

Our ref: BP/Policy/DCLG Consultations/Avoidance

Your ref:

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Dear Sirs,

Business Rates Avoidance - Response to Discussion Paper

Thank you for offering the opportunity to respond to this discussion paper. This letter is my response to the points raised in the discussion paper.

Blake Penfold is an independent consultancy specialising in business rates advice. I have more than 35 years' experience as a rating consultant in private practice and has been involved with rating appeals in respect of all types of property throughout the United Kingdom and in the Irish Republic, the Channel Islands, and the Isle of Man. As well as appeals before Valuation Tribunals and the Upper Tribunal (Lands Chamber), I have been involved with appeals to the Court of Appeal and House of Lords on matters of rating law. I have also appeared before Local Valuation Appeal Committees in Scotland and as an expert witness in the High Court, at County Court, and in Magistrates' Court proceedings in respect of business rates.

I began my career with H Brian Eve and Company (later Wilks Head & Eve) before joining Hillier Parker (now CBRE) and, most recently, headed the Business Rates team at GL Hearn for ten years. I am a former Chairman of the RICS Rating and Local Taxation Panel and represent RICS on the Valuation Tribunal for England Tribunal User Group and elsewhere, including giving evidence to the Parliamentary Scrutiny Committee on the Business Rates Supplements Bill. I am a past President of the Rating Surveyors' Association and a former member of the Valuation Standards Board of the Royal Institution of Chartered Surveyors.

I have expertise in all aspects of business rates from legislation to liability and all types of property. I also have experience from throughout the United Kingdom and in respect of property tax systems elsewhere.

I preface my detailed response to the discussion question with the following general comments:

The current business rates regime is not a satisfactory one. The current level of Uniform Business Rate is unrealistically high. For larger properties in England the tax rate (Uniform Business Rate) will be close to 50% from April this year, and for larger properties in London it is already in excess of 50%. This is the highest level of corporate tax in the UK. OECD and EU Commission data also shows that local property taxes in the UK are significantly higher than in almost all of our EU and international competitors.

Disproportionate tax rates distort behaviour and this is evident in the field of business rates, and particularly so in relation to empty property rates.

For most of its very long history rating has been a tax on the occupation of property. It is only relatively recently that the tax has been used to tax non-occupation (ownership) and it is not a tax that is well-suited to that purpose. The tax is based on the annual value of the occupation which is a difficult concept in respect of empty property where there is, of course, no occupation. To an occupier, a tax on the value of their occupation, whilst it may not be welcome, does at least make sense. To the owner of an unproductive asset, a tax on the occupational value, when there is no occupation, is difficult to comprehend.

This problem has been exacerbated by the imposition, from 2008, of empty property rate at 100% of the occupied rate. I do not suggest that empty property rate should be abolished. It seems reasonable that property owners should be asked to contribute in some way to local services. If a property catches fire or is broken into the owner would no doubt wish the fire service or the police to attend. But vacant properties do not use all the services required by occupied properties. It seems to me that a reasonable balance between taxing unproductive assets and ensuring that property owners contribute to local services would be to restore empty property rate to its previous level of 50%, to apply to all classes of property, and to allow a rates free "void" period that reasonably reflects the time needed to let property - in the current property market a period of six months appears reasonable in this respect.

When the current empty property rate regime was introduced in 2008 the stated aims were that it would increase the supply of property available for occupation and reduce rental values. Whilst rental values have indeed reduced that is a result of market changes, not a result of empty property rates. And research suggests that the empty property rate changes introduced in 2008 may actually have reduced the supply of property available to let because they have increased property holding costs during redevelopment and refurbishment and have therefore worked against redevelopment and refurbishment of the property stock.

I am also concerned at some of the wording adopted in the discussion paper. The paper acknowledges that tax avoidance is legal and that the courts recognise that taxpayers may legitimately organise their affairs so as to minimise their tax liability. The suggestions in the paper, sometimes implicit and sometimes explicit, those taxpayers who do this are behaving improperly and that those who do not do so are behaving properly seem to me to be uncomfortable ones.

It is against this background that I set out below the following responses to the points raised in the discussion paper:

Methods and scale of avoidance

1. Which methods of avoidance are you familiar with and how commonly have you seen them used?

Most methods of avoidance work by utilising the exemptions and reliefs that are built into the business rates system. In particular they utilise: the initial rates free ("void") period; charitable rate relief; or rate relief for insolvent businesses.

It is important to recognise that these methods will be effective where they operate within the parameters of existing exemptions and reliefs, and will not be effective where they fall outside those parameters. Many of the concerns that seem inherent in the wording of the discussion paper could be addressed by ensuring a coherent and consistent application of exemptions and reliefs and a proper means of determining rate liability where there is a dispute as to whether a particular exemption or relief should, or should not, apply.

2. What do you consider to be the defining features of specific methods of avoidance?

Administration / Liquidation

The Insolvency Service has already addressed the question of the use of insolvent “shell” companies to hold leases in order to avoid empty property rate liability. The Insolvency Service guidance is available in March 2012 Issue 53 Chapter 26 Companies Investigation Branch and at:

www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearipmill/chapter26.htm#3

For example, on 29 July 2011 The Insolvency Service’s Company Investigations successfully applied for the winding up of 13 companies that had failed to appoint a liquidator and were set up for holding leases while the landlord claimed an empty property rate exemption. The court found that such a scheme was contrary to the public interest.

It seems, therefore, that the existing framework is capable of distinguishing between situations where insolvency is established purely for the purposes of avoiding empty rate liability, and those where the reduction in empty rate liability is a necessary outcome of insolvency.

Charitable Occupation

The courts have also considered the position of charitable occupiers where the principal intention of the occupation is to reduce or avoid rate liability. In *Public Safety Charitable Trust v Milton Keynes District Council and others (2013)* the use of an office building for Bluetooth transmissions was considered and in *Kenya Aid Programme v Sheffield City Council (2013)* the court considered use of a redundant warehouse for storage of donated furniture. In both cases the use was sufficient to establish rateable occupation but not sufficient to justify charitable rate relief.

If there is genuine occupation by a charity, for the purposes of that charity or other charities, and the use extends to the whole or main part of the property I can see no reason to restrict charitable rate relief. If the use is not genuine in that way the decisions I have referred to establish that charitable relief will not apply. The proper application of the existing guidance should address the concerns about this that seem that implicit in the discussion paper.

Temporary Occupation

This area, too, has been considered in the courts since 2008. The decisions in *Makro Properties Ltd and Makro Self Service Wholesalers Ltd v Nuneaton and Bedworth BC (2012)* and in *Sunderland City Council v Sterling Investment Properties Ltd (2013)* seem to me to establish a robust and workable framework which, if administered consistently, would give both billing authorities and ratepayers a strong degree of certainty as to rate liability in any particular circumstances.

Redevelopment and / or Conversion

This is the area in which the current empty property rate regime appears to have its most perverse and undesirable effect and which is the most difficult to administer, particularly in the light of the recent decision in *Newbiggin (VO) v SJ & J Monk(a firm) (2015)*. The application of empty property rate to properties undergoing refurbishment redevelopment or conversion has an adverse effect on economic viability of such projects. The application of empty property rate to properties undergoing works should urgently be reviewed.

3. What is your view on the scale of avoidance?

Most owners of larger properties which are long-term vacant will give consideration to actions to mitigate empty property rate liability. This seems perfectly normal and reasonable behaviour by any taxpayer.

Tackling avoidance

4. What are your views on giving local authorities general or more specific anti-avoidance powers, whereby authorities can withhold reliefs and exemptions where they reasonably conclude that the main purpose or one of the main purposes of the ratepayer's occupation or arrangements is to receive the relief or exemption and/or that the arrangements or occupation is contrived or artificial?

This seems to me to be a very peculiar suggestion. The discussion paper acknowledges that avoidance is perfectly legal. If that is the case, what form would "specific anti-avoidance powers" take? Would this be a power to prevent a ratepayer doing something that is acknowledged to be legal?

If the government does not like the outcome of the existing system of exemptions and reliefs, it should amend those exemptions and reliefs, rather than seek to give powers to local authorities to administer existing, statutorily defined, exemptions and reliefs in a different way.

It seems to me much more important to establish a regime whereby the existing exemptions and reliefs are administered consistently and coherently, so that both local authorities and taxpayers can understand what their liabilities will be in particular circumstances.

One significant problem in achieving this is that there is no satisfactory legal route to resolve rate liability disputes. These currently are resolved by the ratepayer refusing to make payment and the resulting summons being referred to the Magistrates' Court. Rather than giving local authorities new powers, I consider that it would be preferable to provide a route of appeal (perhaps through the Valuation Tribunal for England) whereby the application of the existing rules on rate liability could be applied clearly and consistently on appeal. The Valuation Tribunal for England is familiar with rating legislation and has a national jurisdiction, both of which factors would offer advantages over the current regime

5. What changes could be made to legislation that sets out which types of ratepayers or properties are eligible for exemptions or reliefs, to make it easier for authorities to distinguish between ratepayers legitimately entitled to reliefs or exemptions and those seeking to abuse them?

As I have set out above in my response to question 2 above, I consider that there is already sufficient legal guidance to enable the existing statutory framework to be applied in most circumstances. The major current difficulty with this is that the existing statutory framework and the legal guidance thereon are applied inconsistently between one local authority and another. This problem is exacerbated by the fact that there is no proper legal route to determine liability disputes - as opposed to disputes involving a simple refusal to pay.

6. Do you have any views on what changes could be made to the administration of reliefs and exemptions that would help prevent or tackle business rates avoidance?

A route of appeal in respect of rate liability disputes (as opposed to refusal to pay) to the Valuation Tribunal for England would, in my view, help establish a framework of a more consistent application of exemptions and would establish better guidance on how those reliefs and exemptions should be applied.

7. What are your experiences in taking action against those avoiding business rates?

This is a surprising question, given that avoidance is legal. Why should action be taken against parties who are acting within the law? Tax policy cannot be administered on “moral” grounds but must be administered on a sound legal basis. If the government is unhappy with the outcome of existing exemptions and reliefs then those should be amended.

8. Do you have any views on what steps could be taken to help authorities come together to tackle attempted business rates avoidance?

A single consistent and coherent route of appeal in respect of business rate liability matters would be very helpful here. As I have set out above, appeals in respect of the liability (as opposed to those involving a simple refusal to pay) should be referred to the Valuation Tribunal for England. This would help encourage consistent application of exemptions and reliefs across the country and would help develop a body of guidance as to how those exemptions and relief should be applied in particular circumstances.

9. Do you have any alternative suggestions as to how to tackle business rates avoidance?

There should be a proper review of empty property rate liability - as was promised after the Lyons Inquiry Report in 2007, but which did not take place prior to the introduction of the current empty property rate regime in 2008.

There should also be a full review of exemptions and reliefs as has been recommended on many occasions since the publication of the Bayliss Report. Such a review should not be conducted solely with a view to looking at empty property rate reliefs and exemptions.

I confirm that I have no objection to this consultation response being made public. I am happy to amplify or explain anything contained in this response.

Yours faithfully



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