

REVENUE SCOTLAND AND TAX POWERS ACT 2014

EXPLANATORY NOTES

THE ACT

Part 6 – Tax Returns, Enquiries and Assessments

Chapter 1 — Overview

Section 73 – Overview

109. This section provides an overview of the matters that are dealt with in this Part of the Act, namely the assessment of the devolved taxes.

Chapter 2 — Taxpayer Duties to Keep and Preserve Records

Duties to keep records

Section 74 – Duty to keep and preserve records

110. This section sets out the duty of a person who is required to deliver a return in relation to devolved taxes to keep and preserve records that are needed to complete that return. In addition, a person who is liable to be registered for a devolved tax must: a) keep and preserve any records that may be needed to enable the person to notify Revenue Scotland about their intention to carry out, or to cease to carry out, taxable activities; b) make and preserve records relating to material at a landfill site. It lists the types of records that generally need to be kept and sets out the maximum time period for which records need to be kept whilst permitting Revenue Scotland to specify an earlier date.
111. It allows the Scottish Ministers to make regulations to specify the records and supporting documents that must be kept and preserved. The regulations are subject to negative procedure and may make reference to things specified in a notice published and not withdrawn by Revenue Scotland. Examples are given of documents that may be deemed as “supporting documents”.

Section 75 – Preservation of information etc.

112. This section provides that the duty in section 74 to preserve records under that section may be satisfied by preserving records (or the information contained in them) in an alternative form (such as microfiche or an electronic facsimile) and by any means. This is subject to any conditions or exceptions that may be prescribed by the Scottish Ministers in regulations. Such regulations are subject to the negative procedure.

Penalties for failing to keep and preserve records

Section 76 – Penalty for failure to keep and preserve records

113. This section provides for a penalty of a maximum of £3,000 for a failure to comply with section 74 (duty to keep and preserve records), with the exception that no penalty is incurred if Revenue Scotland is satisfied that the required facts which would have been demonstrated by the records are provided to Revenue Scotland by other documentary evidence.

Section 77 – Reasonable excuse for failure to keep and preserve records

114. This section provides that, if a person satisfies Revenue Scotland (or on appeal the tribunal) that there is reasonable excuse on the person's behalf for a failure to comply with section 74, then the person is not liable to pay a penalty arising from that failure. The section also set out some circumstances in which reasonable excuse does not apply.

Section 78 – Assessment of penalties under section 76

115. This section provides that, where a person becomes liable for a penalty under section 76, Revenue Scotland must assess the penalty and then notify the person of this. The assessment of the penalty must be made within 12 months of the person becoming liable to the penalty.

Section 79 – Enforcement of penalties under section 76

116. This section provides that a penalty under section 76 must be paid within 30 days of Revenue Scotland issuing the penalty notification to the person. If a notice of review or appeal against the penalty is given (under section 235 or 242 respectively), the penalty must be paid within 30 days of the review being concluded or the appeal determined or withdrawn, whichever applies. If mediation has been entered into following review, the penalty must be paid within 30 days of notice of withdrawal from mediation being given (if this applies).

Section 80 – Power to change penalty provisions in sections 76 to 79

117. This section provides a regulation-making power for the Scottish Ministers to make provision, or further provision, about penalties under Chapter 2 of Part 6. Such regulations are subject to the affirmative procedure, may not create criminal offences but may modify any enactment. Regulations under this section do not apply to a failure which began before the date on which the regulations came into force.

Duty to keep and preserve records: further provision

Section 81 – Further provision: land and buildings transaction tax

118. This section applies to LBTT and sets out that the Scottish Ministers may make regulations (subject to affirmative procedure) to specify records and supporting documents that a buyer must keep and preserve in relation to land transactions that do not have to be notified. A land transaction may not initially be notifiable under the LBTT(S)A 2013, but it can become notifiable later, for instance where a lease continues after the end of its original term.
119. Regulations under this section may apply the provisions in sections 74 to 79 (concerning a taxpayer's duty to keep and preserve records and the associated penalty for failing to comply with the duty) to a buyer in a land transaction that is not notifiable. Any expressions used in this section and in LBTT(S)A 2013 have the meaning given in that Act.

Chapter 3 — Tax Returns

Filing dates

Section 82 – Dates by which tax returns must be made

120. This section provides a definition of ‘filing date’, being the date on which tax returns for the devolved taxes are due. A person who fails to make a return on or before the filing date is liable to a penalty under section 159 of the Act.

Amendment and correction of returns

Section 83 – Amendment of return by taxpayer

121. This section provides for the amendment of a tax return by the taxpayer and allows Revenue Scotland to specify the form and content of any notice of such an amendment. It sets out that the taxpayer must make an amendment within 12 months of either the filing date (which is defined) or any other dates that the Scottish Ministers may prescribe by order (and different provision may be made for different devolved taxes). The power for the taxpayer to amend the return by notice under this section does not apply where sections 87 or 93 apply, which involve Revenue Scotland making its own amendment to the return either during the course, or on completion, of an enquiry.

Section 84 – Correction of return by Revenue Scotland

122. This section provides that Revenue Scotland may correct returns for obvious errors or omissions by notice to the taxpayer. The correction must be within 12 months from the date the return or amended return is made. The taxpayer may amend the return to reject the correction during the amendment period, which is provided for in section 84(5). However, if that period has expired, the taxpayer can amend the return within three months of the date the notice of correction was issued by Revenue Scotland.

Chapter 4 — Revenue Scotland Enquiries

Notice and scope of enquiry

Section 85 – Notice of enquiry

123. This section sets out that a designated officer (defined in section 252) may enquire into a tax return, provided that notice of intention to carry out an enquiry is given to the taxpayer or the person who submitted the return on their behalf (the ‘relevant person’) within the period set out. It also limits the number of notices of enquiry that may be made in relation to any particular tax return.

Section 86 – Scope of enquiry

124. This section sets out the scope of an enquiry into a tax return and limits the scope of a subsequent enquiry on a return to amendments made after the completion of that enquiry, if that prior enquiry had been completed before the expiry of the amendment period (provided for in section 83(2), during which the taxpayer can make amendments to their return.

Amendment of return during enquiry

Section 87 – Amendment of self-assessment during enquiry to prevent loss of tax

125. This section provides for the amendment of a tax return by a designated officer during the course of an enquiry. The amendment can only be made where the designated officer forms the opinion that the amount stated in the self-assessment contained in the return is insufficient and that unless the assessment is immediately amended there is likely to

be a loss of tax to the Crown. Where an enquiry is made into an amended return and is limited by provision under section 86(2) and (3), it limits the ability of the designated officer to make their own amendment under this section to any tax deficiency which is attributable to the taxpayer's amendment made under section 83.

126. Where a designated officer issues notice of an amendment under this section, section 83 no longer applies and the taxpayer cannot therefore submit any further amendment of their own. The taxpayer must pay any amount, or additional amount, of tax chargeable as a result of an amendment under this section at the same time as the notice of the amendment is given. The period in which an enquiry is in progress is defined in subsection (5) for the purposes of this section and section 88.

Referral during enquiry

Section 88 – Referral of questions to appropriate tribunal during enquiry

127. This section provides for the referral of questions to the appropriate tribunal (defined in section 92) during an enquiry. It requires notice of the referral to be given jointly by the relevant person (defined in section 85(2)(a)) and the designated officer.

Section 89 – Withdrawal of notice of referral

128. This section provides for the withdrawal of a notice made under section 88 by a designated officer or the relevant person (defined in section 85(2)(a)).

Section 90 – Effect of referral on enquiry

129. This section sets out the effect of referral under section 88 on an enquiry. It provides that a closure notice or an application for a closure notice cannot be made while proceedings under section 88 are in progress and defines what “in progress” means in this context.

Section 91 – Effect of determination

130. This section provides that the determination of any question by the appropriate tribunal under section 88 is binding on the parties. It requires the designated officer to take the determination into account when making any amendments to the return (under section 87 or section 93) and limits the question determined from being reopened.

Section 92 – “Appropriate tribunal”

131. This section sets out which are the appropriate tribunals for the referral of questions under section 88.

Completion of enquiry

Section 93 – Completion of enquiry

132. This section provides for completion of an enquiry. An enquiry is completed when a designated officer notifies the relevant person (defined in section 85(2)(a)) that the enquiry is complete (a “closure notice”). The closure notice must state the conclusions reached in the enquiry and must be given no later than three years after the relevant date (defined in section 85(3)). If no closure notice is given, an enquiry is also treated as complete three years after the relevant date. A designated officer can make an amendment of a return and give it to the relevant person with the closure notice. The taxpayer must pay any amount, or additional amount, of tax chargeable as a result of an amendment under this section within 30 days of the closure notice being given. Where a designated officer issues notice of an amendment under this section, section 83 no longer applies and the taxpayer cannot therefore submit any further amendment of their own.

Section 94 – Direction to complete enquiry

133. This section provides for the person who made the return to apply to the tribunal to give a direction that Revenue Scotland should issue a closure notice. The tribunal must give the direction unless it is satisfied that Revenue Scotland has reasonable grounds for not giving a closure notice within that period.

Chapter 5 — Revenue Scotland Determinations

Section 95 – Determination of tax chargeable if no return made

134. This section provides that, in the circumstances where a designated officer has reason to believe a person is liable to pay tax, and that person has not filed a tax return with Revenue Scotland by the date by which it believes a return was required to be made (the “relevant filing date”), Revenue Scotland may make a determination of the amount of tax to be charged. Notice of the determination must be given to the person believed to be liable for the chargeable tax, including a statement of the date on which the notice was issued. A determination cannot be made more than five years after the relevant filing date or, if the Scottish Ministers by order prescribe another date, five years after that date. The taxpayer must pay the amount of tax chargeable as a result of a determination under this section immediately upon receipt of the determination.

Section 96 – Determination to have effect as a self-assessment

135. This section provides that a determination by Revenue Scotland has the same effect for enforcement purposes (i.e. the collection and recovery of tax as provided for in Part 10 of this Act) as if it were a self-assessment made by the person liable for the chargeable tax. Under these provisions, a determination by Revenue Scotland does not affect a person’s liability to a penalty for failure to make a tax return (under sections 159 to 167).

Section 97 – Determination superseded by actual self-assessment

136. This section provides that, where a person makes a tax return after Revenue Scotland has made a determination of chargeable tax, the self-assessed tax return will supersede Revenue Scotland’s determination. This provision does not apply when a person makes a tax return more than five years after the power to make the determination was first exercisable by Revenue Scotland, or more than three months after the date on which the determination was issued, whichever is the later. In instances where proceedings have commenced for the recovery of tax following a Revenue Scotland determination, and during those proceedings Revenue Scotland receives a self-assessment that supersedes its determination, the proceedings may continue as if they were for the recovery of so much of the self-assessed tax which remains due and not yet paid.

Chapter 6 — Revenue Scotland Assessments

Assessment of loss of tax or of excessive repayments

Section 98 – Assessment where loss of tax

137. This section provides a designated officer with the power to make an assessment to make good a loss of tax where an amount that should have been assessed has not been, an amount assessed is less than it should be or relief that has been given is or has become excessive.

Section 99 – Assessment to recover excessive repayment of tax

138. This section provides for an assessment to be made to recover an excessive repayment of tax including any interest that may have been paid.

Section 100 – References to “Revenue Scotland assessment”

139. This section provides for references to “Revenue Scotland assessment” in the Act to mean assessments made under section 98 or 99.

Section 101 – References to the “taxpayer”

140. This section provides that, in sections 102 to 105, references to the “taxpayer” in relation to an assessment under section 98 mean the chargeable person and, in relation to an assessment under section 99, mean the person to whom the excessive repayment of tax was made.

Conditions for making Revenue Scotland assessments

Section 102 – Conditions for making Revenue Scotland assessments

141. This section limits the circumstances in which a Revenue Scotland assessment can be made under section 98 or 99 to situations which arose because of careless or deliberate behaviour by the taxpayer, a person acting on behalf of the taxpayer or a person who was a partner of the taxpayer at the relevant time. It also prohibits a Revenue Scotland assessment being made under those provisions if the situation was attributable to a mistake in the calculation of the tax liability that was in accordance with generally prevailing practice at the time the return was made.

Section 103 – Time limits for Revenue Scotland assessments

142. This section provides the time limits under which a Revenue Scotland assessment may be made. The general time limit for the making of a Revenue Scotland assessment is five years from the “relevant date”. This time limit is extended to 20 years where the loss of tax is attributable to deliberate behaviour by the taxpayer or a “related person”. A Revenue Scotland assessment to recover excessive repayment of tax is not late if it is made within 12 months of that repayment. If a taxpayer has died, a Revenue Scotland assessment may be made on a taxpayer’s personal representatives within three years of death and is limited to “relevant dates” within five years before the death. It also sets out how any objection to a Revenue Scotland assessment on the basis of the time limits can be made and defines “relevant date” and “related person”.

Section 104 – Losses brought about carelessly or deliberately

143. This section provides the definition of a loss of tax or situation brought about carelessly or deliberately by or on behalf of a person for the purposes of sections 102 and 103.

Notice of assessment and other procedure

Section 105 – Assessment procedure

144. This section provides the procedure for serving notice of a Revenue Scotland assessment on a taxpayer and also specifying what the notice of such an assessment must state (such as the amount of tax due, the date on which the notice is issued, the date by which the amount must be paid and the date by which any notice of review or appeal against the assessment must be given – see sections 235 and 242 for the relevant time limits relating to notices of review and appeal). The amount, or further amount, of tax chargeable (or tax or interest that is to be repaid) must be paid within 30 days of the date on which the assessment is issued.

Chapter 7 — Relief in Case of Excessive Assessment Or Overpaid Tax

Double assessment

Section 106 – Relief in case of double assessment

145. This section provides that a taxpayer can make a claim to Revenue Scotland for relief if they believe they have been assessed more than once for the same matter.

Overpaid tax etc.

Section 107 – Claim for relief for overpaid tax etc.

146. This section provides that a taxpayer may make a claim to Revenue Scotland for repayment where they have paid tax that they believe was not chargeable. It also provides that, if an assessment or determination is made that a person is chargeable to an amount of tax and they believe the tax is not chargeable, they can make a claim for the tax to be discharged.

Order changing tax basis not approved

Section 108 – Claim for repayment if order changing tax basis not approved

147. This section relates to situations where an order intended to change the tax basis of a devolved tax by means of the provisional affirmative procedure applies for a period but is not subsequently approved by the Scottish Parliament within 28 days of it being laid.
148. When such an order is made, the changes to the tax basis set out in it (which might be changes to tax rates or bands, and in the case of SLfT, changes to the definition of a disposal to landfill, changes to the definition of landfill site activities, or changes to the types of qualifying materials, the disposal of which is taxable) can apply immediately, so taxpayers' liability will change as soon as the order is made. If the proposed changes are not approved by Parliament within 28 days, then the Order falls. This section provides that in such a situation, a taxpayer can make a claim for repayment of the amount of additional tax paid during the period when the Order was in force.
149. Subsection (2) allows a taxpayer to make a claim to Revenue Scotland for the amount of additional tax paid because of the Order that fell, and any related penalty or interest. Subsection (3) sets out which Orders are relevant to this section. Subsection (5) provides that any claim must be made within two years of the 'relevant date' which is defined in subsection (6).

Defence of unjustified enrichment

Section 109 – Defence to certain claims for relief under section 107 or 108

150. This section provides that Revenue Scotland can reject a claim for relief on the basis that paying it would unjustly enrich the person making the claim. This would happen if the taxpayer was not the person who ultimately bore the cost of the tax. For example, for SLfT, while the tax is paid by the landfill site operator it is ultimately borne by those charged for depositing waste at the site.

Section 110 – Unjustified enrichment: further provision

151. This section explains circumstances in which a repayment would constitute unjustified enrichment where the payment of tax was made by someone other than the taxpayer. Loss or damage related to mistaken assumptions about tax made by a taxpayer should be excluded from consideration of whether a taxpayer would be unjustly enriched. The taxpayer may show that a certain amount would be appropriate compensation for the

loss or damage resulting from the mistaken assumption and this may be taken into account.

Section 111 – Unjustified enrichment: reimbursement arrangements

152. This section provides that the Scottish Ministers may make regulations (subject to the affirmative procedure) under which certain reimbursement arrangements may count for the purposes of section 109 (and so do not allow Revenue Scotland to defend the claim for repayment on the ground of unjust enrichment). The regulations may also provide for the conditions that such reimbursement arrangements must comply with, and for other reimbursement arrangements to be disregarded for the purpose of section 109 (so that the fact that the person claiming a repayment may be reimbursing others does not stop Revenue Scotland using the unjust enrichment defence). Subsection (2) defines “reimbursement arrangements” as arrangements made by the person claiming under which the repaid tax is passed on to the persons who actually bore the cost of paying the tax in the first place. For example, if a landfill site operator had overpaid tax, having collected that tax from the person who disposed of the waste, then to return an overpayment of tax to the landfill site operator may lead to the operator being unjustly enriched (if the person who disposed of the waste cannot be found to be reimbursed).
153. Subsection (3) sets out the elements of reimbursement arrangements which may be required by the regulations provided for in subsection (1). These arrangements include setting a period for reimbursement to take place, repayment to Revenue Scotland if reimbursement does not take place and requires interest paid by Revenue Scotland on a repayment to be treated in the same way as the repayment, as well as records to be kept and made available to Revenue Scotland on request that show how the arrangements for reimbursement were carried out.

Section 112 – Reimbursement arrangements: penalties

154. This section provides that regulations made under section 111 may make provision for penalties to be imposed where an obligation by virtue of subsection 111(4) is breached. Regulations may set out circumstances in which a penalty is payable, the amounts payable, and other arrangements for penalties, which may be different for different taxes. The regulations may not create criminal offences.

Other defences to claims

Section 113 – Cases in which Revenue Scotland need not give effect to a claim

155. This section provides a list of situations (other than unjust enrichment) in which Revenue Scotland does not need to make a repayment or discharge an assessment or determination. The situations are: where a mistake is made in a claim, or where a claim is made or not made by mistake; where other provisions in the Act provide means of seeking relief; where a claimant could have sought relief under other provisions in the Act but time limits on those provisions have expired; where the same matter has been put to a court or tribunal by the claimant, has been withdrawn from a court or tribunal, or time limits for putting it to a court or tribunal have passed; where the amount paid is the result of enforcement action or agreement between Revenue Scotland and the claimant; and where the amount paid is excessive but was calculated following normal procedures at the time, unless the tax charged was contrary to EU law.

Procedure for making claims

Section 114 – Procedure for making claims etc.

156. This section sets out that schedule 3 applies in relation to claims made under sections 106 to 108.

Section 115 – Time-limit for making claims

157. This section provides that claims for relief from double assessment or overpayment of tax made under section 106 or 107 must be made within five years of the date the tax return was required and must be made separately from any tax return made to Revenue Scotland.

Section 116 – The claimant: partnerships

158. This section provides that, where an overpayment was made on behalf of a partnership, a claim for relief for overpayment can only be made by someone who is nominated to act on behalf of all partners who would have been liable for the tax if it had been correct.

Section 117 – Assessment of claimant in connection with claim

159. This section provides that, where a claim for relief for overpaid tax is made, and the grounds for that claim are also grounds for Revenue Scotland to make an assessment on the claimant in respect of the tax, then Revenue Scotland can disregard certain restrictions on its ability to make an assessment. These include disregarding the expiry of a time limit. It also provides that a claim for relief for overpayment is not finally determined until the amount to which it relates is final (e.g. following the result of a review or appeal).

Contract settlements

Section 118 – Contract settlements

160. This section makes provision for the effect of contract settlements (defined in subsection (8)). The effect of subsection (1) is that an overpayment of tax can still be reclaimed under section 107 or 108 even though it was paid under a contract settlement. Subsections (3) to (7) apply to situations where tax was paid by someone under a contract settlement but that person who was not the person from whom it was due. In this circumstance a claim for relief from overpayment can be made by the person who paid the amount. In such a case, however, the way some of the defences available to Revenue Scotland under section 113 operate is modified, as is section 117. And where such a claim is made, Revenue Scotland can set off any amount repaid to the person who paid against any amount payable by the taxpayer.