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## Welsh Government

### Consultation: The future of Welsh law: classification, consolidation, codification

#### Joint Response by the Chartered Institute of Taxation (CIOT)

#### and the Low Incomes Tax Reform Group (LITRG)

## 1 Introduction

- 1.1 The Chartered Institute of Taxation and the Low Incomes Tax Reform Group set out below a joint response to the Welsh Government consultation on 'The future of Welsh law: classification, consolidation, codification'.
- 1.2 This consultation on Welsh law (including devolved tax legislation) was published on 17 October 2019 and closes on 31 January 2020. It concerns the following areas.
  - Classification of Welsh Law through a draft taxonomy for codes of Welsh law by subject-matter;
  - The consolidation of existing law including modernising the form and drafting where necessary;
  - Codification of Welsh law, that is, the process of adopting and maintaining a structure for Welsh law (a code would generally be a collection of enactments under a unifying overarching title);
  - Improving accessibility by better communication
- 1.3 This response focuses on the consultation proposals in relation to devolved tax legislation.

## 2 About us

- 2.1 The Chartered Institute of Taxation is the leading professional body in the United Kingdom concerned solely with taxation. 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. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties.
- 2.2 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. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

- 2.3 The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax.
- 2.4 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.
- 2.5 LITRG works extensively with HM Revenue and Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related 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.

### **3 Question 1: With reference to the draft taxonomy in Annex 1, do you agree with the suggested structure of subjects and sub-topics?**

#### **Question 2: Do you have any suggestions for improving this draft taxonomy**

- 3.1 The draft taxonomy includes 'Taxation' as a main category with sub-categories of:

- Management and collection of devolved taxes
- Land transaction tax (LTT)
- Landfill disposals tax (LDT)

The devolved legislation relating to these sub-categories is the standalone Acts of the National Assembly for Wales and consequential secondary legislation including:

- Tax Collection and Management (Wales) Act 2016
- Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017
- Landfill Disposals Tax (Wales) Act 2017

The Welsh Revenue Authority (WRA) is responsible for collecting and administering land transaction tax and landfill disposals tax.

However, the category of 'Taxation' would appear also to encompass the partial devolution of powers to set Welsh rates of income tax as a result of the Wales Act 2014 (amending Government of Wales Act 2006 with consequential amendments to the UK-wide Income Tax Act 2007 and the introduction of secondary legislation). The Welsh rates of income tax were introduced from 6 April 2019. Responsibility for collection of the Welsh rate of income tax remains with HMRC via existing PAYE and self-assessment tax collection frameworks.

Is the legislation related to partial devolution intended to fall under 'Taxation'? A similar question arises in relation to business rates that have been fully devolved to Wales since April 2015. In the latter case, the category of 'Local government' would also be relevant.

The devolved tax legislation incorporates provisions that have not been devolved (eg the Corporation Taxes Act 2009, The Partnership Act 1890 etc), how will these references / dependencies be captured (see also 6.3 below)?

3.2 The Welsh government is exploring the possibility of the following new devolved taxes:

- Vacant land tax.
- Disposable plastic tax.
- Tourism tax.
- Levy to support social care.

The taxonomy may need to expand to reflect further sub-categories.

3.3 The consultation recognises that there may be fine distinctions as to where boundaries lie between subject categories in the taxonomy, for example in relation to taxation, would legislative mechanisms for tax appeals fall under 'Taxation' or 'Public administration'? The ability to link between categories by some form of tagging may be appropriate.

3.4 The draft taxonomy encompasses guidance. The Welsh Revenue Authority (WRA) guidance relating to LTT, LDT and the management of devolved taxes is currently available on the WRA website. Replicating the WRA guidance on 'Cymrux' might lead to confusion for taxpayers and advisers and perhaps impose an unnecessary administrative burden to maintain that guidance in two places unless there are benefits in accessibility not currently provided by the WRA (such as the ability to provide pdfs of current guidance, or provide access to archived guidance). We suggest that providing links from the devolved tax legislation on Cymrux to the WRA website would be beneficial. Similarly, the ability to link directly to the devolved taxation acts on the WRA website would promote taxpayers' understanding of the source of the underlying law.

3.5 Maintaining explanatory notes for the devolved taxes on Cymrux would assist transparency (we comment further on the content of explanatory notes below at 6.2).

**4 Response to the consultation - Question 3: What specific area or areas of devolved law do you think are most in need of consolidation, and why?**

4.1 Our response is concerned with the devolved taxes legislation. That legislation is relatively new, drafted in a modern style and has only been in effect for a short period; there is therefore no obvious case for consolidation of existing devolved tax legislation.

4.2 However, we observe that the UK Tax Law Rewrite Project (TLRP), established in 1996, intended to make the language of tax law simpler, while preserving the effect of the existing law, subject to some minor changes. Tax professionals were divided on the benefits and drawbacks of the TLRP<sup>1</sup> with views to some extent dependent on the role or position of the user. Whether professionals were positive or negative about the TLRP it was felt that the rewrite process had missed the opportunity to simplify; the fundamental issue in terms of accessibility being the inherent complexity of underlying tax concepts rather than language or structure. As the Better Budgets<sup>2</sup> report notes: 'The Tax Law Rewrite Project's rewrite of direct tax legislation in 'plain English' style made legislation clearer but the style of drafting cannot by itself solve the problems inherently involved when provisions are introduced with numerous exemptions or qualifications.' The issue

<sup>1</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/344921/report104.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344921/report104.pdf)

<sup>2</sup> [https://www.instituteforgovernment.org.uk/sites/default/files/publications/Better\\_Budgets\\_report\\_WEB.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/Better_Budgets_report_WEB.pdf). Better Budgets

of underlying complexity in tax policy led to the subsequent establishment of the Office of Tax Simplification and efforts to simplify the UK tax system.

- 4.3 We have some general observations on the process of consolidation as set out below.
- 4.4 At paragraph 57 of the consultation document, it indicates that the process of consolidation ‘is likely to reveal inconsistencies and anomalies in existing legislation.’ It goes on to suggest that as a result, it might be beneficial to make minor amendments, which ‘may only be minor and non-controversial’. Although the identification of inconsistencies and anomalies may in theory be straightforward, with the same going for minor and non-controversial amendments, in practice, this may not be the case.
- 4.5 In terms of the identification of inconsistencies and anomalies, there are questions as to who identifies these and determines that they are indeed inconsistencies and anomalies. Should there be a number of means of identification – perhaps by those reviewing and consolidating the law, external stakeholders (such as the professional bodies in relation to taxation law) and also the tribunals and courts. In this case, there is also a question over whether a wider consensus should be required that an inconsistency or anomaly identified by one group requires amendment.
- 4.6 In terms of whether amendments are minor and non-controversial, it should be recognised, that what appears minor and non-controversial to one party may be viewed as major and controversial by another party. This is particularly the case with taxation law, where a change viewed as administrative by the tax authority may be viewed as a policy change and therefore worthy of consultation by external stakeholders and taxpayers. So again, there is a question over whether wider consensus should be required that an amendment is minor and non-controversial.
- 4.7 At paragraph 62, the consultation discusses the clarification of existing provisions through the consolidation process, where there is doubt or ambiguity. The proposal is that through consolidation it will be possible ‘to clarify the intended meaning.’ However, it may not always be certain what the intended meaning of a provision was, particularly when the legislation concerned is complex. Thus, it should not be assumed that it will always be possible to proceed in this ‘clarification’ without prior consultation or discussion with relevant stakeholders.
- 4.8 Paragraphs 70 ff. discuss making changes to the law in order to achieve satisfactory consolidation. Again, this raises questions about who has responsibility for identifying what is an inconsistency, what should change and how it should change. In addition, consideration should be given as to whether consultation or input from other stakeholders is required in respect of a particular change.
- 4.9 At paragraph 73 of the consultation there is discussion about deciding whether something should be dealt with in primary or secondary legislation, and potentially moving provisions from one to the other. It should be noted that there is not always agreement about where a provision should sit, but in relation to taxation legislation, the CIOT and LITRG holds the opinion that provisions concerning the incidence of a tax, and those raising penalties etc. should be contained in primary legislation. This is to ensure they receive proper scrutiny when the law is being introduced.
- 4.10 Paragraph 76 discusses the possibility of a consolidation Bill containing other changes to the law, recommended by the Law Commission of England and Wales. In order to ensure that any such changes meet the criteria, we think there should be opportunities for stakeholder representations, as similarly to the scenarios referred to above, there is a possibility that there will be disagreement as to whether such changes involve new policy or are controversial.

- 4.11 In light of our comments above, we consider that in all these scenarios, there should be proper procedures in place for identifying such provisions and obtaining a consensus on whether or not an amendment is required and how a provision should be amended. We would expect this to involve providing the opportunity to external stakeholders to give their views. In terms of identifying provisions that require amendment, we think it should be possible for this to be done by the courts and tribunals, external stakeholders and the Welsh Government; there would need to be mechanisms in place to enable this process.

**5 Response to the consultation - Question 4: Do you agree with the Welsh Government's vision and proposed approach for codification of Welsh law?**

- 5.1 In order to maintain the structure of the codes (that is, legislation classified under a particular code such as Taxation), it is proposed that codification would also involve the designation of a principal Act in a particular code. The intention is that amending the law in any subject-area for which there is a principal Act should have to be done by amending the principal Act itself.
- 5.2 We recognise the advantages of this approach in reducing proliferation of subordinate legislation that needs to be read in conjunction with other Acts and helping to ensure consistency of terms and definitions. However, it is not clear how this approach might operate in relation to the three main Acts in relation to devolved taxation that cover the two specific taxes; Land Transaction Tax, Land Disposals Tax and the overall management of taxes framework. Would all three be principal Acts?

**6 Response to the consultation - Question 5: What activities could the Welsh Government undertake or support that would help you or others to better understand Welsh law?**

- 6.1 Tax law itself is often difficult to understand and interpret, so the accompanying documentation including explanatory notes play an important role in helping professionals and the public to understand both the intent and the expected impact of measures.
- 6.2 Explanatory notes accompanying devolved tax legislation will best assist where they set out the intention of the Assembly in enacting a measure and both its intended effect and any significant caveats/limitations as opposed to simply re-stating the legislation. One proposal is that publishing instructions to drafting counsel would help promote greater understanding of the intent behind measures, as well as ensuring that instructions are clear.
- 6.3 Legislation under the authority of the UK government forms part of the definitions in Welsh devolved legislation, for example, the definition of connected persons is dependent upon section 1122 of the Corporation Tax Act 2010. Our preference has always been that where the devolved legislation makes reference to or uses a term from a provision of a UK statute, that the relevant words be re-stated in the devolved legislation itself rather than effected by cross reference. This approach avoids finding that the devolved code is amended by some unrelated change to a UK Act, necessitating an amendment to devolved legislation. It also, pragmatically, makes the devolved legislation and guidance easier to read on its own.
- 6.4 It would assist the understanding of Welsh law if the legislation does not use a term that already has a commonly understood meaning, but then ascribe to it a different meaning. Recent examples in UK tax legislation that have caused confusion among taxpayers arise in connection with the use of the term 'allowance'. This is commonly understood to mean an amount that can be deducted from income, before

calculating the tax on that income, for example, in the case of the personal allowance. However, the personal savings allowance and dividend allowance, which were introduced from 6 April 2016 cause confusion, because they are not allowances in the commonly understood sense of the term. Rather, they are 0% bands of tax. That is, the taxpayer does not deduct them from income before working out their tax; instead, they apply them when they are calculating the actual tax due using the rates and bands of income tax. Another example is the marriage allowance. Although the giver of the marriage allowance transfers part of their personal allowance to their partner (say £1,250 in 2019/20), the recipient does not receive additional personal allowance. Rather, they receive 20% of the amount transferred (say £250 in 2019/20), which they can offset against their income tax liability – it is thus a tax reducer or a tax credit in the hands of the recipient, rather than an allowance.

- 6.5 Compliance and legislative consequences ensue in different ways depending upon whether a statutory easement from tax is described in legislation as, a ‘relief’ or an ‘exemption’. It is important that these terms are consistently and appropriately applied in drafting or amending devolved legislation. For example, the special partnership regime for LTT in Schedule 7 of the LTTADT(W) A 2017 applies ‘...subject to any other provision affording exemption or relief from tax (Schedule 7 paragraph 39). It is therefore essential to know whether a particular easement from LTT is an exemption or relief to determine how the code applies.
- 6.6 As we note above, the Welsh Revenue Authority is a primary source of guidance on Welsh devolved taxes and the ability to link their guidance to the underlying legislation ultimately via Law Wales would assist accessibility and transparency.
- 6.7 More widely, we welcome the development of the Welsh Government website Law Wales.<sup>3</sup> We think it is positive that the Welsh Government wants to make this and its guidance more comprehensive, and to do so by using a collaborative process. We think that it is important from the outset that there are clear lines of responsibility, plans and established funds for its ongoing review and maintenance.
- 6.8 It is essential that there is strong promotion and communication of any new ways to access guidance. Ideally, this should not be viewed as something that is done once and can then be forgotten. As demonstrated by polling of Scottish adults in 2018 and 2019, it appears that awareness of devolved taxation powers in Scotland has fallen.<sup>4</sup> This may in part be to a lack of promotion of Scottish income tax in Scotland since late 2015 /early 2016 in the months leading up to the introduction of the Scottish Rate of Income Tax.

## **7 Response to the consultation - Question 8: We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them:**

- 7.1 The 2019 Welsh Tax Policy Report<sup>5</sup> (at paragraph 237 onwards) identifies a number of circumstances where the ability of the Welsh Ministers to make changes to devolved taxes quickly is important and therefore consideration is being given to an appropriate mechanism in Wales to make changes to primary devolved tax legislation. The circumstances where change might be required are set out in the report as:

- To close an avoidance scheme with immediate effect to reduce the risk to the revenue;

<sup>3</sup> <https://law.gov.wales/?lang=en>

<sup>4</sup> See <https://www.tax.org.uk/media-centre/press-releases/press-release-new-poll-discovers-more-four-fifths-scots-lack> and <https://www.tax.org.uk/media-centre/press-releases/press-release-poll-scots-still-failing-understand-devolved-taxes-support>

<sup>5</sup> <https://gov.wales/sites/default/files/publications/2019-12/welsh-tax-policy-report-2019.pdf>

- Following a departure from the EU, it is possible new trade deals may include reciprocal changes which may impact on the operation of Welsh taxes. In this context, the Welsh Government may need to respond quickly to new international obligations, in line with the Government of Wales Act 2006;
- To respond to changes made at the UK Budget which may result in a greater or lesser 'tax effort', affecting the block grant adjustment, especially with regards to Stamp Duty Land Tax (SDLT).

Proposals to respond to UK Budget and other changes have been scoped and the Welsh Treasury is starting a programme of informal engagement activity with stakeholders including the CIOT.

In doing so, the issues raised in this consultation document about legislative changes, such as identification, determination of the type of change and consolidation/codification will be of direct relevance in the devolved taxes context.

- 7.2 The CIOT and LITRG are represented on the Devolved Taxes Legislation Working Group, which has been established by the Scottish Government and Scottish Parliament.<sup>6</sup> The group is similarly considering legislative options through which devolved tax legislation could be delivered. The group is due to publish an interim report for consultation at the end of February 2020 and a final report in summer 2020.

## **8 Acknowledgement of submission**

- 8.1 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.

The Chartered Institute of Taxation and The Low Incomes Tax Reform Group

30 January 2020

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<sup>6</sup> <https://www.gov.scot/groups/devolved-taxes-legislation-working-group/>