



## WELSH TAX ACTS ETC. (POWER TO MODIFY) BILL 2022

Issued 26 January 2022

Set out in the attached representation are comments made by ICAEW on the Welsh Tax Acts Etc. (Power to Modify) Bill 2022 (the Bill). These comments include:

- comments by ICAEW on specific questions raised by the secretariat of the Welsh Government's Finance Committee in advance of an oral evidence session on 2 February 2022; and
- specific comments on the draft Bill.

This response of 26 January 2022 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW 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 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 157,800 chartered accountant members in over 147 countries. 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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## INTRODUCTION

1. Set out below are comments made by ICAEW in relation to the Welsh Tax Acts Etc. (Power to Modify) Bill 2022 (the Bill). The Bill, and accompanying papers and statements, can be found [here](#). Our comments consist of two sections, as follows.
  - Comments on specific questions raised by the Committee secretariat in advance of on oral evidence session on 2 February 2022.
  - Specific comments on the draft Bill.

## COMMENTS ON SPECIFIC QUESTIONS RAISED BY THE COMMITTEE SECRETARIAT IN ADVANCE OF ON ORAL EVIDENCE SESSION ON 2 FEBRUARY 2022

### Whether you agree with the purpose of the Bill

2. We support the policy purpose behind the Bill. Given that the UK Government continues to make changes to the Stamp Duty Land Tax (SDLT) regime, it is clearly important that the Welsh Government has the tools needed to be able to react to such changes if they are likely to have a significant impact on Land Transaction Tax (LTT).

### Strengths and weaknesses of the Bill

3. The strength of the Bill is it should allow changes to be made quickly to the devolved taxes in react to changing external circumstances.
4. The weaknesses of the Bill are that changes will not be made through primary legislation and there is a danger of a lack of proper scrutiny of any regulations which will be made under this Bill.
5. One of our principles of good tax policy is that tax legislation should be enacted in primary legislation rather than secondary legislation. These proposals allow for changes to be made by way of secondary legislation, i.e. regulations, which is contrary to our principles. That said, we understand the specific difficulties faced by the Welsh Government responding to changes made by the UK Government in relation to, for example, SDLT.
6. As we understand it, one of the reasons for this approach is that Wales does not have an equivalent Finance Bill procedure for making annual changes to the Welsh Tax Acts. While we appreciate that at present such a procedure may not be considered to be necessary because annual changes are likely to be few in number, nevertheless we think that consideration should be given to having the capability to adopt an annual Finance Bill procedure. This would ensure that any changes could be enacted by way of primary legislation. It would also ensure that a procedure is in place so that, if and when further tax raising powers are devolved to the Welsh Government, it has the necessary mechanism to make changes quickly. We understand that similar problems are faced in in relation to amending the devolved Scottish Taxes and similar calls have been made for a legislative process to allow for such changes to be made.
7. It is important to ensure that all measures are subject to proper and effective scrutiny. A weakness of the Bill is the extensive powers given to make changes by way of secondary legislation. There is always a danger with a regulation making powers that there is insufficient scrutiny of them as compared to that given to primary legislation. This is particularly important given that any regulations could contain retrospective powers, although

we recognise that the the accompanying procedures should help to ensure that such powers are exercised only in clearly defined circumstances.

### Whether the level of delegated powers is appropriate

8. The level of delegated powers must be proportionate to the problem they seek to solve. We appreciate that the Welsh Government needs the ability to respond to changes made to SDLT by the UK Government. Further, the ability to react to quickly to identified tax avoidance schemes etc and/or unexpected court rulings is understandable.
9. We support reasonable and proportionate measures to address tax avoidance, and recognise that LTT, like SDLT, poses particular risks in relation to tax avoidance. Particular issues are that LTT is self-assessed and managed on the basis of process now, check later. Agents, usually conveyancers/solicitors, will not necessarily be engaged on an on-going basis; rather they will be engaged to complete and file the return only.
10. LTT poses a slightly different risk profile as compared to SDLT. On the one hand, the impact of LTT tax avoidance is potentially greater than for SDLT given its smaller tax base: on the other hand, LTT is far more likely to be charged at lower rates than for SDLT due to lower property values, thereby reducing the potential motivation to engage in tax avoidance. In practice, however, there is probably not much difference in the risk profile.
11. Nevertheless, we remain concerned about the wide power under these provisions to make retrospective changes to the tax rules. Another key principle of a good taxation system is the need for certainty. In principle, we believe that the approach adopted to countering tax avoidance should be similar to that which is encapsulated in the so-called 'Rees Rules' which were subject to extensive debate in the UK Parliament in 1978 and which were set out at that time as follows:

*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 ...*

12. This doctrine was formulated nearly 44 years ago and we are not sure whether the second of the above rules was ever adopted or not but, if it was, it has not operated for many years. However, we believe that the fundamental principles behind the Rules remain good, namely that any tax changes made should only apply from the date of the announcement, must be announced in clear form, must be published in draft and enacted in the next Finance Bill.
13. The approach adopted by the Welsh Government is, in effect, a modified version of the Rees rule in that regulations could be announced which would make immediate changes to the

primary legislation, thereby by-passing the need to go through a formal Finance Bill process. We can see that this approach might give a higher degree of certainty, provided the regulations are approved under the appropriate ratification process.

14. Our main concern is with retrospection and the **draft statement** on retrospection which is included in the bundle of supporting material for the Bill. This procedure should not be used to introduce a tax change from a date prior to the date on which it was announced and we believe that the draft statement should be clarified to confirm that this is not the intention. If it is so intended, there should be a formal confirmation that such an approach would be wholly exceptional and that it would be accompanied by a detailed and compelling justification for such a procedure.

#### **Whether a similar legislative process has been implemented elsewhere**

15. It would be helpful to compare and contrast the proposed Welsh Government approach to that which has been adopted by the Scottish Government to deal with similar circumstances.
16. We have discussed this with colleagues in relation to the devolved taxes in Scotland. We understand that Scotland has similar issues to those in Wales – namely there is no obvious process to change the devolved taxes. We understand that the problem may be more acute in Scotland than in Wales because the Scottish equivalent of SDLT (namely Land and Buildings Transaction tax) was changed more extensively when rewritten from SDLT – partly due to the need to align it with Scottish land law etc. We also understand that there have been a number of Scottish tax Tribunal cases on the two devolved Scottish taxes and that some of the questions that have been decided are quite fundamental to the operation of the taxes – see the fourth trigger condition in this Bill (namely para 1(1)(d)).
17. We understand that in Scotland there has been a working group that was looking at this and which produced an interim report a couple of years ago but not subsequently and there are calls to reconvene it.
18. We are not aware of any other similar legislative processes.

#### **Whether the Welsh Government needs additional powers considering the existing powers it has to make changes to tax legislation and does it replicate existing powers**

19. The Welsh Government already has the power to change the rates and bands etc by way of regulation so there is already a precedent adopted for such an approach. The powers subject to this consultation exclude the ability to change rates and bands (see clause 2(3) of the Bill). We understand that this approach was adopted because the Welsh Government already has a pre-existing power to change these. However, this exclusion serves to complicate these provisions and consideration should be given to deleting it.
20. We do not think any further powers should be needed.

#### **Whether the Bill is the right approach to make changes to tax legislation**

21. In broad terms, the measures will allow primary legislation to be overridden by secondary legislation in four defined circumstances. Although adopting this approach is not one we would advocate under our principles, we appreciate that the Welsh Government does need the ability to react quickly in the circumstances outlined.

#### **Whether there are possible scenarios where the proposed approach would not work**

22. We cannot think of any. However, we would also note that many promoters of tax avoidance avoidance schemes appear to operate outside of any oversight (whether by a professional body or otherwise) and appear impervious to changes designed to stop their activities. In relation to tax avoidance, these particular changes would impact upon the taxpayer who entered into a scheme rather than those behind such schemes and who may continue to abuse the system. While it is right that measures should be aimed at the taxpayer, the Welsh Government should consider whether it has the necessary powers to tackle the promoters of egregious tax avoidance schemes.

#### **Whether there are any external events not covered by the four purpose tests**

23. We cannot think of any external events at the current time which would not be covered by the four purpose tests. As a general principle, and given our comments above, these powers should be used sparingly and only in defined circumstances, so we think that the four tests are enough for the time being. We suggest the position is kept under review and, if further events are identified, then these could be considered at that stage. We would repeat our request that the Welsh Government should consider adopting a Finance Bill type process which would allow for necessary tax changes to be made every year.

#### **Whether the approach would enable appropriate scrutiny**

24. The approach adopted should normally allow for appropriate scrutiny although in one of the circumstances (namely that in the circumstances set out in para 4(2)(b) the regulations can be made without a draft being laid and approved by the Senedd), it will be effectively after the event. We would expect that the power in para 4(2)(b) is only exercised in extremis and that, if it is used, a clear and compelling justification is made for it.

#### **Whether the Senedd should have a legislative budget process to enable tax changes to be made through primary legislation**

25. See our comments made above. We think that the Senedd should have a legislative budget process and that tax changes should ideally be made by way of primary legislation.

#### **How the Bill could impact on Welsh taxpayers and stakeholders**

26. The purpose of the measures is to allow the Welsh Government to make changes at short notice if one of four conditions is satisfied. In terms of the four conditions, one of them, namely compliance with international obligations, is likely to be a rare occurrence and the impact on Welsh taxpayers is likely to be very limited. The other three conditions are much more likely to occur and therefore the impact on Welsh taxpayers is likely to be much higher.

### **SPECIFIC COMMENTS ON THE DRAFT BILL**

#### **Clause 2(1)(b)**

27. In principle we do not think that a power to make or extend a penalty should be available by way of amending existing primary legislation – such a power should only be made by way of primary legislation through a Finance Bill type process. Accordingly, we would welcome clarification of the circumstances when this provision might apply and what safeguards will be in place to protect taxpayers.

#### **Clause 2(1)(c)**

28. See comments made above about retrospection and that it should not apply to a period before any announcement.

#### **Clause 2(1)(3)**

29. As noted above, we understand that this is included because the Welsh Government already has the power to do this. However, as one would expect to see a specific power to change rates and bands included in this provision, including an exclusion in these rules serves merely to confuse, especially as there is no cross reference to the existing power. We would delete it or put in a specific cross reference so that the reason for this is clear.