

POLICY NOTE

THE LAND AND BUILDINGS TRANSACTION TAX (SUB-SALE DEVELOPMENT RELIEF AND MULTIPLE DWELLINGS RELIEF) (SCOTLAND) ORDER 2015

SSI 2015/123

The instrument above was made in exercise of the powers conferred by section 27(3) (addition, modification and removal of reliefs) of the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTT(S)A 2013”). It is subject to the affirmative procedure.

Policy Background

The main purpose of this instrument is to add a relief from Land and Buildings Transaction Tax (“LBTT”) in a new schedule 10A to the LBTT(S)A 2013 using the power in section 27(3)(a). The order also amends paragraphs 11 and 12 of schedule 5 to the Act (Multiple Dwellings Relief) to ensure that the relief applies only to the acquisition of multiple dwellings, not multiple dwellings and other property.

Sub-sale Development Relief

Sub-sale arrangements are not uncommon in the Scottish property market. The term is used to describe an arrangement where the ‘first buyer’ contracts with a seller for the acquisition of land and buildings and also contracts with a second buyer to sell the whole or part of the acquisition. The substantial performance or completion of the first contract must take place at the same time as the substantial performance or completion of the sub-sale.

A form of sub-sale relief has been available under UK Stamp Duty Land Tax (“SDLT”) since 2003, but was seen by HMRC and some commentators as providing a tax avoidance loophole. In 2013, HMRC amended the legislative provisions governing the SDLT relief to oblige taxpayers to claim the relief if they wished to use it. The aim was to reduce opportunities for tax avoidance.

The LBTT(S)A 2013 was enacted without any form of sub-sale relief, but the then Cabinet Secretary for Finance, Employment and Sustainable Growth made it clear at Stage 3 of the Bill process¹ that a relief would only be considered where significant development of land or buildings was in prospect and if the risks of tax avoidance could be satisfactorily mitigated.

The then Cabinet Secretary convened a consultative group involving representatives of property development interests, property lawyers and taxation professionals. The group met four times from the end of August 2013 to the end of November 2013.

¹ Scottish Parliament, Official Report, 25 June 2013, see from column 21486, available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8786&mode=pdf>

Consultation

Following the work of the consultative group, the Scottish Government published a consultation paper² proposing that sub-sale development relief could be claimed by the ‘first buyer’ in a transaction involving a sub-sale arrangement at the time of the transaction, but because it could not at that stage be demonstrated that significant development would definitely take place on the land in question, it was proposed that at the outset, when the transaction takes place, the full amount of LBTT due would be paid. It was proposed that the relief in respect of the sub-sale would take the form of a payment by Revenue Scotland to the taxpayer later, once the taxpayer had provided evidence that significant development had taken place on the land in question. The availability of the relief was to be conditional on significant development taking place within 5 years of the effective date of the pre-completion transaction.

The consultation closed on 29 August 2014. An analysis of the consultation responses³ covering a range of issues was published by the Scottish Government in December 2014.

Most of the stakeholders who responded to the consultation were not in favour of the proposed sub-sale development relief regulations as proposed in the consultation. The main concerns were as follows:

- The relief mechanism proposed was viewed as more restrictive than that operating in the rest of the UK and could potentially render Scotland less attractive to developers and less competitive.
- It was suggested that developers may experience cash-flow difficulties under the proposed mechanism, because they would have to pay tax upfront and would receive a repayment only when development was complete (up to 5 years later).
- Meeting the requirement to claim the relief would be beyond the control of the taxpayer seeking the relief.

The concerns primarily related to the proposal that the relief is not available at the point when the land transaction return is submitted by the ‘first buyer’, but would be refunded to the taxpayer by Revenue Scotland when completion of the development can be confirmed. Fourteen of the fifteen respondents who answered the relevant question in relation to the LBTT being refunded on completion of the development disagreed with the proposal. Only the Chartered Institute of Taxation agreed with the proposal.

² ‘Land and Buildings Transaction Tax: A Consultation on Proposed Sub-Sale Development Relief’, published June 2014, available at: <http://www.scotland.gov.uk/Publications/2014/06/8803>

³ ‘Land and Buildings Transaction Tax: A Consultation on Proposed Sub-Sale Development Relief - an Analysis’ published December 2014, available at: <http://www.scotland.gov.uk/Publications/2014/12/2637>

How the relief works

Taking account of the views of those who responded to the consultation, using the power in section 27(3) of the LBTT(S)A 2013, the Scottish Government has decided to introduce a sub-sale development relief in new schedule 10A.

In accordance with the criteria set out by the then Cabinet Secretary at stage 3 of the Land and Buildings Transaction Tax Bill, it is intended that the sub-sale development relief will be available to the ‘first buyer’ in a land transaction involving sub-sale arrangements where significant development is in prospect. The relief is available to the first buyer when the whole site is sold to a second buyer; partial relief is available where part of the site is retained by the first buyer and the remainder is sold to a second buyer or partitioned, with the parts sold to a number of buyers. The first buyer may also contract with the seller and then sub-sell parts of the land over time, without completing the contract with the seller until it is necessary to do so. However, the relief is restricted to the first buyer only; it is not available to a second or subsequent buyer where there is a chain of sub-sale arrangements in place.

‘Significant development’ is defined in new schedule 10A as ‘development that is significant having regard to, among other things, the nature and extent of the subject matter’ and also its market value. Relief is not intended to be available, for example, where an existing building on a site is to be subject to a refurbishment, or where only minor ‘development’ takes place, relative to the nature, extent and market value of the land that is the subject of the sub-sale arrangement.

The definition of ‘development’ in the Order includes educational, sports and leisure, residential, retail, office or industrial buildings, but not, as set out in the consultation paper, agricultural buildings, mining or engineering works (other than wind farms) or plant and machinery.

The mechanism by which the relief is claimed has been changed from what was proposed in the consultation paper. New schedule 10A provides for a sub-sale development relief that is claimed and granted at the point when the land transaction return is submitted by the ‘first buyer’. Revenue Scotland may request specific evidence to be provided by the first buyer in support of the claim i.e. that significant development will take place.

If significant development does not take place within 5 years, the relief is withdrawn or partially withdrawn. The tax that should have been paid would then become repayable. The principle enshrined in the order is therefore that, for the relief to be retained, significant development activity must take place on the land in question.

The provisions for withdrawal of the relief are set out in Part 3 of new schedule 10A. The provisions mirror other similar mechanisms in LBTT legislation which allow for the withdrawal of a relief.

Multiple Dwellings Relief

Currently, paragraph 10 of schedule 5 sets out a calculation for the amount of tax due in relation to a transaction involving multiple dwellings. Paragraph 11 applies the minimum prescribed amount (now set by Parliament at 25%) where the result of the calculation is less than 25% of the tax due on the whole transaction without the relief. That formulation means that the minimum prescribed covers all tax due in respect of the transaction and not just that due in respect of dwellings. The purpose of the amendments is to confine the minimum proportion to the tax that would otherwise be due but for the relief on dwellings.

Upon reflection, the Scottish Government has concluded that the relief should apply only to the acquisition of multiple dwellings, not multiple dwellings and other property. The Order therefore amends the provisions for multiple dwellings relief in paragraphs 11 and 12 of schedule 5 to the LBTT(S)A 2013 to ensure that the tax due on remaining property is not part of the calculation using the minimum prescribed amount.

The order also makes a consequential change to provide that the minimum proportion prescribed in the Land and Buildings Transaction Tax (Prescribed Proportions) (Scotland) Order 2014 stays in force but on the amended basis..

Impact Assessments

A Business and Regulatory Impact Assessment⁴ (“BRIA”) has been published for the regulations and orders associated with the LBTT(S)A 2013. No significant financial effect or impact on the private, voluntary or public sector is anticipated as a consequence of this Order.

An Equality Impact Assessment (“EQIA”) has been published⁵. The order will have no impact on equality or environmental issues.

Scottish Government
Finance Directorate
Fiscal Responsibility Division

⁴ ‘Land and Buildings Transaction Tax - Business and Regulatory Impact Assessment’, published December 2014, available at: www.scotland.gov.uk/lbtt-bria2014

⁵ ‘Land and Buildings Transaction Tax - Equalities Impact Assessment’, published December 2014, available at: <http://www.scotland.gov.uk/Publications/2014/12/5671>