



EXPLANATORY NOTES

Air Departure Tax (Scotland) Act 2017 (asp 2)

£6.00

AIR DEPARTURE TAX (SCOTLAND) ACT 2017

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The Act was brought forward as a consequence of measures enacted in the Scotland Act 2016¹ (“the 2016 Act”). Under the terms of sections 17 and 19 of the 2016 Act, the Scottish Parliament may make provision about taxes charged on the carriage of passengers by air from airports in Scotland. This Act deals with that responsibility and makes provision for a tax to be charged on the carriage of passengers on flights that begin at an airport in Scotland, to be called air departure tax (“ADT”).
4. Under paragraph 26 of the fiscal framework² agreed between the Scottish Government and UK Government, the provisions in the 2016 Act disapplying the UK Air Passenger Duty (“APD”) regime in Scotland intended to be brought into force with effect from 1 April 2018 by regulations made by Her Majesty’s Treasury and laid in the UK Parliament. It is intended that the majority of the legislative provisions for ADT will come into force the same day that APD is disappplied, although some provisions will be commenced before that date.
5. The Act is designed to operate under the tax collection regime set up by the Revenue Scotland and Tax Powers Act 2014³ (“RSTPA 2014”). The RSTPA 2014, amongst other things, established Revenue Scotland as Scotland’s tax authority for devolved taxes and provides the general framework for the collection and management of devolved taxes in Scotland. Revenue Scotland currently collects and manages land and buildings transaction tax (“LBTT”) and Scottish landfill tax (“SLfT”), which came into effect on 1 April 2015, and the Act provides that Revenue Scotland will also collect and manage ADT.

¹ <http://www.legislation.gov.uk/ukpga/2016/11/part/2/crossheading/devolved-taxes>

² <http://www.gov.scot/Publications/2016/02/3623/1>

³ <http://www.legislation.gov.uk/asp/2014/16/contents>

THE ACT

OVERVIEW

6. The Act comprises 49 sections and three schedules. The sections are arranged in five Parts, as follows:

- Part 1 provides for a tax to be charged on the carriage of passengers on flights that begin in Scotland, payable by the aircraft operator;
- Part 2 sets out the key concepts underlying the tax, including identifying the passengers and aircraft in respect of which the tax will be charged;
- Part 3 sets out the structure of the tax, and provides for tax bands and tax rate amounts to be set by regulations;
- Part 4 provides for administrative matters relating to the payment, collection and management of the tax, including registration, tax returns, a power to obtain security for payment of the tax and a requirement for aircraft operators based outside the European Economic Area (EEA) to appoint EEA-based tax representatives;
- Part 5 contains final provisions, including an index of defined expressions, Crown application, subordinate legislation, ancillary and commencement powers.

7. The Act makes a number of consequential and technical amendments to the RSTPA 2014. These are set out in schedule 2.

8. The regime in this Act for charging ADT replaces the regime for APD that currently applies under Chapter IV of Part I and schedules 5A and 6 of the Finance Act 1994 (“FA 1994”) and various instruments of subordinate legislation.

9. The following summarises the effect of this Act on aircraft operators who operate flights from airports in Scotland:

Liability for tax

- aircraft operators that are currently liable for APD will continue to be subject to a tax on the carriage of chargeable passengers on a chargeable aircraft – ADT for flights that begin in Scotland and APD for flights that begin elsewhere in the UK;
- the aircraft operator will be the taxpayer for the purposes of the RSTPA 2014, but nothing in the Act prevents aircraft operators from passing the cost of the tax onto passengers (or requires them to do so);
- aircraft operators that are currently exempt from APD because they are part of the Crown may become subject to ADT: this is because this Act takes a different approach to Crown application (see the explanation of section 46);

Exemptions

- aircraft operators that are currently exempt from APD in relation to the carriage of passengers on round-trip flights lasting less than one hour (under section 31(4A) of the FA 1994) will be liable for ADT for carrying these passengers, as there is no equivalent exemption in the Act;

- the Act as introduced does not include an equivalent of section 31(4B) to (4D) of the FA 1994, which, together with The Air Passenger Duty (Designated Region of the United Kingdom) Order 2001 (S.I. 2001/808), creates an exemption from APD for the carriage of passengers from airports in the Highlands and Islands region – the Scottish Government’s view is that such an exemption has to be notified to and assessed by the European Commission under state aid rules before it is implemented, in compliance with European Union law – however, an exemption for passengers on Highlands and Islands flights may still apply if the flight is on a non-chargeable aircraft (see sections 9 and 10);
- the Act includes a regulation-making power under which further passenger and aircraft exemptions may be made, or existing exemptions modified (see section 15);

Tax rates

- the structure of ADT is similar to the structure of APD, in that the amount of tax incurred for the carriage of a chargeable passenger on a chargeable aircraft will depend on the passenger’s final destination and class of travel;
- the Act provides for the Scottish Ministers, by regulations, to define tax bands by reference to a passenger’s final destination and to set tax rate amounts according to the passenger’s class of travel. Detail on tax bands and tax rate amounts will be delivered at a later date in subordinate legislation (see section 17(1));

Collection and management of ADT

- Revenue Scotland will be responsible for the collection and management of ADT, so aircraft operators that carry, or expect to carry, chargeable passengers on chargeable aircraft on flights that begin in Scotland will need to make tax returns to Revenue Scotland;
- aircraft operators are required to register for ADT and make tax returns on a quarterly basis (under section 24), unless they are eligible to make occasional returns (under section 25);
- tax that is due will need to be paid at the same time as a return is made, although tax will be treated as paid if arrangements satisfactory to Revenue Scotland are made for payment of the tax;
- if an aircraft operator that is required to register for ADT is based outside the EEA, it will need to appoint a tax representative for the purposes of ADT. If the operator already has a fiscal representative for the purposes of APD, the Act does not prevent the same person being appointed to both roles but imposes eligibility requirements against which the ADT appointment would need to be assessed;
- failures to comply with obligations relating to ADT will incur penalties under the RSTPA 2014 (see the explanation in respect of schedule 2).

PART 1 – AIR DEPARTURE TAX

10. Part 1 contains only one section, which establishes that there is to be a tax charged on the carriage of passengers on flights that begin in Scotland. The tax will apply only for the carriage of chargeable passengers on chargeable aircraft, and will be payable by the aircraft operator. Revenue Scotland is to be responsible for the collection and management of the tax.

PART 2 – KEY CONCEPTS

11. Part 2 defines the concepts that are fundamental to the operation of the tax: in particular, defining who is a chargeable passenger and which aircraft are chargeable aircraft. Other terms are defined elsewhere in the Act, either in the section in which a term is used or in the general interpretation section (section 44). An index of all terms and expressions that are defined or otherwise explained in the Act can be found in schedule 3.

Section 2 – Meaning of chargeable passenger

12. The effect of this section is that every person carried on a flight that begins in Scotland is a chargeable passenger, unless the person is working during the flight or qualifies for an exemption as a non-chargeable passenger. Some exemptions are set out in sections 3 to 7. Further exemptions may be set, or existing exemptions modified or removed, by regulations made under section 15.

13. For a person to be treated as working during a flight, the person must be carried on the flight for the sole purpose of carrying out an activity described in section 2(2) during the flight. The activities described in section 2(2)(a), (b) and (d) are self-explanatory. Section 2(2)(c) covers work relating to the safety or security of the aircraft or of passengers or goods carried on the aircraft, and includes escorting a passenger or goods. Not all persons who escort a passenger or goods on a flight would be considered to be working during the flight. The paragraph must be read in its context, which requires that the person is carried for the sole purpose of carrying out the activity in relation to the flight. Persons whose work escorting a person or goods continues after the flight, or whose work has no connection with the aircraft operator, would not be considered to be working during the flight for the purpose of this section: for example, a teacher accompanying students on a school trip or a courier delivering diplomatic documents.

Section 3 – Passengers not carried for reward

14. This section creates a tax exemption for the carriage of a passenger who is carried for no reward in the circumstances specified in section 3(2).

15. The circumstances described in section 3(2)(a) and (b) are self-explanatory. The circumstances described in section 3(2)(c) and (d) are intended to enable aircraft operators, without incurring tax, to position their staff before or after they work on any aircraft. The following table provides some examples.

| Example | Tax outcome |
|--|---|
| <p><i>Example 1 (pre-work positioning)</i></p> <p>An aircraft engineer located in Edinburgh is needed to work on an aircraft located at London Heathrow, and is flown from Edinburgh to Heathrow as a passenger.</p> | <p>No ADT is payable. Under section 3(2)(c), the engineer is a non-chargeable passenger. The exemption is subject to two conditions: there must be no fare or other reward paid for the carriage of the passenger, and the flight must land at Heathrow no earlier than 72 hours before the engineer's work on the aircraft begins.</p> |

| Example | Tax outcome |
|--|--|
| <p><i>Example 2 (post-work positioning)</i></p> <p>A cabin attendant whose home base is in London works on a flight from Copenhagen to Edinburgh, and is flown from Edinburgh to London Stansted as a passenger.</p> | <p>No ADT is payable. Under section 3(2)(d), the cabin attendant would be a non-chargeable passenger on a flight from Edinburgh to any London airport. The exemption is subject to two conditions: there must be no fare or other reward paid for the carriage of the passenger, and the flight must depart Edinburgh no later than 72 hours after the passenger finishes his or her shift as a cabin attendant on the Copenhagen to Edinburgh flight.</p> |

Section 4 – Passengers under the age of 16

16. This section creates tax exemptions for the carriage of persons under the age of 16. Children under the age of two on the departure date of the flight are always non-chargeable passengers, unless they are allocated their own seat before boarding. Children under the age of 16 on the departure date of the flight are non-chargeable passengers only if they have tickets for standard class travel for all the flights covered by their agreement for carriage. The definitions of agreement for carriage and standard class travel are set out in sections 12 and 14 respectively.

Section 5 – Passengers carried on connected flights

17. Section 5 provides a tax exemption for the carriage of passengers who are travelling on connected flights, but only in relation to the second or any subsequent connected flight. Schedule 1 sets out the rules for determining which flights are to be treated as connected for ADT purposes. The rules prescribe maximum connection times between flights: 24 hours if connecting to an international flight and either six, 10 or 17 hours for connecting to a domestic flight, depending on what time of day the preceding flight is scheduled to arrive. The rules also prescribe that the flights must be covered by the same agreement for carriage (and for that definition, see section 12(2)).

18. The status of the passenger (chargeable or non-chargeable) on the first connected flight, and the status of the aircraft used for that flight (chargeable or non-chargeable), determines whether tax is chargeable, and at what rate, for the carriage of the passenger on the whole series of connected flights (see section 16). For example:

- if the passenger is a non-chargeable passenger on the first connected flight, or if that flight is on a non-chargeable aircraft, no tax will be incurred for any of the connected flights;
- if the passenger is a chargeable passenger on the first connected flight, and if that flight is on a chargeable aircraft, the aircraft operator for the first connected flight incurs tax at a rate that is determined by, among other things, the place where the last connected flight ends.

19. The connected flight rules are intended to have the same effect as, and therefore dovetail with, the rules that currently apply for APD under The Air Passenger Duty (Connected Flights) Order 1994 (S.I. 1994/1821, as amended). Any difference between the rules that apply in Scotland and the rules that apply in the rest of the UK would create a risk of aircraft operators being taxed more than once for the carriage of a single person on connected flights.

20. The following examples illustrate the ADT that would be payable in respect of the carriage of a passenger on any series of connected flights that includes a flight beginning in Scotland. The examples assume that:

- the flights concerned are connected flights under the rules in schedule 1;
- the passenger would be a chargeable passenger in relation to the first connected flight; and
- the first connected flight is on a chargeable aircraft.

| Example | Tax outcome |
|---|--|
| <p><i>Example 1</i></p> <p>The passenger's first connected flight leaves from a Scottish airport, e.g.:</p> <ul style="list-style-type: none"> • Aberdeen → London Heathrow → Bristol, or • Edinburgh → London Heathrow → Sydney | <p>ADT is payable by the aircraft operator carrying the passenger on the first connected flight, at the rate determined under section 16 by reference to the destination of the passenger's last connected flight.</p> |
| <p><i>Example 2</i></p> <p>The passenger's first connected flight leaves from an airport within the UK but outwith Scotland, and a subsequent connected flight leaves from a Scottish airport, e.g.:</p> <ul style="list-style-type: none"> • London Gatwick → Glasgow → Stornoway, or • Newcastle → Glasgow → New York | <p>No ADT is payable because the first connected flight begins outwith Scotland, and the passenger is a non-chargeable passenger, under section 5, on any subsequent connected flight from an airport in Scotland.</p> |
| <p><i>Example 3</i></p> <p>The passenger's first connected flight leaves from an airport outwith the UK, and a subsequent connected flight leaves from a Scottish airport, e.g.:</p> <ul style="list-style-type: none"> • Brussels → London → Inverness → Stornoway, or • New York → Edinburgh → Kirkwall | <p>No ADT is payable because the first connected flight begins outwith Scotland, and the passenger is a non-chargeable passenger, under section 5, on any subsequent connected flight from an airport in Scotland.</p> |

Section 6 – NATO passengers

21. This section provides a tax exemption for the carriage of passengers on NATO business. This mirrors the extra-statutory concession provided in relation to APD under paragraph 3.2.5 of Her Majesty’s Revenue and Customs Excise Notice 550: Air Passenger Duty⁴.

Section 7 – Changes of circumstance beyond passengers’ control

22. This section provides a tax exemption for the carriage of a passenger on a flight where, for reasons beyond the passenger’s control:

- an exemption that would otherwise apply to the passenger (under section 3 to 6 or regulations under section 15) ceases to apply to the passenger (section 7(1)); or
- the passenger, in the course of a journey that includes only flights for which the passenger has a ticket, departs from a Scottish airport on a flight that is not shown on the passenger’s ticket (section 7(3)).

| Example | Tax outcome |
|---|--|
| <p><i>Example 1</i></p> <p>A passenger is flying from New York to Edinburgh to Kirkwall. Under section 5, the passenger is a non-chargeable passenger on the Edinburgh to Kirkwall flight because it is a second connected flight. However, a flight delay caused by poor weather results in the passenger’s Edinburgh to Kirkwall flight being delayed beyond the maximum allowable connection time.</p> | <p>No ADT is payable for the carriage of the passenger on the Edinburgh to Kirkwall flight. Under section 7(1), the passenger continues to be a non-chargeable passenger on the delayed flight, but only if the delay arose after the passenger’s ticket was issued or last amended.</p> |
| <p><i>Example 2</i></p> <p>A passenger has a ticket for a flight from Aberdeen to London Heathrow. However, the plane develops a mechanical problem and makes an unscheduled stop in Edinburgh. The passenger is transferred to a scheduled Edinburgh to London Heathrow flight.</p> | <p>No ADT is payable for the carriage of the passenger on the scheduled Edinburgh to London Heathrow flight, but only if the passenger is carried on that flight without his or her ticket being amended to reflect the changed flight details.</p> <p>(ADT will already have been incurred for the carriage of the passenger from Aberdeen to London Heathrow at the point when that flight began.)</p> |

⁴<https://www.gov.uk/government/publications/excise-notice-550-air-passenger-duty/excise-notice-550-air-passenger-duty>

Section 8 – Meaning of chargeable aircraft

23. The effect of this section is that ADT is only charged in respect of chargeable passengers carried on certain aircraft, referred to in the Act as chargeable aircraft. A chargeable aircraft is a fixed-wing aircraft, fuelled by kerosene (equivalent to aviation turbine fuel, or “Avtur”), with a maximum take-off weight of 5.7 tonnes or more. Every aircraft that meets those criteria is a chargeable aircraft, unless the aircraft qualifies for an exemption as a non-chargeable aircraft.

24. Rotary aircraft such as helicopters, and aircraft not fuelled by kerosene (such as piston-engine aircraft which are typically fuelled by aviation gasoline, or “Avgas”) are not chargeable aircraft.

25. Chargeable aircraft exemptions are set out in sections 9 and 10. Further chargeable aircraft exemptions may be set, or the existing exemptions modified or removed, by the Scottish Ministers by regulations made under section 15.

26. The following examples show the maximum take-off weights of some aircraft currently used in Scotland. Maximum take-off weight is defined in section 13.

| Example | Tax outcome |
|---|--|
| <p><i>Example 1 (aircraft with a maximum take-off weight of less than 5.7 tonnes)</i></p> <ul style="list-style-type: none"> • BN-2 Islander: used on intra-island routes in Orkney, and between Oban and Coll, Colonsay and Tiree, this small turboprop plane has a maximum take-off weight of 2.994 tonnes. • Viking Twin Otter 400: used on routes between Glasgow and Barra, Campbeltown and Tiree, this small turboprop plane has a maximum take-off weight of 5.670 tonnes. | <p>No ADT is payable for the carriage of passengers on these aircraft. Both are too light to be chargeable aircraft. In addition, the BN-2 Islander is fuelled by Avgas, not Avtur (kerosene).</p> |

| Example | Tax outcome |
|--|--|
| <p><i>Example 2 (aircraft with a maximum take-off weight of 5.7 tonnes or more)</i></p> <ul style="list-style-type: none"> • Let L-410: used on flights between Glasgow and the Isle of Man, this aircraft has a maximum take-off weight of 7 tonnes. • Saab 340: used on most Highlands and Islands routes, this aircraft has a maximum take-off weight of 13.99 tonnes. • Boeing 777-300ER: with a maximum take-off weight of 251.29 tonnes, this is the largest aircraft currently used on long haul routes from a Scottish airport. | <p>ADT is payable for the carriage of chargeable passengers on these aircraft because each aircraft has a maximum take-off weight of more than 5.7 tonnes.</p> |

Section 9 – Aircraft used under public service obligation

27. This section provides a tax exemption for the carriage of passengers on an aircraft that is being operated under a public service obligation (“PSO”) imposed under European Union law. PSOs enable routes to isolated communities to be sustained by the provision of government subsidies. The effect of section 9(1), in the light of the PSOs that are currently in place in Scotland, is that no ADT would be payable for the carriage of passengers on aircraft used:

- on flights subsidised by the Scottish Government on routes that connect Glasgow with Barra, Tiree or Campbeltown;
- on flights subsidised by Scottish local authorities on routes within Shetland, Orkney and the areas of Comhairle nan Eilean Siar and Argyll and Bute Council;
or
- the Dundee to London Stansted service subsidised by a partnership of Dundee City Council, the UK Government and Transport Scotland.

Section 10 – Aircraft used for military, emergency, training or research flights

28. Section 10 provides a tax exemption in relation to flights that serve a public purpose and which would not ordinarily be considered to be commercial or chartered passenger flights. For consistency with the exemption provided in respect of APD under section 29A of the FA 1994, the exemption in section 10 is defined by reference to flights that are exempt from the greenhouse gas emissions allowance trading scheme in place under Directive 2003/87/EC of the European Parliament and of the European Council of 13 October 2003.

29. Directive 2003/87/EC has been amended several times since it was originally made. Under section 12 of the Interpretation and Legislative Reform (Scotland) Act 2010⁵ (asp 10), the version of the instrument that will apply for the purposes of this exemption is the version that is in force immediately before the day on which this Act received Royal Assent. A consolidated version of the Directive, as in force when this explanatory note was prepared, is available⁶.

30. The relevant paragraphs in Annex I to the Directive, which describe the exempt flights, are listed in section 10(2). To aid the reader, a description of what each relevant paragraph covers has been included in bracketed text. However, this text is indicative only. The flights which are exempt are the flights described in the identified paragraphs of the Directive. Section 10(3) requires those paragraphs to be interpreted in accordance with Commission Decision 2009/450/EC⁷ of 8 June 2009, which gives detailed guidance on how to interpret the aviation activity paragraphs in Annex I to the Directive.

Sections 11 to 14

31. Sections 11 to 14 define other concepts that are key to the operation of the tax: flight, carriage, agreement for carriage, maximum passenger capacity, maximum take-off weight and standard class travel. Key points to note include the following:

- a person's flight begins when the person first boards the aircraft and ends when the person finally disembarks from it: a flight does not end nor a new flight begin if, for example, a person disembarks from an aircraft temporarily while it refuels (see section 11);
- an agreement for carriage need not be formal or commercial in nature (see section 12); accordingly, the operators of a private jet would be liable for ADT if the jet is a chargeable aircraft and carries passengers who are chargeable passengers, even if the passengers are carried on an informal basis and do not have tickets for their travel;
- whether a passenger is carried on an aircraft in standard class travel (which is relevant to the structure of the tax in section 16 and the exemption for children under the age of 16 in section 4) depends on the seat pitch, the number of different classes of travel available on a flight, and any guidance issued by Revenue Scotland (see section 14).

Section 15 – Key concepts may be modified by regulations

32. This section provides for regulations to make other provision concerning who is a chargeable passenger, who is a non-chargeable passenger, which aircraft are chargeable aircraft and which aircraft are non-chargeable aircraft. Regulations under this section will be subject to the affirmative procedure (see section 42(1)).

⁵ <http://www.legislation.gov.uk/asp/2010/10/section/12>

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1478510634870&uri=CELEX:02003L0087-20151029>

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1478508844459&uri=CELEX:32009D0450>

PART 3 – TAX RATES

33. Part 3 provides for the structure of the tax. The rate of ADT incurred for the carriage of a chargeable passenger on a chargeable aircraft will depend on three variables:

- the final destination of the flight, which will determine which tax band applies (tax bands are to be defined by the Scottish Ministers by regulations under section 17);
- whether the aircraft is a special category aircraft, which will determine whether the “special rate” applies (see section 16(3)(a)). A special category aircraft is essentially a large aircraft that is configured to carry only a small number of passengers;
- whether the passenger is travelling in standard class travel for all flights covered by his or her agreement for carriage, which will determine whether the “standard” or “premium” rate applies (see section 16(3)(b)).

34. Section 17(1) requires Scottish Ministers to make regulations for two specific and limited purposes—

- to define tax bands by reference to a passenger’s final destination (as defined in section 16(5)); and
- to set the amount of the standard, premium and special tax rates for each band (as those rates are defined in section 16(3)).

35. Setting tax bands and tax rate amounts in subordinate legislation is consistent with the approach so far adopted in relation to other devolved taxes in Scotland – see section 24 and paragraph 3 of schedule 19 of the Land and Buildings Transaction Tax (Scotland) Act 2013⁸ (“LBTT(S)A 2013”) and section 13 of the Landfill Tax (Scotland) Act 2014⁹ (“LT(S)A 2014”).

36. The exercise of the section 17(1) power is mandatory because section 16 of the Act is drafted in such a way that no ADT can be collected unless tax bands and tax rate amounts are prescribed.

37. Regulations defining tax bands and setting tax rate amounts will be subject to the affirmative procedure (see section 42(1)).

38. Section 17(2) places a duty on Scottish Ministers, when preparing draft regulations under section 17(1), to have regard to the economic, environmental and social impacts of the proposed tax bands and tax rate amounts.

39. Section 17(3) places a duty on Scottish Ministers to keep under review the economic, environmental and social impacts of tax bands and tax rate amounts provided for in regulations made under section 17(1).

⁸ <http://www.legislation.gov.uk/asp/2013/11/contents>

⁹ <http://www.legislation.gov.uk/asp/2014/2/section/13>

40. In contrast to section 17(1), section 17(4) provides a discretionary power which enables Scottish Ministers to make other adjustments to the structure of the tax. Provision which could be made under section 17(4) but not under 17(1) might include, for example—

- amending section 16(3) to add or remove a tax rate category – e.g. by adding an additional tax rate for passengers travelling in premium economy, or to replace the standard and premium rates with a single flat rate (the section 17(1) power would be used to set the new tax rate amount);
- amending the scope of a tax rate category – e.g. by adjusting the definition of a term used in a tax rate description, such as “special category aircraft” or “standard class travel”;
- changing the meaning of other terms used in section 16 of the Act – e.g. the definition of “final destination” in section 16(5) or the connected flight rules in schedule 1;
- amending sections 16 and 17(1) to alter the factor by reference to which tax bands are defined – e.g. if it were considered appropriate to set tax bands by reference to the size of aircraft on which a passenger is carried rather than by the passenger’s final destination.

41. The scope of the power under section 17(4) is not unlimited. Regulations must concern the structure of the tax and cannot be used to alter the nature of the tax. The nature of the tax – i.e. a tax on the carriage of passengers by air from airports in Scotland – is protected by sections 1 and 18 of this Act and section 80L of the Scotland Act 1998.

42. Regulations under section 17(4) will be subject to the affirmative procedure (see section 42(1)).

PART 4 – PAYMENT, COLLECTION AND MANAGEMENT OF TAX

43. Part 4 sets out a range of provisions for collecting and managing ADT, and is designed to operate under the tax collection regime set up by the RSTPA 2014, which provides the general collection and management framework for devolved taxes in Scotland.

Sections 18 and 19 (taxable activities and taxable persons)

44. These sections define taxable activity and taxable person. Their combined effect is that every aircraft operator that carries a chargeable passenger on a chargeable aircraft on a flight that begins at an airport in Scotland is a taxable person. Section 19(2) clarifies that the aircraft operator, and not the passenger, is the taxpayer.

Sections 20 to 22 (registration)

45. These sections relate to registration. Section 20 requires Revenue Scotland to keep a register (the “ADT register”) for the purpose of collecting and managing the tax. Section 20(4) gives Revenue Scotland a discretionary power to publish any, some or all of the information in the ADT register. However, this will be subject to existing restrictions on the publication of certain information (for example, under the Data Protection Act 1998).

46. Sections 21 and 22 impose obligations on taxable persons to register and deregister for the tax. Whether a taxable person is required to register (or deregister) for the tax is determined by whether the person is required (or ceases to be required) to make quarterly returns. The registration and deregistration requirements are also triggered if the taxable person forms an intention to do something, or to stop doing something, that will alter whether or not the person is required to make quarterly returns.

Sections 23 to 27 (tax returns)

47. These sections relate to tax returns. Every taxable person must make tax returns – either quarterly under section 24 or on an occasional basis under section 25. Quarterly returns are due no later than 30 days after the end of each quarter (1 January to 31 March; 1 April to 30 June; 1 July to 30 September; 1 October to 31 December). Occasional returns for any taxable activity are due no later than 30 days after the date of that activity.

48. The eligibility of a taxable person to make occasional returns is re-assessed each time the taxable person carries out a taxable activity; eligibility is based on the intended level of taxable activity during the next 12 months and the amount of tax expected to be incurred during that period. If Revenue Scotland is not satisfied that a taxable person is eligible to make occasional returns, Revenue Scotland may require the person to make quarterly returns instead.

49. Before switching from quarterly returns to occasional returns, or vice versa, a taxable person must notify Revenue Scotland.

50. Section 23(2) requires tax to be paid at the same time as a return is made under section 24 or 25 or amended under section 83 of the RSTPA 2014.

51. Section 26 concerns the form and content of tax returns. Section 26(1) requires tax returns to include a declaration about the accuracy and completeness of the return, with the nature of the declaration determined by whether the return is made by the taxable person personally or by an agent (who may or may not be a tax representative) acting on the taxable person's behalf. This provides equivalency with the legislation for LBTT and SLfT (see section 36(2)(a) of the LBTT(S)A 2013 and regulations 11(4)-(5) of The Scottish Landfill Tax (Administration) Regulations 2015, S.S.I. 2015/3 as amended).

52. Section 26(2) requires returns to otherwise be made in the form that is specified by Revenue Scotland; this is consistent with the approach to other devolved taxes (see section 25A of the LT(S)A 2014 and section 35 of the LBTT(S)A 2013, as inserted by the RSTPA 2014).

53. Section 27 allows for taxable persons to agree with Revenue Scotland a special accounting scheme. This would enable the taxable person to make tax returns based on information about chargeable passengers that is calculated in accordance with the special accounting scheme rather than from records of actual passenger numbers. Approval to use a special accounting scheme will only be given if Revenue Scotland considers that it is appropriate having regard to the difficulties that the person has encountered or expects to encounter in obtaining or recording information about passengers and their agreements for carriage.

Sections 28 to 34 (tax representatives)

54. These sections require taxable persons not based in an EEA State (as defined in section 44) to appoint an EEA-based tax representative and notify the details of the appointment to Revenue Scotland. Taxable persons based in an EEA State may appoint a tax representative if they wish to do so, but the appointment does not have effect for the purpose of ADT unless the details of the appointment are notified to Revenue Scotland. A tax representative may be any person (whether an individual, a partnership, a body corporate or an unincorporated body) that meets the eligibility requirements set out in section 32.

55. There are two types of tax representative: fiscal and administrative (see section 29). A fiscal tax representative is the more onerous role. The person effectively stands in the shoes of the taxable person, and is liable to Revenue Scotland, jointly and severally with the taxable person, for ADT (see section 30). This joint and several liability continues after the fiscal tax representative's appointment ends, but extends only to liabilities arising from failures to comply that occurred during the period that the fiscal tax representative was appointed (see section 30(3)).

56. An administrative tax representative is a less onerous role and is mainly for keeping and preserving records for ADT, and is not liable for ADT. The record-keeping requirements for ADT will be set out in regulations to be made under section 74 of the RSTPA 2014¹⁰. A taxable person is authorised to appoint an administrative, rather than a fiscal, tax representative only if the taxable person provides the amount of security (if any) that is required by Revenue Scotland. Directions made by Revenue Scotland under section 35 or 36 may specify the amount of security that is required to validate the appointment of an administrative tax representative. To ensure that the appointment of an administrative tax representative continues to be valid, a taxable person must comply with directions issued under section 35 or 36 after the appointment is made.

57. Nothing in the Act prevents a tax representative from making a tax return as an agent for a taxable person; however, neither a fiscal nor an administrative tax representative is authorised to make a declaration, in or relating to a tax return, that section 26 requires to be made by the taxable person.

58. Section 33 clarifies when the appointment of a tax representative begins and ends, to provide certainty about the extent of the tax representative's obligations.

59. Section 34 places a duty on taxable persons and tax representatives to notify Revenue Scotland, and each other, if the appointment is to cease to have effect for any reason.

Sections 35 and 36 (security)

60. These sections empower Revenue Scotland to issue directions requiring taxable persons (and, in some circumstances, fiscal tax representatives) to provide security for the payment of any tax that may become due. Revenue Scotland has the power to specify what type of security is appropriate, but it is expected that a written guarantee from a financial institution (such as a bank) will normally be acceptable.

¹⁰ <http://www.legislation.gov.uk/asp/2014/16/section/74>

61. A direction under section 35 applies to an individual taxable person or fiscal tax representative. A direction under this section may:

- require a taxable person or fiscal tax representative to provide security, or
- identify the amount of security that a taxable person would be required to provide to validate the appointment of an administrative tax representative (see section 29(2)(b) or (c)).

62. A direction under section 36 applies to taxable persons generally. It may specify the amount of security, or a method for calculating the amount of security, that taxable persons are required to provide to validate the appointment of an administrative tax representative. In respect of any particular taxable person, an individual direction under section 35 prevails over a general direction under section 36.

Sections 37 and 38 (handling agents)

63. A handling agent for ADT purposes is someone that has an agreement with an aircraft operator to arrange seat allocation, baggage handling or boarding for passengers carried by the aircraft operator. Section 38 enables Revenue Scotland to put a handling agent on notice that it will be jointly and severally liable with the aircraft operator, while the notice is in effect, for ADT incurred by the aircraft operator for carrying passengers handled by the handling agent. The joint liability extends to certain tax-related penalties and interest (section 38(5)).

64. Section 38(2) enables Revenue Scotland to issue a notice to a handling agent only when an aircraft operator has fallen into tax arrears or failed to appoint a tax representative when required to do so. Section 38(3)(a) prevents Revenue Scotland from issuing a notice to a handling agent who is an individual. Section 38(4)(a) ensures that a notice under this section cannot take effect before it has been received by the handling agent. The meaning of “handle” and “handling agent” are set out in section 37.

Section 39 and 40 (communications with, and inaccuracies provided to, Revenue Scotland)

65. These sections are self-explanatory.

Section 41 – Administrative provisions may be modified by regulations

66. This section provides for regulations to make other provision relating to the payment, collection and management of the tax (other than to amend the meaning of taxable activity in section 18 or the meaning of taxable person in section 19). Regulations under this section will be subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act, and the negative procedure if they do not (see section 42(1)(c) and (2)(a)).

PART 5 – FINAL PROVISIONS

67. Part 5 includes standard final provisions. Setting aside section 46 (Crown application), which is discussed in more detail below, particular points to note in relation to Part 5 include:

- that section 42 sets out the applicable procedures for regulation-making powers in the Act;
- that section 44(2) provides a power to update, by regulations, references in the Act to other enactments (regulations made under this power will be subject to the negative procedure – see section 42(2)(c)); and
- that section 48 provides for provisions in the Act to be brought into force by regulations.

Section 46 – Crown application

68. There is a common law presumption that an Act of the UK Parliament does not bind the Crown unless it does so expressly or by necessary implication. The Crown is therefore not subject to the FA 1994, which provides the statutory authority for the APD regime. However, the default position under section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010¹¹ is that Acts of the Scottish Parliament bind the Crown unless they expressly provide otherwise.

69. For consistency with the approach to other devolved taxes, the Act does not displace the statutory presumption in favour of Crown application. Any aircraft operators that are currently exempt from APD on the basis that they are part of the Crown will not be exempt from ADT on that basis. For example, Marine Scotland currently uses aircraft for maritime surveillance. If Marine Scotland operated chargeable aircraft for this purpose, and carried chargeable passengers, it would be exempt from APD because it is part of the Scottish Government, and therefore part of the Crown, but would not be exempt from ADT unless it attracted another exemption such as a tax exemption in relation to flights that serve a public purpose.¹²

70. Section 46 provides that Her Majesty in Her private capacity is not a taxable person. The effect of this is that if Her Majesty, in Her private capacity, were to have the management of any chargeable aircraft carrying chargeable passengers on a flight beginning at an airport in Scotland, Her Majesty would not be required to register for or to pay ADT.

71. Section 46 does not exempt Her Majesty from being a chargeable passenger. The effect of this is that if Her Majesty were carried on a chargeable aircraft on a flight departing from an airport in Scotland, the aircraft operator would incur tax at the applicable rate under section 16. This Act does not prevent an aircraft operator from passing on to Her Majesty, or to any other passenger, the cost of the tax, but nor does it require it.

¹¹ <http://www.legislation.gov.uk/asp/2010/10/section/20>

¹² The aircraft currently used by Marine Scotland for maritime surveillance are Reims Cessna Caravan IIF-406, which have a maximum take-off weight of less than 5.7 tonnes and are therefore not chargeable aircraft (see the description of section 3).

SCHEDULES

Schedule 1 – Connected flight rules

72. Schedule 1 sets out the rules for determining which flights are to be treated as connected flights. This is relevant to the connected flights exemption (section 5) and to tax bands, which will be set by reference to a passenger's final destination (see description of Part 3, above). The final destination of a passenger who is travelling on connected flights is the place where the last connected flight ends.

73. The connected flight rules prescribe the maximum time permitted between two flights in order for them to be considered to be connected flights. The permitted connection period is 24 hours if connecting to an international flight and either six, 10 or 17 hours for connecting to a domestic flight, depending on what time of day the preceding flight is scheduled to arrive. Flights are connected flights only if they are covered by the same agreement for carriage (see section 12(2)).

Schedule 2 – Minor and consequential amendments

74. This schedule amends the RSTPA 2014. The amendments bring ADT into the framework for the collection and management of devolved taxes under the RSTPA 2014.

75. Paragraph 2 of schedule 2 amends section 141, which enables a designated officer of Revenue Scotland to enter and inspect a person's business premises. The power under section 141 may be used only if the officer believes that the inspection is reasonably required for the purpose of checking the person's tax position. The effect of the amendment is that the power under section 141 does not extend to the premises of a taxable person's tax representative or handling agent. However, the premises of a tax representative or handling agent may be entered and inspected if the representative or agent is specified as an involved third party for the purpose of section 142 of the RSTPA 2014.

76. Paragraphs 3 to 23 make amendments relating to penalties. Generally, the same penalties have been applied in relation to ADT as currently apply in relation to SLfT. However, some new penalty provisions have been added for failures to meet obligations specific to ADT (for example, to appoint a tax representative or provide security), and some existing RSTPA 2014 provisions relating to the administration and enforcement of penalties have been duplicated for ADT.

77. Some penalty provisions that apply to SLfT or LBTT have been amended in order to incorporate references to ADT, but the substantive effect of the RSTPA 2014 as it applies to SLfT and LBTT is not affected by this Act.

78. The following table identifies the conduct relating to ADT that will incur a penalty under the RSTPA 2014 and the penalties that will apply.

| Conduct incurring penalty | Penalties | Schedule 2 reference |
|---|--|-----------------------------|
| Failing to make tax returns | Multiple penalties ranging from a fixed penalty of £100 to a tax-geared penalty of 100% of the tax liability which would have been shown in the tax return, depending on the nature and persistence of the failure to comply (sections 159 and 164 to 167 of RSTPA 2014 as amended) | Paragraphs 3 to 8 |
| Failing to pay tax when making or amending a tax return Failing to pay an additional amount of tax arising from an adjustment or assessment under the RSTPA 2014 | Multiple penalties ranging to 1% to 5% of the unpaid tax, depending on persistence of failure (sections 168 and 170 to 173 of RSTPA 2014 as amended) | Paragraphs 9 to 15 |
| Giving Revenue Scotland inaccurate taxpayer documents, where the inaccuracy misrepresents the amount of tax payable | Penalty of 30% of potential lost revenue if the inaccuracy is careless and 100% if it is deliberate (sections 182 and 183 of RSTPA 2014 as amended) | Paragraph 16 |
| Failing to register for the tax Failing to appoint a tax representative Failing to comply with an individual direction to provide security for the payment of tax | Penalty of 30% of the potential lost revenue if the failure to comply is careless and 100% if it is deliberate (sections 209 and 210 of RSTPA 2014 as amended) Additional tax-related penalties may be imposed by the Upper Tribunal (sections 215A and 215B of RSTPA 2014 as inserted) | Paragraphs 18 to 21 |

| Conduct incurring penalty | Penalties | Schedule 2 reference |
|--|--|-----------------------------|
| Failing to deregister for the tax on ceasing to be a taxable person Failing to notify Revenue Scotland of details of tax representative appointment Failing to notify Revenue Scotland if a tax representative appointment is to cease to have effect Failing to notify Revenue Scotland about inaccuracies in certain information notified to Revenue Scotland | Penalty of £300 (section 215C of RSTPA 2014 as inserted) | Paragraph 21 |

79. Paragraph 24 of schedule 2 amends section 223 of the RSTPA 2014, which provides for a certificate of Revenue Scotland to be taken as evidence of the certified facts. The section is amended to enable certificates to be given as to whether or not, in relation to a specified flight, a passenger is a chargeable passenger or an aircraft is a chargeable aircraft.

80. Paragraph 25 of schedule 2 amends section 233 of the RSTPA 2014, which specifies which decisions of Revenue Scotland are appealable decisions. The effect of the amendment is that a decision of Revenue Scotland that affects a requirement to provide security for the payment of the tax is appealable. However, a person will not be entitled to appeal a decision of Revenue Scotland to issue a general direction under section 36 (although a person may appeal how the general direction is applied by Revenue Scotland in a particular case).

Schedule 3 – Index of defined expressions

81. Schedule 3, which is introduced by section 47, is self-explanatory.

PARLIAMENTARY HISTORY

82. The table below sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the reference to the Official Report of those proceedings. It also shows the dates on which Committee reports and other papers relating to the Act were published, and references to those reports and other papers.

| <i>Proceedings and Report</i> | <i>Reference</i> |
|---|--|
| INTRODUCTION | |
| Air Departure Tax (Scotland) Bill as introduced, 19 December 2016 | SP Bill 3 – Session 5 (2016) |
| SPICe briefing on Bill as introduced, 25 January 2017 | SB 17-05 – Session 5 (2017) |

| <i>Proceedings and Report</i> | <i>Reference</i> |
|--|--|
| STAGE 1 | |
| FINANCE AND CONSTITUTION COMMITTEE (LEAD COMMITTEE) | |
| Wednesday 1 February 2017 | Columns 11 to 60 Official report, 1 February 2017 |
| Wednesday 8 February 2017 | Columns 22 to 46 Official report, 8 February 2017 |
| Wednesday 22 February 2017 | Columns 1 to 28 Official report, 22 February 2017 |
| Wednesday 1 March 2017 | Columns 1 to 26 Official report, 1 March 2017 |
| DELEGATED POWERS AND LAW REFORM COMMITTEE | |
| Tuesday 31 January 2017 | Columns 7 to 9 Official report, 31 January 2017 |
| Tuesday 21 February 2017 | Column 1 Official report, 21 February 2017 |
| Tuesday 28 February 2017 | Columns 1 Official report, 28 February 2017 |
| CONSIDERATION BY PARLIAMENT | |
| Stage 1 debate, 25 April 2017 | Columns 58 to 100 Official report, 25 April 2017 |
| STAGE 2 | |
| FINANCE AND CONSTITUTION COMMITTEE | |
| Marshalled list of amendments | SP Bill 3-ML – Session 5 (2017) |
| Stage 2 consideration, 17 May 2017 | Columns 1 to 24 Official Report, 17 May 2017 |
| Bill as amended at Stage 2, 18 May 2017 | SP Bill 3A – Session 5 (2017) |
| STAGE 3 | |
| CONSIDERATION BY PARLIAMENT | |
| Marshalled list of amendments | SP Bill 3A-ML – Session 5 (2017) |
| Stage 3 consideration and debate, 20 June 2017 | Columns 34 to 74 Official Report, 20 June 2017 |
| Bill as passed, 21 June 2017 | SP Bill 3B – Session 5 (2017) |
| ROYAL ASSENT | |
| Royal Assent, 25 July 2017 | Air Departure Tax (Scotland) Act 2017 |



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