

Land and Buildings Transaction Tax – Additional Dwelling Supplement: call for evidence and views

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 With regard to the timelines for the Additional Dwelling Supplement (ADS) under the Land and Buildings Transaction Tax (LBTT), particular focus is on the 18-month replacement windows – one for when a main residence is sold, the other being for how long the previous residence must have been lived in prior to the new acquisition. It is our view that both these windows should be permanently increased to 36 months. This longer timescale will not only assist ordinary transactions, but also distressed purchases in divorce/separation scenarios. We note that the equivalent periods for Stamp Duty Land Tax (SDLT) and Land Transaction Tax (LTT) purposes are 36 months.
- 1.3 For inherited properties, we would also recommend that a grace period of three years be adopted for LBTT ADS purposes, so properties inherited in that time prior to purchase are ignored, provided the stake in that property is 50% or less. (We note that this is the case for SDLT and LTT.) We recommend, however, that consideration be given to applying the relief irrespective of whether, and to what extent, the property is jointly owned; and that consideration ought to be given as to whether use of the inherited property should be factored into the legislation. We further recommend that when valuing jointly owned properties, inherited or otherwise, an individual's share is assessed against the £40,000 qualifying threshold at the time of the additional purchase, rather than that of the whole property.
- 1.4 The LBTT ADS is distinct from SDLT/LTT in that cohabitees form an 'economic unit'; but as with divorcing couples, their separation will cause problems when one of the couple has to buy another property, but still owns a share of the shared home. In the absence of a statutory relief, such as applies for SDLT when a Court Order stipulates a property adjustment order, when a departing individual needs to buy a new dwelling, then

unless the old dwelling is sold within 18 months, the ADS will be chargeable. We believe that there should be a statutory, open-ended relief for ADS when a member of an economic unit needs to buy another property for themselves whilst still owning their share of the main residence: we think this would be consistent with the 'economic unit' concept and avoid undue hardship when couples split up.

- 1.5 We recommend that for joint owners who acquire their main residence having replaced another, the rule which stipulates that both parties must have lived in the old residence be amended. The joint buyers may not have cohabited before the new purchase, or one of the joint buyers may not have own an existing property. If cohabitees are treated as a single unit, then that rule should be applied uniformly.
- 1.6 We believe that any disparity in LBTT relief for the provision of affordable/social housing by local authorities and other providers should be removed, with the relief applying equally to any such provider.
- 1.7 There should be a statutory provision allowing Revenue Scotland the discretion, not only to extend the main residence replacement windows, but to allow the ADS to be waived in other exceptional circumstances where the taxpayer cannot dispose of their pre-existing property due to something beyond their control. Furthermore, we believe this discretion should be subject to an appeals process through the tax tribunals, rather than having to rely on Judicial Review.

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 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 ADS within the Land and Buildings Transactions Tax (LBTT) regime, this call to evidence being the prelude. The ADS has clear parallels to the higher rate regimes within Stamp Duty Land Tax (SDLT) in England and Northern Ireland and the Land Transactions Tax (LTT) in Wales concerning the purchases of additional properties beyond one's main residence. We understand that the desire of all three governments is to address the perceived housing shortage and seek to strike a balance between first time buyers' ability to get on the property ladder, and the freedom of others to buy additional properties¹.

3.2 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.

3.3 In common with the SDLT and LTT higher rates for additional dwelling regimes, the ADS does have its complications; specific scenarios encountered in daily life will expose shortcomings in the legislation and it is only right that in the nearly seven years since the ADS was introduced, these are revisited. The call for evidence clearly recognises many of these and we welcome the opportunity to add to the discussion to ensure that the ADS conforms with the government's principles.

3.4 Specifically, the call for evidence is focussed on four areas:

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

¹ As regards Scotland, in para 1.4 of the Call for Evidence document, the intent behind the ADS is stated as being: *'drive to protect and support opportunities for first-time buyers in Scotland, reinforcing the progressive approach in place for LBTT rates and bands. It also raises vital revenue to support public services in Scotland. Furthermore, with similar tax arrangements in place across the UK (the HRAD in SDLT and Higher Rates of LTT), the absence of the ADS could have a destabilising impact on the Scottish property market'*

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

4 The timelines for the ADS

- 4.1 If an individual is buying a new dwelling to replace their existing main residence which they still own, then the ADS will apply to that new purchase. However, if the second property is ultimately to ‘replace’ the first, rather than be an ‘addition’, then clearly this scenario is not within the intended scope of the rules. So, whilst the ADS will apply on the second purchase, once the first property is replaced, the purchaser should be able to reclaim the ADS initially paid. The mechanism which allows this is broadly common across LBTT, SDLT and LTT; however, what differs is the amount of time between the second purchase being an ‘addition’ to becoming a ‘replacement’ and thus allowing the ADS refund.
- 4.2 In both England and Wales, the SDLT and LTT rules state that if the buyer sells their first home within 36 months of purchasing the second/replacement, then any additional tax paid can be reclaimed (‘sale criterion’). A seller must also have lived in their old home at some point within the 36 months before the purchase of a new home (‘residence criterion’). These replacement rules act in isolation, insofar as provided the purchase is replacing a main residence within the 36 months, the additional SDLT can be refunded – even if the purchaser has multiple other (investment) properties besides.
- 4.3 In Scotland, this replacement mechanism also exists, but the sales and residence criteria were originally, and are now, only 18 months apiece. This window for the sale criterion was temporarily extended to 36 months where the second home was purchased between 24 September 2018 and 24 March 2020. The power for this came from the Coronavirus (Scotland) (No.2) Act, which allowed both the sale and residence windows to be extended to 36 months.
- 4.4 **Question 1. Should the Scottish government consider amending the length of time available to purchase a new main residence following the sale of the previous main residence from 18 months?**
- 4.5 Yes. Our view, based on anecdotal evidence concerning the Scottish housing market, is that the current 18 months is not a long enough period in all cases to allow for either the sale of an old house or purchase of a replacement. We would suggest both the residence and sales windows be permanently extended to 36 months as alluded to in the call for evidence document³. We are aware that the suitability of the 18-month timeframe has previously been raised in the Scottish Parliament in respect of transactions involving island communities⁴. It is also likely that with a wide and varied property market, there will be other instances where the current 18-month timeframe is insufficient for transactions to be concluded in order to obtain a repayment of ADS.
- 4.6 **Question 2. If so, can you provide further explanation and/or evidence regarding the circumstances in which 18 months may not be sufficient?**
- 4.7 Although we can offer no empirical evidence that 18 months is insufficient, the fact that 36 months is allowed in other parts of the UK and appears to be offering sufficient time, is a persuasive argument. It is also possible that confusion may exist amongst buyers crossing to and from other parts of the UK, believing that the rules are the same. A consistency of approach, therefore, may offer some benefits. Whilst Scotland’s property laws are slightly different to that in England and Wales, buyers are just as likely to encounter the same difficulties in buying a new house within 18 months: for example, it is still possible for ‘chains’ of property sales and purchases to cause delay. Anecdotal evidence is showing that whilst properties are selling well in many parts

³ Para 4.11

⁴ At a [meeting of the Scottish Parliament’s COVID-19 Committee on 12 May 2020](#), Beatrice Wishart MSP raised the issue with the Cabinet Secretary for Constitution, Europe and External Affairs, stating: ‘Many people will, through no fault of their own, be unable to sell their old home, especially in areas in which property markets are slower, such as the islands. That can cause real anxiety.’

of Scotland (which might support the view that the status quo is sufficient), this housing boom is pricing many people out of the market altogether. Many are simply priced out at an early stage, or find houses within their price range but are forced out by sheer demand.

- 4.8 We surmise that the longer period might help prevent some of the specific issues identified below, such as around separation or divorce, from occurring.
- 4.9 **Question 3. If the Scottish government were to amend the length of time available to purchase a new main residence, what period of time should be considered and why?**
- 4.10 As alluded to above, we would consider a 36-month window to be a more suitable time frame. This timeframe appears to be working well within the SDLT and LTT regimes; so as well as reducing the possibility of any confusion for those moving to and from Scotland, an extension would give a bit more leeway for buyers, particularly in times such as now with the market the way it is. (Certain sectors of the housing market are particularly slow, making it potentially very difficult to sell within 18 months of a new purchase; conversely, other sectors may be so buoyant that it is difficult to buy within 18 months of the earlier sale. These patterns can change over time but the point is it is risky to rely on the housing market being in a good equilibrium in all sectors all of the time.)
- 4.11 Questions 4, 5 and 6 are asking the same questions, but from the perspective of a seller. We apply the same answers to these questions as we made to questions 1, 2 and 3.

5 Specific Scenarios

- 5.1 There are three specific scenarios which have caused some concern about ADS: inherited property, divorce/separation, and joint buyers.

5.2 Inherited property

When purchasing an additional property, the LBTT ADS (along with SDLT and LTT) applies whether the purchaser's pre-existing property was purchased or inherited – an additional property is owned and that is all the legislation requires. However, for SDLT and LTT, where that pre-existing property was inherited within the three years prior to the existing purchase, and that inherited property was a share of 50% or less, then it can be ignored for the purposes of the corresponding additional dwelling charge.

- 5.3 When considering the valuation of an inherited property and whether the £40,000 qualifying limit for SDLT/LTT applies, only the share of the property which the individual owns is considered. If the property is therefore jointly-owned/inherited, and an individual legatee's share is less than £40,000, then the additional dwelling higher rates in England/Wales will not apply to any purchase that legatee subsequently makes. In Scotland, however, the ADS considers the total value of the inherited property; if that total value is above £40,000 then the ADS will apply to a legatee's future purchase, even if their individual inherited share is below that value.
- 5.4 **Question 7. What circumstances and issues should the Scottish government take into account in considering the treatment of low value interests in inherited properties for the purposes of LBTT?**

- 5.5 We believe that the LBTT ADS should be changed so that the valuation of properties which are jointly owned (which is compared to the £40,000 threshold) should be restricted to the individual (and spouse's) shares, rather than the whole building. We note that this is already the case under SDLT and LTT.
- 5.6 However, the Scottish government has the opportunity to go a step further and consider other issues such as the 50% or less share criterion: we think the grace period should apply to a wholly owned inherited property, or jointly-owned property with a greater share than 50%. Furthermore thought also be given to whether use of the inherited property makes any difference to being assessed as part of ADS eg if it is being used as a Furnished Holiday Let, or to house a disabled/dependent relative.
- 5.7 **Question 8. Should the Scottish Government consider the introduction of a grace period along the lines of that in place for SDLT in respect of inherited property? If so, what arrangements should be considered?**
- 5.8 Yes, following from our answer to question 7, ADS should include a grace period with respect to inherited properties, as is the case under SDLT/LTT. We believe that a three-year grace period would be sufficient on the basis that it appears to provide satisfactory relief in the rest of the UK.
- 5.9 We further recommend that beyond the grace period, the ADS rules apply to any share in an inherited property and that the £40,000 ADS threshold be applied only to the proportion of the inherited property which the individual owns.
- 5.10 Divorce/separation

With SDLT and LTT, an 'economic unit' comprises of spouses who live together as such ie if one spouse buys an additional property in their own name, then any additional properties owned by the other spouse will be factored in to determine whether the higher rates apply. The economic unit for LBTT ADS purposes also include cohabittees, defined as a couple who live together as a married couple. Once a couple, married or otherwise, are separated then they cease to be an economic unit and so an additional property purchase made by the departing spouse would not attract ADS if the former property was owned solely by the remaining spouse. However, if the house is jointly owned, that departing spouse/cohabitee still owns half a property, and so ADS would apply to that new purchase.

- 5.11 **Question 9. What circumstances and issues should the Scottish Government take into account in considering the tax treatment of a new property following a divorce or separation, and why?**
- 5.12 The main issue surrounds the scenario in which a departing spouse/cohabitee buys a new property for themselves whilst still owning a joint share in the former main residence. The imposition of the ADS on the departing spouse will further increase the cost of separation and may result in the separated couple having to remain in the same house. If the breakdown of the marriage/relationship was due to domestic abuse/violence, then the couple being effectively forced to stay together could have far-reaching consequences, especially if children are involved.
- 5.13 We recommend a change to allow a relief from ADS for an individual who was formerly in an economic unit when they acquired their share of a joint residence which they still own. This would remove a heavy financial consideration at a very difficult and stressful time. An allowance of this sort would also allow a member of the unit to buy a second property for work purposes if they needed to. The statute could stipulate the work, divorce or separation criteria, or potentially even be subject to a wider discretionary power under exceptional circumstances (see below). Likewise, if a more-targeted approach is more desirable, then the relief could be

dependent upon external evidence of the reasons behind the breakup eg court orders, involvement of police/social services etc.

5.14 Question 10. Do you have views on the case for a more specific legislative amendment along the lines of that available in SDLT? If so, please further details

5.15 A similar provision to that in SDLT which provides relief when a departing partner buys a new property, whilst transferring the first property to the other subject to a court order⁵ would be a sensible and constructive amendment for the same reasons as stated above. We would suggest that the relief under such a statutory provision be open-ended and not subject to any time limit.

5.16 Question 11. Separately, would increasing the length of time available to dispose of main residence assist in situations of divorce or separation?

5.17 As stated above, we recommended above that the current 18 months should be increased to 36 months to ease the position of buyers and sellers in ordinary circumstances. However, in cases of divorce or separation, an increase from the 18 months time limit would be even more valuable. Aside from the fact that divorce proceedings can take many years to resolve, the departing spouse will be in a very distressed and potentially vulnerable position – especially if they have left the main residence with a child. Indeed, so serious can the position be, that we would recommend the relief be left open-ended in cases of divorce or separation.

5.18 Joint buyers/economic unit provisions

We are particularly concerned with the scenario in which a couple buy a house together but do not currently live together; only one of them owns a property at the time of joint purchase: in this situation ADS must be paid - but a repayment cannot be claimed in any circumstances as one member of the couple did not live in the pre-owned property. This example is highlighted within the Call for Evidence⁶.

5.19 Question 12. Are there other issues of concern regarding the treatment of joint buyers which the Scottish Government should consider? If so, can you provide further explanation and evidence regarding these?

5.20 The requirement that both joint buyers must have lived in the property previously owned by only one of them does seem unfair and onerous. It would be more equitable, and in line with the policy intention of the ADS and Revenue Scotland's fundamental principles of tax, to simply require the individual who owned the previous property to be replacing that for the new main residence. If the couple are treated as one economic unit, then the criterion need be that only one of them needs to have replaced a property. At the moment, the rules only work in one direction with the status of cohabittees being relevant for the sales criterion; yet that same status is not relevant for the residence criterion.

5.21 Question 13. Do you have any proposals as to how the legislation might be amended in response to these scenarios, in way that would ensure consistency with the application of the ADS for an individual buyer?

5.22 Please see our response to the question above.

⁵ A property adjustment order per Schedule 4ZA Para 9B Finance Act 2003

⁶ Para 4.32

6 Transactions Involving Housing Providers

- 6.1 Whilst local authorities benefit from relief from LBTT concerning planning transactions and modifications, as well as compulsory purchases, they may be chargeable when buying housing stock from builders. Registered Social Landlords can also benefit from LBTT relief for certain publicly-funded land transactions associated with the delivery of affordable homes. However, as well as local authorities' exposure to ADS, there is some concern about whether all Housing Associations will benefit from ADS relief. This difference has been raised by the Scottish Government as a potential anomaly.
- 6.2 **Question 14. What circumstances should the Scottish Government consider in assessing the case for a broader relief for local authorities where properties are acquired for affordable housing purposes, and why?**
- 6.3 It would seem to us that if a LBTT relief is available for the provision/purchase of social/affordable housing, then the relief should be available irrespective of who provided it and the nature of the transaction. There seems to be no obvious reason why one type of provider should benefit from a relief because it is in the public sector, whereby private sector non-profit organisations cannot.
- 6.4 **Question 15. Are there grounds for the Scottish Government to consider the introduction of a relief from the ADS for housing co-operatives, or any other approaches intended to deliver housing which is affordable? Please provide further explanation and evidence regarding this**
- 6.5 As stated above, we do not see why there is a disparity between different bodies providing the same services/products. Beyond this, we are unable to comment on the provision of affording housing.

7 Exceptional circumstances

- 7.1 Currently, Revenue Scotland has no discretion to waive the application of the ADS (in contrast to the discretion which HMRC have with SDLT). With SDLT, the three-year 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 replacement⁷. However, there is no ability to appeal HMRC's decision given the discretionary nature of the power. The Welsh Government has recently announced proposals to extend the sales window beyond 36 months for those unable to sell their main residences due to exceptional circumstances relating to unsafe cladding.⁸
- 7.2 **Question 16. Is there a case for the Scottish Government to consider legislating for an exceptional circumstances provision (along the lines discussed above)?**
- 7.3 Yes, we believe such a measure should be introduced as a 'safety net' for taxpayers who find themselves subject to the ADS through no fault of their own. In HMRC guidance⁹ as regards this provision under SDLT examples of exceptional circumstances include being prevented from selling the property because of government-imposed restrictions, and actions taken by local authorities to prevent the sale. The cladding issue, being the specific focus of the Welsh government's planning discretion, is another recent example.

⁷ SDLTM09807

⁸ <https://gov.wales/written-statement-land-transaction-tax-higher-residential-rates-refund-period-extension-where>

⁹ *ibid*

- 7.4 The recent Scottish First Tier Tribunal case of *Dr Andrew Christie v. Revenue Scotland*¹⁰ gives a good illustration of where a broader discretion would have been useful. In that case, an army doctor's ADS refund claim was declined on the basis that the family were unable to live in the old property ie the residence criterion had not been met; so the replacement property refund was not available. However, the reason he and his family were unable to take up residence of that first property, despite their initial intention to do so upon their return from a posting in Cyprus, was because he was subsequently posted to an army unit in Canada. Being unable to take up a residence or sell a property due to employment or work demands could also come within the definition of exceptional circumstances. Giving Revenue Scotland a wider discretion provides for greater natural justice and fairness; there should be that discretion to waive the charge in appropriate circumstances.
- 7.5 The other circumstance that should be considered is the opportunity to appeal Revenue Scotland's decision if they decline an application or refuse to exercise their discretion. The only way to counter HMRC's refusal to exercise their discretion is via a Judicial Review. We would recommend that the granting of discretionary powers to Revenue Scotland comes with the availability to appeal the decision, or refusal to exercise that discretion, to the Tax Tribunals.
- 7.6 **Question 17. If so, what circumstances should be considered, and on what grounds?**
- 7.7 We would recommend that LBTT follow the SDLT model to provide discretion to Revenue Scotland to allow an extension to the main residence replacement window within ADS. As with SDLT, these circumstances should be judged on their own facts and merits, with no pre-determined criteria other than the taxpayer having done everything in their power to dispose of the main residence within the 18 (or 36) months. We would recommend that the discretion given to Revenue Scotland be able to take all and any considerations into account.

8 Additional Questions

- 8.1 **Is there any other issue regarding the operation of the ADS legislation which you would wish the Scottish Government to consider as part of the overall review? If so, please provide explanation and commentary on any available evidence about this.**
- 8.2 **Are there any other points you would wish to raise regarding the operation of the ADS in different parts of Scotland?**
- 8.3 **The Scottish Government has a duty:**
- to eliminate discrimination, advance equality of opportunity and foster good relations between different people; and
 - to have regard to the impact on island communities in carrying out its functions.

Are there any issues relevant to the content of this consultation that you believe the Scottish Government should consider in order to assure performance of these duties?

- 8.4 As noted in paragraph 8.5, we are aware that concerns have previously been raised in the Scottish Parliament regarding the impact of the Additional Dwelling Supplement on island communities. Without being in a position to provide concrete examples of this, we would nevertheless suggest that this is an area that should

¹⁰ [2022] FTSTC 2

be taken into consideration when assessing the impact of any future proposals. We also note the commitment made in the 2021-22 Programme for Government to ‘consider the impact of (LBTT) on homes in our remote and rural communities’¹¹.

A wider point to emerge from this consultation relates to the need for there to be improved processes for scrutinising and amending devolved tax legislation. Any changes to ADS proposed as a result of this consultation process are likely to require the introduction either of dedicated primary legislation focused solely on LBTT, or the use of secondary legislation that may not receive the same level of scrutiny and debate.

- 8.5 The CIOT is represented on the Devolved Taxes Legislation Working Group (DTLWG), which has been tasked with finding ways of strengthening oversight of devolved tax legislation. While this work was postponed at the onset of the coronavirus pandemic in March 2020, it remains our hope that this work will resume as soon as is practicable, with proposals brought forward to strengthen devolved tax scrutiny.

Along with other professional bodies, we believe there is a strong case for adopting an alternative legislative process for the devolved taxes. We think that an annual Finance Bill and Finance Bill process would provide Scotland with a practical avenue for carrying out tax changes, allowing proposals for changes to the devolved tax legislation to be made expeditiously and with appropriate parliamentary scrutiny where legislative anomalies or deficiencies have been identified.

9 Acknowledgement of submission

- 9.1 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

7 March 2022

¹¹ Scottish Government (2021) [A Fairer, Greener Scotland: Programme for Government 2021-22](#) (p.95)