Land and Buildings Transaction Tax (Scotland) Bill

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee (“the Committee”) in its consideration of the Land and Buildings Transaction Tax (Scotland) Bill (“the Bill”). This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 24(1) – Duty to specify tax rates and bands for residential and non-residential property transactions

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative procedure for the first order, provisional affirmative, as provided for in section 67(3A), thereafter

2. As indicated in correspondence with the Committee, the Scottish Government has amended the order-making power in section 24 of the Bill at stage 2.

Reason for taking power

3. The Bill as introduced contained an order-making power to allow the Scottish Ministers to set the tax rates and bands for Land and Buildings Transaction Tax (LBTT) alongside the budget process for 2015-2016. As the Delegated Powers Memorandum accompanying the Bill at introduction states, the order-making power is required to allow Scottish Ministers to respond to fluctuations in the property market.

Choice of procedure

4. At introduction, the Bill provided for the order-making power for the first setting of rates and bands to be subject to the affirmative procedure. This remains the position. The Bill also provided that the second setting of rates and bands would be subject to the negative procedure.

5. The Committee’s stage 1 report on the Bill recommended that the power should be subject to a form of affirmative procedure. The Cabinet Secretary for Finance, Employment and Sustainable Growth wrote to the Committee on 18 April 2013 to advise that he would bring
forward an amendment to the Bill at stage 2 so that the power at section 24(1) would be subject
to a form of provisional affirmative procedure after the first occasion that bands and rates are set.

6. The amended power will allow the Scottish Government the necessary flexibility to
respond swiftly to changes in the property market, whilst allowing the Scottish Parliament to
fully scrutinise the rates and bands as set out in the order.

Section 30(5) – Power to amend £40,000 notification threshold

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

7. As the Delegated Powers Memorandum that accompanied the Bill at introduction
indicated, the power in section 30(5) allows for the variation of the £40,000 figure in section
30(1)(b). This power has subsequently been amended to allow amendment of the £40,000 figure
in section 30(1A)(a)(i) and (b)(ii).

Reasons for amending the power

8. The introduction of schedule 18A (Leases) at stage 2 resulted in the need for
consequential amendments to be made to section 30 (notifiable transactions) to set out when
transactions in relation to the grant, assignation or renunciation of a lease are not notifiable. In
some cases, the transactions are not notifiable where the chargeable consideration is less than
£40,000. Enabling the Scottish Ministers to amend the £40,000 figure by order will provide a
degree of flexibility which will assist with the efficient administration of the LBTT system for
the reasons set out at paragraph 26 of the Delegated Powers Memorandum referred to at
paragraph 7 above.

Choice of Procedure

9. Although the power allows for amendment of the Bill, it does so only to a very limited
extent. It is considered that this is a technical and administrative matter and that the negative
procedure is appropriate.

Section 47(1) – Power to make regulations about residential property holding companies

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure (if amends an Act), otherwise negative

10. The power enables the Scottish Ministers to make regulations to capture the “wrapping”
of residential properties in company structures to avoid LBTT. Such regulations would treat
certain transfers of interest in Residential Property Holding Companies (“RPHCs”) as land
transactions that will be chargeable to LBTT.
11. The Scottish Government brought forward an amendment of this power at stage 2, new 
subsection (4A). The amendment enables the regulations to expand what counts as “residential 
property” for the purposes of section 47. It is imperative that Scottish Ministers are able to 
regulate to ensure that transfers of residential properties cannot avoid LBTT liability under 
section 47 by being held together with some non-residential property in a property holding 
company. The amendment provided the flexibility to do that. For example, it would enable the 
regulations to capture any residential property held as part of a larger mixed-use property. Other 
than that, the power remains substantially unchanged.

Reason for taking power

12. As the Delegated Powers Memorandum accompanying the Bill at introduction stated, the 
use of RPHCs is a complex matter. However, the Scottish Government considers that the 
“corporate wrapping” of residential properties in company structures would be an unacceptable 
avoidance of LBTT. The regulation-making power ensures that the Scottish Ministers have the 
flexibility to make regulations to prevent such activity occurring in Scotland.

Choice of procedure

13. When introduced, the power in section 47(1) of the Bill was subject to affirmative 
procedure should the regulations made add to, replace, or omit the text of any Act (including the 
Bill itself).

14. In the Committee’s stage 1 report, it was indicated that the Committee would await sight 
of the proposed amendments before reaching a view on the power. The amendment made is 
minor, and merely clarifies the scope of the power. Given that any regulations made under 
section 47 would add to the LBTT legislation, they would remain subject to affirmative 
procedure.

Section 49 – Power to modify schedule 17 (partnerships)

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15. The power enables the Scottish Ministers to make regulations about the LBTT treatment 
of partnerships.

Reason for taking power

16. Schedule 17 of the Bill contains provisions on partnerships. The provisions are complex, 
but broadly replicate the legislative framework that has been in place for Stamp Duty Land Tax 
(SDLT). In order to address stakeholder concerns about the complexity of the provisions, a stage 
2 amendment was brought forward to allow the Scottish Ministers the flexibility to make 
regulations to modify schedule 17 in the future.
Choice of procedure

17. Any regulations made under the power in section 49(2) will be subject to affirmative procedure. The Scottish Government considers that partnership structures are fundamental to commerce, and it is important that the regulations are subject to the full Parliamentary scrutiny that the affirmative procedure affords.

Section 51A – Power to make regulations about licences

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure (if amends an Act), otherwise negative

18. The power in section 51A allows the Scottish Ministers to specify in secondary legislation particular types of licences that are land transactions and will therefore be subject to the tax. For various reasons, the occupation of certain types of property is made under licence rather than by means of a lease. As such licence arrangements are akin to leases, they ought to be subject to the same treatment under LBTT.

Reasons for taking power

19. The Bill at introduction provided that all licences to occupy non-residential property should be included in the scope of the tax. However, the Scottish Government has reflected further on the evidence the Finance Committee heard during stage 1 of the Bill process, and has amended the Bill at stage 2 to limit the taxation of licences by means of a delegated power in the Bill.

Choice of procedure

20. The power in section 51A of the Bill added at stage 2 is subject to affirmative procedure should the regulations made add to, replace, or omit the text of any Act (including the Bill itself). The Scottish Government considers that affirmative procedure is appropriate, as the LBTT treatment of licence arrangements will be commercially significant.

21. As the Bill stands, other regulations made under section 51A are subject to the negative procedure. However, in recognition of the fact that the regulations may extend the scope of the tax by adding certain licences to occupy non-residential property, the Scottish Government intends to bring forward an amendment at stage 3 to make these regulations subject to the affirmative procedure.
This document relates to the Land and Buildings Transaction Tax (Scotland) Bill as amended at Stage 2 (SPBill19A)

Schedule 8, paragraph 10(1)(b) – Relief for alternative finance investment bonds: power to specify conditions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

22. The power at paragraph 10(1)(b) of schedule 8 is a regulation-making power which allows the Scottish Ministers to specify additional conditions to those set out at paragraph 10(1)(a).

Reasons for taking power

23. The provisions relating to Alternative Finance Investment Bonds are complex and technical. The new schedule 8 substantially replicates schedule 61 to the Finance Act 2009 which includes equivalent powers in so far as it relates to Stamp Duty Land Tax. Schedule 8 specifies a number of conditions on the face of the schedule but the Scottish Government considers that some flexibility to specify different conditions is needed.

Choice of Procedure

24. This power will provide flexibility around prescribing condition C which in part determines eligibility for the relief and is in line with equivalent UK tax provisions. The conditions are likely to change over time in line with commercial practice. It is considered that this is a technical and administrative matter that does not affect the scope of the tax and that the negative procedure is appropriate.

Schedule 8, paragraphs 3, 11(1), 20 and 21(5)(a) and (6) – Relief for alternative finance investment bonds: power to prescribe evidence

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

25. Paragraphs 11(1), 20, 21(5)(a) and 21(6) of this schedule enable the Scottish Ministers to prescribe in regulations the evidence that requires to be submitted to the Tax Authority in relation to a number of paragraphs of the schedule. These paragraphs need to be read with paragraph 3 of schedule 8, which defines “prescribed”.

Reasons for taking powers

26. The provisions relating to Alternative Finance Investment Bonds are complex and technical. The new schedule 8 substantially replicates schedule 61 to the Finance Act 2009 in so far as it relates to Stamp Duty Land Tax.
Choice of Procedure

27. These powers will provide flexibility around prescribing the evidence to be submitted to the Tax Authority in relation to claims for the relief and are in line with equivalent UK tax provisions. The required evidence is likely to change over time in line with practice. It is considered that these are technical and administrative matters that do not affect the scope of the tax and that the negative procedure is appropriate.

Schedule 8, paragraph 14(2) – Relief for alternative finance investment bonds: power to specify period

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Introduction

28. The power at paragraph 14(2) of schedule 8 enables the Scottish Ministers to vary, by regulations, the period of 10 years referred to in condition G at paragraph 14(1)(b).

Reasons for taking powers

29. The provisions relating to Alternative Finance Investment Bonds are complex and technical. The new schedule 8 substantially replicates schedule 61 to the Finance Act 2009 in so far as it relates to Stamp Duty Land Tax.

Choice of Procedure

30. This power will provide flexibility around prescribing the period provided for in condition G and is in line with equivalent UK tax provisions. It is considered that this is a technical and administrative matter that does not affect the scope of the tax and that the negative procedure is appropriate.

Schedule 13, paragraph 15(3) – Power to specify relevant territories in which a body must be established to be eligible for charities relief

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31. Paragraph 15(3)(d) of schedule 13 provides that regulations can be made by the Scottish Ministers to specify the territories in which a body must be established to be eligible for charities relief.
Reason for taking power

32. Sub-paragraph (3) defines a “relevant territory” as being England and Wales, Northern Ireland, a member State of the EU other than the UK or a territory specified in regulations. The power provides the Scottish Ministers with the flexibility to add to this list of relevant territories through secondary legislation.

Choice of Procedure

33. Although the power allows for amendment of the Bill, it only does so to a very limited extent. It is considered that this is a technical and administrative matter and that the negative procedure is appropriate.

Schedule 18A – Leases

34. Section 55 of the Bill as introduced contained a duty on Scottish Ministers to make regulations for the application of LBTT to leases. In its stage 1 report, the Committee highlighted that it realised that the scope of section 55 was likely to change at stage 2, and that it would await sight of the amendments before reaching a view on the power.

35. The Scottish Government brought forward substantial amendments to the Bill at stage 2 to make provision about the application of LBTT in relation to leases. The power in section 55 was removed at stage 2, and replaced with the provisions in schedule 18A to the Bill. There are two delegated powers within schedule 18A, which are set out below.

Schedule 18A, paragraph 3(1) – Duty to set tax rates and bands (leases)

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36. Paragraph 3(1) of schedule 18A places a duty on the Scottish Ministers to lay an order before the Scottish Parliament setting out the tax bands and percentage tax rates for each band for the chargeable consideration which consists of rent.

Reason for taking power

37. The order-making power in section 24(1) of the Bill requires the Scottish Ministers to set rates and bands for residential property transactions, and non-residential property transactions. Due to the nature of the provisions in schedule 18A, the LBTT framework on leases requires to make specific provision for the setting of tax rates and bands.
Choice of procedure

38. The order-making power in paragraph 3(1) of schedule 18A is subject to affirmative procedure at the first setting of bands and rates, and a form of provisional affirmative procedure thereafter. This is to ensure parity with the order-making power in section 24(1). Provisional affirmative procedure is provided for by virtue of section 67(3A).

Schedule 18A, paragraph 7(2) – Power to specify the “temporal discount rate” to be applied to the calculation of chargeable consideration for leases

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary procedure:** Negative procedure

39. The “temporal discount rate” in paragraph 7(1) is relevant to the calculation of the Net Present Value of the rent payable over the term of a lease. The Bill provides that this is 3.5%, as this is the current rate used for SDLT. The power allows the Scottish Ministers to change the temporal discount rate.

Reason for taking power

40. The temporal discount rate is set at 3.5% as this is the standard rate to be used to convert all costs and benefits to “present values” as set out in the HM Treasury Green Book “Appraisal and Evaluation in Central Government”. The same rate is used across government areas in Scotland including transport, housing and culture. This allows comparisons to be made on a consistent basis.

41. However, as the use in a LBTT context represents revenue to the Scottish Government but cost to the private sector (which generally uses higher discount rates in financial planning) there is some rationale for considering the use of a different value. Therefore, the power enables the Scottish Ministers to vary the rate. A similar power is provided for SDLT in paragraph 8 of schedule 5 to the Finance Act 2003.

Choice of procedure

42. As the Bill stands, the power to amend the ‘temporal discount rate’ is subject to the negative procedure. However, in recognition of the fact that a change to the discount rate would change the amount of tax to be paid in relation to transactions involving leases, the Scottish Government intends to bring forward an amendment at stage 3 to make these regulations subject to the affirmative procedure.
LAND AND BUILDINGS TRANSACTION TAX (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM