

Land and Buildings Transaction Tax

Additional Dwelling Supplement: Proposed Amendments to the Additional Dwelling Supplement Legislation

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 Whilst we welcome the proposed changes, as they meet the calls we made in the initial consultation¹, we are disappointed that there is no provision in the draft legislation to allow Revenue Scotland discretion with respect to exceptional circumstances or reasonable excuse with the occupation/replacement timeline criteria. We would also call for the proposal to disregard previously-inherited properties to be amended further to exclude those properties inherited three years prior to the relevant additional purchase.

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

¹ Submitted on 7 March 2022

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 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.

3 Introduction

3.1 As part of the 2021-22 Programme for Government, the Scottish government had pledged to review the Additional Dwelling Supplement (ADS) within the Land and Buildings Transactions Tax (LBTT) regime. The first consultation was released on 16 December 2021 and focussed on four areas:

- timelines;
- specific issues (surrounding inherited property, divorce and joint buyers);
- transactions involving housing providers, and
- exceptional circumstances.

3.2 This latest consultation addresses the same topics – other than exceptional circumstances.

3.3 The Scottish Government states that their tax policies are based upon the fundamental principles of:

- Proportionality to the ability to pay
- Certainty
- Convenience
- Efficiency
- Engagement
- Effectiveness

The first four of these are from Adam Smith's principles of taxation².

² Contained within his 'Wealth of Nations' (1776)

4 The timelines for the ADS

- 4.1 In our initial consultation response, we had recommended that the time available for selling the previous residence and the length of time required to having lived in that previous residence each be extended from 18 to 36 months. We are therefore pleased to see proposed change and that the Scottish government recognises that the current 18 months may not be suitable because of unexpected or personal events occurring in the lives of the parties.

Question 1. Do you think that the proposed amendments provide for the Scottish Government's intended change?

- 4.2 Yes. The extension to 36 months as proposed in the draft legislation will provide for the intended change, and hopefully allow that extra breathing space for buyers.

Question 2. If not, what amendments would you propose to the draft legislation and on what basis?

- 4.3 Not applicable given our response above.

5 Inherited property and small shares

- 5.1 In our initial consultation response, we had also called for a change to allow for inherited properties to be discounted from the consideration as to whether the ADS applied. There is clearly an element of unfairness to penalise somebody who has not consciously chosen to now buy an 'additional' property. Thankfully the Scottish government has recognised this within the draft legislation.

Question 3: Do you think that the proposed amendments provide for the Scottish Government's intended change?

- 5.2 Whilst we welcome this change, the timeframe from which inherited properties will be removed from consideration is far too short. In England, Wales and Northern Ireland, those properties inherited three years prior to the purchase of the 'additional' property are discounted, whereas these proposals only exclude properties inherited after the missives for the additional property have concluded. This will limit the scope of the change drastically, to the point of rendering it worthless in most cases.

Question 4: If not, what amendments would you propose to the draft legislation and on what basis?

- 5.3 We would propose that those properties inherited up to three years (prior to the effective date of transaction on the additional property being concluded) be brought into the exemption. It may well be that (perhaps because it was already let out when inherited) purchasers have not been able to sell an inherited property prior to purchasing the additional property; they may not have been able to occupy it as their main residence given its location or for other reasons; or it might just have been difficult to sell. However, three years seems sufficient and fair time to enable buyers to make and carry out a real choice. In addition, this would align the position with the equivalent taxes in England and Wales: while each jurisdiction is of course free to set its own time limit, given there is no strong reason for any exact time period, it will help avoid confusion for those who inherit a property in one jurisdiction but buy their own property in another one to have aligned rules with less scope for confusion.

Question 5: Over and above existing legislative arrangements, are there any targeted anti-avoidance measures that the Scottish Government should consider in respect of this proposed amendment?

- 5.4 Should a clear three-year limit be included, combined with the clarification of when an inherited property is 'owned', then it is likely that no such anti-avoidance measures would be required in this regard. By contrast the existing proposal could be inviting delays of transactions where possible.

Small shares

- 5.5 Previously, an individual inheriting a share of a property would be brought into the ADS on a subsequent purchase if the total value of that inherited property was above £40,000. Our recommendation in the initial consultation response was to amend this to encompass only the individual's share of the building instead. It seems unfair to assess someone on the value of an asset which they do not completely own. We therefore welcome this proposed change and the news that Revenue Scotland will apply this rule to small shares acquired other than by inheritance.

Question 6: Do you think that the proposed amendments provide for the Scottish Government's intended change?

- 5.6 Yes, the amendment appears to provide for this welcome change.

Question 7: If not, what amendments would you propose to the draft legislation and on what basis?

- 5.7 Not applicable, given our answer to question 6.

Question 8: Over and above existing legislative arrangements, are there any targeted anti-avoidance measures that the Scottish Government should consider in respect of this proposed amendment?

- 5.8 It is important to be clear at what point in time the £40,000 threshold for the inherited property is assessed. One would assume it is when the additional property is purchased as per the existing valuation rules; however, such buyers may wish to argue a lower probate valuation so some clarification might be in order.

6 Divorce/separation

- 6.1 The concerns we expressed in our initial response were that should someone having to leave the marital home (potentially with children and/or as the victim of domestic abuse), then their retention of a stake in the marital home would mean they face the ADS when purchasing their own property. This might force a vulnerable or abused person to stay in the property with their abuser. This proposed change, thankfully, addresses our concern.

Question 9: Do you think that the proposed amendments provide for the Scottish Government's intended change?

- 6.2 Yes, the proposals would seem to satisfy the intended change.

Question 10: If not, what amendments would you propose to the draft legislation and on what basis?

- 6.3 Not a proposed amendment, but one concerning clarification of paragraph 9C(d) ie *'the buyer and the buyer's spouse, civil partner, former spouse or former civil partner do not intend to live together again'*. It would be useful to clarify at what point that becomes the case, clearly a temporary absence would render the whole relief void. If a deed of separation is executed, or separation is per a court order, then that puts the matter beyond doubt, otherwise it would be when the *'they are in fact separated in such circumstances that the separation is likely to be permanent'*, which is the definition applied to Stamp Duty Land Tax (SDLT), as well

as income tax and capital gains tax³. It would be useful if the proposed legislation would clarify whether the existing LBTT definition of separation ie not living together nor intending to again⁴ will apply to the ADS or whether another definition (such as that for SDLT) might be employed specifically in this instance.

We would also ask whether this might be an opportunity to consider whether relief from the ADS might still be available if someone retains a share in the marital property, but without a Court Order or comparable legal document telling them to do so eg maybe that person retains their share simply because the co-owner doesn't want to buy it. If it can be established that the relationship has permanently ended, a time-limited relief for the departing spouse might be available for a retained stake in a house jointly owned with that partner.

7 Joint buyers/economic unit provisions

7.1 The concern with the existing ADS is that if two people are buying a replacement main residence, both need to have fulfilled the criterion regarding occupation and disposal of an original property. Couples living together for the first time are therefore disadvantaged by this; this approach also runs contrary to the principle of spouses and cohabitantes each being treated as one economic unit for ADS purposes. The proposed change means that a jointly-purchased replacement can escape the ADS if only one person disposes of a previous property – it fits in with principles of fairness and equity for the person who owned/lived in the previous property to avoid paying the ADS if they are now replacing that property; the proposed changes deem that to be the case for the co-owner who did not actually own/live in the previous house.

Question 11: Do you think that the proposed amendments provide for the Scottish Government's intended changes?

7.2 Yes, we believe these changes correspond with the principle of cohabiting joint buyers' being treated as one unit for ADS purposes.

Question 12: If not, what amendments would you propose to the draft legislation and on what basis?

7.3 We have no further amendments to suggest

8 Local authorities

8.1 We expressed a view in our initial consultation response that it would seem logical and fair to equate local authorities with housing associations as far as relief from LBTT and ADS. We are therefore pleased to see the proposed changes bringing this into fruition

Question 13: Do you think that the proposed amendments provide for the Scottish Government's intended change?

8.2 Yes, the proposed changes appear to provide for the intended change.

Question 14: If not, what amendments would you propose to the draft legislation and on what basis

8.3 Not applicable, given our answer to question 13.

³ Section 1011 ITA 2007 – applied to SDLT per para 9/9A, Sch 4ZA Fa 2003 and CGT per s.288(3) TCGA 1992

⁴ Section 6(3) Land and Buildings Transaction Tax (Scotland) Act 2013

9 Extenuating circumstance

9.1 Currently, Revenue Scotland has no statutory discretion to waive the application of the ADS (in contrast to the discretion which HMRC have with SDLT). With SDLT, the 36-month replacement window may be extended at HMRC's discretion if the circumstances are exceptional – each case being decided on its own merits based on fact and degree such as something outside the taxpayer's control preventing the sale, and assuming the taxpayer does all in their power to facilitate the replacement⁵. However, there is no ability to appeal HMRC's decision given the discretionary nature of the power.

Whilst the extension of the 18 month timeframes to 36 within this proposed legislation (for both occupying the previous property as a main residence and purchasing the additional one) would likely provide relief in the vast majority of case, there may still be instances where buyers cannot meet even that timeframe for reasons beyond their control.

There have been several instances whereby buyers have been unable to claim a refund on their additional purchase either because they could not occupy the original property before replacing it or occupy the new property; or could not sell the original house within the timeframe. We quoted the case of *Dr Andrew Christie v. Revenue Scotland*⁶ in our original submission as an example of the unfairness caused by the rigidity of the rules – an army doctor being unable to occupy the original property due to their being stationed abroad. More recent cases such as, *Meng Choo Tan v. Revenue Scotland*⁷ (who was unable to occupy a second property because of covid restrictions) and *Ian Tavendale v. Revenue Scotland*⁸ (who was unable to sell the property within the 18 month due to mistaken belief that a qualified acceptance meant that his first property was sold), have highlighted the inability for the tribunals and Revenue Scotland to apply discretion and allow repayments even if, technically, the criteria within the legislation have not been met. In the former case, the tribunal concluded that: '*There are no provisions in the legislation for considering extenuating or special circumstances or reasonable excuse*' (para 26); in *Tavendale*, they concluded again that '*this tribunal does not have jurisdiction to consider fairness in reaching its decision*' (para 25). An ability for the tribunals to apply a statutory discretion might have helped these individuals.

We are therefore disappointed to see that there is no proposal to introduce a mechanism for discretion within the draft legislation which Revenue Scotland or the courts could exercise when reviewing individual cases. We would recommend again that individual circumstances are examined and that, in the event of unforeseen and unavoidable instances and where the taxpayer has done all they reasonably can and executed the transactions as soon as they were able to, relief may be considered.

We do not think allowing such discretion would open any floodgates or be the subject of any possible abuse, nor do we think that it would create 'a significant degree of uncertainty', as stated in the response to the first consultation⁹. We are not aware of HMRC's encountering any such difficulties with their powers of discretion over SDLT. We only advocate that the power be available to Revenue Scotland to hear appeals and use their discretion as they see fit; there would be no obligation other than to give the matter some thought, nor any compulsion to apply the relief in cases which they believe are unworthy.

⁵ SDLTM09807

⁶ [2022] FTSTC 2

⁷ [2022] FTSTC 10

⁸ [2023] FTSTC 1

⁹ In para 2.102

10 Acknowledgement of submission

10.1 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

4 April 2023