

LBTT BRIEFING NOTE APRIL 2015

16 April 2015



MAKING IT CLEAR

Briefing note April 2015

Since 1 April 2015 Land and Buildings Transaction Tax ("**LBTT**") has applied, in place of Stamp Duty Land Tax ("**SDLT**"), to land transactions in Scotland.

Generally, the two taxes are very similar but there are some important differences, particularly in relation to the treatment of commercial leases and the lack of sub sale relief (other than for certain development sub sale situations). Also, LBTT is administered by Revenue Scotland rather than HM Revenue and Customs.

LBTT wholly progressive

For both commercial and residential property, LBTT is a progressive tax - which means that different tranches of the price will be subject to different rates of tax. SDLT is now a progressive tax for residential property, but remains a slab tax for commercial property ie the whole price is charged at the same rate.

LBTT rates

As with SDLT, LBTT is payable on the chargeable consideration for a land transaction, which includes any VAT.

For commercial purchases the LBTT rates and bands are:

- 0% on first £150,000
- 3% for any part of the price between £150,001 and £350,000 and
- 4.5% for any excess over £350,000.

For rent under commercial leases the nil rate band is £150,000 with any excess above that of the net present value of the rent being charged at 1% - the same as applies for SDLT.

For residential purchases the LBTT rates and bands are:

- 0% on first £145,000
- 2% for any part of the price between £145,001 and £250,000
- 5% for any part of the price between £250,001 and £325,000
- 10% for any part of the price between £325,001 and £750,000
- 12% for any excess over £750,000.

No LBTT is payable on residential leases, unless they were granted for more than 175 years.

Leases

The key change for commercial leases is that once an LBTT return has been submitted for a lease, the tenant is then under a duty to submit further returns to Revenue Scotland:

- every 3 years
- if the lease is assigned and
- when the lease ends.

This applies even if there has been no change. If there has been a change e.g a rent review that increases the rent or an extension of the duration of the lease, then further LBTT might require to be paid. (If the lease itself has not yet been notified, but an assignation of the lease was notified because a premium was paid for it, the notification of the assignation does not count as the notification of the lease for the purposes of triggering the regular returns obligation. The exception to this would be if the assignation incorporated a variation of the lease that resulted in the lease becoming notifiable.)

The return should use the rates and bands that were applicable at the original effective date of the lease, not any different rates or bands that might be in force at the date of submission of any of these additional returns.

All tenants of leases which were subject to the LBTT regime when granted will require to keep this obligation in mind and to ensure that their management teams keep records and remember to submit these regular returns. New internal monitoring systems are likely to be required to ensure that tenants do not breach these rules. Revenue Scotland will not issue reminders - and penalties are charged for late returns or for late payment of tax.

If an LBTT lease is assigned, the assignor must submit a return and then the assignee takes on the obligation to submit any remaining 3 yearly returns and a return if it assigns on or when the lease ends. When taking an assignation of an LBTT lease, assignees should ensure that they get information on the LBTT history - so that they can be sure that they provide accurate information to Revenue Scotland in their returns.

Sub sales and sub-sale development relief

For most sub sale transactions, LBTT will be payable on both the sale (first sale) and the sub sale; unlike the position for SDLT, which is only payable on the sub sale price, provided that both deals complete at the same time.

Also, the trigger for payment of LBTT on the first sale is the date that the sub sale contract is entered into. The more usual trigger would be the date on which the first sale completes by payment of the price (or a substantial part of it) or entry is taken - which is often later than the date of conclusion of the sub sale contract. It is hoped that the rules on this might be changed so that the trigger is the more usual one.

There is a restricted form of sub sale relief for development transactions, called sub-sale development relief. It is available on most development transactions - other than those where the proposed development is agricultural or for mining or engineering work - but only on the first sub sale. It is not available for any onward sub-sub-sales.

The main difference between this relief, and the sub sale relief available under SDLT, is that sub sale development relief can be withdrawn (retrospectively) if the intended development is not completed within 5 years. Oddly this 5 year period runs from the date on which the sub sale contract is concluded, rather than the date when the sub purchaser pays its price or takes possession of the land. Therefore the period will be reduced by the length of any interval between conclusion and completion of the sub sale contract.

If only part of the intended development is completed - or a different development is completed or partially completed - at the end of the 5 years, Revenue Scotland will decide what proportion (if any) of the relieved LBTT is to be paid.

Assignations of contracts

Sometimes what could have been set up as a sub sale is, instead, done by taking an assignation of the rights of the buyer under an existing contract. If that is done, then LBTT is payable on both the price payable under the contract and on any price paid by the assignee for the assignation of the buyer's rights under the contract.

The assignation by the buyer of its rights - which takes place before the completion of the contract - triggers the obligation on the buyer to pay LBTT on the price due under that contract. Unless the assignation is taking place just before completion, this brings forward the due date for payment of LBTT on the contract price - and has it paid by the buyer at a time when it is no longer a party to the contract (as it has assigned its rights to the assignee).

It is hoped that the rules on this might be changed so that the LBTT charge on the contract price is only triggered when the contract actually completes or possession is taken. Meantime, buyers who are assigning contracts will want the assignment contract to include an obligation on the assignee to put the buyer in funds to pay the LBTT on the contract price. When the contract does complete, the assignee gets credit for the LBTT paid by the buyer. In turn, assignees might want to require the buyer to agree to apply for a refund (and forward it to the assignee) if the contract, for any reason, does not ultimately complete.

Multiple dwellings relief

Multiple dwellings relief, similar to that applied for SDLT, is available under LBTT. This is the relief that allows a person who is buying more than one house or flat from the same seller (or someone connected to them) in a single transaction or in linked transactions, to pay tax based on the average consideration rather than the aggregate consideration. This results in less tax being due, as the aggregation (which would otherwise push the transactions into higher rate bands) is avoided.

Under both regimes there is a minimum floor level, below which you can't go. For SDLT that minimum is 1% of the total consideration. For LBTT the minimum is 25% of the tax that would be payable in the absence of the relief.

Penalties and interest

Penalties are chargeable for late submission of, or failure to submit, a return. They rack up gradually, depending on the lateness of the return and whether or not the buyer is deliberately withholding information from Revenue Scotland.

The maximum aggregate penalty for a late return will be 100% of the LBTT that was due - so paying double LBTT. (That's just the maximum aggregate for the late return. If the LBTT itself was also paid late - which must be likely - then there will also be interest and the relevant applicable penalty for late payment.)

The graduated penalties for late submission of a return are:

- £100 if not submitted within 30 days of the effective date;
- If more than 3 months late, £10 per day, for max 90 days, so max £900;
- If more than 6 months late, the greater of £300 and 5% of the LBTT due; and
- If more than 12 months late, the greater of another £300 and 5% of the LBTT due - but if the buyer is deliberately withholding information then that rises to 100% of the LBTT due.

Interest always due on a late payment. If the payment is more than 30 days overdue, then penalties apply in addition to the interest (that continues to run).

Penalties for late payment are:

- 5% of the tax unpaid if more than 30 days late plus
- another 5% of the unpaid tax if still not paid after 5 months plus
- another 5% of the unpaid tax if still not paid after 11 months.

So if the payment is more than 11 months late, the penalty is 15% of the tax unpaid (in addition to the interest and any penalty for late submission of the return).

Transitional rules

SDLT will still apply to a transaction that completes on or after 1 April 2015 if it implements a contract that was entered into on or before 1 May 2012. There won't be that many contract which fall into this category but it could still be relevant e.g. to some long fuse development purchase contracts that have many preconditions, including planning and site assembly.

Even some of such 1 May 2012 or earlier contracts will be subject to LBTT, if:

- since 1 May 2012 they have been varied or assigned or
- the transaction involves the exercise of an option or pre-emption right which was exercised after 1 May 2012.

There are other transitional rules for transactions that completed before 1 April 2015 but where there is a change on or after that date. Most of them relate to commercial leases and are generally fairly logical and even handed.

Anti avoidance

Scotland has a new general anti-avoidance rule ("**GAAR**") which applies to all Scottish controlled taxes, not just to LBTT. It will allow Revenue Scotland to take measures to counteract a tax advantage that arises from tax avoidance arrangements that are artificial. They can make such adjustments as they consider just and reasonable to counteract the tax advantage - which could include imposing tax or increasing the liability to tax.

It is thought that the Scottish GAAR is wider in scope than the one that applies to non-Scottish only taxes - as the UK GAAR can only strike at arrangements which are abusive, which generally requires something that is highly artificial and contrived, rather than just artificial.

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