FINANCE COMMITTEE CALL FOR EVIDENCE

REVENUE SCOTLAND AND TAX POWERS BILL

SUBMISSION FROM CHARTERED INSTITUTE OF TAXATION

Introduction
1. We have had various meetings with the Bill team during the development of the RSTPB and welcome the dialogue we have established. We think that the RSTPB has been developed in a good, consultative manner and commend the Bill team for their open approach and recommend that this approach be adopted for future tax legislation.

2. Overall, we congratulate those responsible for the RSTPB: this has been a major undertaking that has been delivered well and needs relatively few adjustments to make it of even higher quality.

Key principles for taxation
3. We reiterate our key principles to be borne in mind in the design of tax systems:
   - Certainty;
   - Simplicity;
   - Fairness;
   - Stability; and
   - Consultation.

4. We note that the policy objectives include the intention for the RSTPB to reflect Adam Smith’s four maxims, which partly overlap with the principles mentioned above: certainty, convenience, efficiency and proportionate to the ability to pay.

5. Our comments are made with the aim of helping to ensure that the RSTPB reflects all the aforementioned principles and maxims. This is in line with the CIOT’s aims of working for a better tax system for the benefit of all those involved: as a charity, our work has as its main objective the public interest. Our contributions draw upon the knowledge and experience of both our members in practice and our in-house technical team. In addition, we have considered how to ensure that the tax system is appropriate to Scotland – this means that we do not always agree that direct borrowing from the equivalent UK provisions is the best approach for Scotland.

Comments on the RSTPB
General points
6. The language of the RSTPB is clear and comprehensive though there are some gaps in its coverage. We are a little disappointed with the number of areas where regulatory powers are granted: whilst we can understand the pressure the Bill team has been under, as we note below there are some aspects that we think should be in primary legislation. The aim must be to have all the main tax rules in primary legislation. Although statutory instruments will be subject to Parliamentary oversight,
they should be used for administrative and procedural matters, not important principles and rules.

7. Traditionally, UK tax law has been written in great detail, leading to complexity and (at times) loopholes. We think there is merit in trying principles-based drafting. Whichever route is followed, guidance will be needed and the key is to see that as ‘dynamic’, ie the tax authority keeps it up to date and develops it in line with experience as part of its service to taxpayers.

**Subjectivity**
8. As a general point, there are many instances of the term ‘reasonable’ in the Bill. This is a subjective term, and therefore until the practice of Revenue Scotland (RS) has been established, which will take time and experience, there will be a degree of uncertainty for the taxpayer and advisers as to what this term means in the Scottish context. Whilst there is plenty of judicial precedent on the meaning of the term in various contexts, it is not really possible to discern a universal meaning. The fact that cases continue to arise shows it is not certain; we suggest that RS needs to develop guidance as to how far UK (and other jurisdictions’) cases will be taken as providing legal precedent.

**The independence of Revenue Scotland and delegation of powers**
9. The provisions of s4 governing delegation of powers are sensible, particularly subsections (4) and (7). With regards to delegation¹, we make the suggestion that the RSTPB contains an explicit provision to the effect that a delegatee cannot go beyond RS powers in carrying out delegated tasks. We understand that this is an accepted principle and implicit in the powers laid down in the RSTPB, but consider that an explicit provision would be a further safeguard and also ensure that Scottish taxpayers are aware of this protection. It would also send out a positive and encouraging message to business about the ethos of RS. For example, there could be a provision explicitly applying the Charter to delegatees.

10. The provisions about independence of RS in s7 and s8 are absolutely vital. The composition of RS, as set out in schedule 1, complements these important sections and we just wonder about the way the Chief Executive of RS is not a member of RS. We appreciate that the Chief Executive will be an office holder under the Scotland Act; but we think it would be better if the Chief Executive (and their deputy) were formally a member and so part of the ‘Board’ to ensure proper liaison/interaction.

11. We note that the RSTPB provides for exceptions allowing ministers for example not to publish their guidance to RS. What are the exceptions envisaged that might permit this?

**Charter**
12. We welcome the provision for a Charter on the face of the RSTPB. We are concerned that RS only has to aspire to the behaviours and values contemplated; we think it would be better framed in terms of the ‘behaviour and values expected of

¹ These delegation powers go beyond the two instances specified in s4: see s111.
Revenue Scotland’. It would be appropriate to frame the expectations of taxpayers similarly.

13. We suggest that consideration be given to including a duty for RS to consult and engage with interested parties in the development of the Charter, and any revisions. This is no doubt contemplated, but should be laid down.

14. We also suggest that the RSTPB should include a provision to the effect that RS must publish an annual report on the Charter and its performance against it. In addition, there should be explicit provision for the Scottish Public Services Ombudsman to exercise guardianship over the Charter.

**Operation of the Tribunals**

15. We are concerned to ensure that the President of the Tribunals is independent and that their decisions can be made in an independent manner. We are sure this will be the case but note the provision for the President to be appointed by Scottish Ministers yet we are not clear whether the President has the security of the five year term set out in paragraph 11 of schedule 2.

**Tax avoidance: the general anti-avoidance rule**

16. We fully accept the decision to include a general anti-avoidance rule (GAAR) in the RSTPB. Our concern is balancing the desire to protect the tax system against the need of taxpayers for certainty in their tax arrangements, one of the four maxims of Adam Smith. It is important that the GAAR provisions do not interfere with or delay commercial decisions. Our comments about the draft clauses are aimed at increasing certainty. Our view is that the best way of countering avoidance is to make the legislation and its effect as certain as possible.

17. The GAAR starts with a wide definition of avoidance, which is then qualified by further clauses. We are concerned that the use of the phrase ‘one of the main purposes’ means that there is a very low threshold for deciding that a transaction is concerned with avoidance and so within the ambit of the GAAR. We can see that the link to ‘artificial’ in s59 is helpful but would have preferred the test to be phrased in terms of ‘sole or main purpose [being avoidance]’.

18. A clearance system for taxpayers concerned about the applicability of the GAAR would clearly be helpful and welcome. There is an argument that these might need to be formal, with full forms and procedures, though in practice we see little difference in effect between formal and informal clearances (as circumstances can change rapidly). Clearances could be used to develop guidance. However, we have concerns about the administrative burdens this would place on RS and think that other routes will need to be used to deliver the necessary certainty.

19. Suggestions that we think might assist in providing certainty include the publication of guidance by RS as to what is and is not caught by the GAAR. As RS’s experience grows, they could update the guidance. Similarly, cases where the GAAR has been applied should be used to add to the guidance (suitably anonymised of course). It should be noted however, that to be helpful, there needs to be some guidance at the outset, that is, from April 2015.
20. We note that the UK GAAR has an Advisory Panel and we think that this should be emulated in Scotland. The aim would be to help RS develop guidance, ensure the Scottish GAAR is applied with commercial experience and generally build confidence in its application among taxpayers. The GAAR provided for in the RSTPB leaves the taxpayer in an uncertain position, as RS guidance must be followed by the courts and the RS guidance will not be subject to parliamentary scrutiny: involvement of an Advisory Panel would balance this.

21. A further concern in relation to the GAAR is the fact that the approach departs from that of the EU, which accepts that some forms of avoidance are not abusive. Although the initial taxes to be policed by the Scottish GAAR are not ones that the EU is mainly concerned with, EU principles can apply to all taxes and the RSTPB should demonstrate that Scotland intends to comply with EU law in this area.

**Taxpayer duties**

22. The range of taxpayer duties in s68 onwards is reasonable. However, we note that there is no equivalent set of duties for RS. This makes the Charter even more important.

**Tax agents and tax advisers**

23. There is little detail on the rights, duties and obligations of agents and advisers. This was covered at some length in the consultation that led up to the RSTPB, in terms of how respondents thought RS should interact with agents, when such interactions should take place etc. As might be expected, the CIOT’s view is that there needs to be a clear procedure for dealing with agents to ensure that the Scottish tax system, RS and taxpayers benefit as much as possible from taxpayers’ use of agents.

24. This is probably a subject best dealt with in the planned Charter, but it emphasises the importance of our earlier comments about including in the RSTPB more about the Charter’s structure and more requirements about how it is to be effected.

25. We note that the RSTPB contains provisions protecting legal advisers and auditors, but not tax advisers and accountants. We accept the point that someone can set up as a tax adviser or accountant without having any professional qualifications and without membership of a professional body. However, those advisers and accountants who have obtained professional qualifications and who are members of professional bodies, such as the Chartered Institute of Taxation, can be disciplined by those bodies for malpractice.

26. We are strongly of the view that legal professional privilege (LPP) should attach to advice given by any adviser. The aim should be a level playing field: it

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2 It should be noted that there are two distinct ways of acting for a client – firstly, as an independent adviser in relation to certain taxes or areas; secondly, undertaking compliance for the client (ie preparing and submitting their tax returns).

3 The history and purpose of LPP shows that the qualification of the adviser is unimportant – the important point is that they need to be able to put themselves in the client’s shoes. Litigation privilege applies, regardless of the status if the adviser represents the client in litigation. Since advice privilege is an adjunct of litigation privilege, it is logical that privilege should apply to independent advice.
would not only be wrong but also bad for the tax system if taxpayers were prevented from seeking advice from a tax adviser because they felt compelled to balance the protection of privilege against the best advice available. In essence, our argument is that the privilege should stem from the nature of the advice, not the profession of the adviser giving the advice. We believe that it is in the interests of good taxation and of RS in particular that taxpayers be free to seek the best advice available to them. In addition, we note that recent case law indicates that changes to LPP is a matter for Parliament – so that the Scottish position can be laid down separately by the Scottish Parliament.

27. Concerns that LPP might be exploited for abuse can easily be dealt with by providing appropriate exceptions when privilege will not apply and for procedures to ensure that claims of privilege can be both challenged and defended without detriment to subsequent substantive proceedings.

**Penalties**

28. This is one of our main areas of concern with the RSTPB. Our view is that the principles of penalties for tax offences should all be in the primary legislation: the circumstances, the amounts, appeals and enforcement. Secondary legislation should be used for procedural and administrative matters.

29. We commend the proposal in s154 for reductions in penalties by RS and the provision for suspension in s155. However, the legislation should be explicit on the possible amounts (presumably in percentage terms) and conditions involved. This will help ensure consistency.

30. We also note that with regard to special reductions, it is not equitable to simply say that inability to pay is not an adequate reason to grant a special reduction. Consideration of the ability to pay should take into account why the taxpayer is unable to pay.

31. A key point of penalties is that innocent errors should not be penalised. We are pleased to see provisions such as s157 (reasonable excuse) and s160 (3) (deliberate/careless) in this regard.

**Power to appeal**

32. The general powers regarding appeal rights, mediation and RS review are appropriate. Nevertheless, we are concerned that the provisions in the RSTPB are not currently adequate for further taxes that may be added in the future.

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4 Notably the Supreme Court in the Prudential case. In Agassi, Lord Justice Dyson commented ‘Specialist accountants such as Mr Mills may well have far greater expertise in esoteric areas of tax law and practice than solicitors.’

5 Especially as s170, quite sensibly and appropriately, allows the amounts of penalties to be inflation-adjusted by secondary legislation.
33. In order for RS to have the authority to use mediation, and to make taxpayers more aware of this option, we suggest that clear provisions should be included in the RSTPB. Equally, in order to ensure a consistent and independent approach to internal review and mediation, the RSTPB should include provisions requiring RS to publish details of their approach, and reviews of their performance in these matters.

34. We welcome the inclusion of a provision in s210 giving RS the power to postpone the collection of tax when an appeal is made. We suggest that this provision should require RS to give proper regard to hardship when considering whether or not to postpone collection of tax. This relief should not be excessively difficult to obtain. That could usefully be included in the primary legislation.

**Enquiries**
35. We have a concern that the system adopted by the RSTPB, which is based on UK direct tax legislation, may not be entirely appropriate for indirect taxes and could create difficulties in the management of tax compliance. Currently, the two devolved taxes being provided for are indirect, so it is important that the provisions cater for them.

36. The enquiry deadline set out in s76 relates to the due date for the submission of a return. This effectively encourages taxpayers to delay the submission of returns to the latest possible date, and could lead to a concentration of submissions around the due date. This could be difficult for RS to manage efficiently.

**Consultation on secondary regulation**
37. As we have intimated, we have some concerns about the number of areas where regulatory powers are granted. The Delegated Powers Memorandum that accompanies the RSTPB is helpful, particularly in the way that it sets out the expected Parliamentary procedure to effect the regulations. We welcome the intention of the team responsible for the RSTPB to consult on the secondary legislation. We suggest that there should be a commitment to consult on secondary legislation.

**The Chartered Institute of Taxation**
38. The Chartered Institute of Taxation (CIOT) 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. 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.

39. 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.
The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.