This document relates to the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill (SP Bill 85) as introduced in the Scottish Parliament on 27 January 2016

LAND AND BUILDINGS TRANSACTION TAX (AMENDMENT) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

BACKGROUND

3. The Land and Buildings Transaction Tax (Amendment) (Scotland) Bill (“the Bill”) is a Bill to amend the Land and Buildings Transaction Tax (Scotland) Act 2013 (“the 2013 Act”). The 2013 Act imposes a tax on the acquisition of chargeable interests in land in Scotland (for example, a standard house purchase) and the Bill will increase the amount of tax for certain transactions concerning the purchase of a dwelling. The tax is known as Land and Buildings Transaction Tax or LBTT and is sometimes referred to informally as “Stamp Duty”\(^1\). LBTT is administered by Revenue Scotland, with assistance from the Registers of Scotland, under the Revenue Scotland and Tax Powers Act 2014 (“the 2014 Act”). LBTT is a self-assessed tax and registration of title can generally not be obtained unless a tax return has been made and arrangements satisfactory to Revenue Scotland have been made for payment of any tax.

APPROACH TO USE OF DELEGATED POWERS

4. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example, changing market conditions);

- the need to make proper use of valuable Parliamentary time; and

\(^1\) It is important to note however that, strictly, Stamp Duty is a separate and unrelated reserved tax administered by Her Majesty’s Revenue and Customs (“HMRC”).
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- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament (for example, tax avoidance).

5. In relation to the final bullet point is the strong stance the Scottish Government and Scottish Parliament have taken against tax avoidance, in particular through the enactment of Part 5 of the 2014 Act which provides for the Scottish General Anti-avoidance Rule (GAAR).

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Paragraph 14(1) within new schedule 2A inserted by section 1(3) – Power to amend percentage figure in paragraph 4(2) of schedule 2A

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: provisional affirmative procedure

7. Section 1(3) of the Bill introduces a new schedule 2A (additional amount: transactions relating to second homes etc.) into the 2013 Act. The new schedule makes provision about an additional amount of tax chargeable in respect of certain chargeable transactions, such as the purchase of a second home or a buy to let property.

8. Paragraph 4(2) of new schedule 2A provides that where an additional amount of tax is payable by virtue of that schedule (for example in a second home or buy to let situation) the additional amount is 3% of the relevant consideration (as defined in sub-paragraph (3)). The delegated power in paragraph 14(1) allows the Scottish Ministers to change that percentage figure.

Reason for taking power

9. The evolving Budgetary process within the Scottish Parliament now includes the Finance Secretary announcing within the draft Budget statement the Government’s proposals for rates and bands for the devolved taxes. At present, the devolved taxes are Land and Buildings Transaction Tax and Scottish Landfill Tax. The Parliament has provided in section 24(1) of the 2013 Act that rates and bands for LBTT to be made legally effective via Order, and the first such order was the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015. The Scottish Government considers that the 3% figure should also be variable on the same basis. Therefore a future Finance Secretary of a future Scottish Government could bring forward

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2 The position of local taxes and the Scottish Rate of Income Tax (which do not have the status of “devolved taxes”) is not directly relevant to this Note and is therefore not mentioned.
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an Order including a variation of the 3% figure together with changes to the ordinary rates and bands.

**Choice of procedure**

10. The Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015 referred to was the first section 24(1) Order therefore, by virtue of section 68(2)(b) of the 2013 Act, it was subject to affirmative procedure³. This reflected that the Parliament did not endorse any particular rates and bands on the face of the 2013 Act itself. By virtue of section 68(4) a second or subsequent section 24(1) Order will be subject to the provisional affirmative procedure, which gives a Finance Secretary a similar ability to a UK Chancellor to act quickly as is normal under UK tax practice under the Provisional Collection of Taxes Act 1968.

11. For the new power proposed, the Parliament will (if it passes the Bill with the 3% figure) have explicitly endorsed the first tax rate for the additional amount of tax. Therefore the Scottish Government considers that the appropriate procedure for orders making subsequent changes to the figure is the provisional affirmative procedure. This is provided for in the amendments made to section 68 of the 2013 Act at section 2(1)(c) of the Bill. This would allow a future Finance Secretary to combine within the same Order subject to the same procedure provisions amending the normal tables of tax rates and bands and provisions amending the 3% figure for additional amounts of tax. The Scottish Government considers it essential that a Finance Secretary should be able to act quickly in appropriate situations, for example where changes to UK tax law have distortive impacts on property market behaviour in Scotland. Whilst the provisional affirmative procedure requires parliamentary affirmation of rate changes to be given after a change has become effective, the procedure also allows a Finance Secretary to invite the Parliament’s affirmation of rate changes in advance. For example, the Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014 was laid before the Scottish Parliament on 18 December 2014, approved by the Parliament on 21 January 2015 and came into force on 1 April 2015 (the principal commencement date for Scottish Landfill Tax and LBTT).

12. Section 108 of the 2014 Act already provides for the legal consequences where the Parliament is not able to affirm a section 24(1) Order that has taken legal effect. A taxpayer affected may seek repayment of tax, which is consistent with the position for Westminster taxes under the Provisional Collection of Taxes Act 1968. Section 2(2) of the Bill ensures that the same applies to Orders under the new proposed power, which delivers a fair result for taxpayers.

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³ The provisional affirmative procedure is one of the less common Parliamentary procedures – see the Delegated Powers and Law Reform Committee’s explanation at: [http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Guide_to_Scottish_Statutory_Instruments.pdf](http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Guide_to_Scottish_Statutory_Instruments.pdf).
Paragraph 14(2) within new schedule 2A inserted by section 1(3) – Power to amend threshold figure in paragraph 9(3) of schedule 2A

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<tr>
<td>Parliamentary procedure:</td>
<td>negative procedure</td>
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**Provision**

13. Paragraph 9(3) of new schedule 2A provides that a dwelling with a market value of less than £40,000 is not to be counted for the purposes of the schedule, which has particular relevance to paragraph 2(1)(b) which is concerned with how many dwellings a buyer owns at the end of the day that is the effective date of a transaction. Therefore if the buyer owns existing property A, which has a market value of £100,000, and exiting property B, which has a market value of £30,000, and is buying property C for £200,000, the ownership of property A is disregarded. If property C was being purchased for £30,000 then the additional amount of tax would not apply (indeed no ordinary amount of LBTT would apply).

14. The delegated power in paragraph 14(2) of new schedule 2A allows the Scottish Minister to change the £40,000 figure.

**Reason for taking power**

15. It is deliberate that the £40,000 figure in paragraph 9(3) of new schedule 2A is the same figure as appears in section 30(1)(b) of the 2013 Act. For the types of land transaction that are potentially within schedule 2A (acquisitions of the right of ownership), section 30(1)(b) sets the notifiability threshold at £40,000. In other words, for a standard house purchase the acquisition of a £35,000 property does not have to be notified to Revenue Scotland in a land transaction return whereas the purchase of a £45,000 property does have to be so notified even though no ordinary amount of LBTT is payable.

16. Scottish Government policy is that the threshold at which the additional amount of tax can apply to a chargeable transaction should be aligned with the notifiability threshold. The notifiability threshold is amendable by order under section 30(7) of the 2013 Act and the Scottish Government considers it appropriate for the schedule 2A threshold to be equivalently amendable. Thus, if there was a future policy to vary both thresholds at the same time a single order could contain the necessary amendments to section 30(1)(b) of and paragraph 9(3) of schedule 2A to the 2013 Act.

17. Given that circumstances could change, and changes to UK Stamp Duty Land Tax legislation could have distortive impacts on Scottish property market behaviour, the Scottish Government considers it appropriate that the new delegated power should be severable from the existing section 30(1)(b) so that potentially a different threshold can apply for schedule 2A purposes.
Choice of procedure

18. Orders under the section 30(7) power referred to are subject to the negative procedure. Given the clear synergies between the existing and new powers the Scottish Government considers it to be appropriate for the same Parliamentary procedure to apply. As mentioned, it may be that a future order to amend both the notifiability threshold and the schedule 2A threshold would be made under authority of both powers, and such an order would be subject to the negative procedure. Although the power allows for the amendment of primary legislation it only so allows to a very limited degree. Negative procedure would allow the Scottish Ministers to act swiftly if that became necessary for reasons of UK legislative changes, or otherwise.

Paragraph 14(3) and (4) within new schedule 2A inserted by section 1(3) – Power to make provision for or about relief from the additional amount

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Provision

19. Paragraph 14(3) empowers the Scottish Ministers to modify inserted schedule 2A to make provision for or about relief from the additional amount. This could include provision adding a relief or modifying or removing any relief that had been added. It would also allow provision to be made as to the process for claiming relief. This would be a different type of relief from a relief referred to in section 27 of the 2013 Act since the ordinary reliefs in schedules 3 to 16C are relevant to the ordinary amount of LBTT. (Where the existing schedules provide for 100% relief, or a transaction is exempt from LBTT, the additional amount of tax would not be relevant; schedule 2A will not apply.)

20. Paragraph 14(4) provides that a paragraph 14(3) order may modify enactments other than schedule 2A that the Scottish Ministers consider appropriate.

Reason for taking power

21. An equivalent power for the ordinary reliefs exists in section 27(3) and (4) of the 2013 Act. This power was exercised to make the Land and Buildings Transaction Tax (Addition and Modification of Reliefs) (Scotland) Order 2015/93 and the Land and Buildings Transaction Tax (Sub-sale Development Relief and Multiple Dwellings Relief) (Scotland) Order 2015. The Scottish Government considers it to be appropriate for equivalent power to be taken in relation to reliefs that are specific to the additional amount. As property market conditions develop the Scottish Government considers that flexibility should be available to take account of evolving conditions and unanticipated developments. For example, any extension or reduction in equivalent reliefs for UK Stamp Duty Land Tax could have distortive impacts on property market behaviour in Scotland. Further, the Scottish Government would wish to have powers to swiftly react to tax avoidance should that emerge and should legislative change be amongst the appropriate responses.
Choice of procedure

22. Orders under the section 27(3) power referred to are subject to the affirmative procedure by virtue of section 68(2)(c) of the 2013 Act. The Scottish Government considers that the same procedure should apply to the new power, and this is provided for in the amendments made to section 68 by section 2(1)(c) of the Bill. This is consistent with the general principle that affirmative procedure is appropriate when primary legislation is being substantively amended. In the case of devolved tax legislation the Scottish Government considers that affirmative procedure will generally be appropriate where a legislative change effected by secondary legislation concerns exemptions or reliefs.

Section 4 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure or affirmative procedure when textually amending primary legislation

Provision

23. This provision enables the Scottish Ministers to make such incidental, supplementary, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of the Bill. The power may be exercised so as to modify any enactment or make different provision for different purposes.

Reason for taking power

24. A comparable power is section 67 of the 2013 Act. It proved necessary to make use of this power to make SSI 2014/376, SSI 2014/377 and SSI 2015/71 as part of the commencement and implementation of the 2013 Act on 1 April 2015. The Scottish Government considers that it is appropriate to seek an ancillary power of equivalent breadth for the Bill. This will be particularly relevant since the UK Stamp Duty Land Tax legislation, envisaged to come into force at the same time as the Bill on 1 April 2016, is not envisaged to be published earlier than March 2016. Therefore should any new or unforeseen issues be presented by the UK legislation when it emerges the ancillary power will be available to make any ancillary provision that is necessary or desirable to address or ameliorate such issues.

Choice of procedure

25. Section 4 follows section 67 of the 2013 Act referred to in making the power subject to negative procedure unless the ancillary provision involves textual amendment to primary legislation. It is considered that this strikes an appropriate balance between allowing Parliamentary scrutiny whilst enabling the Scottish Government to be responsive in an environment where the UK Government can act very speedily indeed.
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