Law Society of Scotland

Consultation Response

Comments on Proposed LBTT Bill

January 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.

The Society's Tax Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament's Finance and Constitution Committee's request for views on the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill. The Sub-committee has the following comments to put forward for consideration.

General Comments

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) issued earlier in the year. The ADS SI addresses one of the most common "unintended consequences" of the ADS legislation.

However, we are disappointed at the narrow scope of the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill (the LBTT Bill). The limited scope of the LBTT Bill misses the opportunity to deal with a number of other changes to LBTT which are urgently required.

The additional LBTT changes which we believe need to be addressed as a matter of urgency involve amendments to allow LBTT group relief to be granted where share pledges are in place.

We also consider that although one ADS issue has been solved through the current bill, there are a number of additional ADS issues which require to be addressed. Some additional ADS issues where the requirement for legislative change which hasbeen identified by our members, are set out in the annex to this paper, would further improve the Bill.

Group Relief and Share Pledges

Revenue Scotland have issued a formal opinion to a taxpayer and confirmed their position 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 all other sectors with property in Scotland. We understand that it is 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 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 a 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.

Given that it has not been possible to include the required legislative change in the current LBTT Bill, we recommend that:-

- an immediate change to the legislation is brought in by statutory instrument
- the Scottish Government confirms in a public statement that it intends to give retrospective effect to the change by primary legislation as soon as practicable.

We believe that if this approach is adopted it will allow transactions which have current stalled because of the group relief issue to be completed, as well as reassuring taxpayers and their advisers that there is no risk of LBTT being payable on transactions previously carried out where group relief was claimed.

Managing Devolved Tax Issues – Policy Partnership between Revenue Scotland and the Scottish Government

We note that, as with any tax system, there will continue to be regular issues that arise in relation to the implementation of devolved taxes some of which are technical issues which do not involve any change in policy.

We recognise the significant progress that has been made through the establishment of Revenue Scotland, and their ongoing work with stakeholders.

We fully appreciate that whilst Revenue Scotland are responsible for the administration of the devolved taxes, the Scottish Government is responsible for tax policy. We also acknowledge that Revenue Scotland has to operate at arm's length from the Scottish Government.

We believe, however, that policy is a continuum. At one end of the scale are decisions which are clearly the responsibility of the Scottish Government such as the rates of LBTT, the availability of reliefs and so forth. At the other end of the scale are changes to the legislation which are much more administrative, for example technical changes to correct defects in the legislation, or to promote the practical effectiveness of the legislation. We believe Revenue Scotland have a role to play in promoting changes to the devolved tax legislation which fall into these categories, for example the change required in relation to group relief and share pledges.

We encourage Revenue Scotland and the Scottish Government to set up a Policy Partnership in relation to the devolved taxes so that they can work more closely together in relation to changes to the devolved taxes and so that necessary changes to the legislation which are at the administrative end of policy could be promoted by Revenue Scotland and not only by the Scottish Government. We believe this would assist greatly in the smooth running of the devolved tax system and would be of great assistance to taxpayers and their advisers.

In addition, an annual Scottish Finance or Tax Bill, similar to that brought before the UK parliament each year, would also help to ensure that any technical issues arising through the devolved tax system, such as those mentioned in this paper, can be addressed regularly and efficiently.

Law Society of Scotland

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Annex

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	• 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. Can ADS be reclaimed following the sale of the Old Property?	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: (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. 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. 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

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<tr><td></td><td></td><td>be claimed.

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.</td></tr>
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<tr><td>2</td><td>Graeme and Jean are getting married and are buying a house together which they will move into when they get married.

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.

Graeme sold his main residence last August.

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?</td><td>The analysis is complex:

To trigger ADS:

<table>
<tr><td></td><td>Para 2(1) criteria</td><td>Graeme</td><td>Jean</td></tr>
<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>
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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.

Para 8 (repayment of ADS) allows repayment where (assuming a sale within 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). 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. Summary of thought process was: • 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. 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. 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 the lender. SH owns a house in Italy.	It is clear that, given the consideration of £131k, LBTT will not be payable but it will be returnable in the usual fashion. 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 property law, they actually have zero rights. 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). We came down on the latter approach but this is not certain. 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.
4	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.	The new relief introduced by the recent SI will not help here because Alan and Brenda are not living together in Brenda's flat. 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.

5	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.	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.
6	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. 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. 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.	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. 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.

7	A already owns a dwelling somewhere in the world. His work relocates to Scotland and he rents a house which becomes his main residence. More than 2 years later, he is still working in Scotland and decides to buy a home here. He is changing his main residence, but ADS is payable as he rented, rather than owned, the old property.	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). 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.
8	Janet and John are separating. They have three children. The matrimonial home is in joint names. Neither Janet nor John own any other dwellings. John is going to move out and Janet and the children will stay in the house. The separation will be permanent. 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	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. 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.

	where the separation is likely to be permanent.	
9	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. 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. 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. No other property is owned. The B&B is the spouses' main residence. Value is £750,000. Wife (S) wants to buy a residential property ("P") in her sole	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: 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. 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. 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 building or part of a building [which] … is used or suitable for use as a single dwelling*".[1] The LBTT legislation expressly provides that "*a building used for any of the*

[1] LBTTA2013 sch5 para24

	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.	*following purposes is not used as a dwelling-* […] *(f) a hotel or inn or similar establishment.*" [2] Further, "*where a building is used [as a hotel or inn or similar establishment] no account is to be taken […] of its suitability for any other use*."[3] As a result, the whole of a hotel would not be classed as a dwelling. B&B is however described as a bed and breakfast and Revenue Scotland's guidance on this issue states the following: "*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.*"[4] 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" though Revenue Scotland's guidance has not made this expressly clear). 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.

[2] LBTTA2013 s59(4) as applied by sch5 para 30

[3] LBTTA2013 s59(5)as applied by sch5 para 30

[4] LBTT4012

		However, *part* of B&B (i.e. the 15% occupied by the spouses - hereinafter referred to as "the Occupied Area") might. Unfortunately, there is some inconsistency in the legislation at this point. 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.[5] 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 account is to be taken at all of its suitability for any other purpose (i.e. as a dwelling)[6] while expressly excluding the provision which states that a "*"building" includes part of a building*".[7] It is possible therefore to read this as stating that: (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.

[5] LBTTA2013 sch5 para25(a)

[6] LBTTA2013 s59(5)

[7] LBTTA2013 sch5 para30 excludes LBTTA2013 s59(7)

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