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1. Terms of reference

To review the provisions of the draft Taxation (Land Transactions) (Jersey) Law 200- which seeks to introduce an equivalent to stamp duty on share transfer transactions involving immoveable residential property in Jersey;

To report to the States on the draft legislation;

To introduce any amendments as considered necessary; and

To examine the difficulties involved in extending the law to commercial properties

2. Panel Membership

The Corporate Services Panel is constituted as follows –

Deputy P.J.D. Ryan, Chairman
Deputy C.H. Egré, Vice-Chairman
Connétable J. Le Sueur Gallichan
Connétable D. J. Murphy
Deputy R.G. Le Hérissier

Scrutiny Officer: M. Haden

3. Independent Expert Adviser

The Panel engaged the following adviser to assist it with the review –.

Mr. Richard Teather, BA, ICAEW, a senior lecturer in Tax Law at Bournemouth University; a Freelance Tax Consultant and a writer on Tax Law and Policy.

4. Executive Summary

4.1 Summary

The Corporate Services Panel has reviewed the draft Taxation (Land Transactions) (Jersey) Law 200- which introduces a land transactions tax on residential share property transactions.

The Panel has not sought to re-examine the principle of the law which seeks to establish equity between purchasers of share transfer and freehold properties with respect to the financial costs of the transaction as the principle has already been approved by the States. Instead, the Panel has looked closely at questions related to the extent to which the draft law will cover all share transfer transactions, the operation and administration of the law and the effect of the law particularly on first time buyers.

The new tax will bring in additional revenue to the States and we have urged the Minister to consider using this income to provide additional relief to all first time buyers, whether by share transfer or flying freehold, in order to alleviate the well-known problems facing young people in taking their first steps on to the housing ladder.

The Panel considered the features of share transfer flat transactions in comparison with flying freehold and recognises why this mechanism has been uniquely popular in Jersey. The Panel has concluded that the introduction of the new tax represents an opportunity to favour the creation of flying freehold flat developments rather than share transfer in the future and we have asked the Minister to consider this issue in reviewing the discounts available to first time buyers.

In a subsequent report the Panel will examine the issues involved in extending the tax to cover commercial property transactions. We have had some initial discussions with witnesses on this issue and we have seen enough to recognise that this is a very complex area. Without prejudging our subsequent review, it is fair to say that the potential revenue yield from taxing commercial property transactions is an important consideration and should provide the Treasury with sufficient motivation to find a workable solution to this issue.

4.2 Key Findings

- 4.2.1 One of the consequences of the draft law will be that for the first time a full set of information about share transfer properties will become available (section 6.1).
- 4.2.2 The introduction of LTT will not in itself lead to a significant shift away from the creation of new share transfer apartment blocks in favour of flying freehold (6.3).

- 4.2.3 If the draft law is approved non resident investors will be liable to pay LTT on their investment properties. The fact that they are not qualified to occupy the property does not exclude them from the obligation to pay the tax. The purchase of multiple share transfer units by persons who wish to let those properties would still attract LTT on the initial purchase of each property (6.4).
- 4.2.4 The fact that J-category employees are obliged to purchase through a company does not give rise to an increasing number of share transfer properties (6.6).
- 4.2.5 The historical exceptions to the general restriction on company acquisition of residential property represent an insignificant proportion of the housing market although the value of individual properties may be substantial (6.7).
- 4.2.6 The potential yield from commercial share transfer property transactions is an important consideration and should provide the Treasury with sufficient motivation to find a workable solution to this issue (7.8).
- 4.2.7 The fact that LTT will be charged only where there is a transfer of shares in a company which also gives the purchaser the right to occupy residential property in Jersey (article 3.2 of the draft law) does not mean that the residential qualification policies of the Housing Law are superseded. Payment of the tax does not give a share transfer property owner the automatic right to occupy the property (section 8).
- 4.2.8 The current Housing Policy which enables people to purchase a flat, whether by share transfer or flying freehold, and still retain their status as First Time Buyers if they wish to move into a larger property within the definition of the Housing Departments' restricted First Time Buyer market will not be altered by the introduction of LTT (9.1).
- 4.2.9 Owners of share transfer flats, having claimed a discount on LTT as first time buyers, will not also be entitled to the discount rate on stamp duty on purchasing a freehold property in the restricted First Time Buyer market (9.2).
- 4.2.10 The additional revenue for the States raised through LTT could be used by the Minister to increase reliefs for all first time buyers, whether they are purchasing a flat or a freehold property in the restricted First Time Buyer market (9.3).

4.3 Recommendations

- 4.3.1. The Treasury and Resources Minister is requested to consider
- (a) the potential benefits of encouraging developers to use flying freehold rather than the share transfer mechanism for future property developments; and

(b) whether, by creating a relatively small differential in the discount available to share transfer first time buyers under the Taxation (Land Transactions) Law 200- in comparison with the Stamp Duty and Fees (Jersey) Law 1998, he might nudge the market in the desired direction (6.3)

4.3.2 The Panel requests the Minister to review the exclusion of co-habiting couples and same sex couples from reduced rates of LTT (7.7).

4.3.3 The Panel supports the Housing Minister's intention to review the policy on allowing flat owners access to restricted First Time Buyers properties in order to ensure that share transfer properties are sold to first time buyers - in the same way as flying freehold operates (9.1)

4.3.4 The Treasury and Resources Minister is requested to review in the next Budget the current reliefs available to first time buyers in respect of both LTT and stamp duty taking into account the revenue to the States from the new tax (9.3).

5. Introduction

In 2005 the States unanimously approved proposition P211/2004 which charged the then Finance and Economics Committee with preparing the necessary legislation for consideration by the States to introduce stamp duty on share transfer transactions involving immoveable residential and commercial property in Jersey.

After extensive research and consultation with interested parties the Treasury and Resources Minister lodged P.185/2007, the draft Taxation (Land Transactions) (Jersey) Law (the 'draft law') in December 2007.

Effectively the draft law prevents the common use of 'share transfers' to avoid stamp duty on residential property transactions by imposing a new tax ('land transactions tax' LTT) on share transfers, where there is an underlying interest in Jersey land^[1]. However, it is more restricted than the original proposition -

- firstly, it was limited to sales involving residential property due to the complexities which had been encountered by the Treasury in bringing commercial property transactions into the remit of the law;
- secondly, it only applies where shares also give their owner the right to occupy that property.

The Minister advised the States in his opening speech on the preamble to the draft law:

Having come to appreciate the complexities of the drafting and realising the difficulties even in the case of residential property, we decided to put commercial property transactions to one side for the time being. I make these preliminary remarks because I am conscious of the fact that we have already, in fact, in effect agreed the principles of the legislation when we agreed and accepted the proposition of the Deputy of St. Martin. The proposition before us today tries to bring the essence of that proposition into legal form, at least as far as residential property is concerned. Once that legal form is established, we shall see how it might be extended to share transfer transactions involving commercial property^[2].

The States debated the preamble to the draft law on 12th March 2008 and approved the principle of the land transactions tax (LTT). It was then agreed to refer the draft law to the Corporate Services Panel for detailed scrutiny of the provisions of the law and their effect. This is the subject of this first report to the States.

It was also understood that the Panel would examine the complexities of taxing commercial property. This aspect will be dealt with subsequently in a second report. Although we have not fully examined the issue, we have had some initial discussions with witnesses and we seen

enough to recognise that this is a very complex area.

For example, when an unincorporated business is sold, stamp duty is charged on the proportion of the price that relates to Jersey land (whether a shop, a factory or a farm). Applying this to the purchase of shares means that if any company (or group of companies) owns land in Jersey, a proportion of the purchase price of those shares would be subject to Jersey stamp duty. One problem is that many UK shops, banks and other companies operate in Jersey, and some of those will own their own premises; it would be an impossible situation to declare that Jersey stamp duty were payable every time anyone, anywhere in the world, bought shares in one of these non-Jersey companies.

We therefore agree with the Treasury Minister's policy of bringing forward a law on residential property first, whilst continuing to work on options for taxing commercial property.

6. Background to residential share transfers

6.1 Lack of statistical evidence

An increasing proportion of the Island's supply of housing is via apartments and these are frequently share transfer. It is estimated that share transfer transactions constitute about 60% of all sales of apartments^[3].

It is commonly believed that the majority of share transfer transactions are at the lower end of the price scale. Mr. R. Trower of Broadlands Estate Agents told the Panel:

The majority of share transfer transactions are for apartments at the lower end of the property market and usually purchased by youngsters entering the property market for the first time or by elderly people looking to retire and 'scale-down'. Both of these groups find the non-imposition of stamp duty to be of great benefit as neither of them can afford to be profligate with their money. It is obvious therefore where this proposed new tax will have the most effect^[4].

It has not been possible to verify this assumption with firm statistical evidence. This would require a comprehensive survey of transactions conducted by estate agents and an enquiry by the Panel produced only a meagre response.

This brings into focus one of the key difficulties with regard to assessing the impact of share property transactions on the housing market in Jersey. Sales occurring through share transfers are not processed through the Royal Court and therefore information on transaction prices is not readily available. Neither the Statistics Unit nor the Population Office were able to supply us with relevant information.

The Director of the Population Office informed us:

Share Transfer sales are not controlled by the Housing Law - we simply control occupation, and the applications submitted in this regard are received each time either a tenant changes or the shares change hands, nor do they specify the value of the property...As such, we cannot give you information on volumes or values of share transaction information.^[5]

The Panel notes that one of the consequences of the draft law will be that for the first time a full set of information about share transfer properties will become available.

6.2 Historical development

The share transfer mechanism developed in a unique way in Jersey as a means of dealing with the conveyancing of apartments. Mr. Le Quesne, an experienced conveyancing

practitioner, informed the Panel:

Share transfer is a very artificial means that was devised more than 40 years ago to overcome the problem of being unable to mortgage a long lease and unable to convey an apartment, or part of a building. I am not aware of any other jurisdiction which has an exactly similar form, although lots of jurisdictions have something similar to the flying freehold law. But the share transfer is very peculiar to Jersey. Before 1991 you could not convey the freehold ownership of an apartment. You could grant a long lease of the apartment but you could not mortgage that. So, this means of passing exclusive right of occupation was devised, and one has to remember that no shareholder has any interest, direct interest, in the property belonging to the company. They do not have an interest in the freehold at all. They are only interested in the shares which give them the right of exclusive use occupation. The words are, "exclusive use and occupation". It does not infer the word "ownership" because the ownership rests with the company^[6].

Share transfer transactions however incur additional complications for the flat owner as there are requirements for annual company registration and other company administrative overheads.

Nevertheless share transfers have remained attractive principally because of their most significant advantage which is freedom from stamp duty. This advantage will be lost with the introduction of LTT.

6.3 Flying freehold - an alternative to share transfer?

Despite the introduction of flying freehold in 1991^[7] many new developments have continued to use the share transfer mechanism. The Panel was interested to know whether the introduction of the new tax on share transfer transactions might encourage a phasing out of the share transfer market and a general movement towards flying freehold status.

For the property owner freehold status provides the advantage of owning immovable property rather than shares in a company and removes the additional burdens imposed by the requirement to establish and administer a limited company.

For the States there are also advantages in encouraging the development of flying freehold rather than share transfer

- Stamp duty is straightforward to collect and without the current extensive share transfer market there would be no need to establish the separate administrative process required to supervise the LTT.

- Furthermore, sales of flying freehold flats are regulated by the Housing (Jersey) Law 1949. This means that the Housing Department can exercise its ownership policies whereas share transfer properties are free of these restrictions. In the Panel's view, Housing Policies should be applied fairly across all types of property. (An example of the current lack of fair treatment is the First Time Buyer policy - see further discussion below).
- Finally, flying freehold property developments are clearly designed for the benefit of the local residential population rather than the overseas investor.

Mr. Hart, a member of the Jersey Law Society Conveyancing Sub Group, informed the Panel that the complications in transferring existing share transfer properties into flying freehold would be considerable:

I do not think, just because of the sheer difficulty and administrative problems associated with it, that there have been any, that I am aware of, conversions from share transfer to flying freehold. So, all flat developments and conversions done prior to 1991 would be, and remain, share transfers. So, all those are continually turning over and indeed there have been quite a number of developments, notwithstanding the advent of the freehold law that have been structured as share transfers.... in order to convert a block of apartments from a share transfer structure to a flying freehold structure you would need every single owner to consent^[8].

Mr. R. Kirkby, Jersey Finance, told the Panel it would be very difficult to achieve an objective to phase out share transfer transactions entirely:

I believe it would take decades to unwind the current situation, particularly where you have properties that are owned either by Jersey or non-Jersey companies or by non-Jersey trusts. So although you are not allowed to hold a Jersey property in a Jersey trust, you can hold a Jersey property in other jurisdictions' trusts.^[9]

Panel comment

The Panel believes that it is in the best interests of the Island to encourage developers to create flying freehold properties rather than to extend the range of share transfer apartment blocks. It believes that the Treasury and Resources Minister should consider ways in which the property market might be influenced to move in this direction.

One way in which we believe that this might be achieved would be to discriminate in favour of flying freehold developments in terms of the discounts on stamp duty and LTT available to first time buyers. Later in this report (see section nine), we suggest that the Minister should review the discounts available to first time buyers at the time of the Annual Budget and consider the merits of an upward review of discount rates for all first time buyers. **In this context, we**

suggest that the Minister could, by creating a relatively small differential in the discount available to share transfer first time buyers under the Taxation (Land Transactions) Law 200- in comparison with the Stamp Duty and Fees (Jersey) Law 1998 nudge the market in the desired direction, with consequent long term benefits.

The effect of this proposal will be to make share transfer flats slightly less attractive to the purchaser. While existing share transfer owners may claim that this might deflate to some extent the potential value of their property, it might also be argued that they have previously benefited from the lack of stamp duty on their original purchase. Future potential property purchasers will be able to take account of the differential between freehold and share transfer and will be able to make an informed choice accordingly between the types of property with full knowledge of the cost implications.

Recommendation

The Treasury and Resources Minister is requested to consider

- (a) the potential benefits of encouraging developers to use flying freehold rather than the share transfer mechanism for future property developments; and**
- (b) whether, by creating a relatively small differential in the discount available to share transfer first time buyers under the Taxation (Land Transactions) Law 200- in comparison with the Stamp Duty and Fees (Jersey) Law 1998, he might nudge the market in the desired direction.**

6.4 Ownership by non qualified residents

One aspect of share transfer properties which often bothers people is the fact that anyone can purchase residential share transfer property whether they are resident in Jersey or not, and whether they have housing qualifications or not. This stems from the fact mentioned above that the actual ownership of share transfer apartments is not something which is controlled by the Housing Department and Housing Consent is not required when shares change hands. The Department does, however, exercise control over occupation of share transfer apartments, which is restricted to category A - H residentially qualified individuals in accordance with general Housing Department policy.

Thus, apartments may be purchased by non qualified individuals but for investment purposes only. The Population Office estimates that 16% of share transfer flats are bought in this way. The Director of the Population Office informed the Panel:

The 16% figure is our own internal best estimate of proportion of share transfer flats

bought by persons not residentially qualified. This figure has always been flagged as based on a selection of known share transfer developments, and as such, no more than a reasonable approximation in the absence of any other source, pending the introduction of the Share Transfer Stamp Duty^[10].

In a submission to the Panel Mr. J. Refault raised a concern related to the right to occupy as he believed that this would exclude non resident landlords for liability to the tax:

The current draft law provides only for owner occupiers to be liable for LTT and not landlords who can acquire multiple share transfer units free of LTT and still achieve a rental yield equal to the retail value of identical owner occupier units. Should this occur, it could be seen as a charter for landlords both on and off island to only acquire share transfer residences and in doing so shortening the availability of units for locally resident 1st time buyers coupled with the inevitable laws of supply and demand driving up prices even further^[11].

Mr. Hemmings, however, advised the Panel that the purchase of multiple share transfer units by persons who wish to let those properties would still attract LTT on the initial purchase. The Draft Law, he said, clearly states that it is irrelevant whether a purchaser actually does occupy, or even if they are able to do so under the Housing Law^[12].

Panel Comment

Political concerns have been expressed about the impact on the local housing market of significant numbers of non resident investors purchasing apartments in Jersey. This is a matter for the Housing Minister and is outside the scope of the Panel's review of the land transactions tax.

The Panel notes that if the draft law is approved non resident investors will be liable to pay LTT on their investment. The fact that they are not qualified to occupy the property does not exclude them from the obligation to pay the tax^[13].

6.5 Houses owned by companies

Although share transfer transactions primarily involve flats there are some dwelling houses which are owned by companies and where in effect the house could be conveyed by means of shares of the company. However, such cases are exceptions to the general policy of the Housing Department which contains a presumption against granting consent for companies to purchase houses. This restriction is in place in the interests of continuing to be able to exercise the ownership restrictions in the Housing Law.

Mr. Hart told the Panel:

There are some historical exceptions dating from the time prior to the policy coming into

being and including dégrèvement properties and other properties which have the peculiar legal status to them. But certainly that is not a way in which for many years as I understand it now, one has been able to, as a rule, acquire properties and so there is not any significant market in houses by the sale of shares^[14].

Dégrèvement

Mr. Le Quesne explained this exception:

Under the dégrèvement procedure a property is vested in the creditor or the creditor's nominee, the subrogated nominee, by the operation of law. It is not a transaction to which the housing law applies. The housing law is a transaction-based law and it specifies what transactions it applies to. The dégrèvement, the vesting of the property pursuant to the Property Foncière Law, is not a transaction to which the law applies and, therefore, does not give rise to a housing consent. There is, therefore, a transfer of ownership without there being any housing conditions imposed on that ownership. That loophole was closed retrospectively in 1993 or 1994. But it was closed retrospectively back to 1993 by an amendment to the housing law which stated that any property acquired under a dégrèvement had to be occupied by persons effectively in a nutshell, by locally qualified people. So if a property was acquired in a dégrèvement after 1993 the premium, the non-qualified status, if you like, does not apply^[15].

Acquisition by a company under a will

The Panel was told that the law was changed recently to restrict occupation of inherited properties purely to the person inheriting. Previously the person inheriting could allow it to be occupied by other people on license but, in relation to inheritances, that has been closed as from 2006 or 2007.^[16]

Ownership by a company before 1949 when the Housing Law came into being

Where a property was obtained by a company prior to the introduction of the Housing Law in 1949 the property remains free of housing restrictions. Mr. Hart explained that these properties may command premium prices:

So those properties can be traded on by means of shares, sell the shares in those companies, which is how there continues to be a market for those properties commanding premium prices. ... Individually they tend to attract a higher price than they would if they were available for local occupation because of the freedom from those restrictions. But they are a small number in terms of the actual number of properties^[17].

6.6 J-cat housing purchases

The major exception to the presumption against companies acquiring residential properties is

the case of j-category employees who are in fact obliged to purchase through a company. Mr. Hart explained to the Panel:

The conditions of the consent and, indeed, the undertaking which the employer and employee give is that the property will be conveyed out of the company to the employee on his either getting housing qualifications or upon losing the (j) category status. So there is not an ongoing trade in houses by means of share transfer^[18].

Thus, in order to sell the house a J cat property owner would have to convey the house out of the ownership of the shares and sell it as a separate freehold, which would give rise to stamp duty. Furthermore, it should be noted that the company purchasing the property would be liable to pay stamp duty on the initial purchase.

The Panel notes then that the fact that J-category employees are obliged to purchase through a company does not give rise to an increasing number of share transfer properties.

6.7 Questions regarding the liability of companies to LTT

Questions were raised in submissions to the Panel regarding whether in certain circumstances companies would be liable to pay LTT on houses in their ownership. Advocate R. Renouf wrote:

In my view Article 3(1)(a) does not appear to apply in the case of a single residential house is owned by a limited company. In such a case the mere ownership of the shares in the company does not confer any express right to occupy the house. The articles of association of such a company are usually fairly standard and are not drafted to confer any rights upon shareholders to use the asset of the company (i.e. the house). The directors of the company have the legal power to decide how the asset of the company is exploited and therefore who should occupy the house owned by the company. Of course the shareholders and directors are usually one and the same and therefore the house is occupied by those who own the company. However, their shareholding does not confer a right of occupation and therefore it seems to me that they will not be liable to pay LTT when acquiring the shares in such a company. This scenario would apply to 1(1)(j) category residents who are required to purchase property in the name of a company and to any purchasers of shares in a company which holds title to a freehold property. Many such company-owned properties are of significant value^[19].

The Panel believes that Advocate Renouf's view may have some merit. It may not be possible to charge the tax on such transactions. Mr. Hemmings, Head of Decision Support, explained why the proposed wording had been adopted:

The adoption of the wording relating to the Articles conferring a right of occupation was made as to not do so would have opened the charge up to all manner of complex commercial transactions. The Panel is already aware of the difficulties these pose. Amending the draft Law to catch that type of transaction for domestic property only would again open up the issue of definition of residential and commercial and the problem of mixed properties^[20].

A further question was raised by the Panel's adviser.

What if flat-owning companies are set up so that owning a share does not convey the right to occupy, but merely the right to nominate an occupier? Would that be caught by this LTT law? It's an arguable point, depending on how one interprets "right of occupation".

Comment

The historical exceptions to the general restriction on company acquisition of residential property represent an insignificant proportion of the housing market although the value of individual properties may be substantial. The above questions about the extent of liability of the tax illustrate the difficulty faced by the Treasury in designing a tax to cover all residential share transfer transactions

7. The tax on residential share transfer property transactions

7.1 Equity

The primary purpose of the draft law is to achieve equity between the financial costs of purchasers of property by share transfer or freehold^[21]. The Treasury and Resources Minister confirmed in his evidence to the Panel that the introduction of the tax was not primarily a revenue raising mechanism:

We have spent 3 years and lord knows how many hours of officer time trying to draft this law. There are probably easier ways of raising £1 million or £2 million a year, such as sticking another penny on a litre of petrol^[22].

The principle of equity is desirable; however, some witnesses told the Panel that the new tax would create financial difficulties for those who have found the freedom from stamp duty an important benefit in taking their first steps onto the housing ladder. Peter Seymour, The Mortgage Shop, wrote in a submission to the Panel:

By definition residential share transfer transactions are frequently at the lower end of the market and as a consequence attract first time buyers. This beleaguered group is having enough problems already with rising house prices and the need to budget for not only a deposit but also legal fees. The imposition of this new tax, even with access to First Time Buyer concessions up to the ceiling of £300,000, is surely inequitable with the States desire to encourage more people to become homeowners^[23].

Advocate R. Renouf also suggested that the fact that the application of the draft law was restricted to residential property only created a further inequity:

The exclusion of commercial property from the draft law undermines the principle of fairness that all those transacting in land should bear a proper burden of taxation to be spread over all transactions taking place in the island. Whilst the draft law (if enacted) will ensure that a certain amount of tax is paid upon the transfer of some fine properties and penthouses apartments, in the vast majority of cases it will tax Island residents of average or below average incomes, many of whom will be trying to secure a foothold on the housing ladder. A taxation system should demonstrably be equitable but the present proposal expressly discriminates against local residents in favour of commercial investors, many of whom will be conducting high value transactions which are essentially no different in legal terms to the purchase of a one bedroomed town flat by a local couple.^[24]

Comment

The Panel supports the principle of equity in the financial costs between share transfer and freehold property transactions. It acknowledges that, if a viable solution can be found, the taxation of commercial transactions must be addressed. The Panel will therefore consider the implications and perceived difficulties of introducing a tax on commercial transactions in its second report. Whilst it does not underestimate the difficulty of finding a workable solution to this issue, it believes that it is vitally important in terms of equity that commercial businesses in the Island should not escape the burden of a tax which will have significant consequences for local residents.

7.2 *Operation of the tax*

The LTT is intended to mimic stamp duty on land transactions, but it is not a stamp duty itself (because there is no public registry of who owns Jersey shares, so there is no public transfer document to stamp). Instead it is a self-assessed tax, paid by the purchaser of the shares.

Internationally this sort of tax is very rare. The UK does not impose such a tax (although it has been mooted in the past).

Under the draft law, a new tax (LTT) will be charged where there is a transfer of shares in a company which also gives the purchaser the right to occupy residential property in Jersey (Art 3(1)). The change of ownership of the shares acts as a trigger for the tax to become payable - the occupancy of the land is itself incidental. (see further discussion on this issue in section 9 below).

The tax will be charged on the greater of the price paid for the shares and the value of the underlying Jersey land, at the same rates as would be charged for stamp duty if the underlying land were sold.

Tax is also charged in other circumstances, which appear to be designed to prevent avoidance of the tax (Art 3(1)).

7.3 *Administration of the law*

The tax is to be paid to the Comptroller of Income Tax, who will issue a receipt. The self assessment element of the tax means that the administration on the part of the States is limited to the issue of receipts for the payment of the tax.

The Head of Decision Support explained to the Panel why, after consideration of various options, the Income Tax office had been chosen to administer the LTT:

Eventually we came down to either a separate collection agency within the Treasury or the Income Tax Office. The Income Tax Office obviously has experience of everything around the fringes of this, around anti-avoidance, around things like appeals. Where

there is no other infrastructure separately within the Treasury that would all have to be built up. We did discuss with the Comptroller of Income Tax whether he would be willing to take this on and the decision was yes, that was the most appropriate place, but on the basis that administration would be as simple as possible.... . I think if you spoke to some of the Income Tax Office people they would say in an ideal world they would like something much tighter and more verifiable in terms of balancing the potential yield against the cost of administration. I think we struck a balance that we felt was appropriate to take to the States^[25].

The Panel was informed that the proposed Jersey system would be much simpler to administer than the tax on share transfers in the Cayman Islands which was one of the few areas in the world with similar legislation.

The Caymans legislation is rather different. It is an annual return from companies. Were we to adopt that in Jersey, we are talking about every company registered in Jersey annually making a return to the States saying what value of shares had changed hands and what the value of their property was in relation to the total issued share capital..... I certainly would not like to have to build up the administration for something like that in Jersey. Whereas obviously in terms of revenue compared to income tax, it is a very small stream for us, so hence we were looking to keep the administration side of things down to a minimum^[26].

The conveyancing lawyers interviewed by the Panel confirmed that in their view, the Income Tax Department was the appropriate body to administer the tax as they were already geared up to issue Treasury receipts for payment of stamp duty:

The only difference between the stamp duty on the conveyance and the L.T.T. is that you have to pay and get your L.T.T. and deliver that L.T.T. receipt to the company secretary because it is an offence for the company secretary, or the company, to register it if the L.T.T. has not been paid^[27].

7.4 Definition of land

In a submission to the Panel, Mr. J. Shenton asked for clarification as to the restricted use of the definition of land to 'a unit of residential accommodation'.

For example would LTT apply to the garden/garage etc and, if not, does this provide opportunities to minimise the tax payable?^[28]

In response the Head of decision Support advised the Panel:

This definition of "land" is not further defined, and so carries its ordinary meaning. Note that the expression is also used in the Housing Law. As it happens, when it comes to

valuation, what is valued is the actual share transfer itself - see the wording of the Schedule. So, once the transaction is caught within Article 3, by virtue of being a transaction as described and conferring a right of occupation of land (i.e. a dwelling) - there is no purpose in a purchaser trying to run an argument that the land occupied is only partly a unit of dwelling accommodation and that, accordingly, the charge to LTT is lower, because it is, at that point, the transaction which is valued and, of course, the transaction derives its value from the whole of the land over which a right of occupation is conferred^[29].

7.5 Enforcement

There are two enforcement mechanisms if the tax is not paid:

The Comptroller has the power to directly assess the tax (Art 12), and charge penalties (Art 16). These powers reflect the same powers he has under the Income Tax law; and

It is a criminal offence for the secretary and directors of the company to register the share transfer (Art 10).

The Panel was informed that there would be relatively little in the way of policing costs as it was believed that the requirement for registration of the shares (Article 10) would provide an adequate safeguard. Mr. Hemmings told the Panel:

I do not think we envisage there will be anyone out there actively looking for share transfer properties that have changed hands that we do not know about. I do not see how you would even go about doing that^[30].

One submission raised the point that the enforcement mechanisms for LTT are different than for normal stamp duty; for example the Comptroller is granted the power to impose a 10% surcharge on LTT:

This legislation grants the Comptroller surprising powers in that he is granted the same powers that he has under the Income Tax Law in relation to anti avoidance provisions. There does not appear to be any corresponding powers contained within the Stamp Duty Law^[31].

We believe however that it is reasonable for there to be differences because the requirement to register a land transfer with the Royal Court makes enforcement of stamp duty more straightforward than LTT.

The Head of Decision Support also added:

It is worth pointing out that our first thought on how to eliminate avoidance of the tax was

to provide for the share transfer to be void if LTT was not paid, but that we pulled back from that due to concerns about the adverse impact that may have on the property market^[32].

Mr. Shenton noted that the Comptroller had power to obtain judgement for non payment of LTT and also to recover debt from the individual's earnings. He asked:

Could this cause hardship especially if the individual already has arrears of income tax and is paying ITIS at 35% and self employed social security at 12.5%?^[33]

The response from the Treasury to this query was:

The advantage of invoking Article 43 of the Income Tax Law is that the Comptroller will already be aware if the individual is having money deducted for arrears of tax etc. Further, that Article requires the Comptroller, in determining the level of deductions to have "regard to all the circumstances of the case" and decide on what is reasonable^[34].

Mr. Shenton also made the point that, under the Treasury and Resources Minister's amendments to the law, the penalty for provision of false and misleading statements has been raised from 6 months to 12 months. We were advised by the Head of Decision Support that the revised penalties were in accordance with the advice given by the Law officers Department.

If anything it is the Stamp Duty and Fees penalty for a fraudulent statement that is too low.^[35]

7.6 Timing of the payment

An amendment to Article 4 allows the statement and amount of relief to be delivered 'no later than the due date.' Mr. Hart explained the reason for this:

I think the main problem that we had with the first draft, the originally lodged draft of the L.T.T. law, was that there seemed to be a sort of chicken and egg situation in relation to the ability to complete a transaction and then the requirement to pay the L.T.T. but one of the amendments that was made makes it clear that you can pay your L.T.T. in advance of completion. It is not -- there is simply a latest date, which is 28 days after completion, on which it has to be paid, but that is not now consistent with -- because there is not an earliest date, it is not inconsistent with the fact that a transfer cannot be registered until the L.T.T. has been paid, so you can in a similar way to buying one's stamps in advance of the conveyance, one can pay one's L.T.T., get the receipt in advance and then proceed to completion. I mean, I think that the stamp duty system works pretty well and I think this now comes as close as it can do to that and is pretty workable, I think^[36].

7.7 Reliefs

The law provides for reliefs from LTT for first time buyers, on the transfer of a deceased person's estate and transfers between spouses and joint owners. This parallels the position with the freehold market^[37].

The issue of reliefs for first time buyers is discussed below (see section 9). In this section we refer to the other reliefs available in the draft law.

One witness, Mr. J. Shenton, drew attention to an anomaly in the application of reliefs on transfers between spouses:

The law appears to be discriminatory in relation to co-habiting couples. It makes specific reference to matrimonial property and transfers from sole to joint and vice versa. There is no mention of transferring from sole ownership to joint in the case of a couple who are not married, nor indeed in the case of a same sex couple. Are these measures human rights compliant?^[38]

The Head of Decision Support advised the Panel:

The rules as to valuation are consistent with those in the Stamp Duties and Fees Law. Jersey law does not confer special rights on a "common law" man and wife (nor does the UK, incidentally) - if a man and woman wish to obtain the benefits of marriage, they must marry. As to same sex couples, if and when the States decide to introduce civil partnerships (which is under active consideration now) all legislation pertaining to husbands and wives would be reviewed and amended accordingly^[39].

Panel comment

The Panel understands that the proposed relief reflects the position with regard to stamp duty reliefs. The Panel suggests that the exclusion of co-habiting couples and same sex couples from reduced rates reflects an outdated approach and requests the Minister to review this matter.

On a separate matter, the Panel received a submission from Advocate R. Renouf questioning whether the reduced rate of tax was worth collecting:

In the case of LTT the lawyers will be obliged to deliver a statement to the Comptroller who will be required to issue a receipt in a prescribed form with a unique number and process the payment of £50 or £60. The lawyer will then be required to produce the receipt to the company secretary. Is all that additional work on the part of the lawyer and Comptroller merited for just £50 or £60? It may cost the Comptroller as much, if not more, to collect that sort of sum. I would therefore suggest that these transactions should simply be exempted from obligation to deliver a payment and pay tax^[40].

Panel comment

The Panel suggests that the Treasury and Resources Minister might consider reviewing the current reduced rates of tax in the cases referred to in this submission.

7.8 Yield

As previously mentioned, the Minister advised the Panel that the primary intention for the draft law was to achieve equity between share transfer and freehold property transactions, rather than to raise additional revenue for the States. Nevertheless the tax will raise a substantial sum, particularly if commercial property transactions can be brought within the ambit of the law.

The provisional estimate for the revenue yield from the LTT on residential property is £1 million based on an estimate of 400 transactions a year at an average of £200,000 each^[41]. It is difficult however, to give any accurate estimate of yield as there is currently no requirement to register transactions.

Mr. Le Quesne told the Panel that in his view the figure of £1 million was very cautious and was probably based on an underestimate of the number of share transfer transactions. He also said that there was a wide range of properties in the share transfer market ranging from £200,000 to upwards of £1 million. In addition, revenue from LTT on security agreements should also be taken into account^[42].

Although commercial property transactions will be considered in the next part of this review it is worth bearing in mind that commercial property is likely to be of higher value and produce a much higher yield than small one or two bedroom flats. For example, the sale of an office block for £5 million would yield a stamp duty of £142,000. It would take the sale of 52 flats to give the same yield, a capital value of £11.2 million. This is because the rate of stamp duty becomes greater as value rises^[43]. One large firm of commercial property advisors informed the Panel that it had dealt with three large transactions in the previous year amounting to around £35 million and went on to say:

The likelihood is transactions within larger office developments going forward would increasingly be of a share transfer approach and as Jersey's economy expands and the office sector matures and enlargens, this process will continue.

Panel comment

The Panel has attempted to survey estate agents in order to obtain a clearer picture on the potential yield from LTT from both residential and commercial property but has had no success in obtaining comprehensive information.

The potential yield from commercial share transfer property transactions is an important consideration and should provide the Treasury with sufficient motivation to find a workable

solution to this issue.

As previously mentioned, the Panel will consider the implications of imposing the LTT on commercial property transactions in its next report.

8. Right to occupy land

(LTT) will be charged only where there is a transfer of shares in a company which also gives the purchaser the right to occupy residential property in Jersey. The Treasury and Resources Minister has proposed an amendment to Article 3, which is intended to clarify this position:

3 Transactions to which this Law applies

(1) This Law applies to the following transactions –

- (a) the transfer to a person of any share, ownership of which, by virtue of the articles of association of the company in which the share is held, confers a right of occupation of land in Jersey;
- (b) a declaration that a share described in sub-paragraph (a) is held on trust for the benefit of a person, or an amendment to such a declaration substituting the person for whose benefit the share is held;”
- (c) the creation of a security interest, pursuant to a security agreement, in any share described in sub-paragraph (a).

(2) For the purposes of paragraph (1), in determining whether a right of occupation is conferred, there shall be disregarded any lease or tenancy or other interest in the land to which the right of occupation is subject and any restriction or requirement of the Housing (Jersey) Law 1949.”

The Panel was informed that the intention behind the amended version of the draft law is to ‘*narrow down the law and to define the share definition of shares which confer a right to occupy land in a narrow fashion*’. Mr. Le Quesne explained to the Panel:

Now, it is important to distinguish between the company and its shareholders and this was one of our problems with the original draft of the law. In law, simply because you own the shares, all the shares of the company, does not mean that you have the legal right to occupy the property and indeed for the company to permit you to occupy that property, other than by way of a fair license, would be a transaction to which the housing law would apply and you would have to get consent^[44].

Comment

The Panel was initially concerned that the article might be interpreted to mean that someone without housing qualifications had obtained the right of occupancy by virtue of obtaining the shares; thus payment of LTT might incur a conflict with the Housing (Jersey) Law 1949. Having carefully considered the wording of the law, the Panel now understands that the effect of Article 3(2), in the amended version lodged by the Treasury and Resources Minister on 26th February 2008, does not mean that the Housing Law is overridden, rather the opposite: the

draft LTT law has no effect on the Housing Law or Housing Regulations. Thus, the fact of paying the tax does not give the owner of the property any automatic right to be allowed to occupy the property.

9 First Time Buyers

While the Panel has tried to confine itself to the taxation issues, it is clear that any change in taxation policy regarding residential accommodation has implications for Housing Policy particularly impacting on First Time Buyers.

9.1 Access to restricted First Time Buyer market

In order to enable people to get onto the property ladder, the current Housing Policy enables people to purchase a flat, whether by share transfer or flying freehold, and still retain their status as First Time Buyers if they wish to move into a larger property within the definition of the Housing Departments' restricted First Time Buyer market.

There is one major difference however. Owners of Flying Freehold properties can only retain their First Time Buyer status if they sell their flat to another first time buyer. The Housing Minister is able to stipulate this on the housing consent required to register the freehold transfer in the Land Registry. The share transfer flat owner, on the other hand, may sell on the open market without this restriction, because the ownership of their shares is not controlled by the Housing Law.

The Panel notes that this gives an unfair advantage to the share transfer property owner who may be able to obtain a premium price for the property due to his being able to offer the flat for sale to an unrestricted market.

The Panel sought confirmation from the Housing Minister that the policy in favour of flat owners would remain in place, notwithstanding the introduction of LTT. The Minister replied as follows:

This treatment is highly beneficial for many local people, in particular, younger people who upon having a family wish to move into a larger property. There is no proposal to change this policy, and the introduction of the Land Transactions Tax will not prevent owners of flats from being able to purchase first time buyer properties under the Housing Law.

Rather the new tax will enable stamp duty, including the first time buyer discount, to be applied evenly, and it may enable us to ensure that share transfer properties are sold to first time buyers - in the same way as flying freehold operates - as a full information set will be available. This would not be without its administrative consequences, and the overall gains may be limited. It is something however I will consider^[45].

Comment

The Panel notes that the Housing Minister has expressed a willingness to review this area of

policy to see whether he can control access to the restricted properties for the owners of share transfer flats in the same way as he does for flying freehold owners. However, it seems to the Panel that in the absence of the requirement for a housing consent form to transfer the actual shares of a share transfer type property it will be hard to achieve this goal. Nevertheless the Panel supports a review to examine the Minister's options.

Recommendation

The Panel supports the Housing Minister's intention to review the policy on allowing flat owners access to restricted First Time Buyers properties in order to ensure that share transfer properties are sold to first time buyers - in the same way as flying freehold operates.

9.2 Will the First Time Buyer discount be available twice?

The Panel sought clarification on the question whether owners of share transfer flats, having claimed a discount on LTT as first time buyers, would also be entitled to the discount rate on stamp duty on purchasing a freehold property in the restricted First Time Buyer market.

The Panel was advised by the Registrar of Deeds that this would not be the case as the Stamp Duty and Fees (Jersey) Law 1998 did not take any account of the Housing Department's policy on First Time Buyers. Under the Stamp Duty Law owning a property in Jersey, or anywhere else in the world, whether by share transfer, flying freehold or any other means, excluded the person from the discounted rate on stamp duty^[46]. Thus, even under current circumstances, the owner of a share transfer flat has to pay the full stamp duty payable on a freehold property designated for first time buyers under the Housing Law, even though they have not paid any stamp duty on their original purchase.

9.3 Review of discount rates

The Panel acknowledges the fact that the imposition of LTT on share transfer properties transactions will have a significant impact on first time buyers who currently use the share transfer market as a starting point into the property market. The various circumstances described above are likely to make share transfer flats less attractive as a proposition for young people and may also make saving for the transition to a larger property more difficult. This may lead to a deflation in the prices which these flats may command. Current owners of share transfer flats may therefore find themselves at a disadvantage when they come to sell their properties.

One way open to the Treasury and Resources Minister to mitigate the effects of these changes is to review the current levels of stamp duty/LTT rates. This is done regularly on an annual

basis in the budget in the light of developments in the housing market^[47].

In the public hearing with the Panel the Minister agreed that it might be appropriate to consider extending the range for first time buyers, particularly in the light of the increased level of prices in the housing market:

Certainly, there is an argument to be had saying that higher-valued transactions would pay a further increased rate of tax or stamp duty, and lower-valued transactions would pay an even greater reduced level of stamp duty...we could go in that direction to some extent. That becomes a political debate, which I am quite happy to have. Maybe when we come to scrutinise the budget it is one of the things you would like to raise at the time^[48].

In this statement the Treasury Minister appears to be implying that reliefs for first time buyers could only be increased by increasing the rate of tax on more expensive properties. **We should point out however that LTT is raising additional revenue for the States, and therefore some of that could be used to increase reliefs for all first time buyers, whether they are purchasing a flat or a house in the restricted First Time Buyer market.**

As previously discussed, the Panel suggests that the Minister might consider in this review whether there might be an advantage to encourage developers to use flying freehold rather than share transfer by making a differential between LTT and Stamp Duty.

A full survey of the impact of rising flat and house prices for first time buyers is beyond the scope of this review. The Panel has decided to limit itself to a recommendation that the Treasury and Resources Minister review the situation in preparation for the Budget debate in December 2008. The Corporate Services Panel will scrutinise the outcome of the Minister's review at that time.

Recommendation

The Treasury and Resources Minister is requested to review in the next Budget the current reliefs available to first time buyers in respect of both LTT and stamp duty taking into account the revenue to the States from the new tax.

10. Conclusion

The draft Taxation (Land Transactions) Law 200- will enable stamp duty or its equivalent, the land transaction tax, to be applied evenly to property owners whether they hold their property through share transfer or flying freehold. We accept that there is a justification for addressing the current distortion which gives what many perceive to be an unfair advantage to share transfer property owners. However, the impact of the tax on a housing market which is already extremely expensive, especially for young people, cannot be neglected.

The Panel is of the opinion that the full consequences of this new tax may not be fully understood. The lack of readily available information concerning the volume and nature of transactions taking place under specific housing conditions (such as share transfer transactions and 'J' category purchases) has been frustrating during the course of this review. Calculating the overall effect of these market sectors on the pricing and availability of homes for local residents is difficult to quantify. The introduction of the draft law will finally improve this position enabling a full set of information to be gathered on share transfer properties for the first time.

The Panel is aware that the Health, Social Security and Housing Scrutiny Panel is currently considering its own review of the information available about activity in the local housing market. We believe that research into this area would be very valuable. A broader picture of the housing market would enable policy makers to understand the full impact of new developments such as the land transactions tax.

Appendix

The draft law was referred to the Corporate Services Panel by the States on 12th March 2008. The Panel issued a Call for Evidence on 14th March 2008

Written submissions - received from:

Roger Trower Broadlands
Erica Jones, Broadlands
John Refault, GIFE, MCIM
Peter Seymour, The Mortgage Shop Plus
Advocate Richard Renouf
John Shenton, Tax Director, Ernst & Young
Andy Fleet, Chief Executive, Style Group Ltd
G. Mayger
N. Stirk
B. De La Haye

One submission, which was received with a request for the name and identifiable details to be removed, raised questions outside the scope of this review and was passed on to the Health, Social Security and Housing Panel for consideration.

Copies of the written submissions are available on the Scrutiny website

Public hearings - held on 7th May 2008 with the following witnesses:

R. Kirkby, Jersey Finance
Mr. T. Hart (Jersey Law Society) & Mr. A. Le Quesne (Voisin)
Deputy F.J. Hill, BEM
Treasury and Resources Minister, Senator T. Le Sueur & Mr. K. Hemmings, Head of Decision Support, Treasury
Mr. J. Shenton, Tax Director, Ernst & Young

Transcripts are available on the Scrutiny website

^[1] And in some other circumstances: See Article 3)

^[2] States of Jersey Official Report 12th March 2008

- [3] Source: Jersey House Price Index First Quarter 2008, Statistics Unit
- [4] Written submission from Mr. R. Trower, Broadlands
- [5] e-mail dated 30th May 2008
- [6] Mr. A. Le Quesne Public hearing dated 7th May 2008 page 29
- [7] Since 1991 when the *Loi (1991) sur la copropriété des immeubles bâtis* was introduced developers have had the option of using share transfer or flying freehold for new apartment blocks.
- [8] Public hearing dated 7th May 2008 pages 14 & 15
- [9] Public hearing dated 7th May 2008, page 13
- [10] e-mail dated 28.05.08
- [11] Written submission dated 18 March 2008
- [12] e-mail response dated 27.05.08
- [13] See also discussion below on the right to occupy land - section 8
- [14] Mr. T. Hart Public hearing dated 7th May 2008 page 3
- [15] Mr. A. Le Quesne Public hearing dated 7th May 2008 page 6
- [16] Mr. Hart Public hearing dated 7th May 2008 page 20
- [17] Mr. Hart Public hearing dated 7th May 2008 page 6
- [18] Mr. T. Hart Public hearing dated 7th May 2008 page 3
- [19] Written submission dated 21st April 2008
- [20] e-mail response dated 15.05.08
- [21] Report accompanying P.185/2007
- [22] Public hearing dated 7th May 2008 page 13
- [23] Letter from Advocate R. Renouf dated 4th April 2008
- [24] Written Submission dated 21st April from Advocate R. Renouf
- [25] Public hearing 7th May 2008 with Treasury and Resources Minister page 17
- [26] Public hearing 7th May 2008 with Treasury and Resources Minister page 20
- [27] Mr. Le Quesne, Public hearing 7th May 2008, page 27
- [28] Submission from Mr. J. Shenton, dated 15 April 2008
- [29] e-mail from Mr. K. Hemmings dated 03 June 2008
- [30] Head of Decision Support, Public hearing 7th May 2008 with Treasury and Resources Minister page 18
- [31] Submission from Mr. J. Shenton, dated 15 April 2008
- [32] e-mail from Mr. K. Hemmings dated 03 June 2008
- [33] Submission from Mr. J. Shenton, dated 15 April 2008
- [34] e-mail from Mr. K. Hemmings dated 03 June 2008
- [35] e-mail from Mr. K. Hemmings dated 03 June 2008
- [36] Mr. T. Hart, Public hearing dated 7th May 2008 page 26
- [37] Schedule Articles 6 & 7
- [38] Written Submission dated 15 April 2008
- [39] e-mail from Mr. K. Hemmings dated 03 June 2008
- [40] Written submission dated 21st April 2008
- [41] Head of Decision Support, , Public hearing 7th May 2008 with Jersey Finance page 8

[42] Public hearing dated 7th May 2008 page 13 & 23

[43] Source: Treasury ministerial briefing paper on the proposed law

[44] Mr. A. Le Quesne Public hearing dated 7th May 2008 page 30

[45] Letter of Housing Minister, dated 28th May 2008

[46] Stamp Duty and Fees (Jersey) Law 1998 Schedule Part 1 section 13(b) (c)

[47] The Jersey House Price Index for the First Quarter 2008 shows the average cost in 2007 of FTB flats was £200,000 and FTB houses was £312,000. The ceiling for FTB relief on stamp duty was raised in the last budget to £300,000. In 2007 average price of dwellings sold in Jersey was increasing at an annual rate of 20%.

[48] Public hearing dated 7th May 2008, page 25