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Briefing

Land and Buildings Transaction Tax - Additional Dwelling Supplement

May 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to provide a briefing paper to the Finance and Constitution Committee prior to the Roundtable Session on Land and Buildings Transaction Tax Additional Dwelling Supplement on 29 May 2019.

General comments

Additional Dwelling Supplement (ADS) was introduced in Scotland from 1 April 2016. ADS is payable, in addition to Land and Buildings Transaction Tax, on the purchase of an additional residential property for example second homes or buy-to-let properties although ADS often applies to the purchase of a main residence. ADS also applies to any purchase of a dwelling by a company or other non-natural person or to a purchase of a dwelling by an individual carrying out a property business.

There are a number of issues which have arisen with the application and implementation of ADS which would benefit from resolution or clarification. A number of aspects of the existing legislation are unclear. It is important that the law is clear so that individuals can guide their conduct accordingly.

We welcome the Scottish Government's current consultation on *Devolved Taxes: Policy Framework*¹ as well as the recent formation of the Devolved Taxes Legislation Working Group. We have previously suggested that an annual Finance Bill would be a useful tool to ensure that any technical issues or relatively minor changes arising through the devolved tax system, such as in respect of ADS, could be addressed regularly and efficiently, creating a more predictable timetable for change.

¹ <https://www.gov.scot/publications/devolved-taxes-policy-framework/>

Unintended consequences

Couples issues

Ann and Jim live together in a flat owned by Ann. Jim also owns a flat which is let out. Ann's flat is sold and the couple buy a new main residence in joint names. Previously replacement of main residence relief was not available because the couple were treated as a unit in counting the number of residences but not for replacement of main residence relief.

This issue has been addressed by The Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 for purchases after 30 June 2017 and then by the LBTT (Relief from Additional Amount) (Scotland) Act 2018 - a "single issue" LBTT act which gave retrospective effect to the relief.

The new ADS couples' relief does not address all cases

Unfortunately, the new relief does not address all situations. If Ann and Jim do not live together prior to the purchase of the new main residence in joint names, the relief will not be available. This does not seem to be within the spirit of the new relief. For example, it means that the tax system can prejudice couples who do not live together before getting married. We suggest that the new relief should be amended so that no ADS is payable in these circumstances.

Similarly the new relief is not available if Ann and Jim do live together before the purchase of the new main residence, however they live together in Jim's flat, which is retained, whilst Ann's flat is sold. In that situation, the new relief is not available, and ADS is payable. This also does not seem to be within the spirit of the new relief. We suggest that the ADS legislation should be amended so that no ADS is paid in these circumstances.

Divorcing and separating couples

Couples who are divorced or separated in circumstances where it is likely to become permanent are no longer treated as a unit, so houses owned by the other party are not taken into account for ADS purposes (i.e. dwellings owned by a former spouse or partner are not counted for ADS purposes). However, many couples own their home in joint names and the joint ownership rules continue to apply after couples separate or divorce. The joint ownership rules mean that each owner is treated as owning the whole of the house.

By way of example, Ann and Ben are former spouses and own their former matrimonial home in joint names. Ann lives in the matrimonial home. Ben has left and is living in rented accommodation. If Ben buys a house he will have to pay ADS as the jointly owned matrimonial home will count against him for ADS as he is still treated as owning all of it for ADS purposes.

Tax legislation is generally framed so as not to treat divorcing and separating couples unfairly. We consider that the ADS legislation should be amended so that divorcing and separating couples are no longer treated as owning the former matrimonial home.

Dependant property 'Granny flat' exemption

Where a main house with a 'granny flat' annex or basement is purchased, this counts as two dwellings and ADS will be payable on both properties.

Even if replacement of main residence relief is available in relation to the main house, ADS will be payable on the 'granny flat'. In relation to the Higher Rates of SDLT for Additional Dwellings (HRAD), a dependant property/'granny flat' exemption has been introduced. The effect of the granny flat exemption is that if one of the dwellings is subsidiary to the other, it is not treated as a second dwelling for HRAD purposes. We suggest that a dependant property exemption should be introduced for LBTT so that the purchase of a small dwelling at the same time as a much larger one does not mean that ADS is payable on both of the properties.

Inherited dwellings

No LBTT or ADS is charge on acquiring an inherited dwelling as there is no consideration (unless debt is being assumed). However, inherited dwellings need to be "counted" in deciding how many dwellings you own for ADS, even if you only inherit a part share in a dwelling. It is not clear from the legislation at what point an inherited dwelling should be treated as being owned by the beneficiary. The legislation should be amended to make it clear from what point an inherited dwelling is treated as owned by the beneficiary.

Low value shares in inherited dwellings

In many cases, individuals own a very small share of an inherited dwelling which is owned in joint names. For example a holiday home with a value of £120,000 was inherited by six grandchildren from their grandparents. Because the joint ownership rules treat each of the grandchildren as owning the whole of the holiday flat, it counts against them in relation to any future property which they may own, even though each grandchild's share is only worth £20,000. This does not seem fair as the grandchildren had no say in acquiring their interest in the holiday home. We suggest that the ADS legislation should be amended so that low value interests in inherited properties are ignored when counting how many dwellings a person owns.

Rented main residence

By way of example, Alan already owns a dwelling somewhere in the world. His work relocates to Scotland and he rents a house which becomes his main residence. More than two years later, he is still working in Scotland and decides to buy a home here.

He is changing his main residence, but ADS is payable as he rented, rather than owned, the old property.

Exemption should apply where the old dwelling was rented, not just owned – involving changing the references to "ownership" in Schedule 2A, paras 2(2)(a) and 8(1)(a).

If the policy basis of the exemption is based on replacement of a main dwelling, why should this only be available to those who happened to own their old dwelling? In this real-life example (relating to an oil executive who had moved to Aberdeen) the purchaser felt really hard done by. We consider that no ADS should be payable on the purchase of property which is to be a main residence.

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