Overall Policy objectives: Adam Smith’s four maxims

1. In terms of administration, the key maxims are the first three: certainty, convenience and efficiency. We would stress the need for early, continuous and genuine consultation as a key principle in promoting certainty and building trust in the tax system. These are also important factors in preventing avoidance and supporting efficiency both for tax payers and Revenue Scotland.

2. Key to achieving those aims and delivering an efficient and convenient system are appropriately trained personnel and appropriately designed and implemented technology. For example, a modern electronic payments system is clearly desirable but cannot be delivered without appropriate resources. This is also a significant issue when powers and responsibility are delegated to other bodies.

The independence of Revenue Scotland

3. We note that whilst Scottish Ministers must not give directions to Revenue Scotland (s7), they can provide guidance to Revenue Scotland on how it exercises its functions and Revenue Scotland is required to have regard to such advice and must provide information to Ministers if asked (ss8 and 9). It would be helpful to clarify the limits of where guidance stops and direction begins. It should also be clear that such guidance will relate to policy matters rather than to individual taxpayers or groups of taxpayers.

The investigatory powers of Revenue Scotland

4. We note that investigatory powers are to be exercised by ‘designated investigation officers’, who will not necessarily be officers of Revenue Scotland. We believe that it is important for investigations into, and disputes over, taxpayer’s tax liabilities to be managed by appropriately-trained and qualified staff who are familiar with both the regulatory framework and the taxes which they administer. Any investigation into a taxpayer’s return needs to be focussed on the tax liability associated with that return. Our experience is that any investigation process which is managed by staff who are unfamiliar with the taxation issues tends to be less focussed and more time-consuming for both taxpayer and tax authority. More particularly, a Revenue Scotland officer would have a clear understanding of the relevant tax provisions and so be able to determine whether, and how, to exercise the investigatory powers detailed in the Bill appropriately.

5. As a result, we would expect such investigations to be undertaken by appropriately-trained and qualified officers of Revenue Scotland.
The proposed approach to the Scottish Tax Tribunals

6. As noted in our response in 2013, we welcome the inclusion of internal review and mediation as initial steps in the process and believe that these measures will contribute to the efficiency of the system.

General Anti-Avoidance Rule

7. We understand the policy objective and support the Scottish Parliament’s aim to tackle artificial tax avoidance.

8. The proposed Scottish general anti-avoidance rule (Scottish GAAR) will apply initially only to the land and buildings transaction tax (LBTT) and the Scottish landfill tax (SLfT), but may ultimately apply to a wider devolved settlement, or indeed to a wider Scottish tax system in the longer term. Initially it will effectively apply only to LBTT, as (per the Policy Memorandum para 66) the main issue with SLfT is tax evasion, rather than tax avoidance.

9. We support a narrow general anti-abuse rule like the UK general anti-abuse rule (UK GAAR), which came into force from 17 July 2013. Despite the majority of respondents to the consultation in 2013 favouring a narrow rule for Scotland, similar to the UK GAAR, the proposed Scottish GAAR is a broad spectrum anti avoidance rule. A broad spectrum was considered and rejected for the UK by Graham Aaronson’s Study Group; it was not thought to be beneficial for the UK tax system as it would undermine the ability of businesses and individuals to undertake “sensible and responsible tax planning”. The introduction of a broad spectrum anti avoidance rule for Scotland is likely to put Scotland at a disadvantage when compared to the rest of the United Kingdom, making it less attractive to businesses. We believe that the impact of the inevitable uncertainty (real or perceived) that such a broad spectrum rule will generate for business, incoming investment and individuals (heightened by the absence of a clearance system for taxpayers) will be detrimental to Scotland.

10. Under the proposed Scottish GAAR, a tax avoidance arrangement must meet one of two conditions in Clause 59 to be an artificial tax avoidance arrangement, as follows:

- **Condition A** - this focuses on the underlying principles on which the provisions are based, the policy objectives and whether the arrangements are intended to exploit shortcomings in the legislation. This is familiar from the UK GAAR, and will require Revenue Scotland to set out policy clearly and coherently at the earliest stage of any legislative process, otherwise our concern is that the Scottish GAAR may have an adverse impact on the stability and certainty of the tax regime due to policy uncertainty.

- **Condition B** – this will be met if a transaction “lacks commercial substance”. Whilst this may be appropriate whilst the Scottish GAAR is limited to LBTT and
landfill tax only, the condition may not be appropriate as and when the number of taxes covered by the Scottish GAAR increases beyond those met in a business or commercial context. There are a number of non-commercial situations that could be caught by this test in the future which are entered into for valid reasons, unconnected with tax avoidance, for example establishing a trust or making an interest free loan.

11. We are concerned that, in contrast to the UK GAAR, there are insufficient taxpayer safeguards in the proposed Scottish GAAR. Due to its inherent uncertainty, it will not always be clear whether or not it will apply in specific cases. We suggest that establishing an independent panel to review individual cases where Revenue Scotland seeks to invoke the GAAR would be appropriate, and this is in line with the Advisory Panel, a key safeguard in the UK GAAR. We would also welcome guidance notes on the application of the Scottish GAAR, which should improve taxpayer certainty; these should be reviewed and approved by an independent panel, again following the model of the UK GAAR Guidance Notes.

The proposed approach to tax returns, enquiries and assessments

12. The proposals for a self-assessment regime, with specific powers for Revenue Scotland to make enquiries into returns within prescribed time limits and to make amendments to returns as a result of those enquiries ought to be broadly familiar to taxpayers and their advisers. We agree that the proposals form an acceptable and workable framework for the administration of the devolved taxes. However, we have a number of specific observations and comments.

13. The 3-year period for enquiry into a return does not provide taxpayers with the same level of certainty as is available under the Self-Assessment regime, which enables taxpayers to regard their tax position as settled within a shorter period (9 months for SDLT returns) unless the level of disclosure in the return is not adequate. We believe that there should be symmetry between filing and disclosure obligations in Scotland and the rest of the UK, not least because a number of clients are likely to have filing obligations under both systems. Additionally, as a matter of principle, we would expect Revenue Scotland to propose a mechanism which would encourage as full a disclosure as possible on tax returns, thereby enabling both taxpayers and Revenue Scotland to obtain certainty over the tax position as early as possible. We would therefore encourage Revenue Scotland to consider a short enquiry time-limit along with a further provision that amendments could be made within the 3 year period if they could not have been aware that tax had been under-assessed. We agree that extended time-limits for deliberate or careless errors are appropriate.

14. We welcome the approach to tax payer information remaining confidential and only being disclosed in prescribed circumstances. We are disappointed that the opportunity to address the issues around Legal Professional Privilege in the context of tax advice has not been taken. An approach which is based on what is broadly
considered to an unsatisfactory position appears inappropriate. The leading judgement of Lord Neuberger in the House of Lords decision in Prudential makes clear that there are a number of compelling reasons why the protection afforded to legal advice provided by lawyers should be extended to non-lawyers. Although the House of Lords declined to extend the protection afforded by Legal Advice Privilege to non-lawyers, this was principally because it was felt the decision to do so was best left to Parliament. In light of the views of the House of Lords in Prudential, we would expect Revenue Scotland to wish to consider the position carefully before deciding on whether to adopt this approach. Additionally, we do not understand the justification for the approach as laid out in the Policy Memorandum, that such a measure might hinder legitimate efforts to tackle tax avoidance.

15. We note that the enquiry regime does not appear to provide for amended time-limits to take account of amendments to returns. We would assume that, for consistency, Revenue Scotland would wish to extend the enquiry time limits in these circumstances. The provisions allowing amendment, at clause 74, enable taxpayers to amend their returns within a period of 12 months from the end of the relevant filing date. At present however, there does not appear to be any impact on the enquiry period of 3 years. We would have expected the making of an amendment to extend the enquiry period, and for this provision to be included at clause 76(3).

The proposed approach to penalties

16. We would encourage Revenue Scotland to publish details of appropriate penalty levels as soon as possible. For most taxpayers, the level of penalties will be the most important feature of the regime. We would also encourage Revenue Scotland to apply penalty ranges which mirror the ranges utilised by HMRC for non-devolved taxes. We do not believe there to be a clear policy justification for penalties at different levels to those across the UK. In the absence of such justification, the clarity and certainty which a harmonised approach provides should be the determining factor.

17. As was discussed at the Devolved Taxes Collaborative meeting (DTC) on 16th August 2013, the level of fixed penalties can be disproportionately high for small businesses. The other matter discussed at the DTC was the level of discretion Revenue Scotland will have over reducing or waiving penalties and we welcome the inclusion of such discretionary powers as well as guidance as to how this discretion could be used, to ensure clarity for the taxpayer.

The proposed approach to interest on payments

18. We note that Revenue Scotland have concluded that the differential between overpayment and underpayment interest is justified on the basis described in the policy memo. The differential between underpayment and overpayment interest arose in periods before 2009, and we have seen no evidence that taxpayers have behaved in the way described at paragraph 118 of the Policy Memorandum. We
believe that any differential in interest rates is both unjustified in principle and likely to have a distorting impact on taxpayer's decision-making.

19. On a general note, we value the fullness and clarity of the Explanatory Notes accompanying the Bill and would like to acknowledge the efforts made by the drafting team in consulting during the process.