Response to the Scottish Government
“A Consultation on Tax Management”

10 April 2013
About ICAS

The Institute of Chartered Accountants of Scotland (“ICAS”) is the oldest professional body of accountants, and is a public interest body. ICAS represents around 19,000 members who advise and lead businesses. Around half our members are based in Scotland, the other half work in the rest of the UK and in almost 100 countries around the world. Nearly two thirds of our members work in business, whilst a third work in accountancy practices, many with expertise in a range of tax areas. Knowledge of the taxes devolved to Scotland and the related administrative practicalities will be essential to all UK based ICAS members, and ICAS members will play a key role in supporting tax compliance for those new taxes. This submission offers ICAS members experience and insights derived from the design and operation of other UK and overseas taxes.

Introductory comments

ICAS is pleased to include below comments in response to the specific consultation questions but a few general themes have emerged in consultation with our members, which set the context for these comments, and it is worth starting with these introductory observations.

1. As matters progress in the development of the taxes management legislation, a decision is needed as to whether the Scottish Government might adopt a principles based approach to the drafting of the legislative provisions. These principles would be based on specified policy intentions and inform clear and plain wording of the law. Whilst the limited scope of Land and Buildings Transaction Tax was a reason for following the UK predecessor legislation, as reflected in the Bill before the Scottish Parliament, no such restrictions need apply to the taxes management provisions being considered at present.

If experience in the Land and Buildings Transaction Tax Bill is followed, it would suggest that the Tax Management Bill will draw heavily on the existing UK legislation. The consultation document makes some reference to overseas jurisdictions but substantially follows the known UK path in the wording adopted. It would then be reasonable to conclude that drafting of the Tax Management Bill for Scotland in due course may follow a very similar path. ICAS members support tax simplification wherever possible and a fresh approach may be necessary to deliver this.

2. Tax is, and should be, collected in accordance with the law; legislation passed by legislators, as supported by the rule of law. Any duty on Revenue Scotland, as is proposed at paragraph 2.4 of the Consultation Document, to “raise maximum net revenue” is therefore wholly misguided; its duty can only be to operate the legislation as enacted and collect what is generally known as the “right amount of tax”. This duty should be established as a fundamental principle at the outset. If it is not, a number of unwelcome or unhelpful consequences may arise. For example, Revenue Scotland staff will be prevented from operating in what might be regarded as a fair and reasonable way to taxpayers (as this follows if they have a duty to maximise revenue), and so Scotland might be seen as a less attractive place in which to live, never mind do business.

Any role to “raise maximum net revenue” is also inconsistent and confusing when considering the approach to counter tax avoidance, where it is often suggested that taxpayers should pay tax in accordance with the intention of Parliament. The latter obligation might be better stated as the “right amount of tax as intended by Parliament”. It can be difficult enough to establish the intention of Parliament, but when there is a contradictory principle that suggests tax revenue should be maximised, what would be the legislative and tax collecting priority? How would the courts interpret such contradictory principles? These uncertainties mean the core duty needs to be restated to “the right amount of tax” or similar phraseology. It is interesting also to note at 4.1 that the taxpayer obligation is to pay the right amount of tax, which (on present wording) may be less than Revenue Scotland has a duty to collect.
3. In determining a way forward to a draft Tax Management Bill, consideration has to be paid to the scale of the task and the time and resource constraints in the Scottish Government and Revenue Scotland, as evidenced by the delay to the publication of the full Land and Buildings Transaction Tax Bill, and reported on recently by the Scottish Parliament Finance Committee. We have commented in previous submissions on the considerable length and ambitious coverage of the Tax Management consultation document, in its attempts to provide for future, unknown, powers. Whilst a sound foundation should be established in principle, the reality of the resource constraints suggest that trying to enact legislation to not only deal with the taxes known to be devolved, whilst anticipating a range of unknown future scenarios, will be neither practical nor deliver the optimum quality output. The more pressing argument however is that the approach may also in part be based on the misconception that all taxes should have the same full scope of management provisions, whereas detailed requirements appropriate to each is likely to be most workable.

We suggest that a staged process should be adopted: the first, this exercise, to provide the legislation necessary to operate the taxes known to be devolved; the second or later stages, if appropriate, when any future tax powers are devolved. Not to do so would result in attention and efforts being spread too thinly, and with quantity rather than quality of legislative proposals the result. Any additional tax management powers can be included in any future legislation that enacts those tax powers as a coherent package of measures, without detriment to the Parliamentary timetable.

4. There should be reconsideration of the apparent decision not to involve HMRC, or its systems, in any of the tax administrative roles. Such involvement might prove cost effective for Revenue Scotland, particularly for the limited range of taxes devolved at present. This might avoid costly duplication of efforts in areas such as preparing guidance to promote compliance (Q10), designing and operating any disclosure regime (Q18) and challenging unacceptable tax avoidance structures (Q19). This is also relevant when considering the potential costs of the infrastructure that could be involved in operating extensive powers when they only apply to a limited range of devolved taxes. It would not preclude transitions in the future appropriate to any expansion in devolved tax powers.

5. It is disappointing that the consultation document is incomplete, in that a key part of the enforcement powers, in relation to sanctions and penalties in chapter 4, has not yet been published. These can give great coherence and consistency to a package of measures and should be consulted on without delay if effective policy outcomes are to be achieved.

Consultation responses by question

Q1: We have commented above on our disagreement with the proposal that Revenue Scotland should have a duty to “collect the highest net revenue practicable” and suggested an alternative.

We consider that it will be important for Revenue Scotland’s guidance material to cover legislative interpretation, including the relevance of UK case law precedents, and it should also highlight areas where differences between UK and Scottish legislation have been addressed. This is likely to be of particular assistance to efficient compliance and in communication with stakeholders in the transition to replacement taxes.

This does however raise the question of when, or whether, UK case law may be regarded as providing judicial precedents to the interpretation of Scottish devolved taxes on similar issues or wording, and clarification of this should be clearly established, or it may take years for the Courts to decide this.

Q2: The establishment of Revenue Scotland as a Non-Ministerial Department is appropriate, but accountability is a serious concern.
If lessons are to be learned from HMRC and the Westminster Public Accounts Committee’s recent challenges, it would be helpful at the outset to establish how accountability to the Scottish Parliament is to be achieved, particularly where it may be constrained by a duty of confidentiality of taxpayer information. It will also be necessary to clearly set out the roles which Revenue Scotland staff may be involved in and the limit of those; for example, what role should it have in policy, as opposed to administrative, matters. The additional tier of responsibility, as matters are delegated to SEPA and Registers of Scotland, adds complexity in determining their responsibility and accountability too in relation to tax matters, when their Boards have separate duties and obligations.

The flexibility of staff transfers between government departments is of less concern to us than the need to ensure that Revenue Scotland has staff with the skills necessary to administer the taxes effectively.

Q3: A board which does not include some key tax executives from Revenue Scotland would appear to be weaker in accountability that one which does, which favours option c).

It is vital that knowledge and administrative experience as appropriate in tax, land and property sector and landfill issues etc should be regarded as key skills among the non-executive directors.

The role of the board of Revenue Scotland should include setting, and monitoring, professional, performance and quality standards for Revenue Scotland and the powers it delegates.

Following on from our introductory comment about a staged process, the composition and operation of the board should also reflect that approach. It would be appropriate to consider a smaller board for Revenue Scotland at the outset, given the limited scope of operations, with additional appointments according to need and expanded tax responsibilities.

Q4: In order to achieve legislative and administrative solutions that are efficient, we would expect that the Scottish Government should consult on policy decisions, and this debate should not be limited only to those on the Tax Consultation Forum. We consider that ICAS members can contribute insights about coherence across the tax systems, and commercial experiences, that may offer a different but equally valid approach to that Forum’s membership.

Revenue Scotland should consult on developments of a technical and administrative nature. With technical changes this would mean that their practical interpretation and application can be considered to ensure they meet the intended policy objectives; with administrative proposals, consideration can be given to their effectiveness and impact on both taxpayers and agents. These might best be addressed by initial discussions, written proposals and further feedback, and testing respectively. This is building on the framework already used with, for example, Land and Buildings Transaction Tax, with the caveat that the timescale has to be sufficient for the complexity of the task in hand.

Consultation principles should be established, particularly around the time allowed for consideration and a minimum of 2 months is suggested. The consultation may be tailored within that to the extent or impact of changes proposed. Introduction of, say, a significantly amended general anti-avoidance rule, should be afforded more extensive discussion before final views are shaped.

Q5: A communication strategy is needed to address the various stakeholders and their particular needs. ICAS members receive a considerable volume of tax update material and have, in general, needs of advance, general awareness, and more immediate, detailed knowledge, the latter particularly where action is required. With all tax legislation, practitioners are accustomed to using (mainly, but not exclusively) online information sources and guidance, which should be readable, technically detailed/referenced and easily searchable. Once any proposals on this matter have been developed further we will be happy to comment.
We believe that Revenue Scotland should establish email as its primary means of communicating with tax agents, and with those taxpayers willing to communicate in this way. However, ICAS does not support a policy of “online everything”, particularly where unrepresented taxpayers are concerned. Hard copy information, guidance and communications will still be required, especially by individuals and businesses with limited IT skills or limited access to computers or the internet – and it needs to be recognised that these include many of the most vulnerable members of society. This is another example of where the operational design of Revenue Scotland should be fit for its purpose – with the initial taxes devoted we would expect the legal professionals, agents and landfill tax operators to be technologically resourced and capable. Should there be any further tax powers devolved, this matter can be reconsidered in view of the particular taxpayer profile and need.

Q6: The tax powers design principles appear reasonable but remain general; more coverage is needed. They do not inform, for example, the expected style or content of engagement between Revenue Scotland and the taxpayer in a way which would put clear obligations and expectations on both. We are not sure if the phrase “framework of tax collection powers” at paragraph 3.3 of the Consultation Document is meant to limit the scope of the principles, but the framework should presumably apply to the full range of tax management powers. A “Taxpayers Charter” could address the specific issues, and we would be in favour of such a Charter in principle, if it was supported by statutory provisions and subject, of course, to consultation on its detailed provisions.

Service standards for Revenue Scotland and the bodies to which it delegates operations could be usefully included, to include for example, availability of assistance and ability to deal with queries competently. This links to the principle of certainty, and the need for tax confirmations or clearances is discussed at Q11 and Q20 below.

Retention of records for different periods for businesses and personal records is illogical, if the purpose of the requirement is to permit appropriate compliance enquiries. This should be determined by the decision on the compliance process and enquiry time limit for each tax.

Q7: As previously advised, we strongly oppose the suggestion that tax should be paid before any assessment issued by Revenue Scotland may be contested. The approach suggested, to pay tax before an appeal is heard, in principle does not fit with a self-assessment system. Practical experience also suggests that there can, and will, be situations where such an approach can needlessly threaten the solvency of a business, cause inappropriate and considerable personal stress, and support carelessness in the issue of assessments. It will prove unpopular and is considered disproportionate, particularly when there is so little information available on the tax system overview, or the competence, duties and skill level of the staff who will be involved.

Landfill Tax and Land and Buildings Transaction Tax, on which this provision needs to focus at present, are transaction and activity based. This differs in context and approach from the provisions for Non-Domestic Rates in Scotland, which are annual and on a fixed base. Therefore the payment and appeal provisions for Non-Domestic Rates are not relevant or appropriate therefore for the new devolved taxes. Clear legislation, good guidance, and efficient dispute resolution will set the context of the payment provisions needed whilst an appeals process takes place; if those provisions are optimal then it might be expected that the number of cases to which this power might apply would be both extremely limited, and on real points of principle. Following that first principles approach, or adapting measures designed for a similar purpose and context, would give greater confidence in the tax system designed.

Q8: The recent “Prudential case” R (on the application of Prudential plc. and another) v Special Commissioner of Income Tax and another [2013] UKSC1 in the UK Supreme Court identified the compelling arguments for the need for Parliament to consider again the issue of legal professional privilege in relation to tax matters, where in practice advisory services on legal matters of tax are frequently provided by members of other professional bodies. That court’s view was that this was not a matter where it should attempt to change the law but saw compelling reasons for a change to be made by Parliament. We understand this issue is being reconsidered in a number of jurisdictions referred to elsewhere in the Consultation Document, such as Canada, Australia and New Zealand.
We consider it is timely and appropriate for the Scottish Parliament to review this issue in detail, in the context of its newly devolved tax powers, and consider the possibility in a separate consultation if necessary. The full analysis of the rationale for any decision not to do so should be explained and published.

At paragraph 3.9 of the Consultation Document, the power is given to Revenue Scotland to require information from, or copies of, records. Limitations on this will need to be introduced, appropriate to the purpose of the power and for the tax concerned to ensure the right balance is struck and avoid unnecessary intrusions and demands. For Land and Buildings Transaction Tax, for example, we would expect this power would only be exercised after the transaction was effected, for the purposes of checking the accuracy of the return. For Landfill Tax, whilst there may be a regular series of returns, the nature of the records to be kept and timing of such requests must be considered.

Problems have arisen elsewhere where HMRC have tried to penalise what they considered poor record keeping, before any return was made, or any corrections had been considered. Again, clarity on the intended use and purpose of these powers is needed.

At paragraph 3.10 of the Consultation Document, the phrase “reasonably believes” may be widely interpreted; tighter protections will be needed when drafting details emerge as experience suggests that tax authority staff may stray into “fishing trips”. Clear boundaries and focus are needed on these powers.

It is difficult to see why the wider ranging powers at paragraphs 3.13 to 3.16 inclusive have relevance to the tax powers devolved; consideration of these can be deferred until any further tax powers are devolved or the need for them is clearly established.

The wording of the proposed power at paragraph 3.21 is extremely wide and clarity is needed on why the provision is needed, particularly on the phrase “if it believes this would be the most appropriate way to check a return” in the context of the specific taxes devolved. We would strongly object to something so vague and wide ranging.

The discussions at, for example, paragraph 3.31, on using investigatory powers of other Scottish public sector bodies, as well as those in chapter 4 on penalties, highlight the need to take a coordinated view of powers and purposes across the Scottish Government. For example, The Devolved Tax Collaborative meeting on 1 March 2013 discussed the question of whether profits from illegal dumping should be taxed, but it was considered that tax powers needed to be properly consulted on alongside criminal and other powers, for action against illegal dumping to be effective and this needs to be explored further.

Q9: A four year period appears reasonable, but is of limited relevance to the taxes currently devolved. The terminology discussed at paragraph 3.38 of “amended returns” covering both Revenue Scotland and taxpayer changes, along with the one year time limits discussed at paragraphs 3.43 and 3.45, seem fair, but need to consider the possible range of practical circumstances that might arise; for example, a valuation dispute might mean the time limit for changes had to be extended.

Any time limits also need to consider the detailed operation of the specific taxes and provide safeguards so, for example, a taxpayer has time to consider and agree, or challenge, amendments or errors made by Revenue Scotland.

Q10: The question of the management of duties and accountability is discussed above in our response to Q2. Debt collection powers are discussed below at Q16.

Q11: The comments at paragraph 4.5 of the document are taken to mean that taxpayers will be able to obtain written confirmation of points of difficulty, but this may be prohibitively burdensome and costly for Revenue Scotland, and so may in fact be operated within limited circumstances only. Clarity on the approach in practice is needed.

The new tax operating systems, including any IT systems, should be fully tested before going live, in line with best practice recommendations. This should minimise operational issues once the taxes are in force.
Q12: As regards the taxes devolved so far, the key features for agents are for a simple and quick authorisation process for an agent to permit that agent to file on behalf of a taxpayer. As the majority (if not all) agents filing for Land and Buildings Transaction Tax are likely to be solicitors, a complex or burdensome agent enrolment or registration process should be unnecessary and would serve no useful purpose. Online and email communication should be available. Should tax enquiries or investigations arise, taxpayers should be free to appoint the agents they consider appropriate, internally or externally to their business, and the obligation should be put on Revenue Scotland to respect that, by ensuring agents are copied into all correspondence.

Q13: As noted above, it is disappointing that the sanctions and penalties regime is not being consulted on at this stage, and it is vital that any further consultation takes place well ahead of the draft legislation being placed before Parliament.

Q14: The levels (or ranges) of penalties should be determined by legislation, rather than established in guidance, as is perhaps suggested by paragraph 4.15. The Scottish Parliament should pass the legislation it intends should apply, including any powers for Revenue Scotland to apply its discretion. Discretion should be limited, and it should be noted that the historic position in the UK on penalties suggested that discretion can undermine both the legislative intention and deterrent effect.

Q15: Warning letters, or reminders, are helpful, if used on a timely basis, to enable behaviours to change before sanctions apply. It is also appropriate to consider a range of strength of warnings. The context of these penalties and practical examples need considered and their appropriateness to the different taxes devolved. Where, say, monthly returns are to be made, the experiences of the (now amended) Construction Industry Scheme penalties demonstrated how cumulative failures, with no overall sense of proportion to the tax not paid, meant that some extreme unfairness arose, and taxpayers were deterred from remedying their past failures.

In addition, email or text prompts as reminders of balances due are commonly used in other industries and could meaningfully be used by Revenue Scotland. However, as poor payments are not expected to be a main feature of the taxes devolved at present, there seems no pressing need to explore this further at this time.

The current difference between prosecutions in Scotland and England and Wales around common law “cheating the Revenue” is not well understood but is generally believed to result in fewer criminal prosecutions in Scotland and possibly operates as less of a deterrent. Clarity around the policy intention as well as specific legislation would be one way of achieving more effective and speedy prosecutions. However, it is difficult to envisage for what offences, in relation to the first two devolved taxes, such additional powers would be necessary.

Consideration should also be given to whether the provisions of the Proceeds of Crime Act 2002 can, or should, apply where tax prosecutions take place under the new Scottish Tax Management provisions.

Q16: Collection powers, again, need to consider the context of the currently devolved taxes, and these appear appropriate at present. Debt collection should not be outsourced beyond Revenue Scotland, Registers of Scotland or SEPA; experiences elsewhere have been less than positive, particularly if collectors are paid by results or are overzealous. In addition, resolution of disputed balances can become much more complex, where a duty of confidentiality on the tax authority prevents disclosure of relevant facts to the appointed outsourced agents, or the appointed outsourced agents have to refer all challenges on disputed liabilities back to the tax authority anyway.

It is surprising that the consultation document makes no reference to the payment of interest on overdue tax, or for that matter, interest on repayments due to taxpayers. In order to avoid taxpayers delaying payment of tax and, effectively, using Revenue Scotland as a source of working capital, such provisions are likely to be necessary and appropriate.
Q17: It is vital in any discussion about tax planning, tax avoidance and tax evasion that clarity is provided as to the distinctions between these. It is simply misleading to state, at paragraph 5.9, that it can be difficult to distinguish between tax avoidance/planning and tax evasion, as if there was a spectrum. It should be clearly understood that tax evasion is illegal and can be prosecuted by the authorities but tax avoidance/planning is what the law allows and so cannot be prosecuted by the authorities. In a country where the rule of law reigns, and the courts decide on the interpretation of tax statutes, the origin of the solutions to such issues – resides in the law as passed by Parliament.

On that understanding, the document offers a fair summary of the methods of tackling tax avoidance available, at a theoretical level. What has proved operationally effective needs to be studied in the specific context of the two taxes currently devolved; due to their different nature it is suggested each should be considered in the light of experiences of similar taxes elsewhere, and adopt the mix of measures most likely to be effective for each.

It should be remembered that a General Anti Avoidance or General Anti Abuse Rule is usually used to tax matters which Parliament has failed to tax specifically. Clear tax policy and intention, clear principles and well considered and drafted legislation remove much of the need for such rules.

It will also be helpful to communicate the established principle that the Scottish Parliament and courts, applying the rule of law, determine the law of Scotland, and that this is not a task for Revenue Scotland staff.

The administrative effort to a tax authority of maintaining and operating a compliance system, a notification system, of legislative amendments and/or challenge through the courts may be considerable and needs to be taken into account in the staffing and budget model adopted.

Q18: Any obligatory notification features need to be sufficiently detailed for taxpayers to understand clearly what they need to do, and for counteraction to be considered; they would also need to identify the taxpayer or transaction involved. Guidance or “white lists” of transactions not considered abusive should be available to assist advisers and taxpayers and eliminate unnecessary steps. The real difficulty here lies in determining what is “acceptable” and what is “unacceptable” tax planning, and as set out below, work in that area might be a necessary first step. Publication of the key features of disclosed schemes, and why they are considered ineffective or the counteraction intended by Revenue Scotland, will send a clear message to the adviser and taxpayer community of the risk of undertaking those particular arrangements.

This needs to be approached on a tax by tax basis. As Land and Buildings Transaction Tax is based on stamp duty land tax, it is also likely that avoidance arrangements may be closely related; what is proposed for one regime may apply with only minor variations to the same transaction in the other regime. Consideration should be given to a specific knowledge sharing initiative between Revenue Scotland and HMRC in order to achieve a faster and more cost effective counteraction mechanism. This is one area where outsourcing to HMRC, or a partnering arrangement, may be more cost effective for Revenue Scotland. Whilst a transaction may be liable to different Scottish and UK taxes at the same time (for example a transfer of land in Scotland may have UK capital gains, inheritance tax, VAT or corporation tax consequences), if a notification scheme is to be adopted, that notification scheme should be as close to the UK regime as possible, to minimise confusion for taxpayers.

Q19: ICAS supported the original proposals put forward by Graham Aaronson QC for a UK level narrowly targeted General Anti-Abuse Rule, rather than a broader General Anti-Avoidance Rule, and the same applies for the Scottish tax system. A more general provision leaves significant uncertainties, in tax and business terms as a matter of experience and principle. ICAS detailed submissions on this topic can be found at: http://icas.org.uk/home/technical-and-research/technical-information-and-guidance/tax/tax-submissions/

As regards powers for the Scottish Parliament, consideration must be given to the structure and risks of the taxes devolved and narrow the focus to the likely activity in each, if the most effective legislation is to be achieved.
For Land and Buildings Transaction Tax, this suggests the route of targeted anti-avoidance provisions embedded in the core legislation is likely to be most effective. In addition, a narrowly focussed General Anti-Abuse Rule would assist by acting as a deterrent, if it can be seen to be applied in practice. We suggest Scotland should adopt a very similar approach as the rest of the UK – which will implement this in summer 2013 – as far as possible will build on the detailed work already undertaken – rather than reinvent a wheel which has been through a considerable consultation process already undertaken and where a repeat exercise may be considered a waste of time and effort. ICAS concern is also that a different regime could result in taxpayers being deterred from undertaking transactions in Scotland because yet another regime may just be too complex.

**Q20:** A prior clearance procedure is essential if uncertainty is to be avoided. In this it should be borne in mind that no one has yet defined the difference between “acceptable” and “unacceptable” tax planning at a transaction level. A clearance procedure will have administrative costs, not limited to the appeals process, as noted at paragraph 5.19, for both Revenue Scotland and the taxpayer, but a fee towards these could be charged, at modest levels. Indeed it would be open to taxpayers to continue with a transaction not cleared, and debate the process in court, which is ultimately where uncertainties would be resolved anyway, were there no clearance process. In practice, in other UK taxes where clearance is denied, many taxpayers do not proceed with that form of transaction.

The optimum cost effectiveness would be where a small team of Revenue Scotland specialists oversaw detailed guidance on the operation of the provision, and offered a timeous response, perhaps in meetings supplemented by written submissions. If resourcing is a key concern, a clearance regime could be offered for a fixed period only, say four years, similar to the operation of the UK regime, for new legislation.

**Q21:** This consideration must firstly address one of the most difficult follow on questions of the debate around countering tax avoidance; what was the intention of Parliament? Ideally it should be readily apparent from the wording of the law it passed, as a matter of legal construction. The only other evidence should be the notes of Parliamentary debates, or, any specific or detailed notes which can be evidenced as being considered by elected members in passing the legislation. The final legislation may have moved on considerably since the original Policy Memorandum was drafted and if that is to be used, it must accurately reflect the matters concluded on. It is not sufficient to look to Revenue Scotland, or administrative officials or committee minutes for Parliamentary intent. Parliament is responsible and legislators legislate, but legislators are free to consult extensively with those who use the tax legislation, and the professional bodies such as ICAS, in order to try to produce legislation that is as clear as possible in intent and avoids imprecise language. Such bodies should be trusted not to exploit the consultation process. Ultimately, or course, clear legislation and intent makes it easier to apply any General Anti-Abuse provision.

**Q22:** The key tests are likely to be around the sole or main purpose, and around artificial and commercially ineffective (or circular) steps, with no commercial substance, which achieve a tax outcome that could be regarded as abusive.

ICAS supported the conclusions of work by Graham Aaronson QC’s study group on this, which can be found at [http://www.hm-treasury.gov.uk/tax_avoidance_gaar.htm](http://www.hm-treasury.gov.uk/tax_avoidance_gaar.htm).

**Q23:** External expertise, or an external body, as explained in Graham Aaronson QC’s report, serves to provide balance to a tax administration which may be regarded as inexperienced in commercial matters or at risk of taking an overly aggressive approach to a broad power, as this would sacrifice both economic attractiveness to business and certainty. To the extent those concerns applied to Revenue Scotland (as seems likely), external expertise would be necessary. However, it might be cumbersome or expensive, and the alternative of a clearance process then becomes more appropriate.

**Q24:** The proposals for avoiding disputes appear reasonable, but in addition, Revenue Scotland staff will need to have a high level of tax knowledge and understanding so that any view taken of the law is the correct one. Whilst clarity of legislative intention is ideal, the practical difficulties of producing clear and precise legislation and guidance to achieve this remain.
Where a taxpayer consults Revenue Scotland a clear record of the advice should be sent and this would help avoid misunderstandings arising. Email correspondence would facilitate this process.

**Q25:** An approach which resolves disputes as early, quickly and cost effectively as possible is welcome. One question is on the settlement strategy that might be applied and what powers staff may have to take views on particular issues, or reach a settlement “somewhere in the middle” as part of an overall agreement of a tax position, and the policy over discretion (or otherwise) on this area should be developed and published as part of the ongoing consultation process.

At paragraph 6.12, consideration should firstly be given to the type of review to be undertaken and by whom, before the process is considered. We question whether a review should be mandatory; or mandatory only as an internal process for Revenue Scotland. Experience suggests that preparation for such a review may not, in practice, support the documentation process necessary for a later hearing but be more a repeat of previous correspondence and debate. A short timescale is appropriate, but flexible enough to permit any new lines of debate to be explored.

**Q26:** In the context of UK taxes, ICAS supports the Alternative Dispute Resolution process. Given the low number of cases likely to arise in the context of the taxes devolved so far, adoption of that, or a very similar mediation system is welcomed; it is likely to be sufficient and cost effective. The position can be reconsidered for future powers.

**Q27:** In the context of the likely small number of cases that will proceed to and through the judicial system for the two taxes devolved (particularly if the legislation, dispute resolution and mediation routes are followed) the lowest cost and most effective route is option a), using the existing UK Tribunals. The main reason is that set out; the expertise of the tribunal panel is key whichever route is adopted. In due course the UK tribunals may also have gained useful insights into tax avoidance case challenges under a UK General Anti-Abuse Rule. The aim should be to achieve speedy and cost effective resolution of cases without the lengthy process of repeated appeals.

**Q28:** The costs scenario is highly relevant to complex cases in particular. The risk of losing a dispute and getting two sets of costs to pay puts off many from appealing and is often perceived as unfair. Cost sharing awards should be considered where, for example, different points were adjudicated on, or genuine points of legal uncertainty arose; as a backstop each party could bear its own costs unless one party was judged as having been wholly unreasonable. It might helpfully be publicised that Scottish courts rules on costs are generally at a lower level than, say, London; the costs policy should however be made clear in the context of the new powers.

**Q29:** The first question at paragraph 6.23 requires consideration of wider communication and performance measures for Revenue Scotland on an annual basis and in terms of its accountability. The desire that Revenue Scotland may learn from the resolution of disputes is a separate matter of organisational competence. This second question requires a process better undertaken on, say, a quarterly basis, of communicating technical developments, in line with updating guidance for established precedents, return forms or consultation on legislative amendments. Anonymised case reports could form part of this.

**Q30:** These are matters of general Government administration but appear reasonable. As set out in our response to Q6, a “Taxpayers Charter” may be a useful means of setting out expectations for taxpayers and communicating such matters. Establishing a review process to consider the operations of Revenue Scotland after, say, four or five years would permit a structured review.

**Q31:** ICAS accepts confidentiality of taxpayer information as a policy provision. The sanctions should be applied rigorously and be consistent with other legislative safeguards in Scotland. We understand this means criminal sanctions may be applied and agree with this.

**Q32:** As noted above, effective tax compliance and anti-avoidance efforts will need, on a mutual basis, cooperation and information sharing with HMRC. We also agree that international cooperation efforts should be complied with as at present.
As stated in our introductory comments, powers for Revenue Scotland should at this stage be focussed on what is necessary to operate the devolved taxes. Parliament will have the power to widen this in due course according to the factors relevant at the time; for the specific needs of any additional taxes devolved and depending on the constitutional issues, status of double tax treaties at the time, or European Union requirements.

**Q33:** This appears sufficient.

**Q34:** This exemption would appear necessary to deliver the confidentiality policy.

**Q35:** This discussion is based on the need for tax legislation to be enacted before the start of a tax year (taken to mean the UK tax year ending on 5 April each year, or perhaps the governmental financial year – this is not specified), yet that is not necessary for Land and Buildings Transaction Tax, nor Landfill Tax, which apply to transactions or activity and can be varied from any date legislated for. This would mean that “provisional collection” powers, akin to those in the UK system, may not need to be considered further at this stage.

It may be useful for the Parliament to have powers to pass “emergency” anti-avoidance legislation but it should be for Parliament to do so after appropriate consideration. The necessary safeguards should be subject to prior consultation with, say, members of the Devolved Tax Collaborative, to ensure proposals are appropriately targeted and supported, and only where it could be demonstrated that a significant amount of tax revenue, say over a particular level as determined by Parliament, would otherwise be lost. These safeguards are considered necessary particularly given the unicameral system in Scotland. Unintended consequences from ill thought out legislation are the key risk.

ICAS does not support retrospective legislation as a matter of fundamental principle.

**Q36:** No comment

**Q37:** Our Introductory comments above address matters discussed in the Draft Partial Business Regulatory Impact Assessment under the heading “Tax Framework”, in that they favour an approach closer to Option 2. The approach recommended by ICAS need not result in the tax system becoming “fragmented and complex” or have additional cost, but rather to have new provisions only where necessary, proportionate and effective in the collection and administration of the new powers. Correspondingly, in the comments on Option 3, the “compactness” of the legislation is of questionable importance. The approach recommended by ICAS maintains a framework which can facilitate accountability without resorting in full to Option 3.

In relation to costs, there will be an identifiable public sector cost, in the consultation and legislative drafting process, in trying to provide a legislative framework for powers that do not exist. It is impossible to tell whether tax management proposals enacted now will provide an appropriate and coherent basis for the future.

The impact of the appeals process on costs for taxpayers will depend on a number of factors, such as the clarity of the legislation and the policy decisions on how costs might be awarded (see Q28 above), as well as the skill and expertise of the tribunal members in arriving at decisions that both parties are able to understand and abide by, rather than appeal further.

**Q38:** See Introductory Comments above. The drafting of legislation in due course in a clear and logical fashion will be necessary to deliver the benefits available from a fresh approach to tax management powers that this consultation offers.