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WELSH TAX ACTS etc. (POWER TO MODIFY) BILL

Dear Huw

Thank you for your recent letter following the Legislation, Justice and Constitution Committee's evidence session on 14 February 2022 in relation to the Welsh Tax Acts etc. (Power to Modify) Bill ("the Bill"). Please see my response to your questions set out below.

I also committed at the evidence session to provide further information in relation to the Welsh Government's intention to exercise the power in the Bill in order to make provision that has retrospective effect. Annex 1 sets out a number of examples of the types of situations where the UK government has introduced legislative changes with retrospective effect. I consider these to be illustrative of the way that the Welsh Ministers will seek to exercise the power should the Senedd approve this Bill.

1. Provisional Collection of Taxes Act 1968

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?

1. The Provisional Collection of Taxes Act 1968 ('PCTA') permits, through resolutions, the tax rates to be changed and imposed (such as the annual re-imposition of income tax). It can also permit significant changes to the rules relating to existing taxes to be made and commenced from a date before the legislation is introduced and approved by the UK Parliament.

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2. The changes given temporary effect by the PCTA resolution must be included in a Bill that has been read by the House of Commons for the second time within 30 days of the resolution or the resolution will cease to have effect. PCTA resolutions are most commonly encountered during the annual (or otherwise) UK Budgets. However, they have also been made outside those events where a change is announced that requires a resolution to bring those changes into temporary effect followed by a 'special purpose' Bill (as opposed to a Finance Bill) introduced to give permanent effect (subject to UK Parliament approval). Examples of such special purpose Bills include what became the Stamp Duty Land Tax Act 2015 and the Stamp Duty Land Tax (Temporary Relief) Act 2020.

3. The PCTA and its resolutions are most closely associated with the annual Finance Bill cycle. However, I do not consider the timing is right to introduce an annual tax or Finance Bill cycle here in Wales and it therefore follows that it is not currently appropriate to introduce a mechanism which would undertake functions similar to the PCTA.

4. Furthermore, I consider that even if there were an annual Finance Bill and accompanying PCTA mechanism here, we would still need the power provided in the Welsh Tax Acts etc. (Power to Modify) Bill. The Bill enables Welsh Ministers to respond to external events, which will not necessarily coincide with a Welsh Government Finance Bill cycle. For example, the UK Budget, at which changes may occur, is not on a fixed cycle and sometimes occurs more than once in a year (for example following a change of government at a general election or following a one off statement by the Chancellor). We may therefore find ourselves occasionally needing more than one Finance Bill each year in order to replicate any necessary changes to respond to UK Budget changes.

5. The Bill will also enable the Welsh Government to be far more responsive to wider changes (such as court decisions and avoidance activity) than is the case with the UK government where changes are often made only through a Finance Bill, and only effective from the date of the PCTA resolution, or Royal Assent.

6. The Bill will enable us to make changes as close to the date they should apply from as possible, and for those changes to be made in law. This differs from the UK approach where changes to respond to avoidance activity are sometimes made by announcement with legislation to be passed as part of a subsequent Finance Act, meaning there can be many months before the changes that must be applied become law. Or, alternatively the avoidance activity may be permitted to continue until the date of the Budget and the passing of a Provisional Collection of Taxes Act resolution.

7. Until the time is right for Wales to have an annual Finance Bill I do not consider a Welsh Provisional Collection of Taxes Act type mechanism is appropriate – and even when this point is reached, I still consider there will be an ongoing need for this Bill.

2. Scrutiny

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?

8. For all Welsh regulations, whether they are subject to the draft affirmative or made affirmative procedure, the date on which the vote occurs in the Senedd is proposed by

the Welsh Government. The proposed date for the vote on regulations made using the power in the Welsh Tax Acts etc. (Power to Modify) Bill would be no different.

9. For regulations made using the draft affirmative procedure, that period is whichever is the soonest of 20 Senedd days or the relevant committee reporting. Standing Orders do permit a longer time period than 20 days between laying and the debate where Welsh Ministers feel this to be appropriate.

10. Made affirmative regulations made using powers within the Bill must be approved by the Senedd before 60 days have elapsed. The Welsh Government will recommend a date for the vote that reflects the complexity of the legislation. That may be close to the 60 day limit, or it may be a shorter period where, for example, a very minor change is necessitated to the legislation.

11. It is also, of course, open to the Business Committee to propose alternative dates for the debates when it considers that more, or less, time is required for scrutiny before the vote. The respective 60 and 20 Senedd day requirements provide a flexible mechanism so that we, Ministers and the Senedd, can consider, on a case–by-case basis, what time is appropriate for scrutiny, reflecting the complexity of the regulations and the impact on taxpayers.

12. My intention is not to reduce the period of scrutiny, but rather to emphasise that I am looking to provide longer than, necessarily, the minimum period permitted by Standing Orders, and future Ministers will be advised to follow the same approach.

3. Senedd Lock

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?
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?

13. I do not agree that the decision to abandon the Senedd lock amounts to the removal of a significant safeguard against potential abuse of the power provided in the Bill. Rather, the scope of the Bill has narrowed considerably from that initially proposed in the policy consultation and therefore, in my view, the justification for the Senedd lock has, accordingly, reduced. The Welsh Tax Acts already contain a significant number of regulation making powers (largely subject to the draft affirmative procedure) which indicates that the Senedd, in scrutinising and passing those Acts, has recognised the importance for the Welsh Ministers to have powers to make such changes. However, I recognise there is greater caution with regard to the provision of a power which may be subject to the made affirmative procedure in urgent circumstances.

14. I have responded to concerns raised by consultees on the broad and open-ended nature of the original proposals for the power, where any changes could be made that the Welsh Ministers considered to be expedient in the public interest. The Bill has been drafted specifically to limit the circumstances in which the power can be used. The introduction of the four purpose tests significantly constrains the use of the power, which can only be used to respond to the specified external events and – for the draft affirmative procedure - only when Welsh Ministers consider it necessary or appropriate in relation to the four purpose tests. The made affirmative procedure is further

constrained and may only be used when considered necessary and in cases of urgency. As such, I consider there are robust and proportionate safeguarding measures in place.

15. I would argue the Senedd has already set a precedent in relation to the made affirmative procedure, by giving the Welsh Ministers powers to make changes to the rates (and where appropriate) the bands that apply to the devolved taxes by made affirmative procedure regulations, without the need for a Senedd lock. The precedent for changes that potentially affect all taxpayers with immediate effect, exercised by made affirmative procedure regulations, has already been provided by the Senedd. The exercise of that power also includes similar protections for taxpayers to those that have been provided by section 5 of the Bill.

16. The Committee should also note that the vote to unlock the power would not present the Senedd with additional opportunity to scrutinise the regulations at that stage. Furthermore, the Committee should note there are also practical issues in relation to how the Senedd lock would operate. For example, the Senedd may need to be recalled during recess to unlock the power. If this were not possible, there would be an inevitable delay in bringing forward the legislation, thereby defeating the purpose of the Bill to make rapid changes to the law. In addition, the disclosure of the vote for the 'release' of the lock, and any information provided to Members before the regulations are made could create an opportunity for forestalling - that is taxpayers may delay or bring forward the timing of a property transaction, or other action for other devolved taxes, to benefit from pre-announced tax changes.

4. Broad use of regulation-making powers

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?

17. I recognise that the inclusion of a regulation-making power to amend primary legislation will, and rightly should, raise questions amongst Members and wider stakeholders. I agree that in circumstances where law is made as a result of considered policy development, and not required urgently or in response to external events, it is right that the Senedd should determine who is taxed, in accordance with the constitutional principles set out in the Government of Wales Act 2006. That is the procedure that was followed in bringing the Welsh Tax Acts into force.

18. However, the power within the Bill is not intended to cover the ordinary circumstances of law making. It is intended to afford timely protection to Welsh taxpayers and the Welsh Government's budget, by allowing the Welsh Ministers to make amendments to Senedd legislation for specific purposes and in specific circumstances, subject all the while to Senedd scrutiny. It is important to remember that any tax law made by the Welsh Ministers will require the approval of the Senedd. Although the law will be made by the Welsh Ministers for reasons of necessity, appropriateness, and/or urgency, the Senedd

will have the ultimate sanction over those regulations and the taxpayers are protected in the event that the regulations fail to gain approval by the Senedd.

19. I think the need for this legislation and the current vulnerability to Welsh devolved tax revenues is recognised. Furthermore, this principle has also been accepted by key stakeholders.

20. There are several measures in place which aim to improve the degree of scrutiny, which I hope should help to allay Senedd concern. The regulations must be made either using the draft or made affirmative procedure, ensuring that all the regulations are voted upon by the Senedd – there is no ability to make regulations using this power that are subject to the negative procedure process. As set out in question 2, the Bill also aims to provide appropriate time for detailed scrutiny of the regulations that reflects the complexity of the regulations and the impact on taxpayers.

21. Importantly, the power has also been constrained by the inclusion of four purpose tests to ensure it can only be used in those specified circumstances to respond to external events and activity and only where considered "necessary" or "appropriate".

22. Also, in contrast to primary legislation, it is possible to challenge the validity of secondary legislation by judicial review, providing an additional safeguard outside the scope of the Bill.

5. Regulation-making powers – procedure

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?

23. I do not consider that any of the four purpose tests should be excluded from the made affirmative procedure or be prevented from having retrospective effect The purpose tests have been specifically developed to capture scenarios where Welsh Ministers may need to respond to external circumstances and at pace.

24. Taking each of the purpose tests into consideration:

25. In response to changes to 'predecessor' UK taxes (that is, stamp duty land tax or landfill tax) which impact or could impact the amount paid into the Welsh Consolidated Fund – it is clear that we need the ability to respond at pace to such changes and therefore the made affirmative process will, in some circumstances, be appropriate.

26. Similarly, in the case of protecting against avoidance activity in relation to landfill disposals tax and land transaction tax, having the ability to use the made affirmative procedure means that the change can be made with immediate effect. This includes cases where increased clarity in the legislation will put beyond doubt the intended application of the legislative provisions, and potentially benefit taxpayers by stopping the promotion of avoidance opportunities that do not actually exist. Such action has been taken by the UK government to protect tax regimes and taxpayers in the past and I wish to be able to take similar action.

27. For non-compliance with any international obligations it is right that we are prepared for changes to be made - and if such a non-compliance were identified then Welsh Ministers may feel it necessary to introduce a change at pace using the made affirmative

procedure and with retrospective effect. Failure to comply could have reputational risks for the Welsh Government and reflect on Wales more generally, impacting on potential inward investment. Failure may also oblige some taxpayers to file their returns in a manner that is contrary to the international obligations, necessitating amendments at a later date when compliance with the international obligation is reflected in our law (assuming the change is made with retrospective effect).

28. Similarly, where a court or tribunal decision identifies an issue that Welsh Ministers consider could benefit from legislative change, or highlights an area of existing law which could benefit from greater clarification, then it may be necessary for Welsh Ministers to introduce such a change urgently.

29. This Bill seeks to find the appropriate legislative solution for the current situation on our devolution journey. The relationship between the revenues available to the Welsh Government from our devolved taxes and the effect on our Budget of the UK government's changes to the predecessor taxes is particularly illustrative. That relationship has only recently arisen. It is worth remembering that devolution itself is a relatively recent constitutional change, with our devolved taxes only commencing operation four years ago (and in Scotland only seven years ago).

6. Regulation-making powers – changing existing law

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?

30. I am not convinced that a legislative sunset provision would work in practical terms within the Welsh legislative context. For example, if a sunset clause ending after five years was placed within this Bill, then after that point any regulations made using the enabling power within the Bill would fall away. Such sunset clauses in relation to individual sets of regulations may create uncertainty as that date approaches as to whether the legislation would remain in force or not.

31. There is also a possibility that the removal of the changes introduced by the regulations may lead (due to further changes) to other consequential changes being required so that the legislation continues to operate in a coherent manner.

32. The sunset clause proposal stems from the rules in section 109 Finance Act 2003 that enables changes to be made to most of the SDLT legislation where the Treasury Ministers consider it to be expedient in the public interest. The sunset provisions within the regulations are triggered 18 months after the regulations are made or such shorter period as may be specified in the regulations. The purpose of the sunset provisions is to provide the Treasury Ministers with the opportunity to incorporate the changes made by those regulations into a subsequent Finance Bill. The UK government generally has a Finance Bill annually enabling this to be achieved.

33. We do not currently have an annual Finance Bill in Wales and therefore have no guaranteed legislative vehicle to 'mop up' such sunset provisions and allow them to continue as law. This is why I do not feel such clauses are appropriate at the present time.

34. Furthermore, there is a concern that sunset provisions create uncertainty for taxpayers and their advisers as to whether the legislation subject to the sunset provisions will be permitted to continue after the sunset date passes, or will fall. This was discussed at my second appearance at the Finance Committee[1].

35. It is accepted that all legislation can be changed by further legislation being passed and, within reason, this can happen at any time. However, I would argue that a sunset provision creates greater uncertainty because of the requirement, to legislate to *maintain* the existing effect of that legislation, and to avoid unwanted legislative consequences. Whereas taking no action in relation to legislation with no sunset provisions would have no similar effect.

7. Regulation making powers

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?

36. I agree that in theory the power in the Bill could be used to change existing regulation making powers or/and associated Senedd approval procedures. However, I consider the possibility to be remote.

I cannot envisage a situation where the power provided by the Bill would be used to change any of the existing regulation making powers or/and Senedd approval procedures. Given that one of the four purpose tests must be met to trigger the use of the power, and the use of that power must be "necessary or appropriate", it is difficult to see how this situation would arise, particularly in relation to the first three purpose tests.

37. In relation to the fourth purpose test, I believe it *may* be possible that a court decision related to the regulation making powers or/and procedures associated with the approval of regulations could impact on our legislation as a result of a 'surprising' decision. As such, it would be advantageous for the power in the Bill to be capable of use in these circumstances, whether that court decision is made in relation to the Welsh Tax Acts, other UK governments' taxes or other regulation making powers or approval procedures to the extent there is a read across to the Welsh Tax Acts. Again, however, in these circumstances any change would still need to pass the necessary or appropriate test before regulations could be made.

38. Annex 1 provides details of examples of the use of retrospective legislation in relation to UK government taxes. I think example 3 is relevant in consideration of the wide and at times surprising impact court decisions can have on the operation of taxes. If a decision impacted on the validity of all or certain regulations made then, in the absence of an ability to respond quickly, this could result in significant ramifications. For example, many taxpayers (especially the very well advised) could lodge claims that tax paid by them, and which they previously believed was correctly paid, should be repaid as the relevant power was not exercised appropriately, or the Senedd approval procedures were in some way lacking. This may seem far-fetched, but, as example 3 shows, such surprising decisions can occur and absent swift and retrospective action significant impacts could arise. I therefore remain of the opinion that the provisions in the Bill remain appropriate in this regard and that, exceptionally, they may need to be used to make changes to the regulation making procedures.

[1] Finance Committee 16/02/2022 - Welsh Parliament (senedd.wales), paragraphs 163-176.

8. Tax Collection and Management (Wales) Act 2016

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.

39. It is not feasible at this stage to anticipate every potential future circumstance which may give rise to an amendment to the Tax Collection and Management (Wales) Act 2016 (TCMA)[2], however I have been careful to exclude any potential amendment to the operation of the WRA in Part 2, because that is something that quite rightly ought to be reserved to primary legislation. Part 2 of the TCMA sets out the establishment, membership and operation of the Welsh Revenue Authority.

40. The Explanatory Notes[3] to the TCMA set out the purpose of each Part of the Act and I attach a link to that document for the convenience of the Committee. I should re-iterate here that in the event that a particular circumstance did arise, legislative change would only be possible if one of the four purposes tests was triggered.

9. Power to impose retrospective taxes by secondary legislation

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?

41. Despite the fact there are no comparable examples of such legislation in the UK, there are reasons why such legislation is right for Wales in certain circumstances and I contend that those circumstances are appropriately reflected in the four restrictive purpose tests set out within the Bill. It should also be remembered that we are dealing here with tax legislation whose primary impact relates to money paid or payable to the tax authority, rather than, for example necessary restrictions on peoples activities and movement as was the case with the Covid regulations.

42. Where Ministers exercise the power in this Bill using made affirmative procedure regulations, even where those regulations make changes that will have retrospective effect, Section 5 of the Bill provides protection for a taxpayer to reclaim additional tax paid as a result of the regulations. This is different from other made affirmative procedure regulations, especially the recent Covid regulations, in that the effect of the regulations that fail to receive Senedd approval can be unwound – the tax can be reclaimed meaning that the risk in relation to the made affirmative regulations rests with the Welsh Ministers and not our citizens and businesses.

10. Retrospective regulation-making power

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?

43. I can understand Sir Paul's comment and have a degree of sympathy with it. However, I also consider that the Bill has been drafted in a way so to achieve the Welsh

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[2] Tax Collection and Management Act 2016 is available at: http://www.legislation.gov.uk/anaw/2016/6/contents/enacted

[3] Tax Collection and Management Act2016 Explanatory Notes is available at: https://www.legislation.gov.uk/anaw/2016/6/notes/contents

Government's aim of providing the necessary tool to enable it to address four specific external events that may impact on the operation or revenues of the devolved taxes. The Welsh Government is seeking to provide the right tool, with the right safeguards, for the stage we are at on our devolution journey. The external event that raises greatest concern is the introduction of a significant change to a predecessor tax that will require a response by the Welsh Government. As I have said, the Welsh Government, unlike the UK government, needs to address changes made by that government to its taxes that can impact the budget of Wales.

44. Retrospective regulation making powers, whilst not the norm, have been used numerous times within UK government legislation. Section 10(2) of the Human Rights Act 1998 allows a Minister of the Crown to amend primary legislation via secondary legislation to ensure that that primary legislation is compatible with a Convention right in situations where a court has determined that the primary legislation is incompatible.

45. An example of secondary legislation made using this power is The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Remedial) Order 2011[4]. That Order amended the 2004 Act retrospectively as a result of a court decision that recognised that immigrants should have equal status regardless of marital status. Further, regulations have been made in England, Scotland and Wales using retrospective provision within section 34(3) of the Fire and Rescue Services Act 2004[5]. This provision allows legislation to be made retrospectively and not just backdated to the date of the announcement.

11. Section 1: General

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?

46. There have been no specific external events that have yet arisen that the power in the Bill would have been used to address. The power provided by the Bill is being sought at this point to provide the necessary tool to address future anticipated external events.

12. 'Necessary or appropriate'

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?

47. It is my view that the wording used within Section 1 does place sufficient restraints upon the use of the power, whilst also permitting a certain degree of flexibility. Section 1(1) states that the Welsh Ministers must consider the regulations are "necessary or appropriate" before they can be approved. It is my view that the term "necessary" sets a high bar, with the courts giving it a meaning including a degree of compulsion. Case law has determined that "something is necessary not if it is useful, reasonable or desirable but only if there is a pressing need for it".

[4] S.I. 2011/1158
[5] See: Fire and Rescue Services Act 2004 (legislation.gov.uk)

48. This will cover a scenario where the Welsh Ministers consider it necessary to exercise the regulation making power (a high bar) or where they consider it appropriate to do so (where it is suitable or proper in the individual circumstances).

49. I would not say that the "necessary test" is always satisfied when considering which regulations to make, because section 1(1) states that the regulations must either be necessary or appropriate, thereby providing Welsh Ministers with alternative tests to choose from depending upon the circumstances.

50. There may be times that the making of a change would be appropriate, such as if a change was desirable following the making of a first set of regulations to, for example, remove a class of taxpayer unintentionally captured within the changes or where the scrutiny indicates that changes are wanted. Such changes may not be "necessary" but they will, if the Welsh Ministers want to make them, be "appropriate". A further example would be if the Welsh Ministers wanted to make a change to provide a reduction in tax following changes to SDLT – again, such a change may not be "necessary" but may certainly be considered "appropriate" to confer an equal benefit to taxpayers or to protect the tax base.
51. I also re-iterate here that even with the test "necessary or appropriate", the regulations will still be subject to the four purpose tests, which provides a check upon the Welsh Minister's power to legislate.

13. Section 1 – international obligations

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?

52. The definition of international obligations excludes "obligations to observe and implement the Convention rights" because these are obligations that are already provided for in domestic UK law within The Human Rights Act 1998.

14. International obligations and Landfill Disposals Tax

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?

53. I agree it may not be readily apparent how international obligations may impact our devolved taxes. Evidence has been given previously to the Finance Committee that the UK's membership of the European Union had previously resulted in an obligation to provide charities relief for qualifying EU and EEA charities on the same basis as UK charities. Similar parity of treatment rules in relation to charities or other aspects of LTT may be required as a result of future trade agreements etc.

54. In relation to LDT, whilst a direct example is more difficult to identify, it is worth noting that the definition of 'non-hazardous waste' has the meaning given in Directive 2008/98/EC of the European Parliament and of the Council of 18 November 2008 on waste. This indicates that treaty obligations can impact on areas of landfill policy. Trade agreements may have a lesser impact, but other treaty obligations, perhaps in relation to environmental issues could still impact.

55. As to whether the changes are required at short notice it is worth remembering that the UK government is not always proactive with sharing changes that may arise through its own policy initiatives let alone when, at first blush, the issue (international treaties) appears to fall firmly within reserved matters. I also consider it is better to be able to say 'our legislation does comply with international obligations' than 'our legislation will comply with international obligations'.

15. Section 1 – anti-avoidance purpose

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?

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?

56. Tax avoidance is artificial or contrived planning (sometimes based on a 'novel' reading of the legislation) that achieves a result not intended by the Senedd. Whereas tax planning, in line with the intent of the provisions, is a perfectly reasonable response to that legislation.

57. I have provided evidence to the Finance Committee on the meaning of 'tax avoidance' and why I have chosen to not define this term in the Bill and I have summarised these arguments below. HMRC has provided some helpful guidance[6] for their taxpayers on what is avoidance and many of the principles hold true for the devolved taxes.

58. The provision refers to "protecting against tax avoidance" and a similarly broad definition is used in section 12 of the Tax Collection and Management Act to describe WRA's main functions in relation to tax avoidance. The Welsh Ministers and the WRA are trying to address the same thing here in terms of tax avoidance, and so it is appropriate to describe this in the same terms.

59. The definition in the GAAR will apply broadly to tackle artificial arrangements that create a tax advantage that the Senedd did not intend when enacting the relevant legislation. The GAAR has not yet been tested through the courts and so there is the possibility that there are avoidance arrangements that could fall outside of this definition but to which we'd need to respond to quickly. Aligning the definition in the Bill with that in the GAAR would increase the risk to Welsh finances and fairness for all taxpayers, as the GAAR might not be engaged and there would be a limited ability to respond quickly to close the loophole.

60. Whilst I recognise a precise definition of what constitutes avoidance activity may be attractive, it is not possible to provide that degree of certainty. If defined too narrowly, there is a risk that Welsh Ministers might find the ability to make regulations is too restricted. Also those seeking to bend the rules may structure their affairs in a way that just fell outside of a narrower definition, but would still achieve a tax result which was contrary to the intentions of the Senedd when passing the original legislation. I think these points have been acknowledged by tax practitioners, and evidence was provided

[6] Introduction to tax avoidance - GOV.UK (www.gov.uk)

to the Finance Committee which recognised the difficulty of providing a precise definition, with some, broadly, favouring the definition in the Bill.

61. An example, of past avoidance activity in relation to SDLT may help illustrate 'tax avoidance'. Many SDLT schemes were structured to exploit the sub-sale rules. One such scheme sought to allow SDLT to be substantially avoided by a couple buying a home in a way that meant that one spouse contracted to buy the house for the full price, paid 85% of the consideration, but, before the sale was completed, 'subsold' the property to their spouse. The consequence of the sub-sale, it was contended, meant that only the remaining 15% of the consideration attracted a tax charge meaning that those buying homes costing millions paid something closer to the tax paid by a person buying an average priced house. The sub-sale rules, which have now been changed, existed for legitimate reasons, but I would suggest that a couple buying their home in this manner is most definitely avoidance rather than merely 'lawful tax planning'.

62. It is sometimes suggested that Individual Savings Accounts (designed by the UK government to encourage citizens to save and provide for the income and gains within the ISA wrapper to grow without being taxed) are 'tax avoidance'. I think that it stretches and obfuscates the meaning of 'avoidance' to try to compare an ISA with the example provided above. One is clearly outside what a reasonable person would expect to be reasonable behaviour or a reasonable tax outcome, the other is responding in the manner that Parliament and the UK government intended. Similarly, pension saving where tax relief is provided on the contributions made, but with tax paid when payments are made to the pensioner, is also not tax avoidance. Rather both form part of tax planning.

16. Section 1 – scope of anti-avoidance purpose

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?

63. It is correct that the power in this Bill could technically be used by the Welsh Ministers to amend elements of the GAAR. However, such changes would still need to pass the 'necessary' or 'appropriate' test and be in response to an external event, and in the case of made affirmative regulations they would need to be necessary by reason of urgency.

64. It is difficult to see how the conditions for exercising the power would be met for changes to the GAAR as a result of the avoidance activity it is designed to target. In those instances, the response might include a legislative change using the new power, but that would most likely be an amendment to the actual LTT or LDT provisions themselves – closing a perceived 'loophole' or putting the interpretation beyond doubt. Likewise, it appears unlikely that an amendment to the GAAR provisions themselves would be necessitated as a result of UK budget changes.

65. Where the new power could be used, potentially, is in response to a court decision that found the GAAR legislation to be 'defective' in some manner or supported an interpretation of the GAAR provisions that changed its application beyond what was intended by Senedd, for example taking an unexpected approach to what is meant by

'artificial'. The impact of the decision could make the GAAR less effective, potentially impacting on the WRA's ability to tackle other ongoing avoidance cases.

66. It is also possible that a court decision could render the GAAR 'too' effective, capturing more transactions than intended. In both scenarios, the ability to make a swift amendment to the GAAR itself to enable it to operate effectively as intended is an important safeguard.

67. It is, of course also, worth remembering that the changes made will only be brought into force or given permanent effect, if the Senedd approves the regulations. At this stage, I am open to considering whether it would be appropriate for there to be additional restrictions in regards to the ability to make changes to the GAAR and look forward to seeing the Committees recommendations. Members should be aware though, that in the event that a court decision finds the GAAR to be ineffective the agile and flexible route to making the necessary changes will not be available as a result of such an amendment, and in Wales we could have a period without an effective GAAR to protect our tax base.

17. Welsh Revenue Authority – tax avoidance powers

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?

68. The WRA has powers to conduct enquiries into the returns that taxpayers make, to make determinations or assess tax that has not been included in a return if necessary and to impose penalties including where taxpayers file inaccurate tax returns. These powers are largely within the Tax Collection and Management Act (Wales) 2016: for example Part 4 contains the WRA's investigatory powers, and Part 8 contains the rules concerning reviews of and appeals against decisions of the WRA when the taxpayer and the WRA fail to agree. The anti-avoidance rules contained within the Welsh Tax Acts include primarily the General Anti-avoidance Rule in Part 3A of the Tax Collection and Management Act (Wales) 2016, and in relation to LTT, the targeted anti-avoidance rule in section 31 Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017[7].

69. The Welsh Government and WRA are not currently aware of any changes that may be required to the devolved taxes to stop any avoidance activity. For both devolved taxes, there is, sadly, always the risk that there will be individual or mass-marketed avoidance activity that the Welsh Government and WRA will wish to stop with immediate effect. This could be because there is a lacuna or gap in the legislation that facilitates the avoidance activity, or, based on the UK experience, a need for clarity to the legislation to make it clear the law operates in a manner that does not permit the avoidance activity.

70. The experience of the UK government with the predecessor taxes does though indicate that when concerted efforts are made to exploit perceived loopholes for avoidance purposes that small legislative fixes or clarifications can stop the particular avoidance activity dead.

71. Therefore the introduction of this new power is not intended to address current perceived deficiencies or 'loopholes' in the devolved tax legislation, rather it is to provide an additional tool to protect revenues from unexpected attacks in the future.

[7] Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 (legislation.gov.uk)

72. Furthermore, it is worth recalling that the tools available to the WRA enable it to counteract instances of tax avoidance where a tax advantage has already been sought by the taxpayer. The new power introduced by this Bill will enable Welsh Ministers to make legislative changes to close down opportunities for avoidance before taxpayers attempt to claim such an advantage.

73. Finally, the new power could be used where a court decision relating to the use of the WRA's powers either renders them less effective, or even too effective, in a similar way to the GAAR as described above. Again, the new power may be an important means to redress the situation in a timely manner and return us to the position where the WRA's existing powers continue to operate effectively.

18. Welsh Revenue Authority - GAAR as an effective deterrent

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?

74. I do agree with the WRA's assessment that the GAAR is an effective deterrent and I welcome the robustness of the legislation to date. However, I also recognise this legislation is still relatively new. I take the risk of tax avoidance very seriously and the possibility of circumstances changing in the future, for example, changes may be made to the current devolved taxes, and, of course, new devolved taxes may be created, should not be ignored - things may arise that require us to take action very quickly. This Bill offers an opportunity to further strengthen the use of these already effective powers and I think that should be welcomed.

19. Section 1 – courts and tribunals

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?

75. The WRA have not yet identified an issue that will require a legislative change in relation to a tribunal or higher court decision. There have been only two WRA First-tier tribunal decisions to date, both relating to penalties. Nor have they, or my officials, identified a court decision in relation to any predecessor tax, or other decision, that might necessitate a legislative response by the Welsh Ministers. That is, firstly, because there is often a time lag between the taxpayer's transaction or actions and the case reaching the Tribunal for hearing. For example, the most recently published SDLT case[8] (a Court of Appeal decision in February 2022) relates to two separate transactions that occurred in October 2015 and March 2016 (before the LTT Bill was even introduced). The First Tier Tribunal released their decisions in July and December 2019, and the Upper Tribunal in March 2021. Secondly, many of the SDLT sub-sale cases that were decided before and after our devolved taxes went live relate to legislation that differs from the LTT legislation,

[8] Hyman and another v Revenue and Customs Commissioners - [2022] All ER (D) 89 (Feb)

meaning that there is no need for a response from the Welsh Ministers. It is also worth emphasising that HMRC have had a very strong record of winning SDLT cases; it is when there is a loss that a legislative change is more likely to be needed.

76. In addition, it is still relatively early days for devolved taxation in Wales – just because there has not yet been a need to respond to any court or tribunal cases does not mean that we will not need to do so in the future.

77. In many cases, taxpayers have the right to challenge the WRA's application of devolved tax law in respect of decisions taken relating to their affairs. Taxpayers can request a review of the original decision by the WRA, or they may choose to appeal. Those appeals are heard by the Tax Tribunals and the higher courts. It is possible that the decision of the court will result in the court finding that the law operates in a manner that differs from what the Welsh Government and Senedd intended when drafting and approving the legislation. In such cases it may be desirable for the Welsh Government to amend the legislation so that it operates in the way that was originally intended.

78. This power is also intended to provide clarity where a tribunal finds in favour of a taxpayer and the Welsh Government is content with the law operating in that manner (and vice versa where the Welsh Government wins the case but the clarity of legislation can be improved).

79. As with my earlier response in relation to protecting against tax avoidance, no necessary legislative response has been identified at the present moment in response to a Tribunal or higher court decision. This purpose test is included to ensure that when such a decision is made the Welsh Ministers can respond in an agile manner (see for example Annex 1 that sets out some of the court decisions that did, or might have, necessitated a legislative change (and perhaps retrospectively).

20. Retrospective legislation in response to a court decision

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?

80. I am grateful to Professor Lewis for raising this issue and note the concern around the use of the power to make changes that are to apply retrospectively whether in relation to court decisions or to the other purpose tests.

81. I am open to considering further whether it is appropriate to restrict the ability to legislate retrospectively back only as far as the date of a Welsh Government announcement. In particular, I agree this should be given consideration where a change – that is, a monetary cost - may impact negatively on taxpayers. If taken forward, I consider the 'date of the announcement' should be capable of including more than just the publication of the specific legislation, but also include 'warnings' that taxpayers could reasonably take to indicate that action in a specific area of the legislation will be taken. This policy position would of course be published within the policy statement on retrospective legislation. However, as set out in paragraph 86, I also consider that we need to approach the restriction of the power to legislate retrospectively with caution.

82. In addition, I consider any such restriction should still allow the Welsh Ministers to use the power to make changes with retrospective effect further back than the date of

any announcement where that change only reduces the tax charged. This is so that we can make changes to our legislation to reduce our taxpayers liability to pay tax to a date before the announcement, for example if responding to a UK Budget change to make sure that our taxpayers can benefit from the reduction at the same time as taxpayers in England. It will also be desirable to make changes retrospectively where a category of taxpayers may have been inadvertently caught within the charge to tax when that is not the intention. Such a situation may arise where regulations have been made and scrutiny of the regulations, or subsequent events, indicates that a change should be made. By permitting retrospective regulations to be made in these circumstances we would avoid the need to use a Bill to make changes retrospectively at a later date.

83. This need to 'double' legislate (regulations and a Bill) was encountered by The Scottish Government when they introduced changes to the land and buildings transaction tax ('LBTT') additional dwellings supplement ('ADS') (the higher residential rates in LTT). A set of regulations[9] were laid in draft making changes that provided for more transactions to not be subject to the ADS. Those regulations only had effect from the date they were made (29 June 2017) following the vote to approve the making of them. A year later (22 June 2018) a very short Bill[10] received Royal Assent to give the regulations retrospective effect to the date the ADS commenced (1 April 2016). In relation to regulations made using the power provided by this Bill I would like to avoid the need to 'double' legislate, especially where the effect of the regulations is to reduce taxpayers' liability to a devolved tax.

84. Annex 1 sets out a number of examples of the use of retrospective legislation that come from the UK government's experience of tax and the accompanying warnings and announcements. Whilst the first two examples do not relate to a response to a court decision, the third example does.

85. The examples identify issues that we will want to ensure are addressed if any further restrictions on the use of the power are included in the Bill.

86. The third example in Annex 1 demonstrates the potential risk created in relation to how the Welsh Ministers can respond to a court decision when the retrospective change is limited to the date of the announcement. We would not be able to use the power to make changes as HMRC did in response to this type of court decision (and the 'what if' example based on the Pollen and Kings College case[11] for SDLT) as there is no announcement to provide a relevant earlier date. The example demonstrates the good policy result that is achieved by making changes to protect taxpayers, and the tax system more generally, and which we will not be able to use the power provided by the Bill to address. That change was not to address any avoidance activity that the taxpayers had knowingly undertaken aware (or they should have been aware) of a warning that retrospective legislation would be used to stop certain activity. Rather it changed the rules retrospectively for all taxpayers who had not yet made a challenge based on facts similar to those that led to the court's decision. For those who had made such a challenge they could still maintain that position based on the pre-amended legislation. I believe that this retrospective change struck the right balance between the protection of individual taxpayers and the tax system and population as a whole. Furthermore, I consider that the ability to legislate retrospectively in similar circumstances is essential for the Welsh

[9] The Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 (legislation.gov.uk)
[10] Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018 (legislation.gov.uk)
[11] [2013] EWCA Civ 753-Court of Appeal Judgment Template (pumptax.com)

Government and I would wish for the power to be capable of being used in this manner.

87. There is a wealth of case law that gives governments quite a wide margin of appreciation in terms of retrospective tax legislation. The most obvious challenge in terms of tax would be to Article 1, Protocol 1 of the ECHR, which provides for the right to enjoyment of possessions. In these types of cases, taxpayers have argued that the money that they would have paid in tax is a possession. But overall, in the majority of cases, the courts have given governments a wide appreciation, on the basis that Article 1, Protocol 1 is a qualified right rather than an absolute right. Accordingly, if there is a public interest in the government pursuing a particular policy, then the courts have accepted that. The courts have always considered the balance between the rights of the taxpayer and the public policy that the government is trying to pursue. The first example in Annex 1 sets out clearly the courts approach to these matters.

88. Case law has also established that government legislation which is retrospective is not devoid of reasonable foundation for the simple reason that it is retrospective. Again, there is a balance to be struck between government policy and the individual rights of the taxpayer.

21. Section 2 - Penalties

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?

89. It is foreseeable that court decisions, for example, could impact on the interpretation of penalty provisions, or the process of applying penalties, in a way which made them less effective or led to unintended consequences. In that respect, I consider it is prudent to retain the ability to make changes to those penalty provisions at speed should the need arise. I do, however, recognise that changes to penalty regimes are relatively rare. Furthermore, for the power in this Bill to be used in this way the situation being addressed would need to meet one of the four purpose tests set out in the Bill, in addition to the Welsh Ministers being satisfied that such amendments are necessary or appropriate.

22. Retrospective effect – Supreme Court approval for special justification

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". Does the Minister accept this position? How do the provisions in the Bill comply with this principle?

90. I accept that retrospective legislation is not to be made lightly and without a clear justification but I can confirm that, in relation to taxation, the courts have been supportive of the use, of retrospective legislation in certain circumstances. The requirements on the Welsh Ministers to act within the law, and the publication of their policy statement on the use of retrospective legislation help to ensure that the power in the Bill can only be used in a lawful manner. To make regulations that will be found to be ultra vires is not in the interest of the Welsh Government.

91. The Welsh Government when looking to use the power retrospectively must comply with the European Convention on Human Rights and the case law that has

developed on the use of tax legislation retrospectively. As I have said earlier tax provisions generally engage Article 1 Protocol 1 ("A1P1) (Right to enjoyment of property) but that unlike many other policy areas, both the Strasbourg and domestic courts have afforded legislatures a considerable margin of appreciation in this area. That margin of appreciation is given provided that the provisions strike a fair balance between the public interest in collecting taxes, and the rights of individual taxpayers and do not impose an individual and excessive burden on taxpayers.

92. The case of R (on the application of APVCO Ltd and Others) v HM Treasury and HMRC concerned a tax avoidance scheme which was closed down by the UK government using retrospective legislation (for more detail see the first example in the Annex). The claimants' argument was that they were being deprived of the tax (money) they would have to pay as a result of the retrospective legislative changes and that unpaid tax could properly be regarded as a possession within the meaning of Article 1 Protocol 1. The taxpayers were unsuccessful in their judicial review and their appeal to the Court of Appeal. The court ruled that the legislation was lawful, proportionate and compatible with the European Convention on Human Rights (ECHR).

93. Welsh Ministers will need to consider on a case by case basis and by reference to the particular circumstances of any case whether the use of a retrospective provision would be appropriate and justified, by reference to the legislative framework in the Bill and a full consideration of the matter including the approach of the courts to retrospective tax legislation.

I am grateful to the Committee taking the time to allow me to give evidence and for these further questions. If you require any further information from me as you draft your report I will be only too happy to oblige.

Rebecca Evans.

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

CC: Chair of the Finance Committee

Annex 1 – Examples of Retrospective Legislation

Example 1 – SDLT changes with warning and then announcement

The first example comes from the stamp duty land tax (SDLT). It demonstrates the linking of retrospective legislation to a clear statement or warning that unspecified action will be taken to address avoidance activity retrospectively. Following the announcement of changes to the operation of the sub-sale rules in his speech on Budget day (21 March 2012) the Chancellor of the Exchequer said:

> "*Let me make this absolutely clear to people. If you buy a property in Britain that is used for residential purposes, then we will expect stamp duty to be paid. That is the clear intention of Parliament. I will not hesitate to move swiftly, without notice and retrospectively if inappropriate ways around these new rules are found. People have been warned.*"

Promoters accordingly adapted the schemes they had been promoting and in Budget 2013, retrospective legislation was introduced to make it clear that two further schemes did not work. Following those changes, the schemes continued to be adapted and on 4 June 2013 a written statement[12] by the Exchequer Secretary stated that amendments would be made to the Finance Bill 2013 to include further retrospective change to make it clear that such schemes were not possible. The legislation would also be imposed retrospectively back to the date of the statement or warning on 21 March 2012[13].

Certain members of the scheme challenged the Government's decision to introduce retrospective legislation, and subsequently appealed to the Court of Appeal[14]. The court found that the UK government had acted lawfully in making retrospective legislation[15]. The lead Appeal Court Judges' decision in dismissing the appeal stated:

> "*For the reasons I have given, I have concluded that neither the appellants' claims that their option agreements were transfers of rights for the purposes of section 45 of the Finance Act 2003, nor the money representing the unpaid SDLT in the appellants' pockets are, in the circumstances of this case, properly to be regarded as "possessions" for the purposes of A1P1 [article 1 protocol 1 of the European Convention on Human Rights]. A1P1 is, therefore not engaged. If it were engaged, I would hold that the legislative changes were, although retrospective, lawful. They were neither unforeseeable nor arbitrary. Moreover, the legislative changes satisfied the proportionality test. The fair balance between the public interest and the protection of the appellants' fundamental rights falls firmly on the side of the public interest in preventing taxpayers taking advantage of abusive tax avoidance schemes after clear warnings have been given that such schemes would not be tolerated and would be tackled with retrospective legislation. Article 6 is also not engaged, since tax proceedings do not relate to the determination of a "civil" right or obligation*."

It is important to note there are effectively two relevant announcements in the first example; that made initially at Budget 2012 (the warning) and those made on publication of the Finance Bill and in June 2013 (the further legislative fix). In addition, the legislation was backdated to the date of the original warning and not the date of the legislative announcement.

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12 House of Commons Hansard Ministerial Statements for 04 Jun 2013 (pt 0001) (parliament.uk)

13 Finance Act 2013 (legislation.gov.uk)

14 R (on the application of APVCO 19 Ltd) v Revenue and Customs Commissioners [2015] EWCA Civ 648.

15 Microsoft Word - StMatthews Judgments Approved_2_.doc (pumptax.com)

Example 2 – Corporation tax warning and announcement of changes, retrospective to a different date

The second example is taken from corporation tax. On 27 February 2012[16], the Exchequer Secretary to the Treasury issued a written statement that the UK government would introduce legislation to counter arrangements intended to avoid corporation tax on buy-backs of corporate debt. The announcement stated the change would have effect retrospectively to debt purchases that occurred on or after 1 December 2011 (three months before the announcement). The Exchequer Secretary stated:

> "*This is not action that the Government is taking lightly. But the potential tax loss from this scheme and the history of previous abuse in this area, means that the Government believes that this is a circumstance where action to change the legislation with full retrospective effect is justified to ensure that the system is fair for all and that those who seek to benefit from this aggressive avoidance do not get an unfair advantage.*"

The UK government considered that it was complying with its protocol on retrospective legislation and in particular drew attention to the primary user of the scheme having signed The Code of Practice on Taxation for Banks[17] and that written statements were also made in 2010.

This is a case where the application of the retrospective change to close a tax avoidance route went back further than the date of the announcement to legislate in 2012. Based on the UK government's protocol, there were extenuating circumstances in this case that justified setting the date that the legislation applied from to a date before the initial announcement to legislate and the date chosen differed (but was after) the initial written statements in 2010.

Example 3 – no warning and a significant retrospective period as a result of a court decision

The third example arises from the administration of certain taxes and the filing obligations placed on taxpayers. HMRC, and previously the Inland Revenue, oversaw income tax Self-Assessment from 1995 and corporation tax Self-Assessment from 1999. In both regimes taxpayers were required to notify the tax authority of their chargeability to tax. Following that notification the tax authority would issue notices to the taxpayers requiring them to file tax returns. In the event that the tax authority wished to enquire into the taxpayer's return they would issue a notice of enquiry.

The tax authority, and many tax advisers and taxpayers adopted a pragmatic approach leading to 'voluntary' returns being made for a number of reasons. The tax authority accepted these returns as validly made, assessed liabilities, accepted payments, issued repayments (many were made to enable income tax taxpayers who did not normally need to submit returns to claim repayments of tax) and when appropriate opened enquiries, closed those enquiries or reached settlements with taxpayers. Two cases were heard as to whether such voluntary returns were valid returns that could be subject to enquiry. The First Tier Tribunal found in 2016[18], and again in 2018[19], the returns were not valid returns

[16] Written Statements - Hansard - UK Parliament (Tax Measures – 1/3 of the way down the page)
[17] The Code of Practice on Taxation for Banks - GOV.UK (www.gov.uk)
[18] Revell v The Commissioners for HM Revenue and Customs -Microsoft Word - TC04887.doc (tribunals.gov.uk)
[19] Patel & Anor v Revenue and Customs (INCOME TAX/CORPORATION TAX : Assessment/self-assessment) [2018] UKFTT 185 (TC) (05 April 2018) (bailii.org)

because they had not been submitted in response to a notice issued by HMRC. It would also follow therefore that any enquiry notices and closure notices were also invalid. The cases indicated that annually around 350,000- 450,000 such 'voluntary' returns were made annually.

The Tribunal findings meant that, over the years since the self-assessment regimes were introduced, millions of returns were potentially invalidly made which could have serious consequences for taxpayers, HMRC and potentially the government finances. Taxpayers could potentially be found not to have notified their chargeability to tax to HMRC or not filed their returns and the protections from discovery action they had obtained through their 'voluntary' returns would disappear. Any enquiries opened and concluded by HMRC would not be valid potentially opening the door for repayments of tax, which in turn could have, potentially, serious consequences to the UK government's finances.

The UK government took action on 29 October 2018[20], the date of the Budget, when it was announced that changes would be made prospectively and retrospectively from the date of the Budget to put voluntary returns on the same footing as returns made following receipt of a notice to file a return. Legislation was introduced in the Finance Bill and on Royal Assent it became section 87 Finance Act 2019[21]. These changes, introduced by section 87(3), are "treated as always having been in force", that is they were in force, in relation to income tax and capital gains tax from 1995 onwards. Protections were provided to those taxpayers who, before 29 October 2018, had appealed, or commenced judicial review proceedings, on the grounds that a return was not a valid return (because no relevant notice to file a return had been issued). Those taxpayers could continue to make that case. All other taxpayers could no longer mount a challenge based on a voluntary return being invalid.

Committee Members may be interested to note that the same issue does not arise in stamp duty land tax, nor land transaction tax, because there is no notice to file issued by the tax authority. This is, in part, because there is no recurrent obligation to file as is the case with, for example, income tax. A recent SDLT case[22] addressed this issue and it was found that there is nothing in the SDLT legislation that creates the same difficulty as 'voluntary' returns did for the income tax and corporation tax regimes. For landfill disposals tax, whilst there can be a recurrent obligation to file (for example by the landfill site operators) the obligation can also arise on a one off basis too. The rules therefore provide filing obligations for both registered and unregistered people who have carried out "taxable operations" to file a return (with no notice issued by the WRA).

However, although this specific issue is unlikely to arise for current devolved taxes, the intention is to provide an example of the type of 'surprising' court decision that can overturn long established prevailing practice or understanding of the law and require action to address the consequences of that court decision. In this case the law was changed without any prior notice and with retrospective effect from a date many years earlier, albeit with protections for certain taxpayers.

For our devolved taxes it is worth considering what the impact would have been had the courts found in favour of the arguments advanced by the appellants in *The Pollen Estate Trustee Company Limited and King's College London v The Commissioners for Her Majesty's Revenue and Customs* in relation to identification of the relevant chargeable interest[23]. Had the appellants' arguments found favour there would have been a very significant undermining of the tax regime as each purchase of a property would be split into

[20] Income Tax, Capital Gains Tax and Corporation Tax: voluntary tax returns - GOV.UK (www.gov.uk)
[21] Finance Act 2019 (legislation.gov.uk)
[22] TC 08327.pdf (tribunals.gov.uk)
[23] [2013] EWCA Civ 753-Court of Appeal Judgment Template (pumptax.com)

the respective undivided shares, and tax calculated separately, for each beneficial owner. The Appeal Court decided that the intention of the legislation was to relieve charities from tax when purchasing property, and that included when buying jointly with non-charities, and therefore 'partial' relief should be available to the extent that a charity is a joint purchaser acquiring an interest in the property. Prospective amendments to the SDLT legislation followed to provide specifically for partial charities relief (with similar rules also provided in LTT).

Looking at this SDLT case and the third example above, it is possible to see that had the appellants 'splitting' argument succeeded, the UK government may have considered amending the legislation retrospectively to ensure that it operated from 2003 onwards as was intended. Again, a similar protection for those advancing similar grounds for appeal may have been provided as was the case in the third example above. The Welsh Ministers may, in such 'surprising' decisions also choose to take similar action to protect the tax base and ensure that large scale repayment of previously paid tax (on a generally prevailing basis) did not arise. Equally, this SDLT case is also illustrative of how it is also advantageous, for a clarity of law purpose, to make amendments to legislation following a court decision to reflect, or otherwise address, the decisions of the courts – the changing of the law to provide clearly for partial charity relief.