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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/RE/1163/22

Peredur Owen Griffiths, MS
Chair
Finance Committee
Senedd Cymru
Cardiff Bay
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22 April 2022

WELSH TAX ACTS etc. (POWER TO MODIFY) BILL

Dear Peredur,

Thank you for the Finance Committee report which was published on 08 April 2022 in relation to the Welsh Tax Acts etc. (Power to Modify) Bill ("the Bill"). Please see my response below to your request for information in advance of the Stage 1 General Principles Debate. The examples do not identify any known issues in relation to the Welsh Tax Acts, rather, the examples outlined are solely for the purposes of responding to the Committee's request. I will provide a further detailed written response in relation to the other recommendations of the Finance and LJC Committees following the Stage 1 General Principles Debate.

I have also written today to the Chair of the Legislation, Justice and Constitution Committee to set out my response to their four recommendations requesting information in advance of the Stage 1 General Principles Debate.

Recommendation 2. The Committee recommends that, prior to the debate on the general principles of the Bill, the Welsh Government provides examples of the specific circumstances in which it envisages the regulation-making power in section 1(1) being used to amend each Part of the Tax Collection and Management (Wales) Act 2016 (other than Part 2), the Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.

Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017

Review of the Parts of the Act and examples of amendments which may be made by regulations under the Welsh Tax Acts etc. (Power to Modify) Bill.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

1. There are a number of crucial areas of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 (“LTTA”) where the Senedd provided the Welsh Ministers with regulation making powers subject to the draft affirmative procedure. The Senedd has also already provided the Welsh Ministers with the power to set rates and bands for LTT by regulations subject to the made affirmative regulation making procedure. However, there are areas where regulation making powers do not exist, including in relation to the calculation of tax (Part 3). The examples below include cases where the Welsh Ministers have existing regulation making powers (and where urgency may make making regulations by the made affirmative procedure necessary or appropriate) and cases where the Welsh Ministers do not have regulation making powers. This is not intended to be a full list of every possible change that could be necessitated by the external events set out in the four purpose tests in the Bill. It provides examples, as requested, of situations in which the regulation making power in section 1(1) of the Bill might amend each Part of the LTTA.
2. In addition, the 2020 consultation paper: *Tax Devolution: Enabling changes to the Welsh Tax Acts*¹ included six examples setting out UK government policy changes that have occurred in the past, the actions the Welsh Ministers could take currently, and what they could do with the three regulation making powers as set out in the consultation document². The sixth example would **not** meet any of the four purpose tests and the power in this Bill could not be used to effect the change. This is because the change would not be as a result of an external event but would represent Welsh Government policy changes. I have been clear that the power will only be used to respond to external events, and the scope of the power has been constrained by the inclusion of four purpose tests which set out with absolute clarity in what circumstances the power may be used.

Part 1: Overview

3. Part 1 provides an overview of the Act, setting out the purpose of each Part. It is possible that this part of the Act may need to be amended if a new Part was introduced by regulations made under the power in the Bill, or changes to the purpose of any of the existing Parts or the Schedules (such as expanding the matters covered). Any changes to this Part would arise from the making of consequential amendments that potentially flow from substantive changes made using section 1(1) of the Bill.

Part 2: The Tax and Key Concepts

4. Part 2 provides for a tax to be charged on land transactions and makes provision about the key concepts underlying the tax. These include rules establishing which transactions are land transactions and chargeable interests, when interests are acquired, the treatment of transactions involving contracts and other kinds of transactions, which land transactions are, and which are not, chargeable to the tax, and what is, and what is not, chargeable consideration in relation to a chargeable transaction.
5. The rules relating to the substantial performance of a contract being a land transaction were introduced into Stamp Duty Land Tax (SDLT) to address substantial avoidance activities in stamp duty (that is the predecessor duty that applied to contracts transferring

¹ *Tax Devolution in Wales - Enabling changes to the Welsh Tax Acts* (July 2020) is available to view at: <https://gov.wales/enabling-changes-to-welsh-tax-legislation>. See Chapter 4, pp 27 - 35

² Powers 1-3 have now been replaced with a single regulation-making power as set out in the draft Bill. References to powers 1-3 may be read as being in relation to the single power provided in the Bill.

land prior to its replacement by SDLT). In the event that promoters contend they have found a way for the current rules to be exploited, then it will be necessary to make changes as quickly as possible to protect the tax base.

6. Similarly, the SDLT rules relating to sub-sales were aggressively exploited. By the time of devolution of the tax to Wales, a series of legislative changes had already been made to the predecessor tax which closed the perceived opportunities. However, in the event that promoters again seek to exploit these rules then it will be necessary to make changes (in line with purpose test 1(1)(b) - protecting against tax avoidance) to ensure that the legislation can be clarified to stop taxpayers entering schemes. At the same time action can be taken to challenge those who have already sought to exploit the rules to seek to avoid their tax obligations.
7. There have also been recent tax cases relating to attempts to exploit the rules relating to annuities. These have been unsuccessful, but, in the event that a way was found to exploit the annuity rules, then the Welsh Ministers (subject to Senedd approval) would want to make changes at pace that would, without question, stop such activity. The WRA would continue to challenge those who contended that the pre-amended rules achieved the result they desired.
8. A further example is that the UK government may seek to make licences and tenancies at will subject to SDLT and therefore no longer exempt interests. If the Welsh Ministers wanted (subject to Senedd approval) to introduce an equivalent change at pace in Wales, then purpose test 1(1)(c) (responding to a change to a predecessor tax that may affect amounts paid into the Welsh Consolidation Fund) could be used.
9. Equally, in relation to many of the sections included in Part 2 it is possible that a court decision could find that the law operates in a manner that differs from that in which it was previously understood to operate. The court decision could relate to LTT, SDLT, Land and Buildings Transaction Tax (LBTT) or, perhaps, a land law case. For example, a court case could find that the creation, surrender, release or variation of an interest has a meaning and effect that would require clarification of our legislation. The Welsh Ministers may consider that failing to clarify the law in this way would result in unintended consequences, for example transactions escaping tax or being liable to tax. The regulation-making power set out in this Bill could be used, if necessary or appropriate, to make these types of changes at pace using purpose test 1(1)(d).

Part 3: Calculation of tax and reliefs

10. **Part 3** makes provision in relation to the calculation of tax, the bands and tax rates, and reliefs available (including the reliefs Targeted Anti-avoidance Rule).
11. In the event that the UK government introduced a new charging regime, similar to the SDLT higher rates for additional dwellings regime (LTT's higher rates residential property transactions), then the regulation making power would enable Welsh Ministers, if necessary or appropriate, to respond at pace, potentially introducing a similar or equivalent type of change using purpose test 1(1)(c).
12. Similarly, if the UK government choose to change the method of calculation of SDLT, as happened previously in the move from the 'slab' to the 'slice' system in 2014 for residential property transactions, it would be likely to impact on the block grant adjustment. Such an impact would therefore change the amount that would be paid into the Consolidated Fund and purpose test 1(1)(c) could be used to make legislative changes. For residential transactions, the change from the slab to the slice method of

calculation was forecast to reduce the SDLT effort by a significant amount with most buyers benefitting from a tax saving. The Welsh Ministers could decide to follow the change in methodology, make different changes, or not to introduce any change. The Welsh Ministers do not have existing regulation making powers within the Act to effect such changes. Regulations made using the power provided in this Bill would be needed to bring such changes into effect, and in this particular case, the sooner the regulations are made, the sooner Welsh taxpayers would pay less tax.

13. The rules relating to the specific reliefs are to be found in Schedule 2 (so far as they apply to pre-completion transactions) and Schedules 6 to 22. Any perceived avoidance opportunities could be closed quickly by making changes using the regulation making power (purpose test 1(1)(b)) in this Bill and the made affirmative procedure. This would prevent, at pace, new entrants into the avoidance arrangements seeking to exploit the reliefs. For those taxpayers who had previously arranged their affairs to attempt to avoid tax, enquiries by the WRA to establish all the facts and arguments, including, where appropriate, taking any appeals to the Tribunals and higher courts will resolve the tax position.
14. In addition, the introduction of a new SDLT relief will have an impact on the block grant adjustment and therefore the amounts paid into the Consolidated Fund by the Secretary of State (the introduction of a new SDLT relief is likely to result in an adjustment that would increase the Welsh Government's block grant). The absence of a similar relief or other changes to the rules in Wales could result in undesirable impacts for Welsh citizens, Welsh businesses or other businesses with a Welsh presence or seeking to expand into Wales. The use of the power by the Welsh Ministers would enable them, subject to Senedd approval, to introduce a similar relief or similar tax reductions by alternative means. Whilst there are pre-existing draft affirmative regulation making powers to make changes to the reliefs rules (including introducing, amending or removing a relief) the power in the Bill would enable the relief to be brought into effect sooner by made affirmative regulations.
15. Regulations made under the power in the Bill to comply with international obligations (section 1(1)(a)) could arise where, for example, a trade agreement or membership of a new trading bloc require equal treatment for entities similar to UK entities when transacting land. The example of the previous charities relief that applied to EU and EEA charitable bodies is an example of treaty obligations requiring provision in land transaction taxes.

Part 4: Leases

16. Part 4 makes provision about the application of the LTTA to leases. It is possible that the need to make changes to the rules that apply to leases will arise if changes to the approach to the taxation of leases by the UK government are made. This could be due to other types of property rights becoming taxable (for example a licence to occupy a property). Or other rules could need to be changed that apply to the current lease regime to stop avoidance, or that the rules are amended in a manner that would increase the revenues derived from the granting or assignment of leases. Whilst the same rules that currently apply more generally to leases might be used, it is also possible that specific rules will need to be crafted for each type of new property interest. Depending on the specific circumstances, these changes could meet either meet the purpose test in section 1(1)(c) or section 1(1)(b).

Part 5: Application of Act of TCMA to certain persons and bodies

17. Part 5 makes provision about the application of the LTTA and the Tax Collection and Management (Wales) Act 2016 to certain persons and bodies, including companies, partnerships and trusts.
18. It is possible that, to incentivise investment into the UK, changes are made at a UK Budget to provide tax treatment for overseas entities to receive similar tax treatment to investment vehicles that have already been provided with specific treatment. The current rules, for example, set out that unit trust schemes are treated as a single entity (a company) for LTT purposes rather than each unit trust holder being treated as one of many joint buyers (as their units are to be treated as shares in a company). Similar treatment was also extended to co-ownership authorised contractual schemes (COACS) in the mid-2010s (and has, with the exception of the SDLT seeding relief for COACS, been included in the LTT legislation). It is possible that future treaty obligations could result in new entities requiring a similar treatment to similar UK entities (or be provided with specifically crafted rules) when buying property in the UK. Such changes could potentially meet the requirements of the purpose test in section 1(1)(a) where that equivalent treatment arose due to compliance with an international obligation.
19. Equally, absent a treaty obligation, the UK government may provide treatment to attract investment that the Welsh Government may consider attractive for Wales as well. Where the provision of the treatment may have an impact on the amount paid into the Welsh Consolidated Fund the Welsh Ministers will be able to provide similar treatment (subject to Senedd approval) to entities investing in Wales as it would meet the purpose test in section 1(1)(c).
20. A court decision could find that any aspect of the rules did not operate as the WRA and many advisers believed. Clarification of the rules may be necessary to ensure the LTT regime continues to operate in a cohesive manner. That clarification could be required with near immediate effect. For example, any court decision that found that the joint buyers' rules operated in a manner that undermined the effective self-assessment of LTT (or compliance activity of the WRA), would require an early and near immediate consideration to ensure the tax regime remained effective. The powers in this Bill would enable any such clarification, if considered necessary or appropriate, through triggering purpose test 1(1)(d) and this could be actioned at pace using the made affirmative procedure.

Part 6: Returns and payments

21. Part 6 makes provision about when returns and payment of the tax are to be made including deferral rules and procedure.
22. A court decision could find that any aspect of the rules did not operate as the WRA and many advisers believed. Clarification of the rules may be necessary to ensure the LTT regime continues to operate in a cohesive manner. That clarification could be required with near immediate effect. For example, any finding that changes the existing filing obligations on taxpayers or what constitutes a notifiable transaction could undermine the effective self-assessment of LTT. The powers in this Bill would enable any such clarification, if considered necessary or appropriate, through triggering the purpose test in section 1(1)(d) and this could be actioned at pace using the made affirmative procedure.

23. The UK government could also change their rules on notifiable transactions. For example, currently, freehold transactions with consideration of less than £40,000 are not a notifiable transaction in both SDLT and LTT. If the UK government were to increase that figure, that would represent a tax simplification for SDLT taxpayers as fewer transactions would result in a filing obligation. However, there would also be tax liability consequences too as an increase in the notification figure would, without other changes, result in tax not being paid under the respective higher residential rates rules. The change by the UK government may therefore result in a change to the amounts paid into the Consolidated Fund (thus triggering purpose test 1(1)(c)). In this instance, the Welsh Ministers may choose to replicate the UK changes to reduce the filing obligations (subject to Senedd approval), but limit it so that it applies only to those transactions liable to the main residential rates of LTT.

Part 7: General anti-avoidance rule

24. Part 7 inserts into the Tax Collection and Management (Wales) Act 2016 the provisions establishing the general anti-avoidance rule for the devolved taxes. Part 7 amendments will not be used to make any further changes to the TCMA. Instead, changes will be made directly to the TCMA using the power within the Bill, provided such changes meet the relevant criteria.

Part 8: Interpretation and final provisions

25. Part 8 introduces Schedule 23 which makes amendments to the Tax Collection and Management (Wales) Act 2016 ("TCMA"). Part 8 amendments will not be used to make any further changes to the TCMA. Instead, changes will be made directly to the TCMA using the power within the Bill, provided such changes meet the relevant criteria

26. The Part also contains provisions that apply generally for the purposes of the LTTA, including definitions of expressions used in the Act for example, 'residential property' and 'connected persons'. There have been many recent Tribunal cases in which taxpayers have contended that they have acquired both residential and non-residential property. When such mixed transactions occur the tax payable by the buyer is calculated based on the non-residential rates rather than the residential rates (and thereby incurring a lower tax charge). In the event that the UK government made changes to their rules following a loss with significant impacts, the Welsh Ministers may decide to make similar changes (subject to approval of the Senedd). Depending on the particular scenario, it is possible that the regulations could be made using this powers in this Bill, as 1(1)(b) may be triggered or (and probably also), due to the impact on the block grant adjustment, the Consolidated Fund test would be met (purpose test 1(1)(c).

Landfill Disposals Tax (Wales) Act 2017

Review of the Parts of the Act and examples of amendments which may be made by regulations under the Welsh Tax Acts etc. (Power to Modify) Bill.

Part 1: Overview

26. Part 1 provides an overview of the Act. It is possible that this Part of the Act could need to be amended in the event that a new Part was introduced by regulations made under the power in the Bill. Any changes to this Part would arise from the need to make consequential amendments that potentially flow from the substantive changes made by the regulations.

Part 2: The Tax and Taxable Disposals

27. Part 2 provides the rules in relation to taxable disposals and exempt transactions, setting out the conditions that must be met for there to be a taxable disposal of waste to landfill. There are a number of concepts that are key to the operation of the tax, for example, disposal of the material as waste, and that the use of the material which is incidental to its disposal by way of landfill does not negate an intention to discard material. It is possible that changes using the power in the Bill could arise in relation to countering avoidance activity (the purpose test at section 1(1)(b)), the amounts paid into the Consolidated Fund (the purpose test at section 1(1)(c)) and the findings of courts (the purpose test at section 1(1)(d)).
28. In particular, those seeking to avoid paying Landfill Disposals Tax (LDT) could seek to exploit a perceived lacuna in these definitions to seek to dispose of waste by landfill without incurring a tax charge. In these cases, the Welsh Ministers may use section 1(1)(b) to rectify the issue and prevent further avoidance.
29. Similarly, a finding by a court that a definition permits activity without incurring a tax charge may result in a need to clarify the law by regulations that meet the purpose test in section 1(1)(d) to protect the tax base and potentially the environment. This may be the case especially if the ruling applied to Wales only and allowed disposal of waste in Wales at a substantially lower cost than in England.
30. Finally, it is possible that the UK government could make changes to the predecessor tax that result in a tightening the definitions so that more activity was within the scope of their tax, perhaps even creating what would amount to an additional condition for LDT purposes. This could impact both on the amount paid into the Consolidated Fund (as the predecessor tax would be making a greater tax effort than previously), and could impact on the environment as Wales became a cheaper place to dispose of waste. Accordingly, Welsh Ministers may consider making regulations that meet the purpose test in section 1(1)(c) to lessen the impact on the Consolidated Fund. Whilst a number of regulation making powers are already provided to make changes, they are subject to the draft affirmative procedure and cannot be made with retrospective effect (back to the date of an announcement by the Welsh Ministers). The powers within the Bill will enable regulations to be made via the made affirmative procedure, and will also allow regulations to have retrospective effect.

Part 3: Taxable Disposals Made at Authorised Landfill Sites

31. Part 3 makes provision about how the tax is to be charged on taxable disposals at authorised landfill sites, including the persons on whom the tax is chargeable, the calculation of tax, reliefs, registration and accounting requirements, and payment, recovery and repayment of the tax.
32. There are a number of Parts of the LDT Act which contain definitions heralding from the UK's past membership of the EU. An example is the definition of non-hazardous waste (requirement 5 of section 16(1) LDT Act). It is possible that future trade agreements and treaties could contain requirements for common definitions between the contracting countries or entities, which do not correspond with the existing definitions. In this scenario, section 1(1)(a) could be used to ensure compliance with international obligations.

33. In relation to tackling avoidance (section 1(1)(b)), it is possible that a situation will arise where attempts may be made by taxpayers to stretch the definitions of some of the types of materials in order to obtain a lower rate of tax. Alternatively, they could seek to exploit the extent to which a mixture of materials can still be treated as a qualifying mixture to which the lower rate of tax applies. Welsh Ministers may wish to be able to stop any avoidance activity at the point that it is identified by use of the power to clarify any aspect of the legislation that is potentially being exploited. The WRA would then address the avoidance activity that had occurred prior to the date the amending regulations came into force.
34. This Part also includes a number of reliefs that taxpayers can claim. Whilst there is already a power provided to the Welsh Ministers to make draft affirmative regulations to create a new relief, or modify or remove an existing relief, there may be situations where it may be necessary to make these changes so that they have immediate effect or potentially retrospective effect. If the UK government amended a similar relief in landfill tax to tighten the conditions it is possible that disposing of the waste in Wales will remain possible, and subject to relief. The power in the Bill (section 1(1)(c)) could be used due to the impact on the amount paid into the Consolidated Fund (the UK government would be making a greater tax effort through landfill tax leading to the amount paid into the Consolidated Fund reducing). There would therefore be benefits to adopting the same or a similar tightening of the conditions quickly, both to address the revenue issue but also the potential environmental issues too.
35. Alternatively, the UK government might amend an existing relief or introduce new relief to provide relief from LDT. A new relief could perhaps be temporary to address a specific environmental issue that has arisen, for example, to provide relief from LDT for disposals to landfill that arise from flooding or another specified event. The amounts paid into the Consolidated Fund will increase (UK government will be making a lesser tax effort with LDT). The Welsh Ministers may wish to use section 1(1)(c) (subject to Senedd approval) to provide a similar relief in Wales, potentially with retrospective effect, so that the relief is available to taxpayers in Wales from the same date as a similar relief is available in England.

Part 4: Taxable Disposals Made at Places other than Authorised Landfill Sites

36. Part 4 makes provision about how the tax is to be charged on taxable disposals at places other than authorised landfill sites, including, the persons on whom the tax is chargeable, the procedure for charging, payment, and late payment interest on unpaid tax.
37. The rules relating to taxable disposals made at places other than authorised landfill sites was a new development for landfill taxes across the UK. Furthermore, the design of the rules for LDT differ from those taxing similar types of disposals in Scotland and the rest of the UK. These rules have yet to be tested before the courts and it is possible that a future court decision may result in the rules operating in a manner that does not permit or makes it very difficult to charge tax at the unauthorised disposals rate. The Welsh Ministers may consider making regulations that meet the purpose test in section 1(1)(d) in these circumstances to provide clarification for taxpayers. Those regulations, especially if made using the made affirmative procedure, could address the courts findings quickly and (subject to the Senedd's approval) maintain the effectiveness of the unauthorised disposals regime. Many of the individual sections in this Part include regulation making powers subject to the draft affirmative procedure, but the nature of the regime may require the changes to be made more urgently, particularly if the WRA is

addressing a number of similar cases at the same time where the decision could have a direct impact on their outcome.

Part 5: Supplementary Provision

38. Part 5 makes supplementary provision in connection with the tax, including, the designation of non-disposal areas within authorised landfill sites, the inspection of premises and information sharing, penalties, and the application of the provisions of this Act and TCMA in specific circumstances
39. In relation to this Part, it is most likely that the need to use the power in the Bill will arise from court decisions (section 1(1)(d)). For example, the court decision could relate to the meaning or application of 'reasonable excuse' for the purposes of a penalty for non-compliance with the duty to be registered³. It is possible that the decision could find that the meaning and application of reasonable excuse was narrower than the Welsh Ministers anticipated so that taxpayers will be charged penalties in inappropriate circumstances, or, conversely, that penalties should be remitted in many more situations so as to render the penalty regime ineffective. Any changes made by the Welsh Ministers using the power to clarify the legislation will be subject to Senedd approval.
40. Part 5 also makes provision for a Landfill Disposals Tax Communities Scheme. An external event as provided for in section 1 of the Bill would be highly unlikely to trigger any changes to the rules relating to the Landfill Disposals Tax Communities Scheme.

Part 6: Final Provisions

41. Part 6 contains provision that applies generally for the purposes of this Act (including provision about the interpretation of this Act). There will be a very limited likelihood that changes to this Part will meet the four purpose tests. It is possible that a court decision could impact the meaning of some of the interpretations (albeit that many are a cross reference to sections of the Act and therefore any clarifications made by regulations would relate to that Part rather than Part 6).

Tax Collection and Management (Wales) Act 2016

Review of the Parts of the Act and examples of amendments which may be made by regulations under the Welsh Tax Acts etc. (Power to Modify) Bill.

42. The examples provided for each of the Parts below are not exhaustive, but seek to demonstrate the types of areas where external events could lead to the Welsh Ministers seeking to make changes to the Welsh Tax Acts (subject to Senedd approval) using the power provided by the Welsh Tax Acts etc. (Power to Modify) Bill. Most of the scenarios cited may trigger purpose test 1(1)(d) in relation to responding to a court or tribunal decision that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under those Acts.

Part 1: Overview

43. Part 1 provides an overview of the Act. It is possible that consequential amendments may be needed to this Part of the Act in the event that a new Part was introduced by regulations made under the power in the Bill, or in the event that new elements are added to existing Parts.

³ S65 Landfill Disposals Tax (Wales) Act 2017

Part 2: The Welsh Revenue Authority

44. Part 2 establishes of the Welsh Revenue Authority. Making changes to this Part is excluded from the power in the Bill.

Part 3: Tax Returns, Enquiries and Assessments

45. Part 3 makes provision about the assessment of devolved taxes namely, taxpayers' duties, tax returns, WRA enquiries into tax returns, determinations and assessments of tax by the WRA and claims for tax relief, repayments and the procedure for making them.
46. It is possible that legal challenges by taxpayers to the validity of the return process, the process or scope of enquiries opened by the WRA or, any assessments or determinations made could reduce WRA's ability to properly assess taxpayers. Examples of decisions that the UK government has previously needed to respond to include *HMRC v Jason Wilkes [2021] UKUT 0150* which resulted in HMRC being unable to use section 29 Taxes Management Act 1970 ("TMA 1970") to assess High Income Child Benefit Charge. The charge was an amount of tax for which the taxpayer was liable, not "income which ought to have been assessed to income tax" within the meaning of s.29(1)(a).
47. The UK government subsequently introduced amendments at pace in Finance Act 2022 to enable HMRC to make assessments for a loss of tax in relation to child benefit. Another example was the various legal challenges to the validity of certain HMRC's automated notices including notices to file returns (s8 TMA 1970). In this instance, the UK government announced changes to their systems that would have both prospective and retrospective effect⁴. Accordingly, should similar cases be brought against WRA in Wales, or decisions in other cases impact in the Welsh Tax Acts, section 1(1)(d) could be used to make the necessary changes to the law quickly, so as to provide clarification and avoid further challenge.
48. Claims to repayment of tax overpaid is restricted in a number of circumstances⁵. It is possible that a future court decision could result in one or more of these restrictions being found not to apply in the way that differs from that initially believed by the WRA. Stopping potential further claims for repayment of tax as a result of such a court decision quickly could be necessary in circumstances where making such repayments now unfairly favour certain taxpayers. Equally, if the court's decision found that the law related to claims operated in a more restricted manner than was intended, then again it may be necessary for the legislation to be amended quickly to permit the ability to claim to be widened. Section 1(1)(d) would permit urgent amendment to the law in these types of circumstances.

Part 3A: General Anti-Avoidance Rule

49. Part 3A makes provision in regards to counteracting avoidance arrangements in relation to devolved taxes (the general anti-avoidance rule – the 'GAAR'). Whilst it is likely that Welsh Ministers will need to make changes to the operation of the GAAR only in limited circumstances, it is possible that changes at short notice and subject to the approval of the Senedd may be necessary.

⁴ [Automated Decisions: Technical note October 2019 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁵ [Tax Collection and Management \(Wales\) Act 2016 \(legislation.gov.uk\)](https://legislation.gov.uk) – section 67

50. This limited need for change is most likely to arise in situations where a court rules on the meaning of different provisions which reduces, or widens, the scope of the GAAR in an unanticipated or unexpected way. Such a position may arise, for example, where a court takes a view on the interpretation of ‘artificial’ (a key concept in the GAAR) which is broader or narrower than was previously understood and therefore widens the scope of the GAAR or potentially reduces its effectiveness. In these situations, the ability to use section 1(1)(d) to clarify the law urgently would be extremely beneficial to protect the revenues on the one hand and taxpayers on the other.

Part 4: Investigatory Powers of WRA

51. Part 4 makes provision about the WRA’s investigatory powers, including in relation to notices requiring information and the inspection of premises.

52. Most likely, clarification of the law as regards Part 4 will be as a result of decisions by the courts. The Welsh Ministers may decide that clarification of Part 4 (subject to Senedd approval) is required to enable the WRA to continue to operate its compliance activity effectively. Such court decisions could arise from cases where the taxpayer challenges the use of the WRA information powers resulting in a change in their ability to use them, or in a finding that previously they have been used ultra vires. Information powers are essential for the work undertaken by the WRA to check that taxpayers are paying the correct amount of tax.

53. To provide a specific example, a future court decision could result in the conditions required to be met for the WRA to issue an information notice, such as “checking a person’s tax position” and “reasonable to require”, operate in a more restrictive manner than had been previously understood. That would result in a more restrictive information notice regime as it does not provide the WRA with the anticipated tools to address avoidance and evasion of the devolved taxes. Use of the power within section 1(1)(d) would enable swift clarification of the legislation to reflect the court decision more clearly.

Part 5: Penalties

54. Part 5 makes provision for and in connection with the imposition of penalties in relation to devolved taxes.

55. It is most likely that the need to use the power in the Bill will arise as a result of court decisions. For example, a court decision could find that the meaning or application of ‘special circumstances’⁶ or ‘reasonable excuse’⁷ is narrower than originally was considered reasonable, so that either taxpayers will not be provided with penalty reductions in appropriate circumstances, or, conversely, that the reductions should be provided in many more situations so as to render the penalty regime ineffective. The use of the power within section 1(1)(d) in these types of circumstances would enable clarity of the law for taxpayers and WRA alike, ensuring that the rules operate effectively.

56. Furthermore, an unanticipated court interpretation concerning the types of disclosures or assistance that a taxpayer can provide to reduce the amount of penalties to which they will be liable (commonly referred to as ‘telling’, ‘helping’ and ‘giving’) could lead to a harsher penalty regime creating unfairness for taxpayers.

⁶ [Tax Collection and Management \(Wales\) Act 2016 \(legislation.gov.uk\)](#) – Section 125 TCMA

⁷ [Tax Collection and Management \(Wales\) Act 2016 \(legislation.gov.uk\)](#) – Section 126 TCMA

Part 6: Interest

57. Part 6 makes provision for interest to be payable on late payments to the WRA and on repayments by the WRA. It is a short Part containing just eight sections. It is possible that a court could find that the meaning of the “relevant amount”⁸ as defined in section 161(2) is wider than originally anticipated and is found to include any amount paid to the WRA so that the WRA has to pay repayment interest in more circumstances than had been originally anticipated. The Welsh Ministers may consider making regulations that meet the purpose test in section 1(1)(d) to clarify the legislation.

Part 7: Payment and Enforcement

58. Part 7 makes provision about payments to the WRA and the recovery of unpaid amounts. This is again a short Part, containing only seven sections. It is possible that a court may find that the rules operate in a manner that differs from what was originally anticipated and how taxpayers, the WRA, and potentially the courts themselves have operated the legislation. The Welsh Ministers may consider making regulations that meet the purpose test in section 1(1)(d) to clarify the legislation.

Part 8: Reviews and Appeals

59. Part 8 makes provision for and in connection with reviews of and appeals against decisions of the WRA. This Part relates to the review and appeals procedures when there is a disagreement between the taxpayer and the WRA. A court could find that the appealable decisions⁹ include decisions made by the WRA that were not previously understood to be appealable. Furthermore, the court decision could find that certain WRA decisions that were previously believed and treated as appealable were no longer appealable decisions. In such circumstances the Welsh Ministers may wish to take action at pace, using section 1(1)(d) to ensure that taxpayers’ interests remain protected and the WRA decisions are appealable.

Part 9: Investigation of Criminal Offences

60. Part 9 confers powers on the Welsh Ministers to make subordinate legislation in relation to the investigation of criminal offences relating to devolved taxes. This Part contains powers to make draft affirmative regulations in relation to the application of the Police and Criminal Evidence Act 1984, the Criminal Justice and Police Act 2001 and the Regulation of Investigatory Powers Act 2000, to the WRA. The Part also makes some amendments to the Proceeds of Crime Act 2002 and provides the Welsh Ministers with an ability to make specified order in relation to that Act.

61. It is highly unlikely that any of the four purpose tests will be triggered in such a way that the Welsh Ministers will find it necessary or appropriate to make regulations in relation to Part 9 using the power in the Bill. I will consider bringing forward an amendment to exclude this Part from the Bill in a similar manner to Part 2 of the TCMA.

Part 10: Final Provisions

62. Part 10 contains provision that applies generally for the purposes of this Act, including the issuing of notices by WRA, the giving of notices to WRA and interpretation.

⁸ (an “amount paid in connection with any liability to pay ... an amount of devolved tax”)

⁹ [Tax Collection and Management \(Wales\) Act 2016 \(legislation.gov.uk\)](https://legislation.gov.uk) – Section 172 TCMA

63. It is possible that a court could interpret 'notice' in a manner that renders notices already issued invalid or ineffective. Similarly, the court could find that the rules for the issuing of a notice differ from what was understood to be the effect of the rules, again, invalidating notices received from, or issued to, taxpayers such as amendments to returns, or notices of enquiry.
64. A court could also potentially take a broader view on what may constitute a valid tax 'return', in a way which renders the WRA online returns ineffective or limits the amount of information the WRA collects (in turn impacting the WRA's ability to risk assess returns).
65. In these types of scenarios, purpose test 1(1)(d) may be triggered, enabling Welsh Ministers to respond at pace if required.

I hope that the attached information helps to provide clarification in advance of the Stage 1 General Principles Debate.

I am copying this letter to the Chair of the Legislation Justice and Constitution Committee.

Yours sincerely,

A handwritten signature in black ink that reads "Rebecca Evans". The signature is written in a cursive, flowing style.

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

CC: Chair of the LJC Committee