

Pwyllgor Cyllid | Finance Committee

Bil Treth Trafodiadau Tir A Gwrthweithio Osgoi Trethi Datganoledig (Cymru)

Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Bill

LTTA 10 Chymdeithas y Cyfreithwyr | The Law Society



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The Law Society

Consultation on the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill

September 2016



Introduction

1. The Law Society of England and Wales ("the Law Society") is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Law Society represents the profession to legislators, governments, regulatory bodies and wider stakeholders.
2. The Law Society has a public interest in law reform and plays an active role in the effective operation of legal institutions and access to justice in England and Wales.
3. The Law Society Wales Office delivers the Law Society's aims in Wales, working with Welsh institutions; influencing and responding to law-making for Wales; and promoting and supporting the legal community in Wales.

Background

4. The current stamp duty land tax ("SDLT") affects both private citizens and commerce consequently Wales' replacement requires a careful approach. On the publication of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill ("the Bill") the Cabinet Secretary for Finance and Local Government stated "The Bill retains key elements of stamp duty land tax, ... This provides consistency and will enable a smooth transition for the property market."¹ This approach is welcomed.

Overview

5. The Bill is long and detailed and a careful approach to line by line scrutiny is necessary. Errors have appeared in Welsh Government Bills in the past which have been corrected during passage through the Assembly. We note that the Cabinet Secretary has provided a "table ...to signpost to existing UK and Scottish legislation"² to assist this process.
6. Additionally, the Welsh version of the Bill requires special attention because provisions have been borrowed from other existing land transaction tax legislation which is stated in English only. The legislative glossary³ which has been published is helpful but does not have legislative effect.
7. In many instances property practitioners rather than tax specialists deal with this tax. Currently, the intention is that the Land Transaction Tax ("LTT") should replicate SDLT however, where there is divergence e.g. as may be the case between the guidance issued by the Welsh Revenue Authority ("WRA") and HM Revenue and Customs ("HMRC") specialists in SDLT will no longer be able to advise for LTT. Unless practitioners develop expertise in LTT a dearth could emerge: this is a particular concern regarding commercial property.

¹ [Written Statement 12 September 2016](#)

² [Letter from the Cabinet Secretary for Finance and Local Government – 28 September 2016](#)

³ [Geirfa'r Gyfraith Bil Treth Trafodiadau Tir a Gwrthweithio Osgoi Trethi Datganoledig \(Cymru\)](#)

8. The provision for a "general anti-avoidance rule" ("GAAR") operates as an amendment to the Tax Collection and Management (Wales) Act 2016 ("TCM") which was passed by the previous Assembly on the 8th of March this year. Such a fundamental provision requires careful scrutiny as it will apply to all Welsh taxes not just LTT. There is a danger that the provision will be considered in the context of LTT only whereas it has a wider impact. In addition, the move to amend the TCM only 6 months later raises the question of how easily any future changes in policy or improvements can be enacted without a vehicle such as a regular Finance Act?
9. As a matter of good law-making there is a need to review the impact and operation of new laws in this case a formal review is vital to appreciate the effect of a move to a new regime and tax collection authority.
10. The comments set out below are made to highlight areas of concern where the Bill requires careful interrogation to ensure there are no unintended consequences, that there is clarity and fairness for taxpayers and that the provisions are workable.

PART 2 The Tax and Key Concepts

Chapter 2 Land Transactions

Section 9 Land partly in Wales and partly in England

11. This section introduces a new and additional step to the process of buying or leasing land along the border. Properties straddling the border ("cross-border properties") will now fall into a special category. The most important point that has been repeatedly made is that buyers will want to know what their LTT/SDLT liability is before they make the offer to buy. Although the section states "the consideration ... is to be apportioned on a just and reasonable basis" this does not help with implementation.
12. Where a single transaction includes Welsh and English land, the transaction will be treated as if there were two transactions, and their consideration is apportioned. The apportionment required by the legislation is very difficult in practice. It would be inappropriate for solicitors to calculate the apportionment. It may therefore fall to the selling agent who has a duty to the seller but has a potential immediate conflict if asked by the buyer to provide the LTT/SDLT apportionment report.
13. Assuming an agent produces a report (hopefully backed by their insurance) and the solicitor considers it safe to rely on that report, we will not then know whether it is agreed by HMRC and WRA until the two returns are submitted and the assumed liabilities discharged. The buyer, their solicitor and the agent could end up in the middle of a dispute between the two tax authorities: it will take any and all certainty out of almost every transaction.
14. Clear guidance will need to be given about how a just and reasonable apportionment will be arrived at and confirmed by the tax authorities so that it can be relied on by the buyer.

15. How closely will the WRA interact with HMRC? Will there be a ruling system available from the WRA? Should SDLT legislation for England include a new provision to accommodate the treatment of cross-border properties?
16. The Land Registry have given evidence regarding the number of properties which could be described as cross-border properties but the number is uncertain and the Land Registry do not currently take account of the geographic border.
17. The whole process needs certainty, preferably from the outset of the transaction. It has been suggested that a notice could be served on HMRC and WRA at the outset of the transaction setting out what the parties believe to be the liability and giving them 28 days in which to object.
18. Another suggestion is to appoint an independent panel of agents (possibly on a tender basis as was the case for the valuations in respect of TB compensation) whose decision would be binding on the parties, the WRA and HMRC. This would ensure that the total LTT/SDLT liability would never be more than the one calculated tax.
19. Whatever the process for cross-border properties it needs to be early, certain and quick.
20. A further issue regarding allocation of properties as being in Wales or in England is that where they are 'near to' the border that location cannot be confirmed as being in Wales or England by reference to the post code. There are lots of cross border postcodes such as Hay on Wye which has an HR (Hereford) post code and further up the SY and CH postcodes criss-cross the border. It is possible that solicitors might not know which side of the border a property is on and without a definitive map showing the location of the border who will bear the burden of any mistake? A definitive border map will be needed at the Land Registry otherwise they will be unable to satisfy themselves that the correct tax been paid to the correct authority.

PART 3 Calculation of Tax and Reliefs

s31 Reliefs: anti-avoidance

21. Lawyers and their clients want certainty insofar as that is possible. Section 31 introduces a targeted anti-avoidance rule ("TAAR") to a variety of reliefs. Our main observations are:
22. The TAAR covers more reliefs than is the case for SDLT. For example, there is no TAAR for sale and leaseback relief for SDLT.
23. The TAAR is a "tax advantage" rather than a "tax avoidance" provision. The former is much wider. It may catch transactions, therefore, which are not caught by the SDLT equivalent. Consider a company which owns land in Wales and England which is transferred to a 75% subsidiary. It may get group relief in England, but not in Wales (or visa versa). This does not "provid[e] consistency".

24. The general anti-avoidance rule ("GAAR") in clause 65 should provide wholly comprehensive effect and so would cover any transaction to which the TAAR would also apply. So why is there any need for a TAAR? If in fact the TAAR covers arrangements which are not covered by the GAAR, can the GAAR genuinely be called a general anti-avoidance rule?
25. When the current English law GAAR ("the English GAAR") was introduced, it was the hope of Graham Aaranson QC, who provided the original research and drafting on the GAAR, that existing TAARs could be phased out and further TAARs rendered unnecessary. This admirable principle should, we suggest, be followed for the LTT.
26. What possibility will there be of clear guidance and/or a ruling system? Time, effort and money can be spent in trying to come to terms with legislation whose effect is unpredictable (i.e. the TAAR) and this can delay, if not completely frustrate, transactions. If there is no ruling system, then the burden of risk will be thrown onto the professions with accompanying additional cost and uncertainty.
27. Detailed guidance would be helpful, but our experience of "anti-avoidance" guidance in SDLT is that it is unhelpful. The examples given are clearly one side of the divide or the other, on the facts, and so are no good as a steer as to how the legislation should be interpreted in marginal cases (which is always going to be the difficult area).
28. We are offering our assistance to help the WRA in producing detailed guidance as well as assisting in the training of WRA officers in future in this difficult area.
29. Because the LTT TAAR is different from the current, or English, TAAR, there is little that can be read across from the SDLT know how/guidance into the LTT. This is a very real distinction between the two regimes.
30. Consider the following example:

For SDLT purposes, Section 57A Finance Act 2003 deals with sale and leaseback relief and, as is mentioned above, is not subject to any TAAR. Relief under Section 57A is only available if the leaseback is granted to the person who transfers the freehold. If the leaseback is granted to a group company, relief is unavailable.

The English GAAR recognises that there seems little wrong with reorganising ownership of the asset to be sold and leased back either prior to the sale and leaseback, or subsequent thereto. So if A owns a property and wishes the leaseback to be not to it, but to another group company, a transfer of the property to that other group company prior to the sale and leaseback is "English GAAR compliant". How would the LTT TAAR operate in these circumstances?

Part 7: General anti-avoidance rule

31. There is no double reasonableness test as there is in the English GAAR.

32. Nor is there any indication that there will be GAAR guidance which has an important statutory status for the English GAAR. We would expect detailed guidance of the application of the GAAR in Wales to be promulgated at the same time as the legislation is enacted. We would expect such guidance to include “marginal” examples, plus an explanation as to why they fall one or other side of the avoidance line (in the same way that the English GAAR guidance does), since it is those reasons which can be extrapolated to real life situations which are not on all fours with any of the examples in the guidance.
33. The GAAR should cover everything that is covered by the relief TAAR in Section 31, thus rendering the latter unnecessary.
34. Taxpayers will have to self-assess whether the GAAR applies. Will there be a ruling facility? Consider the following example; do you think the organisation should be subject to the GAAR (or indeed a TAAR)? A care home organisation owns land which is subject to a lease from a local authority. It wishes to refurbish its premises extensively, i.e. knocking down its existing building and building a new one in its place. The local authority landlord is amenable to the proposition. If the care home surrenders its tenancy and the local authority then sells it the freehold, that is an exchange with a market value imputation, for LTT, for both transactions. If on the other hand the existing tenancy is surrendered and a new lease is granted by the local authority, that benefits from the relief in paragraph 17 of Schedule 5. Does the committee think that choosing the latter course of action should (or indeed does) fall foul of the GAAR? Does the committee think that the granting of the lease has more economic substance than the sale of the freehold? Does it matter that the only reason why the arrangements are structured as a surrender and leaseback, rather than a surrender and sale of freehold, is to save LTT? If this does not fall foul of the GAAR, why is that?

Further points

35. With regard to the powers to make subordinate legislation we suggest that any changes to the legislation which impose a financial burden on taxpayers should be scrutinised and debated by the National Assembly.
36. A stakeholder group, the Stamp Duty Working Together Stakeholder Group, was established to bring together industry and professional bodies with UK government and bodies such as the Land Registry to discuss develop and promote co-operative strategies for dealing with tax affairs with particular reference to HMRC's role. This stakeholder group meets regularly and is a useful opportunity for stakeholders to work together to ensure the system works for all those involved. Such a group should be established for LTT and we would advise the early establishment of a formal group before the LTT comes into effect in 2018.

Emerging Issues

37. The Welsh Government is undertaking a consultation on the introduction of an additional rate of tax for residential properties. The definition for residential and non-residential transactions, which is taken from the SDLT legislation, has some intrinsic difficulties (what is a similar establishment to a hotel, for

example?) and then suffers from a very significant lack of specificity and guidance.

38. Residential property has always been (until the last three years) the poor relation of SDLT. The main guidance dealing with it, therefore (SP1/04), was produced at a time when values were smaller, the rates were lower and neither HMRC nor tax payers were worried, over duly, about residential property. The situation is now completely different. We have produced a paper which has been submitted to HMRC about the lack of clarity there is surrounding the definition of residential property. For example, if a substantial residential property has three or four rooms put to use as self-contained "bed and breakfast" accommodation, what impact does that have on the overall qualities of the substantial property? Does it render it not "entirely" residential? Do you split the non-residential from the residential and tax the two elements at different rates? What if there is a business in the garden or grounds? Does that prevent the property being residential at all, or again, do you pro-rate?
39. The additional 3% is causing a very great deal of trouble in England. HMRC have vastly underestimated the difficulties it has caused and thus has been very slow to provide the advisory resources that taxpayers could rightly expect.
40. It has also provided difficulties for professionals (both conveyancers and accountants) since tax payers have become used to conveyancing fees of a modest level and have not seen SDLT advice as being tax advice; merely part of the conveyancing process. It is difficult for the profession to persuade taxpayers that the two are distinct pieces of advice.
41. The Law Society has been pleased to engage closely with the Welsh Government in its consideration of the implementation of this historic new tax raising power. We are pleased to contribute to the scrutiny of this legislation through the Finance Committee and will provide further comments on these and any additional issues which the Finance Committee wishes to examine.

Please refer any questions regarding this response to:

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