

# **REVENUE SCOTLAND AND TAX POWERS BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Revenue Scotland and Tax Powers Bill introduced in the Scottish Parliament on 12 December 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 43–EN.

### **POLICY OBJECTIVES OF THE BILL**

#### **Overview**

2. The Revenue Scotland and Tax Powers Bill (“the Bill”) is the third of three related Bills being brought forward as a consequence of measures enacted in the Scotland Act 2012. The Bill follows two tax-specific Bills, the Land and Buildings Transaction Tax (Scotland) Act 2013 that received Royal Assent on 31 July 2013, and the Landfill Tax (Scotland) Bill which is currently being considered by the Scottish Parliament.

3. The provisions of the Scotland Act 2012 give the Scottish Parliament legislative competence over devolved areas of taxation and define these as being taxes on transfers of interests in land and taxes on disposals to landfill. The existing Stamp Duty Land Tax (SDLT) and United Kingdom (UK) Landfill Tax (LfT) will be disapplied in Scotland by a Treasury Order in the UK Parliament and the UK Government's policy is that this will take place from 1 April 2015.

4. The two devolved taxes that will replace them, Land and Buildings Transaction Tax (LBTT) and Scottish Landfill Tax (SLfT), ‘the devolved taxes’, will come into effect in Scotland from 1 April 2015. The details of each tax are set out in each of the tax-specific Bills. Further taxes may be devolved or introduced in Scotland in the future without the need for primary legislation at Westminster subject to the agreement of the UK and Scottish Parliaments. The UK Government will make a reduction to the Scottish block grant to offset the expected income from the two devolved taxes.

5. The Bill makes provisions for a Scottish tax system to enable the collection and management of LBTT and SLfT. It establishes Revenue Scotland as the tax authority responsible for collection and management of Scotland's two devolved taxes from 1 April 2015.

Revenue Scotland currently exists as an administrative function within the Scottish Government. The Bill will put Revenue Scotland on a statutory footing and establish it as a non-ministerial department which is accountable to the Scottish Parliament.

6. Some of the operational functions of Revenue Scotland with respect to the devolved taxes will be delegated to two other public bodies – Registers of Scotland (RoS) in the case of LBTT and the Scottish Environment Protection Agency (SEPA) in the case of SLfT. Revenue Scotland will retain overall responsibility for the collection and management of the two devolved taxes.

7. The Bill puts in place a statutory framework which will apply to the devolved taxes and sets out the relationship between the tax authority and taxpayers in Scotland, including the relevant powers, rights and duties. In a statement to the Parliament on 7 June 2012<sup>1</sup>, the Cabinet Secretary for Finance, Employment and Sustainable Growth set out his approach for a tax system for Scotland based on Adam Smith's four maxims with regards to taxes: certainty, convenience, efficiency and proportionate to the ability to pay. The Bill has been prepared to reflect these maxims.

8. The tax system, consisting of the provisions in the tax-specific legislation and in this Bill, will deliver certainty because it has been designed to be as simple as possible, with a common approach to tax assessments, applying penalties, promoting compliance and resolving tax disputes. It will deliver convenience because collection will be supported by a modern electronic payments system in line with the ambitions set out in *Scotland's Digital Future: A Strategy for Scotland*.<sup>2</sup> It will deliver efficiency because LBTT and SLfT will be collected by Revenue Scotland through RoS and SEPA respectively, drawing on all of their existing relevant knowledge and expertise. It will be proportionate to the ability to pay, for example, by introducing a progressive rate structure to LBTT so that the amount of tax paid will relate more directly to the value of the property acquired compared to SDLT.

9. Taxpayers will be required to submit a self-assessed tax return (a 'self-assessment') where there is a liability to pay tax. Both taxpayers and Revenue Scotland will have the power to amend tax assessments after they have been submitted. Revenue Scotland will also have the power to issue its own tax assessment in certain circumstances, or to amend a self-assessment made by a taxpayer. A standard set of time limits for all devolved taxes will apply in relation to the taxpayer's ability to amend a self-assessment or for Revenue Scotland to issue a new assessment or amend the taxpayer's self-assessment.

10. Revenue Scotland, or a delegated public body, will have the power to issue penalty notices to taxpayers or to their agents for non-compliant behaviour with respect to the devolved taxes. It will also have the power to apply discretion with respect to reducing or waiving penalties in certain circumstances and must issue guidance on how discretion will be exercised. The Bill specifies the non-compliant behaviour that should be subject to penalties, including, for example, late or non-payment of tax, errors in documents submitted or not submitting

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<sup>1</sup> *The Scottish Government's Approach to Taxation*, Statement to the Scottish Parliament by the Cabinet Secretary for Finance, Employment and Sustainable Growth, 7 June 2012, available at: <http://www.scotland.gov.uk/News/Speeches/taxation07062012>

<sup>2</sup> *Scotland's Digital Future: A Strategy for Scotland*, Scottish Government, March 2011, available at: <http://www.scotland.gov.uk/Publications/2011/03/04162416/0>

information requested by Revenue Scotland or by another public body to which Revenue Scotland has delegated some of its powers. There will be three kinds of financial penalties for non-compliant behaviour – fixed penalties, daily penalties, and percentage-based penalties, where the penalty is linked to the potential loss in tax revenues. Revenue Scotland will also have the power to inspect records, enter business premises to carry out investigations in relation to tax activity and to seek a summary warrant from the sheriff court to collect unpaid taxes and/or penalties owed.

11. The provisions in the Bill include measures to counteract tax avoidance through the introduction of a Scottish general anti-avoidance rule (GAAR). The purpose of the GAAR is to give Revenue Scotland the power to counteract tax advantages arising from tax avoidance arrangements that are artificial. The Scottish GAAR would enable Revenue Scotland to take counteraction in a wider range of circumstances than the existing UK GAAR (which deals with tax abuse rather than tax avoidance). This is a result of the criteria used in the Scottish GAAR to define what constitutes a tax avoidance arrangement that is artificial. Revenue Scotland will need to demonstrate that obtaining a tax advantage is one of the purposes of a tax arrangement, and that the arrangement is artificial. Artificiality will be determined by reference to a set of tests set out in the Bill, including commercial substance.

12. The Bill sets out a structure for resolving tax disputes by providing that the taxpayer can require Revenue Scotland to carry out an internal review. Revenue Scotland may also offer to enter into mediation with the taxpayer. If a dispute is not resolved by an internal review or if mediation is entered into and an agreement is not reached the taxpayer will still have recourse to the new Scottish Tax Tribunals which will be established by the Bill. A taxpayer who wishes may lodge an appeal with the Scottish Tax Tribunals without first asking for an internal review or may refuse to enter into mediation. A further appeal on a point of law against a decision taken by the Scottish Tax Tribunals could be made to the Court of Session.

## **ALTERNATIVE APPROACHES**

13. The first alternative option is to do nothing – i.e. not to collect the replacement taxes for SDLT and LfT when they are disapplied in Scotland at the end of March 2015. This would mean that from April 2015 taxpayers would no longer need to pay tax on land transactions or on disposals to landfill. However, there would still be a reduction in the Scottish block grant payment to reflect the fact that responsibility for SDLT and LfT has been devolved to the Scottish Parliament. This would represent a material reduction in the block grant and damage public services in Scotland. The Parliament has already effectively rejected this approach in passing the LBTT Bill in June 2013.

14. The second alternative option is for Revenue Scotland to remain as an administrative function within the Scottish Government from 1 April 2015, rather than establishing it as a non-ministerial department. Such an option would not provide Revenue Scotland with independence from Ministerial control, could call into question the impartiality of decisions made in the operation of its function, and would not be consistent with best practice internationally.

15. The third alternative option is to use statutory powers to place responsibility on Her Majesty's Revenue and Customs (HMRC) to administer the devolved taxes as an agent of the

Scottish Government. HMRC indicated that it was willing to administer the devolved taxes on a like-for-like basis with the current SDLT and LfT. Under such an arrangement, the Scottish Government and the Scottish Parliament would have been constrained in the design of the devolved taxes. For example, it would not have been possible to replace the slab structure of SDLT with a progressive structure for LBTT. This would also have prevented the Scottish Government adopting a system for collection and management of the devolved taxes which best meets the needs of people in Scotland. Furthermore, as outlined in the Financial Memorandum, over the period to 2020 the costs for setting up and running Revenue Scotland to collect 'like for like' taxes to SDLT and LfT are estimated to be 25 per cent lower than if HMRC had collected them on behalf of the Scottish Government.

16. The fourth alternative option would be to use RoS and SEPA to collect LBTT and SLfT respectively on behalf of the Scottish Government. This would leave Scotland without a single tax authority responsible for administering the devolved taxes. Effectively, RoS and SEPA would become tax authorities, with full powers over enforcement and compliance. This option would raise issues of accountability and efficiency, since the separate bodies would need at least to some extent to duplicate tax administration, policy and accounting functions.

## **CONSULTATION**

17. As mentioned above, discussion and debate on the provisions of this Bill began with the publication of a consultation document, *A Consultation on Tax Management*, on 10 December 2012. The consultation document included 38 questions, as follows:

- Questions 1-5 sought views on the proposed functions, duties, governance and method of engagement of Revenue Scotland with taxpayers and their agents.
- Questions 6-10 sought views on the proposed powers of Revenue Scotland, including powers for requesting information, inspections and investigations. The questions also sought views on the obligations on taxpayers, including requirements and time limits for submitting self-assessments or amended tax returns to Revenue Scotland.
- Questions 11-16 sought views on ensuring compliance within the tax system for the devolved taxes, including how to make it as easy as possible for taxpayers to comply with their obligations, whether the list of proposed non-compliant behaviours was comprehensive enough and also views on the level of discretion Revenue Scotland would have to determine the level of sanctions issued to a taxpayer.
- Questions 17-23 sought views on the proposed approaches to tax avoidance, including the provision for a Scottish GAAR, prior clearances and on arrangements for appeals against a Revenue Scotland decision that a tax avoidance arrangement is artificial and unacceptable.
- Questions 24-30 sought views on resolving tax disputes, including ways to avoid disputes arising in the first instance and also on the proposed three avenues available to taxpayers who dispute a decision by the tax authority – internal review, mediation and referral to a Scottish Tax Tribunal.
- Questions 31-34 sought views on treatment of taxpayer information, including the proposed statutory provision forbidding disclosure of taxpayer information held by Revenue Scotland except in specific circumstances such as prevention of crime or

meeting EU and international obligations. Views were also sought on exemption from Freedom of Information legislation in order to prevent disclosure of information that could identify a taxpayer.

- Question 35 sought views on the proposals for an accelerated tax changes regime, to cover potential circumstances where tax changes need to be made quickly. The UK approach is for a provisional collection of taxes regime where tax changes (e.g. to rates or bands) can be swiftly implemented with parliamentary scrutiny following.
- Questions 36-38 sought views on the draft Equalities Impact Assessment and Business and Regulatory Impact Assessment published alongside the consultation, as well as on any other aspects of the proposals not covered elsewhere in the questions.

18. Copies of the responses (other than those where respondents asked for their comments to be kept confidential) can be accessed through the Scottish Government's website<sup>3</sup> or Library (0131 244 4565).

19. The consultation allowed a wide range of people and representative bodies with an interest in and experience of tax matters to comment. In view of the range of topics for consideration, the normal consultation period was extended to four months. A total of 28 responses were received from individuals and organisations. The largest category of respondent was tax accountants and professional tax bodies, comprising 32 per cent of all respondents. Other respondents were public bodies, legal professional bodies, local authority bodies, businesses and one individual.

20. The Scottish Government also commissioned The Research Shop to undertake an analysis of the responses received to the consultation and its report has been published on the Scottish Government's website.<sup>4</sup>

21. The Scottish Government worked with a range of organisations, bodies and groups to develop the proposals contained in the Bill. During the consultation period, public discussion group events were held in Aberdeen, Perth, Galashiels, Edinburgh and Glasgow to enable stakeholders with an interest in this matter to communicate their views. Meetings were also held with representative bodies including the Law Society of Scotland, the Chartered Institute of Taxation, the Institute of Chartered Accountants of Scotland, the Low Income Tax Reform Group and Young Scot.

22. The Scottish Government is grateful to all who contributed their time, input and assistance to the consultation process which was very helpful in shaping the content of the Bill.

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<sup>3</sup> Non-confidential responses to the consultation paper are available on the Scottish Government website at: <http://www.scotland.gov.uk/Publications/2013/05/2816/0>

<sup>4</sup> *A Consultation on Tax Management, Analysis of Responses*, The Research Shop, published by the Scottish Government, 2013, available at: <http://www.scotland.gov.uk/Resource/0042/00426403.pdf>

## **Summary of responses**

23. Issues raised during the consultation that are relevant to specific measures in the Bill are discussed under the relevant headings in the ‘Bill Contents’ section below, including the alternative approaches that were considered.

24. Of the 28 responses received, some reflected the balance of views across a wider membership or audience. A summary of responses to the consultation is set out below:

- There was broad support in favour of Revenue Scotland’s proposed function, ‘to ensure the efficient and effective care and management of the devolved taxes and that tax receipts are paid to the Scottish Consolidated Fund’.
- All but one of the respondents were in support of Revenue Scotland being established as a non-ministerial department and being accountable to the Scottish Parliament.
- The Scottish Government’s preferred option for Revenue Scotland’s leadership and governance (made up entirely of non-executive members to whom the chief executive would report) was supported by half of the respondents who provided a view. The option given most support, however, was for a Board comprising of both executive and non-executive members, along with a non-executive Chair. A common view was that transparency will be essential in making appointments to the Board and the chief executive position.
- Whilst there was much support for a ‘Digital by Default’ approach to providing information, on the grounds of wide reach and enabling access, a recurring theme was that this should not inadvertently exclude those without internet access or IT knowledge.
- The proposed framework for tax collection was considered in general to be reasonable, with the emphasis on consistency and proportionality particularly welcomed.
- There was general agreement that the proposed powers for Revenue Scotland to require information and carry out inspections were essential, although many recommended they should not be too broadly framed so as to allow their application in a disproportionate manner.
- The vast majority of those who provided a view on sanctions and penalties supported the proposal that Revenue Scotland should have discretion to determine the level of sanctions, subject to legislation and guidance. The two factors most frequently mentioned by respondents to take into account in exercising discretion were intent (whether deliberate or a genuine error) and the taxpayer’s history of compliance.
- There was general agreement that the measures proposed for tackling tax avoidance were appropriate. The majority of those who provided a view on the GAAR supported a narrowly-targeted rule, citing the benefits in providing greater certainty for businesses and maintaining Scotland’s attractiveness as a location for business and employment.
- The proposals for avoiding and resolving disputes were considered to be broadly appropriate. There was cross-sector support for the proposed arrangements for an

internal review generally taking place as the first stage of resolving a dispute. The majority of those who expressed a view on mediation supported its application as a potentially cost-effective, fair and proportionate mechanism for resolving disputes and minimising the number of cases going to a tribunal. The vast majority of those who provided a view on tribunals were in favour of the UK Tax Tribunal taking on tax appeals until such time as it was appropriate to move it to the Scottish Tribunal System.

25. As a result of the consultation, the Bill makes provision to establish Revenue Scotland as a non-ministerial department, with proposed functions broadly as consulted on. In the Bill, 'collection and management' has been used rather than 'care and management' reflecting current statutory language. The Bill proposes that Revenue Scotland should consist of only non-executive members with clear lines of governance and accountability for executive staff including the chief executive. Revenue Scotland's tax collection powers, including those for requiring information and carrying out inspections, have been tightly framed to help ensure that they are applied in a controlled and proportionate manner. The penalties regime included in the Bill proposes that Revenue Scotland should have some discretion to reduce penalties, within a statutory framework setting maximum amounts, in line with comments received in the consultation.

26. The Bill includes an anti-avoidance rule, which is broader in its reach than, for example, the UK's anti-abuse rule. The reasons for this approach are given in the relevant paragraphs below. Finally as regards dispute resolution, the Bill makes provision for internal review, enables Revenue Scotland to enter into mediation and makes provision for a new Scottish Tax Tribunal. This new Scottish Tribunal will share many features of the existing UK arrangements but which it is intended will be transferred as soon as practicable into the Scottish tribunals system being established by the Tribunals (Scotland) Bill which is currently before the Parliament.

## **BILL CONTENTS**

27. The Bill makes substantive provision across twelve areas:
- **PART 1** provides an overview of the Bill's structure in relation to the different Parts and schedules.
  - **PART 2** sets out the establishment and constitution of Revenue Scotland as a non-ministerial department and its membership, including the position of chief executive, is set out in schedule 1.
  - **PART 3** details how Revenue Scotland will use and ensure protection of taxpayer information.
  - **PART 4** sets out in detail the composition and operational arrangements of the new two-tier Scottish Tax Tribunal.
  - **PART 5** outlines the GAAR applying to avoidance of the two devolved taxes.
  - **PART 6** sets out the powers and duties of taxpayers and Revenue Scotland, outlines the arrangements and time limits for taxpayer self-assessments and Revenue

Scotland assessments, and also arrangements for handling double payment or overpayment of tax.

- **PART 7** outlines the investigatory powers of Revenue Scotland.
- **PART 8** sets out the process for issuing and collecting penalties in respect of non-compliant behaviour by taxpayers.
- **PART 9** deals with interest on payments due to or by Revenue Scotland.
- **PART 10** provides for the enforcement powers Revenue Scotland will have in the collection and management of the devolved taxes.
- **PART 11** sets out the system for the review and appeal of Revenue Scotland decisions.
- **PART 12** outlines final provisions including an index of defined expressions, subordinate legislation and ancillary powers.

28. A number of policy decisions will be set out in subordinate legislation. The purpose of each of the subordinate legislation provisions in the Bill and the reasons for seeking the proposed powers are set out in the Delegated Powers Memorandum.

## **PART 1 – OVERVIEW OF ACT**

29. Part 1 of the Bill introduces the 11 other Parts of the Bill.

## **PART 2 – REVENUE SCOTLAND**

### **Overview of policy objectives**

30. The Bill will establish Revenue Scotland as the Tax Authority with responsibility for the collection and management of devolved taxes in Scotland. At present Revenue Scotland has been set up administratively within the Scottish Government. However, in line with international best practice, the Bill makes provision to establish Revenue Scotland on a statutory basis. As such, by April 2015 Revenue Scotland will be established as a body corporate, a non-ministerial department of the Scottish Administration, but not part of the Scottish Government. Revenue Scotland will be accountable to the Scottish Parliament. It will not be accountable to the Scottish Ministers for its operational activities, although its operating budget will be set by Ministers.

31. As well as the general function for the collection and management of devolved taxes, Revenue Scotland will have the following particular functions:

- providing information, advice and assistance to the Scottish Ministers relating to tax;
- providing information, advice and assistance to other persons relating to compliance with the devolved taxes;
- efficiently resolving disputes relating to compliance with the devolved taxes; and
- protecting the revenue against tax fraud (that is to say, tax evasion) and tax avoidance.

32. Revenue Scotland will be operationally independent of the Scottish Ministers. The Bill specifically prevents the Scottish Ministers from giving directions to, or otherwise trying to control, the way Revenue Scotland exercises its functions. Ministers will, however, be able to provide guidance to Revenue Scotland on how it exercises its functions. Revenue Scotland will be required to have regard to such guidance and will have a duty to provide information or advice relating to its functions as the Scottish Ministers may request from time to time.

33. Revenue Scotland will be required to produce a corporate plan which, when approved by the Scottish Ministers, must be published and laid before the Scottish Parliament. As soon as practicable after the end of each financial year, Revenue Scotland must produce an annual report, send a copy to Ministers and lay a copy before the Scottish Parliament.

34. Revenue Scotland will have five to nine members appointed by the Scottish Ministers. One of the members will be appointed as the Chair of Revenue Scotland. These appointments will be public appointments, will be subject to the Public Appointment and Public Bodies etc. (Scotland) Act 2003 and as such will be overseen by the Commissioner for Ethical Standards in Public Life in Scotland.

35. Revenue Scotland will employ a chief executive who will not be a member of Revenue Scotland. The first chief executive will be appointed by the Scottish Ministers. Subsequent chief executives will be appointed by the members of Revenue Scotland. Revenue Scotland will be able to appoint other members of staff on terms and conditions approved by the Scottish Ministers.

### **Alternative approaches**

36. The main alternative considered was to ask HMRC to administer the devolved taxes on behalf of the Scottish Ministers. HMRC provided an estimate of £22.3m to administer 'like for like' Scottish taxes to replace the two devolved UK taxes (SDLT and LfT) on behalf of the Scottish Ministers. This, however, would have constrained the Scottish Ministers to simply maintain the two devolved taxes as they currently apply. Setting up Revenue Scotland to collect and manage devolved taxes allows the Scottish Ministers the opportunity to set different policy directions for the administration of the devolved taxes, which would not have been possible for the costs HMRC had estimated. It also opens the way for the Scottish Parliament to agree legislation that makes provisions in relation to the design and administration of devolved taxes that are different from those in place for the existing taxes.

### **Consultation**

37. The proposal to create Revenue Scotland as a non-ministerial department met with almost universal support. The main arguments in favour of this approach were that it was important that Revenue Scotland was independent of the Scottish Ministers but remained part of the Scottish Administration. Those who responded also appreciated that Revenue Scotland would be accountable to the Scottish Parliament, and added that the concept of a non-ministerial department was well understood in the Scottish public bodies landscape.

38. The proposed governance arrangements for Revenue Scotland were subject to a range of different views from consultees. In general there was support for non-executives being present on the board and for a non-executive chair. Opinions differed about executive representation on the board, with the preferred option being for a board made up of non-executives and executives. The option of an exclusively non-executive board to which the chief executive reported also received support.

## **PART 3 - INFORMATION**

### **Overview of policy objectives**

39. Revenue Scotland will handle taxpayer information with care, and any disclosure will have to be authorised. Taxpayer information will be protected and only shared in clearly defined circumstances. Protected taxpayer information means any information that is held by Revenue Scotland in connection with a function of Revenue Scotland by which a person may be identified.

40. The Bill provides that a Revenue Scotland official must not disclose information unless legally permitted to.

41. The Bill defines when a disclosure of taxpayer information would be permitted. A disclosure of protected taxpayer information is permitted:

- if it is made with the consent of each person to whom the information relates;
- if it is made in accordance with any provision made by or under this Act or any other enactment requiring or permitting the disclosure;
- if it is made for the purposes of civil proceedings;
- if it is made for the purposes of criminal investigations or criminal proceedings or for the purposes of the prevention or detection of crime;
- if it is made in pursuance of an order of court or tribunal;
- if it is made to a delegate of Revenue Scotland or another person exercising functions on behalf of Revenue Scotland; or
- if it is made to HMRC (reflecting that in certain circumstances HMRC may disclose taxpayer information to the Scottish Ministers).

42. The Bill will create an offence of wrongful disclosure of taxpayer information held by Revenue Scotland in relation to the collection and management of devolved taxes.

### **Alternative approaches**

43. The existing UK legal framework is based on the principle that taxpayer information is confidential. This principle is, however, not universally accepted. During the preparation of *A Consultation on Tax Management* the systems that operate in other countries were examined. In Ireland, those people who have not paid tax within the prescribed period can have their names published. In Norway and Sweden, the tax returns of individual taxpayers are either published or

are available on request. In these countries such measures are believed to promote tax compliance. Such an approach would, however, cut across the Scottish Government's published policy on personal information, *Identity Management and Privacy Principles*<sup>5</sup>. Whilst keen to promote compliance and tackle avoidance, the Scottish Government does not believe that publishing taxpayer information would enhance compliance.

## **Consultation**

44. The proposal that there should be a statutory provision forbidding the wrongful disclosure of taxpayer information was widely welcomed. The proposition that Revenue Scotland should be able to share information with other public bodies for specific purposes was also welcomed with the proviso that there should be safeguards, including the publication of formal agreements between Revenue Scotland and any bodies with which it proposed to share information, providing details of what information could be legitimately shared and how the information would be used. This is provided for in section 4(4) of the Bill and will be set out in more detail in a Memorandum of Understanding between Revenue Scotland and any delegated body.

## **PART 4 – THE SCOTTISH TAX TRIBUNALS**

### **Overview of policy objectives**

45. As stressed in *A Consultation on Tax Management*, avoiding tax disputes by 'getting it right first time' and providing clear information to taxpayers and their agents will be a key priority for Revenue Scotland. Where disputes do occur, and where internal review and if appropriate mediation (see Part 11 'Review and Appeal') fail to resolve the matter in question, then taxpayers will have recourse to the independent Scottish Tax Tribunals.

46. The Scottish Government intends that the arrangements to hear appeals relating to the devolved taxes will be separate from existing UK arrangements, and will be transferred into the new Scottish Tribunals structure being established by the Tribunals (Scotland) Bill which is currently before the Parliament. The Tribunals (Scotland) Bill makes provision for the transfer of existing devolved tribunals into the new arrangements. It is expected that the Scottish Tax Tribunals, established by the Revenue Scotland and Tax Powers Bill from 2015, will transfer into the new arrangements from mid-2016.

47. The Bill will establish a First-tier Tax Tribunal for Scotland and an Upper Tax Tribunal for Scotland. The Scottish Ministers will be responsible for appointing an appropriately qualified person as the President of the Tax Tribunals. The President will be responsible for ensuring arrangements are in place for the effective and efficient disposal of the Tribunals' business.

48. The First-tier Tribunal will consist of ordinary and legal members. Criteria for eligibility for appointment as an Ordinary Member of the First-tier Tribunal will be prescribed in regulations to be brought forward by the Scottish Ministers. Legal Members of the First-tier Tribunal will be a solicitor or advocate in Scotland or a solicitor or barrister in England, Wales or Northern Ireland of at least five years' standing. The Upper Tribunal will consist of legal

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<sup>5</sup> <http://www.scotland.gov.uk/Publications/2010/12/PrivacyPrinciples>

members only, including Court of Session judges. Legal members of the Upper Tribunal will be a solicitor or advocate in Scotland or a solicitor or barrister in England, Wales or Northern Ireland of at least 10 years' standing.

49. The First-tier Tribunal's consideration of any case before it will be carried out by a panel of two or more members including one legal member or by a panel made up of a single legal member. The President of the Tribunals will have responsibility for setting the size of panels and who sits on them. The President may select him or herself. The President's responsibilities in this respect are subject to regulations that the Scottish Ministers may make about the composition of the First-tier Tribunal.

50. The Upper Tribunal's consideration of any case before it will be carried out by a panel of a single legal member. The President is responsible for selecting members to sit on any panel and may select him or herself. The President's responsibilities in this respect are subject to regulations that the Scottish Ministers may make about the composition of the Upper Tribunal.

51. A decision of the First-tier Tribunal may be appealed to the Upper Tribunal by a party in the case on a point of law only. Such an appeal will require the permission of the First-tier Tribunal or, if the First-tier Tribunal refuses, permission of the Upper Tribunal. The Upper Tribunal may uphold or quash the decision. If the Upper Tribunal quashes the decision it may remake the decision or remit the case to the First-tier Tribunal. In remitting the case to the First-tier Tribunal, the Upper Tribunal may give directions for the First-tier Tribunal's reconsideration of the case.

52. A decision of the Upper Tribunal may be appealed to the Court of Session by a party in the case on a point of law only. Such an appeal will require the permission of the Upper Tribunal or, if the Upper Tribunal refuses, permission of the Court of Session. The Court of Session may uphold or quash the decision. If the Court of Session quashes the decision it may remake the decision or remit the case to the Upper Tribunal. In remitting the case to the Upper Tribunal, the Court of Session may give directions for the Upper Tribunal's reconsideration of the case.

53. Rules regulating the practice and procedure of the Scottish Tax Tribunals will be made by the Scottish Ministers.

### **Alternative approaches**

54. At the time of the publication of *A Consultation on Tax Management* in December 2012, three other options were considered, namely to:

- invite the UK Tax Chambers to hear appeals against devolved taxes until such time as the jurisdiction could be moved into the Scottish Tribunal System;
- refer appeals against the devolved taxes to an existing devolved tribunal;
- refer appeals against the devolved taxes to the Scottish court system.

55. Of these options, the second and third were seen as being inadequate. There was a wish to avoid adding to the workload of the Scottish Courts and, of the existing devolved tribunals, none had a particular focus on tax. The first option was preferred as it had several advantages; it was a route for appeals that taxpayers and agents were familiar with and drew on the expertise of existing members of the Scottish panel of the UK First-tier Tribunal (Tax).

56. After the publication of *A Consultation on Tax Management*, it became apparent that Scottish Government tribunal policy was moving in a different direction from that set out in the first option above. The Tribunals (Scotland) Bill makes provision for two unified Tribunals into which the existing devolved Tribunals will be transferred in due course. There is, however, no mechanism for transferring reserved UK Tribunals or jurisdictions bestowed upon UK Tribunals into the new structure. It has, therefore, been decided to establish the Scottish Tax Tribunals as stand-alone devolved tribunals that will transfer into the proposed new tribunal arrangements in due course. This is what is reflected in the Revenue Scotland and Tax Powers Bill.

## **Consultation**

57. At the time of *A Consultation on Tax Management*, the overwhelming majority of responses supported continued use of the UK Chambers. This was, however, overtaken by developments elsewhere as explained above.

## **PART 5 – THE GENERAL ANTI-AVOIDANCE RULE**

### **Overview of policy objectives**

58. Part 5 of the Bill establishes the Scottish GAAR. The GAAR gives Revenue Scotland powers to counteract tax advantages in relation to the devolved taxes achieved through tax avoidance schemes that are artificial. This Part sets out the criteria for determining whether a tax arrangement is artificial, and whether a tax advantage has been obtained. It also sets out the process by which Revenue Scotland may counteract a tax advantage, including taxpayers' rights to receive adequate notice of Revenue Scotland's intentions under the GAAR.

59. Tax fraud or tax evasion is the illegal evasion of taxes (such as deliberately misrepresenting or withholding taxpayer information). Fraud is a common law offence in Scots law for which the sanction can be an unlimited fine and/or an unlimited term of imprisonment. Accordingly, it is unnecessary to enact any new offences of tax fraud or tax evasion. By contrast, tax avoidance takes place where a taxpayer seeks to reduce, delay or avoid the tax liability by taking action which the taxpayer believes is legal, but which the tax authorities regard as not in keeping with the spirit of or the intention behind the relevant tax legislation<sup>6</sup>. Tax avoidance often involves artificial mechanisms for which the sole or main reason, or one of the main reasons, is to reduce the tax due. Tackling tax avoidance is important because:

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<sup>6</sup>The Scottish Government broadly endorses the definition of tax avoidance, "*The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability.*" (Dicta of Lord Nolan in *Inland Revenue Commissioners v Willoughby* [1997] 4 All E.R. 65).

- tax avoidance reduces public revenues, and so will lead either to lower spending on vital public services or to an increase in tax rates generally, which must be paid by other taxpayers, to recoup tax avoided;
- there is a risk to the tax base if other taxpayers behave in a similar way;
- there may be perceived unfairness to compliant taxpayers who continue to meet their liabilities as intended by the law; and
- tax avoidance can undermine public confidence in the tax system and lead to reduced rates of compliance.

60. The Bill provides for a Scottish GAAR by setting out rules enabling Revenue Scotland to counter-act tax avoidance arrangements in relation to the devolved taxes that it determines are artificial. In developing the Scottish GAAR, the Scottish Government has drawn on the basic concepts of the existing General Anti-Abuse Rule legislation in the UK (sections 206-215 of the Finance Act 2013) and European Union (EU) (Commission Recommendation of 6 December 2012 - 2012/772/EU).

61. The objective of the UK General Anti-Abuse Rule is to target highly abusive, contrived and artificial tax avoidance schemes. It is therefore narrow in scope. Under the EU General Anti-Abuse Rule, which is provided as advice to Member States and does not have the force of law, a tax arrangement can be classified as tax avoidance, and therefore counteracted, if obtaining a tax advantage is the sole or main purpose of the arrangement. The Scottish GAAR will take a wider and therefore more rigorous approach to tackling tax avoidance by wider criteria for determining whether arrangements are to be classed as tax avoidance arrangements that are artificial and can therefore be counteracted. At the same time, the criteria are such that arrangements that might be characterised as legitimate tax planning or mitigation would not be open to counter-action. A taxpayer will of course also be able to appeal against decisions of the tax authority to counteract a tax advantage under the GAAR. The Scottish GAAR is intended to operate in tandem with tax-specific Targeted Anti-Avoidance Rules (TAARs)<sup>7</sup> and the ‘Ramsay principle’ of purposive statutory interpretation applied by the Scottish courts and tribunals<sup>8</sup>.

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<sup>7</sup> An example of a distinctive TAAR applicable to devolved taxes is found in paragraph 3 of schedule 1 to the LBTT Act. Because generally a lease of residential property over 20 years in duration may not be granted in Scotland, this provision exempts from charge to LBTT leases that would be unlikely, because of their short duration, to attract tax. Certain long residential leases, known as ‘qualifying leases’, will convert to the right of ownership on 28 November 2015 by virtue of the Long Leases (Scotland) Act 2012. Had these qualifying leases not been excluded from the exemption in paragraph 3 of schedule 1, there would be an incentive for tenants to opt out of conversion to ownership, with a view to the avoidance of LBTT.

<sup>8</sup> “[A question of statutory interpretation] must be considered in the light of the line of authority that has followed the decision in *WT Ramsay Ltd v IRC*, [1982] AC 300; 54 TC 101; [1981] S TC 174. Two fundamental principles emerge from those cases. First, revenue statutes should be interpreted in accordance with the normal principles of statutory interpretation; the court is not confined to a literal interpretation, and the words used in the statute should be considered in the context of the relevant statutory provisions taken as a whole, including the purpose of those provisions. Secondly, the court must ascertain the legal nature of any transaction to which it is sought to attach tax consequences, and if that involves considering a series of transactions, it is the whole series that must be considered...” (Lord Drummond Young in *Aberdeen Asset Management v HMRC* [2013] CSIH 84; His Lordship cited with approval the Hong Kong case of *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, demonstrating that the Scottish courts will draw from international anti-avoidance jurisprudence where appropriate.)

62. The Scottish GAAR defines an arrangement as a tax avoidance arrangement if, having regard to all the circumstances, it would be reasonable to conclude that obtaining a tax advantage is the main purpose, or one of the main purposes, of the arrangement. Compared to the UK and EU approaches, Revenue Scotland will not need to prove that obtaining a tax advantage is the sole or main purpose of the arrangement, simply that it is one of the main purposes. A feature of some tax avoidance schemes in the UK until now is that they have had apparently legitimate commercial or other purposes and taxpayers have sought to argue that the tax advantage obtained was secondary.

63. The Scottish GAAR defines a tax avoidance arrangement as being artificial if it satisfies one or both of two conditions. The first condition is that the entering into or carrying out of the arrangement in question is not a reasonable course of action in relation to the relevant tax provisions. This includes whether the substantive results of the arrangement are consistent with the policy objectives or with any principles on which the tax provisions are based (including implied principles). The second condition is met if the arrangement lacks commercial substance. If either condition is satisfied, the arrangement is artificial and - provided the arrangement also confers a tax advantage on the taxpayer – Revenue Scotland can move to counteract the tax advantage. This is stricter from the point of view of the taxpayer than the UK approach where, in effect, HMRC can act only if both such conditions are satisfied.

64. The provisions in the Bill will enable Revenue Scotland, if it is satisfied that a tax advantage in relation to the devolved taxes has arisen as a result of a tax avoidance arrangement that is artificial, to charge the taxpayer to tax as though the tax avoidance arrangement did not exist. Where Revenue Scotland determines that an arrangement is artificial it must give written notice to the taxpayer outlining why the arrangement is considered to be artificial and what the tax advantage is, what counteraction is proposed and what action the taxpayer can take to avoid the counteraction. The notice to the taxpayer must also set out the period which the taxpayer has in which to send a written representation to Revenue Scotland in response to the notice. Any such written representations must be taken into account by Revenue Scotland. If Revenue Scotland decides to go ahead with the counteraction by seeking to collect additional tax due, a taxpayer will be able to appeal against that decision. Tax due as a result of counteraction by Revenue Scotland would become payable in the same way as tax due as a result of a self-assessment or an assessment amended by Revenue Scotland.

### **Alternative approaches**

65. As outlined above, the UK and EU General Anti-Abuse Rules, and other international examples, were considered in the development of the Scottish GAAR. Some existing GAARs were considered to be too wide in their scope, giving considerable discretion to the tax authority and insufficient certainty to the taxpayer. Other existing GAARs were considered too narrow, restricting unduly the ability of the tax authority to counteract effectively tax avoidance arrangements that were artificial.

66. An additional way to tackle tax avoidance is through use of prior notification schemes to enable the tax authority to quickly identify tax avoidance schemes, and also any potential shortcomings in tax legislation that might allow taxpayers to use such schemes. The UK Government operates a Disclosure of Tax Avoidance Schemes (DOTAS) regime which applies to SDLT (although not to LFT). The Scottish Government does not think that a DOTAS

arrangement is necessary in relation to SLfT due to the nature of the tax (tax evasion is the main issue rather than tax avoidance). Further consideration is being given to a DOTAS-type regime in relation to LBTT. Work is continuing to explore this further. It may be decided to bring forward such a scheme by way of amendments to the Bill at Stage 2.

67. The Bill does not provide explicitly for pre-clearance arrangements because it is not felt they are necessary for the two devolved taxes and because of the significant additional administrative burdens that would be placed on Revenue Scotland. There would, however, be nothing to prevent a taxpayer from approaching Revenue Scotland for an opinion on whether an arrangement in contemplation constituted an artificial tax avoidance arrangement as defined in the GAAR. Were Revenue Scotland to indicate that in its view such an arrangement would be liable to counteraction, a taxpayer could of course go ahead to enter into such an arrangement and challenge Revenue Scotland's position through the appeals process.

68. It is important to note that the Scottish Government's commitment to counteracting tax avoidance is not limited to the Scottish GAAR. As mentioned, the GAAR is intended to operate in tandem with TAARs and the 'Ramsay doctrine' of purposive statutory interpretation. It can also be the case that avoidance schemes do not actually produce the end results that their promoters claim that they do, after plain application of the statutory taxing provisions; this might particularly be the case where Scots law does not give legal effect to "equitable" or "beneficial" interests<sup>9</sup>. Furthermore, section 3(2)(d) of the Bill imposes a statutory requirement on Revenue Scotland to protect the revenue from tax avoidance. Revenue Scotland will do this through robust but proportionate compliance activity, in partnership with RoS, SEPA and, where appropriate, HMRC and other public bodies. Non-compliance where there is neither fraud/evasion nor avoidance – for example where a taxpayer innocently neglects to make a return or pay tax within the statutory time period – may lead to the imposition of a civil financial penalty (see the commentary on Part 8 of the Bill below).

## **Consultation**

69. There was general agreement amongst respondents to the consultation paper that the range of measures proposed for tackling tax avoidance were appropriate. In particular, there was support for promoting a culture of compliance.

70. The majority (72 per cent) of those who provided a view on whether there should be a Scottish GAAR supported a narrowly-targeted Scottish GAAR similar to the UK General Anti-Abuse Rule now enacted in the Finance Act 2013. There was no support expressed for a more widely-drawn provision. The main attractions of the narrow focus were greater certainty for businesses and maintaining Scotland's attractiveness as a location for business and employment. The Scottish Government notes the views of those in favour of a more narrowly-focused Scottish GAAR. However, it considers that the provisions set out in the Bill provide an appropriate balance between the interests of taxpayers generally and of the public in Revenue Scotland's ability successfully to counteract tax avoidance arrangements that are artificial, and the interests

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<sup>9</sup> For example, in the insolvency case of Joint Administrators of Rangers Football Club Plc, *Noters* [2012] CSOH 55, rights in connection with season tickets had a more limited proprietary effect in Scots law than they would have had in English law.

of individual taxpayers in obtaining certainty about their tax affairs and in undertaking legitimate tax planning.

## **PART 6 – TAX RETURNS, ENQUIRIES AND ASSESSMENTS**

### **Overview of policy objectives**

71. Part 6 of the Bill makes provision regarding: assessment of the devolved taxes, powers of enquiry by Revenue Scotland into taxpayer self-assessments, powers and duties for amendment and correction by taxpayers and Revenue Scotland and claims for relief from double assessment and overpayment of tax.

#### *Taxpayer duties*

72. Taxpayers will have seven general duties in relation to the devolved taxes:

- to self-assess tax due;
- to notify Revenue Scotland of any taxable activities undertaken by them;
- to inform Revenue Scotland if tax is due;
- to send a tax return on time;
- to take reasonable care to ensure that the information in a tax return is accurate;
- to pay any tax due; and
- to keep adequate records relating to tax.

73. With regard to the duty to keep adequate records relating to tax, records must be kept for a period of five years from the date of the original or amended tax return (whichever is later). The tax record must be in a form that can be inspected by Revenue Scotland or a delegated public body and have sufficient detail to confirm that the right amount of tax has been paid.

#### *Tax returns*

74. Revenue Scotland (and its delegates) will operate the devolved taxes based on self-assessments completed by the taxpayer and tax will be paid on the basis of these self-assessments. The deadline for the taxpayer making the first self-assessment return will be specific to each tax and so is not set out in this Bill, but may be set in regulations made by the Scottish Ministers.

75. Following the submission of the original self-assessment, the taxpayer will be able to submit an amended self-assessment within the 12-month amendment period, running from the filing date. If necessary, more than one amended assessment may be submitted – for example, in light of new information available to the taxpayer, or to correct an error.

76. Revenue Scotland or its delegate will have the power to issue a corrected assessment within three years of the original or amended self-assessment return (whichever is later) to correct an obvious error or omission. The taxpayer may reject this correction by either amending

the Revenue Scotland return or, if outside the amendment period, by giving formal notice rejecting the revised assessment within three months of the date of issue of the correction.

*Revenue Scotland enquiries and determinations*

77. Revenue Scotland will have the power to carry out enquiries in relation to taxpayer returns where there is a question as to whether the relevant person is liable to pay tax or about the amount of tax that is chargeable. If the investigating officer, upon carrying out an enquiry, forms the view that: a) the amount of tax payable in the self-assessment is insufficient; and b) is likely to be lost unless the assessment is immediately amended, the investigating officer may issue an amended assessment to the taxpayer making good the deficiency. A designated officer must give notice of the intention to make an enquiry to the relevant person. During the period when the enquiry is in progress, any question arising from the tax return in question may be referred to the appropriate tribunal for determination.

78. Where Revenue Scotland or a delegated public body has reason to believe that a person should have paid tax but failed to provide a return, and it is within five years of the date when the return should have been provided, it can issue a determination of the tax owed to the person in question. Such a determination is treated in the same way for enforcement purposes as if it were a self-assessment made by the person.

79. A Revenue Scotland enquiry is completed when a designated officer from Revenue Scotland informs the relevant person (typically the taxpayer) in writing in the form of a closure notice. The closure notice must state that the enquiry is complete, state clearly the conclusions reached in the enquiry and be issued no later than three years after the filing date or the date on which the tax return was made, whichever is later. The person who is the subject of a Revenue Scotland enquiry may apply to the tribunal for a closure notice to be given to the enquiry. The tribunal, upon receiving such an application, must direct Revenue Scotland to issue a closure notice unless it feels there are reasonable grounds for not doing so.

*Revenue Scotland assessments and extended time limits*

80. Revenue Scotland or a designated public body will have five years from the date of receipt of the original tax return or an amended return (whichever is later) during which it can investigate the tax return and issue a revised Revenue Scotland assessment. This power can be exercised to make good a loss of tax where Revenue Scotland or a designated public body comes to the view that:

- tax which ought to have been assessed as chargeable has not been assessed;
- an assessment of the tax chargeable is or has become insufficient; or
- relief has been claimed that is or has become excessive.

81. Revenue Scotland has power to issue or amend assessments in instances of careless or deliberate behaviour by the taxpayer or a related person such as an agent.

82. In cases where a loss of tax occurs due to careless behaviour by the taxpayer, Revenue Scotland may issue an assessment up to five years after the tax became payable. In cases where a loss of tax occurs due to deliberate behaviour by the taxpayer, Revenue Scotland may issue an

assessment up to 20 years after the tax became payable. Careless behaviour relates to innocent mistakes or negligence relating to a tax return provided to Revenue Scotland which has led to a tax loss, either in completing the return accurately or in failing to notify Revenue Scotland about inaccuracies. Deliberate behaviour relates to a loss of tax brought about as a result of a deliberate inaccuracy or omission in a document given to Revenue Scotland.

#### *Double payment and overpayment of tax*

83. A taxpayer who believes that tax has been assessed more than once in respect of the same matter may make a claim to Revenue Scotland for relief against any double charge. This claim is subject to the adjustment period of one year from Revenue Scotland receiving the claim and to a three-year period if notice of enquiry is given.

84. Taxpayers must make a claim for overpayment to Revenue Scotland within two years of an order changing tax rates falling. For other overpayments the taxpayer may make a claim within five years of the relevant date as defined in the Bill. The exception to this is where the cost of the overpaid tax has not actually been borne by the taxable person and Revenue Scotland believes that to make any repayment would result in unjust enrichment (or a windfall) to the taxable person. Revenue Scotland may apply discretion to repay overpaid tax after the time limit has expired except where to do so would cause unjustified enrichment or where the sum of overpayment is less than the likely costs of the repayment process.

#### **Alternative approaches**

85. The current UK tax code includes a mixture of time limits in relation to reserved taxes, setting out: a) how long HMRC has to start an examination of a tax return after it has been submitted; b) in what circumstances HMRC can issue a “discovery assessment” after this initial period for examining a return; c) how long both HMRC and the taxpayer have to amend a tax return already submitted; and d) the time limits for assessing a taxpayer where there is evidence of fraudulent tax evasion.

86. This approach is prone to legal dispute concerning the appropriateness of compliance action, rather than tax liability itself, with resulting difficulties for the tax authority and for taxpayers. The provisions of this Bill are, therefore, based on fixed time limits applying to all devolved taxes, on the basis that these will offer simplicity and certainty to taxpayers and Revenue Scotland.

#### **Consultation**

87. There was general support amongst respondents to the consultation with regard to the obligations proposed for taxpayers. Some felt it important to highlight that taxpayers also have rights and that Revenue Scotland has both rights and obligations. The obligation which attracted most comment was the proposal that taxpayers who wish to contest any assessment by Revenue Scotland through review and appeal would be required to pay the tax assessed as due within the designated period as if a request for review and/or appeal had not been made. The proposal set out in the consultation paper was that, if the taxpayer’s appeal was successful, any overpayment would be reimbursed by Revenue Scotland with the addition of interest at a set rate. Forty-five

per cent of those who provided a view expressed concern that this requirement to pay tax, whether or not an appeal was made, could contribute to hardship for some businesses.

88. Seventy-eight per cent of respondents who provided a view supported the proposed four-year limit in the consultation paper for Revenue Scotland to amend tax returns where there is no evidence of fraud. The remaining respondents argued that allowing this period of time would lead to taxpayer uncertainty. A recurring theme amongst views expressed was that there was inequity between the proposed four year power for Revenue Scotland to amend returns and the one year period in which it was proposed that taxpayers could amend returns. Following further policy consideration and taking on board the views expressed by some stakeholders, the Bill provides for a period of three years in which Revenue Scotland may modify a self-assessment or require a taxpayer to submit a revised assessment.

## **PART 7 – INVESTIGATORY POWERS OF REVENUE SCOTLAND**

### **Overview of policy objectives**

#### *Power to require information*

89. Part 7 of the Bill provides for Revenue Scotland to have powers, in particular circumstances, to require information from the taxpayer, a third party or others who may have information about the taxpayer that is key to a devolved tax investigation. In particular, Revenue Scotland staff, or the staff of bodies to which relevant powers have been delegated, will be able to issue:

- an information notice requiring a taxpayer to provide information or documents that it considers necessary to check that the taxpayer has paid the correct amount of tax;
- an information notice requiring a third party to provide information or documents that are necessary to check the tax position of a specified taxpayer; or
- an information notice requiring a third party to provide information or documents considered necessary to confirm the identity of a taxpayer whose identity cannot be ascertained otherwise.

90. The Bill also sets out a list of restrictions to the above powers, including protection in some circumstances for particular groups of people such as auditors and legal advisers and also preventing certain types of document (e.g. journalistic or personal health records) from being the subject of an information notice.

91. Scottish Ministers will have power by way of regulations to prescribe the circumstances in which the powers can be used, the form and content of the relevant notices, the time periods for complying with information notices and how the use of the powers would be authorised by Revenue Scotland or the bodies to which powers have been delegated.

#### *Power of entry to business premises*

92. Revenue Scotland staff or the staff of bodies to which relevant powers have been delegated will have a power of entry to business premises in certain circumstances and subject to strict conditions which are outlined in Part 7 of the Bill.

#### *Further powers*

93. Revenue Scotland will also have further powers in certain circumstances to copy documents, to remove documents and to mark and record information. Part 7 of the Bill sets out these powers in more detail.

#### *Offences relating to information notices*

94. A criminal offence applies where a person conceals, destroys or otherwise disposes of a document or set of documents which the person has been required to provide by an information notice from Revenue Scotland or a delegated public body in relation to a devolved tax investigation.

95. This offence also applies where the person has been informed in writing that a document will, or is likely to, be the subject of an information notice in relation to a tax investigation and that document is then concealed, destroyed or disposed of. Depending on the nature of the conviction, the penalty for this offence can either be a fine or imprisonment not exceeding a term of two years. Part 8 of the Bill (Penalties) sets out the circumstances where liability to these offences does not apply.

#### *Reviews or appeals against information notices*

96. A person can request a review or an appeal against information notices, with some restrictions which are outlined in section 144 of the Bill.

### **Alternative approaches**

97. The UK legislation provides for the protection of certain communications or documents between a taxpayer and a tax adviser having to be provided to the investigating authority upon notice to either the taxpayer or tax adviser. This has not been provided for in the Bill in relation to the devolved taxes because on balance it is felt that it would unduly hinder efforts to tackle tax avoidance if such communications or documents were protected.

98. The option for Revenue Scotland to have the power to inspect domestic premises (as well as business premises) was considered but not included in the Bill on the grounds that such a power did not strike a fair balance between the rights of the individual and the rights of the tax authority. The Bill states that the power to inspect business premises does not include the power to enter or inspect any part of the business premises that is used solely as a dwelling.

### **Consultation**

99. In responses to the consultation paper, the proposed powers for Revenue Scotland or delegated public bodies to require information and carry out inspections were considered essential although many respondents recommended that the powers should not be too broadly framed and should be used in a proportionate manner. The Bill gives such powers to Revenue Scotland, within a framework which it is believed will provide an appropriate balance between safeguards, including rights of appeal, and effective tax collection and compliance activity.

100. Whilst the majority of respondents agreed that legal professional privilege should be maintained in relation to information communicated between a taxpayer and a legal advisor, professional tax advisory respondents also called for a similar privilege to be provided between taxpayers and providers of professional advice on tax. The Bill does not except such communications and related information from disclosure when Revenue Scotland seeks such disclosure through an information notice, since – as noted above – this might hinder legitimate efforts to tackle tax avoidance.

101. There were mixed views and no overall consensus as to whether the power to inspect businesses without giving advance notice following the issue of a warrant by a sheriff should be exercised only by Revenue Scotland or whether the power could be delegated. The Bill enables Revenue Scotland to delegate this power, since its use may be important in investigating tax evasion or avoidance, and adequate protection is offered to taxpayers through the involvement of a sheriff.

## **PART 8 – PENALTIES**

102. Part 8 of the Bill makes provision for Revenue Scotland or a delegated public body to apply penalties to taxpayers. The purpose is to promote compliance and deter non-compliance.

### *Non-compliant behaviours*

103. Revenue Scotland will be able to charge penalties for a range of non-compliant behaviours by taxpayers and, in certain circumstances, third parties. Many of the penalties will be levied on a ‘strict liability’ basis. The non-compliant behaviours are as follows:

- failure to provide a tax return, or to deliver any other document on or before the filing date;
- failure to make a tax payment on time (including failure to pay any tax due);
- errors in taxpayer documents (attributable to either the taxpayer or another person);
- failure to take reasonable steps to notify Revenue Scotland of an assessment issued by Revenue Scotland which understates a person’s liability to tax;
- failure to produce accurate documents or information in complying with an information notice;
- failure to comply with an information notice from Revenue Scotland or deliberately obstructing an officer during an inspection;
- failure to keep proper records;
- failure to provide contact details of a debtor following a notice from Revenue Scotland; and
- failure to register for tax or notify chargeability.

### *Financial penalties*

104. There are three types of financial penalties which will apply to devolved taxes in respect of non-compliant behaviour by the taxpayer:

- Fixed penalties;
- Daily penalties, chargeable at a particular sum per day over a fixed period but with different daily rates possible for different periods; and
- Percentage-based penalties (calculated by reference to the amount of the tax liability) for continued failure to comply with an information notice or continued obstruction of an officer carrying out an inspection. This is where the penalty is linked to the potential loss to Revenue Scotland by non-payment of tax, underassessment or inflated claim of refund by the taxpayer.

105. The penalties will be triggered by non-compliant behaviour for a certain length of time and the details of how the penalties would work in respect of each devolved tax will be set in regulations by the Scottish Ministers. The penalties will be able to be made cumulative, for example the same non-compliant behaviour could be subject to both the fixed penalty and a daily penalty. The expectation is that the different types of penalties will form a hierarchy, with the mildest being the fixed penalties and the most serious being penalties based on a percentage of the tax calculated as being due.

#### *Criminal offences*

106. As outlined in Part 7 of the Bill ('Investigatory Powers of Revenue Scotland'), a person commits a criminal offence by concealing, destroying or disposing of a document which is required to be produced by an information notice. The person also commits an offence by concealing, destroying or disposing of a document after being informed in writing that it is, or is likely to be, the subject of an information notice. Part 8 of the Bill sets out where liability to these offences does not apply (e.g. if the person acts more than 6 months after the document in question was produced to Revenue Scotland or a delegated body).

#### *Penalties – warning letters*

107. The Bill does not contain provision for warning letters from Revenue Scotland to the taxpayer in relation to penalties, but as set out in sections 150-151, 160, 162-163 and 181 of the Bill, the Scottish Ministers will have regulation-making powers to make further arrangements for penalties (including provision for warning letters for example).

#### *Penalties - discretion*

108. Revenue Scotland will be permitted to use its discretion to reduce or waive some penalties in certain circumstances. Revenue Scotland will be expected to issue guidance on how this discretion will be exercised. This may form part of the guidance issued on penalties. In addition, penalties may be waived when the taxpayer has a reasonable excuse. Revenue Scotland will include in its guidance further information regarding what it will accept as a reasonable excuse.

#### *Penalties – time limits*

109. The Bill makes provision for penalties to be paid within 30 days of the penalty notification being issued. Sections 159, 166 and 175 of the Bill provide further information as to the time limits under which a penalty is assessed.

## **Alternative approaches**

110. An alternative approach would be to adopt identical penalty amounts, timescales and processes for all the devolved taxes. Although such an approach would provide an element of simplicity and uniformity, it would not allow the degree of differentiation between the devolved taxes essential to maximising opportunities for encouraging compliance and deterring non-compliance. The Bill sets out instead a broad statutory framework for the application of penalties with respect to the devolved taxes but importantly allows the Scottish Ministers, subject to parliamentary agreement, to bring forward regulations providing for differentiation where appropriate in relation to the nature, amounts and timescales of penalties for each devolved tax.

## **Consultation**

111. The list of non-compliant behaviours set out in the consultation paper appeared to be reasonable to the majority of those who provided a view, although some requested that greater distinction in terms of penalties should be made between tax evasion and legitimate tax planning and also between careless mistakes and deliberate mis-statements and concealment.

112. Eighty-eight per cent of those who provided a view supported the proposal that Revenue Scotland should have discretion to determine the level of sanctions, subject to legislation and guidance. Respondents felt particularly strongly that the two most important factors in exercising discretion ought to be intent and the taxpayer's history of compliance.

113. On balance the overall consensus was that the proposed sanctions and their possible uses were reasonable but that flat-rate penalties should be applied with care and that use should be proportionate.

## **PART 9 – INTEREST ON PAYMENTS DUE TO OR BY REVENUE SCOTLAND**

### **Overview of policy objectives**

114. This Part of the Bill sets out the provisions dealing with interest on payments due to or by Revenue Scotland. Interest is to compensate Revenue Scotland or the taxpayer for the loss of the use of money, and is not to be viewed as a penalty or other sanction.

115. Revenue Scotland will be able to charge interest on late payment of tax or penalties with respect to the devolved taxes. This includes a partial late payment due to an initial underpayment of tax. The interest on late payment of tax will be calculated and applied from 30 days after the date the tax was due to be paid (specified in regulations), until such time as the tax is paid. The interest on late payment of penalties and the dates from which any interest on a penalty becomes payable will be determined in regulations made by the Scottish Ministers, subject to parliamentary approval by the affirmative procedure.

116. Interest must also be paid on money owed by Revenue Scotland to the taxpayer, whether involving repayment of tax paid, repayment of a penalty or repayment of interest (whether on tax or penalty). The interest on money owed to the taxpayer will be calculated and applied for the

period between the date the payment of the tax or penalty to Revenue Scotland or a delegated public body was made and the date when the repayment was issued.

117. Different interest rates may be applied to different devolved taxes and for different penalties. In all cases, interest rates will be determined in regulations made by the Scottish Ministers subject to parliamentary approval using the affirmative procedure.

### **Alternative approaches**

118. An alternative approach would have been to set in primary legislation identical interest rates for payments due to Revenue Scotland by the taxpayer and for payments due to the taxpayer by Revenue Scotland. This would create simplicity for both the taxpayer and the tax authority but is not an attractive approach because it could create an incentive for taxpayers to deliberately ‘park’ money through overpayment of tax with Revenue Scotland to give taxpayers a more favourable rate than could be obtained in the market place. This was the case in the UK until September 2009, since when the rate payable for underpayment of all main taxes has been set at a discernibly higher rate (currently the Bank of England base rate plus 2.5%) than compared to the rate for overpayments to the taxpayer (currently the Bank of England base rate). Instead, interest rates will be set by regulations, with flexibility to set different rates for different purposes.

### **Consultation**

119. There were no substantive or major issues identified during the consultation period. One respondent recommended that the same rate of interest should apply to both late payment of tax by the taxpayer and for repayments of tax from Revenue Scotland to the taxpayer. As outlined above, this has not been included on the face of the Bill. Interest rates will be set by regulations.

## **PART 10 – ENFORCEMENT OF PAYMENT OF TAX**

### **Overview of policy objectives**

#### *Collection of unpaid tax*

120. If taxpayers do not pay the tax due as a result of a self-assessment or as a result of a Revenue Scotland assessment, Revenue Scotland will be able to seek a summary warrant from the sheriff court (or the Court of Session for larger sums of tax or penalties due) to collect unpaid taxes and/or penalties owed. Revenue Scotland will be expected, however, to make use of other means available to seek taxpayer compliance before seeking a summary warrant.

121. Where Revenue Scotland is owed money in relation to the devolved taxes and it requires the contact details of the debtor from a third party to collect the money owed, Revenue Scotland has the power to issue a written notice requiring the third party to provide it with these contact details. If the third party fails to comply with this notice, a fixed financial penalty is applicable (which can be changed in an order by the Scottish Ministers at a later date if it appears there has been a change in the value of money). The third party has the right to request a review or appeal against this notice only on the grounds that it would be unduly onerous to comply with the notice or requirements set out in it.

## **Alternative approaches**

122. An alternative approach to the enforcement provisions in the Bill is to not allow the tax authority to take enforcement action against a person (in relation to the devolved taxes) by means of an application to the sheriff court or the Court of Session. This approach was not pursued as an option because it would not provide the tax authority with sufficient means of collecting sums of money due to it from a taxpayer or third party.

## **Consultation**

123. There was broad support for the proposal for Revenue Scotland to be able to seek a summary warrant from the sheriff court to collect money owed to the tax authority, as long as the application of the power was fair and consistent. It was considered that the general powers proposed were consistent with those currently available to HMRC, with one respondent in particular emphasising that different approaches should not be developed for devolved and non-devolved taxes. The Bill includes provisions that would deliver these objectives.

## **PART 11 – REVIEWS AND APPEALS**

### **Overview of policy objectives**

124. As explained in Part 4 above, one of Revenue Scotland's key priorities is to avoid tax disputes by 'getting it right first time' by providing clear information to taxpayers and taxpayer agents. Where disputes do occur, Revenue Scotland will aim to resolve the dispute as efficiently as possible. A taxpayer who is unhappy with a Revenue Scotland decision can request a review, which will be carried out by a member of Revenue Scotland's staff who was not involved in the initial decision. If requested, such a review must be carried out by Revenue Scotland. If the review fails to resolve the dispute, Revenue Scotland may offer to enter into mediation with the taxpayer. The mediator will be an independent third party appointed by Revenue Scotland. The taxpayer may decide to take up the offer of mediation or not. If mediation fails to resolve the case, or if Revenue Scotland does not offer to enter into mediation, or if the taxpayer does not wish to take up an offer of mediation, the taxpayer will have recourse to the independent Scottish Tax Tribunal (see Part 4 above).

125. Appealable decisions are laid out at section 198 of the Bill. For any appealable decision the aggrieved person may seek a review. The taxpayer must give notice of review to Revenue Scotland within 30 days of the date the decision in question was notified to the taxpayer. The notice must specify the grounds for the review. If a taxpayer submits a late notice of review, Revenue Scotland must agree to carry out the review if there is a reasonable excuse for the notice being late and it has been made without unreasonable delay.

126. Within 30 days of receipt of a notice of review, Revenue Scotland must notify the taxpayer of its view of the matter in question. The nature of the review will depend on the matter in question. Revenue Scotland will however have regard to steps it has already taken in reaching the decision and steps taken by any person trying to resolve the dispute. The review must take account of any representations made by the taxpayer, if they are made in a timely manner. The review may conclude that Revenue Scotland's view of the matter in question should be upheld, varied or cancelled. Revenue Scotland must notify the outcome of the review

to the taxpayer within 45 days of notifying the taxpayer of its initial view of the matter in question.

127. If a review concludes with Revenue Scotland upholding its view or varying its view of the matter in question, then Revenue Scotland may offer to enter into mediation.

128. It is, however, recognised that not all tax disputes will be appropriate for mediation. For example, a dispute involving a point of law is unlikely to be settled by mediation. Where Revenue Scotland does not offer mediation, or mediation does not result in an agreement, the taxpayer will be able to appeal to the independent Scottish Tax Tribunal.

129. Where there is a review or appeal, the tax, penalties or interest due still remain payable. The Scottish Ministers can, by regulations, provide for the postponement of payment of tax, penalties or interest while a review or appeal is pending. It is the Scottish Government's intention that for cases involving LBTT the taxpayer will be able to apply to have payment of tax, penalties or interest postponed while a review or an appeal proceeds. For SLfT, where the taxpayer has already collected the tax from a third party, the Scottish Government intends that the taxpayer should have to pay the amount assessed prior to a review or appeal proceeding.

### **Alternative approaches**

130. Mediation is offered by HMRC at present, and carried out by HMRC members of staff. If mediation was to be offered by Revenue Scotland, the option of having appropriately-trained Revenue Scotland staff act as the mediator was considered. However, it was felt that it would be difficult to provide appropriately qualified mediators that would be demonstrably independent from the decision in question.

### **Consultation**

131. Respondents to *A Consultation on Tax Management* considered the proposals for avoiding tax disputes to be broadly appropriate. "Getting it right first time" was welcomed, although ultimately it was felt that clear, well-drafted tax legislation and accessible plain English guidance would have the greatest impact in helping to avoid disputes.

132. The proposals for review were also widely welcomed. It was recognised that internal review had the potential to minimise the time spent in dispute, gave Revenue Scotland a chance to reconsider their position and gave a relatively cheap option for the taxpayer to resolve a tax dispute.

133. Respondents expressed general support for Revenue Scotland being able to enter into mediation as long as mediation remained a voluntary step for the taxpayer. Mediation was seen as being a low-cost option that offered the potential of resolving tax disputes in an efficient and fair way. Some respondents sounded a note of caution, pointing out that not all types of tax disputes would be appropriate for mediation.

## **PART 12 – FINAL PROVISIONS**

134. Part 12 of the Bill contains general and final provisions which include an interpretation section, an index of defined expressions, the order-making and regulatory powers and their procedures, ancillary provisions, reference to minor and consequential modifications of enactments and set out how the provisions of the Bill apply to the Crown. It also includes sections on the commencement of the Bill and its short title.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

135. A draft partial Equalities Impact Assessment was included in the consultation document *A Consultation on Tax Management* published in December 2012. A final Equalities Impact Assessment will be published separately by the Scottish Government in due course.

136. The Scottish Government considers that the Bill does not have an adverse impact on the basis of age, sex, race, gender reassignment, pregnancy and maternity, disability, marital or civil partnership status, religion or belief or sexual orientation. Any adverse impacts owing to statutory instruments, prescribed forms, guidance or systems relating to the Bill – for example accessibility to disabled and older persons - will be considered in a subsequent Equalities Impact Assessment in due course.

### **Human rights**

137. The Bill complies with the European Convention on Human Rights (ECHR). Taxation is concerned with the public nature of the relationship between the taxpayer and tax authority and not with civil property rights (see *Ferrazzini v. Italy* [GC] 2001-VII, paras. 24-31), and hence ECHR is generally not engaged. As regards civil penalties, article 6 of the ECHR (right to a fair trial) may be engaged and accordingly the Bill provides for appeals to independent and impartial Scottish Tax Tribunals against decisions of Revenue Scotland in respect of tax, interest and penalties. Investigatory powers such as information notices may engage both article 6 and article 8 of the ECHR (right to respect for private and family life) and therefore they contain safeguards and are proportionate having regard to the compelling public interest in the tax laws enacted by the Scottish Parliament being complied with.

### **Island communities**

138. The Bill is expected to have no disproportionate effect on island communities. The Scottish Government is keen to promote a ‘digital first’ approach to the submission of tax returns by electronic means but is aware that some remote island communities may not have appropriate access. This and other similar considerations have led the Scottish Government not to propose mandatory submission of tax returns by electronic means.

### **Local government**

139. The Bill has no disproportionate effect on local government in Scotland. The only costs which the Scottish Government has identified for local authorities are those associated with the role of local authorities as taxpayers. There are no additional responsibilities or duties for local authorities as a result of the devolved taxes that would result in additional cost. Local authorities are also not expected to incur any additional administrative costs in complying with the two devolved taxes compared to the current UK taxes (SDLT and LfT). The Financial Memoranda for the two devolved tax Bills explain how the amount of tax paid by local authorities might be affected.

### **Sustainable development**

140. The Bill will have no impact on sustainable development.

*This document relates to the Revenue Scotland and Tax Powers Bill (SP Bill 43) as introduced in the Scottish Parliament on 12 December 2013*

# **REVENUE SCOTLAND AND TAX POWERS BILL**

## **POLICY MEMORANDUM**

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