



ICAEW REPRESENTATION 152/16

LAND TRANSACTION TAX AND ANTI-AVOIDANCE OF DEVOLVED TAXES (WALES) BILL

ICAEW welcomes the opportunity to comment on the Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Bill (the Bill) published by the Welsh Government on 12 September 2016.

This response of 4 October 2016 has been prepared on behalf of ICAEW by the Tax Faculty in partnership with the ICAEW's Regional Director for Wales. Internationally recognised as a source of expertise, the faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world.

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LAND TRANSACTION TAX AND ANTI-AVOIDANCE OF DEVOLVED TAXES (WALES) BILL

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation Land Transaction Tax And Anti-Avoidance of Devolved Taxes (Wales) Bill (the Bill) published on 12 September 2016.
2. We are pleased to participate in this consultation and for the opportunity to provide oral evidence to the consideration of this Bill.

MAJOR POINTS

3. We support the approach the Welsh Government has adopted in the introduction of Land Transaction Tax (LTT). We believe that the initial consultation process has been well designed and encouraged participation. The subsequent review process has been transparent and it is clear that the Government has listened and taken account of concerns raised during the consultation process.
4. The Welsh Government has made a good start in its tax legislative process and the approach has provided a high degree of confidence that the new tax will work well for Wales.
5. Generally we support the approach of modelling the tax on the existing and familiar rules found in SDLT. We appreciate the problem that the Welsh Government has been formulating its approach to LTT at a time when the UK Government has been making significant changes to the SDLT regime, most recently in abandoning the 'slab' system in favour of a marginal rate system for both commercial and residential property. The result of this has been that the Welsh Government has been forced to play 'catch up' with the changes to the UK SDLT system. Once LTT is up and running, we would hope that the Welsh Government can resist the temptation to keep tinkering with the LTT rules. We believe certainty is essential for taxpayers and we believe that a stable and certain LTT regime will help to encourage investment in Wales.
6. While the Welsh Government has understandably modelled LTT on SDLT, there are of course a number of differences between them, for example the anti-avoidance provisions and the non-introduction of the 15% rate. To help taxpayers and provide certainty, the WRA should publish a list of the differences between the two taxes, including detailed differences and any omissions and inclusions.
7. We note the publication on 16 September 2016 of a separate discussion paper on setting rates and bands. Again, we think this is a good approach given the introduction of LTT is still 18 months away and the rates will need to be set by reference to the prevailing conditions of the time. The setting of rates is clearly a policy question for the Welsh Government to decide and is not one for us to comment on in detail. All we would say is that if the Welsh Government is seeking to attract inward investment and growth, it should set rates that work for Wales and resist the temptation to set too high marginal rates of LTT.
8. LTT should be framed to be simple, certain, straightforward to operate and be fair and reasonable. Before 1997, the UK stamp duty system was simple and straightforward but the successive moves to raise the marginal rates of SDLT have not only introduced distortions (for example between residential and commercial property) but have encouraged extensive attempts to avoid SDLT, and efforts to counter this have introduced a considerable amount of

unwelcome complexity into the UK tax system, for example the 15% rate for enveloped dwellings and the ATED regime. We are concerned about the long term stability of such an approach and that in the long run such measures might prove counterproductive. We therefore welcome the Welsh Government's decision not to proceed with the introduction of a 15% rate.

9. In our original submission to the first consultation on Stamp Duty devolution we proposed that the Welsh government should consider removing the differentiation between commercial and non-commercial and thereby remove a key area of dispute and administration required to classify properties in the current system. Whilst this Bill does not appear to rule out this possibility neither does it refer to it. We remain of the view that such a move could significantly reduce the cost of administration of LTT and remove what is an artificial differentiation if the overall tax take can be retained within one scale of charges.
10. Turning to the Bill itself, we believe it is well set out and a model of clarity and conciseness.

SPECIFIC POINTS

11. Set out below are our high level points on the Bill. We will continue to review the detail and submit further detailed points as part of the consultation process.

Chapter 2 Land Transactions

CI 9, Land partly in Wales and partly in England

12. While we suspect that there are very few estates that straddle the England/Wales border, we would welcome clarification as to the position when an estate is situated partly between England and Wales. Which Revenue authority will decide whether any apportionment is on a just and reasonable basis? What happens if there is a disagreement and how will it be sorted out? This points to the need for at least some form of operating agreement between the WRA and HMRC and a protocol governing how any disputes in valuations are resolved.

CI 31, Reliefs: anti-avoidance

13. In principle we support the approach adopted by the Welsh Government to ensuring that reliefs are not abused. In our earlier submissions, we suggested that the Welsh Government should not adopt the approach used in relation to avoidance of SDLT and which is set out in s 75A to 75C, FA 2003. The latter adopts a very mechanistic approach based upon transactions and a reduction in the SDLT charged but without any motive test.
14. The approach adopted in this Bill is to introduce, in effect, a targeted anti avoidance rule (TAAR) such as is found in a number of parts of the UK tax legislation. However, while TAARs have become a common approach adopted by the drafter when seeking to counter avoidance, care needs to be taken in using them as they can result in considerable uncertainty. Usually, extensive guidance will be needed to accompany them to ensure that the policy purpose is achieved, but the result is often that taxpayers will find that they are taxed according to the law, but then are untaxed as a result of a published practice or concession. The WRA will need to publish guidance on how this TAAR is expected to apply in respect of each relief that has been granted, and given that each relief is different the 'answer' may be different depending upon the individual circumstances of the relief and the underlying policy behind each relief.
15. In cl 31(2)(b), we are not convinced that the wording is particularly helpful – for example the use of the word 'genuine' is unusual although we appreciate it has also been used in the drafting of the anti-avoidance rule – see further below. We would have thought the test would be better framed as arrangements that lacked economic substance or where the economic

substance was insignificant when compared to the tax advantage received. An alternative formulation would be to link this test to arrangements that are artificial and/or contrived – wording that is used elsewhere in the tax legislation.

16. We are concerned that the list of taxes included within a tax avoidance arrangement includes those which are not devolved, including for example income tax, corporation tax and capital gains tax. Given this measure is aimed at the avoidance of LTT, we do not see that these taxes should be included in a list of taxes that could trigger this provision. However, and more generally, we are concerned as to how this provision might apply given all of those taxes will continue to be administered at the UK level so that the WRA will not have those details to hand. We think the non-devolved taxes should be removed from the list but as a minimum we would welcome greater clarity on how such a provision would operate both legally and in practice. An alternative would be to not list the taxes but use a catch all phrase such as “All taxes devolved to the Welsh Government”.

Part 7 Anti avoidance rule

17. We appreciate the Welsh Government’s decision to adopt a general anti avoidance rule but are concerned that the Welsh version of the rule has significant differences both to the UK’s general anti abuse rule and the anti-avoidance rule adopted by the Scottish Government. While we appreciate that, by definition, devolved taxes should be exactly that, nevertheless for the sake of consistency and the need to encourage inward investment, we think that this is an area where some consistency across the constituent countries of the UK would be helpful.

Cl 81, Artificial tax avoidance arrangements

18. In cl 81C(2)(a), again the Welsh approach has been to adopt a similar wording and tests used in cl 31, however we are concerned about the use of ‘any genuine economic or commercial substance to the arrangement’. The equivalent definition in s 64 of the Revenue Scotland and Tax Powers Act 2014 is that the arrangements lack economic or commercial substance. The Welsh version of this test appears to set quite a low threshold, namely was it genuine, rather than look to the actual substance of the arrangement. The test is likely to create further uncertainty and argument in what is already a difficult area for advisers and taxpayers.
19. It would appear that the taxpayer is not under a duty to ‘self-assess’ under the Welsh GAAR and that instead the WRA must issue a counteraction notice. In this respect, the rules appear to largely follow the rules in the Scottish GAAR rather than the rules in the UK GAAR. However, the Scottish rules include provisions (in s 66(4) Revenue Scotland and Tax Powers Act 2014) which would allow the taxpayer to make the adjustment, but these provisions do not appear to have been carried over into the Welsh Bill. We would have thought that taxpayers should have the ability to amend a return in these circumstances.
20. More generally, we are concerned as to whether the Welsh GAAR provides sufficient certainty to taxpayers. We can appreciate why the Welsh Government would not want to adopt a clearance mechanism, but, nevertheless the broad sweep on the anti-avoidance provision makes it difficult for taxpayers to obtain certainty and we question whether some way might be found to provide greater certainty.
21. In the absence of any clearance mechanism, we note that the UK GAAR is accompanied by extensive guidance which helps to identify when transactions may, or are more likely to, fall foul of the GAAR. Given there is no GAAR advisory panel, we believe the WRA should work with the professions to produce some practical guidance on the likely application of the GAAR in advance of the introduction of LTT.