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Welsh Tax Acts etc. (Power to Modify) Bill

Finance Committee of the Senedd Cymru (Welsh Parliament) inquiry

Response by the Chartered Institute of Taxation and our Low Incomes Tax Reform Group

1 Introduction

1.1 The Chartered Institute of Taxation (CIOT) and its Low Incomes Tax Reform Group (LITRG) respond jointly to the Finance Committee's inquiry into the general principles of the Welsh Tax Acts etc (Power to Modify) Bill.

1.2 Our stated objectives for the tax system include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

1.3 We have considered the following in our response:

- The general principles of the Bill and the need for legislation;
- The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation as set out in Chapter 5 of Part 1 of the Explanatory Memorandum
- Any potential barriers to the implementation of these provisions and whether the Bill takes account of them
- Whether there are any unintended consequences arising from the Bill

- the appropriateness of section 3 (Policy statement: regulations under section 1 that have retrospective effect) and the draft policy statement (PDF, 329KB) published alongside the Bill.

2 The general principles of the Bill and the need for legislation

2.1 As we said in our response to the Welsh government's consultation: Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts[1], our starting point is that tax law should be set out in primary legislation particularly in so far as it relates to the exercise of tax powers setting out what is subject to tax and imposing burdens on taxpayers. Secondary legislation should ideally be used only for administrative matters. This is to ensure proper scrutiny of legislation that results in the imposition of some kind of burden (compliance or financial) on taxpayers.

2.2 However, we recognise the challenges in introducing primary legislation to implement tax changes via an annual Welsh finance bill as currently the volume of legislative change required is probably insufficient to justify an annual finance bill process in Wales. There are however good reasons to keep this option under review. The legislative process should reflect the significance of the devolved tax system in raising revenue in Wales. The case for an annual Welsh finance bill will strengthen if devolved taxes provide an increased share of revenues to fund wider policy areas dealt with by the Welsh Parliament.

2.3 We consider there is currently a good case for a mechanism to enable amendments to be made in the manner set out in the Bill on the basis the powers provide a reasonable balance between the competing needs of speed, scrutiny and responsiveness at this point in the development of Welsh devolved taxes. We suggest consideration is given to a legislative sunset clause or mandatory re-authorisation to ensure they remain appropriate.

2.4 We note the reference in the Explanatory Memorandum at paragraph 11 (*In addition, review of this legislation, and the regulations made using it, will be undertaken as part of ongoing consideration of the feasibility and appropriateness of a future annual Welsh Finance Bill procedure.)*. We welcome that commitment. Extensive use of the regulatory powers to amend the Welsh devolved taxes is likely to be a strong indicator of the need to re-consider whether the regulatory powers remain appropriate.

2.5 Where regulations made under the powers in the Bill make complex amendments we think, it should be the norm to publish (ideally simultaneously) a consolidated version of the law as amended. This would greatly aid transparency and comprehensibility of the law, particularly where the amendments made are very complex, or are due to come into force at short notice. We understand that the Welsh Tax Acts published on the legislation.gov.uk website (and possibly Law Wales in the future) will be updated to reflect the current legislation in force following approval of a regulation by the Senedd.

[1] https://www.tax.org.uk/ref694

3 The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation as set out in Chapter 5 of Part 1 of the Explanatory Memorandum

3.1 The Bill provides Welsh Ministers with a power to make changes, by means of regulations, to the Welsh Tax Acts and regulations made under those Acts, if the Welsh Ministers consider that it is necessary or appropriate to make those changes for any of the four purposes specified in the Bill. The regulations can be made either under the draft affirmative procedure (the regulations can only come into effect once the Senedd has approved the making of them), or where the Welsh Ministers are of the opinion that, by reason of urgency, it is necessary, under the made affirmative procedure (the regulations come into force as soon as the regulations are made, whilst awaiting Senedd approval).

The four purposes are:

(a) ensuring that landfill disposals tax or land transaction tax is not imposed where to do so would be incompatible with any international obligations;

(b) protecting against tax avoidance in relation to landfill disposals tax or land transaction tax;

(c) responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of Wales Act 2006 (c. 32);

(d) responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts.

3.2 We consider the use of the powers in the circumstances described seem reasonable, with the caveat that the there is quite a wide discretion particularly in relation to the undefined term 'tax avoidance'. We note the Minister's comments in the evidence session before the Finance Committee at paragraph 210-211 of the transcript[2] and the interaction with the existing power to

[2]
Para 210 : (Carolyn Thomas MS) Thank you. Just a final question from me regarding the 'to protect against tax avoidance' in relation to devolved Welsh taxes—so, why the Bill confers powers on Welsh Ministers to protect against tax avoidance when there is already the general anti-avoidance rule enacted in legislation. So, if that legislation already exists, why would this Bill confer powers on Welsh Government to protect against tax avoidance?
Para 211: (Rebecca Evans, Minister for Finance and Local Government.) So, for both devolved taxes, there is always the risk that there will be individual or mass-marketed avoidance activity that Welsh Government and the Welsh Revenue Authority might want to stop with immediate effect. That could be because there is a lacuna or gap in the legislation that facilitates the avoidance activity or, based on UK experience, a need for clarity to the legislation to make it clear that the law operates in a manner that doesn't permit the avoidance activity. So, the general anti-avoidance rule is an important anti-avoidance tool available to the WRA to counteract instances of tax avoidance. However, it can only be used after the fact, where a specific avoidance scheme has been used to gain a tax advantage, so it doesn't prevent future taxpayers from exploiting the same avoidance opportunity in the future, whether intentionally or not. So, the new power would enable Welsh Ministers to change the law and close down any perceived opportunities for avoidance before they could become widely exploited.
Para 212: In many cases, it's desirable to make the change to the legislation to provide greater clarity to stop the marketing of avoidance schemes that ultimately the courts find didn't work as the promoters contended. And that sort of change actually protects taxpayers from taking part in avoidance schemes that can result in them paying the tax owed and also the fees for the advice and services as well, so it would seek to protect Welsh taxpayers as well.

counteract artificial tax avoidance arrangements under the General Anti-Avoidance Rule[3]. The intention is that the power may be used to close down any perceived opportunities for avoidance before they become widely exploited. We recognise the value of acting swiftly to close down artificial tax avoidance arrangements thereby helping to protect taxpayers who may otherwise participate in avoidance schemes without the full facts and knowledge of the law. We note also the SDLT experience where there has been a history of mass marketed avoidance schemes subsequently addressed through primary legislation although this has taken time. As with all four purposes it will be essential that the case for using the power in these circumstances is robust, based on evidence and subject to scrutiny.

3.3 There is a tension between introducing a tax change quickly and ensuring the legislation has adequate scrutiny such that it is effective. The more complicated the change, the greater the need for consultation. In evaluating the tensions between scrutiny and speed, one of these needs may outweigh the other depending on the type of legislative change under consideration and, in particular, the motivation for that change.

3.4 We have considered whether there might be a case for extending the purpose in (d) to include a change in interpretation by HMRC in relation to a predecessor tax that leads to a need to clarify the interpretation of a provision in the devolved taxes. However, on balance such changes are more appropriately addressed through existing powers or where necessary through primary legislation.

3.5 We also considered whether there might be advantages in a specific commitment to raising the intended use of the powers at the Minister's Tax Engagement Group or through a dedicated stakeholder forum before proceeding to the formal stages and, where it is not possible to do so (for example, due to forestalling or sensitivities), the restraints on so doing should be noted explicitly in the Explanatory Memorandum when introducing the proposed change to the Senedd. However, we are comforted by the comments at paragraph 4.15 of the Explanatory Memorandum in relation to consultation on new measures.

In many cases the Welsh Ministers will not invite comment on the intention to legislate using the powers provided by the Bill, the nature of the change or on its timing prior to making regulations. However, subject to the risk of forestalling, consideration will be given on a case by case basis to engaging informally, and in confidence, with key stakeholders, before and during the drafting of regulations to establish whether the legislation will achieve its objective. In particular, where the regulations are to respond to changes made by the UK government to a predecessor tax, or the coming force date does not need to be immediate, there may be opportunities for engagement.

Consideration might be given to publishing the nature of any informal consultation after the regulations come into force in the interests of transparency.

3.6 The Bill provides that ministers determine whether 'urgency' requires the made affirmative procedure. Paragraph 3.28 of the Explanatory Memorandum states:

[3] Tax Collection and Management (Wales) Act 2016 section 81A et seq.

However, the Welsh Ministers may use the made affirmative procedure where they consider it necessary by reason of urgency (for example where the regulations will need to have effect immediately or shortly thereafter, and so before a draft affirmative set of regulations could be approved by the Senedd). This will ensure that changes may, where appropriate, come into force as soon as the regulations are made, whilst awaiting Senedd approval. The rules in relation to the making and approval of made affirmative 11 regulations are set out in subsections 4(3) to (7). Made affirmative regulations must receive approval within a maximum period of 60 Senedd days to enable those regulations to remain in effect. The rationale to introduce a change through new made affirmative regulations will be set out in the Explanatory Memorandum to those regulations.

The use of the made affirmative procedure may limit scrutiny and therefore the opportunity to identify unintended consequences of the measure. It would be helpful to explore in what circumstances ministers envisage they may consider invoking this procedure.

3.7 A lack of scrutiny places more weight on the importance of effective and routine post-legislative review of whether substantive measures are achieving their objectives at an acceptable cost, and the Senedd should hold the Welsh government to account accordingly.

4 Any potential barriers to the implementation of these provisions and whether the Bill takes account of them

4.1 In terms of procedure, we note that secondary legislation once laid, cannot generally be amended. Thus, if the draft that is laid is defective, even in a minor way, it cannot be altered to ensure that it is correct – secondary legislation can generally only stand or fall as drafted. This is probably not a major barrier as the consequence of any defect would be a short delay while a new instrument is laid.

5 The appropriateness of section 3 (Policy statement: regulations under section 1 that have retrospective effect) and the draft policy statement (PDF, 329KB) published alongside the Bill

5.1 There is clearly a case for retrospection to correct an obvious anomaly that is harming taxpayers or to correct deficiencies that emerge. For example in Scotland amendments were made to LBTT, initially through secondary legislation prospectively and subsequently with retrospective effect through primary legislation, to correct the ADS position for couples where the title to the former main residence is in the sole name of one of the couple and the couple then jointly buy a new main residence prior to selling their current main residence. There was some inevitable delay before Scottish parliamentary time could be found to pass primary legislation. The ability to correct anomalies retrospectively through the Bill's powers will ensure inequities for the taxpayer's are alleviated more quickly.

5.2 In addition to retrospective changes that benefit the taxpayer, the Explanatory Memorandum and the draft policy statement clearly envisage circumstances where regulations *increase* a taxpayer's

liability (subject to compatibility with the European Convention on Human Rights) including where avoidance needs to be 'halted' or where a court decision means the legislation may not be interpreted as intended by the Senedd when it was enacted.

We observe that retrospection has also been used at Westminster to reconfirm previously established interpretations of the law that were shared across a whole marketplace or section of the population, but which the courts had unexpectedly found to be erroneous.

Similarly the Westminster government has used retrospection to combat organised tax avoidance, the least controversial circumstances have been when an announcement is made that legislation would be amended in the next Finance Bill backdated to the date of announcement: the announcement serves to avoid taxpayers developing expectations of the more favourable tax treatment sought by the avoidance scheme.

We note the regulatory power in paragraph 3(1)(c) of the Bill to make a provision that has retrospective effect is not limited in its effect to the date of a prior announcement.

5.3 The draft policy statement states that a change taking effect from a date earlier than the date of making is intended to be used in exceptional circumstances only. We agree that retrospective legislation that imposes or increases a tax charge on income earned, gains realised or transactions concluded at a time before the legislation was announced should be used with extreme care and justified in detail.

5.4 The draft policy statement refers to 'retrospection'. There are broadly two ways in which tax legislation can act on past events, often referred to as 'retrospective' and 'retroactive' although the meaning ascribed to these terms is not consistent. Tax practitioners, at least in the UK would usually understand retrospective legislation to mean legislation imposes (or reduces) a tax charge on income earned, gains realised or transactions concluded at a time before the legislation was announced. Retroactive legislation is usually taken to mean legislation that imposes a tax charge on income arising or a gain realised after the date when the legislation enters into force (perhaps a deemed gain), but that income or gain arises from transactions entered into (or at least commenced) before the legislation. The powers under the Bill could be used to effect changes in either sense irrespective of the terminology used. A key point from our perspective is that the Welsh government recognises and gives due weight to taxpayers' legitimate expectations in this context.

5.5 The 'Spotlight' system[4] is often used by HMRC to identify avoidance schemes that are contrary to the policy intent. We suggest that where the WRA identifies artificial avoidance activity, a similar approach should be considered to give early warning to taxpayers that such schemes are not effective or where the WRA becomes aware that a particular approach is being marketed to taxpayers that does not reflect the WRA's interpretation of legislation and case law. The aim would be to protect taxpayers from developing expectations of the more favourable tax treatment. A good example of 'pointers' that might be helpful to taxpayers is the article published on the CIOT

[4] https://www.gov.uk/government/collections/tax-avoidance-schemes-currently-in-the-spotlight-number-20-onwards

blog at https://www.tax.org.uk/explaining-subsidiary-dwellings-guidance-for-welsh-properties and (for SDLT) https://www.tax.org.uk/stamp-duty-refunds-too-good-to-be-true.

6 Acknowledgement of submission

6.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

7 About us

7.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

7.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

7.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

7.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

7.5 The Low Incomes Tax Reform Group is an initiative of the Chartered Institute of Taxation to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.

7.6 LITRG works extensively with HM Revenue and Customs and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

The Chartered Institute of Taxation

21 January 2022