Introduction
1. KPMG LLP (“KPMG”) is a global network of professional firms providing audit, tax and advisory services. KPMG’s Scottish offices are located in Aberdeen, Edinburgh and Glasgow.

2. We welcome the opportunity to participate in the Finance Committee’s call for evidence in relation to The Revenue Scotland and Tax Powers Bill ("RSTP Bill"), introduced to Parliament on 13 December 2013.

3. Please note that, given the restriction placed on the length of written responses, our responses are necessarily at a high level.

Call for evidence
The Committee is seeking views on the general principles of the Bill and in particular the Scottish Government’s overall policy objectives in introducing the Bill and whether the Bill reflects “Adam Smith’s four maxims with regard to taxes: certainty, convenience, efficiency and proportionate to the ability to pay.”

4. We welcome the stated objectives of the RSTP Bill, however, we are of the view that it will be difficult to ascertain whether the RSTP Bill, and other Devolved Taxes legislation, meets Adam Smith’s four maxims until Devolved Taxes are implemented.

5. The Finance Committee may wish to consider whether it would be appropriate to include provision in the legislation which makes it clear that the implementation of any Devolved Taxes should respect these principles.

The proposed approach to the establishment and constitution of Revenue Scotland as a non-Ministerial Department and its membership;
6. We have no preference for an alternative legal structure and accountability model to that proposed.

The functions of Revenue Scotland;
7. We consider the proposed general function of Revenue Scotland, being the “collection and management of the devolved taxes”,\(^1\) to be appropriate.

8. We understand that this corresponds with the responsibility for collection and management of revenue given to the UK Commissioners of HMRC in the Commissioners for Revenue and Customs Act 2005, and has the same meaning as references to care and management in older tax statutes. The intention is that this

---

\(^1\) Section 3, RSTP Bill
power should provide Revenue Scotland with the power to operate with a certain amount of discretion and flexibility.

9. The Finance Committee may wish to consider if the bill as drafted gives Revenue Scotland the power necessary to exercise discretion in relation to cases of exceptional hardship for businesses and individuals.

**The independence of Revenue Scotland;**

10. As stated above, we have no preference for an alternative legal structure and accountability model to that proposed.

**The investigatory powers of Revenue Scotland;**

11. We agree that Revenue Scotland should have powers to request information from taxpayers limited to what it reasonably believes to be relevant to determination of the tax position\(^2\) in point.

12. We agree that Revenue Scotland’s powers to request information from third parties who are auditors should be limited\(^3\). UK legislation also limits the power of HMRC to require information from third parties who are tax advisers.\(^4\) This helps to ensure candour between clients and advisers and avoids imposing excessive burdens on advisers.

13. This is subject to certain exemptions to ensure that factual information can be obtained from tax advisers where there is no other way of obtaining that information. We agree that Revenue Scotland should have no right to obtain information that is subject to professional privilege\(^5\).

14. We therefore consider that it would be reasonable to extend professional privilege to advice on Devolved Taxes received by taxpayers from suitably qualified advisers regulated by an appropriate professional body (such as, for example, the Chartered Institute of Taxation, the Institute of Chartered Accountants of Scotland, and the Institute of Chartered Accountants in England & Wales) who are not members of the legal profession.

15. It is worth emphasising that professional privilege benefits the taxpayer and not the adviser. Whilst we envisage that in most circumstances taxpayers who have obtained professional advice on Devolved Taxes in support of their position would have no particular reason to withhold that advice from the tax authorities, it remains the case that on occasion negotiations between a taxpayer and Revenue Scotland may have a legitimately adversarial nature.

16. We consider it would be inequitable that a taxpayer who had obtained assistance from a chartered accountant in relation to his position could be required to disclose information to Revenue Scotland that another taxpayer, who had obtained identical assistance from a lawyer, could not be compelled to disclose.

---

\(^2\)Section 112, RSTP Bill

\(^3\) Section 131, RSTP Bill


\(^5\) Section 130, RSTP Bill
The proposed approach to the Scottish tax tribunals;
17. We recognise that the provisions for Scottish Tax Tribunals are intended as an interim measure until the Scottish Tribunals structure is put in place by the Tribunals (Scotland) Bill. The expectation is that all devolved tribunals will merge into the new structure in 2016. As such, we have no comment on the proposed approach to the Scottish tax tribunals.

The General Anti-Avoidance Rule;
18. KPMG recognises the right of taxpayers to arrange their affairs in a tax efficient manner\(^6\) (e.g. structuring *bona fide* commercial transactions in a tax efficient way), but accepts in principle the need for the Scottish Government to tackle highly abusive and artificial tax planning arrangements.

19. We consider that any Devolved Taxes General Anti-Avoidance Rule ("GAAR") should be consistent with the Scottish Government’s governing principles on Devolved Taxation as to certainty; convenience for the taxpayer; and efficiency.\(^7\)

If taxpayers are concerned that a widely-drawn Devolved Taxes GAAR could adversely affect *bona fide* commercial transactions where tax efficiency is one of the considerations, it could potentially reduce the competitiveness of the business environment and hamper job creation by encouraging investment to be directed outwith Scotland.

20. We consider that certainty for the taxpayer and Revenue Scotland would be improved by the introduction of a principle similar to that of the “double reasonableness test” used in relation to the UK GAAR. We recognise that condition A, being that the arrangement is not a reasonable course of action in relation to the tax provisions in question having regard to all the circumstances\(^8\), requires that the ‘reasonableness’ of an arrangement is considered. However, a statutory requirement that such consideration is made from an objective position would provide greater certainty for both taxpayers and Revenue Scotland.

21. We recognise that condition B, being that an arrangement is artificial if it lacks commercial substance\(^9\), is a more objective test.

22. Where arrangements have as their *sole* purpose the reduction or avoidance of a charge to a Devolved Tax, this should be reasonably clear (e.g. as in *Mayes v Revenue and Customs Commissioners*).\(^10\)


\(^7\) Consultation Document, p. 7, 1.4

\(^8\) Section 59, RSTP Bill

\(^9\) Section 59, RSTP Bill

\(^10\) [2011] STC 1269
23. However, the position may be less clear when the relevant arrangements have an overriding non-tax purpose, but have also been specifically designed to be tax efficient. In addition the possibility of the Devolved Taxes GAAR applying to any arrangements that are not “normally” employed or entered into for commercial purposes could discourage the innovative and commercially driven structuring of transactions for non-tax reasons.

24. It might be that the officers of Revenue Scotland will not be best placed to determine what is and what is not ‘commercial’, given that this will require extensive experience of how such arrangements are structured in practice, and the various non-tax factors that influence that structure.

25. We recommend that an advisory panel of independent, impartial experts is established, similar to the UK GAAR Advisory Panel, to improve certainty for taxpayers. We are of the view that such a panel would be better placed to make an objective and informed assessment as to whether an arrangement is ‘reasonable’ and/or ‘commercial’, than the officers of Revenue Scotland.

26. We note that no provision has been made for an advance clearance procedure or formal process of disclosure preventing against risk of a later assessment outwith the standard enquiry window (similar to the UK DOTAS regime).

27. Certainty in tax affairs is a key requirement for all taxpayers, whether businesses or private individuals. A statutory clearance mechanism could mitigate the risk of uncertainty created by a Devolved Taxes GAAR impeding bona fide commercial transactions and reducing the attractiveness of Scotland as a place for the creation and transmission of wealth.

28. We note the statutory requirement that in determining matters in connection with the Devolved Taxes GAAR a court or tribunal must take into account any guidance published by Revenue Scotland about the Devolved Taxes GAAR (at the time the tax avoidance arrangement was entered into).

29. We recommend that Revenue Scotland publishes clear, unambiguous, and definitive guidance on how any Devolved Taxes GAAR would be applied in practice and that Revenue Scotland be itself formally bound to follow that guidance. It is likely that circumstances which could be foreseen and addressed in the initial version of such guidance would represent the most common transactions that taxpayers are likely to enter into where the Devolved Taxes GAAR could potentially be in point. Additionally, Revenue Scotland’s experience could inform regular updates to the published guidance, thus extending its scope and reducing uncertainty for the taxpayer.

The proposed approach to tax returns, enquiries and assessments;

---

11 We use the phrase “non-tax purpose” in preference to “commercial purpose” as transactions in the normal course of family or domestic relationships may include acceptable tax planning but are unlikely to have any commercial purpose.

12 Section 62(2), RSTP Bill
30. We welcome the introduction of clear time limits for both the taxpayer and Revenue Scotland in relation to amendments, enquiries and assessments.

31. There does not appear to be any clear justification for allowing Revenue Scotland to amend a tax return up to the 3 years from the date of submission,\(^\text{13}\) whilst allowing taxpayers only until the 1\(^\text{st}\) anniversary of the date of submission to amend the return.\(^\text{14}\)

32. We are of the view that the ability of Revenue Scotland to open an enquiry into a Return up to three years from the filing date (or filing the Return if this is later), could result in uncertainty for taxpayers and could, potentially, discourage the fullest voluntary disclosures being made to Revenue Scotland on the basis that this would not bring forward the point in time at which the taxpayer's affairs could be considered settled.

33. The proposal to allow Revenue Scotland to raise assessments over periods of up to 20 years\(^\text{15}\) in cases of fraud by the taxpayer is in line with international practice and appears to be reasonable.

**The proposed approach to penalties;**

34. We recognise that much of the detail of the penalty system is to be specified by Scottish Ministers.

35. We consider that it is appropriate that Revenue Scotland has the ability to exercise discretion and vary penalties by way of remission, suspension or compromise, where there is a 'reasonable excuse'\(^\text{16}\) for a failure to make a return or pay tax. We note that penalties can be varied to recognise voluntary disclosure, the seriousness of the offence and the co-operation of the taxpayer in putting matters right.

**The proposed approach to interest on payments;**

36. We have no comment on the proposed arrangements for interest on payments.

**The proposed approach to enforcement;**

37. We have no comment on the proposed arrangements for collecting unpaid tax.

**The proposed approach to reviews and appeals;**

38. We welcome the introduction of an internal review process by Revenue Scotland in relation to contentious decisions and recognise that this has the potential to minimise the time spent in disputes and lower costs for both taxpayers and Revenue Scotland by potentially reducing recourse to the tribunals and courts.

\(^{13}\) Section 75, RSTP Bill
\(^{14}\) Section 74, RSTP Bill
\(^{15}\) Section 94, RSTP Bill
\(^{16}\) Section 157, RSTP Bill
39. We also suggest that Revenue Scotland considers an internal review process as a matter of course before initial decisions are reached (i.e. an initial analysis of a taxpayer’s position reached by one Revenue Scotland officer is reviewed by an appropriate colleague to test the robustness of the conclusions before the initial decision is made).

40. We welcome the publication of specific time limits within which Revenue Scotland must conduct an internal review.\(^\text{17}\)

As a general observation at this stage, we note that an internal review process must be, and must be seen to be, completely independent in order for there to be confidence in the system. This could potentially be demonstrated by a dedicated review team that does not work directly with taxpayers, although we recognise that resource constraints may make this unrealistic (particularly when Revenue Scotland is expected to have responsibility for only 2 Devolved Taxes at the outset).

41. We welcome the proposal to encourage voluntary use of mediation as a lower cost initial alternative to litigation at the taxpayer’s request.

**The financial implications of the Bill as estimated in the Financial Memorandum (FM).**

42. We have no comment on financial implications of the Bill as estimated in the Financial Memorandum.

43. We welcome the Scottish Government’s approach to consultation on new Devolved Taxes legislation and the associated Revenue Scotland guidance prior to enactment of that legislation and adoption of the guidance.

\(^{17}\) Section 202-204, RSTP Bill