POLICY NOTE

THE LAND AND BUILDINGS TRANSACTION TAX (ADMINISTRATION) (SCOTLAND) REGULATIONS 2014

SSI No: 2014/375

The instrument above was made in exercise of the powers conferred by section 42(1) of, and paragraphs 11(1), 20 and 21(5) and (6) of schedule 8 to, the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTT(S)A 2013") (applications to defer payment in case of contingent or uncertain consideration). It is subject to the negative procedure.

Policy background

The main purpose of this instrument is allow taxpayers who are unable to quantify their Land and Buildings Transaction Tax ("LBTT") liability when the price they are paying is either uncertain or is dependent on a contingency to apply for deferment in the same situations as they would currently apply for deferment from UK Stamp Duty Land Tax ("SDLT"). Therefore there are similarities with provisions in the Stamp Duty Land Tax (Administration) Regulations 2003 (S.I. 2003/2837).

The instrument also prescribes the evidence to be provided by taxpayers for certain land transactions relating to underlying assets consisting of land to qualify for relief for Alternative Finance Investment Bonds and makes a minor and inconsequential change to schedule 17 to the LBTT(S)A 2013.

Deferred payments of tax

Section 17 of and schedule 2 to the LBTT(S)A 2013 set out what is liable to tax in a land transaction - this is known as the "chargeable consideration". In most cases, this is the price that is paid by the purchaser in the land transaction.

Section 18 of the LBTT(S)A 2013 provides for occasions when chargeable consideration is uncertain, dependent on whether a payment relating to a land transaction will be made or not made, or dependent on a future event that may or may not happen. This is referred to as the "contingent consideration". In this situation, section 18(2) provides that for tax purposes the consideration is assumed to be payable, irrespective of the outcome of the contingency.

Section 19 of the LBTT(S)A 2013 makes provision for situations where the amount of all or part of the consideration is not known. Section 19(2) provides that the chargeable consideration is to be determined on the basis of a reasonable estimate. Therefore, in a land transaction in which either section 18(2) or section 19(2) is applicable, a land transaction return must be made if the land transaction is notifiable to Revenue Scotland under section 29 of the LBTT(S)A 2013.

In making a return to Revenue Scotland in the situation in which the consideration is either contingent or uncertain, in most cases the taxpayer will have assessed the liability correctly, in which case no further return will be needed. However in making a return it is possible that the taxpayer may underestimate their liability, or overestimate it. If the taxpayer has underestimated the tax due, then if the land transaction becomes notifiable to Revenue Scotland for the first time, tax may be payable where none was payable before. Alternatively, if the land transaction was already notified, additional tax become payable. In these cases, a further tax return will be due so that the correct amount of tax can be collected.

If the taxpayer has overestimated the liability, then section 32 allows the taxpayer either to amend the initial LBTT return within 12 months, or beyond 12 months to apply to Revenue Scotland to claim a repayment of tax paid.

Rationale for exercising the delegated power in section 42

The final purchase price in a land transaction may not be certain, or may be dependent on future uncertain events, for a variety of business and commercial reasons. For instance, the land transaction may be dependent on other factors such as a contract for services being awarded or planning permission being obtained.

The provisions in LBTT(S)A 2013 as set out above aim to capture a range of situations involving land transactions where the purchasing price is contingent or uncertain. However, the Scottish Government acknowledges that there are certain situations where the buyer simply cannot estimate the purchase price. Therefore section 41 of LBTT(S)A 2013 enables taxpayers to apply to defer their obligation to pay LBTT in certain situations of contingent or uncertain consideration, and section 42 allows Scottish Ministers to make regulations about applications under section 41. Section 41(1)(b) of the LBTT(S)A 2013 provides that some or all of the chargeable consideration must fall to be paid more than 6 months after the effective date of the transaction. There are similar powers and provisions in place in relation to SDLT at present.

Part 1 of the regulations sets out the process and the obligations on the taxpayer and Revenue Scotland in respect of applications for deferred payment. In particular, the regulations state that an application for deferred payment must be made before the last day on which a land transaction return is due to be submitted to Revenue Scotland under the terms of LBTT(S)A 2013 (normally 30 days after the transaction is completed). The taxpayer must supply detail of when works or services are to be substantially completed if relevant. Revenue Scotland is then obliged to give notice of the decision on the application in writing.

Part 1 of the regulations also sets out the grounds on which an application may be refused by Revenue Scotland. One ground for refusal is that the land transaction appears to form part of an artificial tax avoidance arrangement, as defined in section 63 to 65 of the Revenue Scotland and Tax Powers (Scotland) Act 2014 (RSTPA 2014). There are other provisions within the RSTPA 2014 that are relevant to the regulations for deferred payment. For instance, a taxpayer will be able to apply for a review of Revenue Scotland's decision on the application for deferred payment and the decision will also be appealable under Part 11 of the RSTPA 2014.

Consultation

A consultation paper[1] was published on 1 May 2014 inviting views by 25 July 2014 on draft regulations. The Scottish Government received 20 responses to the consultation, all from organisations. No responses were received from individuals. Half of those responding to the consultation represented the legal and accountancy sector. Six retail bodies responded; and four respondents were from the property sector. An analysis of the consultation responses[2] was published by the Scottish Government in December 2014.

Fourteen respondents addressed this question. Of these, 13 agreed with the proposed approach and one opposed it. In particular, the commercial property industry, where there may be greater uncertainty for property companies and the wider business community as to the course of future events, welcomed the approach as it would help to support cash flow. The approach to broadly mirror the deferred payment provisions relating to SDLT was also welcomed.

Three respondents to the consultation highlighted what they perceived to be a lack of detail relating to the information to be included in the deferment application and asked whether guidance would be issued to address this. The required information to be provided by the taxpayer in the application is not set out in the draft regulations. The Scottish Government's approach is that any notice, application or other communication from the taxpayer to Revenue Scotland must be in the form and manner, and contain the information specified, by Revenue Scotland. In keeping with that approach, the requirements in relation to applications to defer payments of tax will therefore be set out in guidance to be published by Revenue Scotland in due course.

Taking the views of those who responded to the consultation into account, the Scottish Government seeks to make provision for a mechanism that enables taxpayers to apply to defer their obligation to pay LBTT in certain situations of contingent or uncertain consideration. The mechanism will mirror the mechanism used for SDLT purposes and where it is used, should help to support cash flow for businesses.

Alternative Finance Investment Bonds – prescribed evidence

Part 2 of the regulations sets out the evidence to be provided by taxpayers to Revenue Scotland in relation to certain land transactions for the purposes of claiming relief for Alternative Finance Investment Bonds. The four circumstances when evidence is required are:

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[1] 'Moving Forward with Land and Buildings Transaction Tax – A Consultation on Proposed Subordinate Legislation', published May 2014, available at: http://www.scotland.gov.uk/Resource/0044/00449463.pdf

[2] 'Moving Forward with Land and Buildings Transaction Tax – A Consultation on Proposed Subordinate Legislation: an Analysis' published December 2014, available at: http://www.scotland.gov.uk/Publications/2014/12/9439

i. the fulfilment of Condition D of relief for Alternative Finance Investment Bonds as set out in paragraph 11(1) of schedule 8 to the LBTT(S)A 2013, i.e. to demonstrate that within 120 days of the effective date of the first transaction, a satisfactory standard security has been registered in the Land Register of Scotland,

ii. for the purposes of the discharge of the security in favour of Revenue Scotland when certain conditions for relief have been met, in accordance with paragraph 20 of schedule 8 to the LBTT(S)A 2013,

iii. for the purposes of releasing replacement land in Scotland from the security in favour of Revenue Scotland, in accordance with paragraph 21(5) of schedule 8 to the LBTT(S)A 2013, and

iv. for the purposes of releasing replacement land that is not in Scotland from the security in favour of Revenue Scotland, in accordance with paragraph 21(6) of schedule 8 to the LBTT(S)A 2013.

In each case, the evidence involves the taxpayer providing certain documents, along with a reference to previously submitted land transaction returns, in the form of a unique reference number to the return.

Impact Assessments

A Business and Regulatory Impact Assessment[3] ("BRIA") has been published for the regulations and orders associated with the LBTT(S)A 2013. As the Scottish Government's approach to applications for deferred payments of tax broadly mirrors the current approach for SDLT, no significant financial effect or impact on the private, voluntary or public sector is anticipated.

An Equality Impact Assessment ("EQIA") has been published[4]. The regulations will have no impact on equality or environmental issues.

Scottish Government
Finance Directorate
Fiscal Responsibility Division

[3] 'Land and Buildings Transaction Tax - Business and Regulatory Impact Assessment', published December 2014, available at: www.scotland.gov.uk/lbtt-bria2014

[4] Land and Buildings Transaction Tax - Equalities Impact Assessment', published December 2014, available at: http://www.scotland.gov.uk/Publications/2014/12/5671