LAND AND BUILDINGS TRANSACTION TAX (SCOTLAND) ACT 2013

EXPLANATORY NOTES

THE ACT

Schedule 8 – Relief for alternative finance investment bonds

214. This schedule is introduced by section 27 and makes provision for relief from LBTT for land transactions undertaken in relation to the issue of alternative finance investment bonds ("AFIBs"). In a normal securitisation the investor does not have a direct ownership in the underlying asset but merely an interest-bearing certificate. With AFIBs, however, the investors own part of the underlying asset. This necessary change in ownership of the underlying asset may involve LBTT issues. Part 1 of the schedule provides an overview of the schedule and at paragraph 2 sets out the meaning of AFIBs in this schedule. Paragraph 3 defines a number of terms for the purposes of this schedule.

215. Part 2 of the schedule makes provision for the issue, transfer and redemption of rights under a bond not to be treated as a chargeable transaction for the purposes of LBTT. Specifically at paragraph 4, the bond holder under an AFIB is not treated as having an interest in the bond assets and the bond issuer under such a bond is not treated as a trustee of the bond assets. Paragraph 5(1) states that the tax treatment of AFIBs outlined at paragraph 4 is not available where a bond holder, or a group of connected bond-holders, acquire control of the underlying asset. Paragraph 5(2) sets out the circumstances in which it may be possible for a single bond-holder or a group of connected bond-holders, to acquire control of the underlying asset.

216. Paragraph 6 outlines two instances where paragraph 5(1) does not apply. The first is where, at the time the rights under the bond were acquired, a bond holder, or all of a group of connected bondholders, did not know or had no reason to suspect that the bonds enabled the exercise of the rights of management and control of the bond assets and, having subsequently become aware of the rights attached to the bonds, the bond-holder(s) transferred sufficient bonds, as soon as reasonably possible so that they could no longer exercise control. The second instance is available for persons acting as underwriters of the bond issuance providing they do not exercise control and management of the bond asset.

217. Part 3 of the schedule introduces 7 conditions (A to G) for the application of paragraphs 15 to 21 of the schedule to provide relief from LBTT. Paragraph 8 provides condition A. This is that a person ("P") transfers a qualifying interest in land to another person ("Q") and P and Q agree that at a later time (when Q ceases to hold that interest as a bond asset in relation to an AFIB of which Q is the issuer) Q will transfer that interest to P. The transfer of the qualifying interest to Q is described in the schedule as "the first transaction". Paragraph 9 provides condition B. This is that Q acts as bond issuer in relation to an AFIB, and holds the interest in land as a bond asset. Paragraph 10 provides condition C. This is that Q and P enter into a leaseback agreement to generate income and gains for the AFIB. Sub-paragraph (1)(b) provides that the Scottish Ministers may, by regulations extend the scope of condition C to include financing structures other

than those involving a sale and leaseback. Sub-paragraph (2) explains what is meant by "leaseback arrangement" in condition C. This is that Q grants P a lease or sub-lease out of the interest acquired in the first transaction.

218. Paragraph 11 provides condition D. This is that, the bond issuer (Q) is required to provide prescribed evidence that a satisfactory standard security has been entered in the Land Register of Scotland. The evidence needs to be provided to the Tax Authority within 120 days of the first transaction. "Prescribed evidence" is evidence prescribed by regulations made by the Scottish Ministers. Sub-paragraph (2) provides rules relating to the security over the land referred to in sub-paragraph (1). Sub-paragraph (3)(a) provides that the amount of the charge is to include the amount of the LBTT that would be due on the market value of the transfer of the interest at the date of transfer. Sub-paragraph 3(b) provides that the charge also includes any interest and penalties that would be payable if the tax had been due (but not paid) on the first transactions.

219. Paragraph 12 provides condition E. This is that over the life of the AFIB, Q receives payments of capital of at least 60 per cent of the value of the interest in land at the time of the first transaction. The purpose of condition D is to ensure that the main use of the interest in land is as a bond asset. Paragraph 13 provides condition F. This is that throughout the life of the AFIB, Q holds the interest in land as a bond asset. Paragraph 14 provides condition G. This is that at the termination of the bond, when the interest in land ceases to be a bond asset, the interest is transferred to P by Q (this transfer is described as "the second transaction"), and that the second transaction takes place no later than 10 years after the first transaction. This effectively puts a term of 10 years on the AFIB. Sub-paragraph (2) provides that the period of 10 years referred to in condition G may be altered by the Scottish Ministers by way of regulations.

220. Part 4 of the schedule makes provision for relief from LBTT for certain transactions. Paragraph 15(1) sets out the requirements for relief from LBTT on the first transaction. These are that the interest acquired is of land in Scotland and that each of the conditions A to C are met within 30 days of the date of the transfer of interest in land from P to Q. Paragraph 15(2)(a) provides that the relief is subject to conditions relating to asset substitution at paragraphs 21 and 22. Paragraph 15(2)(b) provides that relief on the first transaction is also subject to the provisions of paragraph 24 which provides that relief on the first transaction is not available where a bond-holder, or group of connected bond-holders, acquires control of the underlying asset.

221. Paragraph 16 details the circumstances where the relief on the first transaction will be withdrawn. Sub-paragraph (1)(a) provides for the first circumstance, where the asset is returned to P but the requirement to issue bonds to the value of 60 per cent of the asset is not satisfied and the asset is not held as a bond asset until the termination of the bond. Sub-paragraph (1)(b) provides that the relief is also withdrawn where a period of 10 years has elapsed since the first transaction without conditions E and F having been satisfied. Sub-paragraph (1)(c) provides that relief is also withdrawn if at any time it becomes evident that any of conditions E to G cannot or will not be met. Sub-paragraph (2) provides that relief is withdrawn where Q fails to provide prescribed evidence to the Tax Authority that they have registered a standard security within 120 days of the transaction (see paragraph 212 above). Paragraph 17 provides that where relief is withdrawn under paragraph 16 then the tax chargeable is calculated in accordance with paragraph 18. Paragraph 18 provides that the amount of LBTT chargeable is the tax that would have been charged on the market value of the subject-matter of the transaction or if the acquisition was a lease, the rent. See also section 33 which requires there to be a further return to the Tax Authority where relief is withdrawn.

222. Paragraph 19 provides relief from LBTT on the transfer of the land asset from Q back to P. Sub-paragraph (1) provides that this second transaction is exempt from charge if conditions A to G described above have been met and the provisions of this Act in relation to the first transaction have been complied with. Sub-paragraph (2)(a) provides

that the relief is subject to conditions relating to asset substitution at paragraphs 21 and 22. Sub-paragraph (2)(b) provides that relief is not available in respect of the second transaction if paragraph 24 applies because a bond-holder or a group of connected bond-holders acquires control of the underlying assets. Paragraph 20 provides that if following the transfer of the land asset back from Q to P, Q provides prescribed evidence to the Tax Authority that conditions A to C and E to G have been met then the land ceases to be subject to the security registered in pursuance of condition D.

223. Part 5 covers a number of supplementary provisions. Paragraph 21 sets out rules for the case where the interests in land that was subject of the first transaction ceases to be a bond asset (before the end of the bond) and is replaced as bond asset by an interest in other land. These rules allow such a substitution of bond assets to take place without disturbing the reliefs under paragraphs 15 to 20. Sub-paragraph (1) lists the circumstances in which this paragraph applies. Sub-paragraph (2) provides modifications to the application of paragraphs 15 to 20 to the original land and the replacement land.

224. The modifications in respect of the original land are in sub-paragraph (3), and those in respect of the replacement land in sub-paragraph (4). Sub-paragraph (3) provides that condition F (the requirement that Q should hold the original land as a bond asset throughout the life of the bond) need not be met in relation to the original land, provided that conditions A, B, C, F and G (taking account of the modifications made by sub-paragraph (4)) are met in relation to the replacement land. Sub-paragraph (4) provides that following the substitution of the replacement land (a) condition E continues to apply by reference to the value of the original land at the time of the first transaction relating to that land (so that the amount of capital that Q must receive to satisfy condition E is unchanged by the substitution of land); and (b) the ten year time limit for condition G continues to apply by reference to the first transaction relating to the original land.

225. Sub-paragraph (5) provides that, if the replacement land is in Scotland, the security on the original land will be discharged when, Q provides the Tax Authority with the prescribed evidence that the original land has been returned to P and a security has been registered in relation to the replacement land. Sub-paragraph (6) provides that, if the replacement land is not in Scotland, the security on the original land will be discharged when Q provides the Tax Authority with the prescribed evidence that all of conditions A to C are met for the replacement land and that the original land had been returned to the original owner. Paragraph 22 provides for the rules in relation to asset substitution to apply where there is more than one substitution of land during the lifetime of a bond.

226. Paragraph 23 provides that, where a security on the land is discharged because the land has ceased to be a bond asset, either at the expiration of the bond with all of conditions A to G having been met, or because of a substitution of land to which paragraph 21 applies, the Tax Authority must take the necessary action to remove the security from the land register. This must be done within 30 days of Q providing the prescribed evidence that enables the security to be removed.

227. Paragraph 24 provides rules for the situation where a bond-holder, or a group of connected bond-holders, acquires control of the bond assets. The circumstances in which the paragraph applies are the same as for paragraphs 5 and 6 of the schedule.

228. Paragraph 25 provides that paragraph 24 does not prevent relief being available in 2 instances. Sub-paragraph (2) provides that where, at the time the rights under the bond were acquired, a bond-holder, or all of a group of connected bond-holders, did not know or had no reason to suspect that the bonds enabled the exercise of the rights of management and control of the bond assets and, having subsequently become aware of the rights attached to the bonds, the bond-holder(s) transferred sufficient bonds, as soon as reasonably possible so that they could no longer exercise such control. Sub-paragraph (3) provides for a second exclusion for persons acting as underwriters of the bond issuance providing they do not exercise the right of control and management of the bond asset.

229. Paragraph 26 provides that the reliefs under paragraphs 15 and 19 (extended where appropriate by paragraph 21 in relation to substitutions of land) are only available where the arrangements are (a) entered into for genuine commercial reasons; and (b) are not part of arrangements whose main purpose, or one of whose main purposes is the avoidance of liability to pay the tax.