



Law Society
of Scotland

Comments

Scotland's Budget

December 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

In anticipation of the Scottish Government's proposed budget, the Society's Tax Law Sub-committee welcomes the opportunity to consider some issues relating to devolved taxes. The Sub-committee has the following comments to put forward for consideration.

General Comments

The committee has chosen to focus comments at this stage on proposals for the Scottish Rate of Income Tax, and on the need for reforms to the Land and Buildings Transaction Tax (LBTT) regime.

Scottish rate of income tax – challenges and complexities

Scottish Taxpayer Status

We would echo the concerns raised by Sir Amyas Morse, head of the National Audit Office, that the biggest challenge faced by HMRC is the maintenance of accurate address records of Scottish taxpayers.¹ Inaccuracy in the records means taxpayers are at risk of paying the incorrect amount of tax. The Scottish Government is at risk of receiving too little, or too much, revenue if the information is not accurate.

We remain concerned about the possible lack of awareness and understanding of Scottish taxpayer status. HMRC has not yet evaluated the impact of their own marketing and awareness campaigns, and are not

¹ National Audit Office, *The administration of the Scottish Rate of Income Tax 2016-17*, November 2017

planning further Scottish income tax-specific campaigns. Many campaigns are UK wide, such as marketing of the Personal Tax Account, which is UK-wide, and notably there are only four gov.uk pages relating to the Scottish rate of income tax (receiving 178,378 hits). Communication with taxpayers will become even more important if thresholds and rates diverge more substantially between Scotland and the rest of the UK, or if there are new bands created.

Manipulation of residency status

At present, HMRC does not consider that the threshold differences create a sufficient incentive to manipulate residency status. The risk of individuals attempting to manipulate their residency status undoubtedly increases if tax rates and thresholds diverge. Predictably, there have not yet been any cases referred to the first tier tax tribunal regarding Scottish residency status. Taxpayers may respond to higher or lower rates by not updating addresses, or deliberately misrepresenting their address to make it appear they are resident in the other jurisdiction. HMRC will need to have robust compliance procedures and sufficient resources to monitor and review this.

It is also possible that higher rates could lead taxpayers to undertake other tax planning measures, for example incorporation of a business. There are plentiful commercial and personal reasons to do this, and so this would be difficult for HMRC to challenge. The possibility of taking dividends may become even more attractive given the lower rates for dividend income. Dividend tax goes to the UK, rather than to Scotland.

Interaction between savings and dividend income

The different higher rate threshold in 2017-18 means some Scottish taxpayers have to calculate income tax liability partly using Scottish rules, and partly UK rules. This is particularly complex where people have income from savings and dividends. The availability of the Marriage Allowance is also affected. These complexities raise the possibility of errors in self-assessment.

The NAO report highlights that the late finalisation of the Scottish budget meant that 21,356 Scottish taxpayers required to be sent a corrected tax code notification for the 2017-18 tax year. We note that HMRC and the Scottish Government have not agreed a timescale for finalisation ahead of the start of the tax year. We would welcome a timely announcement of the final rates and thresholds and clear communication of the outcome to taxpayers.

Additional collection costs borne by Scottish Government

The extra costs of administering the Scottish rate are borne by the Scottish Government. According to the NAO, in 2016-17 this amounted to £6.3 million. We would express some concern that the HMRC performance data, due in October 2016 was received in July 2017. We would also welcome release of information on changes in Scottish taxpayer status, which was withheld due to concerns over accuracy of the data.

It is notable that the estimated cost of administering the Scottish rate of income tax is quite significantly higher when the rates diverge. The estimate for matching rates is £2 - £2.5 million while the cost of divergent rates is between £5.5 – 6 million.² The costs are stated to increase if: new bands are added or removed; large numbers of taxpayers are affected; changes lead to more customer contacts; or changes come late in the year.

We can understand that all extra communication will have cost implications, particularly if it leads to complex queries. However we would welcome a more detailed breakdown of the estimate to explain why the cost of divergent rates is expected to cause such a sharp increase in the administrative costs.

LBTT

We welcome the proposal to give retrospective effect to the Land and Buildings Transaction Tax (Additional Amount - Second Homes Main Residence Relief) (Scotland) Order 2017 (the ADS SI) through the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill introduced in November 2017. The ADS SI addresses one of the most common unintended consequences of the ADS legislation.

However, there are a number of other LBTT issues which need urgent attention, including amendments to allow LBTT group relief to be granted where share pledges are in place. In addition we would like to see amendments to remove the LBTT charge on the in specie transfer of properties between pension funds.

We call upon the Scottish Government to:-

- issue a statement indicating that legislation will be introduced to give effect to the necessary changes, so that taxpayers can proceed with transactions that are currently stalled;
- make the necessary changes by Statutory Instrument (though it is appreciated that this could not have retrospective effect);
- bring forward legislation as soon as possible to address with these issues with retrospective effect.

² National Audit Office, *The administration of the Scottish Rate of Income Tax 2014-15*, HC 627, November 2015

We also believe it is important to introduce a Seeding relief for Property Authorised Investment Funds (PAIFs) and Co-ownership Authorised Contractual Schemes (CASCs) as is the case in the UK to ensure that transactions in Scotland are not disadvantaged.

Group Relief and Share Pledges

Revenue Scotland recently issued a formal opinion to a taxpayer which indicates that LBTT group relief is not available on the transfer of property from a parent company to its subsidiary or between fellow subsidiary companies where there is a share pledge in place over the shares in the transferee company.

This means that LBTT is payable on the market value of the property transferred. This is a matter of very great concern to many companies not only in the property sector but also in other all other sectors with property in Scotland. We understand that it is also acting as a disincentive to investment in Scotland.

It would appear that this issue has arisen because specific wording to make it clear that share pledges do not affect group relief, which was introduced into the equivalent Stamp Duty Land Tax (SDLT) legislation at about the time that the LBTT legislation was being introduced into the Parliament, was not included in the LBTT group relief legislation.

The policy intent of the Scottish government when LBTT was introduced was to include LBTT group relief to facilitate the movement of property between members of a group.

Share pledges are a very common form of security and are routinely required by lenders. The types of transactions involved are also routine, and include, for example:-

- a company being asked by its bank to transfer some businesses/properties to subsidiary companies in order to reduce or compartmentalise risk
- a developer transferring property which is to be developed at a later stage from one company to another so that security can be granted by the first company over the remainder of the property
- a company deciding to amalgamate some business activities so that they are carried out through a single subsidiary.

An amendment to the LBTT legislation is required to ensure that LBTT group relief is available where there is a share pledge in place so that normal commercial transactions within groups of companies can be carried out without an LBTT charge, as is the case in the rest of the UK.

This change to the legislation needs to be retrospective, going back to the introduction of LBTT. This is because many transactions have been carried out since the introduction of LBTT where group relief has been claimed but according to Revenue Scotland's recent opinion is not due. The amendment therefore needs to be made by primary legislation.

We would be happy to assist the Scottish Government and Revenue Scotland in any way possible in relation to any such amendment.

If the Scottish Government is minded to make the necessary amendments in this area, and could issue a statement to that effect, that would allow taxpayers to proceed with a considerable number of transactions which have been brought to a halt because of the spectre of a significant LBTT charge on an intercompany transaction.

In specie pension fund transfers

Revenue Scotland has indicated that in its view a transfer of properties from one pension fund to another attracts an LBTT charge on the market value of the property transferred.³ This is said to be because the assumption of liability to pay pensions to the pension scheme members is said to be the assumption of debt, which is consideration for LBTT purposes.

The approach of Revenue Scotland is different from that of HMRC in relation to similar drafting in the SDLT legislation. HMRC accept that there is no SDLT charge on in specie pension fund transfers.

Revenue Scotland appear to take the view that an LBTT charge arises not only on the transfer of land from one pension fund to another but also where there is a change of pension fund trustee. This could arise where an individual changes the provider of their SIPP.

Levying LBTT charges on pension fund mergers or similar transactions, or on the decision by an individual to change their SIPP provider simply reduces the funds available to provide pensions on retirement.

An amendment is therefore required to the LBTT legislation to ensure that no LBTT is payable in these circumstances. Again this legislation needs to be retrospective, going back to the introduction of LBTT. This is to address the many transactions which have already taken place where no LBTT was paid, but Revenue Scotland's view appears to be that LBTT is payable.

Additional Dwelling Supplement (ADS) issues

As mentioned above, the Society welcomes the ADS SI issued earlier in the year which it addresses one of the most common unintended consequences of the ADS legislation. We welcome the proposal to retrospectively amend the ADS legislation so that the new relief applies to transactions previously carried out.

We believe that the ADS SI does not deal with all of the issues, however. A number of additional issues have been identified by our members which we believe should also be addressed through legislation. Details of these issues are included in the annex to this paper.

³ <https://www.revenue.scot/sites/default/files/LBTT%20Technical%20Update%20-%2016%20October%202016.pdf>

Seeding relief for Property Authorised Investment Funds (PAIFs) and Co-ownership Authorised Contractual Schemes (CASCs)

The UK Government introduced a seeding relief for PAIFs and CASCs as well as specific rules to deal with the operation of CASCs in Finance Act 2016.

The aim of the relief was to remove a 4% entry charge on setting up PAIFs will mean investors have more opportunity to invest in real estate and diversify their portfolios over the long-term

There is no equivalent relief in LBTT. This means that there is not a level playing field between Scotland and the rest of the UK as a result of which some investment houses and pension funds have taken a decision not to invest in Scotland.

We urge the Scottish Government to consider this issue as soon as possible. We appreciate that introducing a relief of this nature is not straightforward, and consideration has to be given to ensuring that there are adequate anti-avoidance measures. We are also aware that there are some issues with the SDLT PAIFs and CASCs relief which should not be replicated in an LBTT relief. A formal consultation on a seeding relief for PAIFs and CASCs and appropriate LBTT rules for PAIFs would appear to be the best way forward.

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Examples of ADS for which no relief can be claimed or guidance/clarity is required

The following examples of ADS issues have been submitted to us by our members.

No	Question	ADS position/comments
1	<ul style="list-style-type: none"> • Husband (“H”) and wife (“W”) bought a new property together (common ownership) to use as their main residence (“New Property”). • The purchase of the New Property completed in February 2017. • W currently owns a property (“Old Property”) in her sole name. H and W paid ADS on the purchase of the New Property on the basis of W’s ownership of the Old Property. • H and W lived together in the Old Property as their main residence prior to moving to the New Property. • W is now looking to sell the Old Property. A purchaser has been identified and missives are being progressed. <p>Can ADS be reclaimed following the sale of the Old Property?</p>	<p>No. This is because H is not an owner of the Old Property. This prevents him from qualifying for the repayment of ADS in terms of paragraph 8 of schedule 2A of the 2013 Act and unfortunately, the additional concessions which relate to the replacement of main residence relief, (introduced in the Land and Buildings Transaction Tax (Additional Amount – Second Homes Main Residence Relief) (Scotland) Order 2017)(the ADS SI), only apply where:</p> <ul style="list-style-type: none"> (a) 1. missives for the purchase of the New Property were entered into or after 20 May 2017; and (b) 2. the effective date of the purchase of the New Property is on or after 30 June 2017. <p>Given the purchase of the New Property completed in February 2017, neither of these conditions have been met and so no reclaim can be made.</p> <p>We welcome the announcement in the Programme for Government that the Scottish Government intends to introduce legislation to give retrospective effect to the ADS SI so that in situations such as these the ADS paid can be refunded. We urge the Scottish Government to give wide publicity to the new legislation once enacted to ensure that taxpayers are aware that a refund can be claimed.</p> <p>It would be useful if the legislation and explanatory note made it clear that the ‘transactions’ and ‘contract’ referred to is the purchase contract given that there are two relevant ones - ie the sale and the purchase.</p>

<p>2</p>	<p>Graeme and Jean are getting married and are buying a house together which they will move into when they get married.</p> <p>Jean owns a flat which she intends to sell but the sale of Jean’s flat is likely to complete some time after completion of the purchase of the new main residence.</p> <p>Graeme sold his main residence last August.</p> <p>So, they will have to pay ADS on the purchase of the new main residence. Question: can the ADS be reclaimed when Jean completes the sale of her flat given that Graeme has previously sold but her sale and his were solo/different times and the purchase of the new main residence is in joint names?</p>	<p>The analysis is complex:</p> <p>To trigger ADS:</p> <table border="1" data-bbox="1131 435 2139 1038"> <thead> <tr> <th></th> <th>Para 2(1) criteria</th> <th>Graeme</th> <th>Jean</th> </tr> </thead> <tbody> <tr> <td>a</td> <td>Purchasing a dwelling?</td> <td>Yes</td> <td>Yes</td> </tr> <tr> <td>b</td> <td>Paying more than £40k?</td> <td>Yes</td> <td>Yes</td> </tr> <tr> <td>c</td> <td>End of effective date, buyer owns more than one dwelling?</td> <td>No – G is not cohabiting with J and so not deemed to own J’s</td> <td>Yes</td> </tr> <tr> <td>d</td> <td>Is the buyer not replacing their main residence?</td> <td>No – he has sold a main residence within 18 months.</td> <td>Yes</td> </tr> </tbody> </table> <p>Para 5 however provides that where there are two or more buyers who satisfy (a) and (b) above, (c) and (d) are deemed satisfied in relation to all of them if they are satisfied in relation to one of the buyers. This is the case here: G is deemed to have answered “Yes” to (c) by virtue of being a joint buyer with J.</p> <p>Para 8 (repayment of ADS) allows repayment where (assuming a sale within</p>		Para 2(1) criteria	Graeme	Jean	a	Purchasing a dwelling?	Yes	Yes	b	Paying more than £40k?	Yes	Yes	c	End of effective date, buyer owns more than one dwelling?	No – G is not cohabiting with J and so not deemed to own J’s	Yes	d	Is the buyer not replacing their main residence?	No – he has sold a main residence within 18 months.	Yes
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18 months):

	Para 8 criteria	Graeme	Jean
a	Within 18m beginning with the date after the effective date of the transaction, the buyer disposes of ownership of a dwelling	No (no deemed ownership)	Yes
b	That dwelling was the buyer's only or main residence at any time during the last 18m ending with the effective	No (never lived there)	Yes
c	The dwelling that was or formed the subject matter of the transaction has been occupied as the buyer's only or main residence	Yes	Yes

G still does not meet the criteria for repayment. Jean does.

This means that Jean triggers para 8(2) which states that "the chargeable transaction is to be treated **as having been** exempt from the additional amount".

(Our emphasis).

		<p>Example 71 on the RS website: (https://www.revenue.scot/land-buildings-transaction-tax/guidance/lbtt-legislation-guidance/worked-examples-additional/exam-52) is a slightly different example, (two main residences sold after the purchase) and while it doesn't give us much information on the technical interpretation, we think that this must be read as disapplying para 2(1) in relation to the party which is selling their main residence. As a result, if J is no longer satisfying the conditions in para 2(1), then para 5 cannot apply to G, meaning the wrong tax has been paid.</p> <p>Summary of thought process was:</p> <ul style="list-style-type: none"> • G doesn't trigger ADS by himself. • J triggers ADS by herself. • Para 5 means that J triggers ADS for G by virtue of being joint buyers. • However, if J satisfies the repayment criteria in para 8(1) then para 8(2)(a) means that "the chargeable transaction is treated as having been exempt from the additional amount". • Note the reference to the "chargeable transaction" as a whole and it being "exempt". • This is probably sufficient in itself? (May not – see ex 71 which seems to indicate that if two owners have main residences to sell, the repayment is not triggered on the first sale) • But if not, should it be read that J was exempt from charge. Therefore G, who only was charged because J was charged, is no longer charged because J never was chargeable.
3	SH owns a house in Edinburgh jointly with her sister.	It is clear that, given the consideration of £131k, LBTT will not be payable but it will be returnable in the usual fashion.

SH lives in the house.

She has agreed to purchase her sister's half share at a price of £131,000 which represents roughly half of the current value of £260,000.

Last week we received loan papers from Nationwide.

The offer of loan is to SH and her husband DK. They are borrowing £150,000. SH had not mentioned that the loan was to be joint before we got the loan papers.

As the loan is joint the title will also require to be joint and I think that the easiest way to do that would be to take the disposition of the sister's half share to the husband DK as SH's nominee as permitted by the missives. As SH already owns the other half the result would be that the joint borrowers would be joint owners and could grant the security to Nationwide.

SH owns a house in Italy.

LBTT implications?

ADS is the tricky part. It is our view that ADS likely will not be payable but this involves an amount of "double deeming".

To summarise, the husband is buying out his wife's sister's half-share interest. The wife already owns the other half.

The husband triggers ADS on the following basis:

- a) Subject matter includes acquisition of ownership of a dwelling
- b) Consideration is more than £40k
- c) Husband will own more than one property (deemed to own both the newly acquired property and the house in Italy through deemed ownership provisions)
- d) He is not replacing his main residence.

If wife was buying from sister, she would not trigger ADS on the basis of the following guidance:

But ADS will not apply to transactions where a person (whether an individual or a non-natural person) is acquiring a further part of a property which they already jointly own. Note that the transaction may still be notifiable and chargeable to LBTT (without ADS) if any consideration is paid, or debt assumed. - LBTT10061 -

<https://www.revenue.scot/land-buildings-transaction-tax/guidance/lbtt-legislation-guidance/lbtt10001-lbtt-additional-dwell-17>

While not stated here in the published guidance, RS's technical update goes further:

Paragraph 17 of schedule 2A to LBTT(S)A 2013 provides that where an individual jointly owns a property, they are treated as being the owner of the whole property. We consider that ADS will not apply to transactions where an individual is acquiring a further part of a property which they already jointly own. However, the transaction may still be notifiable and chargeable to LBTT (without ADS) if any consideration is paid, or debt assumed.

We will challenge any transaction or series of transactions involving joint ownership where the main purpose, or one of the main purposes, of the arrangement is the avoidance of tax.

It is clear that the deemed ownership provisions for married couples do not apply directly to para 17 as they very specifically state that they apply only to para 2(1)(c) (point c) above).

So the question is, is para 17 to be read as a stand-alone provision which does not include the deemed ownership provisions – i.e. it needs ownership not “deemed ownership”. There is some logic to this as otherwise para 17 would be deeming a person to be the deemed owner of a full property while in

		<p>property law, they actually have zero rights.</p> <p>Alternatively, is para 17 to be read as applying to the whole schedule by virtue of para 2(1)(c) because husband is deemed to be a joint owner for para 2(1)(c), he is deemed to be owning the whole of the property being acquired and so para 2(1)(a) no longer applies (i.e. he is no longer acquiring a property – he already is deemed to own it).</p> <p>We came down on the latter approach but this is not certain.</p> <p>As an aside, we did not think it makes any difference whether husband alone or husband and wife together purchase the half-share from the sister.</p>
4	<p>Alan and Brenda are getting married. They are not currently living together – Alan is living at home, and Brenda is living in a flat which she purchased last year. Alan and Brenda plan to buy a new house in joint names which will be their main residence and to sell Brenda’s flat to part fund the purchase.</p>	<p>The new relief introduced by the recent SI will not help here because Alan and Brenda are not living together in Brenda’s flat.</p> <p>This seems unfortunate as it suggests that relief should only be available to couples living together before they get married. Couples should not be obliged to live together in order to avoid what has been accepted as being an ADS anomaly.</p>

5	<p>Mr H is in negotiations to buy a country house for £1.25m and a cottage for £150k. He has no other properties. There is nothing non-residential included in the sale.</p>	<p>Because two properties are being purchased, and because LBTT does not have a dependant property (granny flat) exemption like SDLT, ADS is payable on the total purchase price. A dependant property exemption should be introduced for LBTT so that the purchase of a small dwelling at the same time as a much larger one does not mean that ADS is payable on both of the properties.</p>
6	<p>H and R bought a property on 21 April 2017 for c£140,000. Missives were concluded on 19 April 2017. R already owned a property which had not yet sold. They paid ADS of c£4200.</p> <p>R then sold his previous property on 29 June 2017. H lived at home with her Dad. All her mail/ billing was registered at this address.</p> <p>The solicitor acting told them that the legislation had changed and that they should be able to reclaim the additional tax within 10-14 days. H and R did all their sums on the basis that this £4,200 would be refunded. This included accepting an offer on R's property at £6,500 below the asking price.</p>	<p>Clearly the ADS isn't refundable because the missives were concluded before 20 May. If legislation is introduced to give retrospective effect to the ADS SI, the ADS would still not be refundable because H & R were not living together in H's flat.</p> <p>It is unfortunate that the relief afforded by the ADS SI is only available where couples are living together and do not cater for the situation where individuals are living separately and then buy a property in joint names to live in together.</p>

<p>7</p>	<p>A already owns a dwelling somewhere in the world. His work relocates to Scotland and he rents a house which becomes his main residence.</p> <p>More than 2 years later, he is still working in Scotland and decides to buy a home here.</p> <p>He is changing his main residence, but ADS is payable as he rented, rather than owned, the old property.</p>	<p>Exemption should apply where the old dwelling was rented, not just owned – involving changing the references to “ownership” in Sch 2A paras 2(2)(a) and 8(1)(a).</p> <p>If the policy basis of the exemption is based on replacement of a main dwelling, why should this only be available to those who happened to own their old dwelling? In this real-life example (relating to an oil executive who had moved to Aberdeen) the purchaser felt really hard done by.</p>
<p>8</p>	<p>Janet and John are separating. They have three children. The matrimonial home is in joint names. John is going to move out and Janet and the children will stay in the house. The separation will be permanent.</p> <p>John thinks it will make sense for him to buy somewhere to live rather than renting, so that there will be a permanent base for when the children to come and stay with him. He has identified a flat that he can just afford to buy. He had assumed that no ADS will be payable on the flat because he and his wife are separated in circumstances where the separation is likely to be permanent.</p>	<p>ADS is payable on the flat. Although he is no longer treated as a unit with his wife for ADS purposes ADS will still be payable because Janet and John are joint owners of the matrimonial home. Consequently John is treated as already owning a dwelling and so ADS is payable on John's new flat. This probably means that John will not be able to buy a new flat to live in following the separation and will be obliged to rent.</p> <p>The ADS legislation should be amended to give relief to separating and divorcing couples so that a new main residence can be purchased by one of the parties without an ADS charge.</p>

	Neither Janet nor John own any other dwellings.	
9	<p>Clients (spouses) both own a property (title is held in common). The property is used and presently being marketed as a 'bed and breakfast'. It has 5 guest bedrooms.</p> <p>It also contains accommodation for the spouses situated in a wing and comprising a separate sitting room and two bedrooms/bathrooms of approximately 15% of the total floor area of the property.</p> <p>That wing also includes rooms used for business purposes (including the boiler room and laundry room). That proportion is used for the apportionment of outlays and the parties expected to claim capital gains tax relief for principal private residence purposes on this fraction.</p> <p>No other property is owned. The B&B is the spouses' main residence.</p> <p>Value is £750,000.</p> <p>Wife (S) wants to buy a residential property ("P") in her sole name with the intention that, within the next two years, B&B will be sold and the spouses will both move into P or purchase another residential property to occupy.</p>	<p>ADS treatment</p> <p>The trigger provisions for ADS depend on the intended use of the property being acquired. Generally, a purchase by individuals will trigger ADS if all of the following criteria are met:</p> <ul style="list-style-type: none"> a. a residential property is being purchased; b. the consideration for the property is £40,000 or more; c. at the end of the date on which the new residential property is purchased, the buyer owns more than one dwelling; and d. the buyer is not replacing their only or main residence. <p>(d)</p> <p>Criteria a, b and d are met by S's circumstances. There is, however, some dubiety regarding criterion c, which concerns whether or not S will be treated as owning more than one dwelling at the date on which P is purchased. The question therefore is whether B&B is deemed to be another dwelling.</p> <p>This involves consideration of whether or not the owner-occupied element of B&B is a "dwelling". For these purposes a "dwelling" is deemed to be "a <i>building or part of a building [which] ... is used or suitable for use as a single dwelling</i>".⁴</p> <p>The LBTT legislation expressly provides that "<i>a building used for any of the following purposes is not used as a dwelling- [...] (f) a hotel or inn or similar establishment.</i>"⁵ Further, "<i>where a building is used [as a hotel or inn or</i></p>

⁴ LBTTA2013 sch5 para24

⁵ LBTTA2013 s59(4) as applied by sch5 para 30

		<p><i>similar establishment] no account is to be taken [...] of its suitability for any other use.”⁶ As a result, the whole of a hotel would not be classed as a dwelling.</i></p> <p>B&B is however described as a bed and breakfast and Revenue Scotland’s guidance on this issue states the following: <i>“All land transactions will be treated on their own merits, including those involving property such as bed and breakfast establishments or guest houses. However, a bed and breakfast (B&B) establishment which has bathing facilities, telephone lines etc. installed in each room and is available all year round would normally be considered non-residential.”⁷</i></p> <p>We assume that these criteria are met and B&B can be relatively safely treated as a non-residential property (because a bed and breakfast is treated as a “hotel or inn or similar establishment” even though Revenue Scotland’s guidance has not made this expressly clear).</p> <p>Based on these assumptions, it appears clear that the entirety of B&B will not represent a building which is a dwelling given its use as a business property. However, <i>part</i> of B&B (i.e. the 15% occupied by the spouses - hereinafter referred to as “the Occupied Area”) might.</p> <p>Unfortunately, there is some inconsistency in the legislation at this point.</p> <p>To explain, the legislation refers to the dwelling test being applicable not only to whole buildings but also parts of a building where it is suitable for use as a single dwelling.⁸ By contrast, the rules also specifically include reference to the rule that if the property is a hotel or inn or similar establishment then no</p>
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⁶ LBTTA2013 s59(5)as applied by sch5 para 30

⁷ LBTT4012

⁸ LBTTA2013 sch5 para25(a)

		<p>account is to be taken at all of its suitability for any other purpose (i.e. as a dwelling)⁹ while expressly excluding the provision which states that a “<i>building</i>” includes part of a building”.¹⁰</p> <p>It is possible therefore to read this as stating that:</p> <ul style="list-style-type: none">(i) it is a blanket exception (i.e. if the property meets the test of being a hotel, inn or similar establishment) then it does not matter what any part is used for; or(ii) it is does not matter whether or not the whole building is used as a hotel, inn or similar establishment, as one must consider whether any part of it could be used as a single dwelling. <p>If interpretation (i). is correct, the entirety of B&B is not to be counted as a dwelling and as such, S will be treated as only owning one property on the date of the acquisition of P. Correspondingly, no ADS will be due.</p> <p>If, however, we consider the worst case scenario, then this will depend on the facts and circumstances which apply to the Occupied Area. While there is little guidance published in connection with this area, we would expect those factors which count towards the Occupied Area being a dwelling would include:</p> <ul style="list-style-type: none">(i) the Occupied Area being a separate flat within B&B (for example, similar to a ‘granny flat’ type arrangement);(ii) entrance to the Occupied Area being by way of separate entrance not used by customers;(iii) does the Occupied Area have the benefit of a separate kitchen and bathroom which are not used for business purposes;(iv) does the Occupied Area include a distinct living room or other
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⁹ LBTTA2013 s59(5)

¹⁰ LBTTA2013 sch5 para30 excludes LBTTA2013 s59(7)

- recreational area not available for customers; and
- (v) is there some degree of separation which make the Occupied Area physically distinct?
- (e)

This is not a definitive list nor has it been tested in the context of LBTT but presumably if the Occupied Area meets some of these criteria, B&B will be deemed to be a dwelling and thus ADS will be payable.

Alternatively, if the Occupied Area is fully 'integrated' with the rest of B&B (for example, there is no separate kitchen or other physical distinction) it may be possible to state that there is no "*part of a building [which]... is suitable for use a single dwelling*" and correspondingly, there will be no second dwelling. This will mean that criterion c in terms of the test for ADS will not be met and ADS will not be payable.

The information we have been provided with both assist and hinder the "integrated" interpretation. For example, we understand there is both a separate entrance to the Occupied Area through the back door (hinders) but also it can be accessed via the main door (assists). Being contained in a separate wing will count against the integrated interpretation, as will having a separate sitting room and a proportionately large number of separate bedroom and bathrooms, but the wing also being used to house 'business features' such as the laundry room and boiler facilities for the business will assist.

It is, unfortunately, impossible to provide any further guidance on this without applying to Revenue Scotland for a ruling on the status of B&B and their view of the correct interpretation of the contradictory dwelling rules.

For further information, please contact:

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