STATES OF JERSEY

DRAFT TAXATION (ENVELOPED PROPERTY TRANSACTIONS) (JERSEY) LAW 202-

(P.119/2021): COMMENTS

Presented to the States on 3rd February 2022
by the Corporate Services Scrutiny Panel
Earliest date for debate: 8th February 2022

STATES GREFFE

COMMENTS

Introduction

1. The Minister for Treasury and Resources (the Minister) lodged the Draft Taxation (Enveloped Property Transactions) (Jersey) Law 202- [P.119/2021] (the Draft Law) on 21st December 2021.

2. If adopted the Draft Law will make provision to create a new Enveloped Property Transactions Tax (EPTT) to relevant transactions, and make amendments to the Taxation (Land Transactions) (Jersey) Law 2009, concerning Land Transaction Tax, with further consequential amendments to the Companies (Jersey) Law 1991 (the Companies Law) and Revenue Administration (Jersey) Law 2019.

3. The Minister subsequently presented an Acte Opératoire (P.119/2021 Add.(2)) to enable the new tax to be charged immediately should the Assembly adopt the Draft Law.

4. An Addendum with economic impact analysis of Enveloped Property Transactions Tax was presented by the Minister on 21st January 2022 , this has subsequently been reissued (P.119 Add. (re-issue)) to include further supporting information upon questioning by the Panel.

5. The Corporate Services Scrutiny Panel (the Panel) launched a Review (the Review) of the Draft Law on 6th January 2021. The Panel received a number of written submissions, from key stakeholders, expressing concern on elements of the Draft Law,[1] as such the Panel lodged two Amendments to P.119/2021:

    a) The first Amendment (P.119/2021 Amd.) would remove the Amendments to the Companies Law which would have disabled the registering of an instrument of transfer of shares for relevant companies until evidence of a receipt of EPTT is produced.

    b) The second Amendment (P.119/2021 Amd.(2)) would remove property used for non-domestic purposes (commercial properties) from the scope of EPTT.

6. The Minister for Treasury and Resources subsequently lodged a third Amendment (P.119/2021 Amd (3)) on 1st February 2022 which if adopted will bring the Law into force on 4th April 2022 to enable certain large commercial property transactions to be finalised who have not been able to consider the Draft Law as proposed.

7. On 3rd February 2022 the Minister for Treasury and Resources presented the Draft Order [Draft Taxation (Enveloped Property Transactions) (Statements) (Jersey) Law 202-] as a third Addendum (P.119 Add. (3)) to the Draft Law to set out the information that would be required to be sent to the Comptroller following a relevant transaction. Due to the late lodging of the third Addendum, by the Minister, this Addendum has not been subject to scrutiny by the Panel.

[1] https://statesassembly.gov.je/scrutiny/Pages/ReviewSubmissions.aspx?ReviewId=418

Background

8. Early indications on the content of the Draft Law were provided to the Corporate Services Scrutiny Panel (the Panel), on 11th November 2021, with the Panel receiving a briefing from Government Officers on the Draft Law on the 10th December 2021. Prior to this period the Panel was advised that the Minister was consulting with stakeholders on the Draft Law and updating it to match the views being expressed.

9. Following the public lodging of the Draft Law the Panel formally launched the Review, scrutiny was unfortunately conducted under a compressed time frame as the lodging period fell over the festive season. The Chair of the Panel declared an interest, as such the Vice Chair, Deputy Steve Ahier, was appointed as lead member to the Review.

10. The Panel wrote to the Minister upon launch of the Review (6th January 2022), informing of its intentions and requesting that economic analysis details in P.119/2021 be forwarded.[2] An early version of the economic analysis was received by the Panel on 18th January 2022 prior to its presentation to the States Assembly, this was later reissued to include further supporting information.[3]

11. The Minister and Government Officers attended a Public Hearing with the Panel on 27th January 2022.[4]

12. This Comments Paper outlines the Panel's understanding and concerns of the Draft Law following its Review.

Overview of the Draft Law

13. If adopted the Draft Law will introduce an Enveloped Property Transactions Tax to relevant transactions where:

    - The entity, or any entity over which it has control, is the beneficial owner of the enveloped property; and
    - The transferor (owner) of the entity transfers to a person (the transferee) a "significant interest" in the entity.

14. A "significant interest" is defined in the Draft Law as more than 50% of the interest in the entity. For example, a company transfers a significant interest if it transfers more than 50% of its shares. Schedule 1 of the Draft Law stipulates specific exemptions from Enveloped Property Transactions Tax, this schedule will be able to be amended by Regulation. Exemptions include:

    - Devolution of an estate (essentially the winding-up of an estate);
    - Any transactions that take place by order of the court, such as during divorce proceedings;
    - The transferee is a tax-exempt charity;

[2] Letter - to Minister for Treasury and Resources re Enveloped Property Transactions Tax Review - 6 January 2022
[3] P.119 Add. (re-issue)
[4] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022

- The transferee is a tax-exempt Social Housing Company;
- The transferee is a Minister, or one of the Parishes; and
- Transactions where the beneficial owner of the property remains the same.

15. Enveloped Property Transaction Tax will be imposed where the land has a market value exceeding £700,000 for commercial properties and £500,000 for residential properties. This will be calculated using market value bands, mirroring those used for Stamp Duty and Land Transaction Tax (LTT).

16. P.119/2021 will also amend the LTT Law (Taxation (Land Transactions) (Jersey) Law 2009) expanding the scope to include relevant transactions of commercial properties by share transfer. Further amendments are proposed to the Companies (Jersey) Law 1991 to require receipt relating to relevant transactions to be provided in line with the Draft Law and the Revenue Administration (Jersey) Law 2019 which are consequential on the new provision of EPTT.

Use of Acte Opératoire

17. The Acte Opératoire (P.119/2021 Add.(2)) lodged by the Minister enables Enveloped Property Transaction Tax (EPTT) to be charged immediately should the Assembly adopt the Draft Law.

18. Written submissions provided to the Panel confirmed that the Acte Opératoire had come as a 'surprise' to key stakeholders. The Panel drew specific attention to the practical considerations of its implementation during its Public Hearing with the Minster which highlighted the need to:
    - develop processes and procedures for the Draft Law;
    - consider the resourcing requirements of Revenue Jersey; and
    - understand the effect on those transactions which had not been able to consider the new tax as proposed in the Draft Law

    The Minister responded:[5]

    "I think, in addition to my earlier comments, that there has been plenty of notice, plenty of consultation. There may be, in view of this Proposition coming forward for debate in the Assembly, some transactions ongoing, in which case we may have to consider, as the Comptroller has said, the Acte Opératoire becoming implemented immediately after the debate, but that is something we have to look at."

19. The Panel were therefore pleased to observe that the Minister subsequently lodged the third amendment (P.119/2021 Amd (3)) which brings the Draft Law into force on the 4th April 2022. The Panel believes this will enable the Minister to update information and provide guidance whilst also allowing time for businesses to adjust to changes.

[5] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022, p.18

Economic Impact Analysis

20. A key element of the Review by the Panel was to explore the economic impact of the Enveloped Property Transactions Tax. The Minister has maintained that the impact upon the economy will be minimal,[6] and has published economic impact analysis carried out by London Economics through an Addendum to the Draft Law. [7]

21. The economic impact analysis carried out by London Economics was completed as a desk top review over a short period (December 2021-January 2022) which appears, to the Panel and from written submissions provided, to have limited the scope and depth of the analysis.

22. The Panel would highlight the concern of key stakeholders' that the work carried out by London Economics does not appear to provide a sufficient base to make an informed decision on the economic consequences of the Draft Law.

23. London Economics acknowledge in the economic impact analysis introduction[8] that they are not experts in tax law or property markets, including the Jersey property market yet, written submissions provided to the Panel indicates the economic impact analysis appears to make broad assumptions as to the behaviour of the market and causes disparities to other evidence provided to the Panel.

24. Written submissions made to the Panel surmised that the introduction of EPTT risked impacting investment into the Island's property market and the Island's economy.[9]

25. The Panel would highlight that the economic impact analysis was not released by the Minister to the Panel until 18th January 2022 and was not presented to the States Assembly and key stakeholders until 21st January 2022, with a reissue to include additional supporting information, upon questioning by the Panel, being provided to the Assembly on 31st January 2022. The Panel therefore deduce that the timetable applied for the release of the economic impact analysis has restricted the Ministers ability to address concerns regarding the economic consequences of adopting the Draft Law.

Forecasted Income

26. In its Public Hearing with the Minister, the Panel questioned the difference in forecasted income from that stated in the Draft Law of up to £1 million and the indication in the economic impact analysis of between £2 million and £5 million.

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[6] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022, p.24
[7] (P.119 Add. (re-issue)
[8] (P.119 Add. (re-issue)
[9] Submission - Enveloped Property Transactions Tax Review - D2 Real Estate - 27 January 2022

27. The Minister confirmed that any additional revenue above the £1 million to be used for the Housing Development Fund would be entered into the General Reserve for use across the Government of Jersey.[10] However, the Panel would like to observe the Minister providing a clearer strategy for the additional projected income indicated by the economic impact analysis.

Panel's First Amendment

28. The Panel's First Amendment, if adopted by the Assembly, will remove the Amendments to the Companies (Jersey) Law 1991 (the Companies Law) within the Draft Law, which would disable the registering of an instrument of transfer of shares for relevant companies until evidence of a receipt of EPTT is produced.

29. The Panel lodged its First Amendment after it received comments on the Draft Law that expressed significant concern that the proposed changes to the Companies Law would create uncertainty and complexity around the transfer of shares in a Jersey company. The information supplied to the Panel indicated that this change would risk such companies, and as such the Island, becoming less attractive to international investors which in turn would have a negative effect on Jersey's economy.

30. The Draft Law therefore creates uncertainty around title to shares which bring little benefit and may prejudice investors against using a Jersey company as compared to those from other jurisdictions. A practical example of the complexity and confusing nature that the Draft Law would introduce is detailed as follows:

A transaction which involves the transfer of shares in a Jersey holding company of a group which happens to have relevant Jersey real estate held further down the corporate structure. Such real estate may not be material to the group as a whole and/or the overall transaction which could lead to a risk that the liability to EPTT may not be identified in time for completion of the transfer. In that event, the purported transfer of shares at completion would be in breach of the Companies Law. In most cases, if the transaction parties are properly advised, it should be that the issue would be identified and resolved in time, but the risk remains.

31. The Panel has also been informed that certain secured lending transactions, in particular where debt is used to fund the acquisition of a Jersey company and, in that connection, the Jersey company shares are to be pledged/secured by the new owner as collateral for that debt. Customarily, that security takes effect at completion of the transaction. The Panel has been further advised that while there are various methods to create such security under the Security Interest (Jersey) Law 2012 (as amended) ("Security Interests Law"), the usual approach is for secured parties to take possession of the share certificate and thereby constitute "control" under the Security Interests Law.

[10] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022, p.25

32. During the Panel's Public Hearing with the Minister for Treasury and Resources for its review it was highlighted by the Deputy Director, Domestic Tax Policy:

There is already a provision in the Companies Law, we just picked up a consequential amendment for this law. We had no feedback that there was an issue with it until very recently, but we had a very constructive call yesterday with 2 members of the Law Society subgroup that had issues with it. We have discussed it and we can see that even though some transactions that would be in scope have been taken out by exclusions, some big important transactions, very high-value transactions, might fall foul of this amendment. [11]

33. The Panel agreed that in light of such information it would appear that the Draft Law would not, if adopted, keep with the principles of keeping taxation simple and fair. Furthermore, the Panel holds serious concern that adoption of the necessity for companies completing relevant transaction to provide evidence of receipt of EPTT will risk companies facing extra administrative and legal burden.

34. The Panel would also highlight its concern that the Draft Law places undue weight upon the transferee to deliver a statement to the Comptroller for Revenue (the Comptroller). Beyond additional legal and administrative costs, this risks inadvertent noncompliance in the case that a company that owns Jersey property being purchased as a larger group and that ownership being missed, leading to reputational damage should the transferee be fined. This risks detrimental impact to Jersey's standing as an International Finance Centre, and again may deter investors from purchasing companies that operate in the Island, damaging the Island's economy.

35. The Panel believes that should this Amendment be adopted the Minister can bring forward a separate Proposition to implement changes to the Companies (Jersey) Law 1991 (the Companies Law) following further analysis and enablement of scrutiny.

Panel's Second Amendment

36. The Panel lodged a second Amendment as written submissions to the Review had raised significant concerns regarding the introduction of taxation upon transactions including commercial properties, and there remained much uncertainty and questioning regarding the implication of the Draft Law and its practical and economic impact. The Panel were also concerned about the intended implications of Standing Order 72 (10) which the Minister believed was applicable.[12]

37. The Panel anticipated that if the Assembly adopted the Amendment the Minister would bring forward a separate Proposition to implement those changes following further analysis and enablement of scrutiny.

[11] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022, p.14
[12] Letter - Bailiff to Corporate Services Scrutiny Panel re Standing Order 72 (10) - 26 January 2022

38. Although questions of practical implications of Enveloped Property Transactions Tax remain, following robust discussions and reassurance during the course of its Review the Panel concludes that the Minister has now provided sufficient explanation ahead of the debate of the Draft Law. The Panel would note, however, that this information should have been forthcoming in a more timely and open manner.

39. The Panel has therefore decided to formally withdraw its second Amendment. Detailed reasoning as follows:

- The primary concern which prompted the Panel to lodge the Amendment related to the Minister's perception of what constituted tax avoidance, a key argument for the introduction of Enveloped Property Transactions Tax, and the Draft Law's inadvertent impact upon transactions that are genuine in nature. As the Panel highlighted in its Amendment, the Minister had not provided enough evidence of the necessity of the Draft Law at the point of lodging. The Comptroller of Revenue has since highlighted that it would not be right to characterise enveloping properties for that reason and that Enveloped Property Transactions Tax was not merely an anti-avoidance measure, instead it addressed an identified inequality in the tax system.

- The Amendment, if adopted by the Assembly, would have removed property used for non-domestic purposes (commercial properties) from the scope of Enveloped Property Transactions Tax which was not the intention of the Panel. This meant that the tax would only be charged on the transfer of a significant interest in an entity that owns domestic property valued at over £500,000. This had consequential impact upon the Draft Law's changes to the Taxation (Land Transactions) (Jersey) Law 2009. This Amendment would also have meant that the Draft Law's changes to Companies (Jersey) Law 1991 (the Companies Law) wouldn't apply in respect of the transfer of shares in a company that owns only non-domestic property.

- The Panel questioned the inclusion of leasehold in this element of the Draft law and was informed that it was not believed that companies holding these would become less attractive to investors or purchasers, and that rates mirrored those included in the Stamp Duty Law (Stamp Duties and Fees (Jersey) Law 1998).[13]

- The Panel further questioned the impact upon multinational investment and was informed by the Deputy Director, Domestic Tax Policy:

  I think this is a chain, maybe a global, a huge deal that Jersey is a relatively small part of, and we have introduced some exclusions. We did listen. One of the exclusions that will help this is that any transaction involving shares on a

[13] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022, p.22

listed recognised stock exchange - most listed companies that are recognised - that is not a relevant transaction. That takes out some of the very big transactions where Jersey property might be incidental. Similarly, we have other exclusions for group relief. If you are restructuring in a group of companies and you change ownership that is not caught. So, we have done a number of things technically to reduce the chance of very big transactions missing a liability, but we do expect people to undertake due diligence if there is a Jersey entity that has control of a Jersey property. That is a fairly obvious requirement.[14]

- The Panel received confirmation from the Bailiff that Standing Order 72 (10) did not apply, meaning the Panel could call in the Proposition after approval of the Principles, if required.[15]

Panel Conclusion

40. The Panel concludes that, whilst the introduction of Enveloped Property Transaction Tax is a complicated and somewhat controversial piece of legislation, the principal of the proposed introduction of the new tax is based upon the intended goal of ensuring broadly equivalent treatment across similar types of transactions involving land in Jersey.

41. The Panel is of the opinion that the introduction of new taxation should always receive ample consideration. Although the Minister has advised the Panel that Enveloped Property Transaction Tax is simply a method of closing the gap of paying Stamp Duty or Land Transition Tax (LTT) as an individual or company,[16] it will introduce a new charge for those purchasing companies.

42. The Panel has deduced from the content of the written submissions received and Amendments required that the Minister should have provided comprehensive detail and engaged further with key stakeholders on the Draft Law, prior to the Proposition being lodged.

43. Questions remain regarding the practical and economic impact of the Draft Law on this segment of the economy. The timetable that the Minster adopted for the preparation and release of the economic impact analysis has restricted the ability to address concerns regarding the economic consequences of adopting the Draft Law prior to the Assembly debate.

44. The Panel is presently minded to support the Draft Law should its First Amendment and the Third Amendment lodged by the Minister be adopted by the Assembly, it is conscious however that the tax is complex and controversial in part.

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[14] Transcript – Enveloped Property Transactions Tax Review – Minister for Treasury and Resources – 27 January 2022, p.15
[15] Letter - Bailiff to Corporate Services Scrutiny Panel re Standing Order 72 (10) - 26 January 2022
[16] Letter - Minister for Treasury and Resources to Corporate Services Scrutiny Panel re EPTTR - 31 January 2022, p.2