



TAXREP 29/13

ICAEW REP 74/13

ICAEW TAX REPRESENTATION

CONSULTATION ON TAX MANAGEMENT ISSUED BY THE SCOTTISH GOVERNMENT

Memorandum of comment submitted in April 2013 by ICAEW Members in Scotland (IMS), in response to the Scottish Government consultation paper on *Tax management* published in December 2012.

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INTRODUCTION

1. ICAEW's Institute Members for Scotland (IMS) has commented on the consultation paper *Tax Management*, which was published by the Scottish Government on December 2012. A copy of the consultation document is available from this [link](#).
2. The comments in this response were reviewed by the Tax Faculty before submission and in view of the wider interest in devolved taxes within the UK, IMS and the Tax Faculty have agreed to publish the response in the Tax Faculty's TAXREP series.

WHO WE ARE

3. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
4. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
5. IMS works with local stakeholders and government to represent and raise the profile of over 1,400 members who live and work in Scotland. It responds to local issues, provide a programme of activities for members and engage at the heart of business in Scotland.
6. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

RESPONSES TO SPECIFIC QUESTIONS

Section 2: Revenue Scotland duties

Q1: What are your views on the proposed function and duties of Revenue Scotland?

7. These are to be applicable to all taxes collectable by Revenue Scotland, so must look beyond the initial taxes: Land and Buildings Transaction Tax (LBTT) and Scottish Landfill Tax, to any possible future devolved taxes.
8. Furthermore, it is also essential that Revenue Scotland is set up in such a way that it will be 'fit for purpose', as Scotland's tax authority, if the referendum to be held on 18 September 2014 were to lead to independence.
9. We therefore welcome the broad and all-encompassing approach which has been taken in the consultation and we have responded in a like manner throughout this document.
10. We would suggest a slight amendment to the first of the proposed duties, as follows:

'to administer the devolved taxes, assess the correct amount of tax due and then collect the highest net revenue practicable, while exercising appropriate discretion over cases of exceptional hardship or where further pursuit of unpaid tax would not be in the public interest;'

11. In other words, the amount which is assessed should be correct, having regard to the relevant law, whilst the amount which is collected, net of costs, should then be the highest proportion thereof which is practicable, having regard to the factors set out in the consultation document.
12. Otherwise, the proposed functions and duties seem appropriate as drafted.

Q2 What are your views on the proposal to establish Revenue Scotland as a Non-Ministerial Department, part of the Scottish Administration and accountable to the Scottish Parliament?

13. Revenue Scotland should be separate to the Scottish Government, but publicly accountable. At present it is appropriate that this accountability be to the Scottish Parliament.
14. Whilst we understand the potential flexibility available by enabling staff to transfer between Revenue Scotland and the core Scottish Government and other non-Ministerial departments, the staff of Revenue Scotland will need to build up and retain a core level of expertise. It needs to develop and retain its staff to meet these challenges and should not be seen as a mere 'staging post' on the civil service career path.

Q3 What are your views on the governance options for Revenue Scotland, and on how people should be selected for appointment to the posts of Chief Executive and the Board?

15. The proposals on leadership and governance are sound. The preference would be for a board, accountable for the performance of Revenue Scotland, to comprise both executive and non-executive members.
16. Non-executive oversight is important but not the only means to secure that overview.
17. It is also important for the board to include members with genuine 'front line' experience in both tax administration and in the wider tax profession.
18. Transparency is an important element of successful governance. So too are clear lines of responsibility.
19. The Chief Executive, as the leader of the organisation bears ultimate responsibility: the board must play a role in helping the Chief Executive succeed in their task.
20. In the modern business world the title Chief Executive of Revenue Scotland clearly indicates the person in charge. Alternative titles Comptroller-General or Chief Collector could be seen as implying responsibility for just part of the organisation.

Q4 When, how and on what subjects should Revenue Scotland engage with taxpayers, their agents and tax professionals?

21. Engagement with taxpayers, agents and professionals needs to be frequent and open and should cover as many aspects of Revenue Scotland's current operations and future plans as possible, including all proposed changes to tax policy and legislation. Whilst it is recognised that prior engagement may not be possible in a few cases (especially in the field of tax avoidance), these should be the exception.
22. There are many opportunities for engaging with taxpayer agents – including technical and practical conferences by professional organisations (ICAEW Scotland hold an annual practical tax conference in the Peebles area for example). Delegates at these events will be those encountering most parts of Revenue Scotland and will have the broadest possible experience of how the devolved taxes are operating in practice.

23. There should also be a regular event hosted by Revenue Scotland as an opportunity of laying out policy, or successes/other achievements which also invites comments from relevant bodies – such as the devolved tax collaborative meeting held on 1 March 2013.
24. It may also be worth considering forming a group similar to the HMRC ‘Working Together’ initiative. Initially and in the short-term, whilst there are few devolved taxes involved, it might make sense for Revenue Scotland to take part in the existing Working Together arrangements.
25. Eventually, if and when Revenue Scotland's responsibilities expand to include more taxes, it would be good to have a programme of 'workplace visits' (similar to those carried out by senior HMRC staff recently), where Revenue Scotland staff visit tax agents to experience for themselves what it is like for those agents to deal with their department.

Q5 How and in what form should Revenue Scotland provide information to, and communicate with, taxpayers and their agents?

26. The most efficient way to disseminate information is through a dedicated website for taxpayers with, we would suggest, a separate area for agents. The website should be comprehensive and easily searched. It should include webinars and e-learning modules to assist agents and taxpayers generally.
27. However, a website alone does not necessarily encourage two way communication; which could be better achieved through an occasional open forum – for example in the way Scottish Government seeks to engage with businesses through the National Economic Forum – and the face to face opportunities suggested under Q4 above.
28. Text messaging, social networking and email are all good media for taxpayers and agents to communicate their views and experiences and Revenue Scotland should be open to these.
29. However, these media will not always be appropriate for Revenue Scotland to communicate in the other direction, due to security concerns and the risk of fraudulent manipulation by third parties.
30. Whilst general information and guidance could be sent by these means, any communications regarding taxpayers' affairs will have to be by letter pending the development of a secure email system. However, even then, paper communication will still be needed for the digitally excluded.
31. Any information regarding Revenue Scotland's own bank details ('how to pay', etc) should only be provided by letter or via the official website.
32. To cater for the digitally excluded there will need to be efficient call centres with knowledgeable staff, based in Scotland, who can answer taxpayers' queries and supply information leaflets on request. Landline calls to the call centres should be via 0800 numbers or to a standard exchange code number for those users of mobile phones whose call bundles exclude 0800 numbers.
33. Section 3: Revenue Scotland Powers

Q6 What are your views on the proposed framework for tax collection powers? We would be especially interested to know whether you see merit in the creation of a 'Taxpayers' Charter'.

34. ICAEW Tax Faculty has for many years proposed that the 10 Tax Tenets for a better tax system should be adopted. These are set out in Appendix 1.

35. The powers and obligations for Revenue Scotland should have regard to these and we are pleased that the consultation paper has many references to these tenets.
36. With reference to item 10 above, it is important to bear in mind that Scotland will be in competition with the rest of the UK (as well as internationally). Hence, whilst appropriate enforcement powers will be necessary for Revenue Scotland, it is important that these do not exceed those applying elsewhere in the UK – since this could result in Scotland being perceived as a less attractive location for business, investment and employment.
37. Intrusive powers, such as the right of entry to business premises, should be available in only the most exceptional of circumstances and must be subject to prior authorisation by an independent authority, such as the courts.
38. Where any enforcement powers are being used, Revenue Scotland should be obliged to clearly inform the affected taxpayers of their rights and responsibilities and there should be no attempt made to mislead those taxpayers into believing that the powers conferred on Revenue Scotland staff are any more extensive than the law in fact actually provides.
39. We are broadly supportive of the concept of a 'Taxpayers' Charter', provided that it is developed in consultation with representative bodies such as ICAEW, has legislative backing, and hence carries genuine force.

Q7 What are your views on the proposed obligations on taxpayers? Are there any other obligations on taxpayers which should be included?

40. Given that there is already an obligation to self-assess any tax due, the proposal to include an additional obligation to pay tax due under a contested assessment at 3.7(c) is unfair. It would be more appropriate for taxpayers to have the right to postpone such tax until such time as any dispute is resolved, but to be subject to late payment interest on the additional tax arising. Deliberate defaulters who have failed to meet their obligations under 3.7(a) or 3.7(b) should then be subject to additional penalties.
41. In general terms, it is essential that taxpayers are made aware of their obligations before they are imposed upon them. One issue of potential concern for future devolved taxes is the question of who will be liable as a Scottish taxpayer.
42. Although this is defined in ss 80D-80F Scotland Act 1998 (as inserted by s25(3) Scotland Act 2012) for the purposes of the Scottish rate of income tax, it is by no means certain that this same definition will (or should) apply to future devolved taxes. Whilst there is physical activity connected with the initial taxes being devolved, there is a greater risk of lack of clarity for other taxes in the future. This aspect must be made clear at the time of introduction of any further devolved taxes.

Q8 What are your views on the specific powers proposed for requesting information, for inspecting and sampling and for investigating? Are there any safeguards that might need to apply to them or any other powers you think Revenue Scotland may need?

43. It is important that there be reasonable access to check taxpayers are complete and open in their declarations to Revenue Scotland. Powers must be reasonable and applied proportionately to protect the wider public against tax evasion without being wasteful of a publicly funded resource.
44. 3.10 envisages that Revenue Scotland should have power to require information that it reasonably believes to be relevant to a tax return (or lack thereof) in a given case. Whether or not that belief is reasonable should be open to challenge before a court or tribunal.
45. Tax advice provided by any independent professional adviser who is subject to the professional conduct rules and disciplinary procedures of a recognised professional body

should be subject to the same level of professional privilege as currently applies to advice provided by a lawyer. The concept of providing such privilege but only where the advice is provided by one type of professional is contrary to the interests of the taxpayer, contrary to the principles of commercial competition and potentially counterproductive.

46. While the UK Supreme Court in its judgment in *Prudential* in January 2013 declined to extend Legal Advice Privilege (LAP) to clients of non-lawyers the President of the Supreme Court, Lord Neuberger, did, however, accept that the logic of LAP was such that it should be extended to the clients of other suitably qualified advisers. However, in his view, and the view of the majority of the Supreme Court, such an extension should be a matter for Parliament. As the present consultation is considering new tax laws for Scotland then LAP needs to be reviewed in the light of modern business and commercial practices and an appropriate solution developed. In our view this new law should follow the logic identified by the Supreme Court and extend LAP to clients of chartered accountants and other suitably qualified advisers.
47. Regarding the proposed powers outlined at 3.12 to 3.16, we are concerned about whether Revenue Scotland would have jurisdiction in other parts of the UK outwith Scotland. Further clarity is needed on how these powers might be used in such circumstances, both legally and in practice.
48. Where the proposed power outlined at 3.12 is used, it is essential that Revenue Scotland is required to maintain the strictest level of confidentiality regarding the taxpayer's affairs, especially when 'explaining why Revenue Scotland is asking the third party rather than the taxpayer'.
49. We are broadly supportive of the proposed powers outlined at 3.14 and 3.15 provided that the protocols referred to are sufficiently robust. The protocols should carry for taxpayers the right of legitimate expectation that they will be adhered to, actionable if there is a breach.
50. In the case of the power outlined at 3.15, we have concerns regarding the way in which the similar power referred to has been utilised by HMRC. Given the intrusive nature of the request, we believe that it should be approved by an independent person, for example a Sheriff, rather than by someone at a senior level within Revenue Scotland.
51. We would agree that Revenue Scotland should only have the power to inspect domestic premises where invited to do so by the taxpayer and this should include cases where businesses are carried on at the taxpayer's home. Investigatory powers should take precedence over this, subject to appropriate safeguards, as discussed at 3.30.
52. We consider that a 'Power to Inspect' without advance notice should be subject to the same safeguards as other investigatory powers.
53. It is crucial that investigatory powers are only carried out by appropriately trained individuals. For that reason we are not in favour of asking other bodies with appropriate powers to carry out investigations on behalf of Revenue Scotland, even if this might be more efficient. If this approach were to be adopted, then staff in those bodies would need additional training in order to give them an appropriate understanding of the powers involved and the taxes in question. However Revenue Scotland will need to take responsibility in the event that problems arise.

Q9 What are your views on the proposals set out for the amendment of tax returns by Revenue Scotland or taxpayers? Please comment on the terminology, the time limits proposed and anything else you consider relevant to the amendment of tax returns.

54. The proposals as outlined in the consultation are unfair and would lead to excessive levels of uncertainty.
55. It is unreasonable to suggest that businesses and individuals should have to wait four years to be certain that a tax return cannot be amended by Revenue Scotland. This level of uncertainty

would be highly detrimental to Scotland's competitiveness as a location for business and investment.

56. We consider the UK concept of an 'enquiry window' to be the most appropriate way to establish an effective time limit for amendments by Revenue Scotland. The 'enquiry window' should be as short as possible, and certainly no longer than one year from the date of submission of the relevant return. This is essential to provide certainty to businesses, individuals and other entities investing in Scotland.
57. It is unfair to allow Revenue Scotland four times as long to amend a tax return as is allowed to the taxpayer themselves. Whatever period is set for the 'enquiry window', the taxpayer should have the same period of time following the normal due date for submission of the return in order to make their own amendments.
58. Notwithstanding some of the difficulties regarding the concept of 'discovery', we believe that it is an important part of establishing a fair tax system. Where 'discovery' applies, we would agree with the proposal for Revenue Scotland to have a time limit of four years to make the relevant amendments.
59. Furthermore, in order to encourage non-compliant taxpayers to come forward and put their affairs in order, we would suggest that, where a taxpayer wishes to make amendments leading to an increase in tax due, the four year time limit should again apply. This could be termed a 'self discovery'. To make such a 'self discovery' system attractive, but also prevent it from being abused, we would suggest that a minimal, and fixed, rate of penalty be applied to the additional tax due. (The penalty should not apply to amendments made within the normal time limit described above.)
60. The 'self discovery' route should not be available once a taxpayer has been notified of an investigation into their tax affairs. It might also be inappropriate for such a facility to be available in cases where serious fraud is involved or, if it were available, a higher rate of penalty would be appropriate.

Q10 Are there any powers that Revenue Scotland should not delegate and, if so, what are they and why?

61. Any delegated powers must continue to be subject to the same safeguards as powers exercised directly by Revenue Scotland itself.
62. Whatever powers are delegated, it must be clear that Revenue Scotland remains responsible for the administration and collection of the devolved taxes and hence also remains accountable to the Scottish Parliament. Revenue Scotland should be joined with the body to which it had delegated responsibility if any complaint or action for maladministration is brought by a taxpayer.

Section 4: Compliance

Q11 What else might be done to make it as easy as possible for taxpayers to comply with their obligations, and to ensure that those who wish to comply are supported to do so?

63. We consider that supporting those who wish to comply is an essential feature of a fair tax system and we welcome the proposals outlined at 4.4 to 4.6.
64. We would add that published guidance must be kept up to date and must fairly reflect the current state of the law: both the relevant legislation and any decided cases. It is to be hoped that areas of uncertainty regarding Scottish tax law will be kept to a minimum but, where such uncertainty does genuinely exist (as it inevitably will on some occasions), the published guidance should not be used to promote a one-sided view of the position. It must be recognised that guidance issued by the tax authority has no legal force unless supported by legislation or decisions made in court.

65. In general terms, we consider that supporting those who wish to comply is better done by way of 'carrots' than by way of 'sticks'. Individuals respond better to incentives than to the threat of punishment. We suggest that consideration be given to establishing a reward-based system for those who meet, or exceed, compliance standards (eg by submitting returns early) rather than a purely penalty-based system for those who fail to do so (e.g. by submitting returns late).
66. One of the more unfortunate features of many aspects of the UK tax system is the disproportionate degree of penalty imposed on those who are 'nearly compliant' and who only narrowly fail to meet compliance standards. For example, an elderly pensioner who is due a tax repayment will nonetheless still be subject to a £100 penalty for filing their self-assessment income tax return one minute late: the same penalty as would apply to a wealthy individual who owes thousands of pounds in tax and who files their tax return three months late.
67. There is an opportunity here for Scotland to create a system which avoids such unfair and disproportionate penalties and the consequent incredibly high levels of stress which the UK system creates for taxpayers and their agents.
68. We would suggest that any penalty system introduced in Scotland should always be kept proportionate to the amount of tax at stake and the degree of non-compliance involved and that the unfairness of the fixed penalty regime used in the UK system be avoided.
69. We believe that there could be a role for Revenue Scotland to engage school pupils through a programme of citizenship education. This, coupled with financial literacy, would embed the notion of responsibility to pay taxes and of how taxes fund public services in Scotland.
70. We are supportive of a 'digital by default' approach but also concerned that adequate support is provided to those who are digitally excluded. For those who have difficulty accessing on-line processes there should be telephone helplines, staffed by knowledgeable people based in Scotland, to deal with queries. The helplines should operate as 0800 numbers. Filing paper returns and paying by non-electronic means should also be available to these taxpayers.
71. For the majority who are digitally enabled, it will be helpful, and important, that Revenue Scotland recognises that identity underpins many of the digital opportunities with respect to collecting and paying taxes. As a new body, everything ought to be done to simplify the process for the individual, agent or business by making the digital elements of tax work for the person completing the work.
72. In particular, it would be helpful if each individual or entity could have a single reference number for all Scottish taxes and even more helpful if that number could, where possible, be based on an existing number within the UK tax system.
73. We are also concerned that any new software required for Scottish taxes does not put an unnecessary burden on micro and small businesses. HMRC's RTI system is a case in point. If new technology is required then Revenue Scotland should provide adequate resource free of charge for such businesses. Cloud based accounting software is helping many micro/small businesses, and thus system requirements should be compatible to existing infrastructure or provide developer tool kits (APIs etc) to ensure cloud based software providers can update their systems in a cost effective manner. This will help ease the compliance burden for many micro/small businesses.

Q12 What particular features should Revenue Scotland's systems include to help agents to operate most effectively on taxpayers' behalf?

74. In general terms we welcome the fact that the consultation recognises the importance of agents. For any tax system to operate effectively, it is essential that the tax authority and the tax agent community are able to work together as efficiently as possible. A self-assessment tax

system cannot function without the support of the professional agents who make it work on a day-to-day basis.

75. Taxpayers should have the option to appoint an agent to deal with devolved taxes dealt with by Revenue Scotland at the same time as they are appointing them to deal with UK taxes dealt with by HMRC.
76. When a devolved tax comes into force and replaces (or supplements) an existing UK tax, any agent appointments in place for the existing UK tax should automatically apply to the devolved tax unless the taxpayer elects otherwise.
77. Agents should receive a copy of **all** communications sent to the taxpayers they represent and at the same time. The taxpayer should also be advised that their agent has received a copy of the communication.
78. Where authorised by the taxpayer, agents should have access to the taxpayer's accounts with Revenue Scotland.
79. Agents should also be provided with access to dedicated telephone lines operated by experienced staff to enable queries to be dealt with efficiently.
80. It may additionally be worth considering a system whereby certain authorised agents can operate a 'self serve' system similar to that currently under consideration by HMRC. This might also include the ability to release repayments due to the taxpayers the agent represents (subject to relevant safeguards). A suitable system of agent authorisation would of course be required.
81. There is an opportunity here for Scotland to take a more proactive approach regarding the appointment of tax agents and thus implement a form of 'quality control'. It may, for example, be worth considering making it a requirement for agents to be regulated by an approved body such as ICAEW. This does not necessarily mean that all agents would be perfect, but at least they would be subject to the rules and regulations of their professional bodies and it would help prevent some unsuitable people from acting as agents.
82. Alternatively, it could be worth considering a requirement for agents to register with Revenue Scotland, with those who are regulated by approved bodies (as described above) gaining automatic registration whilst others would be required to demonstrate that they are a fit and proper person.

Q13 What are your views on the list of non-compliant behaviours at 4.10 – for example, are there other situations in which civil penalties should be available?

83. Where late payment is the only non-compliant behaviour involved, the taxpayer's financial position should be taken into account. Taxpayers suffering financial hardship should be treated with consideration and not punished or made to feel embarrassed when they are already suffering other misfortunes. Staff involved in dealing with such taxpayers should be considerate and should be trained to deal with them in a consistent manner.

Q14 What are your views on the proposal that Revenue Scotland should have discretion, subject to maximum penalties set in legislation and also subject to published guidance, to determine the level of sanctions? What factors might be taken into account by Revenue Scotland in deciding what level of sanction to apply?

84. Penalties should be fair and proportionate to encourage full and correct disclosure rather than excessively punish genuine errors of fact or omission.
85. In principle, we support the proposal to give Revenue Scotland a degree of discretion over the level of penalties, or other sanctions, to be imposed.

- 86.** In particular, we agree with the comments in 4.11 that the regime should be proportionate, consistent and predictable.
- 87.** To ensure that the regime is indeed proportionate, we would suggest that all penalties should be set as a proportion of tax due and that fixed penalties should be avoided (as further discussed under Q11 above).
- 88.** Published guidance will be an essential part of ensuring that the regime is predictable and is applied consistently. We consider that any guidance which is to form part of the tax system should require legislative support and should therefore be subject to ratification by the Scottish Parliament.
- 89.** We strongly support the use of warning letters for cases of minor non-compliance and the use of suspended penalties to encourage compliant behaviour where there is no incidence of fraudulent or dishonest conduct involved. We would like to see Revenue Scotland using these sanctions as widely as possible in order to encourage compliant behaviour and support those who are making genuine efforts to be compliant.
- 90.** The factors to be taken into account by Revenue Scotland in determining the appropriate level of sanction should include:
- The amount of tax involved
 - In cases of late filing or late payment, the amount of time involved in the delay
 - In cases of late payment, the taxpayer's ability to pay should be taken into consideration
 - The taxpayer's previous compliance history with both Revenue Scotland and HMRC
 - The degree to which the taxpayer has co-operated with Revenue Scotland or its agents
 - The degree to which the taxpayer is prepared to improve their procedures in order to avoid future non-compliance
 - Whether the taxpayer has acted in good faith, in the genuine belief that their actions were in accordance with the relevant tax legislation and case law
 - Whether errors or omissions have arisen purely by accident
 - Whether the taxpayer has made voluntary disclosure of any matters leading to an underpayment of tax and whether such disclosure was prompted or unprompted
 - How promptly the taxpayer has acted to advise Revenue Scotland of any errors or omissions discovered
 - Whether the taxpayer has been more negligent in their tax affairs than they would normally be in any other business transactions, or personal transactions, as the case may be
 - Whether there is deliberate concealment or other fraudulent behaviour involved

Q15 What are your views on the types of sanction and their possible uses described in the text box at the end of chapter 4?

- 91.** As discussed at Q14, we are strongly in favour of the use of warning letters in appropriate cases, particularly for a first offence.
- 92.** As discussed at Q11 and Q14, we consider that the indiscriminate use of flat rate penalties leads to unfair and disproportionate results which risks bringing the tax system into disrepute.
- 93.** In order to avoid the risk of disproportionate results, any daily penalties should also be subject to a form of limitation in proportion to the tax at stake.

- 94.** We are in favour of percentage-based penalties in principle. As discussed at Q14, however, it is critical that the penalty regime is applied consistently, is predictable, and is based on published guidelines with legislative support.
- 95.** We are broadly in support of the proposals regarding criminal prosecution but would like to see further proposals regarding the precise circumstances under which an agent could be regarded as being actively involved in fraud.

Q16 What are your views on the proposed arrangements for collecting unpaid tax set out at 4.22 - 4.25?

- 96.** As discussed at Q13 above, where late payment is involved, the taxpayer's financial circumstances should be taken into account and those who are suffering financial hardship should be handled with consideration and should also be dealt with consistently.
- 97.** Time-to-pay arrangements will only be effective and fair where they are sufficiently flexible to meet taxpayers' changing circumstances. We also find it hard to see any justification for placing unnecessarily onerous deadlines on the agreement of time-to-pay arrangements since such deadlines do nothing to help with the efficient collection of the tax due. We consider that deadlines for agreeing time-to-pay arrangements should be extended at least 30 days beyond the due date for payment of the tax involved. Furthermore, where time-to-pay arrangements are in place, sufficient resources must be provided to enable those taxpayers suffering financial hardship to have fair and reasonable access to those arrangements.
- 98.** In exercising its duty of collecting as much of the tax due as is economically feasible, we consider that Revenue Scotland should always be mindful of the wider impact of its actions on the Scottish economy. For example, what impact will forcing a business to close in order to meet its tax debts have on that business's employees, customers and suppliers?
- 99.** Obtaining value for the public purse means balancing expenditure with returns. Benchmarking may be obtained from HMRC and revenue bodies in other European countries to historically assess measures taken by Revenue Scotland. The proposed initial arrangements seem appropriate, but this balance can be distorted in the execution.
- 100.** Have steps been taken to discover what worked well following the introduction of Self Assessment returns in the UK by HMRC?

Section 5: Tax avoidance

Q17 What are your views on the measures proposed for tackling tax avoidance? What other methods might be employed?

- 101.** Tackling tax avoidance is a difficult question and depends upon a range of factors including the perceived fairness of the tax, the actual rate of tax, the availability of reliefs and the complexity of the legislation.
- 102.** When tax is simple in description and in calculation then the scope to avoid taxes is reduced. Where there are complicated rules on measuring tax liability, frequently with a range of reliefs and incentives, then the scope for tax avoidance is increased.
- 103.** Where tax is fair, and seen to be fair, the motivation to pursue tax avoidance schemes will be reduced. The consultation mentions the example of SDLT and the many aggressive tax avoidance schemes designed to avoid it but the Scottish Government's previous consultation on LBTT also recognised some of SDLT's shortcomings as a 'slab tax' rather than a progressive tax: which must surely be at least partly responsible for the amount of avoidance activity seen.

- 104.** Any anti-avoidance measures which are implemented should not interfere with legitimate, routine and well-established tax planning strategies. To do so would severely reduce Scotland's attractiveness as a location for business, investment, employment and personal residence.
- 105.** The use of a Policy Memorandum to enable the intention of those drafting tax legislation to be set out clearly and in appropriate detail when introducing a Bill, as discussed in 5.10, could be a useful point of reference for interpreting legislation. However, if the Policy Memorandum was to have quasi-statutory force, the intention should not be expressed so widely as to be akin to a GAAR.
- 106.** The wording of any proposed GAAR should be subject to consultation with interested parties before being passed into law.
- 107.** We are opposed in principle to the concept of retrospective legislation (discussed at 5.25), as it undermines certainty (one of Adam Smith's Four Maxims and one of the Tax Tenets at Appendix 1 above) and creates an unreliable tax system, which would be a significant disincentive for investment in Scotland. Such uncertainty would be compounded by the fact that any retrospective legislation would be vulnerable to being overturned by the European Court of Justice.
- 108.** Furthermore, we find it difficult to see any justification for such retrospective legislation where a GAAR is already in place.

Q18 If obligatory notification arrangements were included in the proposed Tax Management Bill, what do you think should be the main features? Are there any features of other similar schemes that you think should be avoided?

- 109.** The existing UK DOTAS legislation contains the main features of appropriate arrangements but the most important feature of any such notification arrangements will be a clear definition of what constitutes a tax avoidance scheme which requires notification.

Q19 Of the two broad approaches – a GAAR targeted at highly-artificial and contrived abuse of tax legislation, or a more widely-drawn provision – which do you believe is likely to be more effective, and why?

- 110.** We consider that a more tightly-drawn GAAR aimed only at artificial and abusive tax avoidance would be more effective in meeting the Scottish Government's wider objectives because:
- i) A more widely drawn provision would severely reduce Scotland's attractiveness as a location for business, investment, employment and personal residence compared not only with other locations internationally, but also with other parts of the UK.
 - ii) A tightly-drawn GAAR would provide greater certainty to businesses operating in Scotland and to other taxpayers located in Scotland.
 - iii) A tightly-drawn GAAR will improve economic stability since it should not interfere with legitimate, routine and well-established tax planning strategies.
 - iv) Adopting an approach which is consistent with that applying to other UK taxes will be fairer and easier for taxpayers to understand as the operation of the UK GAAR becomes clearer.
 - v) Adopting the same approach as the UK will ensure that a transaction which involves both a devolved tax and a UK tax should not have the potential for being subject to two different GAARs.

- vi) It is far easier for taxpayers and others to be aware of when a tax avoidance scheme is artificial and abusive than to comprehend whether a tax planning strategy is within the scope of what may have been intended by Parliament when passing legislation. Furthermore, Parliament's original intentions must also be viewed in the light of subsequent technological, social or economic changes which sometimes make it extremely hard to determine whether a tax planning strategy is within the spirit of what may have originally been envisaged by those passing the legislation.

Q20 What advantages might a prior clearance rule offer? How might it be designed to provide maximum certainty at least cost?

- 111. We are in favour of an optional prior clearance mechanism which should be available to be used to provide certainty in respect of any unconventional arrangements or any transactions which may potentially be subject to a TAAR or GAAR.
- 112. We cannot see how an appeals procedure can create any uncertainty which does not already exist.
- 113. Administrative costs could be reduced by publishing general clearances, some of which could be based on actual clearance applications received (but with all names and other material facts removed in order to preserve the confidentiality of the original application).
- 114. Another cost saving measure might be to limit the application of the GAAR so that it only applies where a certain minimum amount of tax is at stake. This would then obviate the need for prior clearance applications where smaller sums were involved.

Q21 How can the intentions of those drafting and passing the relevant legislation best be set out in a way that is useful to taxpayers, Revenue Scotland, and those adjudicating on disputes and appeals?

- 115. As explained in the ten tenets for a better tax system, simplicity is the key.
- 116. The intentions behind each piece of tax legislation should be set out clearly in the Policy Memorandum that has to accompany the publication of each parliamentary Bill. Those same intentions should be modified as appropriate if any changes to proposed legislation occur and then, as each Bill progresses to an Act, included within the Revenue Scotland guidance on the website.

Q22 What tests do you think should be used to decide whether an arrangement is wholly or mainly intended to achieve a reduction in tax due?

- 117. We consider this question itself to be fundamentally flawed.
- 118. Whilst we can see that a GAAR may have a role within the management of devolved taxes in Scotland, it must be appreciated that many arrangements are intended to achieve a reduction in tax due but are also still well within the spirit of the relevant tax legislation. For example, an investor may choose to subscribe for Enterprise Investment Scheme shares with the main intention of achieving a tax saving but this is clearly well within the spirit of the underlying legislation.
- 119. We believe that the correct question should be framed along the following lines:
 - whether an arrangement, when looked at in the round is wholly or mainly intended to achieve an artificial reduction in tax due which is beyond the intended scope of the underlying legislation.
- 120. The first point which arises from this is that it becomes absolutely critical to be very clear about what the intended scope of tax legislation is. If the basis of the tax, relieving provisions,

exemptions, etc, are all kept simple then, as stated above, it will be far easier to ensure that the intended scope of the legislation is well understood.

121. With the proviso that this question is amended as suggested above, we would agree that the tests suggested at 5.21 are suitable for some taxes, but not for others. For example, if, at some stage in the future, Scotland had a devolved tax to replace Inheritance Tax, these tests would be completely unsuitable. As a better alternative, we would therefore suggest adopting the original formulation emanating from the Aaronson Committee when considering the application of the UK GAAR – an arrangement would not be caught by the GAAR, if it can reasonably be regarded as a reasonable exercise of choices of conduct afforded by the provisions of the [tax] Acts.

Q23 Do you see a role for external expertise in assessing tax arrangements to see whether they are ‘caught’ by a GAAR, and if so what might that role be? What arrangements do you think should be put into place for appeals?

122. Yes, we do see a role for external expertise in assessing tax arrangements.

123. We would regard the key roles of such external experts to include assessing whether any arrangements:

- i. Have commercial substance
- ii. Are within the intended scope of tax legislation
- iii. Are a natural extension to normal routine tax planning or whether they constitute an aggressive tax avoidance arrangement

124. Such external assessments should take place before the GAAR can be applied and should be made known in any subsequent proceedings.

125. Where a case progresses beyond the external assessment and Revenue Scotland and the taxpayer continue to be in dispute, there seems no reason to suggest that the substantive case should not then go through the normal appeals process in the same way as other disputes.

Section 6: Disputes

Q24 What are your views on the proposals set out in 6.6 - 6.8 for avoiding disputes? What else could Revenue Scotland do to avoid disputes arising in the first place?

126. Creating a culture of co-operation and an atmosphere of trust will reduce the incidence of disputes between Revenue Scotland and taxpayers who are seeking to be compliant.

127. Applying the sanctions described at Section 4 in a consistent, fair and considerate manner will assist immensely in this. In addition, taxpayers should have a case manager whom they can meet to discuss potential disputes before they escalate. Such meetings can be far more effective at resolving differences than correspondence.

128. If Revenue Scotland has delegated some of its powers to another body (as discussed at 6.3), it nonetheless retains ultimate responsibility for the administration and collection of taxes. Revenue Scotland should therefore be jointly responsible for resolving any dispute between a taxpayer and a delegated body.

Q25 What are your views on the proposed arrangements for reviews and / or the appropriate duration for the period within which the review must be concluded?

129. We support the concept of internal review as a first step in principle. To aid early resolution it should be started within thirty days of a request by a taxpayer.

130. Publishing statistics on the number of disputes which are resolved in this way will be helpful in providing taxpayers with some 'faith' in the system.

131. The appropriate duration for the review process will depend on the circumstances. As a safeguard, the taxpayer should have the option to move the dispute onto the next stage if dissatisfied with a lack of progress.

Q26 What are your views on the proposal to encourage the voluntary use of mediation? Should we be considering any other approaches to dispute resolution?

132. We support the proposal to make mediation available as an optional dispute resolution mechanism. Mediators should be external to Revenue Scotland to avoid any perception of bias against the taxpayer. Although this has cost implications, if the dispute is resolved without resorting to the appeals process there should be an overall saving.

133. Publishing statistics on the number of disputes which are resolved in this way will again be helpful.

Q27 What do you think would be the best option for dealing with appeals to a tribunal until a tax jurisdiction is established in the Scottish Tribunal System?

134. In view of the existing expertise on tax matters in the UK Chambers, option (a) would appear to be the most efficient.

Q28 How should the costs of mediation or tribunal appeals be met or shared?

135. In the case of mediation, it would be appropriate to operate on an initial assumption at the outset that the costs would be shared equally between Revenue Scotland and the taxpayer.

136. It would be important for taxpayers to be advised of the projected and actual costs of the mediation process before they committed to it and at regular intervals throughout the process.

137. The final liability for the costs of the mediation process could then be agreed as part of that process – ie through mediation. The initial assumption would be that the costs are shared equally, but it might be that one party agrees to accept the liability as part of a wider settlement.

138. We believe that the costs of mediation borne by any business entity should be tax deductible.

139. Our main concern regarding the cost of tribunal appeals is that taxpayers should not be deterred from exercising their rights. To this end, we feel the default position should be that Revenue Scotland bears all reasonable costs where it loses (perhaps by reference to a scale rate) but that each party should bear its own costs in other cases. However, this could be overridden if a tribunal decides that one party has acted unreasonably in bringing or conducting a case and that party should therefore bear the other's costs.

Q29 What are your views on how Revenue Scotland could best demonstrate that it is learning from the resolution of disputes?

140. The proposals in 6.22 and 6.23 would be appropriate, with the addition of another. The summary statement in the annual report outlined in 6.23 should also cover what action Revenue Scotland has taken on the learning points identified in the current and previous years.

Q30 What are your views on the proposed approach to the handling of complaints set out in 6.24 - 6.27?

141. Annual reports as described would help transparency of actions in this area.

142. We consider that the **expectation** that a body to which Revenue Scotland had delegated powers would notify them that a complaint relating to a tax matter had arisen, and also notify them of the outcome of the complaint at each stage until it was resolved (6.26), should be replaced by a **requirement** to do so. Revenue Scotland has the ultimate responsibility for administering and collecting taxes and should be actively involved in the resolution of complaints against its agents.
143. Feedback and discussion at a forum with taxpayers' agents could assist progress in this area.

Section 7: Taxpayer information

Q31 What are your views on the proposed statutory provision forbidding disclosure of information held by Revenue Scotland? Should there be criminal sanctions if information is disclosed?

144. The proposed statutory provision appears appropriate.
145. Criminal sanctions should apply to unauthorised disclosure.

Q32 Do you agree that Revenue Scotland should be empowered to share information with other public bodies and other tax authorities internationally for the purposes outlined at 7.8 and 7.9? Do you think there are other purposes for which information should be shared? Should such sharing be governed by some kind of formal agreement, and if so what form should that agreement take?

146. We would agree with these proposals subject to the proviso that the other body with which Revenue Scotland shares information is itself under an obligation to keep that information confidential (in the case of information on specific taxpayers).
147. The decision to disclose taxpayer-specific information in the public interest would need to fall within published guidelines as to what is 'the public interest'. The disclosure should only be made on the authority of a senior member of Revenue Scotland.

Q33 Do you agree that the existing framework for public interest disclosure, described at 7.16, is sufficient for Revenue Scotland?

148. The framework governing public interest disclosure by civil servants should be appropriate for Revenue Scotland's staff, with the important proviso that any disclosure relating to an individual taxpayer, or identifiable group of taxpayers, would be outwith this framework and subject to the normal criminal sanctions for unauthorised disclosure.

Q34 Do you agree that certain information held by Revenue Scotland and bodies to which it has delegated powers should be exempt from Freedom of Information legislation in order to prevent disclosure of information that would identify or could be used to identify a taxpayer?

149. The confidentiality of information regarding taxpayers dealt with by Revenue Scotland should be protected.

Section 8: Accelerated tax changes

Q35 What are your views on the proposals for an accelerated tax changes regime set out at 8.10?

150. We are broadly in support of these proposals in principle subject to:
- i. Further consultation on the procedures for subsequent affirmation by Parliament

- ii. Appropriate limitations on the use of the accelerated tax changes regime (eg to prevent it being used to introduce new taxes or to make significant changes to rates or thresholds)

151. We appreciate the comments at 8.2 regarding the risk of distorting commercial activity which sometimes arises but nonetheless consider that, in the interests of certainty and stability in the Scottish economy, it should be very much the 'norm' to discuss changes to tax rates and thresholds well in advance.

Equalities Impact Assessment

Q36 Do you have any comments on the draft Equalities Impact Assessment published alongside this consultation?

152. None.

Business and Regulatory Impact Assessment

Q37 Do you have any comments on the draft Business and Regulatory Impact Assessment published alongside this consultation?

153. None.

Other comments

Q38 Do you have any other comments you wish to make on the arrangements for tax management?

- 154.** The guiding principles should be stability and certainty. Our members are clear that there should be 'no change for change's sake'. In other words, as a general principle, it makes sense to align the tax management procedures for devolved taxes as closely as possible with existing procedures for UK taxes where these remain 'fit for purpose'. This should minimise any extra work arising from having to abide by different rules according to whether the UK or Scottish rules apply.
- 155.** By contrast, however, and as we have detailed throughout this response, there are opportunities for Scotland to introduce a modern, fairer, more consistent, and more co-operative approach to taxation and such opportunities for improvement should not be overlooked.
- 156.** In particular, it is important to appreciate that each country or territory faces competition from its neighbours as a location for business, investment, employment and personal residence.
- 157.** The degree of competition faced by Scotland is considerably greater than that faced by New Zealand. Scotland is in fierce competition with other European countries. Most importantly, in the context of devolved taxation, it is critical to appreciate that Scotland is in competition with other parts of the UK.
- 158.** We would ask that Revenue Scotland does not follow the precedent set by HMRC of referring to taxpayers as 'customers': this description is completely inaccurate and inappropriate.
- 159.** The formation of Revenue Scotland also raises a huge number of technical questions not covered in the consultation, many of which may depend on whether Scotland votes to become independent following the referendum on 18 September 2014.
- 160.** Further consultation on, and speedy resolution of, these questions will be essential if the referendum produces a 'Yes' vote and may also be necessary in the event of further devolved taxation following a 'No' vote.
- 161.** Some of the most obvious questions include:

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- Will the existing test to determine who is a Scottish taxpayer for the purposes of the Scottish rate of (UK) income tax be valid for other taxes?
- If not, what other tests will be applied to determine who is a Scottish taxpayer?
- How will such tests operate for companies and other non-natural entities?
- What will be the position of an individual who is resident in Scotland but domiciled elsewhere in the UK?
- How will double taxation (in Scotland and in the rest of the UK) be dealt with?
- Will UK double tax treaties hold good for individuals, companies and other entities resident in Scotland?
- Will a UK group be able to surrender losses to each other across the border?
- And there are a great many others to be considered.

162. In view of the potential scale of this task, we would suggest that plans are put in place to address these issues as soon as possible.

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The Tax Faculty's ten tenets for a better tax system

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by the appropriate 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 UK (for this response read Scotland rather than the UK).