

Business Rates Avoidance and Evasion Consultation

Response by the Chartered Institute of Taxation

1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 The consultation considers misuse of business rates reliefs through artificial arrangements, often operating within the letter of the law, but which enable ratepayers 'to gain a financial advantage which Parliament did not intend. There is however very little published data on existing mitigation schemes and tax leakage. Business rates are not included in the tax gap. Regular formal and robust evaluation of the business rates tax gap is required in the same way as HMRC estimates the tax gap for taxes it administers.
- 1.3 Once that data is available, the measures needed can be considered in that context and evaluated accordingly through further consultation. A wider consultation could also consider the efficacy of anti-avoidance measures introduced in Scotland and the proposals in Wales.
- 1.4 In terms of empty property relief (EPR) although there are good reasons for having a reset period, we agree that 6 weeks is too short. We suggest the Welsh experience should help inform any decision in England about the length of the reset period. Alignment of the reset period between England and Wales offers the benefit of consistency for business especially those businesses operating cross border.
- 1.5 There are concerns about abusive arrangements for empty properties where the ratepayer is a charity or a community amateur sports club. In the case of genuine charities the Charity Commission has issued guidance to trustees that they will be in breach of their duties if they enter into arrangements with owners of empty properties to avoid empty rates. We suggest that consideration might be given to re-issuing its guidance and considering ways for giving greater prominence and publicity to this guidance.

2 About us

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.
- 2.5 The CIOT’s Business Rates Working Group consists of rating specialists and tax advisers including members in industry.

3 Introduction

- 3.1 This joint HM Treasury and Department of Levelling Up, Housing & Communities consultation considers:
- specific measures to reform Empty Property Relief in order to address known avoidance schemes: Questions 1-11
 - calls for evidence on other avoidance and evasion practices within the business rates system and seeks views on whether local authorities have sufficient powers and information to combat avoidance and evasion: Questions 12-20
 - asks for evidence on ‘rogue’ rating agent behaviour and seeks views on how the government could address any problems: Questions 21-23

We have not responded to Questions 12, 14-17 and 18-20 as these are outside our area of expertise or knowledge and primarily addressed to rating authorities.

- 3.2 We have also not responded to Questions 21-23 concerning ‘rogue’ rating agents as our members are rarely rating agents. We agree that it is important that any action on rating agents is consistent with wider government policy across the tax system and aligns with and complements the work conducted by HMRC in relation to agents.
- 3.3 Our stated objectives for the tax system include:
- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
 - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.

- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

4 Tax gap

4.1 The starting point for evaluating the misuse of a tax relief is a clear statement of the objective of the relief intended by Parliament. The consultation considers misuse of business rates reliefs through artificial arrangements, often operating within the letter of the law, but which enable ratepayers ‘to gain a financial advantage which Parliament did not intend. There is however very little published data on existing mitigation schemes and tax leakage. Business rates are not included in the tax gap¹. The tax gap publication states:

‘The tax gap estimates only cover the taxes administered by HMRC, so exclude taxes and duties administered elsewhere (Council Tax, business rates, and Vehicle Excise Duty) as well as charges, such as the congestion charge. These estimates also exclude error and fraud in tax credits which are published separately.’

Any evaluation of the extent of the problem by reference to the objectives of the relief and the appropriate methods for addressing issues will require robust data on the tax leakage. We therefore welcome the consultation’s emphasis on information gathering to identify avoidance and evasion. However, we strongly suggest that regular formal evaluation of the business rates tax gap is required in the same way as HMRC estimates the tax gap for taxes it administers.

5 Empty Property Relief

Question 1. Would increasing the required duration of occupation during the ‘reset period’ from 6-weeks to 3 or 6-months, in your view, be effective in reducing avoidance through empty property rates?

Question 2. What potential issues may arise from requiring occupation for 3 or 6-months during the ‘reset period’?

Currently owners of empty non-domestic properties are not liable to pay rates for the first 3 months (6 months in the case of industrial properties) after a property becomes empty (the initial relief period). We understand that the aim of the initial relief period is to provide owners (the person entitled to possession) with a period of reprieve from paying rates while seeking a new occupier or use for the property. After the end of this period, the owner must pay full rates indefinitely. However, if at any time the property is occupied for a temporary period of 6 weeks² where full rates are paid by the occupier this acts as a ‘reset’ to the relief cycle arrangements, and the owner is eligible for another cycle of 3 or 6 months relief. There is no limit on

¹ <https://www.gov.uk/government/statistics/measuring-tax-gaps>

² Regulation 5 Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008/38

the number of times an owner can claim future cycles of relief so long as the temporary occupation criterion is satisfied.³

- 5.1 There are concerns that the current 6-week ‘reset period’ is treated as satisfied through repeated periods of minimal and superficial occupation. The aim of changing the ‘reset period’ to a longer period of 3 or 6 months between claims is to make contrived short-term occupation less attractive financially such that it discourages avoidance.
- 5.2 We recognise there are good reasons for having a reset, for example in the serviced office industry where room users can come and go quite frequently. However a period of 6 weeks is usually too short in those cases.
- 5.3 We note that Wales consulted on changing the reset period from 6 to 26 weeks in 2020 and that change has been implemented in Wales with effect from 1 April 2022⁴. We suggest the Welsh experience should help inform any decision in England about the length of the reset period. Alignment of the reset period between England and Wales offers the benefit of consistency for business especially those businesses operating cross border.
- 5.4 **Question 3. Would introducing a limit on the number of times EPR could be claimed in a given time period, in your view, be effective in reducing avoidance?**

Question 4. What potential issues may arise from limiting the number of times properties can benefit from EPR within a given period?

- 5.5 The proposal is to limit the number of times a property can benefit from Empty Property Relief so that a property which repeatedly becomes unoccupied within a short time frame would cease to benefit from the relief. The consultation indicates that under this proposal the existing ‘reset period’ would cease to apply. Instead a property would only benefit from the initial relief period of 3 or 6 months in a given period of time.
- 5.6 We think this would add significant complexity. It would make determining the basis of liability very difficult to understand, that is whether a property was being charged on an occupied basis (under LGFA 1988 section 43), unoccupied (under section 45) or under a new third way status of ‘permanent full charge due to prior utilisation of a short reoccupation period’. This might be more straightforward if the property remains in the same ownership but if a genuine transaction took place the new owner would acquire a property that had no access to the normal set of rate reliefs due to its new ‘third way’ status. If a rule was included to say that new owners would not be bound by the third way status, it is likely to mean existing owners of empty property would be looking to create artificial transactions. It seems to present unnecessary complexity.
- 5.7 We suggest extending the ‘reset period’ to 6 months is a simpler standalone solution to the issue of repeated periods of minimal or superficial occupation outside the policy intent.
- 5.8 **Question 5. What are your views on adding additional conditions to the meaning of occupation for the purposes of determining whether a property should benefit from a further rate free period?**

Question 6. How could the additional occupation conditions be effectively defined to reduce avoidance?

³ In *Makro Properties Ltd v Nuneaton and Bedworth Borough Council* [2012] EWHC 2250, the High Court held that the temporary storage of documents occupying only 0.2% of a warehouse's floor space was actual occupation for the purposes of business rates liability. This meant that a new period of empty rates relief applied when that occupation ended.

⁴ Regulation 5 Non-Domestic Rating (Unoccupied Property) (Wales) Regulations 2008/2499 as amended by the Non-Domestic Rating (Unoccupied Property) (Wales) (Amendment) Regulations 2021/118 reg.2 (1 April 2022)

- 5.9 The consultation puts forward a further option of adding conditions to the meaning of occupation for the purpose of determining whether a property should benefit from a further rate free period by amending the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008.
- 5.10 We are concerned that adding new conditions such as a minimum floor space requirement for occupation may lead to new avoidance activity aimed at meeting the further conditions but in a way that is still outside the policy intent. In addition we think an extended statutory definition of occupation for EPR only would add complexity, without necessarily achieving the policy intent. Currently occupation for business rates is not defined in legislation but depends upon a body of case law built up over 400 years⁵.
- 5.11 **Question 7. What are your views on reforming the current arrangements for empty property rates relief and replacing them with a local, discretionary scheme?**

Question 8. Are there any other additional criteria which, in your view, should be met for a property to qualify for EPR?

- 5.12 There are policy tensions inherent in Empty Property Relief. Business rates are assessed by reference to hypothetical rents at a set date for a location. A vacant property does not by definition produce any business income, therefore for an owner-occupier of a vacant property who would generally meet their business rates liability out of general business income, the basis of assessment is even more hypothetical than for commercial tenants and can lead, we understand, to impacted properties having a negative value and owners being put into substantial financial stress. Whilst this is relieved to some extent by the empty property reliefs, these are often not sufficient to cover the actual period of non-occupation. On the other hand, from an economic and social perspective the government wants to encourage property owners not to leave their properties vacant so the reliefs are restricted.

Could these inherent tensions be more effectively addressed by a local discretionary scheme because it is local so councils 'know' their ratepayers? It is recognised that councils retain up to half of the rates revenue raised from businesses in their local area and therefore business rates represent a significant source of income for local authorities that may be dependent on a relatively low number of large ratepayers. However it is not clear how an entirely discretionary local scheme could be effectively administered and its operation systematically evaluated to ensure accountability and transparency.

Currently businesses find it difficult to know what reliefs they are eligible for, and local authority guidance on reliefs can be limited and vary between billing authorities. There is a perception that the business rates relief administration sometimes lacks professionalism with vague statements such 'we may award the relief' instead of setting out the objective criteria. This lack of transparency and consistency increases administrative burdens and adds complexity for business particularly for those operating across local authorities. The benefits of a local discretionary scheme may therefore be outweighed by the need for consistency and clarity for business on what reliefs they are eligible for, and what steps must be taken to claim them.

⁵ See the four tests derived from Lord Justice Tucker's judgment in *JS Laing v Kingswood Area Assessment Committee [1949] 1 KB 344*. Broadly, the requirements are as follows:

- There must be actual occupation.
- The occupation must be exclusive to the occupier; it must not be shared with another.
- The possession must be of some value or benefit to the possessor.
- The possession must not be for too transient a period.

5.13 **Question 9. Would removing the ‘next in use’ exemption, in your view, be effective in tackling avoidance of EPR?**

Question 10. What issues may be caused by the removing the ‘next in use’ exemption?

Question 11. What are your views on how the ‘next in use’ exemption may be improved to minimize the opportunities for rates avoidance, including (but not limited to) introducing additional criteria or devolving the award of the exemption to local authorities?

- 5.14 There are concerns about abusive arrangements for empty properties where the ratepayer is a charity or a community amateur sports club (CASC). Under LGFA 1988 section 45A property is exempt (without a time limit) where it appears that when the property is re-occupied it will be wholly or mainly used for charitable purposes even though there may be no realistic intention that the charity will occupy the property or does in fact occupy the property at some future point. The consultation notes the government’s view that use of such methods to reduce the rates liability of properties that are unoccupied for prolonged periods is tax avoidance. The activity may involve a legitimate charity (that may be misled as to the nature of the scheme) or potentially a non-legitimate body.
- 5.15 The basic premise of the relief is to ensure charities or CASCs do not incur empty rates where they are planning a relocation/expansion and have to acquire a property before disposing of the first.
- 5.16 In the case of genuine charities we note it should be clear from an examination of the minutes whether the charity is undertaking a genuine acquisition of a property for future occupation or colluding with property owners to avoid a business rates liability. The Charity Commission has issued guidance to trustees that they will be in breach of their duties if they enter into arrangements with owners of empty properties to avoid empty rates. We suggest that consideration might be given to re-issuing its guidance and considering ways for giving greater prominence and publicity to this guidance.

6 Wider business rates avoidance and evasion

Question 13. Do you have any suggestions for what action could be taken to effectively mitigate against, discourage or prevent this behaviour?

- 6.1 We suggest that the starting point for considering what action could be taken to mitigate, discourage or deter avoidance activity is to determine the extent of that activity in the form of robust data, as we note above in our comments on the tax gap (para 4 above). Once that data is available, the measures needed can be considered in that context and evaluated accordingly through further consultation. A wider consultation could also consider the efficacy of anti-avoidance measures introduced in Scotland⁶ and the proposals in Wales.

Subject to that overarching point, we have the following initial observations.

⁶ Scotland <https://www.legislation.gov.uk/asp/2020/4/part/4/enacted?view=plain> and guidance <https://www.gov.scot/publications/local-government-finance-circular-5-2023-non-domestic-rates-relief-guidance/pages/anti-avoidance-measures/>

Currently there are no penalties⁷ or interest imposed on failed business rates avoidance schemes. This contrasts with the extensive range of tax-gearred penalties and other measures such as enablers of tax avoidance penalties in the wider tax system. Enabler penalties⁸ impose a penalty charge on advisers when tax avoidance arrangements they have enabled are defeated. The process of issuing an enablers penalty involves the General Anti Abuse Rule (GAAR)⁹ Advisory Panel issuing a final decision notice in relation to the arrangements in question.

The GAAR does not cover business rates abuse. However, we consider there would be challenges in extending the GAAR to business rates because of the lack of supporting infrastructure around it. For HMRC administered taxes, HMRC has a dedicated GAAR team, with a GAAR Board, and protocols about using authorised officers to issue GAAR notices and make referrals. The GAAR Advisory Panel has appropriate expertise to consider whether the taxpayer has engaged in a reasonable course of action, taking account of the legislation, in relation to HMRC taxes. None of that would be available for business rates which perhaps is part of the issue in challenging avoidance. The interaction between the billing authorities and the Valuation Office Agency does not appear to make it easy to have a dedicated team to challenge avoidance

7 Acknowledgement of submission

- 7.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

20 September 2023

⁷ A new penalties compliance regime is proposed under the Non Domestic Ratings Bill 2023 to support new duties on ratepayers to notify the VOA of changes to the occupier and property characteristics that affect the assessment of the property for business rates and to provide lease and other information affecting liability.
of lease information

⁸ Finance (No 2) Act 2017 section 65 and Schedule 16

⁹ Finance Act 2013 Part 5