



FACULTY OF ADVOCATES

RESPONSE FROM

THE FACULTY OF ADVOCATES

IN RESPECT OF THE CONSULTATION: “DEVELOPING A SCOTTISH TAX TO REPLACE THE UK AGGREGATES LEVY”

Foreword: The Faculty of Advocates (“**the Faculty**”) welcomes the opportunity to respond to the consultation. The Faculty notes the Minister’s foreword to the consultation document, which states that the Scottish Government is “*seeking views on how a new and distinctive Scottish aggregates tax, replacing the UK levy, should be structured and operate*”.

On the information available to us it is not clear that there are, at this stage, any proposed features of a Scottish tax which are distinctive from the UK levy. Nor are we aware of any case being made for any departure from the current regime. We note as a matter of generality that the burdens on compliance and enforcement of aggregates levies across the UK will be lessened where unnecessary variation is avoided. This has largely been achieved in respect of other Scottish taxes such as Land and Buildings Transaction Tax and Landfill Tax. We consider that avoiding unnecessary variation supports the taxation canons of certainty, convenience and efficiency.

It is not for the Faculty to take a position on matters of policy. However, the Faculty is pleased to submit for consideration our response to this consultation. This is limited to the questions which relate to the legal or administrative mechanics of a Scottish tax in this sphere.

Where a question relates to a matter of policy that raises no legal issue of which we are aware, we have simply offered no answer.

As a generality, we would however point out that the nature of the levy is such that its operation requires expertise in aggregates and the aggregates industry on the one hand, and, on the other, expertise in tax law. We would therefore suggest that Revenue Scotland

should seek to ensure that officers working on the levy have a reasonable understanding of both those disciplines. In particular, it is suggested that this would be a better model than (for example) relying on employees of external agencies who do not have expertise in tax law to operate the levy.

Chapter 2: The Scope Of The Tax –Defining “Aggregate” And “Commercial Exploitation”

A9 – Treating imports as giving rise to a liability to aggregates levy supports the policy aim of reducing use of virgin aggregate. Given that policy, the Faculty would therefore support the taxation of imports of aggregate that are subject to commercial exploitation.

Chapter 3: Exemptions and Reliefs

A12 – Consistency with the exemptions currently under the UK Aggregates Levy would be desirable. Replicating these in the Bill will ensure that businesses are not unduly burdened by different substantive rules in Scotland and the rest of the UK. This will assist in creating certainty, convenience and efficiency – three of the six guiding canons of taxation.

A14 – Consistency with the reliefs currently under the UK Aggregates Levy would be desirable. Replicating these in the Bill will ensure that businesses are not unduly burdened by different substantive rules in Scotland and the rest of the UK. This will assist in creating certainty, convenience and efficiency – three of the six guiding canons of taxation.

A16 – Where a non-liability is based on the type of material extracted, this is known at the start and an exemption would be the appropriate mechanism. Where a non-liability is based on the eventual use to which a material is put a relief would be appropriate, because the use would only be known with certainty at this later point.

A17 – There may be merit in considering a Scottish relief where it can be shown that UK aggregates levy has been paid on that material. This avoids the undesirable risk of double taxation. However, (a) in the absence of any double taxation arrangements between Scotland and the rest of the UK, there is no particular reason why the Scottish government should take the risk of double taxation arising from rest-UK aggregates levy into account; (b) if an exemption or relief were to be granted, it would seem appropriate to provide for a relief dependant on evidence of export and the payment of rest-UK aggregates levy on the material in question; and (c) relief could be restricted to the amount of rest-UK aggregates levy (similarly to provisions for relief for foreign tax in the Taxation (International and Other Provisions) Act 2010, section 9). To illustrate the last point (c), if (say) Scottish aggregates

levy on a particular load of material were £2 per tonne, and rest-UK levy was £3 per tonne, if the load were exported to rest-UK and rest-UK aggregates levy were paid on it, then the whole of Scottish aggregates levy would be allowed by way of relief. If, by contrast, Scottish aggregates levy were £3 per tonne, and rest-UK aggregates levy were £2 per tonne, relief would be restricted to £2 per tonne, so that £1 per tonne would remain with Revenue Scotland.

Chapter 6: Registration

B1 – Certainty for the taxpayer is important in this regard. We suggest that consideration be given to providing a time limit within which Revenue Scotland must make a decision as to whether to register the tax payer. It is suggested that 40 days be considered.

Further, we note the possibility of material being commercially exploited by organisations which are only incidental producers, for example by exploitation from the site of a project, including by overseas-registered entities. Consideration ought to be given as to the registration requirements affecting these types of organisations.

B3 – With a view to creating a proportionate reporting regime, we consider that in appropriate circumstances requirements could be reduced to an annual confirmation statement that a taxpayer has not exploited anything beyond exempt aggregates. This would replace the requirement for quarterly returns showing a taxable volume of nil.

B4 – We foresee the key information required being the type of aggregate to be exploited and its proposed use.

B7 – We note the desirability of consistency in reporting obligations, exemptions and reliefs in respect of aggregates exploitation across the UK, in order to ensure that businesses are not unduly burdened by different substantive rules in Scotland and the rest of the UK. This will assist in creating certainty, convenience and efficiency – three of the six guiding canons of taxation.

Chapter 7: Tax Returns and Payments

B8 – With a view to creating a proportionate reporting regime, we consider that in appropriate circumstances requirements could be reduced to an annual confirmation statement that a taxpayer has not exploited anything beyond exempt aggregates. This would replace the requirement for quarterly returns showing a taxable volume of nil.

B10 – Supporting information ought to be kept by taxpayers for a length of time consistent with comparable Scottish and UK tax regimes to ensure consistency and aid compliance. It should be consistent with the information that Revenue Scotland would rely on in respect of

a future investigation. Relevant information is to be retained by taxpayers for 6 years, per Regulation 10 of the Aggregations Levy (General) Regulations 2002. We can see no reason to depart from that.

Chapter 8: Tax Compliance

B12 – The Faculty has no problem with existing rules on tax compliance RSTPA 2014 being applied in relation to this tax.

We note that a period of 3 years in which Revenue Scotland may open an enquiry is a long time, when information is being returned quarterly. There will be a reasonably modest number of taxpayers for this levy, meaning that Revenue Scotland might be expected to act more quickly. The important taxation canons of efficiency and certainty would be supported by a shorter time limit, such as one year.

B14 – As with any differences between the jurisdictions in a single economic unit, any differences in treatment between the two regimes could create the opportunity to mis-use those differences as a device to evade tax. However, we are not currently aware of any proposals which would cause undue concern in that regard. We are happy to comment further as plans progress in firming up the proposals for this tax.

Chapter 9: Tax Avoidance and Evasion

B15 – Faculty notes that underreporting is a relative straightforward example of tax evasion. Where this happens in respect of aggregates, it is likely that liability to both VAT and the Scottish Aggregates Levy will be underreported. In that scenario, as with the comparable situation in respect of Landfill Tax, the UK tribunal system would have jurisdiction for a claim brought by HMRC in respect of the VAT, and the Scottish tribunal system would have jurisdiction over a claim brought by Revenue Scotland in respect of the Aggregates Levy. This would require, if contested, the same factual situation to be argued twice in relation to tax liabilities (and possibly a third time in relation to criminal matters). It opens the possibility of conflicting judgments in the two jurisdictions of the UK's tribunal systems. The Faculty urges that some form of recognition of judgments between the two tribunal systems be investigated. Consideration should be given to whether there can be efficiencies engendered between the tribunals, to avoid the difficulties outlined above.

B16 – The common law offence of fraud appears to be an effective offence in respect of tax evasion. On that basis it would not be necessary to create a statutory offence.

Chapter 10: Penalties

B17 – Yes, we consider that the current devolved tax penalties would be appropriate for a new tax of this kind.

Chapter 11: Dispute Resolution

B19 – We consider that there would be merit in a proposal for postponement of tax pending an appeal against any assessment, or any amendment of a return. This is presently available in relation to land and buildings transaction tax, expressly under secondary legislation (Revenue Scotland and Tax Powers Act (Postponement of Tax Pending a Review or Appeal) Regulations 2015 (S.S.I. 2015 No. 129)); in practice, Revenue Scotland considers postponement under its general ‘care and management’ powers, which leads to significant uncertainty. Postponement of tax pending appeal is also allowed (if various conditions are satisfied) for all UK taxes (at least outside tax abusive arrangements / repeated tax avoidance arrangements). It is also generally the case in the operation of the civil dispute resolution regime as between private parties. We cannot see this should apply differently in respect of dispute resolution between taxpayer and Revenue Scotland, when Revenue Scotland is protected by interest and the sums at stake are generally more significant to the taxpayer than they are to Revenue Scotland.