

# TAX COLLECTION AND MANAGEMENT (WALES) ACT 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4 – Investigatory Powers of WRA**

##### *Sections 83-85 – Interpretation*

78. **Section 83** sets out the five different types of notices WRA may use to require a person to provide information or a document. Collectively, they are described in the Act as “information notices”. Subsection (2) provides a general rule that WRA may specify or describe the information or documents being sought, in other words an information notice might require a specific document (e.g. a particular contract document) or WRA might require documents of a particular kind or which contain a particular kind of information (e.g. any document containing information relating to a particular transaction).
79. WRA may only exercise its powers under sections 86, 87, 89 or 92 where the information or document requested is required for the purposes of checking a person’s “tax position”. Section 84 sets out the definition of “tax position” for the purpose of references in this Part of the Act. A tax position can include a person’s past, present and future liability to pay any devolved tax or associated penalties, interest and any other amounts that have been paid or are payable by or to the person relating to devolved tax and also includes claims and notices in connection with the liability to pay any devolved tax. It follows therefore that one of these notices can be used in relation to an ongoing enquiry into a tax return or claim or to help WRA in making a WRA determination (see chapter 5 of Part 6) or a WRA assessment (see chapter 6 of that Part). Checking a person’s potential future liability is likely to be a rare occurrence but it may be relevant, for example, in relation to certain types of land transaction which are staged over a long period and in relation to which a tax return might be made before all the liability to tax arises.
80. **Section 85** sets out the definition of “carrying on a business”, which includes a business whose activity generates income from land; carrying on a profession; a charity; and, the activities of a local authority or any other public authority. This is relevant when WRA exercises its powers under section 92 (power to require information to enable a person’s identity to be ascertained), and section 93 (power to obtain contact details for debtors), which may only be exercised where the recipient of the notice has obtained the information in the course of “carrying on a business”.

##### *Section 86 - Taxpayer notices*

81. This section enables WRA to serve a notice on a person requiring the production of information or documents, provided the requirements in subsection (1) are met and the tribunal has approved the notice (see section 88).

82. The requirements in subsection (1) provide that WRA may only issue a notice if:
- (i) it requires the information or a document for the purpose of checking the person's tax position;
  - (ii) it is reasonable to require that person to provide the information or document requested; and
  - (iii) the notice does not require information or a document subject to any restrictions set out in Chapter 3 of this Part of the Act.

### ***Section 87 – Third party notices***

83. This section gives WRA the power to issue a notice on a person (the “third party”) requiring the production of information or documents where WRA knows the identity of another person (the “taxpayer”) and wants to check that taxpayer's tax position. WRA can only issue a notice under this section if the taxpayer has agreed, or the tribunal has approved the notice (see section 88), subject to certain requirements in subsection (1) being met.
84. WRA may also ask the tribunal to approve a notice under this section that does not name the taxpayer, if the tribunal accepts that having the taxpayer's name in the third party notice might seriously prejudice tax assessment or collection. Subsection (3) requires the WRA to give a copy of the third party notice to the taxpayer unless the tribunal decides that the WRA has reasonable grounds for believing that doing so might seriously prejudice tax assessment or collection.

### ***Section 88 – Tribunal approval of taxpayer notices and third party notices***

85. This section 88 provides the tests the tribunal must apply when it is asked by WRA to approve the issue of a taxpayer notice (section 86) or a third party notice (section 87).
86. The test the tribunal must apply when deciding whether to approve a taxpayer notice or third party notice will depend on whether the recipient has been told that WRA will be applying for approval.
87. If the recipient has not been told that WRA will be applying for tribunal approval, the test provided by subsection (2) applies. This requires the tribunal to be satisfied that the requirements for the issue of the notice have been met; and that giving notice of the application might prejudice the assessment or collection of devolved tax.
88. If the recipient has been told that WRA will be applying for tribunal approval, the test provided by subsection (3) applies. As well as requiring the tribunal to be satisfied that the requirements for the issue of the respective notice have been met, the test also requires the tribunal to be satisfied that the recipient of the notice has been told about the information or documents required by WRA, and given an opportunity to make representations about that request to WRA. Where representations are made, WRA must provide the tribunal with details of those representations. In the case of a third party notice, the tribunal must be satisfied that the taxpayer who is the subject of the notice has been told by WRA why the information or documents are required.
89. When a recipient has been told that WRA is going to require the information or documents in a formal notice it becomes a criminal offence under section 115 to conceal, destroy or otherwise dispose of the information or documents.
90. Subsection (4) enables WRA to disapply some of the above requirements where giving notice of the application to the taxpayer or third party might prejudice the assessment or collection of devolved tax. The tribunal may make such modifications of the notice as it thinks appropriate (for example the tribunal might think it is reasonable for WRA to require some documents but not others and might restrict the scope of the information notice accordingly).

***Section 89 – Power to require information and documents about persons whose identity is not known***

91. This section provides that, where the WRA wants to check the tax position of a person or class of persons whose identity it does not know, the WRA may give a notice to a person (an “unidentified third party notice”) requiring them to provide information or produce documents. This might occur where WRA has enough information to have grounds for believing a person is liable to tax (for example, WRA knows that a land transaction took place) but it does not yet know the identity of the person involved.
92. Notices issued under this section must have been approved by the tribunal beforehand, which can only do so if the conditions in subsection (1)(a) to (c) are met (which are the same as the basic requirements to be met for taxpayer notices and third party notices), and it is satisfied that the WRA is not able to obtain the information or documents from another source. The tribunal must also be satisfied that there are reasonable grounds to believe that the person or persons who are the subject of the notice have failed (or may fail) to comply with the law related to a devolved tax and this has led (or will lead) to serious prejudice to the assessment or collection of devolved tax (in the example given above, WRA might have grounds to believe that the person involved in the land transaction is not going to come forward and make a tax return). As with section 88, the tribunal may make such modifications of the notice as it thinks appropriate.

***Sections 90-91 – Requiring information and documents in relation to a group of undertakings or to a partnership***

93. [Section 90](#) provides arrangements for the issue of third party notices where the WRA wishes to check the tax position of either a parent undertaking or any of its subsidiary undertakings (for example either a parent company and any of its subsidiary companies; the detailed meaning of these terms being found in sections 1161-1162 of, and Schedule 7 to, the [Companies Act 2006 \(c.46\)](#)).
94. Where WRA issues a notice to any person for the purposes of checking the tax position of a parent undertaking or any one of the subsidiary undertakings, subsection (2) applies. In these circumstances, WRA may issue a notice if it has the agreement of the parent undertaking, or approval of the tribunal, i.e. the agreement of the parent is treated as also covering any subsidiary.
95. Where WRA issues a notice to the parent undertaking for the purposes of checking the tax position of a subsidiary undertaking, subsection (3) applies. In these circumstances, WRA must obtain the tribunal’s approval before issuing the notice. In effect a third party notice issued to a parent in relation to a subsidiary is treated as if it is a taxpayer notice given that the parent controls the subsidiary.
96. The changes made by this section do not apply where WRA issues a notice to one subsidiary undertaking for the purposes of checking the tax position of a fellow subsidiary undertaking. In these cases, the notice must be issued in accordance with the procedure set out in section 87. But where WRA issues a notice to one subsidiary undertaking for the purposes of checking the tax position of the parent undertaking (and any other subsidiaries) that is a case to which subsection (2).
97. [Section 91](#) provides for arrangements for the issue of a third party notice to someone other than one of the partners where the WRA wishes to check the tax position of two or more persons in a business partnership. Notices issued under this section should: state its purpose; and, in normal circumstances include the name of the partnership to whom the notice applies and be copied to at least one of the partners. Where tribunal approval is being sought to issue a notice, the tribunal may disapply the requirement to name the taxpayer and issue a copy of the notice if it is satisfied that WRA has grounds to believe that complying with these requirements might negatively affect tax assessment or collection.

***Section 92 – Power to obtain information to enable a person’s identity to be ascertained***

98. The WRA can, in certain circumstances, issue a notice (an identification notice) to someone requiring them to provide information about a person (either a single person or class of persons) in order to establish a taxpayer’s identity. The notice can only be issued with the tribunal’s approval. The WRA may apply for approval without giving notice. The tribunal may only approve the issue of a notice if it is satisfied that conditions 1 to 6 in subsections (4) to (9) are met. Under this section the WRA may request a taxpayer’s name, last known address, and/or date of birth.
99. While these notices are similar to unidentified third party notices under section 89, the information that may be required is much more limited and WRA does not have to prove that there are grounds to believe that the unidentified person may have failed to comply with the law relating to devolved tax. In practice this procedure will be used where WRA knows that something has happened which attracts a tax liability (e.g. a land transaction) and wishes to contact the persons involved but does not know their identity. They may seek to use this power prior to the point where any failure to comply with the law occurs so that they are able to contact the taxpayer to give him or her the opportunity to get their tax affairs in order.

***Sections 93 - Power to obtain contact details for debtors***

100. The WRA may issue a notice (debtor contact notice) requiring a person to provide contact details (a person’s address and any other contact information) for another person if it is satisfied that conditions 1 to 5 in subsections (2) to (6) are met.
101. This power would be used where WRA needs to contact a person who owes WRA money but who WRA have been unable to get hold of.
102. This procedure is not to be used to seek contact details from personal friends or relatives of a debtor. It can only be used if the contact details have been obtained by a person in the course of business (see above). But it cannot be used to ask for contact details of debtors from charities or persons providing services to charities free of charge to the recipient of the service.

***Section 94 – Time limit for issuing a tribunal approved information notice***

103. This section requires the WRA to issue an information notice which has been approved by the tribunal within 3 months of that approval, or a shorter period if specified by the tribunal.

***Section 95 – Complying with an information notice and Section 96 - producing copies of documents***

104. **Section 95** sets out that a person issued with an information notice must comply with it and provide the required information or documents within a time period, location (which cannot be a place solely used as a dwelling) and in the manner specified in the information notice. As a public body, WRA must act reasonably when specifying the time, location and manner of production. The duty to comply with the information notice is suspended where the recipient has requested a review of the notice or made an appeal against it. A person may be liable to a penalty under Chapter 5 of Part 5 of the Act where that person fails to comply with an information notice.
105. **Section 96** provides that where an information notice requires the person to produce a document, the person may comply by producing a copy of the original document (unless the notice specifically requests the original, or within 6 months of the copy being produced WRA subsequently requests it). This is subject to any conditions imposed by regulations made by the Welsh Ministers.

***Sections 97-99 - Information notices: general restrictions and protection for journalistic material and personal records***

106. **Section 97** provides some general restrictions on information notices, including that a person is required to produce a document only if it is in their possession or power. Furthermore, an information notice may not require a person to produce a document if the whole of it originates more than six years before the date of the notice, unless the notice is issued with the approval of the tribunal. An information notice issued to check the tax position of someone who has died cannot be given more than four years after the death.
107. Subsection (4) provides that an information notice may not require a person to provide information or a document (part or full) where it relates to an ongoing review or appeal in relation to any tax (whether or not the tax is a “devolved tax”). For example, if HMRC is conducting an enquiry into a person’s self-assessment income tax return, WRA cannot require information in relation to the same person’s devolved tax position if the information also relates to HMRC’s enquiry.
108. **Section 98** provides that WRA cannot require a person to provide material created, acquired or otherwise in someone’s possession for the purposes of journalism and section 99 provides protection for personal records, such as medical records. However, subsection (2) of section 99 makes clear that WRA may still require information or a document where it is possible to provide the information or document by omitting the personal record (e.g. by redacting or removing those parts of the document).

***Section 100 - Taxpayer notices following a tax return***

109. This section sets out restrictions on when taxpayer notices may be given. A taxpayer notice cannot be given in relation to a transaction or an accounting period (to check the tax position for those) where a person has made a tax return in relation to that transaction or accounting period. If WRA wishes to check the tax position in relation to the tax return it should open an enquiry into the return (see chapter 4 of Part 3).
110. However, a taxpayer notice could be given where a notice of enquiry had been given and the enquiry was not completed (in other words the notice is part of the conduct of the enquiry) or where the WRA suspected an issue with the assessed tax liability (including any reliefs) for the transaction or accounting period (in other words the notice is part of the work WRA does in making a WRA determination or WRA assessment).
111. Subsection (6) means that these restrictions apply to all the partners in a partnership when at least one of them has made a tax return (but only in respect of their role as partners).

***Sections 101-102 - Protection for privileged communications between legal advisers and clients and for tax advisers and auditors***

112. **Section 101** provides that information notices do not require a person to provide or produce information or documents that are legally privileged. This refers to information or documents that benefit from the confidentiality that arises between a professional legal adviser and a client. The Welsh Ministers have a power to make provision by regulations for the tribunal to resolve disputes as to whether or not information or documents are privileged. Such regulations are subject to the negative procedure.
113. **Section 102(1)** provides that an information notice does not require a tax adviser to provide information or documents about tax advice given to a client.
114. Subsection (2) defines “relevant communication” and “tax adviser” for the purposes of this section. A person is a “tax adviser” where that person gives advice to another person about their “tax affairs” (whether or not that tax is a “devolved tax”).

115. Subsection (3) provides that an information notice does not require a person appointed as an auditor under any piece of legislation to provide certain information or documents related to that function.
116. However, these provisions are subject to subsections (4) to (7), which limits the scope of the protection in some circumstances. Subsection (4) provides that WRA may require a tax accountant to provide explanatory material which has been provided to a client in connection with information or documents provided to WRA. Subsection (5) provides that the protection does not apply to requests made under section 89 for information showing the identity or address of the unknown person.

### ***Section 103 – Power to inspect business premises***

117. **Section 103** provides that the WRA can enter a business premises and inspect the premises (including business assets and documents that are on the premises) to check a person's tax position. Such an inspection can only be carried out with either the agreement of the occupier of the premises or with the approval of the tribunal.
118. Subsection (3) provides for the time of an inspection, which permits WRA to undertake an inspection at any time it has agreed with the occupier or at a reasonable time if the inspection has been approved by the tribunal. If WRA has not obtained the occupier's agreement, it must give the occupier notice of the inspection 7 days before it is due to take place, unless the tribunal is satisfied that giving such notice would seriously prejudice tax collection or assessment.
119. If an inspection has been approved by the tribunal, the notice issued to the occupier must say so. This requirement is relevant because a person will only be liable to a penalty as described in Chapter 5 of Part 5 where the inspection has tribunal approval.
120. The WRA are not permitted to enter or inspect any part of premises that are used solely as a dwelling.

### ***Section 104 – Carrying out inspections under section 103: further provision***

121. This section provides further powers available to a WRA inspector when carrying out an inspection of business premises under section 103. These include: taking any other person(s) with them onto the premises (including a police officer where it is believed that the inspection may be seriously obstructed); examining or investigating anything considered necessary in the circumstances of the inspection; directing that the premises (or any part of the premises) be left undisturbed for as long as is reasonably necessary for the purposes of any examination or investigation; the power to take samples of materials from the premises, including by experimental borings or other works or the installation and maintenance of monitoring or other apparatus on the premises.

### ***Section 105 – Carrying out inspections under section 103: use of equipment and materials***

122. This section provides WRA with supplementary powers it may exercise when undertaking an inspection under section 103 and may be most relevant when WRA is exercising the additional powers in section 104.
123. Subsection (1) provides WRA with the power to take equipment or materials required for the inspection on to the business premises. The power can only be exercised:
- (a) at a time agreed to by the occupier (agreement to the inspection itself does not necessarily include agreement to bringing equipment or materials, the occupier can refuse at that point and WRA would then have to seek the tribunal's approval to proceed, see section 108)
  - (b) if a notice was issued informing the occupier at least 7 days in advance of the inspection; or

- (c) where it is deemed by the WRA that there are reasonable grounds for believing that giving advance notice that the power will be exercised would seriously prejudice the assessment or collection of tax, in which case notice must be provided at the time that the equipment or materials are taken onto the premises.

- 124. Subsections (4) to (6) set out the requirements of a notice. If the inspection, or use of equipment or materials, has been approved by the tribunal, the notice issued to the occupier must say so. This requirement is relevant because a person will only be liable to a penalty as described in Chapter 5 of Part 5 where the inspection has tribunal approval.

### ***Section 106 – Power to inspect premises or property for valuation etc.***

- 125. **Section 106** provides that the WRA may enter and inspect premises and any property on the premises for the purpose of valuing, measuring or determining the character of the premises if it is required for the purposes of checking a person's tax position. Unlike inspections under section 103, this power can be used in relation to dwellings (which will be relevant for example where taxes involve land transactions).
- 126. Such an inspection can only be carried out with either the agreement of the occupier (or a person who is in charge of the premises if the occupier cannot be identified), or the approval of the tribunal, (provided the occupier or person in charge has been given at least 7 days notice of the inspection).
- 127. The power does not give a right to WRA to physically force entry or to search.
- 128. Subsections (5) and (6) specify the requirements of a notice issued under subsections (2) (b) or (3)(b). Subsection (7) provides for any other person(s) to accompany the person carrying out the inspection where they consider it necessary to have assistance with undertaking valuation, measurement or determination.

### ***Section 107 – Producing authorisation to carry out inspections***

- 129. **Section 107** provides for an occupier of premises being inspected or other person who appears to the inspector to be in charge or in control of the premises to ask to see evidence of authority to carry out the inspection. Where this is not produced the inspection must be stopped until such time as the evidence is provided.

### ***Section 108 – Approval of tribunal for inspection of premises***

- 130. **Section 108** provides that WRA can ask the tribunal to approve an inspection under sections 103 or 106 or the exercise of powers under 104 or 105 in relation to an inspection under section 103.
- 131. The tribunal's approval of an inspection under section 103 includes approval to exercise any of the powers in sections 104 and 106. But as referred to above, where an occupier agrees to an inspection under section 103, the occupier may reserve the right not to agree to the exercise of any of the powers in sections 104 or 105. In those cases WRA would need to seek tribunal approval for the exercise of the powers.
- 132. The application to the tribunal can be made without notice and in such circumstances the tribunal must satisfy itself that the sending of a notice of the application might have prejudiced the assessment or collection of devolved tax.
- 133. In approving an inspection under section 103 the tribunal must be satisfied the inspection of the business premises or powers to be exercised are required for the purposes of checking a person's tax position.
- 134. In approving an inspection under section 106 the tribunal has to be satisfied that WRA gave both the person whose tax position is being checked and the occupier (if different and capable of being identified) a reasonable opportunity to make representations to the WRA and WRA must give a summary of any representations to the tribunal.

135. Subsection (7) requires the WRA to carry out an inspection no later than 3 months after the tribunal's approval or within any shorter period as specified by the tribunal.

### ***Section 109 – Power to mark assets and to record information***

136. Section 109 provides that while inspecting premises, business assets or documents (for valuation and/or for checking a tax position), assets can be marked to show that they have been inspected and relevant information can be obtained and recorded.

### ***Section 110 – Restriction on inspection of documents***

137. This section applies the restrictions contained in Chapters 2 and 3 of this Part of the Act so that WRA cannot inspect any document during the course of an inspection if WRA would have been restricted by Chapters 2 or 3 from requesting the same document using an information notice.

### ***Section 111 - Interpretation***

138. Section 111 provides an interpretation of the expressions used in this Part of the Act. The definitions of “business assets”, “business documents” and “business premises” are tied to the definition of “carrying on a business” in section 85. “Premises” is defined broadly so as to ensure WRA is able to inspect any type of property that it might need to inspect under this Chapter.

### ***Section 112-113 – Further investigatory powers***

139. Section 112 provides a power to WRA to copy, make extracts from and remove documents. The WRA may also retain the document for a reasonable period of time. This allows items to be removed for consideration or cross referencing against other documents. Where this happens, subsection (3) allows the person who produced the document to request a receipt for it and a copy of it without charging the person for the costs for doing so. The power to remove documents will normally be exercised with the taxpayer's agreement as it does not amount to a right to seize documents. Subsection (5) provides that where a document that has been removed is lost or damaged, the WRA is liable to compensate the owner of the document for any expenses reasonably incurred in replacing or repairing the document.
140. Section 113 applies to any provision of this Act that requires a person to produce documents or where the WRA is permitted to inspect, copy or remove documents. The section is primarily concerned with ensuring WRA is able to access information or documents stored in electronic form.
141. Subsection (3) allows the WRA at a reasonable time to obtain access to, inspect, and check the operation of any computer or other apparatus used in connection with a document that someone is required to produce or which may be inspected, copied or removed by the WRA. Subsection (5) allows the WRA to require the person in charge of the computer or other apparatus to provide help to fulfil the requirements of subsection (3). Subsection (6) makes it clear that references in subsections (3) to (5) to WRA getting access to a computer etc. or requiring assistance from a person are to be treated as references to an inspector carrying out an inspection on WRA's behalf under section 103.
142. Any person obstructing WRA or an inspector exercising the powers in subsections (3) and (5) is liable to a penalty under section 146.

### ***Sections 114-115 – Offences relating to information notices***

143. Section 114 creates an offence relating to concealing, destroying or otherwise disposing of a document required by an information notice which has been approved by the tribunal. Subsection (2) confirms that a person may still commit an offence under this

section where that person has appealed against the information notice or a requirement in it.

144. **Section 115** also creates an offence relating to concealing, destroying or otherwise disposing of a document where WRA has told a person that it intends to seek the tribunal's agreement, but has not yet done so.
145. The sections state the circumstances when an offence is not committed and also provide a defence where a person demonstrates that there was a reasonable excuse. A person who commits an offence under either of the sections is liable on summary conviction to a fine or on conviction on indictment to imprisonment for up to 2 years or to a fine (or both). In each case the court has discretion as to the amount of the fine.

***Sections 116 – Tribunal approvals not to be reviewed by the tribunal or appealed***

146. This section amends the Tribunals, Courts and Enforcement Act 2007 so that the tribunal's decision to approve an information notice or inspection cannot be reviewed, or appealed to the Upper Tribunal or Court of Appeal. "Review" in this context means a review by the tribunal itself of its own decision, as is normally provided for under that Act.