



THE LAND AND BUILDINGS TRANSACTION TAX - ADDITIONAL DWELLING SUPPLEMENT

A CALL FOR EVIDENCE AND VIEWS BY THE SCOTTISH GOVERNMENT

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BACKGROUND TO LBTT AND THE ADDITIONAL DWELLING SUPPLEMENT

ADS has become a hugely significant component of LBTT, contributing 22% of total LBTT revenue in the last full tax year. This is twice the rate of England's equivalent measure and the Scottish rate at 4% is higher than England's (3%).

SPF members have held consistent reservations regarding aspects of the ADS framework however; and this review represents an opportunity to amend those concerns.

INTRODUCTION

Information about your organisation

The Scottish Property Federation (SPF) is the voice for the real estate industry in Scotland. We include among our members: property investors, including major institutional pension and life funds; developers; landlords of commercial and residential property; and professional property consultants and advisers. Our members build Scotland's workplaces, homes, shops, schools and other facilities and the infrastructure that serves them. Our industry is therefore central to the Scottish economy.

QUESTIONS 1-3 Time taken to purchase a new main residence: 18-month window**1. Should the Scottish Government consider amending the length of time available to purchase a new main residence following the sale of a previous main residence from 18 months?**

Yes

2. If so, can you provide further explanation and/or evidence regarding the circumstances in which 18 months may not be sufficient?

The property transaction process may be significantly impacted by events that affect an individual's ability to meet the 18-month timescale for the purchase of a new main residence subsequent to a disposal of a previous main residence. The lockdown restrictions of the pandemic are an example of how the market can be significantly affected by wider circumstances. But individual circumstances can also be unpredictable. For example, a person may fall ill, or their employment may require an unforeseen deployment to another location entirely. Unexpected problems may occur with an intended new build purchase (material or labour shortages) or building issues may be found that unexpectedly delay the transaction (cladding or other possible serious building defects).

The concern with a relatively short window for the tax to be returned is that it may pressure the purchaser in the new transaction into agreeing an offer that without the possible tax burden they would not otherwise accept. This would be unfair and would not support the policy intention of the tax in our view.

3. If the Scottish Government were to amend the length of time available to purchase a new main residence, what period of time should be considered and why?

We believe that the 36-month period adopted by SDLT and LTT would be appropriate. It would be true to say that the exact period of time available to purchase a new residence as with other timescale related questions, is subjective. However, given the significant number of cross-border transactions that continue to occur annually we feel that alignment with England and Wales would be welcomed by taxpayers.

QUESTIONS 4-6 Disposal of a previous main residence: 18 month window**4. Should the Scottish Government consider amending the length of time in which a previous main residence can be sold in order for a repayment of the ADS to be claimed?**

Yes

5. If so, can you provide further explanation and/or evidence where 18 months may not be an appropriate length of time?

This question is more nuanced given the clear concern that some properties for which a repayment is claimed may be used for commercial purposes rather than as a main residence. However, if the issue is considered from the taxpayer perspective, and the consultation notes that some two-thirds of potential repayments are in fact made, then we feel an extended timescale is appropriate. Again, the issue is very much one of fairness whereby taxpayer intentions to sell their previous main residence can be delayed by technical issues with cladding-affected properties, or other previously unknown building defects which require to be rectified or addressed with an intended purchaser. There could also be complex personal factors involved in the disposal of a former main residence. This is particularly the case with couples splitting up, dealt with specifically below.

6. If the Scottish Government were to amend the length of time available to dispose of the ownership of a main residence, what period of time should be considered and why?

Again, and simply because of the significant number of intra-UK transactions we believe that 36 months, to align with England, Northern Ireland and Wales, would be beneficial to taxpayers. Consideration should also be given to extending the period before a new purchase within which the previous main residence must have been occupied as such to 36 months.

QUESTIONS 7-8 Inherited Property

7. What circumstances and issues should the Scottish Government take into account in considering the treatment of low value interests in inherited properties for the purposes of Land and Buildings Transaction Tax?

The question of the timescale for disposal and purchase of a main residence would also be pertinent in answering this question. An extended timescale will support the appropriate disposal or indeed payment of any ADS for taxpayers who probably become unexpectedly subject to possible ADS liabilities with inheritance at the point of purchasing a (new) main residence.

We feel that inheritance is becoming a much more widespread issue for taxpayers than it has been previously for society in general. The example portrayed in this consultation is therefore more and more relevant. We feel the Scottish Government's proposal to exempt inheritors who inherit post missives is somewhat limited and does not address the main issue of fairness and proportionality.

Taxpayers who inherit significant sums such as the share of a substantive property will already be possibly liable for a share of inheritance tax and the imposition of ADS in these circumstances therefore appears to be excessive.

The government suggests that the SDLT approach to exempting a person from with 50% or less interest in an inherited property could be one solution. While we agree that a similar de minimis rule applied to the share of an interest in inherited property could be a fairer and more proportionate approach to the treatment of ADS liabilities in these circumstances, we consider that a wider exclusion of all inherited property for (say) a period after the relevant death (see below) would remove more anomalous consequences, as would a simpler de minimis test applying the £40,000 threshold to the value of any share of inherited property.

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8. Should the Scottish Government consider the introduction of a grace period along the lines of that in place for SDLT in respect of inherited property?

The introduction of a grace period along the lines of SDLT, whereby an inheritor would have three years to purchase a main residence to avoid being taxed for ADS would improve matters. But in particular younger siblings who inherit a share of a property may not be in a position to effect a transaction within three years of an inheritance and therefore we feel that on balance a de minimis approach is a better solution.

QUESTIONS 9-11 Divorce or Separation

9. What circumstances and issues should the Scottish Government take into account in considering the tax treatment of a new property purchased following a divorce or separation, and why?

The government should consider the application of ADS to divorcing or separating couples from the perspective of pragmatism and fairness in usually difficult individual circumstances. If the purpose of a divorcee is to purchase a new place to live away from their previous main residence after the breakdown of a marriage/partnership, then the tax system should support that purpose and not penalise or obstruct it. There will be considerable difficulties in many situations, including where there are children resident in the former marital home and the partner staying in it may not be able to dispose of the premise or support their mortgage requirements independently.

Once again, we believe the policy intent of this tax is a charge on taxpayers who opt to purchase a second dwelling. Where it is not the taxpayer's intention to retain a second residence, we feel this should be the tax authority's main consideration of liability. In circumstances where a taxpayer owns partly or wholly two residences through circumstances of divorce or separation then we do feel these are exceptional circumstances that ought to exempt such a taxpayer from ADS charges where that taxpayer is simply acquiring a new main residence in circumstances where they will not return to, but are unable to dispose of, their previous main residence within any (even revised) medium term timescale.

10. Do you have views on the case for a more specific legislative amendment along the lines of that available in SDLT?

Yes, we believe the SDLT legislation relating to court orders is helpful and could be adopted for LBTT, but once again a wider exclusion may be appropriate.

11. Would increasing the length of time available to dispose of a main residence assist in situations of divorce or separation?

Yes. The process of divorce and separation will in many cases be complex and difficult, particularly where a former spouse will be required to retain an interest because of mortgage or other legal and financial reasons. The longer timescale will therefore help to relieve pressure from ADS liabilities on the separating family, therefore. However, there may well still be a need for an exceptional circumstances style exemption if people are to be enabled to get on with their lives without the threat of a heavy tax liability from ADS, where they have no intention of practically owning more than one dwelling. See answer to question 9.

QUESTIONS 12-13 Joint Buyers/Economic Unit Provisions

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12. Are there other issues of concern regarding the treatment of joint buyers which the Scottish Government should consider?

Yes. The example is a good illustration of the complexities and inflexibility created by the current ADS legislation. In our view these factors combine to cause unfairness and disproportionate tax liability for those taxpayers caught under these provisions. Other circumstances include where couples may not previously co-habit due to cultural or religious belief and yet find themselves caught by ADS because one or both own a main residence where they do not live together prior to marrying; and then jointly find and purchase a matrimonial home.

13. Do you have any proposals as to how the legislation might be amended in response to these scenarios, in a way that would ensure consistency with the application of the ADS for an individual buyer?

Yes. The legislation for ADS could be improved if the government chose to not see every different individual circumstance as a potential tax avoidance threat. The majority of transactions do not occur with the purpose of avoiding potential tax liability. If the LBTT process developed a broader purpose test for transactions then it might avoid a number of the complications that appear with ADS.

In a recent stakeholder meeting a representative from the CIOT noted that one of the key problems with the legislation is that it does not consistently treat two buyers as an economic unit where they are clearly intending to enter a main residence together. The SPF agrees with this critique and believes that if the ADS system correctly identified the purpose of two buyers as a joint economic unit seeking to relocate from one partner's main residence to move jointly to a new main residence, then the exemption from ADS liability should be met and no liability will apply.

QUESTION 14 Transactions involving Local Authorities – Affordable Housing**14. What circumstances should the Scottish Government consider in assessing the case for a broader relief for local authorities where properties are acquired for affordable housing purposes, and why?**

We support the case for a broader relief for local authorities from ADS where properties may be purchased for affordable housing purchases. There may be circumstances where a local authority is required to purchase a property to meet critical affordable housing objectives, or for supported living purposes if a residence requires significant investment to make essential repairs or refurbishment to support affordable housing needs.

In a recent stakeholder meeting local authority representatives noted figures from 2019 which suggested the tax impact of ADS on these kinds of purchase was in the order of £2m for a small number of authorities combined. If applied across the whole of Scotland then the tax could be over £10m or more. This could represent a significant number of individual property purchases made for affordable housing purposes. But more importantly in the context of an ADS revenue of over £115m in the 2020-21 tax year, then we feel it is feasible to allay these tax costs for local authorities.

QUESTION 15 Housing Co-operatives and other approaches**15. Are there grounds for the Scottish Government to consider the introduction of a relief from the ADS for housing co-operatives, or any other approaches intended to deliver housing which is affordable?**

Yes. ADS should not be a barrier to the establishment of housing co-operatives for affordable housing purposes. ADS has performed much more strongly than anticipated as a proportion of the overall LBTT revenue. In fact, ADS is 22% of LBTT, a proportion that is twice the size of its equivalent in England. We believe therefore that there is scope to support a relief for housing cooperative purchases for affordable housing purposes.

QUESTION 16-17 Exceptional circumstances

16. Is there a case for the Scottish Government to consider legislating for an exceptional circumstances provision?

Yes. We believe there is a strong case for an exceptional circumstances provision under the ADS legislation. The application of this tax is very susceptible to individual circumstances and that is why we feel the tax authority should be able to consider cases on an individual basis. Otherwise, we will continue to see genuine cases of unfair and disproportionate tax liability for some taxpayers, which under ADS is effectively charged under the old Stamp duty approach of a full charge on the consideration (i.e. not applied on a progressive basis as LBTT introduced for property transactions).

Question 17. If so, what circumstances should be considered, and on what grounds?

We consider that any such provision should be applied reasonably, and guidance produced setting out the kind of matters that could be covered. We suggest that such a provision apply in circumstances which are 'beyond the reasonable control of the taxpayer'. We do not consider that the provision should be limited to circumstances which are outwith the knowledge of the taxpayer because while a matter may be within knowledge, it may be outwith the taxpayer's control.

We note the recent judgement in the case of Dr A Christie [2022] FTSTC2 concerning a member of the armed forces. The taxpayer was unable to meet the requirements for a repayment of the ADS as the property in question had not been his main residence in the period of 18 months before purchase of the second property, as a result of a required posting abroad. We consider that an exceptional circumstances provision could accommodate such situations so as to ensure members of the armed forces are not disadvantaged by the ADS rules.

Another exceptional circumstance could arise where a contract for a purchase or more usually a sale has been concluded with an anticipated settlement date within any relevant time limit, but for unexpected reasons (and perhaps entirely because of new purchaser) the transaction does not settle at the time anticipated, leaving the taxpayer owning more than one dwelling at a time when they believed they had done all that they could not to be in that position.

Broader exceptional circumstances can be anticipated, such as disease or indeed war action bringing the market for residential properties to a halt.

QUESTIONS 18-20 Additional questions**18. Is there any other issue regarding the operation of the Additional Dwelling Supplement (ADS) legislation which you would wish the Scottish Government to consider as part of the overall review?**

Yes

Our members have raised one additional circumstance where a relief should be considered for the purchases of subsidiary dwellings. An example could include the purchase of a dwelling within which there is a bespoke unit for the care of an elderly relative or disabled person - (sometimes referred to as the 'granny flat').

With a growing elderly population and an enhanced focus on supported living, it would seem appropriate to consider a relief for ADS purposes for these circumstances.

19. Are there any other points you would wish to raise regarding the operation of the ADS in different parts of Scotland?

Yes

There has clearly been an increase in the market for second homes in more rural locations during the pandemic. This has had an upward pressure on house prices in these areas of Scotland, and consequently created a very strong market for second homes in these locations. This market may not be a permanent feature however and there may come a time when it may be difficult to dispose of second homes in Scotland in some locations (such as more remote rural locations). We would therefore welcome the flexibility of a longer timescale.

20. Are there any issues relevant to the content of this consultation that you believe the Scottish Government should consider in order to assure performance of these duties?

Yes

We noted earlier in our answer to Question 12 (Joint Economic Units) that there are cultural, or sometimes simply traditional, grounds which mean that people will not cohabit ahead of a marriage or partnership. This means they may have individual circumstances due to the current legislation on joint economic units for ADS purposes that could lead to a tax charge where there is no intention by the taxpayers of doing anything other than disposing of a previous dwelling by one or both of the individuals in order to occupy a common main residence. This potential tax charge could be seen as discriminatory to these individuals and should be considered as part of this review.