



## Consultation Response

# Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill

## Call for Evidence

Date: 27 September 2016

### Introduction

1. The CLA is the membership organisation for owners of land, property and businesses in rural England and Wales. We help safeguard the interests of landowners and those with an economic, social and environmental interest in rural land and the rural economy. CLA Cymru has 3,300 members in Wales who between them own and manage about half of the rural land in Wales. Our membership is engaged in all sectors of the rural economy and includes farmers, landowners and around 250 types of rural business.
2. We welcome this opportunity to respond to the call for evidence by the Finance Committee. In commenting on the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill we have focused on our areas of concern.

### Land Transaction Tax

3. As can be seen from the length of the Bill, the legislation on Stamp Duty Land Tax (SDLT) and the new Land Transaction Tax (LTT) is complex. However, SDLT has been in place since 2003 and it is understood by advisers, so we welcome the decision of the Welsh Government to maintain consistency with existing legislation on SDLT. Where there are differences, it would be helpful if a document setting out the differences as a quick reference guide could be published to assist taxpayers and their professional advisers. It should be remembered that responsibility for complying with LTT will fall on property lawyers, rather than experienced tax advisers, so anything that can make their role easier is to ensure compliance is to be encouraged.
4. Differences between the two régimes will particularly have an impact on those seeking to purchase land that straddles the E/W border and their professional advisers. We believe that something like 25% of the Welsh population and 10% of England's live within 30 miles of the border. Whilst we acknowledge the need of the Welsh Government to establish the rates and bands for LTT that are most suitable to Wales, there is a risk of market distortions should there be any significant

difference between the two tax régimes. An individual taxpayer or business looking to purchase property or take a long lease of commercial premises, for example, may chose to do so just over the border in England rather than in Wales if the LTT régime in Wales is that much less attractive to them and they are in a position to make that choice. A factor affecting many property acquisition decisions may be the tax payable as part of their purchase costs.

5. Policy decisions taken, not just on the LTT rates and bands, but also in relation to planning and housing policy, may have a negative impact on the number of transactions, leading to a reduction in the amount of revenue from LTT available to fund public services, including the cost of running the new Welsh Revenue Authority. Whilst we note that there is an acknowledgement in the paper '*Land Transaction Tax: Setting Rates and Bands*' that tax strategy and policy decisions can be used to support wider policy aspirations, it is also important to take into account the impact other policy measures may have on tax receipts and policy.
6. We consider that the Welsh Government should have the flexibility to react to changes in the economy or to mirror any changes to SDLT in England by changing the rates or bands at short notice. However, if any changes are proposed that alter the structure of the new tax then this should be subject to consultation.
7. In a significant number of cases the provisions of the Bill are to be supplemented by regulations which have not yet been published in draft form. This makes it difficult to assess the full impact of the legislation contained in the Bill. Regulations are generally not subject to the same level of Assembly scrutiny as primary legislation. While we understand the logistical pressures that compel the use of regulations to supplement primary legislation, we feel that it is important that regulations should be published in draft form and should be the subject of a consultation so that adequate consideration can be given to their effectiveness. We also recommend that the default position is that the regulations should be made by a positive approval procedure rather than the negative resolution procedure.
8. We are disappointed that the Welsh Government has not taken the opportunity to address the issue of the consideration on which the LTT will be payable. The current position for SDLT purposes, which is reflected in clause 8 and Schedule 4, paragraph 2, is that chargeable consideration will include any VAT charged in relation to non-residential property, where the vendor or a landlord in relation to the granting of a commercial lease has opted to tax their land. This will result in LTT being paid on an amount of VAT which does not in reality form part of the consideration as it is recoverable by the purchaser/lessee from HMRC if they themselves are VAT registered. In our view, the imposition of a tax on a tax is unacceptable and is perceived as being unfair. We would therefore recommend

that the same approach is adopted in Wales as in Ireland<sup>1</sup> so that the VAT element of consideration is ignored in calculating the LTT due. If the policy of excluding VAT is adopted this may make Wales a more attractive place for business to locate and to invest in their business property.

9. We note that the Welsh Government has opted to use the same definition of residential property in clause 71 that currently exists for SDLT in section 116(1) Finance Act 2003. Difficulties can arise with the definition, particularly as to the term “suitable for use as a dwelling” or what is meant by “garden or grounds”. The latter can cause particular difficulty for property in rural or semi-rural areas where homes are typically bought with a number of accompanying acres which may not be clearly designated as gardens or grounds. As clause 71 mirrors the existing SDLT terminology, then in our view these terms should be defined so that the taxpayer does not have to rely on inadequate guidance to determine their tax position.
10. The Bill adopts the same treatment of non-residential leases as that for SDLT purposes. This means that it can be complex, particularly in calculating the tax payable, where the rent is not certain, for example an element of the rent is linked to a tenant’s income/profits. More certainty could also be given whether the LTT would be chargeable and how much is chargeable in situations such as those that can arise in relation to agricultural tenancies where there is no lease premium and only a rent is paid. The existence of online calculators and clear guidance will be essential.
11. For those wishing to take on farm tenancies of over 7 years, consideration will have to be given to any potential LTT liability on the granting of such longer term tenancies. The need to pay LTT may act as a deterrent to tenants taking on longer term arrangements. If the Welsh Government and, more particularly, Assembly members wished to encourage farmers, and particularly new entrants to the industry to take on longer tenancy arrangements, they could facilitate these longer terms by exempting agricultural tenancies from LTT. This will also prevent the difficulties that arise if an Agricultural Holdings Act tenancy (AHA) is surrendered and converted to modern farm business tenancy, with a successor to the AHA tenancy included as a tenant on the new tenancy. Such a surrender and re-grant would not be excluded from LTT by virtue of paragraph 17 of Schedule 5 of the Bill. Paragraph 17 only applies on surrender and re-grant “between the same parties”. Unfortunately the current SDLT position in these circumstances can be very unclear, as the SDLT manuals do not address agricultural tenancies, only more common residential and business leases and there is little in the way of case law to

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<sup>1</sup> See Sections 48 and 56 of the Stamp Duties Consolidation Act 1999:  
<http://www.irishstatutebook.ie/1999/en/act/pub/0031/index.html>

assist. This is an opportune moment for Wales to lead the way and simplify the position for farm tenants.

12. Clause 43 imposes a duty on the buyer of property to make a return to the Welsh Revenue Authority (WRA). The returns that currently need to be completed for SDLT can be lengthy and time-consuming, whether this is done online or not. Much of the information that has to be provided in the SLDT return is not required to determine the liability to pay SDLT or the amount due. We would encourage the Committee to recommend that the Welsh Government does not follow this example and provides that the returns required by clause 43 are simpler and limited to the information required to ascertain the taxpayer's liability to pay LTT and the amount due.
13. As with any tax, clarity and certainty for taxpayers and their agents should be a priority for the Assembly, the Welsh Government and the WRA. Certainty as to how tax legislation applies to a particular taxpayer and their particular circumstances also aids compliance. Access to comprehensible guidance and assistance will help enormously in the ease of operation of the LTT. The WRA could improve the position by providing more comprehensive and clearer guidance than that currently available from HM Revenue and Customs for SDLT. Consulting relevant stakeholders will help to ensure the guidance to be provided meets the needs of taxpayers and their advisers.

### **Anti-Avoidance**

14. The Bill introduces a general anti-avoidance rule (GAAR) into the Tax Collection and Management Act. Whilst we recognise the importance of the ability of the WRA robustly to tackle tax avoidance across devolved tax legislation, and help to deter and prevent tax avoidance, it is disappointing that the Welsh Government has decided to include in this Bill its own GAAR, rather than to mirror the existing UK general anti-abuse rule, introduced in the UK by the Finance Act 2013 after a lengthy period of consultation with stakeholders. Whilst the Welsh Government consulted on whether a GAAR should be introduced for Wales, it has not consulted on the scope of the GAAR that is now included in clause 65.
15. It should be remembered that avoidance (unlike evasion) is perfectly legal and is usually taken to mean the structuring of a person's affairs in a way that minimises the tax payable. However, the language used by politicians in the UK and elsewhere (such as in the OECD) in the ongoing debate on these issues seems to be confusing avoidance with evasion. There is an argument that the boundaries between very aggressive avoidance and evasion are sometimes blurred.

16. A tax avoidance arrangement is defined in proposed section 81C as an arrangement that is “artificial”. However, the definition of “artificial” in proposed section 81C leaves scope for doubt. What is a reasonable course of action for one person, may not be for another. Where legislation is complex, this in itself can give rise to uncertainty, particularly if there is a lack of clarity as to the “anticipated result” when the provision was enacted. Effective working of the GAAR will depend on the ability of the taxpayer and their advisers to be able easily to identify what the purpose of the legislation is. One of the difficulties with existing tax legislation, including that on SDLT and the application of the current UK GAAR, is that it can be a challenge to determine with any certainty what the anticipated result of the legislation is.
  
17. It has previously been recognised in the published principles for Welsh taxes that it is important to be fair to businesses and individuals who pay them; be simple, with clear rules that seek to minimise compliance and administration costs; and provide stability and certainty for taxpayers. It is not clear whether it is intended to produce guidance to clarify the approach of the WRA in applying the GAAR. Proposed section 81C of the TCMA(3) provides that the WRA will indicate its acceptance of generally prevailing practice and detailed practical guidance would be the natural home for the WRA to do so. It would also meet the principles for the Welsh tax system. The UK GAAR is supported by detailed guidance that is approved by the GAAR advisory panel. Although we agree that it is not appropriate to have guidance approved by a similar advisory panel at this stage, as the GAAR is likely to be extended to other devolved taxes, we believe there should have been a full consultation on both the rule and accompanying detailed practical guidance prior to the introduction of the rule into a Bill before the Assembly to ensure that taxpayers and their advisers can be certain of its scope and application.
  
18. The majority of CLA members own and farm their own land, but a significant number let land to tenant farmers and run wider, diversified rural businesses. CLA members on the whole hold land for generations. It is commonplace for our members to enter into arrangements, which owe more to concerns about succession planning than to tax planning and as such we would not wish to see a rule put in place, without clear detailed guidance that will hinder such succession planning.
  
19. We are pleased to see that the onus will be on the WRA to show that any particular arrangement is artificial (proposed section 81E).

### **Disclosure of Tax Avoidance Schemes**

20. The existing UK disclosure of tax avoidance schemes rules (DOTAS) are understood by professional advisers and there is little benefit in having a separate

system for Wales, particularly as the taxes it would cover are less likely to be the subject of marketed avoidance schemes. This is evidenced by the fact that the number of SDLT schemes disclosed to HMRC in 2014 were fewer than 5, a substantial decrease in the number of schemes from the high of 485 schemes in 2005-06<sup>2</sup>. This is no doubt influenced in part by the publication of a warning notice by Solicitors Regulation Authority in 2012 following concern about the promotion or facilitation of SDLT schemes<sup>3</sup>.

21. The Welsh Government has the opportunity to ensure that the taxes it develops are based on firm principles, are fair and certain and clearly set out in legislation so that there is less scope for the type of schemes that are the subject of the DOTAS régime.

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**For further information please contact:**

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/379821/HMRC - Tax avoidance disclosure statistics 1 Aug 2004 to 30 Sept 2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/379821/HMRC_-_Tax_avoidance_disclosure_statistics_1_Aug_2004_to_30_Sept_2014.pdf)

<sup>3</sup> <http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Stamp-duty-land-tax-schemes--Warning-notice.page>