

Rebecca Evans MS

Minister for Finance and Local Government

24 February 2022

Dear Rebecca

Welsh Tax Acts etc. (Power to Modify) Bill

Thank you for giving evidence to the Committee on 14 February 2022 on the Welsh Tax Acts etc. (Power to Modify) Bill. As I indicated during the session, there are some other issues we would like to explore with you, as well as some we were not available to cover in the time available. I therefore look forward to receiving a response to the questions below by 11 March 2022.

Provisional Collection of Taxes Act 1968

1. Your **2020 consultation paper** highlighted the *Provisional Collection of Taxes Act 1968*, noting that it enables proposals for tax changes and tax continuations to have immediate provisional legal effect pending the necessary primary legislation receiving Royal Assent. The paper also added that there is no equivalent provision to the 1968 Act in Welsh law. What thought did you give to proposing an equivalent 1968 Act and why did you discount it?

Scrutiny

2. In relation to timescales for scrutiny of regulations that would be made under the powers in this Bill, you explained to the Finance Committee that the Welsh Ministers will propose a timescale for either procedure before the vote that includes the "length of time needed to provide suitable scrutiny" (see Finance Committee, [RoP \[228\]](#), 22 December 2021). Isn't the approach here therefore effectively the Welsh Government deciding the level of scrutiny it wishes to be



subjected to, potentially when making significant changes to legislation previously passed by the Senedd?

Senedd Lock

3. Professor Emyr Lewis referred to the Welsh Government's decision to abandon the Senedd lock as the removal of a significant safeguard against potential abuse of broad power. What is your response to that view and, if you disagree, how would you argue differently?
4. In Plenary on 14 December, you referred to the concept of a Senedd lock potentially setting an "unhelpful precedent" for future made-affirmative powers. It could be argued the reverse is true, and that this Bill sets an unhelpful precedent for the Welsh Ministers proposing to take regulation-making powers in areas that should remain the responsibility of the Senedd. How do you respond to such an argument?

Regulation-making powers – broad use

5. In his written evidence to the Finance Committee, Sir Paul Silk highlighted:
 - two recent reports from House of Lords Committees ([Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#) and [Government by Diktat: A call to return power to Parliament](#)) expressing concerns regard the appropriateness of using secondary legislation for significant policy implementation;
 - the Hansard Society's review of Delegated Legislation and their broad concerns about the balance between what should be in primary and secondary legislation, the potential use of secondary legislation in unexpected ways which the legislature may not have appreciated when granting the enabling powers, the undesirability of Henry VIII powers, the comparatively limited scrutiny of secondary legislation compared to primary legislation and the inability of the legislature to amend secondary legislation.

What consideration has the Minister given to the views expressed in these reports, and the concerns of the Hansard Society, and what reflections do you have on them in the context of the proposals in this Bill?

Regulation-making powers – procedure

6. Sir Paul Silk has commented that the made-affirmative approval procedure is "very unusual ... historically". In developing the Bill, did the Minister consider whether regulations relying on any of the four purposes set out in the Bill could or should be excluded from the made-affirmative approval procedure, particularly in circumstances where such regulations have retrospective effect? If not, why not?

Regulation-making powers – changing existing law

7. In evidence to the Finance Committee, you referred to section 109 of the *Finance Act 2003*, which provides HM Treasury with powers to make immediate, but temporary changes to Stamp Duty Land Tax (SDLT). However, as you also explained, those powers are subject to a sunset provision which limits their effect for up to a maximum of 18 months. Did you consider including similar sunset provisions applying to regulations made under the power proposed in section 1 of this Bill? If so, why was that approach discounted?
8. Do you consider that the powers within this Bill could be used to change existing regulation-making powers or/and associated Senedd approval procedures in the Welsh Tax Acts, even if that is not the policy intention behind the Bill? If not, will the Minister consider amending the Bill to make this clear?
9. As drafted, the power proposed in section 1 of the Bill would allow the Welsh Ministers to make regulations modifying any provisions in the *Tax Collection and Management (Wales) Act 2016* with the exception of Part 2. The Committee would be grateful if the Minister could explain the particular circumstances in which it is envisaged that regulations made under section 1 may need to modify each of Parts 1 and 3 – 10 of that Act.
10. Is the Minister aware of any other examples in Welsh or wider UK law where a government has the power to impose retrospective taxes by secondary legislation?
11. Sir Paul Silk has commented that, in respect of retrospective regulation-making powers, the Senedd may be asked in this Bill to agree to a further ratchet away from best parliamentary practice. What is the Minister's view on this?

Section 1: general

12. Can the Minister give any specific examples of situations where the powers (under section 1) would have benefitted Welsh taxpayers since the devolved taxes came into operation in 2018?
13. Section 1 of the Bill, as introduced, provides for the Welsh Ministers to make regulations for any of the four stated purposes if they consider modification to devolved tax legislation to be "necessary or appropriate". What (if any) constraint do you think these words impose on the use of the power? If the Welsh Ministers decide to exercise a power to make regulations, wouldn't the Minister considering the regulations being "appropriate" be a condition that is automatically satisfied?

Section 1 – international obligations

14. One of the purposes for which the Welsh Ministers may make regulations is to ensure the devolved taxes are not imposed in a way that would be incompatible with international obligations. Section 1(4) of the Bill defines international obligations as any UK international obligations other than to observe and implement the Convention rights. What was the rationale for excluding Convention rights from the scope of these powers?
15. The Explanatory Memorandum to the Bill (at paragraph 3.17) suggests that the conclusion of a new trade deal or double taxation agreement would be an example of circumstances in which the Welsh Ministers may wish to make changes to the Welsh Tax Acts at short notice to ensure compliance with international obligations. How would the Minister envisage such agreements potentially impacting on landfill disposals tax at short notice?

Section 1 – anti-avoidance purpose

16. In her evidence to the Finance Committee, Dr Sara Closs-Davies of Bangor University noted that the term “tax avoidance” in the Bill needed to be defined. Why did the Welsh Government choose not to define this, for example a principles-based approach by reference to the existing tax avoidance provisions set out in Part 3A of the *Tax Collection and Management (Wales) Act 2016*?
17. What protections are there in relation to the power proposed in section 1 of the Bill for taxpayers who engage in lawful tax planning, particularly given that power could be used to impose tax retrospectively without the full scrutiny of the Senedd that would be afforded to such proposals if there were included in a bill?
18. You previously explained to the Finance Committee that the proposed power in section 1 of the Bill could be used to close down perceived opportunities for tax avoidance before they become widely exploited. In his written evidence to the Finance Committee, Professor Emyr Lewis states that there is nothing in this Bill that would prevent the Welsh Ministers from amending the existing anti-avoidance provisions in the *Tax Collection and Management (Wales) Act 2016* to reverse the burden of proof and require a taxpayer to demonstrate that avoidance arrangements are not artificial, instead of the Welsh Revenue Authority as the law currently stands. Do you accept that and, if so, would you consider amending the Bill to exclude the anti-avoidance provisions in the 2016 Act from the scope of the regulation-making powers in this Bill?
19. The Explanatory Memorandum notes that in the case of tax avoidance, the Welsh Revenue Authority already has a range of powers available to it and is actively using them to ensure everyone pays the right amount of tax and no-one gains an unfair advantage. What powers are

being referred to and what specific deficiencies in these current powers have been identified that require a further power to “tighten” existing anti-avoidance provisions?

20. In evidence to the Finance Committee on 2 February, the Welsh Revenue Authority told the committee that avoidance isn’t a risk it currently sees within the two devolved taxes, that the existing anti avoidance provisions in the *Tax Collection and Management (Wales) Act 2016* are an “effective deterrent” and, further, that a scenario in which these proposed powers would have been beneficial to the Welsh Revenue Authority or Welsh taxpayers “has not yet arisen”. Does the Minister agree with the Welsh Revenue Authority? If not, why not?

Section 1 – courts and tribunals

21. Section 1(1)(d) of the Bill would permit the Welsh Ministers to make regulations amending the Welsh Tax Acts for the purpose of “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” (including retrospectively). In evidence to the Finance Committee on 2 February, the Welsh Revenue Authority told the committee that, in relation to its operation of the devolved tax regime, it has not to date needed to respond to the decision of any tribunals. What led the Minister to conclude that this particular regulation-making power is necessary?
22. Would you accept Professor Emyr Lewis’s view that, if retrospectively legislating in response to a decision of a court is to be permitted at all, it should at least be limited on the face of the Bill so that the Government cannot change the law with effect from a date earlier than the date of its announcement of that change? If not, why not?

Section 2

23. Section 2(1)(b) of the Bill specifically permits the Welsh Ministers by regulations to impose or extend a liability to a penalty. In what circumstances could the Minister foresee an urgent need to make regulations imposing new, or extending existing, penalties?
24. Sir Paul Silk has drawn the Finance Committee’s attention to the Supreme Court’s approval of the Counsel General’s acceptance of “a need for special justification where a statutory provision has retrospective effect”¹. Does the Minister accept this position? How do the provisions in the Bill comply with this principle?

¹ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, paragraph 53

Yours sincerely,

Huw Irranca-Davies

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Chair

