

Consultation Response

Land and Buildings Transaction Tax – Property Investment Funds

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Tax law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *Land and Buildings Transaction Tax - property investment funds*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome the introduction of LBTT reliefs for property investment funds and consider it essential that the Scottish Government keep pace with the UK Government in respect of the introduction of reserved investor fund (RIF) provisions for Stamp Duty Land Tax (SDLT). In general, we consider it important that the Scottish Government align the clauses within this legislation with the SDLT framework where possible.

We note that whilst many RIFs are cross-border, we are aware of some purely Scottish RIFs that exist. We would note that this is a growing area within the Scottish investment sector and consider it desirable that Scotland is as attractive an investment location as the rest of the UK.

¹ [Land and Buildings Transaction Tax - property investment funds: consultation - gov.scot](https://www.gov.scot/publications/consultations/land-buildings-transaction-tax-property-investment-funds/pages/1.aspx)

Questions

Co-Ownership Authorised Contractual Schemes - Proposed Amendments

Q1 - In your view, do the clauses as drafted work as intended to prevent an LBTT liability arising on the transfer of units within the CoACS?

We would observe that the proposed wording within the draft order differs from that used for SDLT reliefs. As stated in our general comments, we consider it important that the Scottish Government seek to align the provisions of this legislation with the SDLT framework where possible.

The draft order proposes a new exemption from LBTT for the transfer of units in Co-ownership Authorised Contractual Schemes (CoACSs) which is set out in new section 9(1) of Schedule 1 of the Land and Buildings Transaction Tax (Scotland) Act 2013, introduced by section 4 of the draft order.

This differs from the approach taken under SDLT, where the legislation provides (under section 102A of the Finance Act 2003) that CoACSs are to be treated as companies for the purposes of SDLT, and the rights of participants are to be treated as shares in the company.

We consider that it is important that, so far as possible, the LBTT provisions relating to CoACSs and RIFs should be similar to the existing SDLT provisions, because many funds will operate on a UK-wide basis, and if there are differences between the LBTT and the SDLT regimes, this will lead to uncertainty, which could result in Scottish property not being included in CoACSs.

In addition, we believe that the effect of the SDLT treatment of CoACSs is wider than the effect of the proposed LBTT treatment under the draft legislation.

To give example, if the LBTT exemption is introduced, this would not protect against an LBTT charge where cash subscriptions are made to a property CoACS containing Scottish property, and new units are issued to an incoming investor contributing cash. Where the person receiving the newly issued units becomes the owner of proportionate interests in each of the Scottish properties held by the CoACS, this would result in LBTT being payable. However, if the CoACS had only English property, this same individual would not be liable for payment of SDLT because the broad deemed company status results in no land transactions arising and so protects the recipient of the units from a charge to SDLT on their issue.

Under the proposed LBTT exemption of transactions within the CoACS, the deemed corporate treatment does not apply as broadly as the deeming of a CoASC to be a company for SDLT purposes. Where units have been issued in the

CoACS it is not clear whether these units would actually be “within the CoACS” when issued and therefore whether the proposed exemption would actually apply as intended. We would highlight the risk of negative economic consequences in the event that LBTT liability would arise on cash subscriptions to CoACSs containing Scottish property, as CoACSs would be unlikely to invest in Scottish property due to a charge on entry to a fund. We would be concerned that, for this reason, CoACSs will continue to be inhibited from investing in Scottish property, and the policy intention behind the proposed draft amendment will therefore not have been met, to the detriment of investment into the Scottish economy.

Our proposal, to ensure that the policy intention behind the proposed amendment is met, is that instead of introducing an additional exemption in Schedule 1, the Scottish Government should instead introduce an additional section to be inserted following section 45 of the Land and Buildings Transactions Tax (Scotland) Act 2013 which deems CoACSs (and in due course RIFs) to be treated as companies for LBTT purposes.

Q2 – The draft clauses rely on various definitions set out in FSMA 2000. Are these definitions suitable for transactions in land and property situated in Scotland?

The Financial Services and Markets Act 2000 definitions apply to funds operating throughout the UK. We do not believe any changes are required, and we would also stress the importance of aligning the provisions relating to LBTT to those which apply to SDLT as much as possible.

Q3 – In certain circumstances, the draft legislation seeks to treat the scheme operator as the buyer for the purposes of the wider LBTT framework. Do these clauses work as intended?

The draft order proposes a specific exemption for the transfer of units in a CoASC, we would highlight with concern that this does not identify who the buyer is when a CoACS acquires property. This could result in all the participants being treated as joint owners of the property. This would be avoided if the SDLT approach of deeming a CoACS to be a company is adopted.

Q4 – Should the Scottish Government consider amendments to the draft clauses to reflect any potential differences between Scots Law and property law elsewhere in the UK?

We would welcome clarity from the Scottish Government regarding how these provisions will impact on split equity ownership of CoACSs where some owners are based in England, Wales or Northern Ireland.

Q5 – Do you have any other comments, or proposed amendments, in respect of the legislation as drafted?

We have no comments.

Part 2 - Reserved Investor Funds – A Call for Evidence and Views

Q6 Should the transfer of units within RIFs be exempt from LBTT? Please set out further commentary on the basis of your views.

We agree with the proposal that no LBTT should be payable on the transfer of units in RIFs. We do not believe this should be addressed by introducing an exemption for the transfer of units in RIFs, as has been proposed in the draft legislation included in this consultation paper in relation to CoASCs.

We recommend that the same approach is adopted as for SDLT, i.e. the RIF should be deemed to be a company for LBTT purposes.

Q7 If yes, should the LBTT treatment replicate the SDLT treatment of treating the RIF as a company and units as shares? Please set out further commentary on the basis of your views.

Yes. As per our previous comments, we think it appropriate that the proposed provisions align with the existing provisions currently in place for SDLT, i.e. the RIF should be deemed to be a company for LBTT purposes and the units as shares in the company.

Q8 Are there any aspects of the existing SDLT framework which would need to be amended if equivalent LBTT arrangements were introduced?

We have no specific comments as to amendments to the existing SDLT framework. Generally speaking, it would be appropriate and desirable if, in the event that the UK Government deemed it necessary to amend the SDLT provisions relating to RIFs, CoASCs and property authorised investment funds (PAIFs) that the Scottish Government make the equivalent amendments to LBTT as quickly as possible, in order to ensure there is clarity and alignment.

Q9 Are there any alternative approaches that the Scottish Government should consider?

We have no comments.

Q10 What would the impact be on investment in Scottish property if equivalent LBTT arrangements were not introduced?

We would highlight the risk of negative economic impact if these measures are not introduced. We have seen from PAIFs and CoACS that investors and fund managers using these vehicles avoid investing in Scottish property due to the disparity between the SDLT and LBTT rules. In our view this would only be exacerbated if there was no equivalent LBTT treatment of RIFs.

Part 3 - Seeding relief – A Call for Evidence and Views

Q11 Should seeding relief be introduced under LBTT? Please set out further commentary on the basis of your response.

Yes, we consider it appropriate that seeding relief be introduced for LBTT, in line with our previous comments regarding alignment with arrangements under SDLT. If seeding relief is not introduced for LBTT, Scottish properties risk not being included in UK fund structures, and Scotland will not benefit from capital investment in these new funds.

Q12 If yes, should the relief replicate that in place under SDLT?

Yes. We refer to our general comments and our answer to question 7.

We would highlight that part 3.1 of the consultation document states that SDLT seeding relief is available for contributions of property including on conversions of existing funds.² In actuality, it is more often utilised for seeding of portfolios held directly by prospective investors (which in most cases have been life companies with big property portfolios that they want to unitise, but also local government pension schemes pools). If an existing fund used it to seed a CoACS then it would receive the new units in return and its act of distributing them to the investors could trigger a clawback of seeding relief. We understand that it is usual practice in these circumstances to use other methods to convert existing funds.

We would suggest that the “portfolio test” should apply on a UK-wide basis, not just in respect of Scottish properties, so that if at least £100m of Scottish and rUK properties were seeded into a RIF or CoASC, the portfolio test would be met.

² [Land and Buildings Transaction Tax - property investment funds: consultation - gov.scot](https://www.gov.scot/publications/consultations/land-buildings-tax-property-investment-funds/pages/10.aspx)

Q13 Are there any aspects of the SDLT framework which would need to be amended if equivalent LBTT arrangements were introduced?

If the portfolio test is introduced on a UK-wide basis for LBTT, we would consider it appropriate if the SDLT portfolio test were amended accordingly.

We also refer to our answer to question 8.

Q14 Are there any alternative approaches that the Scottish Government should consider?

We have no comments.

Q15 What would the impact be on investment in Scottish property if equivalent LBTT arrangements were not introduced?

We would highlight our answer to question 10 and reiterate our point that if arrangements for LBTT do not align with those in place for SDLT then there would be a negative economic impact for the sector. It would not be possible for LGPSs and others owning Scottish property to pool these assets using a RIF.

Q16 Should the Scottish Government consider bespoke seeding arrangements for any of the investment vehicles discussed in this consultation?

Yes. We suggest that consideration should be given to the creation of a bespoke Scottish seeding period for the investment vehicles discussed in the consultation where there has been an SDLT seeding period which has already closed. This would allow Scottish assets to be seeded into existing funds.

Q17 - If seeding relief is introduced in Scotland, should a different approach be taken to withdrawal of relief?

No. We refer to our answer to question 16.

Part 4 - Addressing Tax Avoidance Risks

Q18 – Are amendments required to the draft legislation to ensure the exemption does not go beyond its' intended scope – i.e. solely exempting the exchange of units within the scheme?

We do not believe any additional safeguards are necessary. There is no evidence of avoidance opportunities being exploited in relation to the existing SDLT reliefs.

Setting up a RIF or CoACS is a complex process involve considerable expense and consideration of many regulatory issues. It is extremely unlikely that this type of vehicle could be used for tax avoidance purposes.

Q19 If equivalent RIF arrangements are introduced under LBTT, is it appropriate to mirror the current SDLT safeguards?

Yes, as per our previous comments, we believe it is appropriate that these proposals mirror the current SDLT framework as much as possible. We note that there have been extensive discussions between HM Treasury, HMRC and industry bodies in relation to the introduction of the RIF, and the RIF tax reliefs, as a result of which the current SDLT safeguards were considered in some detail.

We would also highlight the utility and effectiveness of the general anti-abuse rule (GAAR) in preventing tax avoidance in Scotland.

Q20 Should any specific or bespoke provisions be considered for LBTT?

We have no comments.

Q21 In order to prevent artificial enveloping of properties, should the Scottish Government consider providing for seeding relief in respect of non-residential property only?

We do not think the Scottish Government should limit the provision of seeding relief to non-residential property only and consider it appropriate that the legislation should extend to cover residential property also. It does not seem likely that introducing seeding relief would reduce the availability of residential property for purchase, because the properties which are likely to be seeded into RIFs are likely to already be owned by institutional investors for rental purposes. We do not think a proposal to limit the relief to non-residential properties only is proportionate and risks disadvantaging the residential property sector in Scotland. It would also mean the reliefs from LBTT would be different from the position for SDLT, which in itself would be problematic.

Q22 Are there any other avoidance risks the Scottish Government should consider in respect of seeding relief?

We would highlight that there are existing requirements for RIFs that prevent tax avoidance. In part 4 of the consultation paper, the Scottish Government suggests that seeding relief could encourage enveloping of properties with no LBTT being

payable on the sale of units.³ We do not consider this likely because assets to be seeded into a RIF or CoASC are likely to already be enveloped within existing investor vehicles. Also, there is a significant time and expense involved in setting up a RIF or CoASC which could benefit from seeding relief, which makes it unlikely that these fund vehicles would be used purely to avoid an LBTT charge on the sale of interests in the RIF or CoASC.

There is also a clawback of SDLT seeding relief if units are sold within 3 years of the end of the seeding period, which also mitigates against using these types of fund vehicles to envelope property and transfer the units without an SDLT charge.

³ [Land and Buildings Transaction Tax Property Investment Funds](#)



For further information, please contact:

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