Business Rates Briefing – December 2019

Rating Revaluation news ■ Draft Multiplier Correction ■ Treasury Select Committee: Inquiry Report ■ General Election guide to Business Rates ■ Upper Tribunal Decision on Property Guardians ■ NHS Charity Relief claim ■ Appeals Update in Scotland ■ BA's to set Business Rates in Scotland?

Further to our last Business Rates briefing in October on the likely multipliers for 2020/21, there is plenty of other rating news to catch up on and we set out further information on developments in the rating world over the past three months, primarily in England and Scotland, which hopefully will be of interest.

England

- ### Revaluation 2021 or 2022 – England & Wales

Since our last briefing in October, we have, of course, had the announcement of a General Election for 12 December 2019 and there will be no new legislation until after then. As such, whereas we understand it remains the Government's intention to push through the three pieces of legislation that were abandoned when parliament was prorogued in September, much may depend on the outcome of the election and not much time remains for the legislation to be enacted if the government decides to proceed with a 2021 revaluation in England and Wales. Readers will recall that the three business rates related Acts of Parliament that did not make it into law were:

1 - Non Domestic Rating (Public Lavatories) Bill 2019

2 - Non Domestic Rating (Preparation for Digital Services) Bill 2019

3 - Non Domestic Rating (Lists) Bill 2019

As things currently stand the next revaluation in England and Wales is set for 1/4/2022, and it will need the Non-Domestic Rating (List) Bill 2019 to be enacted or a similar replacement Bill. As also mentioned last time, the AVD has been amended to 1/4/2019 by Statutory Instrument, but this could be reversed/changed again if the Revaluation in 2021 does not proceed in England and Wales

- ### Draft Multiplier 2020/21 England - CORRECTION

In our previous October Briefing, we set out the estimated multiplier for England based on the announced CPI rate for September 2019. We followed the calculation prescribed to produce a draft multiplier of £0.50 but the Government has since clarified their interpretation of the calculation and published in DRAFT the Local Government Finance Act 1988 (Non-Domestic Rating Multipliers) (England) Order 2019. This confirms the statutory inflation rate producing a multiplier for England slightly below the original estimate for 2020/21 at **£0.499**.

Of course, the draft Order cannot now be introduced until after the election on December 12th and may yet not take effect. This will rely on the next Government introducing it and, given the political uncertainty with a general election, this cannot be taken for granted. We now expect the multiplier to be formally confirmed once the Local Government settlement takes place, but the timescale on this is unknown and may well not be until January at the earliest.

In the meantime, GL Hearn has retained our estimate of £0.50 for England, based on the prescribed calculation, but we will update our GLHIMS and Riverlake systems as soon as the new multiplier is formally confirmed.

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- **Treasury Select Committee Inquiry on "Impact of Business Rates" in England**

Impact of Business Rates – In February 2019, the Treasury Select Committee announced that it would conduct a review of the impact of business rates on business in the UK. As part of their proceedings, the Committee held five oral evidence sessions including testimony from a number of ratepayers, professional bodies and trade associations, the VOA and from government departments involved with business rates - HM Treasury and the Ministry of Housing Communities and Local Government (MHCLG). As well as this oral evidence, the committee received over 140 written submissions from a wide range of businesses (including GL Hearn), trade and professional stakeholder bodies as well as from local government and academic institutions.

After some delay the resulting report has now been published and we attach a copy hereto.

The Committee's report is, refreshingly, a unanimous one - despite the committee consisting of Conservative, Labour, SNP and Independent MPs – this is somewhat surprising to say the least given wider political agendas.

The report references that total business rates liabilities stood at some £31Bn in 2018/19. In this context, a key finding of the report is that such liabilities have significantly increased, in real terms, over the past 30 years and the committee asks: *"The Government must explain whether it is deliberate that, since Business Rates were introduced in their current form in 1990, the revenue they have generated has outpaced inflation*". It also notes that this increase is inconsistent with other corporate taxes which have, generally, fallen over the same period. The Committee also reference the perceived unfairness of the tax: *"Throughout this inquiry, the Committee has been told that Business Rates do not fall upon all business equally, for example, they place a far greater cost on physical businesses, such as those on the high street, than those that rely more upon an online presence".*

The report recognises the extensive number of exemptions, reliefs, and other complexities in the business rates system and comments that "t*weaking the current system of Business Rates through an increasingly complex web of reliefs does little to address the negative aspects of this tax and simply demonstrates how broken the system is"*. The report recommends a review of all exemptions and reliefs and has particularly harsh words for the transitional relief scheme introduced for the 2017 rating revaluation in England, which has *"kept rate bills artificially high over a prolonged period for many businesses".*

The committee expresses concern that successive changes to business rates policy and its increasing burden has not aligned with the government's wider policies for business. In particular: *"The current approach to business rates acts as an immediate, significant disincentive to investment. Business Rates are an important source of revenue but the Government must explore alternatives to address their negative impacts".*

In this regard, the Committee considered alternative options put forward by various respondents to replace or reform the current system (which include suggestions for land value tax and an online sales tax). However, the Committee concluded: *"further work is needed to fully model the proposals" and*, in the case of Land Value Tax, the report notes that the practicalities of implementation of this are *"very difficult".*

The Committee, nevertheless, recommends that the Government should take a deeper look at possible alternatives and prepare a consultation in time for its Spring Statement 2020. In the meantime, it suggests that improvements could be made by improving and simplifying reliefs, reducing statutory limits for responding to appeals, and ensuring that the Valuation Office Agency (VOA) is properly resourced.

The new "Check, Challenge, Appeal" system in England comes in for criticism as having been badly implemented. The report is particularly scathing of the statutory timescales for responses by the VOA calling them *"too generous"* and suggesting that 6 months would be sufficient (rather than the current 12 months for Checks and 18 months for Challenges). The report states *"It is unacceptable to bring in a system that creates so many difficulties for ratepayers".*

The final section of the report also expresses concern that the VOA may not be properly resourced to deal with the proposed change to 3 yearly revaluations. The report suggests that the *"VOA must perform a detailed analysis of its staffing and skills requirement in time for the next Spending Review and share it with this Committee".*

GL Hearn comment: The Treasury Committee's report is clearly a welcome one, picking up on the clear deficiencies of the current business rates system, albeit, these are so plain to see it would have been very surprising for any other conclusion to have been reached! The key findings: that the level of business rates taxation is very high in relation to both international comparisons and to other UK corporate taxes, and that the system is overly complex, are familiar concerns from ratepayers and professional commentators alike. Whilst the report recommends an in-depth review of the business rates system by government, in time for the 2020 spring statement, it is hard to see this happening with a general election having been announced shortly after publication. It is also disappointing, albeit hardly surprising, that whilst the Committee welcomed suggestions of alternative options to the current business rates system, they were unable to recommend any practical, alternative solutions. One could argue that doing so would be beyond most stakeholders outside of Government.

The Government would normally be expected to respond promptly to any recommendations contained in a Treasury Select Committee report but, as the General Election has now intervened, it seems unlikely that we will see any formal response until next year. The timing of the report's publication was unfortunate in this respect and we now have to hope that it is not simply "buried" and ignored by whatever government comes into being following the general election.

- ### General Election Update: Manifesto commitments on Business Rates

The announcement of a General Election for 12th December was not ideal timing in terms of pressing home the conclusions of the Treasury Select Committee Inquiry into business rates. There is no question that business rates has become a "hot" political topic. Unsurprisingly, the main political parties have tried to incorporate reform of property taxation in their manifestos.

Whilst business rates policy may not be the obvious basis for the electorate to vote on, it will nevertheless be of considerable importance to businesses in the UK. The case for reform is beyond question given the hard-hitting conclusions of the Treasury Select Committee but that is only something that businesses have known for a considerable period. The "million dollar" question is what will the next Government do about it and how quickly?

We therefore thought that readers might like to compare what the various parties are saying about both non domestic rates and council tax in their published manifestos. The attached guide sets out the various extracts identified from each of the main party's published manifestos where direct reference is made to business rates or Council Tax and makes for interesting reading!

Case Law Update:

- ### Upper Tribunal determines Property Guardians case

The case of **Ludgate House Ltd v Ricketts (VO) and the London Borough of Southwark** relates to the use of Property Guardians in buildings as a means of mitigating rates liability through the contention that the property has changed from non-domestic to domestic use. We referred to the original Valuation Tribunal for England determination last year where the president of the VTE determined that the use of an office building by Guardians did not change the use to domestic accommodation and the existing entry should remain in the non-domestic Rating List.

The Case so far:

The property comprised a large 9 storey office block built in the 1980's to largely open plan specification but which had become vacant by 2015 pending a redevelopment as part of the wider Bankside Gardens scheme. It had been assessed on the 2010 List as two separate office hereditaments.

Upon becoming vacant the owner entered into arrangements with a security company for the building to be "occupied" by live-in guardians for residential use and to provide a "robust level of protection". Proposals were submitted seeking the deletion of the existing entries as "Offices and premises" on the basis that the property was now in domestic use.

These proposals were actioned by the VOA on the basis requested and the entries deleted. The Billing Authority, however, having inspected the premises, served its own proposals seeking the re-inclusion of the entries in the Rating List as office assessments and these too were actioned by the VOA but as "composite" hereditaments meaning a part commercial, part domestic building.

The owners appealed these revised entries seeing their deletion again or, as an alternative, a rateable Value of £1 on the basis that the building was intrinsically domestic. The VTE had to consider firstly, who was in rateable occupation of the building and what was the hereditament; secondly, was the property wholly non-domestic, wholly domestic or composite as per the current entries; thirdly, if any part was non-domestic, what was the correct RV.

The VTE found that whilst the guardians were physically present, their occupation was sufficiently restricted under the terms of the agreement in place and sufficiently under the control of the owner of the building, Ludgate House Limited (LHL) that *"LHL, not the guardians, was in fact in paramount occupation of the whole of Ludgate House as a single hereditament"*. Furthermore, the VTE *was "not satisfied that Ludgate House (or any part of it) was used wholly for the purposes of living accommodation"*. The facts of the case showed that around 32 guardians had resided in the premises – primarily the basement, the first floor and one of the open plan floors – by no means a majority of the building; indeed *"most floors were sparsely occupied"*. Only four were actually residing as at the material day.

In commenting on the extent of the guardians' occupation in the physical context of the building, the VTE determined that the property should not be treated as a wholly domestic hereditament. Indeed, it should not, properly, be treated as a composite hereditament either - i.e. no part of it was wholly domestic - but, because the 2010 Rating List has now closed, *"it falls to be valued that way and cannot be changed"*.

In determining against the owners on almost every aspect the Vice President commented "Owing to the nature of the building and the arrangements, the legal framework it tried to impose in fact defied reality and logic. Each case must be determined on its facts, and the scale of the building and the nature of the occupational licences tipped the scales far away from LHL. I considered the circumstances as to the routes of passage used by the guardians to be contrived and counter-factual, unnatural in a domestic context."

The existing Rating List entry of RV £3,390,000 as a "Composite" hereditament was confirmed and the appellant's appeal dismissed.

Upper Tribunal:

Before the Upper Tribunal, the building owner again contended that the occupations by the four guardians in place at the relevant material day were domestic, and that each occupation represented a separate domestic hereditament.

The respondents (namely the VO and the LB Southwark) submitted that the building was not used for domestic purposes (as had been determined by the VTE), and that the owner had been in paramount control of all of it. As such a single, non-domestic hereditament was appropriate and the current entry should remain in force.

The resulting decision of the Upper Tribunal is an interesting one, with some detailed consideration around the nature and purpose of composite hereditaments in respect of domestic and non-domestic areas existing in the same building. Furthermore, there was extensive commentary on “unit of assessment” issues and the extent to which “general control” on the part of the landlord might influence matters. Whilst the particular facts of this case determined the outcome there are clearly points of principle that may well affect other, similar situations.

The Tribunal concluded that each of the rooms occupied by the four property guardians in place at the relevant day was capable of representing a separate hereditament by virtue of satisfying the tests set out by the Supreme Court in Woolway (VO) v Mazars (2015). This was notwithstanding that other areas needed for domestic use (bathroom facilities, toilets and kitchen etc) lay outside the boundaries of such areas. The Tribunal also concluded that each of the respective guardians satisfied the required tests of rateable occupation and must be considered the rateable occupier of the room concerned. Having determined as much, the Upper Tribunal concluded that the building could not, therefore, be described as a single non-domestic hereditament, whether composite or otherwise - the VO’s 2017 notices were fatally flawed. The Tribunal Member, Martin Rogers concluded: *"We are therefore satisfied not only that the licensees’ individual rooms were separate hereditaments, but that the rateable occupier of each of those hereditaments was not LHL but was the individual licensee whose temporary home it was. The rooms were used wholly for the purpose of living accommodation and the licensees were therefore not liable for non-domestic rates, but for Council Tax. Ludgate House was not a composite hereditament, because there was no single rateable occupier of the domestic and non-domestic space."*

The Tribunal ordered that the Rating List must be restored to its position before the Valuation Officer’s 2017 notices (essentially no List entry existing) and that the erroneous Rating List entries created by those notices should be deleted.

If this decision had related to 2017 List entries the Valuation Officer might have been able to bring into assessment the correct domestic and non-domestic entries. Here, with the 2010 List closed, there was no opportunity to do so.

The Tribunal’s decision is an important one for building owners looking to mitigate empty rate liability is by installing property guardians. It is clear from the decision that each case will fall to be considered on its own individual facts and that no general rule as to the effectiveness, or otherwise, of property guardians has been established by this decision. But what is clear, is that the Tribunal considered that the relevant test for domestic occupation was the one set out in the legislation and relates to the “use” of the property concerned, rather than the way in which the property is designed or configured. Those implementing property guardians’ schemes will also wish to consider carefully the Tribunal’s comments regarding “Houses in Multiple Occupation” (HMOs) and the legal requirements thereto.

The case also raised a number of other significant issues, regarding the valuation of composite hereditaments, and the backdating of rating list entries. But, given the determination rested solely on the initial issue of identification of the hereditaments, the Upper Tribunal did not deal with these matters and we will need to await future cases in that regard.

- **High Court considers Charitable Relief claims by NHS Foundation Trusts**

The High Court have been asked to determine a preliminary issue in respect of proceedings issued by Derby Teaching Hospitals NHS Foundation Trust and 16 other NHS Foundation Trusts against the respective Billing Authorities that their occupied hospital premises fall with, claiming reimbursement of non-domestic rates paid. The case is of potentially huge financial importance to Billing Authorities. The 17 Trusts contend that they are entitled to receive mandatory 80% Charitable relief (similar to that obtained by certain private hospitals) and such rebate claims should be awarded retrospectively, potentially costing Billing Authorities billions of pounds cumulatively. The Billing Authority’s case is being supported by the Local Government Association who have obtained advice from the Charities Commission in support of their contentions.

"The LGA is supporting member councils that have received applications for mandatory relief from business rates on behalf of a number of NHS trusts and are working with them to consider the appropriate response. We have sought legal advice from counsel. We believe that NHS trusts and foundation trusts are not charities, and that the applications for rate relief are therefore unfounded."

A spokeswoman for the Charity Commission said the regulator would be providing assistance to the court in interpreting charity law for the purpose of helping the court reach a decision on the legal status of NHS trusts. *"We consider it vital that the court, in making a decision in this case, is fully aware of current law, procedure and practice applicable to charitable status in England and Wales and is mindful of the potential consequences of changes to the principles that determine those boundaries,"* the spokeswoman said. *"As the registrar and regulator of charities in England and Wales, the Charity Commission is in a unique position to offer the court our expertise and experience in this area."*

The case could, potentially have wider implications for other "not for profit" organisations and the outcome of the High Court's deliberations are awaited with interest.

Scotland

- **Appeals update in Scotland**

Scotland's Chief Statistician has published statistics on the progress and results of non-domestic rates revaluation appeals following the 2010 and 2017 revaluations. These figures were produced by independent statistical staff free from any political influence, in accordance with the Code of Practice for Official Statistics. As of 30 September 2019:

- 49,970 appeals for the 2017 revaluation have been resolved, with an original RV of £2.25 Bn, representing 68% of the 73,888 appealed properties but only 42% of the £5.39 Bn appealed RV
- a total of 23,918 appeals against the 2017 revaluation remain outstanding - some £3.14 Bn of appealed RV
- 73% of appeals resolved to date - 36,416 - did not result in any change in RV
- the RV decrease to date of £161 million stems from 13,554 resolved appeals
- 2010 revaluation appeals have been resolved for over 99% of properties for which an appeal has been received - 66,903 of 67,026
- the original RV of the properties for which 2010 revaluation appeals have been resolved is £4.89 Bn, 98.9% of original RV for all properties for which such appeals were lodged
- the RV decrease to date on 2010 revaluation appeals resolved is £265 million

GL Hearn comment: Whilst CCA in England still struggles to "get out of the blocks" some 2 ½ years after the 2017 List came into force, the situation in Scotland is very different. It is quite staggering to think that more proposals have been concluded successfully in Scotland than have been made in totality in England given the substantially fewer number of hereditaments north of the border. In stark contrast to England all Scottish proposals had to be served by 30th September 2017. That said we are aware the Scottish parliament favours a form of CCA in Scotland for the new revaluation in 2022 and the statistic above that 73% of appeals resolved to date did not result in a change in Rateable Value will no doubt strengthen this view.

** STOP PRESS ** Local Councils to set rates in Scotland??

Members of the Scottish Local Government Committee voted through an amendment to the Non-Domestic Rating (Scotland) Bill last week to potentially give local authorities the power to set their own business rates and take full control of the Scottish rates system at a local level.

The Local Government and Communities Committee had been debating the Bill and Andy Whiteman of the Scottish Green Party put forward four amendments, briefly:

- 9 - local authorities would have the power to set a rate but if they didn't choose to exercise the power the government prescribed national rate would apply.
- 10 – the Government would set a national rate and the local authority would set an additional rate.
- 11 – the local authority to be given the power to raise rates in one sector but to cut them in another. This would be linked to amendment 9 but be revenue neutral.
- 12 – as per amendment 11 but introducing similar powers under the current system if 9 & 10 were rejected.

Amendment 9 was passed which proposes an amendment to the Paragraph 7 of the 1975 Act as follows:

(1) The Scottish Ministers must by regulations make such provision as they consider appropriate with a view to giving full effect to section 7, as amended by the Non-Domestic Rates (Scotland) Act 2020, by the year 2024.

(2) Regulations under subsection (1) are subject to the affirmative procedure.

(3) If a rating authority do not choose to discharge their power under section 7, the Scottish Minister may, in respect of the financial year following that in which subsection (1) has come into force and each subsequent financial year, prescribe a rate which will be the non-domestic rate to be levied throughout Scotland in respect of that financial year.".

It remains to be seen if the amendment will survive further discussion and a fresh vote in the Scottish Parliament itself, but the move was swiftly condemned by the Scottish Retail Consortium and the Federation of Small Businesses (FSB):

David Lonsdale, director of the Scottish Retail Consortium, said *"Retailers stump up over a fifth of all rates paid, and with shops under enormous pressure action is needed to reduce rates bills which are now at a 20-year high. Allowing each of Scotland's 32 councils to set the poundage rate in their area is an alarming and retrograde step, and flies in the face of the Bill's aims and the thrust of the rates reform agenda. Councils are already able to reduce business rates in their area, but only three have ever bothered to do so. Handing councils control over the poundage rate could lead to firms being treated like cash cows, pushing business rates up even higher and further hitting competitiveness."*

Stuart Mackinnon, the Federation of Small Businesses' external affairs manager for Scotland, said: *"This Bill is supposed to be looking at new ways to make the rates system more user friendly and introduce more frequent revaluations. Instead, we see a policy adopted which could costs businesses far more than the tourism tax or the workplace parking levy. At the earliest opportunity parliamentarians must put this significant Bill back on track."*

GL Hearn comment: This is a surprising and potentially unwelcome change to the business rates regime in Scotland. Whilst recent developments north of the border, post Barclay, have largely been progressive - with a number of new measures introduced to make rate payments fairer (not least the popular business growth accelerator relief) - this seems to fly in the face of ensuring Scotland remains competitive in comparison with other jurisdictions – one of Barclays key recommendations. We await to see if the amendment is passed, whether any controls will be put in place to restrict what local councils can impose on local businesses and the timing of such changes. Secondary legislation is required and may or may not be introduced before the revaluation in 2022. We will keep you informed as more information becomes known.

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I hope that the above update is helpful and if you have any queries or would like further clarification of the matters raised please do not hesitate to contact me, our senior team below or your usual GL Hearn contact:

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