

These notes relate to the Land and Buildings Transaction Tax (Scotland) Act 2013 (asp 11) which received Royal Assent on 31 July 2013

LAND AND BUILDINGS TRANSACTION TAX (SCOTLAND) ACT 2013

EXPLANATORY NOTES

THE ACT

Part 2 – Key Concepts

Chapter 2 of Part 2 – Provision about Particular Transactions

General rules for contracts requiring conveyance

Section 8 – Contract and conveyance

28. Sections 8 and 9 establish the general rule that where a contract is to be completed by a conveyance it is the conveyance that represents the land transaction. This rule will apply in the majority of cases and ensures that a transaction is only charged to LBTT once. In a standard house purchase, the missives of sale are the contract and the disposition is the conveyance.
29. Special rules are provided for in sections 9 to 13.
30. Defined terms used in this section:

“completion”	section 64
“contract”	section 65
“conveyance”	section 65

Section 9 – Completion without substantial performance

31. Section 9 provides for the usual case where a contract is completed by a conveyance without having previously been “substantially performed”. The contract and conveyance comprise a single land transaction. In this case, the “effective date” would be the date of completion (i.e. in a normal house purchase, the date of settlement).
32. Defined terms used in this section:

“completion”	section 64
“contract”	section 65
“effective date”	section 63
“substantial performance”	section 14

Section 10 – Substantial performance without completion

- 33. Modifying the general rule in sections 8 and 9, section 10 also provides that if a transaction is substantially performed and then is formally completed, the contract and any subsequent completion are treated as two separate land transactions but tax is chargeable on the second transaction to the extent only that the consideration exceeds that on the first transaction. On the other hand if a contract is substantially performed but not completed, the contract is treated as the transaction.
- 34. The rationale for this provision is to remove any tax benefit in a buyer resting on his or her contract and having the effective enjoyment of the interest despite not proceeding to formal completion. Subsection (6) disapplies the section 10 provisions in a case where paragraph 25 of schedule 19 (agreement for lease substantially performed etc.) applies.
- 35. Defined terms used in this section:

“completion”	section 64
“contract”	section 65
“effective date”	section 63
“land transaction return”	section 65
“substantial performance”	section 14

Contract providing for conveyance to third party

Section 11 – Contract providing for conveyance to third party

Section 11 makes special provision for where a contract is entered into whereby one party to the contract (B) has the right to direct a conveyance to him/herself or to a third party (C). An example is a development agreement where the developer has the right to enter on the land and build on it and then direct the conveyance of the completed plots. The effective date of the contract is the date that the contract is substantially performed by B. Transactions within subsection (3) are always notifiable (see section 30(5)). Section 11 also ensures that it is the consideration that is given or is to be given by B that is charged to LBTT once substantial performance occurs.

- 36. Where B directs the original seller (A) to convey a plot to C, subsections (9) and (10) apply sections 8 to 10 to the contract between B and C and to the conveyance from A to C. The result is that C is liable to pay LBTT on the consideration paid to B, either on completion or on substantial performance by C.

Example: Contract providing for conveyance to third party
 Parties A and B agree in a contract that A will provide land for B to build new homes. A and B agree that A will transfer the homes to buyers found by B. B agrees to pay A £1.5 million with an initial deposit of £150,000. The effective date will be the day that B takes possession of the land and starts building the homes. At that point, LBTT is due to be paid by B on the agreed consideration of £1.5 million. Once the homes are built, A transfers ownership of each one to the buyers, each of whom will pay LBTT at the appropriate rates.

- 37. Defined terms used in this section:

“chargeable interest”	section 4
“contract”	section 65
“conveyance”	section 65

“effective date”	section 63
“land transaction”	section 3
“substantial performance”	section 14

38. The usual meaning of “completion” in section 64 is modified in subsection (10). This modification allows for a land transaction between B and C to be completed by a conveyance from A to C.

Options

Section 12 – Options and rights of pre-emption

39. **Section 12** deals with the treatment of options and rights of pre-emption (i.e. rights of first refusal). An option or right of pre-emption falls within the category of “other interest in or over land in Scotland” in section 4(2)(a). Therefore, where such an option or right is acquired, a land transaction is constituted. The land transaction will be chargeable to LBTT, depending on the consideration paid.
40. Where such an option or right is exercised, the transaction that arises as a consequence is a distinct transaction (although the two transactions may be linked) and chargeable to LBTT in its own right. Options fall within subsection (1)(a) even if the grantor can discharge his or her obligation either by entering into a land transaction or in some other way (e.g. payment of money). The effective date in relation to options and rights of pre-emption is when they are acquired, not when they become exercisable. If an option or right of pre-emption is chargeable as a land transaction in its own right, or because it is part of a wider transaction, then it is dealt with as such, rather than dealt with under this section.
41. See also paragraphs 6(b) and 11(b) of schedule 7 in relation to alternative property finance relief. Defined terms used in section 12:

“acquisition”	section 6
“effective date”	section 63
“land transaction”	section 3
“linked transaction”	section 57

Example: Options and rights of pre-emption

On 1 January 2016, Mrs Macdonald is granted an option by Mr Brown to buy his house on or before 31 December 2016. Mrs Macdonald paid Mr Brown for the grant of the option.

The acquisition of the option by Mrs Macdonald is a land transaction in its own right. Mrs Macdonald may have to make a land transaction return to the Tax Authority in relation to the option depending on what she paid for it and may be liable for LBTT.

Mrs Macdonald subsequently exercises the option on 1 December 2016.

The exercise of the option by Mrs Macdonald constitutes a separate land transaction from the grant of the option. The effective date of that land transaction is the date of completion of the sale of the house to Mrs Macdonald or, if earlier, the date of substantial performance.

Mrs Macdonald must make a land transaction return in relation to the purchase of the house to the Tax Authority.

A return or further return is also required in respect of the option, which is linked to the purchase since the buyer and the seller in relation to both the option and the purchase are the same (see sections 34 and 57).

The final LBTT payable by Mrs Macdonald in respect of both the grant of the option and the purchase of the house will be determined by the total consideration given by her for both the grant of the option and the purchase of the house. See section 26 for how the tax is calculated.

Exchanges

Section 13 – Exchanges

42. **Section 13** provides that, where parties enter into transactions that involve an exchange of land, they are treated as if they had entered into two separate land transactions which are not linked. Exchanges are often known as “excambions” in Scotland. Paragraphs 5 and 6 of schedule 2 are also relevant to exchanges.
43. Defined terms used in this section:

“buyer”	section 7
“linked transaction”	section 57

Interpretation

Section 14 – Meaning of substantial performance

44. **Section 14** defines “substantial performance”. This is where either the buyer takes possession of the whole or substantially the whole of the subject-matter of the transaction, or where “a substantial amount of the consideration” is paid or provided or where there is an assignation, subsale or other transaction whereby a third party is entitled to call for a conveyance to the third party. Whichever event happens first will trigger the charge to tax even though the contract has not been completed by, say, a conveyance.
45. One of the ways in which a buyer can take possession is if he or she receives or is entitled to receive rent in respect of the property. A buyer is treated as taking possession whether or not the right to possession is documented in the contract or by a licence.
46. Subsection (3) sets out when a substantial amount of the consideration is paid or provided:
- if none of the consideration is rent, it is when the whole or substantially the whole of the consideration passes,
 - if the only consideration is rent, it is when the first payment of rent is made,
 - if the consideration is partly rent and partly other consideration, it is when the whole or substantially the whole of the consideration passes, or when the first payment of rent is made.
47. See also paragraphs 6(a) and 11(a) of schedule 7 in relation to alternative property finance relief. Defined terms used in section 14:

“buyer”	section 7
“connected persons”	section 58
“subject-matter”	section 61