

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

15. **Part 2** makes provision for the key concepts underlying the tax including:
- which transactions are land transactions,
 - which interests are, and which are not, chargeable interests in land,
 - when a chargeable interest is acquired and the treatment of transactions involving contracts which require to be completed by conveyance as well as other kinds of transaction,
 - which land transactions are, and which are not, chargeable transactions,
 - what is, and what is not, chargeable consideration in relation to a chargeable transaction.

Chapter 1 of Part 2 – Land Transactions and Chargeable Interests

Land transaction

Section 3 – Land transaction

16. **Section 3** defines “land transaction” as the acquisition of a chargeable interest.
17. Defined terms used in this section:

| | |
|-----------------------|-----------|
| “acquisition” | section 6 |
| “chargeable interest” | section 4 |

Chargeable interest

Section 4 – Chargeable interest

18. **Section 4** defines “chargeable interest”, the acquisition of which constitutes a land transaction under section 3. A chargeable interest is a real right or other interest, in or over land in Scotland or the benefit of any obligation, restriction or condition affecting the value of any such right or interest. In simple terms, a chargeable interest is an interest in land, so an interest in moveable property such as kitchen “white goods” or furniture falls outside the scope of LBTT. The definition is very broad and captures more than the real rights in land known to Scots law; accordingly options to buy or sell land, licences to occupy land and certain statutory rights are chargeable interests. In some

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cases, certain interests are treated as being interests in land for the purposes of LBTT (see, for example, Part 6 of schedule 17 (property investment partnerships)).

19. Chargeable interests do not include exempt interests (see section 5). Subsection (3) reflects that under Part 4A of the [Scotland Act 1998 \(c.46\)](#) (as inserted by section 28 of the 2012 Act), a tax on interests in land in Scotland may not be imposed on so much of a transaction as relates to land below mean low water mark - therefore interests in the seabed fall outside the scope of LBTT.

Section 5 – Exempt interest

20. Pursuant to section 4(1), exempt interests are not chargeable interests. Section 5 defines “exempt interest” as a security interest, such as a standard security. In addition, certain interests are exempt if they have been acquired by financial institutions under alternative property finance arrangements (see schedule 7, paragraphs 21 to 24).
21. Power is conferred on the Scottish Ministers to vary by regulations the interests in land that are exempt interests. Such regulations will be subject to the affirmative procedure (see section 68).

Section 6 – Acquisition and disposal of chargeable interest

22. [Section 6](#) defines “acquisition” and “disposal”. The section sets out various categories of land transactions in terms of disposals by one party and acquisitions by the other. The creation, renunciation, release or variation of a chargeable interest constitutes an acquisition by one person and a disposal by another. Subsection (2) clarifies that the variation of a lease is treated as an acquisition and a disposal of a chargeable interest only where paragraph 29 of schedule 19 applies (reduction of rent or term or other variation of lease) applies.
23. In many cases an acquisition will be where an existing interest is transferred, for example title to a shop is sold and the buyer acquires the property. In other cases acquisition is when a new interest is created, for example a lease of a shop is granted and the tenant acquires the lease. Acquisition also includes where an interest is renounced or released, for example the lease of a shop is surrendered and the owner ceases to be subject to the terms of the lease and acquires free possession.
24. “Disposal” is construed in accordance with the meaning of acquisition. So in the examples given immediately above: the seller of the shop disposes of it when selling it to the buyer; the owner of the shop disposes of the lease in the shop when granting it; and, in the final example, the tenant disposes of the lease when surrendering it.
25. Subsection (5) clarifies that LBTT applies irrespective of how the acquisition is effected, and thus includes transactions arising from a court order or by operation of law, for example transfer by virtue of statute.

Section 7 – Buyer and seller

26. [Section 7](#) defines “buyer” and “seller”.¹ The “buyer” is the person acquiring the subject-matter of the transaction, and “seller” is the person disposing of the subject-matter of the transaction. But a person is not a buyer if they are not a party to or have not provided consideration for the transaction.
27. Defined terms used in this section:

| | |
|------------------|------------|
| “subject-matter” | section 61 |
|------------------|------------|

¹ The terms used for SDLT are “purchaser” and “vendor”, reflecting English conveyancing practice.

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

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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 |

Chapter 3 of Part 2 – Chargeable Transactions and Chargeable Consideration

Chargeable transaction

Section 15 – Chargeable transaction

48. **Section 15** defines “chargeable transaction”. Chargeable transactions will give rise to a charge to LBTT although that might not mean that any tax is payable if, for example, they fall within the nil rate tax band referred to in section 24.
49. Where a transaction is not exempt but section 27 (and a schedule referred to in it) provides for a 100% relief from the tax, the Act uses the words “exempt from charge” to make clear that no tax is payable. (The difference between a relief and an exemption is that a relief will have to be claimed in a land transaction return (see section 29)).
50. Defined terms used in this section:

| | |
|----------------------|------------|
| “land transaction” | section 3 |
| “exempt transaction” | section 16 |

Section 16 – Exempt transaction

51. **Section 16** defines “exempt transaction” by reference to schedule 1. Where a transaction is an exempt transaction, no tax will be payable and the transaction will not be notifiable (see section 30(1)(a)).
52. If a transaction falls outside the scope of LBTT (for example, a transaction involves only moveable property) then it is not liable to charge or to notification.

Chargeable consideration

Section 17 – Chargeable consideration

53. **Section 17** defines “chargeable consideration” by reference to schedule 2. The chargeable consideration is used to calculate the amount of tax due, as determined by sections 25 and 26.
54. Subsection (2) confers a power on the Scottish Ministers to amend by regulations the definition of chargeable consideration with respect to what is to count as chargeable consideration and as to how chargeable consideration should be calculated in specific cases. Such regulations will be subject to the affirmative procedure if they amend the Act itself. Otherwise, they will be subject to the negative procedure (see section 68).

Contingent, uncertain or unascertained consideration

Section 18 – Contingent consideration

55. **Section 18** provides that where the whole or part of the chargeable consideration for a transaction is contingent, the amount of consideration should be calculated on the assumption that the amount relating to the contingency will be payable, whether or not the occurrence of the contingency means that the amount will be payable or cease to be payable. So where a contingency affects the eventual amount of consideration, buyers must calculate the consideration on the basis that the amount relating to the contingency will be payable. “Contingent” is defined in subsection (3).

Section 19 – Uncertain or unascertained consideration

56. **Section 19** provides that where the whole or part of the chargeable consideration for a transaction is uncertain or unascertained, the amount of consideration should be calculated on the basis of a reasonable estimate of the outcome. So where the consideration is uncertain or has not yet been ascertained – for example, where it is based on profits in accounts which have not yet been drawn up – buyers must make a reasonable estimate of the final consideration as at the effective date of the transaction.

Section 20 – Contingent, uncertain or unascertained consideration: further provision

57. **Section 20** clarifies that sections 18 and 19 on contingent, uncertain or unascertained consideration are to be read with sections:
 - 31 (return where contingency ceases or consideration ascertained),
 - 32 (contingency ceases or consideration ascertained: less tax payable), and
 - 41 (application to defer payment in case of contingent or uncertain consideration).

Annuities etc.

Section 21 – Annuities etc.: chargeable consideration limited to 12 years’ payments

58. **Section 21** determines how LBTT will apply where the chargeable consideration is in the form of an annuity. Where an annuity is paid as consideration for a land transaction, the chargeable consideration will be taken to be a one-off payment comprising twelve years’ payments. Where the payments vary, the twelve highest payments will be taken into account. LBTT will accordingly be payable as a single payment.
59. Subsection (9) clarifies that there is no provision for LBTT payments to be deferred, or for an adjustment of the amount of tax paid if, at a later date, an actual payment differs from a reasonable estimate, say, of the payment made when the tax was assessed.

Deemed market value

Section 22 – Deemed market value where transaction involves connected company

60. LBTT is generally calculated by reference to actual consideration and not market values. However, section 22 provides that LBTT will be charged on the full market value of any land purchased by a company with which the seller is “connected” (within the meaning of UK Corporation Tax law) if the consideration involves the issue or transfer of certain shares. For example, if land is purchased by a company from another company which is connected with the buyer in consideration for the issue of securities whose value is less than that of the land, then the section ensures that LBTT is charged on the market value of the land.
61. A special definition of “company” applies for the purposes of this section (the definition is wider than the general definition of “company” in section 65).
62. The general rule that transactions with zero chargeable consideration are exempt does not apply to transactions falling within this section. Otherwise, this section does not affect situations where specific exemptions or reliefs apply. It is also subject to the exceptions provided for in section 23.
63. Defined terms used in this section:

| | |
|---------------------|------------|
| “connected persons” | section 58 |
| “market value” | section 62 |

Section 23 – Exceptions from deemed market value

64. **Section 23** provides three exceptions from the connected company rules in section 22 for transfers to independent corporate trustees and distributions of land, including distributions on liquidation, to corporate shareholders, other than in specific circumstances. Where the exceptions apply, the charge to LBTT will only apply to any chargeable consideration paid for the transaction.