

Technical consultation: Residential Property Developer Tax – draft legislation

Response by the Chartered Institute of Taxation

1 About us

- 1.1 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.
- 1.2 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.
- 1.3 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.
- 1.4 Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

2 Introduction

- 2.1 A policy paper containing draft legislation and explanatory notes for the Residential Property Developer Tax (RPDT) was published on 20 September and subsequently updated on 8 October 2021¹. The legislation is to be included in Finance Bill 2022. The new tax is to be payable from 1 April 2022 by residential property developers on their UK residential property development profits that exceed an allowance.

¹ <https://www.gov.uk/government/publications/residential-property-developer-tax-draft-legislation>

- 2.2 The government intends to announce the final design of RPDT, including the tax rate and the level of allowance below which profits fall out of scope of RPDT, at the Autumn 2021 Budget on 27 October 2021.
- 2.3 The introduction of a new tax was first announced on 10 February 2021 as part of a five-point plan to pay for the removal of unsafe cladding on high-rise residential buildings². HM Treasury’s consultation on the design and implementation of the new tax was then published on 29 April 2021. The consultation omitted stage 1 of the consultation process (*Setting out objectives and identifying options*) that would have allowed for a consultative and transparent evaluation of the options available to achieve the government’s policy objective of raising revenue to help fund the removal of unsafe cladding while minimising adverse effects on wider government objectives to increase housing supply.
- 2.4 CIOT representatives attended HM Treasury/HMRC consultation meetings on 30 September and 6 October to consider the draft legislation published on 20 September 2021. The summary of responses to the consultation has not yet been published³ and therefore the underlying intention for parts of the draft legislation is not always clear. It was, however, very helpful that the ministerial decision to exclude build to rent profits and to include an exemption for non-profit affordable housing providers was communicated before the current technical consultation closed.
- 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 and greater certainty, so businesses can plan ahead with confidence.

3 Sunset clause/ review mechanism

- 3.1 The consultation indicated the new tax would be time-limited seeking to raise at least £2 billion over a decade. However, the draft legislation makes no reference to temporary status or to a review mechanism. We reiterate our comments in response to the consultation that consideration is given to a legislative ‘sunset’ clause to embed that review. We suggest a review has particular relevance for RPDT given the truncated timetable for design and implementation and its stated nature as a temporary tax. The optimal design of a time-limited tax to raise a specified amount may differ from a tax that evolves into a longer term feature of the tax system.
- 3.2 In the absence of a sunset clause or other review mechanism, it is important there is transparency over the amount of tax collected. Monitoring the amounts of RPDT collected is clearly essential given the policy intent to collect £2bn over a decade. We understand RPDT amounts will be included as a separate line in the HMRC Annual Accounts so it will be transparent and easy to monitor externally.

4 Clauses 2 - 4 Scope

- 4.1 Under clause 2 a RP developer is a company that is within the charge to corporation tax, undertakes residential property development activities (‘RPD activities’) and is not a non-profit housing company (as defined). RPD activities are those carried out by a RP developer on land in which the RP developer has/had an interest and are for the purposes of development of the residential property. The interest in land must form or have formed part of trading stock.

² <https://www.gov.uk/government/news/government-to-bring-an-end-to-unsafe-cladding-with-multi-billion-pound-intervention>

³ The summary of responses to the consultation will be published at the Autumn Budget on 27 October 2021.

The elements of what is in scope of the charge to RPDT are set out in the draft legislation as ‘building blocks’ under the heading ‘key concepts’. Clauses 2,3,4 and 5 are all relevant to scope; each element has to be read as part of the whole to determine the scope. In particular only interests held by a RP Developer (or a related company) as ‘trading stock’ of a trade that includes residential property development activities are within scope.

We suggest consideration might be given to a brief summary⁴ of the operative clauses at the beginning of Part 1 to help the reader navigate through the legislation.

In terms of scope, the following questions or points arise :

- How is a ‘company’ defined for the purposes of clause 2? Aside from the express exclusion for non-profit housing companies it is not entirely clear what entities fall outside the scope of RPDT noting the reference also to ‘a body that is not liable to the tax’ in Clause 14(1). Under the heading ‘Administration and enforcement’ clause 15(2) states that all enactments applying generally to corporation tax apply to the tax. For the purposes of corporation tax, a ‘company’ is a body corporate or an unincorporated association but not a partnership, a co-ownership scheme within the Financial Services and Markets Act 2000 section 235A or a local authority or a local authority association (CTA 2010 section 1121). (Local authorities are exempt from corporation tax under Corporation Tax Act 2010 section 984(1).)
- Is a corporate partner of a Limited Partnership in scope where the RPD activities are being undertaken by the general partner rather than directly by the corporate partners? There appears to be a certain disconnect in the definitions if the intention is to capture profits of the corporate partners.
- In the case of a partnership with a separate legal personality, for example an LLP or certain Scottish partnerships, the interest in the land under development may be held by the partnership instead of by the partners. In that case there is also a disconnect between the owner of the land and the corporate partner that does not appear to be resolved by clause 4(2) dealing with related companies.
- We agree that the current draft legislation excludes build to rent developments based on the definition of an interest in land in clause 4(1)(b) as one that forms or formed part of trading stock. For the avoidance of doubt please confirm that rental profits from build to rent developments are similarly out of scope.
- Options over land are in scope of RPDT by virtue of 4(1)(b) but if the right over land is not exercised can the right ever form part of the developer’s trading stock? This may be relevant to promotion agreements.
- The meaning and purpose of clause 4(5)(b) is not clear – is it intended to capture write-up or write downs of stock and /or appropriations into trading stock?

It is noted that clause 4(1) refers to a RP developer but sub-clauses 4(1)(a) and (b) subsequently refer ‘the developer’. It would be preferable to use the term ‘RP developer’ consistently in this clause and elsewhere in Part 1 where the defined meaning is intended to be applied.

⁴ See <https://www.gov.uk/government/publications/drafting-bills-for-parliament> paragraph 3.2.5.

- 4.2 Clause 4(6) defines a disposal by reference to TCGA section 21 to include a part disposal. The use of the TCGA definition sits oddly with a corporation tax based charge. It might be more consistent to use an existing appropriate Corporation Taxes Act definition eg CTA 2010 section 356OQ(2).

5 Clause 5 RPD activities : residential property

- 5.1 In order to cover mixed use developments, clause 5(1)(a) and (b) should refer to a building **or part of** a building. As it stands clause 5 defines residential property as ‘a building that is designed or adapted, or is in the process of being constructed or adapted, for use as a dwelling’. There is no suggestion that RPD activities should be apportioned where a building is part dwelling and part commercial. Is the RPD activity in relation to the building as a whole as opposed to the relevant part? We think the insert of ‘part of the building’ would help to clarify the position.
- 5.2 The definition of garden or grounds in clause 5 (1)(b) is intended to cover amenity land according to the draft explanatory note⁵ (*Any land that is intended to be provided along with a residential property, or general amenity land developed alongside the residential property, falls within the definition of residential property for the purposes of the tax. The main relevance here is to ensure that all the costs that are incurred by the developer in a residential property development are accounted for when calculating the profits subject to the tax.*) We suggest the definition is expanded in the legislation to make this clear as this definition is used in the SDLT and capital gains tax to cover gardens and grounds in the context of the acquisition or disposal of a dwelling. It translates less easily to the development context and may give rise to uncertainty that could be relatively easily addressed in the legislation, or less ideally in guidance.
- 5.3 Clause 5(1) (d) includes ‘land in respect of which planning permission is being sought or has been granted..’ The process of obtaining planning permission may take place over months or years and may begin as informal discussion before a formal application or pre-application is made. It is not clear what is meant by ‘being sought’. Would this definition also cover a lapsed permission or a pre-application in a case where the developer abandons the project following the planning authority’s response to the pre-application ? It is also not clear what happens if during the seeking of planning permission the use is changed from residential to commercial or retail, but RPDT has been paid. Can a refund be requested?
- 5.4 What is intended to be covered by the exclusion in clause 5(2) for ‘temporary sheltered accommodation’?
- 5.5 We suggest consideration is given to a regulatory power to add to the exclusions.

6 Clauses 6 and 9 Adjusted profits or losses

- 6.1 It is understood that adjusted trading profits do not include deemed trading profits under the transactions in land code such as ‘slice of the action’ (overage) contracts. We suggest this confirmation and the interaction of RPDT with the transactions in land rules should be included in guidance with examples.

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018792/210917_RPDT_Explanatory_notes.pdf

- 6.2 It would be helpful to confirm in guidance that costs incurred ‘for the purposes of or in connection with the residential development’ such as section 106 obligations to build a new school or a similar obligation to build new roads are deductible in computing the RPDT adjusted profits.
- 6.3 Will the Gateway 2 Levy be deductible in computing RPDT (and corporation tax) profits?
- 6.4 We understand that the intention is for ancillary costs in holding companies to be deductible. We think this is consistent with the draft legislation on the basis that:
- the holding company is an ‘RP developer’ within clause 2,
 - its activities are ‘RPD activities’ if they are carried on by the RP developer on or in connection with land etc. and for the purposes or in connection with the development of residential property,
 - a holding company’s activities should fall within the definition of ‘ancillary’ in clause 3(2); and
 - under clause 4 the holding company will be treated as having an interest in land on the basis a related company (the ‘actual’ RP developer) will hold the land.

Confirmation is requested in guidance. We note, however, that it appears a deduction would not be available where the ancillary cost is treated as an expense of management, is that intended?

7 Clause 7 Chargeable accounting periods

- 7.1 The absence of any transitional provisions and the requirement in Clause 7 to apply a mandatory time apportionment basis where a chargeable accounting period straddles the commencement date of 1 April 2022 can result in profits attributable to the same period falling in or out of the RPDT charge depending only on the RP developer’s accounting period. Where the accounting period straddles the commencement date, say a December year end, profits attributable to developments completed prior to April 2022 will need to be apportioned whereas profits attributable to exactly the same period for a RP developer with an accounting period ending on or before 1 April 2022 will fall out of charge. Is this consequence intended noting that pre-commencement losses are not available for carry forward? If this result is not intended it could be addressed by having the option to use a just and reasonable apportionment to remove pre-commencement profits?

Examples of existing tax provisions where the concept is already used include:

- CTA 2009 section 1120 in the context of allowable management expenses versus expenses with an unallowable purpose,
- CTA 2010 section 356OJ in the context of apportioning income and expenses under the transactions in land provisions, and
- CTA 2010 section 952 in the context of apportioning receipts and expenses when transferring a trade and its losses.

8 Clause 12 Reliefs : restrictions

- 8.1 The interaction of loss relief and the allowance is complex. Worked examples in the guidance will be needed to aid understanding of this clause.

9 Clauses 13 and 14 Allowance

- 9.1 Under clause 13(3) where an allocating member of the group has not been nominated clause 13(4) applies such that the amount of the allowance available to a RP developer in the group is the total allowance divided by the number of members in the worldwide group. This could lead to a much reduced allowance and seems unnecessarily penal if it is meant to simply encourage the making of an allowance allocation statement. It would seem more reasonable to divide the total allowance by the number of RP developers in the group to exclude companies outside the scope of RPDT including non-UK resident companies and dormant companies. This alternative approach would still encourage the making of an allowance allocation statement because it is unlikely to be an optimal allocation but is less penal and arbitrary in its effect. The alternative also looks more practical for HMRC to enforce/check.
- 9.2 The operation of clause 14 for joint ventures will also benefit from comprehensive examples in guidance.

10 Clause 16 Requirement to provide information about payments

- 10.1 We note the information requirement to provide the amount of RPDT paid in writing. Could an email address be provided? The payments are likely to be made under group payment arrangements (GPA) and the GPA team can currently only be contacted by phone or letter. Notification to the Customer Compliance Manager (CCM) would be ideal for those developers with a CCM but not all RP Developers will have one and there will still be need for HMRC to have a central point for collation.

11 Clause 17 Anti-forestalling : accelerated profits

- 11.1 It appears that the main purpose test in clause 17(1)(c) should remove genuine sales to a third party from scope. However confirmation in guidance would be helpful. Confirmation that ‘the tax’ in Clause 17 3(a) (b) and (c) means RPDT is also needed to avoid doubt.

12 Acknowledgement of submission

- 12.1 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

15 October 2021