ICAEW
REPRESENTATION 93/20

TAX DEVOLUTION IN WALES - ENABLING CHANGES TO THE WELSH TAX ACTS

Issued 15 October 2020

ICAEW welcomes the opportunity to respond to consultation document Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts published by the Welsh Government on 16 July 2020.

We appreciate the difficulty for the Welsh Government in responding to tax developments at the UK level. We agree that it needs appropriate powers to react and make changes quickly and that the current powers and processes are not sufficient. Ideally, we think the Welsh Government should develop an annual Finance Bill type process but, if this is not feasible, the proposed approach looks a reasonable one provided that the powers are used only for the stated purposes and not more widely. We believe that Power 1 should contain the same safeguard as Power 2 so that it is subject to a Senedd motion or 'lock'.

This response of 15 October 2020 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System are summarised in Appendix 1.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 186,500 chartered accountant members and students around the world. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

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GENERAL COMMENTS

1. We welcome the opportunity to comment on the consultation document Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts published on 16 July 2020. We also welcomed the opportunity for ICAEW members to discuss the proposals with officials from the Welsh Government at a virtual roundtable on 1 October 2020.

2. We understand the difficulty in which the Welsh Government finds itself with regard to making tax changes. A typical example of the problem is in relation to Welsh Land Transaction Tax (LTT). Having devolved the power to tax land transactions to Wales as a replacement of UK stamp duty land tax (SDLT), the UK government has then made a number of changes to SDLT, including the changes made to the residential property rates with effect from 8 July 2020.

3. While the UK Government changes were made for understandable policy reasons at a time of crisis, such changes put the Welsh Government in a difficult position as it is, in effect, at the mercy of changes in policy made by the UK Government. Although some commentators might argue that the whole purpose of devolving taxes to Wales is so that the Welsh Government do what is right for Wales and should not be driven into making changes as a result of changes to SDLT, the reality is that any changes at that level do have to be considered carefully in the context of LTT. In short, although LTT is a devolved tax, the Welsh Government cannot ignore changes made to SDLT and therefore it needs to have in place the powers and procedures for it to make any necessary changes to react in a timely manner.

4. We understand that, and as the consultation acknowledges, the Scottish Government faces similar problems, so it must make sense to learn from its experiences and identify whether similar solutions might also work in Wales.

5. Accordingly, we do think that the Welsh Government needs a new legal procedure and processes for addressing these problems. Ideally, we would suggest that the best approach would be for an annual Finance Bill type process similar to that used by the UK Government. However, we appreciate that given the timing of the UK Budget process, this may not be practicable. In principle, therefore, we support the approach suggested in the consultation document, provided that the powers are used only for the stated purposes and not more widely. We believe that, in the interests of transparency and consistency, Power 1 should contain the same safeguard as Power 2 so that it is subject to a Senedd motion or 'lock'.

ANSWERS TO CONSULTATION QUESTIONS

Q1: Do you consider Emergency or 'fast-track' Bills to be appropriate legislative processes to make immediate or very quick changes to the Welsh Tax Acts?

6. In principle such processes could be appropriate procedures for ensuring that legislation is passed quickly, but it will be necessary to meet strict criteria before an expedited process can be adopted. Some of the reasons why Bills might be fast tracked are listed in para 2.16. These all seem reasonable in themselves, but care must be taken to ensure that such processes are used only in cases where the normal processes would not work.

Q2: Can you suggest any changes to the Emergency or 'fast-track' Bill process to make them better suited to make immediate or very quick changes to the Welsh Tax Acts?

7. Consideration could be given to whether an emergency or fast track Bill should go through all four stages: for example, could a Bill that had been certified and agreed is an emergency Bill proceed from stage 1 straight to stage 3, or even stage 4? Such a process might need a higher threshold of agreement and cross-party support.

Q3: Although the Welsh Government does not currently consider an annual Welsh Finance Bill to be a proportionate mechanism to make changes to the Welsh Tax Acts, we would be interested in your views on the potential to introduce such a Bill in the future. When would be the right time? How might this work? How should this link to the Welsh budget process?

8. Given that the UK is likely to see many changes made to the tax rules because of the covid-19 crisis, we think that the power to introduce an annual Finance Bill would be beneficial. It may not be necessary to use the process every year, but it would help support and underpin the democratic scrutiny of tax changes. Ideally this would be tabled as part of the Welsh Budget process.

Q4: Do you agree that arrangements are needed, beyond those already available, to enable amendments to the Welsh Tax Acts to be introduced promptly in particular circumstances?

9. Given that the Welsh Government is, as noted above, vulnerable to tax changes made at the UK level which potentially impact on taxes devolved to Wales, we do think such arrangements are necessary.

Q5: Are you aware of any examples of international tax legislative change processes that would be helpful for the Welsh Government to explore?

10. Not that we are aware of, although at the UK level we think the Welsh Government should learn from how the Scottish Government has dealt with these issues. It would be reasonable to model any emergency legislative processes as closely as possible on those already in use at the UK level.

Q6: Do you consider the principle of using regulation-making powers appropriate to give effect to these changes (as compared to using primary legislation or some other means such as the UK government's PCTA process)?

11. The first of our ten tenets for a better tax system (attached as Appendix 1) is that tax legislation should be enacted by statute and subject to proper democratic scrutiny by parliament. The default position should be that tax legislation should be in primary legislation except in exceptional circumstances. The Welsh Government should explore whether the Provisional Collection of Taxes Act 1968 process might go some, or most, of the way to addressing the problems identified in the consultation document.

12. The use of regulations has usually been to allow changes to be made to the administrative framework rather than the underlying structure of the tax and rates. If regulations are used to make changes to the primary legislation, ideally this should only be in exceptional circumstances, for example to correct clear errors or granting taxpayers reliefs.

Q7: Are there any risks with using a regulation-making powers to give effect to these changes? Please describe using examples if possible

13. The ability to make changes through secondary legislation is a power which, while potentially very attractive to policymakers, should be used sparingly and then only under strict conditions. There is always a risk with secondary powers that they may exceed the authority upon which they were granted, potentially exposing them to challenge. There is also a danger that the regulations are not subject to proper scrutiny, so defects and mistakes do not get picked up until after they have been enacted.

14. However, in the particular circumstances in which the Welsh Government finds itself, the proposal set out in para 3.7 et seq. of the consultation document appears a reasonable way to address the concerns that have been highlighted in the consultation. The key point, as highlighted in para 3.10, is that such powers should not be used to make routine tax policy changes.

Q8: Do you agree that power 1 should only apply to changes needed to respond to tax avoidance or evasion activity, compliance with international obligations, or, to address cases of exceptional need? If not in what circumstances should it not apply, and which additional situations should it apply?

15. We agree that power 1 should only be used in limited circumstances. We agree that countering tax avoidance should be one such case. We do not think it is necessary to include evasion as this would be an offence under the existing law. We agree that it could also be used where there is a need to comply with international obligations.

Q9: Do you agree that a Senedd motion for power 1 should not be necessary for the Welsh Ministers to make provisional affirmative procedure regulations under power 1?

16. We are not convinced as to why a Senedd motion or 'lock' is not necessary for Power 1. Although the suggested powers under Power 1 appear to apply to public interest matters, we believe that in the interests of transparency and consistency Power 1 should, like Power 2, be subject to a Senedd motion or 'lock' so ministers can be held to account.

Q10: What length of period do you consider to be appropriate to provide adequate scrutiny time for changes to be made under power 2?

17. A three-month period would appear reasonable to allow time for proper scrutiny and the ability to take evidence from third parties such as professional bodies, a feature which we think is particularly valuable. This should be encouraged given these measures would be in the public interest, a founding principle under which ICAEW as a Royal Charter body operates.

Q11: Do you agree that the use of power 2 should be subject to a Senedd 'lock'?

18. Yes.

Q12: Do you agree that power 2 should only apply to changes needed to respond to UK budget changes that impact on the resources available to the Welsh Government? If you think it should apply to more circumstances, please set these out.

19. The proposed limitation to Power 2 appears reasonable.

Q13: Do you consider the use of retrospective legislation to make changes to tax laws appropriate in certain circumstances? If so, under which circumstances?

20. In principle, we are opposed to retrospective legislation and believe that changes to the tax rules should apply only prospectively. However, we appreciate that this may not always be possible, especially in relation to countering identified tax avoidance. We refer the Welsh Government to a recent House of Commons Briefing paper on Retrospective Taxation published on 27 August 2020. The paper is valuable in setting out many of the arguments for and against retrospective taxation. It also sets out (on page 6) the principles of the so-called "Rees Rules" for when retrospective taxation might be an acceptable policy response. We believe these rules remain a sound set of principles which should always be followed when considering the case for retrospective legislation.

Q14: Are there any particular points that you think should be included or addressed in the protocol document?

21. We agree that there should be a protocol document and suggest it should be modelled on the so-called Rees Rules mentioned in our response to question 13 above. For convenience, we have set out the Rees Rules in Appendix 2.

Q15: Do you agree with the proposal for repayments that where the: a) taxpayer has overpaid as a result of the failed regulations they should be entitled to a repayment; and b) taxpayer has underpaid as a result of the failed regulations the WRA should not be able to collect the shortfall.

22. We agree with the proposed repayment as described in a). In proposal b), we agree that the WRA should not be able to collect the shortfall. This provision will need careful drafting to give taxpayers the necessary certainty given that, if the regulations did fail, the original, higher, amount would be legally due.

Q16: Do you consider that power 2 should be used to make any changes to the Welsh Tax Acts that the Welsh Ministers consider to be expedient in the public interest, other than those specified for power 1?

23. We have no examples of where it may be expedient to make the changes such as those envisaged in the consultation document. The guiding principle should be that these powers are only used in extremis, ie. immediate action needs to be taken in the public interest and there is no other suitable approach that can be used. As noted earlier, we think Power 1 needs to incorporate the same safeguard as Power 2, namely a Senedd motion or 'lock'.

Q17: Do you have any comments on the examples of tax legislative changes described in examples 1 to 6?

24. We have no further comments.

Q18: Are you aware of any other examples of tax legislative changes in the UK that will be helpful for the Welsh Government to explore in the context of amending the Welsh Tax Acts?

25. The UK Government has made several changes in recent Finance Acts which have been of concern in that they contain elements of retrospection and/or retroaction. The loan charge, introduced by F (No 2) A 2017, is a recent example of a retroactive provision which has proved particularly controversial. However, there have also been some other examples which have also proved controversial. For example, s 71 FA 2020 has made retrospective changes to the IHTA 1984 in respect of excluded property settlements where the settlor subsequently becomes UK domiciled. We believe it is wrong in principle to rewrite retrospectively the rules set out 36 years ago. It is also unfair on those trustees who relied in good faith on HMRC practice and assurances and where the taxpayers' view was confirmed in the Court of Appeal (see the case of *Barclays Wealth Trustees (Jersey) Limited & Michael Dreelan v HMRC* [2017] EWCA Civ 1512). For further details please see our briefing to MPs on the Finance Bill clause published as ICAEW REP 16/20.

26. We urge the Welsh Government not to follow either of the two examples mentioned above.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).

APPENDIX 2

The Rees Rules

As set out in the House of Commons Library Briefing Paper No 4369 Retrospective Taxation dated 27 August 2020

First, the warning must be precise in form. A mere suggestion that there are vague schemes of tax avoidance that must be counted should not suffice.

Secondly, the problem at which the warning has been directed should immediately be referred to a committee which I understand exists … composed of members of the Inland Revenue and of the accountancy and legal professions … [the committee] should to left … to devise the precise legislative measures which should then be introduced.

Thirdly, if the committee can hit on appropriate legislative provision, the draft clause … should immediately be published in advance of the Finance Bill so that those who are likely to be in the field of fire will have a second clear intimation of what to expect.

Fourthly, such a clause must, without fail, be introduced in the following Finance Bill … I believe there may be situations in which [this approach] … is the only solution if we are to counter avoidance of the sophistication and scale which we understand has been current of late. But if a Government are to adopt that remedy, it must be on [this] basis.