

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

Introduction

The purpose of this paper is to respond to the publication of the Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Bill (the “Bill”) and assist the Finance Committee of Welsh Government with its deliberations of the Bill in advance of the oral representations to be made on 13 October 2016.

General observations

We have been provided with suggested consultation themes and areas that the Finance Committee may wish to consider which have been particularly helpful in considering the Bill given the length of the Bill and the time available for comments.

We are supportive of the need for the Bill and legislation to raise taxes from property transactions and legislation to counter tax avoidance. Given the prospect of Welsh Government losing up to £250M (based on ONS projections) on the switching off of stamp duty land tax (“SDLT”) from 1 April 2018 and the corresponding reduction in the block grant from Westminster, the option of doing nothing to replace SDLT is not a realistic option. The existing pressure on public finances is only likely to increase in 2018 and a decision not to replace a £250M funding stream would probably be unacceptable, both from a public perception and political point of view.

We support the decisions made regarding the use of the powers of Welsh Government to make secondary legislation including changes to the rates and bands of LTT. It is important that the LTT legislation can be amended quickly to enable Welsh Government to react to changes in market practice and changes to SDLT which could have a negative impact on the wider Welsh economy. It is important that Welsh Government can react quickly to any LTT tax-avoidance schemes that escape the proposed anti-avoidance legislation, rather than the response from HMRC which is sometimes slow with regard to SDLT. As professional advisers, it can be tricky advising clients who have heard of a particular scheme which uses a certain interpretation of the legislation with which we as advisers may disagree but has not been stopped by the relevant legislation.

We welcome the decision of Welsh Government to mirror the provisions of SDLT when preparing the LTT legislation and to accept the responses to the previous consultation on LTT which supported the premise that replication of the existing processes and procedures would be desirable.

From a practitioners’ point of view, the existence of clear, unambiguous legislation and guidance together with a notification and payment system that works smoothly will be vital. Clients will not appreciate having to spend substantial fees in order to make a payment of LTT and to file a return. It will also be important for the Welsh Revenue Authority (“WRA”) to be able to support professional advisers and taxpayers with the provision of suitable tax clearances and advice services where there are uncertainties in the legislation and/or guidance issued on LTT.

A failure to provide sufficient resources to WRA in relation to both systems that work and have been adequately tested before going “live” on 2 April 2018 (1 April 2018 being a Sunday) and having personnel with sufficient experience and knowledge to deal with queries could have an adverse effect on the ability to implement the LTT provisions.

Specific areas of the legislation

We do not propose to comment on all the areas of the legislation and unfortunately our comments have been curtailed by a limited amount of time being available to devote to a full, considered review of the legislation.

1. Tax bands and rates

Certainty of the tax bands and the rates in relation to non-residential transactions is important so that commercial property clients can plan ahead with regard to major property developments. An announcement in early 2018 of the bands and rates that differ substantially from the current bands and rates will not give sufficient time for clients to factor in the changes into their budgets.

The relatively high amount of SDLT that is collected from a small number of non-residential property transactions (compared to residential transactions) shows the importance of the non-residential property sector to LTT. It is important that the commercial property sector is not seen as a “cash cow” to fund the spending promises of Welsh Government. Property investors are highly mobile and may choose to invest their money in developments in England if LTT is seen as imposing a greater cost on equivalent developments.

2. Approach to tax avoidance

We recognise that it is important to tackle tax avoidance and to discourage artificial schemes. As a firm we have taken a positive decision not to promote tax avoidance “schemes” to our clients. However, it is sometimes possible to structure transactions in different ways to reduce the amount of tax payable and this would fall within the definition of a “tax advantage” used in clause 31 and the proposed section 81B of the Tax Collection and Management (Wales) Act 2016 (“TCMA”).

Clause 31 uses terms such as “genuine economic or commercial substance” which will be interpreted on a subject basis. Section 81B(1) refers to obtaining a tax advantage with section 81B(2) refers to less tax being paid as a result of entering into the particular arrangement.

There could be a disagreement between the client and the WRA as to whether the transaction was genuine or commercial. The fact that the client had a choice between two structures and chose the structure which results in a lower tax liability should not be caught by a tax avoidance rule.

It has long been the case (since the House of Lords decision in *IRC v Duke of Westminster* (1936)) that taxpayers, when faced with two alternatives, are entitled to choose the option which results in the lower amount of tax being paid.

Section 81C gives the power to WRA to decide what is “artificial” by reference to whether the transaction was a “reasonable course of action” by reference to the

Welsh tax legislation. Subsection 81C(2) lists a couple of factors to be considered but only refers to the fact that the WRA “may” refer to the factors. There is no compulsion and the WRA could consider other factors not listed in the legislation. There does not appear to be an acceptance of the Duke of Westminster principle.

The let out in section 81C(3) providing for a “whitelist” of arrangements that WRA is prepared to accept are consistent with generally prevailing practice will not assist a client who has structured a transaction on the basis of advice of which the WRA was not aware. The WRA would have to offer a form of advance clearance in relation to a particular structuring of a transaction that varied slightly from an arrangement on a “whitelist”. Without the clearance service the client could be faced with an unexpected tax demand and potentially adverse publicity if the transaction ends up before a court or tribunal as provided for in section 81H.

3. The proposed exemptions and reliefs

We welcome the retention of a substantial number of reliefs that are contained within the SDLT legislation. This approach should avoid the steady “roll back” that occurred with the Scottish Land and Buildings Transaction Tax where reliefs had to be added to the LBTT legislation once Scottish Government had been persuaded of the commercial merits of the reliefs rather than being tax avoidance by the backdoor.

Conclusion

Geldards has been delighted to be able to assist Welsh Government with the development of the devolved taxes through its involvement with the Tax Advisory Group, the Tax Forum and membership of the SDLT Technical Experts Group. Geldards is also looking forward to continuing with its assistance during the passage of the LTT Bill through the Welsh Assembly.

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About Geldards

Geldards is a leading law firm in Wales and England with a heritage of over 160 years of legal expertise. Recognised by the independent legal directories as a regional heavyweight, the firm continues to grow from its Cardiff base with offices in London, Nottingham and Derby.

With 350 talented people, our teams specialise in infrastructure, projects and construction, banking and project finance, real estate, planning and environmental, commercial and procurement, state aid and competition law, employment and pensions, health and safety, charities, constitutional and administrative law and dispute resolution. As multi-disciplinary deal facilitators, we have significant experience in orchestrating high-value transactions involving complex structuring and negotiations within time and cost constraints.

We are also experts at understanding how the law in Wales is rapidly diverging from English law. Under the devolution settlement, there is a growing body of Welsh law which impacts on a broad range of areas. Given the complex and far-reaching reforms and jurisdictional changes, we help clients navigate the legal, regulatory and policy differences in Wales.