The Scottish Parliament
Pàrlamaid na h-Alba

FINANCE COMMITTEE

MEETING DETAILS

4th Meeting 2016, Session 5

Wednesday 14 September 2016

The David Livingstone Room (CR6)

MEETING PAPERS

Agenda

Cover note for LBTT

Summary of written evidence

Written submissions from ICAS and The Law Society of Scotland

ADDITIONAL INFORMATION

Written Submissions Received

ITEMS FOR NEXT MEETING

It is expected that the next meeting will take place on 21September.

FINANCE COMMITTEE

AGENDA

4th Meeting, 2016 (Session 5)

Wednesday 14 September 2016

The Committee will meet at 10.00 am in the David Livingstone Room (CR6).

1. **Land and Buildings Transaction Tax (LBTT):** The Committee will take evidence from—

    Charlotte Barbour, Director of Taxation, ICAS;

    Isobel D'Inverno, Convenor of Tax Law Subcommittee, The Law Society of Scotland.

Jim Johnston
Clerk to the Finance Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5215
Email: James.Johnston@parliament.scot

The papers for this meeting are as follows—

Agenda item 2

Cover note	FI/S5/16/4/1
Summary of written submissions	FI/S5/16/4/2
Written evidence from ICAS and The Law Society of Scotland	FI/S5/16/4/3

Finance Committee

4th Meeting, 2016 (Session 5), Wednesday 14 September 2016

Land and Buildings Transaction Tax: First Year of Operation

Introduction

1. The Scotland Act 2012 devolved Stamp Duty Land Tax (SDLT) and Landfill Tax to the Scottish Parliament. Stamp Duty was substantially changed to become the Land and Buildings Transaction Tax (LBTT) and the Landfill tax regime remained largely unchanged with a Scottish Landfill Tax (SLfT). The new devolved taxes have been collected by Revenue Scotland since April 2015.

2. The Committee issued a call for evidence seeking views on the first full year's operation of LBTT in July. 21 responses from stakeholders were received along with a letter from the Cabinet Secretary for Finance and the Constitution and a submission from Revenue Scotland and these are available on the Committee's website. A summary of the submissions is attached as an annexe as are the submissions from the witnesses from whom the Committee will hear at this meeting.

Scottish Government Forecasts

3. The Scottish Government set out its forecasts for the newly devolved taxes during Parliamentary scrutiny of the 2015-16 Budget. Initial rates and revenue forecasts were presented in the Draft Budget 2015-16, published in October 2014. The LBTT residential tax rates and revenue forecasts were subsequently adjusted during passage of the Budget Bill in January 2015 as a result of changes to the rates and bands following changes to SDLT affecting the rest of the UK. The revised rates and bands are set out in the following table.

Table 1: LBTT Rates and Bands for 2015-16

Residential transactions		Non-domestic transactions		Non-residential leases	
Band	Rate	Band	Rate	Band	Rate
Up to £145,000	Nil	Up to £150,000	0	Up to £150,000	0
£145,001 to £250,000	2%	£150,001 to £350,000	3%	Over £150,000	1%
£250,001 to £325,000	5%	Over £350,000	4.5%		
£325,001 to £750,000	10%				
Over £750,000	12%				

4. The final forecasts for the various elements of LBTT and SLfT are set out in Table 2. These are the figures upon which the Scottish Government based its budget planning. As such, if these forecasts are lower than outturn, the Scottish Government would have a budgetary surplus, whilst were they higher than outturn, the Scottish Government would have a budgetary shortfall.

Table 2: Final LBTT and SLfT Revenue Forecasts for 2015-16

	Forecast Revenue (£m)
LBTT	**381**
Of which	
Residential Transactions	**235**
Non-residential transactions	**146**
Scottish Landfill Tax	**117**
Total	**498**

Residential Transactions

5. In its Report on Draft Budget 2016-17 the Scottish Fiscal Commission (SFC) provided a breakdown of expected tax revenues by month.[1] Revenue Scotland publishes monthly LBTT outturn data on its website.[2] The most recent monthly forecast versus outturn figures for residential transactions in 2015/16 are set out in the following table.

Year/ Month	Expected Tax Revenues	Total Residential Tax Received By Month To Date4	Difference
Apr-2015[P]	£17,600,000	£7,000,000	**-£10,600,000**
May-2015[P]	£19,100,000	£11,400,000	**-£7,700,000**
Jun-2015[P]	£21,900,000	£18,500,000	**-£3,400,000**
Jul-2015[P]	£24,100,000	£19,400,000	**-£4,700,000**
Aug-2015[P]	£21,500,000	£21,400,000	**-£100,000**
Sep-2015[P]	£22,500,000	£18,700,000	**-£3,800,000**
Oct-2015[P]	£21,300,000	£19,900,000	**-£1,400,000**
Nov-2015[P]	£19,800,000	£20,800,000	£1,000,000
Dec-2015[P]	£23,000,000	£19,700,000	**-£3,300,000**
Jan-2016[P]	£12,900,000	£12,600,000	**-£300,000**
Feb-2016[P]	£14,300,000	£11,600,000	**-£2,700,000**
Mar-2016[P]	£17,000,000	£20,900,000	£3,900,000
Total	**£235,000,000**	**£201,900,000**	**-£33,100,000**

6. The previous Committee published a call for evidence in July 2015 inviting views on the operation of LBTT and on whether the rates and bands should be changed in the forthcoming draft budget. 13 responses were received and the Committee's then Budget Adviser produced a summary of the written evidence. [3]

[1] Table 1: Residential LBTT - Monthly Forecast vs Outturn: http://www.fiscal.scot/media/media_437935_en.pdf
[2] https://www.revenue.scot/about-us/publications/statistics
[3] http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Adviser_briefing_on_LBTT_Written_Evidence.pdf

7. The previous Committee's budget adviser suggested that the market data showed a significant reaction to the introduction of LBTT. In particular, the Your Move/Acadata house price index for August 2015 demonstrated a considerable impact at the very top of the market. This showed that between January and March 2015 there were 112 sales of homes worth £1m or more whereas in the following three months only ten such houses were sold, with no such transactions taking place in April 2015.[4] Christine Campbell, Your Move's managing director in Scotland, stated that LBTT "has slowed high value property sales considerably."[5]

8. However, a more recent price index covering the full calendar year from January to December[6] which was published by Your Move/Acadata shows that there were 62 sales of homes worth more than £1m during the six months from July to December 2015. The report stated—

> "Subsequent to the introduction of the LBTT, the number of £1 million+ sales fell to zero, immediately after the introduction of the tax, but then resumed an average 3.5 sales per month over the following 4 months, although over the last five months of the year that average has increased to 11.6. It would thus appear that the market is slowly edging back towards the same number of high value transactions as that experienced prior to the introduction of the LBTT."

9. Table 4 below provides details of the number of monthly sales of £1m plus houses in the 2015 calendar year.

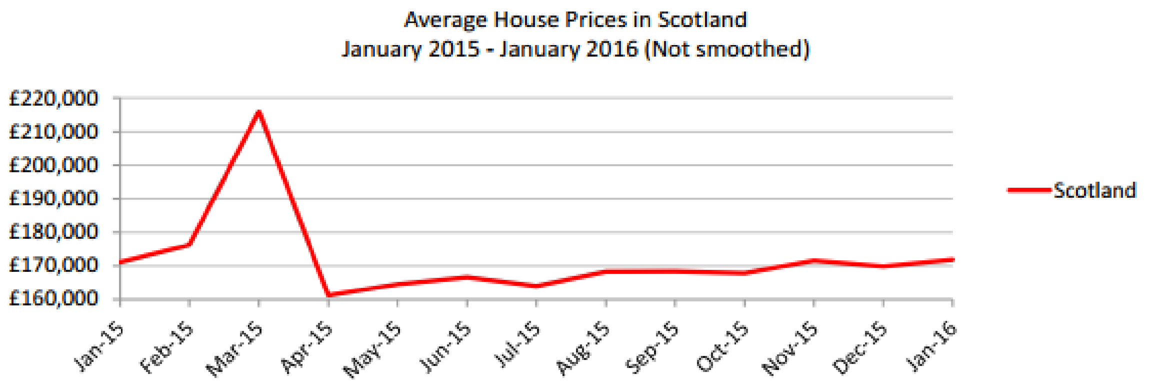
Table 4: Number of £1 million plus properties sold by month in 2015

Total 2013	**115**
Total 2014	**139**
Month (2015)	**£1m plus sales**
January	8
February	14
March	90
April	0
May	2
June	8
July	4
August	13
September	11
October	6
November	18
December	10
Total (2015)	**184**

10. The impact of the spike in high value sales prior to implementation of LBTT on average house prices in 2015 is illustrated by the following Your Move/Acadata graph.

[4] http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Adviser_briefing_on_LBTT_Written_Evidence.pdf
[5] http://www.acadata.co.uk/Your%20Move%20Acad%20Scotland%20HPI%20News%20Release%20August%2015.pdf
[6] https://lsl-assets.s3.amazonaws.com/your-move/uploads/asset_file/Your-Move-Acad-Scotland-HPI-News-Release-January-16-Christine-Campbell.pdf?ts=1458056726230

Table 5



11. Whilst LBTT may have slowed sales at the higher end of the market, Your Move/Acadata suggested that it had had a much more positive impact on the middle and lower tiers. In October 2015, Christine Campbell stated that the tiers at this end of the market "have got a new lease of life under the new tax regime" and more recently in December that "property sales in Scotland for first-time buyers and home movers are increasing three times faster than the rest of the UK."7

12. During the previous Committee's scrutiny of Draft Budget 2015/16, the DFM was asked why he had not considered a change in the rates at the higher end of the market. In response he stated that as the "forestalling effect is so tangible, it would be prudent to wait and see the completion of a full year, and perhaps to wait even longer."[8]

13. In its Report on Draft Budget 2016/17 the previous Committee recommended that the Scottish Government conduct a review of the operation of the first year of LBTT once outturn figures became available for the full year and that this should be made public.

14. The Government's response was as follows—

> "The Scottish Government intends to review the operation of residential LBTT after the first full year of operation and will update Parliament on the outcome of that review in the 2017-18 Draft Budget. We note that the Written Agreement on the budget process commits us to including "a commentary on outturn figures for the devolved taxes for the most recent year, including any variance between outturn and forecasts"."[9]

Behavioural Response - LBTT

15. The Scottish Fiscal Commission (SFC) has consistently raised concerns in relation to the lack of any analysis of the behavioural response to LBTT. One of the key issues which the previous Committee considered is the extent to which

[7] https://www.your-move.co.uk/uploads/asset_file/Your-Move-Acad-Scotland-HPI-News-Release-October-15-Christine-Campbell.pdf
[8] Finance Committee, 13 January 2016, OR Col. 37
[9] http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Response_to_Finance_Committee_draft_Budget.pdf

behavioural factors in response to the introduction of LBTT are temporary or longer term. The temporary response is known as forestalling whereby homeowners shifted the timing of property transactions when the tax was introduced. A longer term behavioural response might include homeowners opting to upgrade existing properties rather than moving home.

Forestalling

16. The Scottish Government estimated that the loss of revenues for 2015-16 due to forestalling to be in the range of £12m to £37m “with the expectation that they would lie towards the bottom of this range.”[10] The SFC advised that this “comes from examining the response observed in Scottish data to the stamp duty holiday analysed by Best and Kleven (2015).” Professor Leith explained to the Committee on 25 November 2015 that “we encouraged the Scottish Government to look into that paper” and that the range of £12m to £37m “capture[s] the range of estimates as to the magnitude of the behavioural effect and how long it lasts.”[11] These estimates do not include any permanent behavioural effects but relate only to the temporary impact of forestalling.

17. The SFC evaluated outturn data, for the period to end October 2015, in order to assess the extent to which forestalling had materialised and concluded that either the—

- forestalling effects were larger and possibly more prolonged than anticipated;
- underlying forecast is over-predicting revenues received for the year to date; or
- process of seasonal adjustment in attempting to allocate an annual forecast across individual months is not accurately capturing the monthly variable in revenues observed this year.[12]

18. Professor Leith told the previous Committee that the—

> “outturn data is significantly below what one would expect, given the normal seasonality. That may be because of a temporary forestalling effect, or it may be that the change in the tax regime has permanently subdued parts of the market, so the trend will continue indefinitely.”[13]

19. He went on to note that from the data, “the best guess is that there is a combination of a little bit of forestalling and perhaps a little bit of a longer-term effect.”[14] He further stated that “it seems that there was substantial forestalling in those early months.”[15]

20. The DFM told the previous Committee that he accepted that there had been forestalling and that the “shortfall in residential transactions is broadly comparable at

[10] http://www.fiscal.scot/media/media_437935_en.pdf paragraph 3.11
[11] Finance Committee, 25 November 2015, OR Col. 37
[12] http://www.fiscal.scot/media/media_437935_en.pdf
[13] Finance Committee, 25 November 2015, OR Col. 31
[14] Finance Committee, 25 November 2015, OR Col. 32
[15] Finance Committee, 25 November 2015, Or Col. 35

this stage with the level of forestalling that was identified or suggested by the OBR."[16] The OBR's November forecast[17] for the devolved taxes increased its forecast for forestalling from £20m to £30m.

21. The agreement between the Scottish Government and the UK Government on the Scottish Government's fiscal framework (published 25 February 2016)[18] stated that—

> "The baseline adjustment for Stamp Duty Land Tax will take into account the forestalling that is estimated to have occurred, which will reduce the baseline adjustment by £20m. No further forestalling effects in relation to the implementation of new powers will be taken into account."

22. By adding this £20m adjustment to the full year's outturn data, it appears that total revenues generated by residential LBTT in 2015/16 were £221.9m (£201.9m in tax paid plus £20m baseline adjustment to compensate for forestalling) compared to a forecast of £235m.

Longer term impact

23. The SFC stated that "there may be longer-term behavioural responses to the new tax which the current forecasting approach does not allow for."[19] The SFC's view was that this could mean the forecast was overly optimistic. Professor Leith told the Committee that in "our initial report, there are several instances in which we suggest that it would be best if the behavioural effects of policy could somehow be incorporated into the method of producing the forecast."[20]

24. The SFC recommended in its report on Draft Budget 2015-16 that behavioural factors should be included in the forecasting methodology as soon as practicable. It pointed out that there may be other environmental or behavioural factors which could have a bigger impact on outcomes than forestalling particularly in the medium term and these need to be considered as well.[21]

25. In its report on Draft Budget 2016-17, the Committee recommended that the Government "needs to carry out an analysis of the initial behavioural response to LBTT once a full year of outturn data is available. In particular, there is a need to assess whether there is a longer-term behavioural response to the new tax at the higher end of the market" and that that this work should help to inform whether there is a need to review the rates and bands for residential LBTT and should also inform future revenue forecasts."[22]

[16] Finance Committee, 13 January 2016, OR Col. 37
[17] http://budgetresponsibility.org.uk/docs/dlm_uploads/Devolved-taxes-forecast.pdf
[18] https://www.gov.uk/government/publications/the-agreement-between-the-scottish-government-and-the-united-kingdom-government-on-the-scottish-governments-fiscal-framework
[19] http://www.fiscal.scot/media/media_437935_en.pdf
[20] Finance Committee, 25 November 2015, OR Col. 67
[21] http://www.fiscal.scot/media/media_397838_en.pdf
[22] http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/85404.aspx

26. In its response, the Government confirmed that it was "committed to further development work on behavioural responses" and that "decisions on LBTT rates and bands will be taken as part of future budget-setting processes."[23]

Additional Dwelling Supplement

27. A 3% supplement on purchases of additional residential properties in Scotland (such as buy-to-let properties and second homes) over £40,000 was announced on 16 December 2015 and came into force on 1 April 2016. The policy objectives underlying the Additional Dwelling Supplement (ADS) were "to ensure that the opportunities for first time buyers to enter the housing market in Scotland remain as strong as they possibly can"[7] and "to ameliorate the likely distortions"[8] from the introduction on 1 April 2016 of a similar supplement at UK level.

28. Christine Campbell, Your Move managing director in Scotland, stated

> "The Scottish housing market made a bracing start to the year with the highest January sales since 2008. Property transactions in Scotland are up 24% year-on-year, easily outpacing sales south of the border, as England and Wales only saw a 1% rise over the same time period. The surge in Scottish home purchases has been propelled by second-home and buy-to-let buyers eager to avoid paying the 3% Land and Buildings Transaction Tax (LBTT) surcharge. As this tax hike was only announced in December's Scottish Budget, January's surge in sales may only be the tip of the iceberg."[24]

29. The Scottish Government estimated that between £5m and £7m of LBTT revenue would be brought forward from 2016-17 to 2015-16 as a result of forestalling (i.e. people bringing purchases of second homes forward to complete them before the supplement came into force). This may account to some extent for the higher than forecast LBTT revenues collected in March 2016 (£20.9m against a £17m forecast). However, total LBTT revenues for the three months between the announcement and the supplement taking effect (January to March 2016) were only £900,000 higher than the £44.2m forecast.

Non-Residential Transactions

30. Draft Budget 2016-17 stated that maintaining the rates and bands for non-residential transactions "will ensure that Scotland remains a competitive and attractive location for business."[25]

31. The SFC also provided a breakdown of expected tax revenues for non-residential transactions by month.[26] The most recent monthly forecast versus outturn figures for non-residential transactions in 2015/16 are set out in the following table.

---

[23] http://www.parliament.scot/S4_FinanceCommittee/General%20Documents/Cabinet_Secretary_for_Finance_Constitution_and_Economy_to_Convener_dated_3_February_2015(1).pdf

[24] https://www.your-move.co.uk/blog/highest-january-home-sales-in-eight-years

[25] http://www.gov.scot/Publications/2015/12/9056 page 17

[26] Table 6: Non-Residential LBTT - Monthly Forecast vs Outturn: http://www.fiscal.scot/media/media_437935_en.pdf

Table 6: Non-Residential forecast Vs outturn figures for 2015-16

Year/ Month	Expected Tax Revenues	Total Non-Residential Tax Received By Month To Date	Difference
Apr-2015[P]	£11,500,000	£10,900,000	-£600,000
May-2015[P]	£12,600,000	£12,700,000	£100,000
Jun-2015[P]	£12,100,000	£13,900,000	£1,800,000
Jul-2015[P]	£12,300,000	£18,100,000	£5,800,000
Aug-2015[P]	£11,900,000	£15,500,000	£3,600,000
Sep-2015[P]	£12,200,000	£15,800,000	£3,600,000
Oct-2015[P]	£12,800,000	£14,800,000	£2,000,000
Nov-2015[P]	£13,000,000	£22,500,000	£9,500,000
Dec-2015[P]	£12,200,000	£34,600,000	£22,400,000
Jan-2016[P]	£10,200,000	£12,000,000	£1,800,000
Feb-2016[P]	£10,800,000	£10,300,000	-£500,000
Mar-2016[P]	£14,400,000	£33,200,000	£18,800,000
Total	**£146,000,000**	**£214,300,000**	**£68,300,000**

Non-Residential Revenue Forecasts

32. Draft Budget 2016-17 contained a revised non-residential forecast of £210m for 2015-16 (£64m higher than the forecast in draft budget 2015-16). This revised forecast is roughly in keeping with the outturn figure of £214.3m.

Alan Hunter
Assistant Clerk to the Committee
September 2016

Finance Committee
4th Meeting, 2016 (Session 5), Wednesday 14th September 2016

Summary of LBTT Written Evidence

Introduction

The Finance Committee issued a call for evidence considering the operation of the Land and Buildings Transaction Tax (LBTT) in its first full year at the start of summer recess. In particular, the Committee was interested in hearing views in respect of the following issues—

- The impact on both the residential and commercial property market of the various rates and bands.
- The extent to which the rates and bands are consistent with the principles of "fairness, equity and the ability to pay";
- The level of receipts for residential and non-residential transactions in relation to the forecasts;
- The impact of forestalling and whether it is likely to have a short-term impact only or lead to longer-term changes in the market;
- Whether there should be any changes to the rates and bands in the draft budget for 2017-18; and
- The performance of Revenue Scotland in administering and collecting the tax.

Twenty one submissions were received. In addition, correspondence was received from the Scottish Government and Revenue Scotland in relation to LBTT generally. This correspondence is not considered in this summary but has been provided separately. The key points in relation to the written submissions, in response to the call for evidence, are summarised below.

Impact of Rates and Bands

<u>Difficulty assessing causality</u>

Aberdeen City Council noted that "it would be difficult to establish the extent to which any change in the market in the ACC area was due to the LBTT as opposed to being due to general economic conditions." North Lanarkshire Council stated that it had "not noticed any significant change in its exposure to the property market" as, in its view, "the application of LBTT in the initial year is substantially the same as the previous stamp duty scheme."

Pinsent Masons suggested that LBTT had "potentially had a negative effect on affordability and the ability to move house" in Aberdeen but acknowledged that this was difficult to assess "given the generally higher prices in that market." RICS also pointed out that there had been UK and Scottish Parliamentary elections in addition to the EU referendum since the introduction of LBTT and that these events, in addition to other external factors could have impacted on LBTT revenues making "like-for-like annual comparisons complex, if at all possible."

Impact on different sections of the property market

With regard to the middle and lower end of the market, Homes for Scotland (HfS) suggested that LBTT was unlikely to be a deciding factor on whether to purchase a home stating “it is unlikely that home buyers are aware of any saving in the tax compared to the old SDLT regime.” However, HfS considered that “at the middle to higher end of the market the LBTT has created a real cash burden to customers who see the introduction of LBTT as a penalty on aspirational movers.” This, HfS stated, was having a detrimental effect on house sales in this part of the market as “it is viewed as a punitive tax with homeowners opting to stay rather than move to a new home due to concerns over cost” with some homeowners choosing to invest in or extend their existing properties.

HfS also considered that LBTT had a disproportionate effect on specific markets including Aberdeen, Aberdeenshire and Edinburgh. In their view, low activity “at the middle to higher end of the market would have implications for other parts of the market over time” making it “essential that LBTT allowed scope for movement up and down price levels.” In terms of revenue generation, it must also be acknowledged according to HfS “that fewer transactions at higher price points will put more pressure on achieving higher revenue from the lower end of the market.”

The National Association of Estate Agents (NAEA) noted that the average house price in Scotland had increased by 4% in the year to June 2016 and suggested that the ADS had led to higher rents. It went on to explain that average rents had increased by 1.3% since the introduction of the supplement in April constituting “the fastest month-on-month growth on record.”

Reid Estates stated that it had “found the home market reduce substantially” since the introduction of LBTT and had had to terminate 50% of its staff. It went on to explain that it had seen 15 houses valued at between £400k and £2m withdrawn from the market since LBTT’s introduction whilst 16 houses in the same bracket “had taken substantial reductions in price in order to sell.” In addition to the loss of tax revenues to the Government, Reid Estates also spoke of the impact on the related economy of a downturn in the upper end of the housing market.

In respect of first time buyers, Reid Estates stated that—

> “No LBTT at the lower end is of no help to the first time buyer, if they can’t get a mortgage, saving £3 to £500 pounds on LBTT is irrelevant. If not enough homes are being built they can’t buy them. If home movers are not moving up market, releasing FTB properties, the FTB can’t buy them. We require movement in all types of property to produce a healthy market place.”

However, RICS disagreed, stating “there is much evidence that indicates the Government’s objective to have LBTT assist the house-buying opportunity for first time buyers has been successful. The LBTT framework has increased house buying participation of FTBs and, therefore, activity at lower end of the housing market. Unfortunately, lower end properties do not contribute to LBTT revenue generation.”

The Royal Institute of Chartered Surveyors (RICS) pointed out that 2015-16 had seen a greater number of sales but lower revenue generation than 2013-14 leading it to conclude “that the majority of house buyers were paying less, or no, LBTT which has decreased income; with the higher end properties, who pay proportionately higher rates, not making up for the deficit.” It went on to note that the average tax paid equates to £2,123 per property.

Savills agreed that LBTT had “contributed to an increase in the bulk of Scottish residential transactions up to £450k and a fall in activity above this level.” Breaking this down, it noted that the number of residential transactions between £145k and £325k had increased by a combined 14% whilst those in the band between £325k and £750k had witnessed only a slight increase of 2%. However, this was a wide band and sales below what it described as the “tipping point” of £450k had increased by 9% whereas sales valued at between £450k and £750k fell by 9%. It further noted that the number of sales above £750k had “fallen sharply by 27%.”

The Scottish Property Federation (SPF) highlighted similar statistics, noting evidence of an increase in turnover below £325k but highlighting evidence from its members of decreased market activity at prices over £325k with the bulk of the slowdown in properties above £500k where the market, it suggested, “remains subdued even now.” To quantify this, it estimated “a loss of some £200m in value and 235 in number of transactions at the £325k plus level.” However, in line with several other respondents, the SPF pointed out the difficulty in attributing this to LBTT as opposed to other contributory factors.

The SPF went on to state that “In the years prior to the introduction of LBTT the value of property transactions at above £325,000 had grown in Scotland by over £1.5bn before reversing in value during the first year of LBTT by £200m.” SPF was not aware of any other major factor for this reversal other than the application of the higher bands of LBTT. Specifically, SPF took the view that lower numbers of tax-paying transactions would clearly impact on government revenues but could also “undermine market fluidity as householders wishing to upsize or downsize struggle to find purchasers.”

With regard to non-domestic LBTT, the SPF noted a steady increase in the number of commercial transactions taking place annually. The “less radical change” between SDLT and commercial LBTT had contributed to “a smoother transition” in the SPF’s view and avoided significant disruption to the market.

The Law Society expressed “some concerns” about the diverging rates north and south of the border as higher end buyers who are relatively mobile might be deterred from buying high value property in Scotland as a result of what it described as “historically an extremely high marginal rate” which represented “a considerable additional initial burden.” However, it noted that LBTT had “undoubtably been beneficial for first time buyers.”

The Law Society also expressed concern about the lack of a general sub-sale relief. Purchasers can claim relief if they intend to sell the property on, but this is withdrawn if development does not take place within five years. It further stated that it was common for LBTT to be paid twice for sub-sale transactions where the relief was not available. This, it feared, could prejudice the biggest developments in Scotland and it provided the example of a major purchase of six Scottish casinos (three in Scotland and three in England) where the client withdrew from the Scottish purchases upon learning that sub-sale relief was not available.

In respect of the Additional Dwelling Supplement (ADS), the Law Society also expressed concerns in relation to its impact on the higher end market, particularly in rural areas where second homes are common.

For Taxpayer Scotland, the imposition of any taxation could be expected to reduce demand leading to reduced economic activity and the potential for behavioural responses, particularly where there is “a perception that one segment of the tax base is being targeted.”

Consistency with principles of “fairness, equity and the ability to pay”

The majority of respondents felt that LBTT was consistent with the four principles. For example, the Chartered Institute of Taxation (CIoT) stated that LBTT adopted a more progressive system than SDLT. This move away from a slab system removed the “cliff edge” effects when a transaction moved into a higher band and in the CIoT’s view, with the effect that the rates and bands “are fairly consistent with the principles.” However, the reliance on higher rates of tax for the upper bands could lead to the possibility of greater deterrence of transactions which in turn, could affect revenues.

ICAS agreed that the structure of LBTT was more progressive than the slab SDLT system it replaced and stated that “LBTT is generally considered to be fairer to taxpayers.” Whilst noting that the “ability to pay” principle is generally viewed as a proportionate rise in tax rates as income increases, ICAS pointed out that the operation of this principle could be undermined by behavioural changes such as purchasing less property.

KPMG agreed that “the progressive system introduced for both residential and non-residential property appears to be in keeping with these principles” although it considered that “the introduction of the Additional Dwelling Supplement (ADS) as a flat rate of 3% runs counter to this progressive approach with those purchasing high value residential properties paying the same rate of ADS as those purchasing lower value properties.” ICAS supported this view that the ADS “is not progressive in the same way as the main LBTT charge in that it does not levy higher rates on more expensive properties.”

KPMG went on to ask whether the Scottish Government has considered adopting a more progressive approach to the ADS. KPMG also suggested that the supplement might penalise “reluctant owners of two dwellings” who were unable to sell their existing dwelling, contradicting the “ability to pay” principle, whilst ICAS highlighted the same “anomaly” which, in its view, could be perceived as “unfair.”

The NAEA noted that purchasers of properties valued at less than £325k were paying less tax than under SDLT, “making Scotland a more affordable place to invest for first-time buyers and middle-income earners.” However, it went on to note the impact of increased house prices in the major cities having a knock-on effect on prices in nearby “commuter belt” areas.

Aberdeen City Council agreed that the rates and bands are consistent with the principles, particularly in the case of residential transactions. However, North Lanarkshire Council queried the equitability of the higher LBTT charge levied on residential properties in comparison to non-residential ones, noting that at the top band "the residential buyer will be paying over two times the LBTT of a non-domestic buyer for the same value of property."

RICS stated that "the progressive nature of LBTT, excluding 3% slab ADS, contributes toward the principles" although Reid Estates stated that it did not believe that the introduction of LBTT takes the four principles into consideration. Savills considered that the principles were "entirely subjective and impossible to measure on a case-by-case basis."

The Law Society took the view that LBTT was generally consistent with the principles because of its progressive structure. However, it agreed with others that the "slab" nature of the ADS structure was "directly in conflict with these principles" and provided "an underlying level of complexity which is undesirable" (whilst recognising that "the single rate mitigated this complexity to an extent.") The Law Society was also of the view that the ADS was inconsistent with the principle of fairness due to its impact on those affected by "unplanned or temporary ownership of a property."

The Law Society further stated that the penalties chargeable for late submission or failure to submit a return (up to 100% of the LBTT payable) were "excessive and should be reviewed."

Taxpayer Scotland "rejected the epistemological capture of these terms in the way they are used by the Scottish Government" as they "pre-suppose the notion that tax progressivity is a *de facto* good as part of the political objective to redistribute wealth."

Level of receipts

Aberdeen City Council suggested that the shortfall in residential receipts compared to forecasts "seems to have been largely due to forestalling" whilst the higher than forecast non-residential receipts "suggests that LBTT has not been a barrier to such transactions." North Lanarkshire Council noted what it described as "a significant disparity in the actual yield in comparison to the projections ranging from -14% to +47%" before concluding that "there needs to be an improvement in the methodology applied in the projections/statistical analysis to provide the Scottish Government with a more realistic projection of the tax raising opportunity from LBTT."

The CIoT pointed out that the introduction of the ADS and forestalling associated with it meant that "it may not be possible to obtain a clear, long-term view until the end of the second year of LBTT's operation.

Similarly, ICAS stated that "it is difficult to give meaningful comment about the level of receipts for LBTT for either residential or non-residential transactions relative to the forecasts at this particular stage. This is partly because this was the first year of forecasting." ICAS was also of the view that forestalling resulting from changes to UK SDLT in December 2014 followed by the introduction of the supplement from April 2016 meant that for 2015/16, "it may be unexpectedly difficult to draw a meaningful analysis between the forecasts and the actual revenues."

KPMG noted concerns around "the additional compliance burden in relation to commercial leases, i.e. the requirement to file returns every three years, on assignment and on termination of a lease" and asked whether the Scottish Government has undertaken any forecasting in relation to the likely amount of additional revenue that this is likely to generate. South Lanarkshire Council also expressed concerns in this regard whilst stating that its surveyors had not noticed any adverse effects on the Council's commercial lets.

Savills expressed concern that the first full year of LBTT had "generated £14m less than the previous year's SDLT despite fewer sales taking place in that period." They went on to note that LBTT revenues between the £145k to £325k bracket between May and December 2015 were 45% lower than in the same period in the previous year despite a 14% increase in sales. Conversely, LBTT payable above £450k had generated 29% more in revenues than over the same period in the previous year despite a 12% drop in sales. According to its research, "around 44% of the LBTT revenue between May 2015 and December 2015 was generated from sales above £450,000, despite making up just 3% of the overall residential market over this period."

In respect of non-residential sales, Savills noted that £214m of LBTT was generated, significantly exceeding the forecast £146m. Given that non-residential revenues had been £175m and £205m in the two previous years, Savills suggested that the Government explain the reasons for its "relatively low target" of £146m.

SPF pointed out that in January 2016, the Government "greatly increased its revenue forecasts from £381m to £455m mainly due to better than expected non-residential revenue. The outcome for LBTT revenue in 2015-16 was £414m with residential revenue ending up some £39m short of the Scottish Government's January 2016 expectations."

The Law Society noted that commercial LBTT had exceeded its forecasts as a result of "a small number of large transactions" but stated that "it is difficult to estimate future levels of receipt on the basis of a small number of high-value commercial sales."

Taxpayer Scotland described the 14% shortfall in residential receipts as "a poor policy outcome" and a "strong signal of a downturn in the value and rate of housing exchanges." With regard to non-residential LBTT it suggested that the flexibility of the market had been enhanced by not having such high levels of marginal tax."

Taxpayer Scotland considered the impact of reduced house sales on the wider economy and suggested that people who were deterred from moving home would be less likely to spend on refurbishment, fittings and furniture when entering a new property. However, this suggestion appeared to contradict the views of other respondents such as HfS who spoke of increased rates of home extensions and refurbishments as some homeowners chose to "improve not move."

Forestalling

Whilst ICAS did not have evidence around potential longer-term trends, it encouraged "an independent study into the impact on changes to the concept of home ownership, for example, with projected moves over a lifetime, or a focus on extending rather than moving, and to do so by looking forward a generation at least. Potential costs of job mobility, or inward investment into more rural areas, all have wider consequences albeit for the wealthier or more aspirational purchases."

The NAEA stated that, as expected, it had seen a rise in both the number and value of purchases around March in both 2015 and 2016, largely as a result of forestalling. It also highlighted the impact of interest rate cuts and uncertainty surrounding Brexit whilst noting that a third of its members had reported no changes in the market since the Brexit vote. RICS agreed that the introduction of LBTT and the ADS had resulted in house sale surges in March 2015 and March 2016. However, its view was that these surges were not unexpected and that the impact of forestalling "is most likely a short term issue, assuming LBTT rates and thresholds remain the same going forward."

Aberdeen City Council suggested that in its view, forestalling was "a short-term issue that should disappear over time."

Savills took the view that "the residential market in Scotland above £450,000 has struggled to recover, with fewer sales taking place compared to 2014 when political and taxation challenges were not impacting the market."

The SPF noted that forestalling was suggested to have reduced revenues by around £20m in 2015-16 but pointed out that further forestalling in advance of the introduction of the ADS from April 2016 would have mitigated the loss of revenues to some extent.

Taxpayer Scotland believed that the impact of forestalling was likely to be long term "if the higher rates in the present LBTT regime persist."

Changes to rates and bands

CIoT noted that they do not generally comment on the setting of tax rates but observed that the Government "should uprate the bands periodically to ensure that they remain appropriate and are in line with policy objectives." For example, this might involve adjusting bandings to reflect changes in average house prices. With regard to any changes to rates, CIoT stated that "it would assist certainty if changes to rates in particular could be minimised" whilst acknowledging that "adherence to the principles needs to be balanced with the pragmatic need for tax revenues." ICAS made a similar point, stating that minimal changes would "enable taxpayers, both individuals and businesses, to plan ahead with confidence".

CIoT did suggest however, that "a low, almost nominal rate, such as 1%" could be applied to non-residential LBTT (in addition to the nil rate) to minimise the impact on small businesses. CIoT further suggested that there should not be a significant leap in rates from one band to the next. In this context, the 5% leap from 5% to 10% on residential properties over £325k was "not ideal." CIOT further noted the necessity of considering how LBTT rates and bands compare to those in the rest of the UK to ensure Scotland continues to attract investment and business.

In light of what it considered to be a "disproportionate burden on middle to higher value purchases" HfS reiterated its call for a review of rates and bands over £325k "to provide a more stepped approach." This, it suggested, could involve a 5% rate for purchases between £250k and £925k which would mirror arrangements for SDLT at this level. In its view, higher levels of activity in this section of the market "would result in a higher tax take than what is being achieved at present." The impact of uncertainty relating to Brexit provided "an opportunity to boost the housing market and make now a great time to buy" according to HfS, which "strongly believed that house sales could generate more income through higher sales activity if the rates and bands were apportioned more effectively", particularly in a climate of uncertainty.

With regard to non-residential rates and bands, HfS considered the existing 4.5% rate which applied to most land purchases to be "acceptable" meaning that no changes to the existing rates and bands were currently required. KPMG agreed with this view, stating that "the bands and rates are similar to those in the rest of the UK, which should ensure that investment decisions made by businesses are not unduly influenced by lower or higher rates in Scotland."

Lynn Powell stated that in her view, government should not influence the property market "by setting seemingly arbitrary price bands and percentages." She therefore suggested that it would seem "simpler, and more open and transparent" to implement a flat rate of 5% across all property sales. She went on to suggest that there were better ways to support first time buyers, for example "by reduced or zero deposits."

North Lanarkshire Council suggested that residential buyers "bear a greater burden" than non-domestic buyers in most cases and recommended that the number of non-domestic bands and the rates levied on them should be revised to be more in keeping with domestic rates to address what it considered to be an "imbalance." Pinsent Masons also suggested that the rates and bands "should be aligned with SDLT rates to avoid competitive disadvantage."

Reid Estates proposed what it described as the radical approach of getting rid of LBTT bands entirely and levying a flat rate transaction tax payable by all parties involved in the transaction meaning "many more properties would sell at their true value" bringing "major benefits" to the Revenue.

However, RICS recommended that the Scottish Government "does not amend the bands and thresholds of residential LBTT until research report is returned, discussed with stakeholders and, if necessary, scrutinised by the Finance Committee."

Conversely, Savills recommended "immediate changes to the rates and bands in the draft budget for 2017-18. In particular, the Scottish Government should review the 10% tax band which has heavily impacted the market between £325,000 and £750,000."

Similarly, the SPF suggested that residential rates should be reformed by increasing the 5% band up to £500k to mitigate the "significant impact" of the 10% rate which currently takes effect on transactions above £325k. This, it noted, effectively added "£500 for every £5,000 of property value above this level" significantly increasing "up-front" cash-flow issues and contributing to reduced market activity. This was of particular concern in areas such as Edinburgh, Aberdeen or East Renfrewshire. The SPF advocated no changes to the non-residential rates and bands which, it considered, were "supporting both competitiveness and the public revenue" but suggested that it would be helpful if Revenue Scotland could differentiate between LBTT paid on lease and that paid on sales in its reports.

Taxpayer Scotland recommended "a robust review of the LBTT regime," proposing "a low flat rate" for 2017-18 before being reduced to zero the following year with the tax being discontinued thereafter. In its view, the relatively small revenues generated by LBTT (in the region of just over £400m per annum) “in no way compensates for the damage done to the dynamism and growth of the Scottish economy” and the impact on receipts from other forms of taxation such as income tax and VAT.

Performance of Revenue Scotland

The majority of respondents considered Revenue Scotland to be performing well on the whole with the CIoT for example, stating that the “general view is that the LBTT system is working well for day-to-day conveyancing.” Revenue Scotland’s willingness to offer different communication channels and to invite engagement and feedback with stakeholders was also widely welcomed.

However, CIoT went on to suggest that there was some room for improvement and that Revenue Scotland must be sufficiently resourced, for example to allow them to operate facilities such as their opinion service efficiently and ensure that their guidance is dynamic and responsive to taxpayer queries. KPMG welcomed “this dynamic and flexible approach to the provision of guidance as a direct response to taxpayer uncertainty”.

CIoT expressed disappointment that the LBTT forum, which was intended to provide a platform for stakeholders to discuss the operation of LBTT with Revenue Scotland, had not met since September 2015 despite having been intended to meet on a six-monthly basis. KPMG also expressed concerns with regard to sub-groups of the forum which Revenue Scotland had agreed to set up to allow “more technical matters to be worked through in detail.” However, KPMG was not aware of any such sub-groups having been established.

The CIoT also noted that some of its members had experienced problems in relation to passwords for online systems expiring too quickly. However, it understood that Revenue Scotland was exploring options for a practical solution. With regard to guidance, CIOT suggested that “more resource could be dedicated to ensuring that the guidance is as helpful and responsive to user needs as possible.”

CIOT also noted continued “uncertainty surrounding interpretation of substantial performance due to a lack of guidance” which compared unfavourably with the 90% rule that applied to SDLT. This, it stated, was disappointing as the issue had previously been raised with Revenue Scotland which had agreed to consider creating a similar percentage rule, “but there does not appear to have been progress towards this.” Similarly, KPMG stated that the guidance in relation to substantial performance was “still lacking” and recommended that this be “reviewed and the matter clarified as soon as possible.”

ICAS had found its dealings with Revenue Scotland to be “professional and helpful” and stated that it had been “good at engaging through a number of channels.” In its view, Revenue Scotland’s website was also “a good source of information and well laid out.” Despite canvassing its members, “no major areas of concern had been raised” leading ICAS to conclude that the administration of LBTT was “working as expected.”

ICAS did, however, note comments from some members that “there are occasions when Revenue Scotland could be more helpful in providing an opinion that provides certainty and that in the same scenario HMRC would have given a clearance (for instance, with an incorporation of a 'husband and wife' partnership)." ICAS further noted that the technical guidance did not always give Revenue Scotland's interpretation of the legislation in contrast to that of HMRC in respect of SDLT. As it was "unclear whether LBTT, and Revenue Scotland, follow the existing interpretation in the UK, it would be helpful from the practitioner's perspective to receive some sort of acknowledgement from Revenue Scotland of whether the interpretation and guidance for SDLT, at least in certain areas, is to be followed when interpreting LBTT provisions."

The Law Society also stated that it believed that "Revenue Scotland has been successful in administering and collecting the tax" highlighting its "dedicated staff", relatively simple online system and willingness to engage. However, in keeping with some other respondents, it noted negative feedback from its members in relation to the opinions service before suggesting that it would be helpful for Revenue Scotland to publish opinions where they relate to common, general areas. It further suggested that it would be helpful for Revenue Scotland to confirm whether it would take the same approach as HMRC to areas of the legislation that were identical to SDLT such as substantial performance. The Law Society expressed concern that these issues might have resulted from a lack of funding it suggested that the Government review its resources in comparison to those spent by HMRC in administering SDLT.

Pinsent Masons stated that it was "pleased with the way in which Revenue Scotland engaged with stakeholders in developing/testing the LBTT online filing system and in general we consider that the system works well."

SPF was of the view that LBTT had been successfully introduced in administrative terms and was now an established tax but that "Revenue Scotland needs to invest in awareness of its services and to prepare for the implementation of the rent reassessment process for non-residential rents. It also highlighted anecdotal concerns around access to detailed guidance on more complex matters.

Other Comments

The Association of Local Authority Chief Housing Officers (ALACHO) and the Chartered Institute of Housing (CiH) raised specific concerns about the impact of LBTT on the Affordable Housing Supply programme given the absence of an exemption for local authorities when acquiring existing homes (unlike Registered Social Landlords who are exempt). Previously, this wasn't a significant problem as typical acquisitions tended to be below the LBTT threshold of £145k. However, the introduction of the 3% second home supplement (which is applied to the purchase of any additional home over £40k) along with changes to the statutory guidance relating to planning agreements has ALACHO stated "much wider implications for local authorities". ALACHO estimated costs in excess of £2.5m to local government over the next five years" as a result.

On that basis, ALACHO and the CIH have called for the relevant legislation to be amended to extend the relief provided to RSLs to local authority landlords. However, KPMG stated that "the recent cuts to grant funding for RSLs, means that the majority of acquisitions made by RSLs are not assisted by public subsidy and so no longer meet the conditions for relief from LBTT, as provided for at Schedule 6 LBTT(S)A 2013" and asked whether consideration had been given to expanding the relief to ensure RSLs can continue to claim it in future. North Lanarkshire Council also requested that the exemption criteria be extended to include local authorities and other social landlords.

South Lanarkshire Council stated that as “nearly all” of its residential purchases since the introduction of LBTT had been for less than £145k it had been largely unaffected by the changes from SDLT. Similarly, the purchase price of commercial land acquisitions meant that it was unlikely to incur additional costs as a result of non-residential LBTT. However, it shared the concerns around the ADS, suggesting that on an average purchase price of close to £70k for a target of 20 homes per annum, it could incur LBTT supplement charges in the region of £42k per year. This, it suggested, seemed “inappropriate and inequitable” given the relief afforded to corporate buyers and to RSLs.

KPMG also noted what it saw as “inequality” in respect of those bodies that can claim relief such as charities, RSLs and NHS Trusts in comparison to those who can’t such as local authorities and the emergency services and asked whether consideration had been given to the creation of a blanket relief for all public bodies.

Aberdeen City Council suggested that it would be useful for local authorities “to have some discretion locally over elements of LBTT” to support the development of its affordable housing strategy, particularly when targeting key workers.

In respect of the ADS, HfS noted the views of its members that “investment in rural areas will reduce going forward with fewer buyers looking to invest in holiday homes” which would not typically appeal to first time buyers in any case. Similarly, Pinsent Masons suggested that the Government should “consider exempting certain identified areas, where second homes are an essential element of the local economy (eg a touristic economy) from the ADS.” HfS also raised the subject of “accidental” additional home owners (for example through inheritance or through two families coming together) and expressed a willingness to explore with the Committee the introduction of exemptions to help prevent the unintended consequences of the supplement.”

An additional response was also received from HfS’ Private Rented Sector Champion who highlighted the importance of the multiple dwellings relief and the exemption from the additional dwelling supplement to attracting investment in the new build to rent market.

In addition to its more general comments, ICAS provided examples of specific differences between the LBTT and SDLT legislation in paragraphs 24 to 27 of its submission, which added complexity to businesses operating in both jurisdictions. ICAS was unclear as to whether these differences were purposeful or unintended consequences and if the latter, whether they might be amended.

The NAEA highlighted what it saw as “the need for increased flexible lending criteria and support for first-time buyers” before calling on the Scottish Government to “implement a long-term house building programme that will sustain demand for years to come.”

Pinsent Masons stated that it “would encourage the Scottish Government to consider the impact which any new SDLT legislation (particularly exemptions/reliefs) may have upon Scotland and to react swiftly where appropriate (for example, Co Ownership Authorised Contractual Schemes/Property Authorised Investment Funds seeding relief is in the current UK Finance Bill but is not currently reflected in LBTT legislation). Failure to do so, it suggested, might deter investors if they were faced with a less favourable tax environment in Scotland compared to the rest of the UK.

RICS also suggested that a number of specific exemptions be introduced *for new developments only* including an exemption of new build property from the supplement "after all attempts to sell to owner-occupiers had been exhausted, exemptions for purpose built holiday homes for rent, for purpose built student accommodation and for purpose built accommodation for private rent.

RICS suggested that some people in medium to higher end properties "are less inclined to move at present due to the costs incurred for moving. As an alternative, they are building extensions or improving their existing property which is hampering new homes coming to market." In the worst case scenario, RICS suggested this could result in "a growing family in need to upsize is not able to do so due lack of supply and the costs of moving, and are not in a position to extend their property due the costs to make improvements." To mitigate this, RICS suggested that the introduction of "an exemption or reduction for older owners wishing to downsize" which may help to stimulate sales amongst homeowners who may have been deterred from selling by LBTT rates, thereby freeing up certain elements of the market and generating revenues by encouraging sales.

The Scottish Association of Landlords (SAL) was of the view that "contrary to the intention of the Scottish Government, the ADS might also encourage small investors to purchase more, lower cost properties as opposed to investing in the higher end of the market in order to reduce their tax liability." It further stated that "it would have been more reasonable to tailor the tax to address the bands of property values that first time buyers were likely to purchase within, rather than being an arbitrary tax that applies to all eligible property purchases."

SAL concluded by suggesting that "investment in new build properties should be exempt from the tax supplement as those investors are party to helping to supply much needed new housing stock. This also incentivises housebuilders to build more units in order to satisfy a range of customer demand."

The Law Society highlighted the importance of good intergovernmental relations in order to "ensure that both governments are aware of what the other is doing" to mitigate the risk of tax changes in one jurisdiction impacting on the other. It further suggested that parliamentary procedures should be reviewed and that an annual Scottish Finance Bill should be introduced to announce any changes to taxation at a fixed point every year. A Scottish equivalent of the Westminster provisional collection of taxes regime was also recommended to enable the Government to make swift changes to tax rates in order to reduce opportunities for forestalling.

Alan Hunter
Assistant Clerk
9 September 2016

Finance Committee
4th Meeting, 2016 (Session 5), Wednesday 14th September 2016

Submission from ICAS

About ICAS

1. The following submission has been prepared by the ICAS Tax Committee. The ICAS Tax Committee, with its five technical sub-Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

2. ICAS is grateful for the opportunity to give evidence to the Finance Committee regarding the Land and Buildings Transaction Tax (LBTT) and the performance of Revenue Scotland in administering and collecting the tax, as requested in the call for evidence issued on 30 June 2016.

3. ICAS has contributed the experience of its members and their technical expertise in the development and implementation of the two devolved taxes, Land and Buildings Transaction Tax (LBTT) and Scottish Landfill Tax (SLfT), in the development of the proposed Air Passenger Duty, and in the establishment of the tax authority Revenue Scotland. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members in the many complex issues and decisions involved in tax and financial system design, and to point out operational practicalities.

4. As a matter of policy, ICAS does not comment on the rates of any tax.

5. Our comments below are restricted to our areas of expertise, which in this instance are in relation to forecasting and accountability, and the operational aspects of LBTT and Revenue Scotland administration. We have therefore addressed four of the questions in the call for evidence.

6. We note that the call for evidence relates to the first full year's operation of LBTT and so has made no direct reference to the LBTT Additional Dwelling Supplement that was introduced by way of the The Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016 that came into force on 1 April 2016.

The extent to which the rates and bands are consistent with the principles of "fairness, equity and the ability to pay"

7. ICAS supports the structure of LBTT, which is more progressive than the SDLT slab system which it replaced. The move away from the slab system was welcomed by ICAS and LBTT is generally considered to be fairer to taxpayers.

8. One of the four principles is ‘certainty’, which in our view includes both simplicity and stability. To provide certainty it would be helpful if a relatively long term view could be taken with a minimum number of changes to the thresholds and rates over time. This will enable taxpayers, both individuals and businesses, to plan ahead with confidence.

9. The principle of ‘ability to pay’ is generally viewed as a proportionate rise in tax rates as income increases, although this can be less clear cut in transaction based taxes such as LBTT or APD. Further, the operation of this principle can be undermined by behavioural changes such as less purchases of property; the principle itself may undermine other objectives such as stimulating the economy. This needs to be recognised, and balanced, in the matrix of policy objectives.

10. The amount of LBTT chargeable on a land transaction will impact on the availability of funds to the taxpayer, both equity and loans. For those buying property with a mortgage it simply means that ‘the cake is cut in a different shape’ as typically there is a limit to the funds available.

11. The Additional Dwelling Supplement (ADS), at a flat 3% rate introduced with effect from 1 April 2016, is not progressive in the same way as the main LBTT charge. It is not progressive in that it does not levy higher rates on more expensive properties (whose owners are assumed to have greater capacity to pay and therefore the relative burden of taxation may not be proportional).

12. We also receive anecdotal evidence that there can be anomalies with ADS which are perceived to be unfair. For instance, consider a person purchasing their first home who had rented previously but happens to have an interest in another property that is jointly owned but the joint owner will not sell or buy out. Consequently, ADS has to be paid on the purchase of the home.

The level of receipts for residential and non-residential transactions in relation to the forecasts

13. It is difficult to give meaningful comment about the level of receipts for LBTT for either residential or non-residential transactions relative to the forecasts at this particular stage. This is partly because this was the first year of forecasting.

14. There were further forecasting difficulties with the residential sector due to (i) the change in UK Stamp Duty Land Tax rates in December 2014, resulting in some purchases being brought forward to before April 2015; and (ii) a similar behavioural impact may have been triggered by the introduction of the 3% LBTT Additional Dwelling Supplement. So, for this particular year, 2015/16, it may be unexpectedly difficult to draw a meaningful analysis between the forecasts and the actual revenues. We agree with the commentary in paragraphs 2.2 and 2.3 of the Scottish Fiscal Commission’s ‘Report on Draft Budget 2016-17’.

15. There are clearly difficulties in accurate forecasting of the non-residential revenues, with discussion of this in the SFC's 'Report on Draft Budget 2016-17'. We have no further analysis or insight to offer in relation to this.

16. More broadly, however, there is a need for sound financial processes that provide useful and meaningful financial information. Such financial information is needed to allow a better understanding of tax policy and collection, how it has been used to support public finances, and to enable taxpayers to hold decision makers to account. An important part of this is being able to analyse devolved revenues against budget to assess whether policy decisions have achieved their intended effect. We support the work of the Scottish Government forecasters, and the SFC report recommendations regarding tax forecasts, to ensure meaningful provision of financial information in future budgets and thereby support accountability.

The impact of forestalling and whether it is likely to have a short-term impact only or lead to longer-term changes in the market

17. The structure of LBTT and significantly higher rates at higher values were intended to be major changes and might be expected to change the property market in the longer term, for instance, with the number of house moves made over a lifetime.

18. ICAS does not have evidence around any potential trends but we would encourage independent study into the impact on changes to the concept of home ownership, for example, with projected moves over a lifetime, or a focus on extending rather than moving, and to do so by looking forward a generation at least. Potential costs of job mobility, or inward investment into more rural areas, all have wider consequences albeit for the wealthier or more aspirational purchases.

The performance of Revenue Scotland in administering and collecting the tax

19. The two devolved taxes for which Revenue Scotland has a responsibility to collect and manage are two discrete taxes with only LBTT compliance relying on the agent community. The vast majority of transactions that give rise to LBTT need a lawyer as the agent. Chartered accountants are only likely to be in an advisory position if the transaction is part of a business venture, such as purchasing or leasing commercial premises, or in a business reorganisation for either a group of companies or a partnership.

20. As a professional body representing both its members and the public interest, ICAS has found its dealings with Revenue Scotland professional and helpful. ICAS representatives have regular meetings with Revenue Scotland and its senior staff.

21. In our meetings with staff at Revenue Scotland, they have actively engaged with us and have responded well to our comments and feedback. In terms of the Revenue Scotland approach to communications, they have been good at

engaging through a number of different channels; and the website is also a good source of information and is well laid out.

22. Despite canvassing for information amongst ICAS members, both through our tax committee system and during the provision of courses on Scottish taxes, no major areas of concern have been raised. The feedback we have received is that the operational implementation has gone well and that the LBTT returns are more straightforward than the SDLT equivalents. From this, we draw the conclusion that LBTT administration is working as expected.

23. Some of our members have commented that there are occasions when Revenue Scotland could be more helpful in providing an opinion that provides certainty and that in the same scenario HMRC would have given a clearance (for instance, with an incorporation of a 'husband and wife' partnership). This also places the agent in a difficult position with their client if they cannot obtain certainty from Revenue Scotland regarding the tax treatment of a prospective transaction. And uncertainty over the tax cost of a proposed transaction may adversely affect a decision over whether to proceed.

Legislative differences between LBTT and SDLT

24. Areas that have given rise to debate amongst our members include those where the LBTT legislation is different from that for SDLT. For businesses that operate across the UK it adds to their complexities if the legislation in different jurisdictions has differences, and particularly so where these appear to be due to minor drafting changes.

25. There are also some areas of detailed policy in LBTT which lead to commercial outcomes that are different when compared with SDLT. Our members are unsure whether some of the differences in the legislation between SDTL and LBTT were purposeful decisions or if they were unintended consequences and, if the latter, whether these may be amended.

26. For example, this is the case in a demerger transaction where a property is transferred out of a trading company to another group company prior to the sale of the trading company. There are provisions which deny relief where there are arrangements for the company which acquires the property to leave the group in Sch 10 LBTT (S) Act 2013. It is understood that Revenue Scotland is of the view that relief is not available in these circumstances; but this is a different approach to HMRC where relief from SDLT would be available. We suggest that this detailed area of policy should be revisited. A proposed way to resolve this is included in the attached appendix.

27. Another example where Scotland may be put at a commercial disadvantage when compared with the rest of the UK is the lack of seeding relief for Property Authorised Investment Funds (PAIFs) and Co-ownership Authorised Contractual

Schemes (ACS). ACS and PAIF vehicles have been designed to encourage onshore collective investment in property. Collective investment offers benefits to the investor by offering asset diversification and a spread of risk. It offers benefits to the property market by introducing additional liquidity which should benefit the economy as a whole. Seeding relief is generally put in place to enable a transition to a new regime so as to remove a non-commercial cost of reorganisation where there is no economic disposal. Inevitably, if the fiscal environment appears to be disadvantageous, investment decisions may be influenced and Scottish properties within a UK portfolio may be excluded from a transfer into these collective investment regimes.

Interpretation of the law and lack of certainty

28. There are a number of areas where the technical guidance on LBTT does not give Revenue Scotland's views on the interpretation of the LBTT legislation whereas, in contrast, HMRC has given guidance in relation to SDLT. The published interpretation of the SDLT provisions is quite extensive, giving practitioners certainty as to the correct application of law. The vast majority of LBTT provisions are duplicates of SDLT ones. Despite this, it is unclear whether LBTT, and Revenue Scotland, follow the existing interpretation in the UK. It would be helpful from the practitioner's perspective to receive some sort of acknowledgement from Revenue Scotland of whether the interpretation and guidance for SDLT, at least in certain areas, is to be followed when interpreting LBTT provisions. Alternatively, if Revenue Scotland agrees with the interpretation of law in the UK, a similar guidance (such as manuals, tax bulletins etc) relating to LBTT could be replicated by Revenue Scotland. The current situation creates uncertainty for taxpayers who, when the LBTT legislation is identical to the equivalent SDLT legislation, might reasonably assume that a similar interpretation would apply.

The LBTT Additional Dwelling Supplement

29. The LBTT Additional Dwelling Supplement (ADS), which was introduced earlier in 2016 was delivered within a challenging timeframe and lessons could be learned from this in establishing future processes, and making sure that the introduction of any future tax legislation has had the benefit of going through a full and robust consultative process by interested stakeholders.

30. The ADS guidance issued in March 2016 is, on the whole, very helpful. It deals with many situations and gives clear guidance on how Revenue Scotland views matters. There were some gaps though, and in particular where there was a mix of non-residential and residential property and multiple dwellings where the new ADS applied. There appeared to be confusion on how this operated and, as noted in paragraph 23 above, the opinion service was not particularly helpful at a stage when clarity of treatment was sought.

Appendix

Proposed legislative change (see para 26 of our submission above)

Relief is denied in a demerger transaction where a property is transferred out of a trading company to another group company prior to the sale of the trading company and there are arrangements for the company which acquires the property to leave the group in Sch 10 LBTT (Scotland) Act 2013. It is understood that Revenue Scotland is of the view that relief is not available in these circumstances; but this is a different approach to HMRC where relief from SDLT would be available. We suggest that this detailed area of policy should be revisited.

This issue could be resolved simply by amending paragraph 7, schedule 10, LBTT(S)A 2013 to state that paragraph 5(b) does not apply to arrangements to which paragraph 9 applies. The arrangements to which paragraph 9 apply are those to which section 75 Finance Act 1986 (UK stamp duty) apply and for that section to apply the relevant acquisition must be effected for bona fide commercial reasons and must not form part of an arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to stamp duty, income tax, corporation tax or capital gains tax. A paragraph 9 arrangement must therefore be carried out for bona fide commercial reasons and consequently it is difficult to understand why paragraph 7, schedule 10, LBTT(S)A 2013 should not be amended as suggested.

Clarity sought in the interpretation of the law (see para 28 of our submission above)

There is an apparent conflict between section 22, LBTT(S)A 2013 (which imposes an LBTT charge by reference to market value where property is transferred to a company which is connected with the seller) and the partnership provisions in Part 4, schedule 17, LBTT(S)A 2013 when a property is transferred from a partnership (comprising individuals) to a connected company, when the chargeable consideration is based on the market value of the property but takes account of the fact that there may be no ultimate change in ownership by the individuals. In relation to SDLT HMRC have confirmed that the partnership provisions have precedence however, so far as we are aware, Revenue Scotland have not confirmed their views.

Submission from The Law Society of Scotland

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 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 legal 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 legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fair and just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

This evidence has been prepared on behalf of the Law Society by members of our Land and Buildings Transaction Tax working party, a sub-group of our Tax Committee. The working group welcomes the opportunity to respond to the Scottish Parliament's call for evidence on the operation of the Land and Buildings Transaction Tax in its first full year.

General Comments

Land and Buildings Transaction Tax (LBTT) is Scotland's replacement for Stamp Duty Land Tax (SDLT). It was introduced from 1 April 2015. LBTT is a tax applied to residential and commercial land and buildings transactions (including commercial purchases and commercial leases) where a chargeable interest is acquired. Revenue Scotland administers LBTT with support from Registers of Scotland.[1]

In November 2015, the UK Government proposed the introduction of a supplementary SDLT charge of 3% on the purchase of additional residential properties, to take effect from 1 April 2016. In order to ameliorate any distortions

[1] LBTT was introduced by the Land and Buildings Transaction Tax (Scotland) Act 2013 and came into effect from 1 April 2015 - http://www.parliament.scot/parliamentarybusiness/Bills/56718.aspx

between Scotland and the rest of the UK, the Scottish Government introduced a supplementary LBTT charge of 3% on the purchase of additional dwellings in Scotland. This additional charge is known as the Additional Dwelling Supplement ("the ADS").[2]

The impact on both the residential and commercial property market of the various rates and bands

LBTT is a progressive tax (like income tax) and slices of the price are charged at different rates on both residential and non-residential purchases.

Following changes in the December 2014 Autumn Statement, UK SDLT now also has progressive rates for residential purchases, and from 17 March 2016 for commercial property transactions as well.

Rates for non-residential purchases:

For LBTT the rates are:

3% for the part of the price between £150,001 and £350,000 and

4.5% for any excess over £350,000

For SDLT the rates are:

2% for the part of the price between £150,001 and £250,000 and

5% for any excess over £500,000

Rates for residential purchases:

For LBTT the rates are:

2% for the part of the price between £145,001 and £250,000

5% for the part of the price between £250,001 and £325,000

10% for any part of the price between £325,001 and £750,000 and

12% for any excess over £750,000

For SDLT the rates are:

[2] The ADS was introduced by the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill and came into effect from 1 April 2016 - http://www.parliament.scot/parliamentarybusiness/Bills/96000.aspx

2% for the part of the price between £125,001 and £250,000
5% for any part of the price between £250,001 and £925,000
10% for any part of the price between £925,001 and £1.5m and
12% for any excess over £1.5m

Essentially, some buyers are better off than they would be under the UK SDLT system. For some, there is little difference. For others, there is more tax to pay when purchasing a property in Scotland. The tipping point at which there starts to be a tax increase is for properties being purchased for over £333,050. Anyone purchasing a property above that level is paying more LBTT than they would under the UK SDLT regime.

We have some concerns about these diverging tax rates north and south of the border. At the upper end of the residential market, where LBTT rates are higher than SDLT rates, many purchasers are relatively mobile and can choose where they will live and purchase property. The existing rates of LBTT combined with the ADS has led to significant levels of amounts of LBTT being applied at the higher end of the residential property market in Scotland, with overall rates of 13% on property worth in excess of £325,000 and 15% on property worth in excess of £750,000. We have received feedback from practitioners that these levels of LBTT rates at the upper end of the residential market might be deterring clients from purchasing high value property. Whilst LBTT has undoubtedly been beneficial for first time buyer (because of the lower overall charge at the lower end of the market), it is possible that the higher rates have created a slowdown in the market in the upper bracket.

While LBTT rates will never be a dominant factor, increased divergence from rUK rates are bound to have an effect in marginal decisions; and it is obviously necessary that decisions on changes to UK rates are informed by the rUK position (as clearly happened with the introduction of ADS). The mirror of this may be said to have happened at the outset with the introduction of progressive rates of SDLT – but the difficulties of interaction were then clearly illustrated with the first announcement of LBTT rates requiring to be swiftly changed before their introduction, following the SDLT changes announced for rUK. This kind of “back and forth” process may on occasions be unavoidable, but it is undesirable.

It is also the case that, in absolute terms, the highest rate of LBTT (without ADS) is historically an extremely high marginal rate (and indeed, compared to historic SDLT average). Given that LBTT is a transaction tax incurred in a lump sum at the time of purchase, this levy represents a considerable additional initial burden for prospective purchasers already incurring significant transactional costs. Lenders may be less willing to extend loans to cover such additional costs given understandable tightening of the lending market since the last recession, and demands for increased equity funding by prospective purchasers.

Sub-sales

We remain concerned that there is no general sub-sale relief for LBTT. Following representations raised by the Society and others about the lack of sub-sale relief, the Scottish Government introduced a targeted relief. This Sub-sale Development Relief can be claimed in transactions where there is a sub-sale of land and significant development is in prospect.

The relief can be claimed up front by the purchaser who is buying the land and selling it on but the relief is withdrawn (in whole or in part) if development does not take place within 5 years. In sub-sale transactions where Sub-sale Development Relief is not available (which are common), LBTT is payable by both purchasers. This means there is a double LBTT charge compared with the position under SDLT.

We have concerns that a strict interpretation of the legislation does not allow for this Sub-sale Development Relief to be claimed at all. Section 14(1)(c) of the Land and Buildings Transaction Tax (Scotland) Act 2013 (LBTTSA) has created significant difficulties in this regard (see below). It is not possible to supply the necessary evidence at the point of contract to demonstrate qualification for the relief, as such evidence would not yet be available. This could prejudice the biggest developments in Scotland as they have the longest lead-in periods, which again will have a negative impact on economic development.

We are also concerned that a strict interpretation of the wording of Section 14(1)(c) of the LBTTSA suggests that in a sub-sale transaction where Sub-sale Development

Relief is not available, LBTT is payable by the mid-purchaser at the time the onward sale contract is entered into, and not when the contracts are completed. This makes no sense at all, since at that stage the mid-purchaser would have no funds to pay the LBTT and indeed the transactions may never actually complete. The rule applies even where the sub-sale is of a small part of the subject matter of the original transaction. Having to pay LBTT at the contract stage is not a requirement anywhere else in the LBTT legislation. We believe that the LBTT legislation should be amended to make it clear that on a sub-sale transaction where no Sub-sale Development Relief is available, the LBTT on both purchases is payable when the purchases complete.

Unlike SDLT sub-sale relief, Sub-sale Development Relief is not available where the sub-sale takes the form of an assignation.

We have anecdotal evidence of a number of transactions which have not proceeded because of the absence of sub-sale relief. In one case the position was as follows:-

> A client was purchasing six casinos (three in Scotland and three in England), and was putting together a deal to flip them on. Matters were far advanced commercially; however, the client withdrew from purchasing the three casinos in Scotland on learning that there was no sub-sale relief. The figures for the Scottish properties that did not proceed were:
> Casino 1: purchase price £5m; on-sale price £6m
> Casino 2: purchase price £2.1m; on-sale price £2.6m
> Casino 3: purchase price £6m; on-sale price £7.5m.

Other Differences between LBTT and SDLT

Under the UK SDLT higher rates system (the equivalent of the ADS), purchasers have 36 months rather than 18 months to claim a refund of the 3% supplement if they buy a new main residence before disposing of their previous main residence. Purchasers also have 36 months rather than 18 months between selling a main residence and replacing it with another main residence without having to pay the supplement.

There are other marked differences which overall make the SDLT supplement less financially onerous for those purchasing homes in the rest of the UK.[3]

We are concerned that the combination of these differences and the higher rates might, in the longer term, have an impact on the level of property purchases in Scotland, particularly at the higher end of the residential property market. Particularly in rural Scotland where there is a considerable market in second homes, the ADS may well have a detrimental effect (without proving enough of an incentive to first-time buyers unaffected by ADS).

The extent to which the rates and bands are consistent with the principles of "fairness, equity and the ability to pay"

We recognise LBTT was introduced as a progressive tax and believe that, generally, it is consistent with the principle of ability to pay because of its progressive structure. This is because the amount of LBTT payable relates more closely to the value of the interest in the property acquired compared to the old 'slab' system.

There has been a partial reintroduction of the 'slab' structure through the ADS, as the ADS is charged at 3% on the whole of the consideration, provided the consideration exceeds £40,000. The ADS is chargeable even if no LBTT would be chargeable because the price is below the nil rate band. This creates problems for purchases of properties at the lower end of the market as the supplement effectively creates a cliff edge at the £40,000 threshold. We can see no reason why the ADS could not have been introduced on a more progressive basis, in keeping with LBTT structures generally. As it stands, the structure of ADS is directly in conflict with the principles of fairness, equity and ability to pay. It is not a tax which has higher rates in relation to higher levels of consideration. The lower threshold for ADS and the slab structure in contrast to that for basic LBTT provides an underlying level of complexity which is undesirable (although it is recognised that a single rate of ADS does mitigate the complications arising from the two different structures). A similar degree of structural difference is seen in the need for apportionment between residential and

[3] For a summary of the differences see: http://www.gillespiemacandrew.co.uk/news-views/latest-news/2016/how-do-the-lbtt-and-sdlt-additional-home-surcharges-compare/

non-residential elements for ADS purposes, which does not exist in the basic LBTT structure.

More broadly, we believe that ADS, as currently applied, is not consistent with the principles of fairness. In our response on the ADS Bill, we suggested it would be more appropriate (and in keeping with the overall policy objective) for any acquisition of a main residence to attract only standard rates of LBTT. As things stand, home owners moving from one main residence to another are generally unaffected whether or not they own additional homes,[4] whilst the additional 3% is imposed on a person who is buying their first main residence if he or she has an interest in another dwelling. This latter scenario can arise through a number of situations e.g. inheritance of a part share on death of a grandparent/parent where the ability to sell that interest before acquiring the main residence can be limited (and the question of when the purchaser "owns" the inherited interest is opaque, to say the least). There are a range of scenarios which entail unplanned or temporary ownership of a property. The complications are such as to allow for the possibility of someone owning another interest (or because of the rules on connected persons, being deemed to own such an interest) without actually being aware that they are potentially liable for ADS. Such persons should not be in a worse position than those who already own a second home along with a main residence and are replacing the latter. We maintain that it would be fairer for any acquisition of a main residence to attract only standard rates of LBTT. It would be relatively straightforward to determine if a person is buying a main residence or not, given that it is a question of fact.

The ADS has an impact on the deposit savings of the buyer, either reducing the deposit percentage he or she can put down or prolonging the amount of time he or she is forced to save for. Additionally, at the higher end of the residential property market, there might be difficulties for the buyer in attracting lending for the large up-front sums required.

[4] They are able to reclaim ADS within the 18 month period.

Furthermore, there is perhaps some confusion as to the policy aims of the supplement. The ADS was ostensibly introduced to prevent housing stock being purchased by buy-to-let investors and instead allow more first time buyers to enter the market. The ADS legislation, however, provides a full relief from ADS for those buying six or more properties. The legislation therefore seems to incentivise larger purchases of the housing stock by single entities.

Penalties

In our view, the penalties which are chargeable for late submission of, or failure to submit, a return are disproportionate in relation to the errors that have been made. The maximum aggregate penalty for a late return will be 100% of the LBTT that was due so paying double LBTT. That is just the maximum aggregate for the late return. If the LBTT itself is also paid late (which is likely if the return is late) then there will also be interest and the relevant applicable penalty for late payment. We are aware that the LBTT penalties are higher than the SDLT penalties and we believe they are excessive and should be reviewed.

Penalties are also chargeable even where no LBTT is payable, for example where a relief such as group relief is available. We are particularly concerned about the imposition of late return penalties in connection with leases. Tenants have to submit lease returns every three years, as well as when a lease is assigned or terminated, even if no LBTT is payable. We are concerned that late return penalties could be charged in relation to “no LBTT” lease returns where tenants are not aware of the requirement to submit a return every three years. We believe the imposition of any penalty where no LBTT is payable is disproportionate and should be reviewed.

The level of receipts for residential and non-residential transactions in relation to the forecasts

The total LBTT tax take in its first year was £416.1m. The tax raised by residential LBTT was £201.9m, which was £33.1m less than expected. The tax raised by non-residential LBTT was £214.2m, which was £68.2m more than expected.[5]

[5] https://www.struttandparker.com/knowledge-and-research/scottish-government-lbtt-revenue-surpasses-target-due-boost-commercial-sales - Strutt & Parker analysis based on aggregated

A small number of large transactions within year one has meant that the commercial LBTT tax revenues delivered a higher amount than anticipated. It is difficult to estimate future levels of receipts on the basis of a small number of high-value commercial sales. Individual commercial transactions can be of such a size as to skew even annual receipts and forecasts. We believe that forecasts based on anticipated numbers of domestic transactions are likely to be more reliable.

The impact of forestalling and whether it is likely to have a short-term impact only or lead to longer-term changes in the market

It is difficult to measure levels of forestalling, but feedback from our members suggests that there was increased activity in the housing market in the run up to the implementation of LBTT on 1 April 2015 and also in advance of the ADS being introduced on 1 April 2016. LBTT revenues were likely to have been affected as households brought transactions forwards in order to minimise their tax bill. However, it is clear that tax changes such as these will always result in some people taking forestalling action. There are other organisations that will be better placed to comment on whether the forestalling activity will have a short term impact or lead to longer-term changes in the market. However, the undoubted existence of forestalling behaviour does have an impact on the timing and method by which future changes to LBTT are introduced, particularly but not exclusively in relation to changes in rates.

Whether there should be any changes to the rates and bands in the draft budget for 2017-18

In our evidence on the ADS Bill,[6] we commented on the partial return to the previous 'slab' system. We believe that the 'cliff edge' introduced by the ADS could be replaced with a more progressive system.

More generally, at the higher end of the residential property market, some of the same problems of the old 'slab' system have been recreated despite the 'slice' effect.

---

statistics from Acadata using Registers of Scotland licensed data. It includes data on all sales (not simply Strutt & Parker). February – the last figures available.

[6] http://www.lawscot.org.uk/media/687961/law-society-response-lbttamendbill.pdf

At this end of the market, there is a clear incentive where possible to apportion the maximum reasonable amount of overall consideration to items other than land and buildings; this creates a tension (and possibly significant expense) because of an understandable wish to minimise tax compared to the need to report such apportionments accurately.

The performance of Revenue Scotland in administering and collecting the tax

Overall, we believe that Revenue Scotland has been successful in administering and collecting the tax.

Our members have found the SETS online system easier to use than the HMRC SDLT system. It requires much less information to be provided than the SDLT online system, and all the information is relevant to the tax which some of the SDLT information is not. It is possible to amend LBTT returns online and to submit returns in advance, which is not possible for SDLT returns.

The online systems have generally worked well and there is clearly a dedicated staff team that works hard to fulfil the goals of the organisation. For example, the publication on a monthly basis of Revenue Scotland's aggregated figures for LBTT and ADS is very helpful.

Revenue Scotland and indeed the Scottish Government have been willing to engage in meetings, correspondence and discussion to a significant degree in attempts to smooth the introduction of, and developments in, the tax. We very much appreciate the positive and open environment in which such contact has taken place and sincerely hope that this continues, even in the relatively few situations where we disagree with the position taken.

We believe that there could be yet more, and more immediate, concrete results from this engagement. We would always welcome some more time to consider the input we can give and perhaps some more recognition that timescales for response make the kind of detailed input we would wish to supply difficult to achieve. As taxation becomes of more significance to the work of the Scottish Parliament, a more regular timetable for tax changes (see below) may improve the cooperative efforts even further.

There are certain areas where we believe the performance of Revenue Scotland could be improved.

Opinions Service

Revenue Scotland offers an Opinion Service.[7] It will, in certain circumstances, provide its opinion on the tax consequences of specific transactions. Revenue Scotland's website states that this service is offered in "order to allow taxpayers to file with certainty".

We have received mainly negative feedback from members about this service. Our members have reported that, following a request for an opinion, Revenue Scotland will often state that the person has not identified an uncertainty. This response can be issued a few weeks after a request is submitted. We appreciate that a request for an opinion should be specific but our members do not experience these difficulties obtaining a substantive opinion from the HMRC. This means solicitors are often able to obtain an opinion on a matter relating to UK SDLT from HMRC but cannot get an opinion on the equivalent Scottish position for LBTT (even where it relates to the same matter).

It is particularly important that the Opinions Service should work well in the early days of a new tax, as guidance is still being developed, and there are areas on which no guidance has been published. One of the areas of difficulty in relation to the Opinions Service has been in areas where HMRC have issued guidance but Revenue Scotland has not, but on being asked for an opinion Revenue Scotland have advised that they do not see an uncertainty.

We appreciate the existence of resource constraints, but speed of response is often essential especially in relation to commercial transactions; it is often unrealistic to expect transactions to complete without certainty as to the LBTT liability.

[7] https://www.revenue.scot/contact-us/revenue-scotland-opinions

We also believe that in a number of cases, opinions negative to a view put forward on behalf of a taxpayer have been issued without a reasoned response for the difference of view.

The opinions that have been issued by Revenue Scotland have not been published. We believe it would be helpful to publish the opinions where they cover common general areas. We cannot imagine that it would be difficult to anonymise the opinions. We query why Revenue Scotland does not, at least, provide a list of the areas where people have sought opinions and statistics on the numbers of opinions sought or issued. But in our view, a programme of publishing anonymised opinions may in fact conserve resources, as we are certain that fresh opinions on the same or even analogous matters would be less likely to be sought in the knowledge of the position taken by Revenue Scotland already.

Gaps in Guidance

Similarly, there is published guidance from HMRC for certain aspects of SDLT but there is no equivalent guidance from Revenue Scotland for the same areas. This creates ambiguity and has caused difficulties for clients.

In relation to SDLT, there are some areas where HMRC has been felt that there needs to be guidance. It would be helpful if Revenue Scotland could clarify if it would take the same approach as HMRC in these areas, particularly where there is no obvious reason why there would be any difference (as there is, for example, no difference in the underlying property law concepts and/or the wording of the legislation is identical or materially the same). We are aware of a number of areas, for example in relation to the meaning of substantial performance, where Revenue Scotland has indicated that it does not agree with HMRC's approach but has not published its own view. Taxpayers are keen to have certainty in relation to their tax affairs, and it is really essential that guidance in these areas is issued.

There are quite a large number of areas where guidance is limited or unclear – examples include the meaning of substantial performance, details for apportionments where these are required, the "Prudential" principle in contracts for purchase and construction and a significant number of questions on leases and in particular their variation (although guidance has been expanded on leases, especially on transitional issues).

Enquiries

Revenue Scotland has various statutory powers to help check that taxpayers meet their tax responsibilities and pay the right amount of tax at the right time. We are not aware that there have been many formal enquiries raised and would be interested in how many LBTT enquiries were opened by Revenue Scotland in the first year. This is an important aspect of Revenue Scotland's obligations, to ensure that the taxes are operating as intended and to detect and to deter the minority who do not comply with their obligations. We are aware that Revenue Scotland will be setting up a protocol for enquiries which might mean that there will be a greater number of enquiries in the future. However, given the resource constraints already mentioned, we trust that such enquiry efforts will be carefully targeted and if necessary constrained, as responding to enquiries which do not have a serious and realistic basis in expected error (or worse) generate considerable and unproductive expense for both Revenue Scotland and compliant taxpayers.

We are aware that Revenue Scotland has raised queries with taxpayers or agents which have been resolved without the need for a formal enquiry. We welcome this approach, but would suggest that it is still desirable for enquiries to be carried out on a risk basis for the reasons set out above.

Resource

We are concerned that the issues outlined above might be the result of a lack of funding in Revenue Scotland and that the organisation might not have access to sufficient resource to perform all of its functions in the most efficient and effective way.

We suggest that the Scottish Government reviews the resources spent by HMRC in administering and collecting SDLT (and whether that there have been any changes in funding due to recent changes in SDLT). This could help to provide a comparator for determining whether Revenue Scotland has sufficient resource.

Short Term Improvements

In the short term, we would suggest that Revenue Scotland:

- Sets up a support helpline to avoid the need for formal requests for opinions
- Produces a form of mandate
- Produces a 3 year lease form
- Drafts additional sections to the guidance, particularly where there are gaps and where SDLT guidance exists on the same wording. This is necessary and indeed urgent where Revenue Scotland's views differ from those of HMRC on the same or analogous wording
- Issues drafts of guidance for comment in areas of particular complexity
- Improves the Opinions Service so that it is easier for taxpayers to achieve certainty in relation to their tax affairs and also by publishing opinions requested and provided (on an anonymised basis).

Parliamentary Procedures

In relation to the implementation of ADS, Revenue Scotland carried out a range of activities to help with its introduction. The organisation had a very difficult task – the short timeframe between the announcement and date of implementation meant that advisers had little time to prepare themselves for the new regime.

The deadlines also affected timescales for parliamentary procedures and consultation on the ADS Bill. The Scottish Government sought to introduce the ADS at the same time as the SDLT supplement came into force in England and Wales (in order to mitigate the risk of any related impact on the Scottish property market). That meant that the usual consultation process could not be undertaken fully, in order to facilitate a truncated timetable for parliamentary consideration of the Bill.

At stage 1 of the Bill, the Finance Committee stated:

> "The Committee recognises that as more financial powers are devolved to Holyrood there will be occasions such as with the current Bill when a tension

arises between the need to take swift decisions on tax matters and the consultative principle which underpins budgetary and legislative scrutiny within the Scottish Parliament.

In particular, given the inevitable impact of tax policy changes at a UK level, as has already been clearly demonstrated in relation to residential LBTT, the Committee recognises the need to build an element of flexibility into the scrutiny process. In essence there is a need to balance the risk of not responding immediately to tax changes at a UK level with the risk of unintended consequences from making legislative changes without conducting a full consultation and full parliamentary scrutiny."[8]

We believe that further consideration should be given to the potential impacts on the devolved taxes of tax policy changes at a UK level. With the devolution of additional tax powers, both the Westminster and Holyrood Governments will need to work closely together to ensure that both Governments are aware of what the other is doing. This is particularly important in the context of mitigating the risk of tax changes in one jurisdiction impacting on the other.

We appreciate that in every tax jurisdiction situations might arise where changes may need to be made to the tax system swiftly without advance consultation. However, generally, and where there are significant changes involving complex legislation, we would welcome full discussion of principles and consultation before the necessary parliamentary scrutiny and the eventual passing of legislation. We would also be very grateful for any procedural reform that would lead to greater certainty on when announcements for proposed changes to the devolved taxes might be made.

The UK regime works with the annual Budget and Finance Bill cycle. Each year the Chancellor of the Exchequer presents the Budget, which contains all the tax measures for the year ahead. Traditionally the Budget has been in March, prior to

---

[8] 3rd Report, 2016 (Session 4): Stage 1 Report on the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill, Paragraphs 11 and 12: http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/96666.aspx

the start of the tax year on 6 April. More recently, some tax measures are also announced in the Autumn Statement, late in the calendar year. The latter in particular often contains detailed announcements, with opportunities for consultation and draft legislation made available. It is fairly well known when these announcements are likely to be made. The statutory provisions to effect these tax measures are generally set out in a single Bill: the annual Finance Bill. The UK also has the provisional collection of taxes regime which enables the UK Government to introduce changes to tax rates and amend tax thresholds on Budget Day prior to the Finance Bill receiving Royal Assent, subject to the House of Commons approving these measures.

We suggest that Scottish Ministers consider the introduction of an annual Scottish Finance Bill, with changes to the tax regime included in the Scottish Budget or within another fixed announcement. Providing a timescale for when the Scottish Government is likely to declare tax changes would help to ensure a greater level of certainty for the business community generally. We would also encourage Scottish Ministers to consider introducing a Scottish equivalent of the provisional collection of taxes regime which might allow for a more effective mechanism for altering changes to tax rates in particular; this method of operation is also extremely effective in relation to some anti-avoidance rules and militates against the forestalling mentioned earlier.

Finally, we are aware that HMRC has a close relationship with the Treasury, and that HMRC plays a greater role in the development of tax policy than Revenue Scotland does. Indeed some tax changes are promoted by HMRC rather than by the Treasury. We suggest that consideration is given to the creation of a “policy partnership” between Revenue Scotland and the Scottish Government to ensure that there is effective interplay between strategic tax policy development and policy implementation.

We have no further comments.