

Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill Response by the Chartered Institute of Taxation

1 Introduction

- 1.1 The CIOT welcomes the opportunity to respond to the Finance Committee of the National Assembly call for evidence on the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill ('the Bill').
- 1.2 The Bill makes provision for introducing Land Transaction Tax (LTT) to replace the UK Stamp Duty Land Tax in Wales from April 2018 and includes measures to tackle the avoidance of devolved taxes. The Bill is the second of three bills to establish devolved tax arrangements in Wales. This Bill was preceded by the Tax Collection and Management (Wales) Act 2016 (TCMA) which provides the powers and duties to collect the tax, including the establishment of the WRA, and will be followed by a bill to establish Landfill Disposals Tax (LDT).
- 1.3 Overall we think the Bill is comprehensive and well laid out.

2 About us

- 2.1 The CIOT is an educational charity. Our primary purpose is to promote education in taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 Our stated objectives for the tax system include:
 - A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
 - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
 - Greater certainty, so businesses and individuals can plan ahead with

- confidence.
 - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
 - Responsive and competent tax administration, with a minimum of bureaucracy.
- 2.3 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

3 Tax bands and tax rates

- 3.1 Sections 25-26 of the Bill set out the procedure for regulations specifying tax rates and bands. The Bill provides that LTT tax bands and rates are to be set initially by a statutory instrument (SI) to be laid before and approved by a resolution of the Assembly. Subsequent changes can be made a SI that needs to be laid before the Assembly and ceases to have effect on the expiry of 28 days unless, before that time, it is approved by a resolution of the Assembly (the Provisional Affirmative procedure).
- 3.2 We welcome the certainty provided by section 26 in dealing with the consequences for purchasers of failed regulations under the Provisional Affirmative process.
- 3.3 We note the Welsh Government's commitment to the use of a marginal rate calculation of LTT for both residential and non-residential transactions rather than the 'slab' system. The adoption of marginal rates is in line with the current rates system for both SDLT and LBTT. The Bill requires Welsh Ministers to set at least three bands (of which one is a zero rate band) and requires the rates to be progressive in nature in the sense that the tax rate increases as the taxable amount increases.
- 3.4 We are not economists or experts in the property market and we do not generally comment on the setting of rates of tax, as these are decisions for politicians. We therefore limit our comments on this aspect to a few observations on the progressive nature of high marginal rates.
- 3.5 The 'slab' system has clear and well accepted distorting effects in terms of the 'cliff edge' when the price for a transaction moves into a higher band and in creating an incentive to re-characterise part of the consideration as paid for non-land elements of the transaction (eg chattels).
- 3.6 Assuming the aim is to secure revenues, the corollary to the move away from a slab approach is the need for higher nominal rates for the upper bands. This in turn may mean higher effective average rates of tax for higher value transactions. High marginal and effective average rates of tax lead to the possibility of greater deterrence of transactions, which to the extent it occurs, would adversely affect tax revenues. This disincentive to move house may be exacerbated in populous border areas to the extent that higher value properties are clustered in such areas.

Although we cannot estimate the economic effect of higher marginal rates, if the effect were to reduce the volume of transactions with a consequential reduction in revenue, there is then less revenue to spend on public services and the effect may not be regarded as especially progressive. This form of economic argument is often made against progressive rates. However the possible behavioural change in response to

higher marginal rates should be weighed particularly seriously for the residential rates of a transaction tax because it is generally easier to move house less often than to say, forego income, in the case of higher marginal income tax rates.

We note the reference in the recent paper: Land Transaction Tax: Setting rates and bands¹ to the lower than forecast residential revenues for LBTT for 2015/16 being due in part to the effect of forestalling. The forestalling effect is of course a short term effect while higher marginal rates may impact the volume of transactions on an ongoing basis.

- 3.7 In terms of forestalling in relation to the first announcement of LTT rates, we recognise the difficulties in balancing certainty (by announcing rates as early as economic assessment allows) and the risk of forestalling as a result of pre-announcing tax rates. The timing of the UK 2017 Autumn Statement and any announcement of a change in SDLT rates will no doubt have a bearing on that process.

4 Consistency with SDLT

- 4.1 We note that, in line with the views of stakeholders including the CIOT, the legislation will be broadly consistent with SDLT to provide stability and clarity to all affected by it – taxpayers, their advisers and the Welsh Revenue Authority. Adoption of much of the SDLT code is clearly in line with stakeholders' views. It brings with it the benefits of consistency but inevitably involves the adoption of its flaws. It is therefore important to continue to monitor the impact of this approach, we comment further below at paragraph 11 in respect of post-implementation review.
- 4.2 It would be helpful to have a detailed technical summary of all the differences between LTT and SDLT, ideally with practical examples of how the differences might affect common transactions. This will assist conveyancers in particular who may not be tax specialists.
- 4.3 If a detailed note of all the differences in wording is provided, we will be happy to consider whether there may, in our view, be some unintended consequences.
- 4.4 It will also be helpful to have an indication of the extent that the previous SDLT (and wider UK case law) is considered relevant in construing common provisions.
- 4.5 To the extent that SDLT and LTT provisions are consistent, we note that there are a number of significant common areas that would benefit from more extensive and improved guidance than that provided for SDLT, such as the scope of the linked transactions rule (see section 28) and the definition of residential property (sections 71 -72) common areas of uncertainty for advisers and taxpayers alike.

5 General Anti-Avoidance Rule (GAAR) – section 65

- 5.1 The GAAR counteracts tax advantages in relation to devolved taxes that arise from artificial tax avoidance arrangements. It is to be inserted into the TCM (Wales) Act 2016.

¹ <http://gov.wales/docs/caecd/publications/160915-ltt-bands-en.pdf>

- 5.2 An arrangement is a tax avoidance arrangement if the obtaining of a tax advantage for any person is the main purpose, or one of the main purposes, of a taxpayer entering into the arrangement. Regard may be had in particular to the amount of devolved tax that would have been chargeable in the absence of the arrangement.
- 5.3 A tax avoidance arrangement is artificial if the entering into or carrying out of the arrangement is not a reasonable course of action in relation to the provisions of Welsh tax legislation applying to the arrangements. Regard may be had in particular to a) any genuine economic or commercial substance to the arrangement (other than the tax advantage); b) as to whether the arrangement results in an amount of tax chargeable that was not the anticipated result when the relevant provision of Welsh tax legislation was enacted.
- 5.4 We fully respect the decision to include a general anti-avoidance rule (GAAR) in the TCM (Wales) Act. Our concern here is balancing the desire to protect the tax system against the need for certainty. It is vital for business in Wales that the GAAR provisions do not interfere or delay commercial decisions. Business and individuals must be able to plan ahead with confidence. The best way of countering avoidance is to make the legislation and its effect as certain as possible. Our comments and recommendations below are made with those aims in mind.
- 5.5 In defining both 'tax avoidance arrangements' and the meaning of 'artificial' particular regard is to be had to the amount of tax that would have been chargeable without the arrangement and the amount of tax anticipated when the relevant provision was enacted. We do have a concern that the implication that might be drawn from those provisions is that a shortfall in revenue from a particular measure must be due to avoidance activity. Even with the legislative safeguards in sections 81F - 81G, and the placing of the burden of proof on the WRA, such an implication would appear to disproportionately tip the balance of power in favour of tax collection as against the rights of the taxpayer.
- 5.6 In order to realign that balance and enshrine in the legislation the policy intention underpinning the provision at the time of enactment, we reiterate our suggestion in our joint (with the Stamp Taxes Practitioners Group) response to the LTT consultation that a statement of the intent in respect of each LTT relief is included in the Bill. The advantage of a purpose clause for each relief is that it makes the intention clear at the point of enactment and is therefore visible to i) taxpayers when considering whether the relief applies and ii) to the court or tribunal in considering the application of the GAAR.
- 5.7 The GAAR begins with a wide definition of a 'tax avoidance arrangement' which is narrowed by the 'artificial' formulation in section 81C. However we are concerned that the use of 'one of the main purposes' means there is a very low threshold for deciding that a transaction has an avoidance element. While recognising that the formulation is deliberately designed as a 'broad spectrum' deterrent, the breadth of the provision means that some form of clearance system or opinion service² would provide certainty. (Revenue Scotland's opinion service is an example although the turnaround time of 25 days may not be fast enough for large commercial transactions).
- 5.8 Publication of guidance by the WRA of what is and what is not caught by the GAAR

² In order to allow taxpayers to file with certainty, Revenue Scotland will, in certain circumstances, provide its opinion on the tax consequences of specific transactions with a turnaround time of 25 working days – see <https://www.revenue.scot/contact-us/revenue-scotland-opinions>

would also assist from the outset. As experience grows the guidance can be updated with (suitably anonymised) examples. A general point is that guidance is likely to work best for taxpayers and the WRA if it is dynamic and agile with regular updates (publicised on the WRA website via a dedicated updates page). In terms of avoidance, we have previously pointed to the UK SDLT experience where SDLT schemes were widely marketed for some considerable time before action was taken despite feedback from practitioner members of HMRC's stakeholder group (SDLT Working Together). We think that setting up a similar stakeholder group in Wales to provide a platform for discussion between the WRA and those working with LTT will be helpful here. (Paragraph 8.41 of the Explanatory Memorandum indicates that such engagement is envisaged alongside the existing forums.)

6 Reliefs

6.1 The Explanatory memorandum states at 3.21 :

'Tax reliefs are an important part of the tax regime and targeted at a variety of different objectives. Some reliefs are designed to encourage a particular behaviour, aimed at achieving social or economic policy objectives, whereas others are created to ensure fairness within the tax regime, for example, to prevent 'double taxation', where land is transferred without any effective change in its economic ownership. The intention is to provide a suite of reliefs consistent with the LBTT and SDLT regimes.'

6.2 The availability of the reliefs is subject both to the overarching TAAR for all LTT reliefs (section 31) and the general anti-avoidance rule (section 65). We note that the GAAR is intended to operate in tandem with the targeted anti-avoidance rules. We welcome the fact that the flawed FA 2003 sections 75A-C have not been replicated in the Bill.

6.3 The TAAR denies relief for a tax avoidance arrangement defined as being one where the obtaining of a tax advantage is the main purpose, or one of the main purposes, of the buyer and the arrangement lacks genuine economic or commercial substance other than the obtaining of a tax advantage. As with the GAAR formulation, we are concerned that using 'one of the main purposes' rather than 'the sole or main purpose' means there is a very low threshold for deciding that the claiming of the relief has an avoidance element. A clearance facility would aid certainty.

6.4 The rationale for the overarching TAAR is to be found in the EM where it is noted (at 3.39) that SDLT legislation includes a number of Targeted Anti-avoidance Rules (TAARs) in the various reliefs, many of which are expressed in the same way so can appear repetitive. The intention is therefore to extend, significantly simplify and strengthen the approach by creating an overarching TAAR for all LTT reliefs.

6.5 While entirely recognising the value of simplifying the code, the 'one size fits all' approach of the overarching TAAR may not sit comfortably alongside all the reliefs given their different objectives, particularly the public benefit reliefs³ for example a charity may not operate according to economic or commercial principles; its charitable purposes may override those principles. We note that note 44 of the Explanatory

³ The category of public benefit reliefs include charities relief, certain acquisitions by registered providers of social housing, relief for transactions relating to the reorganisation of public bodies, compulsory purchases, transactions relating to compliance with planning obligations, changes to parliamentary boundaries, and compliance with treaty obligations.

Memorandum attempts to address this concern noting that while a charity may not have a commercial reason for the acquisition, an economic purpose would be present as the charity has exchanged cash for a physical asset with the aim of furthering its charitable purposes. We are concerned that this helpful interpretation⁴ may not be readily apparent from the legislation. The CIOT has long opposed the use of concessionary guidance to narrow the effect of widely drawn anti avoidance legislation.

- 6.6 The suggestion, noted above, that a statement of the intent in respect of each LTT relief is included in the Bill would assist in applying the TAAR also.
- 6.7 We note also that it is not immediately apparent how the TAAR is to be applied where a combination of reliefs are claimed as part of a larger transaction in circumstances where each relief has an economic purpose but the result (as in the case of *Project Blue*⁵, for example) is that no tax is claimed to be due.
- 6.8 We note from Table 3 of the Explanatory Memorandum the low take up of the relief for certain acquisitions by registered social landlords (Schedule 14 Part 6) despite the fact that social housing is a key issue for Wales. One of the conditions for this relief is that the transaction is funded with the assistance of a public subsidy. Anecdotal evidence from members suggests that since the enactment of this relief for SDLT, the availability of grant funding for housing associations has reduced so that associations are now more likely to raise external funding in the market or by selling off part of their developments. The lack of grant funding denies relief, is that result consistent with the policy intent? There is a further lack of clarity in what level of grant funding is required as the condition refers to funding 'with the assistance of a public subsidy'? A statement of legislative purpose would help to clarify when relief is intended to be available.
- 6.9 Section 31(3) defines 'tax' for the purposes of the TAAR as meaning LTT and defined UK non-devolved taxes. Explanatory Note 45 notes that prohibiting the relief from LTT where the arrangement involves avoidance of tax imposed at a UK level is without prejudice to any action HMRC might take to recover the non-devolved tax that has been avoided.
- 6.10 The inclusion of non- devolved taxes in the definition of the TAAR appears to present significant practical difficulties; it is unclear to us how the WRA will have access to the information to determine whether non-devolved taxes have been avoided.
- 6.11 We suggest that in fact consideration might be given to reversing the definitions of 'tax' in the GAAR and the TAAR: for the TAAR, only devolved taxes is likely to be of concern as it is the misuse of the relief from LTT that is the presumed focus; for the GAAR the concern is more perhaps with an artificial structure that may be aimed at avoiding other taxes but happens to give rise to a loss of devolved tax.

⁴ The relevant part of Note 44 reads: '*Whether an arrangement has a genuine economic or commercial main purpose will, ultimately, depend on the facts of the transaction. However, the rule should not prohibit a claim to relief by a charity where it acquires a property for charitable purposes (for example housing people who meet the charity's charitable purposes) as, whilst there may not be a commercial reason to the acquisition, there is an economic purpose as the charity has exchanged cash for a physical asset – the property – with which to further its charitable purposes.*'

⁵ *Project Blue Ltd v HMRC* [2016] EWCA Civ 485

7 Powers to make subordinate legislation

- 7.1 The extent of the regulation making power conferred by the Bill is apparent from the table in the Explanatory Memorandum setting out 33 powers. We note the careful consideration that has been given to deciding whether the more rigorous affirmative procedure is prescribed for powers that could affect a buyer's tax liability with the negative procedure restricted administrative changes.
- 7.2 We have some reservations about the lack of scrutiny by the Assembly for powers to change substantive matters by statutory instrument even where the process is subject to the affirmative procedure, for example the power to introduce, modify or remove reliefs conferred by section 30(6) to reflect policy changes and/or economic and property market conditions.
- 7.3 Section 76 provides a power to make further ancillary changes to give full effect to the Bill. Is this section intended to provide for the enactment of transitional provisions? Otherwise there is no mention of transitional measures.

8 Filing and payment deadlines

- 8.1 We note the current HMRC consultation 'Stamp duty land tax: changes to the filing and payment process' that proposes changes relating to SDLT filing and payment process, the main change proposed being to reduce the filing and payment window from 30 days to 14 days. (Consideration of the SDLT penalty regime will also reflect the wider Making Tax Digital consultations). We note that the Bill includes powers to amend the filing and payment dates by secondary legislation if Wales choose to make similar amendments.
- 8.2 The CIOT is responding to the current HMRC consultation. In broad terms, our view is that for a straightforward residential sale and purchase transaction (freehold and leasehold), filing the return and making payment within 14 days should not generally present difficulties particularly as the preparation of the draft return is usually done at an earlier stage in the conveyancing process. Nevertheless 14 days (which includes non-working days) will significantly shorten the time available to file and pay before a fixed penalty is incurred particularly over bank holiday periods. We think the shortened period will present difficulties for firstly, complex commercial transactions requiring detailed enquiries to establish the information required for the return and secondly, for deferment applications in the case of contingent or uncertain consideration (section 57 of this Bill) that have to be made by the filing date.
- 8.3 One of the long-running issues in completing the SDLT return is the need to include the data for VOA rating purposes rather than to establish the SDLT liability. We note that the LBTT return does not require the equivalent rating information.
- 8.4 It is to be hoped that the new LTT return will remove the need to include the rating data and will ideally de-couple the deferment application from the return, via a separate online application.
- 8.5 We note that the deferment provisions in the Bill differ slightly from the equivalent provisions for SDLT; subtle differences may provide a trap for the unwary. For example the deferral request must propose an 'effective end date' by which the tax must be paid unless a further extension is agreed. It is unclear why this provision is necessary as the timing of the deferral may simply not be known.

9 Land partly in Wales and partly in England

- 9.1 Land straddling the border of Wales and England will be treated as two transactions, one relating to land in the UK (chargeable to SDLT) and one relating to land in Wales (chargeable to LTT). The Bill provides for the consideration to be apportioned on a just and reasonable basis.
- 9.2 We note that the Explanatory Memorandum (at 8.42) indicates that data is not currently available on the extent to which two returns will be required although it is expected to be 'very small' for both residential and non-residential properties whether cross border properties or purchases of multiple properties.
- 9.3 We suggest that land straddling the border be regarded as linked (section 28) to ensure that developments are not structured to straddle the border and take advantage of rate differentials between SDLT and LTT.

10 The 15% per cent slab rate

- 10.1 We support the decision not to include the 15% charge (and associated reliefs) for the purchase of high value residential property by companies or other non-natural persons which was introduced into the SDLT code by Finance Act 2012. We note that there is power at clause 24(4) of the Bill to introduce this provision through regulations

11 Post implementation review

- 11.1 We welcome the anticipation that the legislation will be reviewed on a regular basis and at a minimum in 3-5 years' time once the WRA has bedded in (para 11.1 of the Explanatory Memorandum).
- 11.2 In relation to the treatment of leases, Part 4 of the Bill broadly mirrors SDLT. As we noted in our consultation response, a requirement for a regular return (rather than the current SDLT approach, as adopted in the Bill, of returns at a 5 year date or when the rent becomes certain, if earlier) would provide additional information and, arguably, improve compliance. However the compliance advantage of a return at regular intervals (as adopted for LBTT) will be balanced by an increase in the administrative burden for businesses, a cash flow cost and potentially a need for additional resources within the WRA. An assessment of these factors should however form part of the early experience of the WRA and the post implementation review.
- 11.3 The Bill retains the current SDLT approach to partnerships again providing welcome consistency in a complex but now reasonably familiar area for advisers (at least those who specialise in real estate transactions). However, partnership taxation is an area that is open to change and subject to consultation⁶ and the wholesale adoption of the SDLT regime needs to be kept under review. There is a priority need for more

⁶ There is the current consultation for example <https://www.gov.uk/government/consultations/partnership-taxation-proposals-to-clarify-tax-treatment>

comprehensive guidance in this area as the guidance provided to date by HMRC is incomplete.

12 Cross reference to other statutes

- 12.1 As a general point, we would strongly recommend that where the Bill makes reference to or uses a term from a provision of a UK statute, the relevant words should be re-stated in the Bill itself rather than effected by cross references (see in particular the cross references at Part 8). This would avoid finding that the LTT code is amended by some unrelated change to a UK Act, necessitating an amendment to the Bill. It also, pragmatically, makes the LTT code easier to read as a stand-alone Welsh Act.

13 Acknowledgement of submission

- 13.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

14 The Chartered Institute of Taxation

- 14.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 17,600 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation