

Tax barriers to housing supply

Proactive submission 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 20,000 members, and extensive volunteer network, in providing our response.
- 1.2. The government has committed to a target of building 1.5 million new homes by the end of this parliament. In this submission we identify tax barriers in the current tax system to delivery of this target and suggest possible solutions with a focus on simplification.
- 1.3. The current tax system distorts the way in which neighbouring land plots held in different ownership is assembled to produce a combined site for housing development. As a result, landowners may choose not to pursue any form of land collaboration. It is widely recognised that fragmentation does not promote good place making and design. We suggest ways in which these barriers to sustainable development might be addressed.
- 1.4. Reliefs from SDLT are aimed at facilitating liquidity in the housing market by allowing housebuilders and other property traders to acquire a seller's home to allow them to buy their new one. These reliefs do not cover all situations and may not be operating effectively to achieve that aim.
- 1.5. It is extremely common for banks and other third-party lenders to require some form of guarantee to lend to housing developers given the relatively high level of risk inherent in development activities. For SME housebuilders and developers, the related party guarantee rules under the corporate interest restriction for corporation tax adversely affect project viability in a way that appears inconsistent with the policy intent.
- 1.6. Given the nature of property development, profit recognition from residential development tends to be 'lumpy' with early year losses and higher profits recognised at the end of the project. Falling within and outside the scope of Residential Property Developer Tax adds significant complexity for SME developers. It would be

helpful if HMRC's data could be reviewed to evaluate the extent of this issue for SME developers and how it might be addressed.

- 1.7. There is an impediment in relation to supply pipelines for affordable housing sites because of the current VAT treatment that appears inconsistent with the policy to expedite the supply of affordable housing. We suggest a simplification to address this issue.
- 1.8. The ability to make a group ATED return for all group entities could offer administration and efficiency savings by reducing the number of returns required where no ATED liability arises. This simplification could therefore benefit both taxpayers and HMRC

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.

3. Introduction

- 3.1. The government has committed to a target of building 1.5 million new homes by the end of this parliament¹ and announced land, regulation and financing reforms to support SME and smaller housebuilders in reaching this target². The government has also committed to building more affordable homes³.
- 3.2. The purpose of this submission is to help identify tax barriers in the current tax system that may hinder or do not assist in delivery of this target and related initiatives.
- 3.3. We do not generally comment on rates of tax as these are a matter for government.
- 3.4. The focus of this submission is on the current tax regime as it affects housing supply. In terms of wider reform to property taxes, we suggest effective reform requires a holistic approach, looking at the interaction of taxes - and non-tax policies - and the market. The ability of homeowners to move is affected directly by transaction

¹ <https://www.gov.uk/government/publications/plan-for-change>

² <https://www.gov.uk/government/news/government-backs-sme-builders-to-get-britain-building>

³ <https://questions-statements.parliament.uk/written-statements/detail/2024-07-30/hcws48>

taxes - SDLT and capital gains tax, also less directly by council tax because, for example, levying council tax on outdated values provides an incentive to remain in a house when the owner would rather move to something more suitable for their needs. Reform of taxes on housing (or even speculation about reform) can have a significant effect on house prices so measured reform and wide consultation is key to successful implementation and public acceptance.

3.5. Our stated objective for the tax systems 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. Land assembly for new housing development

- 4.1. In earlier submissions we have considered the complex tax issues (both in terms of the known application of specific provisions and of uncertainties of application) that arise when assembling neighbouring land held in different ownership to produce a combined site for housing development. As noted by the Office of Tax Simplification in their Capital Gains Tax – second report⁴, although the tax complexities may only affect a relatively small number of taxpayers the economic effect is likely to be significant due to the values involved. The current tax treatment distorts the economic decision as to the optimal route to assemble the site and the complexity slows or potentially blocks delivery. Individual landowners may refuse to proceed either because they are not able to manage the potential ‘dry’⁵ tax charges that may arise or else, effectively, to hold other landowners to ransom for the highest price with the result that the combined development is either prevented or delayed.
- 4.2. These barriers hinder housing supply and are brought into sharper focus by the government’s housing target as, it may be difficult to achieve the target through patchwork development of small sites and instances will arise where there is a need to assemble large sites for development into new towns.
- 4.3. The CIOT has previously explored the tax barriers inhibiting land collaboration arrangements in earlier submissions to the then Department of Communities and Local Government consultation in 2017 ‘Fixing our broken housing market’⁶, to the Building Better Building Beautiful Commission and to the Office Of Tax Simplification’s (OTS) Capital Gains Tax review (tranche two) in 2020⁷. The OTS Capital Gains Tax – second report⁸ concludes that the government should explore ways to make land assembly more tax neutral.

⁴ <https://www.gov.uk/government/publications/ots-capital-gains-tax-review-simplifying-practical-technical-and-administrative-issues>

⁵ A dry tax charge is where a tax liability arises but there are no proceeds or profits from which to pay the liability.

⁶ <https://www.tax.org.uk/ref281>

⁷ <https://www.tax.org.uk/ref693>

⁸ <https://www.gov.uk/government/publications/ots-capital-gains-tax-review-simplifying-practical-technical-and-administrative-issues> (see para 7.79)

- 4.4. We summarise below and at Appendix I some of the key tax issues, as previously explored in our earlier submissions and potential solutions.

Outline of tax issues in land assembly for development

- 4.5. Where there are multiple neighbouring owners, a mechanism is needed to protect each owner's position so that individual landowners receive an appropriate share of the whole, for example landowner A's site may be used for high end housing, landowner B's for affordable housing and landowner C's for green space. The development requires all three for high quality sustainable development and therefore a route is needed to share the proceeds in agreed proportions regardless of when each tranche of land is sold to the developer and for what purpose on the combined site.

Equalisation agreement

- 4.6. At its simplest, the site owners may enter into an equalisation agreement under which each disposing landowner will pay an agreed share of the proceeds to the others in the set proportions reflecting the split agreed. For CGT purposes the selling owner's chargeable gain is taxed (at 24%) without any deduction for the amount they pay on to the other owners. The other non-selling owners are taxed on the receipt of their share of the proceeds on the basis that the right to receive a share of the proceeds from the selling owner's land is a chose in action. The base cost of the chose in action will typically be negligible resulting in CGT on almost the full gross amount. The basis for the non-deductibility for CGT purposes of the equalisation payment paid by the selling owner to the other landowners is usually cited as *Burca v Parkinson* [2001] STC 1298. In that case the court held the obligation to pay part of the proceeds from the sale of shares to another party under a loan agreement did not affect the amount of consideration received for CGT purposes.⁹ HMRC's guidance does not refer to or comment upon this case.
- 4.7. Equalising payments are therefore taxed twice - in the hands of the seller without deduction and in the hands of the other owners. A double charge is clearly contrary to underlying CGT policy.
- 4.8. There are alternative routes to achieve equalisation that remove the double CGT charge as outlined at **Appendix I**. However, they are complex and raise other tax disincentives to collaboration such as the loss of CGT and IHT reliefs even if the same land is farmed in the same way until sale. None of the alternatives remove all distortions and are hampered by uncertainties in tax outcome and legal complications if it is necessary to unwind the structures. As a result, landowners may choose not to pursue any form of land collaboration, instead entering into option and sale arrangements for the promotion phase of projects, then selling plots on a field by field basis. From a tax perspective, dry tax charges do not arise and reliefs are largely preserved. However, it is widely recognised that fragmentation impacts adversely on good place making and design.
- 4.9. We include at **Appendix II** a narrative experience of advising on three housing development projects in the West Midlands, Bedfordshire and Oxfordshire to illustrate the barriers operating in practice and complexities involved.
- 4.10. Our previous submissions considered short term fixes and more optimal longer-term options for ensuring the tax treatment of collaborative land assembly is less distortive.

⁹ The question of the base cost of the chose in action (ie the non-selling landowner's right to receive a share of the proceeds) was not considered in *Burca v Parkinson*.

Short term fixes

- Amending TCGA 1992 section 38 to remove the double CGT charge by providing for a statutory deduction for equalisation payments when computing the gain when the landowner sells their site. The provision of a statutory deduction is conceptually simple to understand and would remove a key barrier in the double charge that is contrary to wider CGT policy. It would need to be specifically targeted and not open to abuse. The intended effect of an amendment is outlined below.

In effect the amendment would include the following (assuming a simple two phase sale of 100% of Parcel's A and B by landowner A and landowner B):

- when calculating the CGT Liability of landowner A on the disposal of Parcel A, the share of proceeds transferred to Landowner B would be treated as allowable expenditure under section 38 for landowner A;
- Landowner A's allowable expenditure under section 38(1)(a) and (b) of the disposal of Parcel A would be apportioned as if that were a part disposal of Parcel A;
- Landowner B would be subject to CGT on the sum it received from the sale of Parcel A but part of landowner B's allowable expenditure under section 38(1)(a) and (b) in Parcel B would be apportioned and applied to such sum as if it were the proceeds of a part disposal of Parcel B;
- When calculating the CGT Liability of landowner A on the sum it receives from the sale of Parcel B, its remaining allowable expenditure under section 38(1)(a) and (b) in Parcel A would be treated as allowable expenditure under section 38 as if it were the proceeds of a part disposal of Parcel B.

- Expanded HMRC manual guidance for the land pooling bare trust route to provide certainty of tax treatment for VAT, SDLT and CGT. The OTS recommendation in 2021 that HMRC should improve their guidance for land assembly was accepted by the government at that time.¹⁰ Any non-statutory clearances made in relation to land pooling trusts in the past may have provided HMRC with the opportunity to review the arrangements. It is hoped that means supplementing the guidance may be possible in the short term.
- Large housebuilding schemes would meet the quantitative threshold suggested in the consultation on the policy design for 'Advance tax certainty for major projects'. In our response to the consultation we encouraged the government to consider including such projects in scope covering the corporate and personal tax uncertainties given the interconnection for housing supply. Publication of anonymised advance clearances could provide comfort to smaller schemes as the tax issues are likely to be the same. Addressing the lack of certainty in this way would not require legislative change or have yield implications and the consultation also raises the merits of charging for clearances.

These short-term fixes would go some way to addressing the current barriers to land assembly for housing but would not necessarily offer a complete solution.

¹⁰ See <https://www.gov.uk/government/publications/chancellor-responds-to-ots-reports-on-inheritance-tax-and-capital-gains-tax> (recommendation 14)

- 4.11. Therefore, in our earlier submissions, we also considered the pros and cons of longer term solutions that could address the identified issues more fully including principles-based legislative drafting to ensure a pooled development enjoys a comparable (neutral) tax treatment to the more traditional option and sale arrangements irrespective of the legal form of the arrangements adopted, a tax neutral 'land-pooling' vehicle specifically designed to provide a neutral tax treatment without affecting the wider tax code or a series of dedicated reliefs for CGT, IHT and possibly other taxes or amendment to existing reliefs or provisions.

5. SDLT FA 2003 Schedule 6A Relief for certain acquisitions of residential property

- 5.1. The policy intent of the SDLT exemptions in Schedule 6A is to facilitate liquidity in the housing market and assist with mobility of employment by providing an exemption from SDLT in specified situations. However, the conditions attached to the exemptions and their scope mean they may not be operating as intended.
- 5.2. The current exemptions apply to the following acquisitions by 'a house- building company' or by a 'property trader', both as defined in Schedule 6A. All are subject to clawback provisions under which, in certain circumstances, the relief is withdrawn. In outline the exemptions are:

An acquisition of the seller's existing dwelling by a house-building company where the seller acquires in part exchange a newly constructed dwelling from the house-building company (Schedule 6A paragraph 1)
An acquisition of the seller's existing dwelling by a property trader where the seller acquires a newly constructed dwelling from a house-building company (Schedule 6A paragraph 2)
Where a property chain 'fails' and a property trader buys the old dwelling in order to facilitate acquisition of another freehold or leasehold of an existing dwelling by the seller (whether or not a newly constructed dwelling) (Schedule 6A paragraph 4);
An acquisition by a property trader where the existing property is being sold out of an estate by personal representatives (Schedule 6A paragraph 3);
An acquisition by a property trader (or an employer) where the existing property is being sold as a result of a relocation of employment of the seller (Schedule 6A paragraph 6).

Acquisition by a house-building company as part of a part exchange scheme (Schedule 6A para 1)

- 5.3. Large-scale residential developments are often undertaken by a limited liability partnership (LLP) as part of joint venture arrangements between commercial developers and, for example, a local authority, a not for profit landowner (such as a charity), a financial institution or a housing association, to facilitate residential development. Part exchange schemes for buyers of residential homes are routinely operated by the larger house builders.

- 5.4. Finance Act 2003 Schedule 6A paragraph 1 exempts a 'house-building company' from SDLT on the acquisition of an existing house in exchange for a new house, subject to the conditions as defined in FA 2003 Schedule 6A paragraph 1. A 'house-building company' is defined as 'a company that carries on the business of constructing or adapting buildings or parts of buildings for use as dwellings' (paragraph 1(4)).
- 5.5. In correspondence between CIOT and HMRC in 2019-2020, HMRC have confirmed that:
- The Schedule 6A paragraph 1 exemption does not apply to an LLP by virtue of its status as a body corporate.
 - The exemption is available in principle where the members of the LLP are all house building companies (as defined) because of the look through provisions in FA 2003 Schedule 15 Part 1.
 - Where not all the members are qualifying house building companies, HMRC's view is that there is no partial relief in respect of qualifying members. HMRC's view is that the Court of Appeal decision in *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753 relates only to transactions involving a charity as a joint purchaser.
- 5.6. In the context of HMRC's position that all members of an LLP must be house building companies to qualify for the exemption, a leading text book¹¹ notes that it is arguable that they should be treated as answering this description by dint of their participation in the partnership if the partnership carries on the business of 'constructing or adapting buildings or parts of buildings for use as dwellings' in accordance with the definition of a house-building company at Schedule 6A paragraph 1(4).
- 5.7. As we noted in the original exchanges, the Welsh Land Transaction Tax (LTT) legislation does not have this restriction. For LTT a housebuilder is defined as a company or an LLP or a partnership whose members are all either companies or limited liability partnerships (see LTTADT(W)A 2017 Schedule 14 para 2,9.)¹². We suggest that, if HMRC do not accept the analysis at 5.6 above, a simple amendment is made to the SDLT legislation (to match the position in the LTT legislation) for an LLP should be considered to resolve the commercial barrier.
- 5.8. Separately this relief does not provide for a look through to the underlying individual buyer where the buyer is financing the acquisition of the new dwelling from the housebuilder using alternative finance. The effect is that relief is denied when alternative finance arrangements are in place. This is inconsistent with a policy of providing parity of treatment between alternative finance and conventional financing.

Property traders

- 5.9. There current SDLT exemptions for property traders do not cover the following circumstances:
- The seller has not made arrangements to buy another dwelling and so is not in a chain of transactions. It appears the relief at Schedule 6A paragraph may not apply if the seller simply wants to sell the old dwelling to a property trader to realise the cash proceeds and then subsequently look for another dwelling;
 - If the chain exists but breaks down, the relief at Schedule 6A paragraph 4 might not apply if the seller has enough finance to buy another existing or new dwelling - because the paragraph 4 states it only

¹¹ Sergeant & Sims on Stamp Taxes at paragraph AA150

¹² In Scotland Land and Building Transaction Tax mirrors the SDLT position (see Land and Buildings Transaction Tax (Scotland) Act 2013 Part 2 Schedule 4).

applies where the property trader buys the old property ‘for the purpose of enabling the individual’s acquisition of the second dwelling to proceed’;

- The property that the seller wants to buy is not currently a ‘dwelling’ for example a piece of bare land on which a dwelling will be built or a commercial premises that the seller wants to convert into a dwelling once acquired;
- The seller does not wish to buy or let another dwelling if they will move into a nursing or care home the terms of the occupancy being that the seller only has a licence to occupy;
- Where a housebuilder wishes to purchase a property to complete a chain. The housebuilder would not usually be eligible to claim relief as it is not a property trader buying and selling dwellings (as defined). Its business is to develop for resale dwellings in the course of a property development trade. Its business is not to buy and sell dwellings (as stock of the business) in the course of a property trading business. Therefore a separate qualifying property trader entity would need to be established to use this exemption.

It is not clear whether these ‘gaps’ in the current exemptions are consistent with the policy intent. We suggest therefore the scope of this relief is reviewed.

Permitted amount on refurbishment of the old dwelling

- 5.10. One of the conditions for the exemptions for an acquisition by a property trader under paragraph 2, 3, 4 and 6 is that the property trader does not intend to spend more than the permitted amount on refurbishment of the dwelling. The permitted amount is defined in Schedule 6A paragraph 9 as the greater of £10,000 or 5% of the consideration, capped at £20,000. These amounts have not changed from when the exemptions were introduced in 2004, 21 years ago¹³ and do not allow for basic inflationary increases in cost. In addition, they do not reflect costs of upgrading EPC ratings, particularly for older housing, in line with the government’s net zero targets.
- 5.11. We suggest that the permitted amount requires evaluation to determine whether it meets the policy intent given the increase in costs of construction materials and labour since 2004 and the benefits of encouraging recycling of housing by investing in upgrading existing properties rather than building new properties, with the consequential increase in carbon emissions.

6. Corporate Interest Restriction

- 6.1. The corporate interest restriction rules were introduced to limit the deductibility of interest for corporation tax purposes. At the time that the rules were introduced, there was an acknowledgement that the real estate sector, and particularly businesses carrying out real estate development, tended to be highly geared. A specific relaxation of the rules was included in Chapter 8 of Part 10, TIOPA 2010; the public benefit infrastructure election (‘PBIE’). This election can be made by qualifying infrastructure companies in order to mitigate the impact of the corporate interest restriction rules for companies carrying out qualifying activities. These includes long-term renting out of property to unconnected third parties. The effect of the election is to remove interest payable on third-party borrowing costs from the CIR calculation for companies that have made the

¹³ The permitted amount is the same for LTT (See LTTADT(W)A 2017 Schedule 14 paragraph 9) and for LBTT (See LBTT(S)A 2013 Schedule 4 paragraph 28).

election and for those same companies, the tax-EBITDA is taken to be nil. Related party borrowing costs remain in the CIR calculations for companies that have made PBIE election.

- 6.2. Making the PBIE means that companies building housing for rent should be able to deduct all third-party borrowing costs incurred on their development loans. However, certain third-party loans are treated as related party loans for these purposes under TIOPA 2010 s 438(4) if the bank requires a guarantee to be issued by a related party of the borrower. In the context of real estate development, it is extremely common for banks and other third-party lenders to require some form of guarantee in order to lend to development companies, given the relatively high level of risk inherent in development activities. We understand that HMRC has asked why more real estate companies do not make use of the PBIE. The guarantee issue is one of the reasons why some companies do not utilise the exemption.
- 6.3. A similar issue arises in the context of the group ratio rule, which is designed to ensure that heavily leveraged groups can deduct greater than 30% of tax-adjusted EBITDA. The percentage of tax-adjusted EBITDA that is deductible is calculated as the percentage arrived at by dividing the qualifying net group-interest expense of the group for the period by the group's accounting EBITDA for the period, multiplied by 100 (with specific rules applying where that gives a percentage not between 0% and 100%). Qualifying net group-interest expense excludes related party interest, so the intention is that, taking a hypothetical UK only group, all third party interest should in most cases be deductible. However, the definition of related party interest in TIOPA 2010 section 415 contains provisions that deem third-party interest to be related party interest for CIR purposes where a guarantee has been given by a related party. This deeming does not apply where the guarantee is given by a member of the same CIR group as the borrower. As noted above, businesses in the real estate sector are often highly leveraged compared to other sectors and so the group ratio election ought to be beneficial for them.
- 6.4. Real estate businesses are also more likely to take out debt that provides for a return linked to the overall development value. These arrangements are often with PE Funds or Challenger banks. Where there is a profit participating element, this can also result in the interest being treated for CIR purposes as provided by a related party due to the fulfilment of the participation condition, even if the profit participation element itself has been treated as a distribution under CTA 2010 section 1000 and not claimed as an interest deduction.
- 6.5. In the context of real estate development, it is extremely common for banks and other third-party lenders to require some form of guarantee in order to lend to development companies, given the relatively high level of risk inherent in development activities. Unlike larger groups, smaller, joint venture developers often cannot rely on another member of the CIR group in order to obtain the guarantee but usually need to rely on one provided by one of the joint venture partners, which tend to be in another CIR group. Often as noted above on large schemes there is likely to be a number of stakeholders who may provide these guarantee or the guarantee may be requested from the top holding vehicle which often due to its corporate personality is an LLP. Whilst an LLP is legally a body corporate, it does not form part of a CIR group. By contrast other members of the CIR group can often provide the necessary guarantee where larger housebuilders are concerned.
- 6.6. Where smaller housebuilders are not able to use the PBIE or the group ratio because of the related party guarantee restriction, projects may not be viable as the developers need to fund tax as a result of CIR restrictions on projects reducing margins to a point where the project is economically not profitable.
- 6.7. While this point has always been an issue for developers, we understand that the impact on viability has increased as interest rates have risen, particularly for SME and small developers.

- 6.8. We intend to raise this issue directly with HMRC to explore whether this aspect of the CIR rules continues to meet the policy intentions of the rules and is not creating unintended consequences that are adversely affecting other aspects of the government's policy objectives around house building and growth.

7. Residential Property Developer Tax ('RPDT')

- 7.1. Given the nature of property development, the recognition of the profits from residential development tends to be 'lumpy' with early year losses and then larger profits recognised at the end of the project. This can mean that SME developers in particular find themselves falling in and out of the scope of this tax on an annual basis, particularly given that interest is not deductible against the profits attributable. The risk of falling within the scope of the tax may lead to deferral of sales to ensure that the profits fall below the £25m threshold. Falling within and outside the scope of RPDT adds significant complexity for SME developers. It would be helpful if HMRC's data could be reviewed to evaluate the extent of this issue for SME developers.
- 7.2. Larger schemes are often mixed use eg residential with commercial elements or community buildings, and therefore a just and reasonable apportionment needs to be undertaken to assess the level of profits subject to RPDT. We have previously submitted¹⁴ to HMRC a request for further clarity and guidance on the approach that should be taken for these purposes. Additional guidance on the matter would be helpful.

8. Zero-rating the supply of affordable housing development sites

- 8.1. Current VAT law impedes affordable housing pipelines. Housing associations ('HAs') require completed dwellings and other designated residential properties ('RRP Buildings'), in order to make them available for occupation. HAs are generally unable to fully recover VAT. However, there are several statutory provisions that HAs may seek to rely on to protect them from paying VAT on top of the purchase price for development sites and building works.
- 8.2. One protection is **zero-rating**. This allows both the HA to receive housing development supplies VAT-free and allows the HA's supplier to recover its VAT, lowering the overall cost of development for the HA. Zero-rating applies to the following supplies to an HA.
- A supply of a major interest (freehold or long leasehold) in a dwelling/RRP Building by a 'person constructing' that dwelling/RRP Building.
 - A supply of a major interest (freehold or long leasehold) in a dwelling/RRP Building by a 'person converting' a non-residential building into that dwelling/RRP Building.
 - A supply in the course of construction of a dwelling/RRP Building (essentially, a supply of building works services, rather than of a building).
 - A supply in the course of converting a non-residential building into a dwelling/RRP building (this head of zero-rating is specific to HAs).

¹⁴ <https://www.tax.org.uk/ref1086>

An HA must certify its intention to use any RRP building as such in order to enjoy zero-rating. An incorrect certificate carries a penalty equal to the full amount of VAT saved (with no right to recover the penalty as input tax), under VATA 1994 section 62. An accurate certificate of initial intention, followed by a change of occupational use or disposal of entire interest (in the ten years that follow practical completion of the building) will trigger a clawback of some or all of the benefit of zero-rating, using a self-supply charge.

- 8.3. Another protection is **exemption**. The supply of land is ordinarily exempt for VAT purposes, but is usually standard-rated if the supplier makes an option to tax in relation to the land. Three provisions relating to buildings allow an HA to switch off a supplier's option to tax.
- One provision (applicable to all recipients of a property supply) allows buildings already designed or adapted for dwelling/RRP use, and intended for use as such, to be supplied exempt, notwithstanding the supplier's option to tax.
 - Another provision (applicable to all recipients of a property supply) allows non-residential buildings intended for dwelling/RRP use to be supplied exempt, even if the supplier has opted to tax, provided the recipient certifies that intended use. An incorrect certificate is subject to a penalty under VATA 1994 section 62.
 - A specific provision allows HAs to 'switch off' the supplier's option to tax in relation to the supply to the HA. The HA can certify (using form VAT1614G) its intention to use the site to construct dwellings or RRP Buildings. Again, an incorrect certificate is subject to a penalty under VATA 1994 section 62.
- 8.4. There is a tension between the need for developers to delay selling sites to HAs for VAT purposes, and the desire for HAs to acquire the sites before they lose funding. This creates an unnecessary bottleneck in the affordable housing supply chain.
- 8.5. Once it identifies an affordable housing development site, an HA will be under pressure to secure the legal title in it as soon as possible, due to a combination of factors relating to grant funding rules, rather than VAT.
- Firstly, an HA cannot draw down a grant allocation unless it acquires the legal title in the site.
 - Secondly, if the HA is unable to use its grant allocation within a particular period, then the allocation may be lost to it in that funding period and might also result in a lower allocation in the next funding period.
- 8.6. By contrast, developers will, for VAT reasons, be forced to delay sales to HAs until the developer can meet the current conditions for zero-rating, or to engage in complex and potentially costly structuring with the HA.
- Under both zero-rating and exemption, the HA will not pay its seller VAT in addition to the purchase price. But zero-rating is markedly superior: the supplier can recover the VAT it incurs in the course of making its supply, but that is not the case if the supplier makes an exempt supply.
 - The input tax involved for the seller can be very significant: typically, the seller to the HA will be a residential developer who has worked with a landowner and a promoter at a substantial cost. VAT will have been incurred on costs – sometimes limited to professional fees, but in other circumstances, on the purchase of the land itself. In a typical form of supply chain, the promoter will charge the

landowner VAT on its fee for promoting the site, and the landowner will opt to tax and charge the developer VAT on the supply of the site (so as to recover VAT on the promotion fee).

- The developer, as the supplier to the HA, will therefore lose a significant amount of input tax if it makes an exempt supply to the HA. In order not to do this, it is common for developers to acquire sites and develop them sufficiently to allow them to make zero-rated supplies in the manner contemplated in paragraph 8.2.¹⁵ Practically, this means that the developer needs to reach the threshold for being a ‘person constructing’ a given building (known as the ‘golden brick’), in order that it can then supply it to the HA.
- Another route by which an HA can acquire an interest in the land earlier without forcing the seller to make an exempt supply is for:
 - the HA to incorporate a subsidiary company and register it for VAT independently of the HA; and
 - the subsidiary company to acquire the land by way of a standard-rated supply, contract with the developer for them to construct the dwellings, and then – once it can – make a zero-rated supply of the dwellings to the HA.

This means that the developer can recover its VAT but may incur SDLT, subject to relief. An HA acquiring a development site directly may qualify for SDLT relief on the acquisition (under either FA 2003 section 68 or section 71). Its subsidiary would qualify for neither relief. So the HA would incur either SDLT or VAT, and always suffer cashflow impediments, restricting the capital it has available for development.

- 8.7. In summary, the current VAT law creates significant inefficiencies and delays in delivery of affordable housing, and the exchequer receives no greater amount of VAT as a result.

Potential solution/simplification

- 8.8. Whereas currently, an HA-certified intention to use an undeveloped site for the construction of dwellings/RRP buildings results in an *exempt* supply to it; a simplification could be that the certificate instead gives rise to a *zero-rated* supply to the HA.
- 8.9. Following Brexit, there is no meaningful impediment to expanding the scope of zero-rating, in this case to the supply of affordable housing sites to HAs. There are several factors that make the transition easy.
- The VAT legislation already supports the concept and policy approach of special treatment for HAs, reflecting the trust they embody as tightly-regulated entities, not just within the VAT code, or the rest of the UK tax code, but generally.
 - The template legislation already exists. With appropriate amendments, the provisions in VATA 1994 Schedule 10 paragraph 10 could be ported to Schedule 8 Group 5. Paragraph 10 relies on provisions and definitions in Schedule 8 group 5, already and there are duplicated definitions (including of a ‘relevant housing association’).

¹⁵ Anecdotally we understand that the estimated cost of a dwelling reaching golden brick stage is c60% of the overall cost of the dwelling taking account of land acquisition, planning, infrastructure and foundations.

- The certificate infrastructure is also well-established. Form VAT1614G, in its current form, has been used since mid-2008. VAT1614G could be revised and repurposed with ease.
- The existing penalty regime for incorrect certification (VATA 1994 section 62) applies to exempt and zero-rated certificates alike, so no additional provisions would be required.
- As explored in paragraph 8.2, there are already clawback provisions that recoup VAT savings from zero-rating based on certified intention, where that intention ceases to be fulfilled within a decade. These provisions are set out at VATA 1994 Schedule 10 part 2 and, with minor modifications, could apply to acquisitions by HAs of affordable housing development sites against a *zero-rated* VAT1614G certificate.

9. Land Remediation Relief

- 9.1. The government has consulted recently on the impact of Land Remediation Relief, the objective of which is ‘incentivising the regeneration of brownfield land and reducing pressure to develop greenfield sites’. Our response to the consultation is at <https://www.tax.org.uk/ref1548>.

10. Simplification of Annual Tax on Enveloped Dwellings (ATED) administration for group companies

- 10.1. Following consultation in 2014¹⁶ the relief declaration return (FA 2013 section 159A) was introduced to reduce the ATED compliance burden for businesses eligible for relief. For single entities the relief declaration return removes the compliance burden of stating the market value of the dwellings covered by the return in that return. This is of particular benefit to property developers and investors holding multiple dwellings purchased, converted or built in a chargeable period that are eligible for property developers relief (section 138) or relief for property rental businesses (section 133). However, across a property investor or developer group, for commercial, risk and financing reasons dwellings are likely to be held in multiple special purpose vehicles (SPV) for each development. Therefore, although an SPV can file a relief declaration return covering the dwellings held, each SPV within the group has to make separate returns. The ability to make a group return for all group entities could offer administration and efficiency savings by reducing the number of returns required where no ATED liability arises. This simplification could therefore benefit both taxpayers and HMRC.

11. Acknowledgement of submission

- 11.1. We would be grateful if you could acknowledge safe receipt of this proactive submission.

The Chartered Institute of Taxation

9 October 2025

¹⁶ Annual Tax on Enveloped Dwellings (ATED): Reducing the Administrative Burden for Business

APPENDIX I: SOME ALTERNATIVE ROUTES TO ACHIEVE EQUALISATION: high level summary*Use of a separate company/partnership*

Each landowner transfers their land to the vehicle in consideration of the issue of shares in proportion to their land or a partnership share. Use of a separate vehicle for collaboration avoids the double CGT charge that arises on a contractual equalisation agreement. However, the initial transfer is likely to lead to 'dry'¹⁷ CGT and SDLT¹⁸ charges on the market value of the land transferred.

Use of a company also gives rise to a potential double layer of tax both at the company level on profits subject to corporation tax and at shareholder level when profits are distributed or the shares are sold.

In the case of a partnership, the landowners' profit share on disposal is likely to be subject to income tax at higher rates instead of the lower CGT rate.

If some or all the land needs to be returned to the original owners if the development does not proceed, further tax charges will arise on the transfers out.

From a legal perspective, it is often preferable not to establish any joint venture vehicle until the project is seen as commercially feasible. However the effect is that the upfront dry tax charges can increase by reference to higher values and this may distort the choice of commercial vehicle.

Land pooling (bare trust)

Site owners transfer legal title to their land to trustees who hold the pooled land for the owners in undivided shares with each landowner holding a percentage of the whole by reference to the value of the land contributed and the agreed proportion of profits. Based on the authority of *Jenkins (Inspector of Taxes) v Brown* [1989] 1 WLR 1163, HMRC accept that transfers to or from the trustees should not constitute a disposal for CGT purposes (see [CG34380](#)). On the sale of a tranche, each would receive a share of the proceeds with the chargeable gain subject to CGT at 24%. Business Asset Disposal Relief (BADR) is not available on the disposal¹⁹. However the structure avoids CGT dry tax charges on transfer in and the double CGT charge on equalisation because there are no payments between the landowners.

Pending sale landowners can continue to farm the land while the land is in the pooling trust.

HMRC's current position on whether they consider that the principle in *Jenkins v Brown* applies to SDLT removing a SDLT charge on the transfer of land to/from the bare trust is unclear. HMRC have not stated their position publicly.

Unwinding a bare trust if the development does not proceed or land is not utilised in the development, once the pool is wound up, is complex as land must be transferred out of the land-pool in direct proportion to the value of their remaining interest in the land-pool to avoid CGT charges. This could result in landowners taking back areas of land that was not theirs before the land-pool was set up.

¹⁷ 'Dry' in the sense that the tax charges arise well in advance of the proceeds from the sale of the land arising.

¹⁸ LBTT in Scotland, LTT in Wales

¹⁹ For disposals before 30 October 2024 the reduced BADR rate was 10% for gains up to £1m of gains per individual. The rate is 14% for disposals in the tax year 2025/26 tax year and 18% thereafter.

There is also inconsistency in relation to how HMRC treat registration of a co-ownership trust for VAT.

Use of cross -options

Each landowner grants an option to the other landowners (or to a developer) to acquire a share in their land. Equalisation payments are reflected in the consideration for the grant and the price on exercise. Cross options therefore mitigate the double CGT charge however there are upfront dry CGT charges on the grant of the option based on the value of the right to receive a share of the proceeds. Therefore the cross-options route is likely to be utilised only when the value of the land reflects its agricultural use and before 'hope' value accrues as a result of likely planning consent. The grant of an option is also a chargeable transaction for SDLT.

APPENDIX II Case studies: Land development – tax problems where neighbouring landowners collaborate

The following sets out some of the key tax problems that arise in the context of three land development projects (each a **Project**) where the owners of adjoining land wished to dispose of their respective parcels to a developer/developers for the purposes of the construction of commercial units and/or dwellings. The locations of the Project land were variously the West Midlands, Bedfordshire and Oxfordshire.

The life of the Projects span the period between 2018 and the present day. The direct tax and VAT issues discussed have altered little during that period of time.

The size of each development was such that the site was comprised of several neighbouring parcels of land each being owned by separate and unconnected landowners. The West Midlands site was owned by five landowners. The site at Bedfordshire was owned by three landowners. The Oxfordshire site was owned by four landowners.

The landowners for the Projects included various combinations of private individuals, an Isle of Man company, UK resident companies, charities and a local authority.

Most of the landowners held their parcels as capital assets but some of the UK companies were housebuilders who held their land as trading stock.

For each Project the landowners (or some of them) entered into a Collaboration Agreement whose basic commercial terms were similar – being, broadly, that (a) each landowner would be entitled to a share of the purchase price paid by the housebuilder for the site and (b) if the acquisition of Project land was phased over time, the landowner selling its parcel would share the proceeds of sale of that land with the other landowners in accordance with the percentage interest each landowner had of the entire site.

Broadly speaking, therefore, the commercial intent was that:

if Landowner A owned 34% (Parcel A) , Landowner B 45% (Parcel B) and Landowner C 21% (Parcel C) of the whole Project land; and

Parcel A were developed first in Phase 1, Parcel B developed second under Phase 2 and Parcel C developed last under Phase 3; then

When Parcel A was sold to the developer at Phase 1, despite the fact that only Landowner A would be disposing of his Parcel, Landowners B and C would be contractually entitled to 45% and 21% respectively of the proceeds of sale of Parcel A;

Upon the disposal of Parcel's B and C the proceeds of sale would similarly be shared between the Landowners in accordance with their respective percentages.

This commercial structure – a simple Equalisation structure – makes perfect sense commercially but it is not efficient from a capital gains tax perspective because:

- The selling Landowner is subject to UK capital gains tax (**CGT**) on the entire proceeds of sale for the land that it sells because it is understood that the proportion of the proceeds of sale shared with the other two landowners is not allowable expenditure under section 38 TCGA 1992. In the above example, Landowner A would be subject to CGT on the entirety of the proceeds of sale of Parcel A despite the fact that it is obliged to transfer 66% of the proceeds of sale to Landowners B and C. *Burca v Parkinson* is usually cited as the authority that these transfers of proceeds of sale are not deductible when calculating Landowner A's capital gain; and
- The non-selling Landowners on the other hand, who are receiving a share of the proceeds of sale of a Parcel are at risk that they have no base cost in their share of the proceeds of sale from that Parcel and so are subject to CGT on the entirety of what they receive²⁰.

²⁰ This point was not considered in *Burca v Parkinson* and it is possible that these Landowners who are disposing of their rights under the Collaboration Agreement (the *Marren v Ingles* asset) do have a base cost in that asset by virtue of the fact that they have agreed to share part of the proceeds of sale from their own Parcels. But there is no judicial authority directly on the point and therefore considerable uncertainty/risk for these Landowners.

Consequently a simple Equalisation structure is at significant risk of doubling the CGT liability overall. It is this risk that forces Landowners to seek alternative collaboration structures. These can be in the form of complex cross option structures, partnership arrangements or land pooling arrangements. In the three Projects referred to in this paper, Land Pooling Trusts (**LPTs**) were used. This paper looks at a few of the tax issues and difficulties that the LPTs created.

LPTs are bare trusts in which each Landowner is a beneficiary holding an equitable interest equal to the value of its Parcel as to the value of the overall Project land. Landowner A will, for instance, have a beneficial interest under the trust equal to 34% of the trust's assets. Each Landowner contributes its Parcel to the trust and as a result each Landowner holds an equitable interest in the whole Project Land equal to its equitable percentage under the trust. Landowner B, for instance, having owned 100% of Parcel B (being 45% of the whole of the Project land), will cease to be 100% owner of Parcel B and will end up with 45% beneficial interest in the whole of the Project Land.

It is understood that the contribution of each Parcel to the LPT is not treated as a disposal for CGT purposes – the authority being *Jenkins v Brown*. It is also understood that these contributions do not give rise to a charge to SDLT, with *Jenkins v Brown* sometimes being cited as justification for that view.

Once the Project Land is in the LPT, the Parcels are sold in accordance with the phased development. The trustees receive the proceeds of sale and as it is a bare trust the Landowners as beneficiaries are subject to CGT on those proceeds in accordance with their equitable entitlement. Accordingly the intention is that there is a single incidence of CGT under an LPT, not the double incidence under a simple Equalisation structure.

Leaving the realm of direct tax for a moment, it might be noted that the use of LPTs may not be commercially acceptable to some Landowners. Where all landowners hold their Parcels as capital assets, the LPT is a useful structure. But where some hold as capital, where others hold as trading stock and/or are exempt from CGT, or where internal governance makes it problematic for the entity to 'relinquish' its land to a trust or other arrangement, the use of an LPT is unattractive and finding a single development structure to avoid the CGT double hit for Landowners A, B and C can be difficult and will cause delays. We have seen this on the development in the West Midlands where the original landowners comprised several housebuilder companies, a charity, a local authority and a farming family. Conversely, in the Oxfordshire project most of the landowners were charities and so exempt from capital gains tax, but the use of an LPT had to be considered because there was a piece of land owned by an individual which was fairly key to the development as a whole. The parties were proceeding on the basis of a simple Equalisation structure but then took tax advice as it was realised that the landowner would not get a tax deduction for the sums it transferred out to the other landowners on the sale of its parcel.

LPTs can also create uncertainty as regards VAT treatment. The LPT itself will register for VAT and will almost certainly opt to tax the Parcel's contributed to it. As far as we are aware there is no judicial authority that looks directly at the VAT treatment of contributions of land to LPTs but arguably the better view is that the contribution of the Parcels to the Trust represents a barter transaction between the Landowners and the LPT Trustees with the Landowner swapping its interest in its Parcel for an interest in the whole Project Land. As these supplies are made at the same time and are it is understood for the same value, the Landowner's and the LPT's respective outputs and inputs in effect cancel each other out and each Landowner makes no payment to or any claim from HMRC. Likewise the Trustees. In brief the barter represents a book entry in the Landowner's and the Trustees' respective VAT returns. HMRC seems to accept this analysis. Whether that is on the basis that HMRC agrees with the technical position or whether it is because in practice there is no loss to HMRC in accepting this analysis is not known.

On the Bedfordshire Project, however, one of the Landowners was registered for VAT in the Isle of Man and the barter analysis for that Landowner was challenged by the Isle of Man Customs and Excise (**IoMCE**). Barter is in effect exchanges of land interests for VAT purposes where the result is that the tax authority receives no VAT output tax, it being nullified by an equal and opposite input tax entry. The IoMCE were of the view that it was a purely linear transaction whereby the Landowner made a supply of land to the LPT but the LPT made no supply of any interest in land back to the Landowner. HMRC did not, however, query the VAT barter analysis so far as the LPT and the other two Landowners were concerned. Two tax authorities within the same Member State for VAT purposes were taking different views of the same transaction. The differences were eventually sorted out without cost or loss (except for legal costs) to any of the Landowners and the Trustees, but the process took over a year to do so. The impression left was that the VAT treatment of LPT transactions was accepted eventually as VAT neutral but was not clearly understood by the tax authorities involved.

This paper outlines two areas of tax uncertainty facing landowners, the more important being the need to avoid double taxation of the proceeds of sale on phased development. Landowners will not currently collaborate and so release land to housebuilders unless that double tax risk can be eliminated. The method of doing that involves the introduction of legal and structural complexity. This increases the time it takes to achieve agreement between Landowners and increases their costs. This inevitably has an impact, possibly small, on land prices. It would be much easier for TCGA 1992 section 38 to be amended to enable simple equalisation structures to be used without the double tax hit.