FINANCE COMMITTEE CALL FOR EVIDENCE
REVENUE SCOTLAND AND TAX POWERS BILL
SUBMISSION FROM FACULTY OF ADVOCATES

General
1. It is understood that the intention is to enact provisions that will be suitable not only for the taxes currently devolved (namely land and buildings transaction tax and Scottish landfill tax) but also for any other taxes for which the Scottish Parliament acquires competence. It is suggested that before the enactment of any provisions relating to such future taxes, a consultation process takes place as regards the extent to which the current Bill, as enacted, requires amendment to be suitable for the management of those future taxes.

Independence
2. The Faculty welcomes the proposal that Revenue Scotland should be independent of Ministerial control. 1. Delegation of powers.

3. The Faculty recognises the efficiency gains that may be realised by the delegation of certain functions relating to land and building transactions tax and Scottish landfill tax to, respectively, Registers of Scotland and the Scottish Environmental Protection Agency. However, it may be appropriate to identify specifically which of Revenue Scotland’s functions may be delegated. For example, it would seem appropriate that matters of exercising investigative powers, imposing penalties, making assessments, and undertaking review decisions ought not to be delegable, whereas the current draft of the Bill would permit all of these to be delegable.

Confidentiality of taxpayer information
4. It is suggested that clause 15(2) be expanded so as to refer expressly to an individual exercising functions on behalf of a person to whom Revenue Scotland has delegated any of its functions (the point is probably already covered, but the amendment would remove any room for doubt).

Tax Tribunals
5. The Faculty welcomes the establishment of specialist first instance and appellate tribunals for tax matters.

6. It is suggested that names other than the ‘First-tier Tax Tribunal for Scotland’ and the ‘Upper Tax Tribunal for Scotland’ be used. Using these names is likely to cause confusion with the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery Chamber), both of which are generally known by the same names as it is proposed should be used for the Scottish tribunals (respectively, the First-tier Tribunal and the Upper Tribunal). It is almost inevitable that some appeals will be commenced in the wrong forum. This will lead to delay and increased expense and in some cases possibly the loss of any appeal rights.
7. Alternative names might be, for example, the Tax Tribunal and the Tax Appeal Tribunal.

Upper Tribunal decisions
8. It is suggested that consideration be given to enabling the Upper Tribunal to sit with more than a single member in individual cases (see clause 28).

Appeals to the Court of Session
9. The Faculty recognises the policy issues behind restricting appeals to the Court of Session to cases raising important issues of principle or practice, or in which there is some other compelling reason for allowing the appeal to proceed. However, the Faculty is concerned that this may unduly restrict the right of individual litigants to have access to the supreme court in Scotland. It is in general unlikely that large numbers of cases would have to be considered by the Court of Session. For example, in any recent 12 month period there have been only around 50 or 60 decisions made by the First-tier Tribunal (Tax Chamber) sitting in Scotland, and far fewer by the Upper Tribunal (Tax and Chancery Chamber) sitting in Scotland. The Faculty suggests that the restriction of appeals to points of law, coupled with the need for permission and the condition that the appeal has arguable grounds, are adequate restrictions on the possibility of appealing to the Court of Session.

Expenses
10. On its face, clause 44 would permit Tribunal rules to provide that counsel may be made personally liable for wasted expenses. At general law, this is considered not to be competent. There are sound policy reasons for this, involving broadly the need to avoid secondary litigation. It is suggested that the reference in clause 44(3)(c)(ii) to a ‘person’ should be replaced by a reference to a ‘party’. The Faculty of course recognises that if a party’s representative has done something leading to a wasted costs order being made against a party, that party may have a right of relief against that representative.

Powers of Tribunal to make rules (clauses 46 to 52)
11. It is not clear whether the powers conferred on the Tribunal to make rules include power to impose fees on parties to appeals before the First-tier or Upper Tribunal.

12. It is suggested that parties should not be required to pay fees to the Tribunal in relation to appeals. It is suggested that this be made clear in the Bill.

General anti-avoidance rule
13. The Faculty recognises the policy behind the proposed general anti-avoidance rule.

However, the Faculty suggests that an Advisory Panel similar to that established by Finance Act 2013 in relation to the general anti-abuse rule should be established. Inevitably, the application of a general anti-avoidance rule is difficult to predict. The establishment of an independent body with powers to provide guidance would assist in making the application of the general anti-avoidance rule more certain for both taxpayers and Revenue Scotland.
Taxpayer duties
14. Clause 68 might be interpreted as including UK taxes. It is suggested that the terms ‘tax’ and ‘taxable activities’ be defined so as to be restricted to devolved taxes.

Returns
15. The period for Revenue Scotland to correct obvious errors in returns is three years (clause 75). It is suggested that this is too long a period. Revenue Scotland should be able to correct obvious errors within a much shorter time frame, for example 12 months. Indeed, the equivalent period in relation to income tax returns is nine months for HMRC to correct obvious errors: Taxes Management Act 1970, section 9ZB. Allowing Revenue Scotland a period four times as long does not seem to be justified, in particular by reference to Adam Smith’s principle of certainty.

16. Similarly, it is submitted that the period in which Revenue Scotland has power to open an enquiry is too long, being three years (clause 76). There does not seem to be any reason why returns relating to transactional taxes should be able to be enquired into for such a long period. Again, this is not consistent with Adam Smith’s principle of certainty. It is understood that the policy behind this is to avoid litigation about when a ‘discovery’ has been made enabling an enquiry to be opened after the expiry of a shorter window, such as 12 months. But the period of three years does not sit well with annual taxes for which the Scottish Parliament may in future acquire competence; creating such a long enquiry window not subject to any ‘discovery’ requirement will discourage taxpayers from providing additional information in tax returns; and the absence of any discovery requirement seems to put Revenue Scotland in a much better position than HMRC without any corresponding benefit being conferred on the taxpayer.

Referrals during enquiry
17. Given that the decision on a referral during an enquiry is binding as between the parties, it is suggested that the designated officer should ‘give effect to’ the determination rather than merely ‘take it into account’ in reaching conclusions on the enquiry (clause 82).

Relief for overpayment
18. It is suggested that the term ‘claimant’ in clause 100 should be replaced with ‘recipient’, so as to clarify that the defence is directed to the position of the person to whom the repayment would actually be made.

The possibility of a repayment claim where a tax charge is contrary to EU law is welcome (clause 104(11)). However, the Faculty has a concern that the definition of circumstances in which a tax charge is contrary to EU law is too narrow. For example, a tax charge may be contrary to EU law if it breaches the general principles of EU law, such as effectiveness, equivalence, proportionality, and non-discrimination. It may be better to leave the term ‘contrary to EU law’ undefined.

Information powers
19. The Faculty welcomes the proposal to provide expressly that Revenue Scotland’s information and investigation powers under chapter 2 of part 7 should not be exercisable once a review or appeal is pending (clause 128(1)(a)).
20. It is suggested that the wording of clause 130(1)(b) be changed so as to make it clear that where a document is privileged in part only, that part need not be disclosed.

21. It is suggested that a person from whom a document is removed should be entitled to a copy of the document on request, regardless of the purpose for which the copy is required. For example, there does not seem to be any reason why a person should not be entitled to a copy simply for that person’s own records. It is therefore suggested that clause 142(3)(b) should be re-worded accordingly.

Penalties
22. The Faculty does not agree that the regulation of penalties should be left largely to secondary legislation. The details of penalties should be provided for in primary legislation. Specifically, the matters set out in clauses 150(2), 151(2), 160(7), 162(4), 163(3), and 181(2) should be provided for by primary legislation. The Faculty welcomes the penalty suspension provisions in clause 155. The Faculty would suggest that Revenue Scotland publicises these provisions in particular to Citizens’ Advice Bureau and other organisations whose services are aimed at low income individual taxpayers, and also to trade associations for dissemination to their members.

23. The Faculty welcomes the power conferred on Revenue Scotland to reduce, remit or suspend penalties (clause 156).

Reviews and appeals
24. The Faculty generally welcomes the proposals regarding reviews and appeals. However, it is suggested that the provisions relating to postponement of tax pending a review or appeal should be set out in primary legislation. These provisions are of crucial importance to taxpayers wishing to challenge decisions of the taxing authority.

Interpretation
25. It is suggested that other terms be used as references to the Land and Buildings Transaction Tax Act (Scotland) 2013 and the Landfill Tax (Scotland) Act 2014, for example ‘LBTTA13’ and ‘LTA14’. This will make it easier to read the provisions referring to these statutes. It is also a form that is better able to cope with future ASPs enacting Scottish taxes. For example, it is easy to imagine that a range of taxes could be implemented in a single year. In that event, some means of referring to them other than by year would be essential.

Composition of tribunals
26. It is suggested that a time limit be put on the disqualification arising from previous insolvency, disqualification as a company director, or disqualification as a charity trustee (Schedule 1, paragraph 2).

27. The Faculty is concerned that status as a solicitor or barrister in England and Wales or Northern Ireland confers eligibility for appointment as President of the Tax Tribunal or as a legal member of the First-tier or Upper Tribunal. The Tribunals will be dealing with matters of Scottish tax law. There does not appear to be any reason for appointing individuals not qualified to advise on it as Tribunal members. Although
the Faculty is aware that in the UK tribunal system individuals qualified only in England and Wales or Northern Ireland sit on the First-tier and Upper Tribunals when hearing tax matters in Scotland, this is possible because of the UK nature of the tax law in respect of those tribunals have jurisdiction, and is in any event unusual in practice.

28. The Faculty also questions why eligibility should be able to be broadened by regulations. If this is indeed necessary, the Faculty would in any event suggest more specific provisions as regards what regulations may provide, for example that regulations may provide that a person may be eligible for appointment on the basis of experience in the law and practice relating to Scottish taxes.

29. The Faculty welcomes the provisions concerning the term of office and re-appointment of members of the First-tier and Upper Tribunals (Schedule 2, paragraphs 11 and 12).