Delegated Powers and Law Reform Committee

Land and Buildings Transaction Tax (Amendment) (Scotland) Bill at Stage 1
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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.
Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

Lesley Brennan
Scottish Labour

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meeting on 2 February 2016 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill at Stage 1 ("the Bill")\(^1\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government has produced a Delegated Powers Memorandum ("DPM")\(^2\) on the delegated powers provisions in the Bill.
Overview of the Bill

3. This Bill was introduced by the Deputy First Minister and Cabinet Secretary for Finance, Constitution & Economy on 27 January 2016. The Bill amends the Land and Buildings Transaction Tax (Scotland) Act 2013 (“the 2013 Act”). The 2013 Act (and related enactments) imposes a tax on the acquisition of chargeable interests in land, known as the Land and Buildings Transaction Tax (“LBTT”). The Bill imposes an additional amount of tax (“the additional charge”) in relation to certain types of transaction concerning the purchase of a dwelling.

4. The Bill provides for the additional charge to be levied on the purchase of an additional dwelling i.e. where the buyer is purchasing a dwelling and is not replacing his or her main residence. The additional charge would apply, for example, to the purchase of a second home or buy-to-let property. The Bill also provides, as an anti-avoidance measure, that all purchases of residential property (not just additional residential property) where the buyer is a business entity or sole trader will be subject to the additional charge. The Bill sets the additional charge as 3% of the total purchase price, to be charged in addition to any existing LBTT liability. The Bill provides that a dwelling with a market value of less than £40,000 is not to be counted as a dwelling “owned” by a person; this is relevant when working out whether the additional charge will apply.

Bill provisions

5. Section 1 of the Bill inserts a new section 26A into the 2013 Act, which introduces a new schedule 2A making provision for the additional charge.

6. Part 1 of new schedule 2A gives an overview of that schedule.

7. Part 2 sets out the transactions affected. The additional charge will only apply to “chargeable transactions” (as defined in the 2013 Act); thus, where a transaction is fully exempt from LBTT it will also be exempt from the additional charge. The additional charge will not apply where the purchaser is replacing his or her main residence: in this context, the buyer is treated as “replacing” their residence if they have sold their previous residence within the 18 months preceding the purchase of the new property. Part 2 also provides that the additional charge will apply to any purchase of a dwelling by a business entity, not simply where the purchase is of an additional dwelling. This is an anti-avoidance measure aimed at removing any incentive for individuals to purchase additional dwellings via a corporate “wrapper”.

8. Part 3 deals with the amount of the additional charge, and provides that the amount of LBTT payable in respect of a purchase caught by schedule 2A is increased by 3% of the total purchase price. Where the purchase also includes non-residential property, the additional charge is based on the proportion of the purchase price attributable to the residential element.
9. **Part 4** deals with types of buyer, and provides that where there are joint purchasers, the additional charge will apply where either (or both) purchasers are buying an additional dwelling. A joint purchase where one of the purchasers is a business entity will be treated as a purchase by a business entity. Part 4 also provides, as an anti-avoidance measure, that a home owned by a buyer’s spouse, civil partner or cohabitant will be treated as being owned by the buyer for the purposes of the additional charge.

10. **Part 5** allows for a repayment of the additional charge in certain circumstances. This will apply where a buyer has not been able to sell their previous residence before buying a new one, and has therefore incurred the additional charge. Where the buyer manages to sell their previous residence within 18 months of purchasing their new home, they can claim full repayment of the additional charge.

11. **Part 6** clarifies what is meant by a buyer “owning” a dwelling, for the purposes of working out whether they are buying an additional dwelling. For this purpose, homes owned outside, as well as within, Scotland will count. Properties with a market value of less than £40,000 are discounted. The date of settlement of a property transaction is the operative date for working out what properties are owned.

12. **Part 7** confers power on the Scottish Ministers to substitute, for the 3% additional charge, a different percentage figure; to substitute, for the figure of £40,000 market value below which the additional charge will currently not apply, a different figure; and to make provision about reliefs from the additional charge.

13. **Sections 2 to 6** of the Bill deal with transitional and ancillary provision, commencement and short title.
Delegated Powers Provisions

14. The Committee considered each of the delegated powers in the Bill at its meeting on 2 February 2016. At that meeting, the Committee agreed that it did not need to draw the attention of the Parliament to the following 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

- 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

- Section 4 – Ancillary Powers

15. At the same meeting, the Committee took oral evidence from Scottish Government officials on the power in paragraph 14(2) within new schedule 2A inserted by section 1(3) – Power to amend threshold figure in paragraph 9(3) of schedule 2A. The Committee’s recommendation on this power is set out below.
Recommendations

16. The Committee comments on the remaining power in the Bill as follows:

Paragraph 14(2) within new schedule 2A inserted by section 1(3) – Power to amend threshold figure in paragraph 9(3) of schedule 2A

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>negative</td>
</tr>
</tbody>
</table>

Provision

17. Paragraph 14(2) of new schedule 2A confers a power on the Scottish Ministers to amend, by order, paragraph 9(3) of that schedule so as to substitute, for the figure for the time being specified there, a different figure. Paragraph 9(3) provides that, for the purposes of working out what counts as a dwelling “owned” by a person, a dwelling with a market value of less than £40,000 is not to be counted.

18. Paragraph 2(1) of new schedule 2A provides that the additional tax charge will apply where the main subject-matter of the transaction consists of or includes the acquisition of ownership of a dwelling, and at the end of the day of the transaction the buyer owns more than one dwelling (and is not replacing the buyer’s only or main residence).

Comment

19. The power in paragraph 14(2) allows the Scottish Ministers to adjust the threshold below which a dwelling is not counted as “owned” by a person, and therefore below which the additional charge will not apply. In this regard it is similar to powers already taken in the 2013 Act for the Scottish Ministers to adjust tax rates and bands for the purposes of the ordinary LBTT charge. The power to adjust tax rates and bands by subordinate legislation is standard in the context of tax law, and on this basis the Committee agrees in principle that it is appropriate to be able to modify the £40,000 threshold by subordinate legislation.

20. With regard to the choice of procedure, however, the Committee does not consider that the negative procedure is appropriate.

21. The Committee has considered the Scottish Government’s argument, set out in the DPM, that the “clear synergies” between the existing power in the 2013 Act to set the “notifiability threshold”, on the one hand, and the proposed power in the Bill to adjust the £40,000 threshold, on the other, mean that the same procedure should apply.

22. However, the Committee considers that the two thresholds operate in very different ways. The “notifiability threshold” in the 2013 Act is an administrative
provision which sets the value (currently £40,000) below which a land transaction is not notifiable to Revenue Scotland, but which does not of itself affect tax liability. Thus, the power to change the notifiablity threshold is administrative in nature and, on this basis, the negative procedure is appropriate. The £40,000 threshold in the Bill, on the other hand, sets the value below which a dwelling is not counted as “owned” by a person, and therefore below which the additional charge will not apply. Thus the power to change the £40,000 threshold is not merely administrative in nature, but is fundamental to the question of tax liability under the Bill.

23. The Committee considers, as noted above, that the proposed power to adjust the £40,000 threshold for additional tax liability is similar to the powers in the 2013 Act to set tax rates and bands for the purposes of the ordinary LBTT charge. The Committee notes that the powers in the 2013 Act to set tax rates and bands are subject to the affirmative procedure when first exercised, and thereafter to the “provisional affirmative” procedure. The Committee also notes that “provisional affirmative” is the procedure chosen to apply to the power in the Bill to adjust the 3% rate for the additional charge.

24. The Committee notes generally that powers to adjust tax rates and bands require close scrutiny by the Parliament, but the Committee accepts that it may be necessary for the Scottish Ministers to act swiftly to adjust tax rates to respond to changing market conditions. The Committee considers that “provisional affirmative” appears to be the appropriate procedure for tax powers of this nature, which may require to be exercised quickly to adjust tax levels, but which nonetheless require close scrutiny by the Parliament. Since the initial value for the £40,000 threshold is set out on the face of the Bill, the Committee considers that the “provisional affirmative” procedure is appropriate for the power in paragraph 14(2) to adjust this threshold.

25. The Committee is content with the power in paragraph 14(2) in principle but makes the following recommendation regarding parliamentary procedure:

26. The Committee recommends that the Scottish Government brings forward an amendment at Stage 2 to make exercise of the power in paragraph 14(2) subject to the “provisional affirmative” procedure. The Committee also notes that, in oral evidence, Scottish Government officials indicated that they would reflect on the Committee’s recommendation, and the Committee welcomes this.

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I Instruments subject to the “provisional affirmative” procedure can be made and can come into force straight away, but require subsequent approval by the Parliament within 28 days in order to continue to have affect after that date.
Land and Buildings Transaction Tax (Amendment) (Scotland) Bill [as introduced] is available at the following website:

Land and Buildings Transaction Tax (Amendment) (Scotland) Bill Delegated Powers Memorandum is available at the following website: