

Response to Consultation on the Tax Collection and Management (Wales) Bill

Please find below our response to the Consultation which focuses on the Dispute Resolution aspects of devolved tax in Wales. The submission is made in our role as independent Civil and Commercial Mediators involved in mediating a wide variety of civil and commercial disputes. A note on our practice appears, for information, at the end of this response.

Section 1 - General Comments on the Bill and Dispute Resolution

1.1 The Bill envisages the foundation of the Welsh Revenue Authority (WRA), a body separate from the Welsh Ministers. It provides for the WRA to have powers of information gathering and investigation, penalties and fines, civil and criminal enforcement, and, importantly, appeal rights and administrative justice. It also provides for mechanisms for review of and appeal from WRA decisions in certain circumstances. In making our comments below, we refer to the content of the Explanatory Memorandum rather than the provisions of the Bill itself, for ease of discussion of the concepts that we believe the Finance Committee needs to take into account in developing the dispute resolution processes for devolved tax.

It is important to note that our comments at this stage apply only to appropriate disputes – that is, to disputes which do not require determination of a point of law and which the draft legislation categorises as capable of review or appeal.

1.2 The Explanatory Memorandum states:

22 *In developing the tax arrangements for Wales, the Finance Minister has confirmed that the following principles should be followed in the development of tax policy and legislation:*

- ☐ be fair to businesses and individuals who pay them;*
- ☐ be simple, with clear rules which seek to minimise compliance and administration costs;*
- ☐ support growth and jobs that in turn help tackle poverty; and,*
- ☐ provide stability and certainty for tax payers.*

23 *In preparing for the Bill, an analysis of the existing UK tax legislation and Scottish tax legislation has been undertaken. The Welsh Ministers have agreed that where there is no good policy reason (for example, on the grounds of a focus on Welsh needs or efficiency) to diverge from the UK tax administration, Welsh tax collection and management arrangements should replicate current UK operational processes and arrangements.*

This general statement of principles has considerable relevance to the way in which the WRA deals with disputes. It would, we think, be fair to say that tax authorities are not looked upon with fondness by taxpayers, whether individuals or businesses, and that fairness, simplicity, stability and certainty are not traditionally concepts associated with tax collection. We applaud the objective that these principles should apply to the development of tax policy and legislation in Wales but in our view the Bill misses an opportunity to fully follow them through by failing to include provision for referral to **Alternative Dispute Resolution (ADR) by a neutral third party at an early stage** when suitable disputes between taxpayer and WRA arise. For detailed comments as to suitability of disputes for ADR and the value of neutral third party involvement, please see Section 2 onwards.

1.3 The Memorandum goes on to say:

41 *The WRA's general function is to collect and manage devolved taxes, it also has the following particular functions relating to devolved taxes:*

- ☐ the provision of information and assistance to taxpayers, their agents and other appropriate persons;*
- ☐ **efficiently** resolving complaints and disputes;*
- ☐ promoting tax compliance with the law and protecting against tax evasion and tax avoidance. Exercising its powers to carry out compliance and enforcement functions (e.g. imposing and collecting*

interest or penalties, taking criminal enforcement action, gathering information, and making enquiries into a taxpayer's affairs);

*☑ responsibility for the preparation, management and monitoring of a Charter of Standards and Values;
.....*

*☑ operating **an effective** complaints and disputes process, including an internal review process and utilising the tribunals appeals process as appropriate.*

Providing for early referral to neutral third party Alternative Dispute Resolution would in our view allow for the objectives of efficiency and effectiveness to be met in the most time and cost effective manner. Again, for detailed comments please see Section 2 onwards, below.

1.4 The delegation of functions is already contemplated by the legislation and the use of ADR in resolving disputes could be dealt with at a later stage by way of a delegation of dispute resolution powers. However, it seems to us that Wales has an opportunity to put in place a system which allows real engagement between the taxpayer and the tax authority from the outset and that incorporation of provision for ADR in the primary legislation would be a clear demonstration of the principles of fairness and simplicity referred to at paragraph 1 above.

42. Chapter 2 of Collection and Management of Devolved Taxes in Wales set out the Welsh Ministers' thinking around tax collection and management functions and how they could be delegated if required. The WRA will retain legal responsibility for the exercise of its functions and the discretion over whether to delegate, for how long and to what extent. The partner(s) to which functions can be delegated will be named through subordinate legislation. The Bill provides that information about delegations and any directions issued in relation to them are subject to publication unless to do so would prejudice the effective exercise of WRA's functions.

1.5 The current dispute resolutions contained in Part 8 are described in the Memorandum as follows:

Reviews and Appeals (Part 8)

66. Wales does not have its own judicial system and having considered the available options, the Welsh Ministers consider the best way forwards with regards to simplicity, stability and certainty is to use the existing Ministry of Justice administered two-tier tax tribunal system as this will meet immediate needs. The intention is to underpin arrangement by a Memorandum of Understanding.

*67. **The aim will be to avoid disputes at all in so far as is possible, and this optimum situation will be worked towards with the implementation of this Bill. The WRA will seek to get things right first time, working collaboratively with taxpayers, communicating clearly and effectively and providing appropriate explanations of decisions.***

68. In cases where a dispute does arise, the aim will be to resolve matters as informally and cost effectively as possible, whilst recognising that in some cases, particularly where there is a point of principle or legal uncertainty, that a more formal decision may be necessary and/or desirable in order to resolve matters.

*69. When an issue initially arises between WRA and the taxpayer, the WRA will seek to informally resolve matters by explaining the reasons for the decision as fully and clearly as possible and seeking to listen and respond to any concerns of the taxpayer. **If a WRA decision is defined as being appealable, the Bill provides that if someone can show that they are or will be affected by that decision, they will be entitled to exercise the review and appeal rights.***

*70. **The Bill provides for a settlement process that may occur in lieu of an internal review. In essence, WRA and the taxpayer can conclude an agreement between themselves. A concluded agreement is treated as final in the same way as a tribunal determination (except there will be no further appeal rights attached to a settlement agreement). There is however, a 30 day 'cooling off' period provided for in the Bill, during which the taxpayer may withdraw from the agreement.***

71. In common with the Revenue Scotland model of dispute resolution, the internal review is a stage in the process that is available between informal discussion with the WRA and an appeal to the tribunal. This stage is carried out by and within the WRA, similar to the settlement process above, but with a greater degree of formality and independence. The use of the internal reviews process is not compulsory but WRA will aim to encourage its use by developing a cost-effective, fair and respected system that is seen as an effective means of avoiding the external appeals process.

72. The Bill also sets out the basis on which a review can be requested and the format of how this can occur.

Avoiding disputes by clear communication and collaboration is an objective which will undoubtedly appeal to taxpayers, and one which we would all benefit from following in our daily lives! Our communications are, however, only as clear as our command and understanding of the languages we use. Our languages leave us open on a daily basis to a great deal of misinterpretation and miscommunication, no matter how clear we think we are being. The majority of disputes arise through misunderstanding and our experience as commercial mediators informs our view that **mediation by a neutral third party mediator is the simplest and most efficient way of clearing up misunderstanding and allowing the parties to a dispute to move forward to a sensible, workable, settlement.**

Section 2 Overview of ADR and its uses

2.1 We focus in this section on Mediation, since this is our primary area of ADR experience. However, we do not overlook the importance of negotiation between the parties as well as facilitated negotiation on which we include comments in Section 3 below.

2.2 Mediation allows effective communication between the parties to a dispute via a neutral third party, the mediator. The mediation process is confidential and without prejudice. It is these factors, together with the parties' trust of the mediator, that bring about open discussion of the parties' positions and full exploration of possible solutions to the dispute. Separate confidential sessions with the mediator allow the parties to speak freely and explore a range of options in private before sharing some or all of those options with the other party. The without prejudice nature of the process means that in the event that agreement is not reached, neither party can rely on information disclosed during the mediation in any litigation which then takes place, but they will have the benefit of having examined their positions honestly during the mediation and are likely to go to any litigation with a more realistic view of the likely outcome.

2.3 Confidentiality can be extended to the terms of any settlement agreement reached as a result of successful mediation, though there may of course be policy reasons why it may be necessary to disclose or publish the outcome. This needs to be made clear prior to any mediation.

2.4 The mediation process works best, in our opinion, when the mediator meets face to face with the parties. It is possible to mediate by telephone or in some circumstances online. However disputes which involve reliance on written evidence (as many tax disputes will) mean that even with the ability to share documentation online it is still most effective for the mediator to see and be able to discuss the relevant paperwork face to face with the parties.

2.5 This does not, however, mean that the process is slow or long drawn out. Most mediations – even in large scale commercial cases – can be completed a day or less. Of course, time must be spent preparing for mediation but this time is less about preparation of large amounts of evidence and more about the parties considering carefully and being ready to discuss the reasons why the dispute has arisen and the outcome which they hope to achieve. Even if a mediation fails this is rarely time wasted - it is a useful exercise in preparing for any subsequent litigation.

2.6 Mediation is particularly helpful in cases which are fact-intensive which would lead to protracted and expensive litigation. Often the cases have been long running resulting in entrenched positions. There may be

uncertainty regarding the interpretation of complex tax laws with the result that there is considerable litigation risk.

2.7 A single framework for mediation within a dispute resolution process ensures consistency and transparency.

2.8 In summary, the process of mediation permits both sides to review their positions through discussion with the mediator, reality testing and consideration of options for settlement. It allows for honest and frank consideration by each side of the strengths and weaknesses of their position because of the confidentiality of the private sessions. Barriers to settlement can be broken down more quickly and effectively than in other forms of dispute resolution.

Section 3 Mediation and Facilitated Negotiation in relation to tax disputes

3.1 The Finance Committee will have considered the use by HMRC of facilitated negotiation and mediation as part of its Litigation and Settlement Strategy. We believe that while facilitated negotiation as offered by HMRC (negotiation through an appropriately qualified HMRC employee with no prior involvement in the particular dispute) is a useful internal dispute resolution tool, offering taxpayers the possibility of involvement of a neutral third party with no connection to the tax authority would allow far greater engagement of the taxpayer in the process. Our experience as mediators is that even the most reluctant parties to a dispute will engage fully in the process if given the opportunity to speak confidentially to a mediator who has their trust. In our view, it is difficult to see how this can be true where the third party facilitator is part of the tax authority.

3.2 An important consideration is the timing of any referral to either facilitated negotiation or ADR. We recognise that there is a balance to be struck between the duty of the tax authority to collect in all tax properly due and the time and cost of dealing with disputes which may or may not result in a good percentage recovery for the tax authority. This is no different from the position of any commercial organisation which has duties to employees and shareholders to maximise income while at the same time recognising the need to be pragmatic in certain cases of debt recovery.

3.3 For the tax authority, mediation can offer a way of rapidly releasing funds tied up in unpaid tax bills while for the paying party it offers the opportunity of engaging in a process designed to allow both parties to be heard and to be involved in a mutually acceptable solution

3.4 Early referral to a third party neutral mediator can offer both sides to a tax dispute the opportunity to review their position before it becomes entrenched as a result of continued rehearsing of arguments. It is recognised by many tax lawyers that factual arguments can become increasingly convoluted causing disputes to run and run; early involvement of a skilled mediator can prevent this happening and allow both parties to find a way forward.

3.5 Time and money spent by the tax authority enforcing decisions is likely to be reduced where mediated settlements are reached. A settlement which is workable and sustainable is the object of mediation and has the benefit of being one which is less likely to be breached by the parties to it.

3.6 The opportunity to engage in mediation increases a party's feeling that it has a real chance of being heard in situations where disputes arise. This increases the perception of a fair economy which in turn makes investment in the area attractive and benefits the wider economy.

Section 4 Mediation and Facilitated Negotiation in the proposed legislation

4.1 The Welsh Ministers have the opportunity to benefit from the experience of HMRC to date in using ADR but also to put in place dispute resolution mechanisms which offer the possibility of

- Fully supporting the objectives of fairness, simplicity, efficiency and effectiveness of the processes of the WRA
- Giving a fresh image of fairness and collaboration to the WRA which is likely to be of benefit in the aim of attracting business investment in Wales

- Time and cost effective resolution of a high percentage of disputes between tax payers and the WRA.

4.2 Offering the option of third party neutral mediation on application by the taxpayer would in our view provide invaluable support to the WRA, enabling it to fulfil its primary role of administering devolved taxes. We would suggest that mediation be incorporated as a first tier option for dispute resolution. The Finance Committee may even consider automatic referral to mediation after an initial period of negotiation between a tax payer and the WRA results in stalemate. This may seem radical, but could have the effect of drastically reducing time otherwise spent in negotiation of individual disputes, freeing up staff to continue with their other roles.

4.3 The confidentiality and flexibility of the mediation process offers the benefit of settlement without setting precedents. However, there may be situations where publication of settlements would be necessary or beneficial. The status of settlements would need to be made clear in the legislation and provision made for transparency/publication where appropriate.

4.4 The method of appointing external mediators would need to be established. For efficiency and consistency, we would suggest that a panel of mediators appointed annually would be one option. There are a number of mediation associations who could be approached for tendering purposes. Welsh speaking mediators would clearly need to be available. These are all matters which will require further consideration.

Section 5 Note on Monmouthshire Mediation Practice - www.monmediation.co.uk

Alyson Houghton and Elizabeth Ashford are qualified solicitors who now practise full time as Civil and Commercial Mediators. We specialise in providing professional mediation services for a wide range of disputes between individuals, businesses and public sector organisations. We are trained by ADR group, one of the UK's leading mediation training and referral bodies.

We are also joint chair of the Association of Wales & Border Counties Mediators www.walesmediators.com which provides mediation across the whole of Wales and the bordering Counties, is accredited by the Civil Mediation Council and a member of the National Mediation Providers Association www.nmpa.org.uk.

In 2014 Alyson and Elizabeth sat on the Steering Group advising Skills for Justice and funded by the Welsh Assembly Government which considered the possibility of establishing a Centre of Excellence for Dispute Resolution in Wales. The recommendations, which were strongly in favour of such an initiative, were endorsed by Sir Alan Ward, Chair of the Civil Mediation Council and had cross party support.

We feel that there is now an opportunity for the Welsh Ministers to build on the work done by the Assembly to date on dispute resolution in Wales by incorporating provisions for Mediation the draft Bill.