands and heritages, or who is a partner or close relative of the owner, or
- (iv) names as the person liable for payment of the rates, or liable on behalf of the occupier, a person falling within paragraph (5).

(5) The persons referred to in paragraph (4)(c)(iv) are those who, within the period of two years prior to the date on which the tenancy or other arrangement was entered into—

- (a) carried out the business or exercised the borrowing powers of a public company which did not have a trading certificate, contrary to section 761(1) of the Companies Act 2006⁽¹²⁾,
- (b) have been declared by a court to be liable to make a contribution to the assets of a company, in the course of its winding up, as a result of—
 - (i) knowingly having been a party to the carrying on of business in the manner described in section 213(1) of the Insolvency Act 1986 (fraudulent trading) or section 246ZA(1) of that Act (fraudulent trading: administration)⁽¹³⁾, or
 - (ii) being or having been a director to whom section 214(2) of that Act⁽¹⁴⁾ (wrongful trading) or section 246ZB (wrongful trading: administration) of that Act⁽¹⁵⁾ applies,
- (c) have had a disqualification order made against them, or a disqualification undertaking accepted, under the Company Directors Disqualification Act 1986⁽¹⁶⁾,
- (d) have been convicted of a contravention of section 216 of the Insolvency Act 1986 (restriction on re-use of company names),
- (e) have been subject to a bankruptcy restrictions order, or a bankruptcy restrictions undertaking, under the Bankruptcy (Scotland) Act 2016⁽¹⁷⁾, the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989⁽¹⁸⁾, or
- (f) have been issued a notice under section 20 of the 2020 Act (non-use or underuse of lands and heritages: notification) in relation to which the local authority has, following the expiry of the period mentioned in section 20(5)(b) or receipt of an explanation from the ratepayer, concluded that either of the conditions in section 20(3) or (4) of that Act have been satisfied.

(6) For the purposes of this regulation, a tenancy or other arrangement may only be considered by a local authority not to be on a commercial basis where at least one of the following applies—

- (a) there has been no change to the occupation of the lands and heritages since the tenancy or other arrangement took effect,
- (b) the lands and heritages are being occupied by a person or body other than the person or body named in the tenancy or other arrangement,
- (c) payment of the rent for the lands and heritages is optional in terms of the relevant tenancy or other arrangement,
- (d) the rent charged for the lands and heritages is significantly below the level of the rent which could reasonably have been obtained for the lands and heritages on the open market at the time the tenancy or other arrangement was entered into,

(12) 2006 c. 46.

(13) Section 246ZA was inserted by section 117(2) of the Small Business, Enterprise and Employment Act 2015 (c. 26) (“the 2015 Act”).

(14) Section 214(2) was amended by section 117(3)(a) of the 2015 Act.

(15) Section 246ZB was inserted by section 117(2) of the 2015 Act.

(16) 1986 c. 46. Section 1 was amended by section 5(1) and paragraph 2 of schedule 4 of the Insolvency Act 2000 (c. 39), section 204(3) of the Enterprise Act 2002 (c. 40) and paragraph 2 of schedule 7 of the 2015 Act.

(17) 2016 (asp 21).

(18) S.I. 1989/2405 (N.I.19).

- (e) payment of the rent for the lands and heritages is offset or cancelled, in whole or in part, by other transactions or arrangements, whether individually or as a whole,
- (f) the arrangement has been identified in the tenancy or other arrangement as being for the purpose of mitigating rates liability,
- (g) the occupier, or the person or body entering the tenancy or other arrangement, has no assets that are directly linked to the economic use being made of the lands and heritages.

Notification of owner of intention to treat as liable for payment of non-domestic rates

5.—(1) Where a local authority intends to treat the owner of lands and heritages as liable to pay non-domestic rates, the local authority must inform the owner, by sending a notice to them in writing.

(2) A notice under paragraph (1) must—

- (a) set out the local authority's intention to treat the owner as being liable to pay non-domestic rates,
- (b) explain the basis, under regulation 4, on which the local authority proposes to do so,
- (c) set out the date with effect from which the local authority proposes that the treatment will have effect, with an explanation of how this has been calculated in accordance with regulation 6,
- (d) advise that, where an owner is treated as liable to pay non-domestic rates on a subsequent occasion, the liability will have effect from a date determined in accordance with regulation 6(2),
- (e) advise that any relief from liability to non-domestic rates in respect of the lands and heritages which was previously available will cease to be available, with effect from whichever is the relevant date under regulation 6.

(3) Any owner who receives a notice under paragraph (1) may—

- (a) make representations as to why they consider—
 - (i) that the tenancy or other arrangement under which the lands and heritages are occupied does not have as its main purpose, or one of its main purposes, the gaining of an advantage within the meaning of section 38 of the 2020 Act, and
 - (ii) that the tenancy or other arrangement is not an artificial non-domestic rates avoidance arrangement within the meaning of sections 39 and 40 of the 2020 Act, or
- (b) agree a payment arrangement with the local authority in respect of the non-domestic rates for the relevant lands and heritages.

(4) Representations under paragraph (3)(a)—

- (a) must be in writing,
- (b) must be sent to the local authority within the period of 28 days beginning with the day on which the notice under paragraph (1) is presumed to have been received, and
- (c) may be sent by means of electronic communication.

(5) A notice under paragraph (1) is to be presumed to have been received 48 hours after it is sent.

(6) The owner of lands and heritages is not to be treated as being liable to pay non-domestic rates where the owner demonstrates, to the satisfaction of the local authority, that both of the conditions in paragraph (3)(a) are met.

(7) Unless paragraph (3)(b) applies, the local authority must, within the period of 28 days beginning with the day on which representations under paragraph (3)(a) are received or, where no representations are submitted, the last day on which any representations could be submitted, send to the owner a final notice advising—

- (a) whether or not the owner is to be treated as liable to pay the non-domestic rates,
- (b) the reasons for the decision, including a summary of consideration of any representations submitted, and
- (c) where the owner is to be treated as liable to pay the non-domestic rates—
 - (i) the liability resulting from that, including a statement as to the relief, if any, removed in accordance with regulation 6, and
 - (ii) the date from which the treatment and, where relevant, the removal of relief has effect.

Date from which owner treated as liable

6.—(1) Subject to paragraph (3), any treatment of the owner of lands and heritages as liable for payment of non-domestic rates under regulation 4 is to have effect from the date set out in the final notice issued under regulation 5(7).

(2) The date referred to in paragraph (1) must be no earlier than 28 days after the date on which the final notice is to be presumed to have been received.

(3) Where the owner has, within the period of five years preceding the date of a final notice issued under regulation 5(7) treating them as liable to pay non-domestic rates, previously received a final notice under the same regulation treating them as liable to pay non-domestic rates, outstanding liability will be transferred with effect from whichever is the later of—

- (a) the date on which the tenancy or other arrangement in respect of the lands and heritages for which the owner is currently to be treated as liable to pay non-domestic rates was entered into between the owner and the occupier, and
- (b) the date specified in the earliest final notice issued to the owner in respect of any lands and heritages, in accordance with regulation 5(7).

Removal of relief and subsequent applications for relief

7.—(1) Where the owner of lands and heritages is treated as liable to pay non-domestic rates under regulation 4, any relief in relation to those lands and heritages is to cease to be available, with effect from the date on which the transfer of liability takes effect in accordance with regulation 6.

(2) Where relief has ceased to be available under paragraph (1) in respect of any lands and heritages, any subsequent application for relief by the same owner, or a person or body that has entered into a tenancy or other arrangement with that owner, in relation to those lands and heritages, must demonstrate, to the satisfaction of the local authority, that the making of the application is not part of an artificial non-domestic rates avoidance arrangement within the meaning of sections 39 and 40 of the 2020 Act.

(3) Where the person or body fails to demonstrate the matters described in paragraph (2) to the satisfaction of the local authority, no relief may be awarded.

(4) In paragraph (2), “subsequent application” means an application for relief in respect of lands and heritages made after the date on which the transfer of liability in respect of those lands and heritages takes place in accordance with regulation 6.

PART 3

Disregarding of changes leading to reduction in rateable value

Circumstances in which changes causing a reduction in rateable value are to be disregarded

8.—(1) This regulation applies where—

- (a) a change has been made to lands and heritages,
- (b) the change was made on or after 1 April 2023,
- (c) prior to the change, either—
 - (i) no non-domestic rates were payable in respect of the lands and heritages, or
 - (ii) the rates payable in respect of the lands and heritages were being reduced by virtue of section 24(3) or 24A(1) of the Local Government (Scotland) Act 1966⁽¹⁹⁾ (unoccupied, or partly unoccupied, lands and heritages), and
- (d) by virtue of the change, an assessor has determined that, for the purposes of any entry in the valuation roll, the net annual value or rateable value of the land and heritages, or some part of them, has been reduced.

(2) In determining liability for non-domestic rates in relation to such lands and heritages, a local authority must disregard any change which has been determined by an assessor to result in a reduction in their rateable value where the local authority is satisfied, in all the circumstances, that—

- (a) the making of the change has as its sole or main purpose the gaining of an advantage within the meaning of section 38 of the 2020 Act, and
- (b) the making of the change is an artificial non-domestic rates avoidance arrangement within the meaning of sections 39 and 40 of the 2020 Act.

(3) In determining whether the condition in paragraph (2)(a) is met, the local authority may have regard to the amount of non-domestic rates that would have been payable in respect of the lands and heritages in the absence of the change.

(4) A local authority may only be satisfied that the condition in paragraph (2)(b) is met where it reasonably appears to the local authority, in all the circumstances, that—

- (a) the change has been made for the sole reason of reducing the net annual value or rateable value of the lands and heritages, or
- (b) there is no clear link between the change that caused the reduction in net annual value or rateable value and an intention to make the lands and heritages the subject of economic activity.

(5) In determining whether the condition in paragraph (4)(b) has been met, the local authority may have regard to comparable lands and heritages or comparable economic activity.

(6) Where a change is disregarded in accordance with this regulation, non-domestic rates are to continue to be payable on the basis of the rateable value that applied on the day before the day on which the change took effect.

Notice of intention to disregard change

9.—(1) Where a local authority intends to disregard a change to lands and heritages in accordance with regulation 8, the local authority must send a notice in writing to the person or body liable to pay the non-domestic rates advising the person or body—

⁽¹⁹⁾ 1966 c. 51. Section 24(3) was amended by section 1(2) of the Local Government Finance (Unoccupied Properties etc.) (Scotland) Act 2012 (asp 11) and section 24A was added by section 155 of the Local Government etc. (Scotland) Act 1994 (c. 39).

- (a) of the intention to disregard the change,
 - (b) the basis under regulation 8 on which the local authority proposes to do so, and
 - (c) the proposed effect of a decision to disregard the change.
- (2) Any person or body who receives a notice under paragraph (1) may make representations to the local authority as to why they consider—
- (a) that the change made does not have as a main purpose the gaining of an advantage within the meaning of section 38 of the 2020 Act, and
 - (b) that the effecting of the change is not an artificial non-domestic rates avoidance arrangement within the meaning of sections 39 and 40 of the 2020 Act.
- (3) Representations under paragraph (2)—
- (a) must be made to the local authority in writing,
 - (b) must be sent to the local authority within the period of 28 days beginning with the day on which the notice under paragraph (1) is presumed to have been received, and
 - (c) may be sent by electronic communication.
- (4) A notice under paragraph (1) is to be presumed to have been received 48 hours after it is sent.
- (5) The local authority must, within the period of 28 days beginning with the day on which representations under paragraph (2) are received or, where no representations are submitted, the last day on which representations could be submitted, send to the person or body liable to pay non-domestic rates in respect of the lands and heritages a final notice advising—
- (a) whether or not the change is to be disregarded in accordance with regulation 8(2),
 - (b) reasons for the decision, including a summary of consideration of any representations made under paragraph (2), and
 - (c) whichever of the following applies—
 - (i) where the change is to be disregarded, that for rating purposes the rateable value of the lands and heritages on the day before the day on which the change took effect will apply, or
 - (ii) where the change is not to be disregarded, that for rating purposes the rateable value which has been determined by the assessor to apply to the lands and heritages will apply.

St Andrew's House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision to prevent or minimise advantages arising from artificial avoidance arrangements in relation to non-domestic rates. Artificial avoidance arrangements in relation to non-domestic rates are defined in sections 38, 39 and 40 of the Non-Domestic Rates (Scotland) Act 2020.

These Regulations prescribe the circumstances in which the owners of lands and heritages, rather than the occupiers, are to be treated as liable to pay non-domestic rates and the circumstances in which any relief (reduction or remittal) in relation to non-domestic rates for those lands and heritages is to cease to be available (Part 2). They also prescribe the circumstances in which changes to lands and heritages causing a reduction in rateable value are to be disregarded (Part 3).

Part 2 provides that, where a tenancy or other arrangement is in place in respect of lands and heritages, such that the occupier would ordinarily be liable to pay non-domestic rates in respect of them, a local authority must treat the owner as liable where it is satisfied, in all the circumstances, that the tenancy or other arrangement has as one of its main purposes the gaining of an advantage and is an artificial non-domestic rates avoidance arrangement. The provisions only apply in respect of a tenancy or other arrangement entered into on or after 1 April 2023.

The circumstances in which a local authority may be satisfied that a tenancy or other arrangement is an artificial non-domestic rates avoidance arrangement include that the lands and heritages are not occupied on a commercial basis, that the body liable to pay non-domestic rates has been, or is being, wound up voluntarily yet the property is still occupied, and that the occupier of the lands and heritages names as the person liable for payment of the rates someone falling within certain prescribed categories. Regulation 5 sets out the process for notification of the owner where a local authority intends to treat them as liable to pay non-domestic rates, which includes an opportunity for the owner to make representations to the local authority.

Regulation 6 makes provision regarding the date from which any treatment of an owner as liable for payment of non-domestic rates is to have effect, which can be an earlier date than it would otherwise be if the owner has received a similar notice in the past. Regulation 7 makes provision for the removal of non-domestic rates relief (reduction or remittal) where the owner of lands and heritages is treated as liable to pay non-domestic rates under regulation 4. Regulation 7 also requires the owner or tenant to demonstrate, to the satisfaction of the local authority, that the making of any subsequent application for relief is not part of an artificial non-domestic rates avoidance arrangement.

Part 3 requires certain changes to lands and heritages, made on or after 1 April 2023, and which have been assessed as reducing their rateable value, to be disregarded where the local authority is satisfied that the making of the change has as its sole or main purpose the gaining of an advantage and is an artificial non-domestic rates avoidance arrangement. In order to disregard such a change, it must appear to the local authority that the change has been made for no reason other than to reduce the rateable value of the lands and heritages, or that there is no clear link between the change that caused the reduction in rateable value and an intention to make the lands and heritages the subject of economic activity. Regulation 9 sets out the process for notification of the person or body liable to pay the non-domestic rates that the local authority intends to disregard such a change, which includes an opportunity for the person or body to make representations to the local authority. If representations are received, the local authority must issue a final notice advising of its decision.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: *The Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023 No. 92*