



Law Society
of Scotland

Consultation Response

The Proposed Land and Buildings Transaction Tax First-Time Buyers Relief

March 2018



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.

Our Tax Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation on the Proposed Land and Buildings Transaction Tax First-Time Buyers Relief. The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome the introduction of the relief. While we note that comment is not sought on the principle of the relief being introduced or on the threshold of £175,000, we note that this increases the differences from the SDLT or equivalent regimes applicable in the rest of the UK. While this is inevitable in a partially devolved tax system, it (and this relief in particular) does add additional layers of complexity to an already complicated system.

As a separate point, we note that the timing of the introduction of the relief is unclear, and will be significantly after its announcement as a policy intention. We have previously suggested that an annual Finance Bill would be a useful tool to ensure that any technical issues or relatively minor changes arising through the devolved tax system, such as the introduction of this relief, could be addressed regularly and efficiently, creating a more predictable timetable for change.

Consultation Questions

Question 1: Do you agree with the Scottish Government's proposed four key criteria for the relief, as described above?

Buyer as a natural person

We agree that the buyer should be a natural person, but note that the draft Order does not specify this, simply referring to the buyer as a 'person'. This should to be clarified, along with the level of the relief, before the draft Order is introduced to the Scottish Parliament. We would be interested in reviewing the revised draft Order at an early stage.

Single dwelling for an amount greater than £145,000

Setting the amount at greater than £145,000 is sensible, as the relief is of no relevance for consideration below the nil rate threshold.

The single dwelling condition is understandable, although in rare cases could give rise to unfairness. For example, if two existing dwellings are purchased with the intention of being used as a single dwelling the relief would not be available. This is a situation that can already cause difficulty in relation to the additional dwelling supplement.

Property to be used as a main residence

This is the condition which seems most likely to cause difficulty. While it is accepted that this fits with the policy intention of the new relief, it may be questioned whether the condition is in fact necessary, especially when combined with the other conditions of the relief and other provisions in relation to LBTT.

Removing this condition would provide the relief once to all first time buyers, without assessing their intention regarding the property purchased. Any future purchases would not qualify for the relief as a result of the prior ownership condition (additional dwelling supplement would also apply if the first property was still owned).

In addition, it may not be known at the time of purchase whether any particular property will actually be used as the purchaser's main residence. The test as set out is based on intention "to occupy as the buyer's only or main residence". While that will usually be obvious and clear, there will be occasions when that is not the case. Intention is subjective, and can change over time.

Consideration should be given to whether this condition is necessary in achieving the desired outcome of this relief. If the policy is simply to apply to main residences, the relief will be more complex and careful thought will need to be given to how the buyer's intent will be assessed.

No prior ownership of a dwelling

While the reason for this condition is clear, as with the analogous rule in relation to additional dwelling supplement, it may be practically difficult to enforce.

It is also capable of causing unfairness. For example, ownership of a small share of an inherited foreign holiday home at any time in the life of a first time buyer would preclude the relief being available for the entirety of that buyer's life. It would also prevent the relief being available if that buyer was to purchase a house together with a partner who had no previous ownership of any property.

There is also the possibility that such previous ownership may simply have been forgotten, in particular if it was of a small share and potentially only held for a short time, such as may be the case with an inheritance.

Finally, there is the possibility of circumvention of the restrictions on the relief if two people intend to buy a property, but one is disqualified from the relief – a decision may be made for the purchase to be made in the name of the buyer who has never had previous ownership, perhaps even followed by a transfer into joint ownership.

Question 2: Do you agree that, where there is more than one buyer, all buyers must meet the relevant criteria in order for the relief to be claimed?

We agree with the general goal of the condition to encourage consistency and simplicity. However, it is capable of causing unfairness, including in the situation described above when this may interact with the prior ownership of another dwelling.

Question 3: Do you agree with the Scottish Government's proposed approach with regard to gifts, inheritance and trusts?

While the rules on inheritances and gifts are understandable, it would be equally logical if the relief were available where a buyer was making a first ever purchase, as opposed to being the recipient of a gift or inheritance. While that is a matter of policy, it would simplify the new relief if current or previous ownership through gift or inheritance were not relevant.

The proposed rules on bare trusts and beneficiaries under settlement trusts are logical, in relation to qualification for the new relief. They are less logical in relation to disqualification based on previous deemed ownership through such a settlement. No draft legislation has been provided for these situations, but we presume it would follow the model in either schedule 2A (additional dwelling supplement) or schedule 18 (trusts) of the LBTT (Scotland) Act 2013. There may be unfair consequences, for example if a temporary liferenter of a trust which may have had a dwelling among its assets (perhaps unknown to that liferenter) should be permanently excluded from the new relief.

Question 4: Are there any other issues which need to be considered with regard to assessing prior ownership of a dwelling?

Consideration should be given to whether the effects of prior ownership should expire after a set period to address some of the potential unfair situations raised above. However, we accept that this is likely to be a rare occurrence and would increase the complexity of the relief.

Question 5: Do you agree with the Scottish Government's position on linked transactions? If not, in what scenarios should relief be available where there is a linked transaction.

Disallowing the relief in relation to linked transactions is understandable. However, as the very broad principle of the rules on linked transactions is to treat them as a single transaction, there seems no reason in principle why this relief should not be available for a purchase in a linked transaction.

Question 6: Are there other issues, not covered in this consultation, that should be addressed in the legislation or guidance?

As with other areas of LBTT, it will be desirable for Revenue Scotland to publish guidance setting out a full range of examples of situations where the relief does and does not apply.

Question 7: Do you have any views on the draft Land and Buildings Transaction Tax (First-Time Buyer Relief) (Scotland) Order 2018?

Our comments relate to the schedule to the draft Order.

In relation to eligibility for relief, we refer to our comments, above, on the four criteria.

Major interest in land

The draft Order includes a specific definition for the purposes of the new relief. This differs considerably from that in s 60 of the 2013 Act, where the meaning includes the tenant's interest in a lease. The definition in the new relief starts with ownership, but then extends to other interests (including the interest of a tenant) where market value of the interest exceeds the LBTT nil-rate band.

The change in the definition appears arbitrary. In relation to Scottish leases, it is likely that the tenant's interest would be outwith this threshold. However, that is not certain and it seems unfortunate that any tenant's interest in residential property should require consideration.

Beyond Scotland, it would seem appropriate to include within the definition of ownership the tenant's interest under a long lease (as in paragraph 15 of schedule 2A of the 2013 Act). Otherwise, in relation to leasehold property in the rest of the UK and elsewhere, it may be necessary to consider the value of the unexpired period of a lease. This seems inconsistent.

It is also inconsistent that any degree of ownership, including deemed ownership through a "settlement trust", will disqualify a buyer from the new relief, while other forms of possession of a prior dwelling will not do so.

Question 8: Do you think that the planned first time buyer relief will in any way impact upon equal opportunities, human rights, businesses, island communities, privacy and/or sustainable development in Scotland?

We refer to our comments above, on potential areas of unfairness, and have no further comments to add at this stage.



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