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The Committee Clerk

Finance Committee
National Assembly for Wales
Cardiff Bay
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11 January 2017

Emailed to: seneddfinance@assembly.wales

Dear Sir/Madam

Consultation on the Landfill Disposals Tax (Wales) Bill (“The Bill”)

We welcome the opportunity to respond to the Finance Committee of the National Assembly’s call for evidence on the Bill. We attach at an appendix our specific comments on the Bill but the general points we would also like to make are set out below.

1. Since its introduction in the UK on 1 October 1996 landfill tax has been relatively successful in achieving its stated aims of changing behaviour in the waste treatment sector from environmentally damaging practices of landfilling waste material to more positive practices of developing and adopting less polluting treatment processes. The escalator applied to the standard rate has led to prohibitively expensive waste treatment technologies becoming viable and more widely implemented. This, along with other regulatory measures introduced to encourage diversion of waste from landfill has contributed significantly to substantial falls in the volume of waste material going to landfill sites. The tax has had a dual role – firstly to encourage behaviour change and secondly (arguably) to raise revenue. These two roles are not necessarily compatible and devolving the tax to Wales will give the Welsh Government the challenge of successfully managing both objectives.
2. The inevitable consequence of increasing the cost of landfill has been to increase motivation to deposit waste in unauthorised sites and to fly-tip. The Bill introduces a novel approach to this problem by bringing unauthorised disposals into the scope of the tax, providing the Welsh Revenue Authority (and the NRW) with an additional tool to combat illegal disposals. Given that landfill tax has proven successful in changing behaviour in the legitimate waste treatment sector there are good grounds for using landfill disposals tax to encourage further behaviour change in Wales.
3. As the tax is geographical – revenue arising according to the location of the landfill site – differences between the structure of Landfill Disposals Tax in Wales and Landfill Tax in England and differences in the approaches adopted by the different revenue agencies, can affect the level of waste being brought to landfill sites in Wales (on the border with England) and the revenue arising from the tax. Landfill tax is continuing to be revised in England in an attempt to address operational concerns and legal disputes, so a further challenge for Wales is to what extent revisions in England should be mirrored in Wales.

If you have any specific queries then please do not hesitate to get in touch.

Yours sincerely

Gareth Pritchard
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Appendix

1. Section 3(4) sets out that for a disposal to be a 'taxable disposal' the material must be 'waste'. Section 6 then goes on to better define what is meant by 'waste' in this context, stating that whether or not material is waste depends upon the intention of the person responsible for its disposal. Current legislation for landfill tax in England and Wales (Finance Act 1996, s64) contains a similar definition for the purpose of determining taxable material, specifying that if the person making the disposal does so with the intention of discarding the material then the material is 'waste' for the purposes of landfill tax. This definition has previously been the subject of high profile litigation including *HMRC v Waste Recycling Group Limited* (2008) EWCA Civ 849, which found that putting material to use within a landfill site meant that there could not have been an intention to discard it as waste and therefore the material was not part of a taxable disposal. HMRC subsequently sought to address this apparent gap in the definition by introducing legislation (Finance Act 1996, s65A) that specifically prescribed uses of material that would always be treated as taxable even if the material had a useful function on the site. In light of this litigation and the perception that defining taxable material by reference to what is in the mind of the person discarding it is difficult to establish empirically, HMRC consulted stakeholders during 2016 and on 5 December 2016 published plans to remove the waste criteria from the definition of a taxable disposal. These changes will come into effect from a future date (once the Finance Act 2017 receives Royal Assent). Thereafter, unless similar changes are introduced in Wales, there will be a fundamental difference between definitions of taxable disposals in Wales and those in England. As with any difference between the application of the tax in Wales and England, it will be important to consider the potential impact it may have on behaviour in the waste sector and whether the difference has the potential to draw waste into Wales or drive it out of Wales and into landfill sites across the border. Given the fundamental nature of this particular difference in definition, we recommend that due consideration is given to adopting a similar definition in Wales.
2. Sections 6 ('Disposal of material as waste') and 7 ('Disposal of material as waste: person responsible for disposal') specify that the person whose intention is relevant to determining whether or not the material is 'waste', is the operator of the site at the time of disposal, and a third party's intention is only relevant if that party makes a disposal without the knowledge of the site operator. We note that this also varies from the extant legislation in England where the intention criterion is not limited to the site operator but can also extend to a third party on whose behalf the site operator makes a disposal. This criterion has been examined at tribunal (including *Parkwood Landfill Ltd v Commissioners of Customs and Excise* (2002) EWCA Civ 1707) concluding that the intention of the person actually making the disposal to landfill is the relevant one rather than the intention of entities further back in the supply chain. In light of this it seems sensible that the more restrictive condition adopted in the draft Bill is the better, more appropriate one (notwithstanding our comments at 1 above).
3. Section 6(2) states that whether or not a person has the intention to discard material may be 'inferred from the circumstances of its disposal' – i.e. if the

material is deposited in a landfill then it is likely to be discarded as waste. In general, establishing tax liability by inference is challenging and we wonder whether this section provides any practical assistance.

4. Section 7 identifies that the person responsible for disposal is the operator of the site or, if a disposal is made by a third party without the knowledge of the operator, the person responsible is that other party. There are occasions where someone other than the recognised site operator controls material being deposited on a site with full permission of the site operator. It seems that the current drafting of the Bill does not recognise this 'controller' as having any responsibility for landfill tax for material deposited in a landfill site under their direction. Rather, under the Bill as drafted, the site operator holds all responsibility for this material even though the site operator may have little detailed knowledge of the quantum and weight of material being deposited by a site controller. We wonder whether a 'controller' of waste entering a landfill site should also be recognised by the Bill so as to ensure that such a person is held to account for the tax (perhaps jointly and severally with the site operator as is the case in extant legislation in England) and also to remove from the site operator a risk of exposure to tax on operations for which he has little detailed knowledge.
5. Section 8 (Landfill site activities to be treated as taxable disposals) sets out particular on-site uses of material that will be taxable. Similar activities are prescribed as taxable in England (Finance Act 1996 s65A - as noted in 1 above) but the need to do so will end once the Finance Act 2017 receives Royal Assent and the waste criteria is removed from the definition of a taxable disposal is removed. As commented above, if, after due consideration, the waste criteria is removed from the definition of a taxable disposal in Wales to reflect the changes in England, section 8 would also become redundant.
6. Sections 9, 10 and 11 (Exempt Disposals) provide exemption from the tax for material deposited at the same site for a second time (section 10) and for specified material deposited in pet cemeteries (section 11). Currently there are also exemptions for material removed from water courses, material arising from certain mining operations and qualifying material being deposited into quarries. We note that the Bill similarly allows for these materials to be tax free but does so by granting them 'relief' (in sections 26 and 27) rather than exemption. It is not entirely clear to us why some tax free material is classified as relieved from the tax in the Bill rather than exempt from the tax as in the extant legislation in England. Material falling into both categories will need to be reported in tax returns. We note that a relief is only available for relevant disposals made at authorised landfill sites so we query whether the underlying reason here is to restrict tax free status for unauthorised sites. In the absence of any strategic aims we consider that tax free treatment might be applied through exemptions only.
7. Section 16 sets out the tax treatment of qualifying (i.e. lower rate) mixtures of materials, stating that a 'small amount' of non-qualifying (i.e. standard rated) material which appears incidentally in a mixed load would not prevent the lower rate of tax being applied to the entire load. Taking a view on what is 'small' and

'incidental' will be difficult for taxpayers and for the WRA but given the inevitability that many loads will contain a mix of materials a subjective test of this type is unavoidable. We therefore endorse the inclusion in the Bill (s16 (3)) of a provision that regulations can prescribe what percentage constitutes a 'small' amount. Determining a percentage by weight or volume will also be challenging for taxpayers but this measure will provide greater clarity than that provided by the subjective terms 'small' and 'incidental' – particularly where there are disputes.

8. Section 21 provides for the weight of taxable material to be discounted for added water content. We are aware that the appropriateness of water discounts has become more contentious given that landfill regulations (we understand) seek to reduce or wholly prevent water being sent to landfill. Nevertheless, water discounting is available for material deposited in sites elsewhere in the UK including Scotland currently, so we endorse its inclusion in the Bill. In any case water discounting will only be available on approval by the WRA so the risk of abuse is minimal. Current legislation restricts water discounting to material where added water constitutes 25% or more of the waste material. In prescribing the conditions where discounting is available, section 21 of the Bill does not include such a requirement and, given that setting a minimum would appear to be quite arbitrary, we endorse this. It seems to us that the WRA, perhaps assisted by NRW will be better placed to determine whether the discount applies in the context of the specific material being deposited.
9. Part 4 of the Bill concerns disposals made at locations other than authorised landfill sites and seeks to tax unauthorised disposals. The deterrent effect of this measure may depend upon how readily and effectively it can be applied, and this would be hindered if the provisions are too complicated or difficult to apply. Areas of complication and contention may include:
 - a. Applying the tax to a person who owns land upon which unauthorised disposals are made (by someone else) and where it may be necessary to establish at tribunal that the landowner knowingly caused or knowingly permitted that such a disposal was made (s46(2)).
 - b. Timescales – the WRA will have 20 years after an unauthorised disposal is believed to have taken place to issue a Preliminary Notice advising the relevant person that the tax may be applied. A Charging Notice applying the tax must be issued by the WRA within the subsequent 45 days, and the tax assessed must be paid within the following 30 days. Given the extent of history that the person may have to review, a timescale of 75 days from the Preliminary Notice to payment of tax (and possible penalties) does seem disproportionately short (s47, 48, 49, 50).
 - c. There does not appear to be any provision in the Bill for the person to seek time to pay the assessed tax where, for instance, the matter is disputed and the person is in financial hardship.

10. Section 59 - where an unauthorised disposal has taken place this section provides for information to be shared with the WRA by a county council, borough council or the NRW. The nature of the tax is such that these bodies are intrinsic to its application and so each of them is likely to hold information relevant to waste disposal activities in Wales. In practice it seems likely that this information will relate mostly to authorised disposal activities and that the data relating to wholly unauthorised disposals will be very limited or – given the nature of the activity – negligible. In this context, it is important that the legitimate right to confidentiality of businesses in their dealings with each of the bodies concerned, is not compromised in the pursuit of information that may be of limited use to the WRA.