



SCOTLAND

Call for evidence on the Scottish Parliament's Finance Committee scrutiny of the Revenue Scotland and Tax Powers Bill

Introductory Comments

ICAEW welcomes the opportunity to comment on the Finance Committee's call for evidence on the Revenue Scotland and Tax Powers Bill.

ICAEW is an international body based in the UK and operates under a Royal Charter, working in the public interest. The regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council.

As a world-leading professional accountancy body, ICAEW provides leadership and practical support to over 140,000 members in more than 160 countries. Strengthened by the expertise of our whole membership, particularly those in the UK/EU who are interacting with government and institutions on similar economic issues, ICAEW is working with governments, regulators and industry in order to ensure the highest standards are maintained.

We believe in acting responsibly, in the best interests of our members and the general public. We act with integrity, creating effective partnerships with organisations and communities worldwide to ensure the highest technical, professional and ethical standards.

ICAEW is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. ICAEW ensures these skills are constantly developed, recognised and valued.

ICAEW Scotland serves over 1400 ICAEW members across the private and public sectors in Scotland and represents the views of ICAEW members who work in Scotland for local, national and international organisations.

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Part 1: General Comments

The ICAEW Tax Faculty has developed ten tenets for a better tax system. A 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.

Part 2: Comments on the Revenue Scotland and Tax Powers Bill

1. The following comments have been compiled by ICAEW Scotland member Mike Holland, who has recently retired from his position as tax manager for a US multi-national group. The comments deal with specific areas within the Bill, which raise issues or may require further examination or clarification.
2. Overall the Bill is clearly worded and concise.
3. Cl.7 prohibits Scottish Ministers giving directions or seeking to control Revenue Scotland (RS). Cl. 8 permits Scottish Ministers to give guidance to RS about the exercise of its functions and RS must have regard to the guidance, which must be published *unless Ministers consider that the publication would prejudice the effective exercise by RS of its functions*. It is not difficult to envisage situations in which the distinction between directions and guidance will be, at the very least, questionable. If Ministers give guidance that is not published they should have to declare each time they do so and such guidance should be reviewed by an independent arbiter, for example the President of the Tax Tribunals, to ensure that it does not amount to a direction.
4. Cl.10 requires RS to publish a Charter but gives no time frame. The Charter should be prepared and published within a specified time frame. RS should consult with interested parties on the detailed content of the Charter.
5. Under Cl.2 of Sch. 2 Ministers will prescribe by Regulation the eligibility criteria for Ordinary Members of the First-Tier Tribunal. There are similar provisions for the eligibility criteria for legal members of the First-tier and Upper Tribunals. The tribunals are an important safeguard for taxpayers against the power of RS, but the Regulations regarding eligibility criteria for members are subject only to the negative procedure in the Scottish Parliament prior to becoming law (Cl.218). The draft Regulations should be published for consultation and subject to the affirmative procedure.
6. Cl.7 of Sch. 2 covers disqualification from office. The disqualification criteria should include having been convicted of any criminal offence or having made a monetary settlement with RS or HMRC in connection with civil procedures for dealing with fraud under COP 9 (2005) or its equivalent.
7. Part 4 Sch. 2 contains provisions for establishing a fitness panel to investigate and report whether an ordinary or legal member of the Tax Tribunals is unfit to hold office on the grounds of inability, neglect of duty or misbehaviour. The panel's conclusion is not appealable. As the panel's finding against a member would almost certainly lead to dismissal, and adversely affect the member's personal reputation, there should be a right of appeal to the Court of Session.
8. Cl.44 allows the FTT and UT to award expenses according to tribunal rules that are to be drawn up by the Court of Session (Cl.46). To give taxpayers an effective right of appeal unconstrained by the fear of an adverse award of expenses, the tribunal rules should require each side to bear its own costs unless (a) the appeal is judged to be vexatious or without merit or (b) there is prior agreement to the contrary between the parties.
9. Cl.50 envisages the possibility of private hearings before both tribunals ((2)(a)(ii)) and the imposition of reporting restrictions ((2)(g)). In the interests of justice being seen to be done, these sub-clauses should be removed. If, however, they are retained, the tribunal rules should only permit private hearings and reporting restrictions in wholly exceptional circumstances (defined).
10. The publication of the decisions of the tribunals is to be subject to tribunal rules (Cl.51(4)). In the interests of justice being seen to be done, all tribunal decisions should be published,

particularly as the possibility of private hearings is envisaged. Anonymisation of the taxpayer's identity could be allowed in wholly exceptional circumstances.

11. Part 5 (the General Anti-avoidance Rule) raises issues. It gives an authorised officer of RS the power to decide what is an artificial tax avoidance arrangement (Cl.63). Condition A of what defines "artificial" (Cl.59(2)) is so broad that an authorised officer could view almost any transaction that does not maximise the tax take as artificial. This definition should be reviewed.
12. Having decided that a tax advantage has arisen to a taxpayer from a tax avoidance arrangement that is artificial, the authorised officer must, if the advantage is to be counteracted, issue a notice to the taxpayer telling him what adjustments to make (Cl.64).
13. The taxpayer has the right to have an appeal against the notice heard by the tribunals and court in connection with the GAAR, at which RS must show that there is a tax avoidance arrangement that is artificial (a low hurdle) and that the counteraction adjustments are just and reasonable (Cl.62). A court or tribunal *must* take into account any guidance published by RS about the GAAR (Cl.62(2)). It would be open and reasonable for RS, therefore, publish a wide range of guidance about what it considers artificial and the court or tribunal must take this into account. Although, presumably, they need not agree with the guidance, the fact that RS have given their view is likely to influence the tribunal's decision.
14. Overall, the conditions to trigger the use of the GAAR are completely subjective and the manner of its use against the taxpayer is weighted too heavily in favour of RS. To quote from Para. 50 of The Briefing from the Adviser accompanying the publication of the Bill "..... the use of the double reasonableness test in Condition A would confirm that the test is intended to be objective, not subjective, and the introduction of an advisory panel of independent persons with relevant financial and commercial experience would help ensure that Conditions A and B are judged in an unbiased way."
15. Para. 7 of the Policy Memorandum on the Bill states "In a statement to the Parliament on 7 June 2012, 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." As regards the Canon of certainty, the GAAR fails completely. This is no climate in which to encourage business investment and growth, particularly if further taxes are to be devolved, or enacted in an independent Scotland
16. Cls.76(2)(b)&(3) permit an enquiry into a tax return to be opened up to three years after, usually, the filing date. A one year period would better deliver certainty.
17. If an enquiry into a return is opened, Cl.84(2) states that it must be completed within three years (to which we propose amendment: paragraph 16 above refers) of the "relevant date" which, according to Cl.76(3) is, usually, the filing date. It appears that RS have three years from the filing date to open an enquiry, but it appears that it must also be completed by the same date.
18. Cl.86 and Cl.94 give RS five years from filing dates in which to raise, respectively, Determinations and assessments. If the taxpayer has died, RS have three years after the date of death to raise an assessment where the filing date for the return was up to five years before the date of death (Cl.94(4)), i.e. an eight year window. These are further examples of the disregard of certainty for the taxpayer and should be reduced to a more reasonable period, for example three years from the filing date.
19. Part 7 of the Bill covers investigatory powers. A designated investigation officer, defined in Cl.111 as, in normal parlance, a specialist investigator, must obtain the approval of a tribunal to issue a notice to a third party in respect of a named individual (Cl.117(4)).

However, no such approval is required where the name of the taxpayer is unknown to the officer, or the notice relates to a class of taxpayer whose individual identities are unknown to the officer (Cl. 119). Although the name(s) may not be known to the officer, it may be obvious to the third party who the individuals are. Indeed, presumably the notice may require them to be named. This type of notice can, therefore, be as sensitive as a notice in respect of a named individual. All third party notices should require the approval of a tribunal in order to give taxpayers equal protection.

20. Cl.130 gives protection from disclosure to privileged communications between legal advisers and clients. Using the same arguments that were advanced in the Prudential case, the principle of privileged communications should be extended to communications between clients, chartered accountants and other tax advisers who are members of regulated bodies.
21. A designated investigation officer has the power to inspect business premises at any reasonable time without notice (Cl.135). This is a power that could have significant ramifications for the taxpayer's relationship with customers, suppliers and employees; it should be subject to approval by the tribunal.
22. A penalty for failure to make a return may be reduced for disclosure, the reduction depending on the usual prompted/unprompted disclosure, co-operation, etc. criteria (Cl.154). To ensure consistency between RS officers, and thus equality of treatment of taxpayers, the penalty abatement percentage bands should be fixed by regulation. The same comment applies to penalty reductions under Cl.165.
23. Clauses 156 & 164 permit RS to reduce penalties under Cls.150 &151 and Cls.160-162, respectively, because of "special circumstances". By their nature, special circumstances cannot be specified and, therefore, the penalty reductions attributable to them would be at the discretion of RS officers. To ensure consistency, so far as possible, and to avoid any suggestion of "sweetheart deals", a proposal by an officer to reduce penalties in special circumstances should be subject to the approval of a panel consisting of three members of RS.
24. Cl.4 permits RS to delegate any of its functions relating to LBTT and SLfT to Registers of Scotland and SEPA respectively. To ensure consistency in the application of penalties across all taxes for which SR has management responsibility now or in the future, the imposition and mitigation of penalties should not be delegated.
25. Scottish Ministers have the power to change by order the amount of certain penalties "if it appears to them that there has been a change in the value of money since the last relevant date" (Cls.170 & 196). Ministers should be required to state in the order how the change has been measured e.g. increase in the CPI or RPI.
26. Scottish Ministers are to specify in regulations the rate of interest payable on overdue tax, penalties and repayments (Cl.185). The regulations should state the basis for setting rates e.g. x% above base rate on a particular date.
27. A taxpayer may request a review by RS of an appealable decision made by them (Cl.199). Cl.203(2) establishes that "the nature and extent of the review are to be such as appear appropriate to RS in the circumstances". For the protection of the taxpayer, and RS if the review is appealed to the tribunal, the legislation should state that the review may not be carried out by any officer of RS who made, or assisted in the making of, the appealable decision.
28. Cl.204(1) requires RS to notify the appellant of the conclusions of the review within specified time limits, but sub-clause (3) states that if RS does not notify the appellant within the time limits the decision is taken as upholding RS's view. This provision appears to give RS the opportunity to deliberately delay notifying the appellant within the statutory time

limits or, indeed, to not carry out a review at all, and have their appealable decision upheld. It should be removed and a provision substituted that requires RS to agree with the appellant a date by which the review will be carried out and the conclusions notified.

29. If Cl.204 remains unaltered, the wording in Cl.205(1) should make it clear that the conclusions that the review *is treated* as having reached are also appealable, for instance by altering the first line of (1) to read “If RS gives notice of the conclusions of a review (see section 204(1) & (4)).....”
30. Cl.211 deals with settling matters in question by agreement. Cl.211(1) starts “In relation to a review, mediation or appeal.....”. Mediation is also mentioned in Cls.205(2)(a) and 207(2)(d). There are clauses in the Bill covering how reviews and appeals are to be requested and conducted but there is nothing similar for mediation. The Bill should cover these aspects of mediation, including the appointment of external (to RS) mediators and which party should bear the cost.