

Air Departure Tax (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Air Departure Tax (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is being brought forward as a consequence of measures enacted in the Scotland Act 2016¹ (c.11) ("the 2016 Act"), which received Royal Assent on 23 March 2016. Under the terms of sections 17 and 19 of the 2016 Act, the Scottish Parliament will have responsibility for taxes charged on the carriage of passengers by air from airports in Scotland. This Bill deals with that responsibility and makes provisions for a tax to be charged on the carriage of passengers on flights that begin at an airport in Scotland, to be called Air Departure Tax ("ADT").
4. Under paragraph 36 of the fiscal framework² agreed between the Scottish Government and UK Government, the provisions in the 2016 Act

1

<http://www.legislation.gov.uk/ukpga/2016/11/part/2/crossheading/devolved-taxes>

² <http://www.gov.scot/Publications/2016/02/3623/1>

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disapplying the UK Air Passenger Duty (“APD”) regime in Scotland will be brought into force with effect from 1 April 2018 by regulations made by Her Majesty’s Treasury and laid in the UK Parliament. It is intended that the majority of the legislative provisions for ADT will come into force the same day that APD is disapplied, although some provisions will be commenced before that date.

5. The Bill is designed to inter-operate with the Revenue Scotland and Tax Powers Act 2014³ (asp 16) (“RSTPA 2014”), which received Royal Assent on 24 September 2014. The RSTPA 2014, amongst other things, established Revenue Scotland as Scotland’s tax’s authority for devolved taxes and provides the general framework for the collection and management of devolved taxes in Scotland. Revenue Scotland currently collects and manages Land and Buildings Transaction Tax (“LBTT”) and Scottish Landfill Tax (“SLfT”), which came into effect on 1 April 2015, and the Bill provides that Revenue Scotland will also collect and manage ADT.

Rationale for subordinate legislation

6. The Government has had regard, when deciding what subordinate legislation powers and respective Parliamentary procedures are appropriate for the Bill and whether provisions should be in primary or in subordinate legislation, to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example changing market conditions or government priorities, or in light of operational experience of the collection and management of the tax);
- the need to make proper use of valuable Parliamentary time; and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament (for example tax avoidance).

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

³ <http://www.legislation.gov.uk/asp/2014/16/contents>

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Delegated Powers

Section 8(1) – Key concepts may be modified by regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

8. This provision allows the Scottish Ministers to make regulations which make other provision relating to who is a chargeable passenger, who is a non-chargeable passenger, which aircraft are chargeable aircraft and which aircraft are non-chargeable aircraft. The regulations may add, change or remove any exemption from being a chargeable passenger or chargeable aircraft and any provision in the Bill that defines or otherwise explains a term or expression. The Bill as introduced sets out these provisions in sections 2 to 7 and 37.

Reason for taking power

9. The Bill as introduced contains no provision for chargeable passenger and chargeable aircraft exemptions. The Scottish Ministers wish to set out the detail of these exemptions at a later date before the tax comes into effect from 1 April 2018.

10. In addition, as the UK Government has done several times with APD, after ADT has come into effect the Scottish Ministers may wish to change the scope of chargeable and non-chargeable passengers and chargeable and non-chargeable aircraft to support key government priorities, to reflect changing market conditions, in light of operational experience of collecting and managing the tax, as a consequence of the passage of new legislation or to reflect amendments to existing legislation referred to in the Bill.

11. For the reasons set out in paragraphs 9 and 10 above, the Scottish Government considers it is necessary to have this subordinate legislation power in the Bill to ensure sufficient legislative flexibility to make further provision for who is a chargeable passenger and which aircraft are chargeable aircraft in relation to ADT, in addition to this being a more effective use of resources by the Scottish Parliament and the Scottish Government.

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Choice of procedure

12. The power allows for the amendment of primary legislation, and in particular the provisions determining the basis upon which the tax will be charged. It is appropriate that regulations of this nature receive the highest scrutiny short of primary legislation, which is why these regulations are to be subject to the affirmative procedure.

Section 10(1)-(2) – Tax bands and rate amounts to be set by regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

13. The provision in section 10(1) requires the Scottish Ministers to make regulations which define one or more tax bands by reference to the destination of a chargeable passenger carried on a chargeable aircraft and, for each band defined, set the amount or the method of calculating the amount of each tax rate described in section 9(3) (which provides for a standard rate, premium rate and special rate). The provision in section 10(2) also allows the Scottish Ministers to make regulations which make other provision concerning the structure of the tax. Regulations under section 10 of the Bill may add, change or remove the description of any tax rate, tax band or any provision in the Bill that defines or otherwise explains a term or expression.

Reason for taking power

14. The Bill as introduced contains no provision for the tax banding structure or tax rate amounts. The Scottish Ministers will set out the detail of the tax banding structure and tax rate amounts at a later date before the tax comes into effect from 1 April 2018. This is consistent with the approach so far adopted in relation to other devolved taxes in Scotland – see section 24 and paragraph 3 of schedule 19 of the Land and Buildings Transaction Tax (Scotland) Act 2013⁴ (“LBTT(S)A 2013”) and section 13 of the Landfill Tax (Scotland) Act 2014⁵ (“LT(S)A 2014”).

⁴ <http://www.legislation.gov.uk/asp/2013/11/contents>

⁵ <http://www.legislation.gov.uk/asp/2014/2/section/13>

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15. As the UK Government has done several times with APD, after ADT has come into effect the Scottish Government may wish to change the structure and definition of tax bands and tax rates and set different tax rate amounts in order to support key government priorities, to reflect changing market conditions or in light of operational experience of collecting and managing the tax.

16. For the reasons set out in paragraphs 14 and 15 above, the Scottish Government considers it is necessary to have these subordinate legislation powers in the Bill to ensure that provision can be made for tax bands and tax rate amounts, and to ensure sufficient legislative flexibility to make further provision concerning tax bands, tax rates and tax rate amounts, in addition to this being a more effective use of resources by the Scottish Parliament and the Scottish Government.

Choice of procedure

17. Amounts of tax and tax bands are at the core of tax legislation and demand the highest level of parliamentary scrutiny short of primary legislation. For this reason, affirmative procedure is considered to be appropriate.

Section 34(1) – Administrative provisions may be modified by regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure if amending primary legislation, otherwise negative procedure

Provision

18. This provision enables the Scottish Ministers to make regulations which make other provision concerning the payment, collection and management of ADT. The regulations may add, change or remove any provision in the Bill concerning the payment, collection and management of ADT or any provision that defines or otherwise explains a term or expression. However, the regulations cannot modify section 11 or 12, because those provisions are at the heart of what and who is taxable.

This document relates to the Air Departure Tax (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 19 December 2016

Reason for taking power

19. Unlike the legislative approach taken with APD, where the majority of the detail on how that tax is collected and managed is set out in subordinate legislation, provisions for the collection and management of ADT are mostly set out in primary legislation - Part 4 of the Bill and the RSTPA 2014, as amended by schedule 2 of the Bill. This approach will make the details of the ADT regime more accessible.

20. Once ADT is in operation it may be necessary to make changes to how the tax is administered, for example in light of Revenue Scotland's operational experience of collecting and managing the tax, to reflect changing market conditions, as a consequence of the passage of new legislation or to reflect amendments to existing legislation referred to in the Bill.

21. The Scottish Government considers it is necessary to have this subordinate legislation power in the Bill to ensure sufficient legislative flexibility to make these types of changes for ADT, in addition to this being a more effective use of resources by the Scottish Parliament and the Scottish Government.

22. To the extent that changes are required to the collection and management of ADT which relate to provisions contained in or under the RSTPA 2014 (which provides the general framework for the collection and management of devolved taxes), separate subordinate legislation-making powers under that Act will be used.

Choice of procedure

23. Regulations under section 34 are concerned with merely the administration of core policy rather than with its substance. For this reason, they do not warrant the same degree of scrutiny as regulations under sections 8 and 10, unless they amend primary legislation. For this reason, affirmative procedure is considered to be appropriate to the extent that the power allows for the amendment of primary legislation. For all other regulations under section 34, negative procedure is appropriate.

This document relates to the Air Departure Tax (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 19 December 2016

Section 36(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure if amending primary legislation, otherwise negative

Provision

24. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with or for giving full effect to, this Bill or any provision made under the Bill. The regulations may modify any enactment.

Reason for taking power

25. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. The ancillary provision is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provisions in the Bill. The ancillary power is wide-ranging because it is vital that the collection and management of ADT is able to be delivered effectively and efficiently.

26. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues (for example, to align the ADT regime with a change in technology, business practices or flight regulations). Without this power, it may be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Scottish Parliament or the Scottish Government.

27. The power, whilst potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, in connection with, or for giving full effect to, any provision in the Bill or any provision made under the Bill.

Choice of procedure

28. Regulations made under this section which contain a provision which adds to, replaces or omits any part of an Act are subject to the affirmative

This document relates to the Air Departure Tax (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 19 December 2016

procedure. Any other regulations made under this section are subject to the negative procedure. These procedures are typical for ancillary powers.

Section 37(2)(b) – Interpretation

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

29. This provision enables the Scottish Ministers to make regulations amending a reference in a provision in the Bill to an enactment which is repealed and re-enacted (with or without modification), so that the provision refers to the re-enacted enactment. The regulations can also provide that the reference to an enactment which is repealed and re-enacted (with or without modification) is not to be treated as referring to the re-enacted enactment.

Reason for taking power

30. An enactment referred to in the Bill could, after enactment of the Bill, be repealed and re-enacted (with or without modification) at any point. Although section 37(2)(a) provides that in such a case the reference to the enactment must be construed as a reference to the re-enacted enactment, it may be considered desirable (for example, to keep the wording of the legislation updated) to amend the Bill so that it refers to the re-enacted enactment.

31. The power also provides the flexibility to ensure that the reference to an enactment which is repealed and re-enacted (with or without modification) is not to be treated as referring to the re-enacted enactment. This may be necessary where it is not appropriate to refer to the re-enacted enactment (which would otherwise automatically take effect under section 37(2)(a)), and instead it is appropriate to retain the reference to the original enactment.

Choice of procedure

32. Negative procedure is considered appropriate for a technical and administrative matter. The provision does not allow for the amendment of other primary legislation.

This document relates to the Air Departure Tax (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 19 December 2016

Section 41(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: no procedure

Provision

33. This provision allows the Scottish Ministers to commence provisions in this Bill (other than sections 35 to 37, 39 to 40 and 42, which come into force on the day after Royal Assent) on such day as they appoint by regulations. The regulations can include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

34. It is standard for the Scottish Ministers to have control over the commencement of a Bill.

Choice of procedure

35. As is now usual for commencement regulations, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill..

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