

Finance Committee - Welsh Tax Acts (Power to Modify) Bill

A Submission by:
The Chartered Institute of Public Finance and Accountancy

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CIPFA, the Chartered Institute of Public Finance and Accountancy, is the professional body for people in public finance. CIPFA shows the way in public finance globally, standing up for sound public financial management and good governance around the world as the leading commentator on managing and accounting for public money.

Further information about CIPFA can be obtained at www.cipfa.org

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1. Executive summary

CIPFA is pleased for the opportunity to provide evidence to the committee. As a professional body for public finance, we take a special interest in the good public financial management, administration, and the devolution of powers.

Set out below are comments made by CIPFA in relation to the Welsh Tax Acts (Power to modify) Bill.

The bill is anticipated to be used in response to external changes not to be used to instigate tax policy changes. The act is significant in its powers, including its remit of making retrospective changes. Wales constitutional arrangements sets out as clear lines by providing that it was illegal for the government to raise taxes except to the extent that Parliament had granted it the power to do so. Under the Government of Wales Act, Senedd Cymru (Welsh Parliament), has the power to decide whether and to what extent people should be subject to devolved taxes.

The Bill clearly outlines amendments to three Acts of Senedd Cymru, together referred to as the Welsh Tax Acts. Which will establish a framework for the collection and administration of devolved taxes – to be administered by the Welsh Revenue Authority, with particular focus on Land Transaction Tax (LTT) and Landfill Disposal Tax (LDT).

This bill would delegate to the Welsh Government (the executive) from the Senedd (the legislature) power to change tax legislation made by the Senedd. This is a common delegation of power we have seen utilised by Welsh Government using powers granted to them by UK Acts of Parliament (enabling Acts) to react with urgent need to take action to protect the public in response to Covid-19 Pandemic, as an example of an external factor requiring use of these powers by the executive. In principle the balance of power between the executive and the legislature must be closely considered in these matters. The Chartered Institute of Taxation and the Institute of Chartered Accountants in England and Wales stated that their default position is that tax legislation should be in primary legislation, and particularly in the case where legislation relates to the exercise of tax powers, except in very exceptional circumstances – which CIPFA would agree with this principle. CIPFA recognises that in response to these concerns the scope of the bill has been restricted the power to exercise the act by the executive has been restricted to the four sets of circumstances outlined in the draft bill.

Under the Bill as introduced, the Welsh Ministers would have the power under section 1 to amend the Welsh Tax Acts (and any regulations made under them) if they considered that the modifications were necessary or appropriate for or in connection with:

- ensuring that LTT or LDT is not imposed where to do so would be incompatible with any international obligations;
- protecting against tax avoidance in relation to LTT or LDT;
- responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of Wales Act 2006;
- responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts.

Clause 2(1)(c) enables the Welsh Ministers to make Regulations which have retrospective effect. CIPFA has a concern in regard to retrospection and the draft statement on retrospection. 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 in very exemption circumstances and that it would be supplemented by a detailed and compelling reasoning for such a procedure.

In regard to Clause 2(1)(B) – CIPFA, in principle is concerned by the power to make or extend a penalty without amendment to existing primary legislation. Such power should be made through primary legislation.

In summary CIPFA, supports the policy purpose behind the Bill in principle. Given that the UK Government continues to make changes to the Stamp Duty Land Tax (SDLT) regime, it is important that the Welsh Government has the mechanism needed to be able to react to such changes if they are likely to have a significant impact on Land Transaction Tax (LTT).

2. Welsh Tax Acts (Power to Modify) Bill Comments

Under section 2, we have made commentary against each question, in order, raised in the Committees call for evidence from expert witnesses, also considering the adoption of modifying tax legislation and its effectiveness and potential alternative approaches.

2.1 *Considerations of the general principles of the Bill and the need for legislation?*

2.1.1 There is significance of the bill regarding its potential impact on public administration and risk to Welsh Government in its ability to raise and collect taxes within the parameters of the specific taxes outlined in the bill. The level of delegated powers should be proportionate to the problem they aim to resolve. CIPFA understands that the Welsh Government needs the ability to respond to changes made to SDLT by the UK Government and the mechanism to react to swiftly to identified tax avoidance schemes and unexpected court rulings.

Considering the four purposes of the bill and its intended use, CIPFA has the following observations;

2.1.2 ***“Ensuring that LTT or LDT is not imposed where to do so would be incompatible with any international obligations”*** - section 116A(3) of the Government of Wales Act 2006 states ‘A devolved tax may not be imposed where to do so would be incompatible with any international obligations.’

To enable the Welsh Tax Acts to be amended swiftly if the reason for the incompatibility with international obligations lies in those Acts. It also stands to reason, the power should be capable of being exercised retrospectively.

2.2.2 ***“protecting against tax avoidance in relation to LTT or LDT”*** – CIPFA supports mitigating the risks of tax avoidance. However, Part 3A of the Tax Collection and Management (Wales) Act 2016 (a Wales Tax Act) already contains a broad general anti-avoidance rule. This applies where a person or entity enters an arrangement for the main or sole purpose of obtaining a tax advantage, and that arrangement is an artificial one when measured by reference to certain statutory criteria. Should these cases arise, the Welsh Revenue Authority (WRA) can start a process which can lead to tax adjustments against the taxpayer. If the matter comes to be determined before a court or tribunal, it is for the WRA to prove both that there is an artificial tax avoidance arrangement, and that the adjustments are reasonable (Section 81H). In summary – CIPFA does not have any substantive comment on the new bill, as the power to

2.2.3 ***“responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of 15 Wales Act 2006”*** – As the committee will be aware The Welsh Consolidated Fund is the money that pays for the devolved governance of Wales. Its main component is the annual block grant received from the UK Government. Under the arrangements agreed between the UK and Welsh Governments, the block grant is adjusted if the UK Government changes an UK government tax which is the equivalent of a

devolved tax. So if the UK Government increases the rate of SDLT (the equivalent to LTT), the block grant is reduced, and vice versa. In CIPFA's view The policy need for a mechanism that enables swift action in these sorts of circumstances is clear.

2.2.4 ***“responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts”*** - In board 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. In the case of the anti-avoidance purpose, it allows the Welsh Ministers to change the Welsh Tax Acts in response to an external challenge to the way in which they operate. The difference in this case, however, is that the amendment will not be made to avert the use of a loophole, but rather to respond to a decision of a court of law. It is not uncommon for the law to be changed in response to a decision of a court. Where the law in question is primary legislation, that would normally be done by further primary legislation, unless the power to do so is given to the executive. The challenge is that, as in the case of the anti-avoidance provision, the drafting of the Bill does not reflect this approach. Rather it gives the Welsh Ministers the power, should they choose to do so, to achieve routine policy changes, significant or otherwise, and to overturn decisions made in a court of law. The principle of this should be considered in order to ‘future proof’ the bill.

2.2 *The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)?*

2.2.1 This bill would delegate to the Welsh Government (the executive) from the Senedd (the legislature) power to change tax legislation made by the Senedd. This is a common delegation of power we have seen utilised by Welsh Government using powers granted to them by UK Acts of Parliament (enabling Acts) to react with urgent need to take action to protect the public in response to Covid-19 Pandemic, as an example of an external factor requiring use of these powers by the executive.

2.2.2 In principle the balance of power between the executive and the legislature must be closely considered in these matters. The Chartered Institute of Taxation and the Institute of Chartered Accountants in England and Wales stated that their default position is that tax legislation should be in primary legislation, and particularly in the case where legislation relates to the exercise of tax powers, except in very exceptional circumstances – which CIPFA would agree with in Principle.

2.2.3 CIPFA recognises that in response to these concerns the scope of the bill has been restricted the power to exercise the act by the executive has been restricted to the four sets of circumstances outlined in the draft bill.

2.3 *Any potential barriers to the implementation of these provisions and whether the Bill takes account of them?*

2.3.1 CIPFA would note that tax avoidance schemes operate outside of any oversight and appear resistant to changes designed to stop their activities. In relation to tax avoidance, these changes would impact upon the taxpayer who entered into a scheme rather than who 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. Otherwise CIPFA has no other substantive comment.

2.4 *Whether there are any unintended consequences arising from the Bill?*

2.4.1 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 cautiously and only in defined circumstances, so we think that the four tests are sufficient for the current environment. We suggest the position is kept under review and, if further events are identified, then these could be considered at that stage

2.5 *The appropriateness of section 3 (Policy statement: regulations under section 1 that have retrospective effect) and the draft policy statement published alongside the Bill?*

2.5.1 CIPFA has a concern in regard to retrospection and the draft statement on retrospection 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 in very exemption circumstances and that it would be supplemented by a detailed and compelling justification for such a procedure.

2.6 *The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum)?*

2.6.1 Based on the financial impact assessments CIPFA has no material concern from the outcome of these assessments. However CIPFA wish to highlight the potential costs from adapting systems, building capacity and data, should a retrospective liability calculation be needed.