Chapter 20
Financial Legislation

20.1 Introduction

The expression 'financial legislation' is commonly used in two senses. In its wider sense, it refers to the whole body of legislation concerned with all aspects of finance, including that dealing with banking, financial institutions, financial services (e.g. advice on investments, mortgages, pensions), insurance, capital markets, loans, securities, etc.

In its narrower sense, 'financial legislation' refers to the body of statutes concerned with **public** finance, in particular that of the central government, namely government

- accounting
- expenditure
- borrowing, guarantees and lending
- income from taxation.

This chapter is concerned only with the latter types of legislation.

20.2 Government accounting

The starting point for legislative control of government accounting is usually the Constitution itself. Typically, that document will provide for:

- government funds, often known as 'the public exchequer', to be maintained in a central account which, following the practice in the United Kingdom, is usually called 'the Consolidated Fund'
- the office of Auditor-General (or similar title such as Director of Audit) whose duties are to audit the Consolidated Fund and government accounting generally, and whose independence is normally a matter for express provision.

The **Consolidated Fund** is the fund into which, with limited exceptions, all government revenue, including that from loans, is to be paid. The main exceptions are:

- cases where the Treasury:
  - directs that revenue received by government departments by way of, for example, fees, fines and penalties, and proceeds of sale may, instead of being paid into the Consolidated Fund, be applied for the purposes of the departments themselves by way of appropriations-in-aid; or
  - authorises deductions by those departments of sums required to be paid out by them as, e.g., repayments or refunds; and
- money paid under authority of primary legislation into a special fund set up for a particular purpose, such as a national loans fund (for government lending) or a road tolls fund (for maintenance of roads).

Legislation (e.g. a Government Accounting Act or an Exchequer Act) will also provide in outline for accounting by government departments, particularly the provision for each department to have an accounting officer (normally the permanent secretary or other senior civil servant) who is answerable to the Auditor General, and ultimately to Parliament.

Parliamentary control over government spending is typically exercised by the Public Accounts Committee, a committee of the legislature with power to examine accounting officers under oath and, ultimately, to surcharge accounting officers for money misspent.

20.3 Government expenditure

There may be variations on precise requirements in different jurisdictions, but the following broad principles apply. Payments out of the Consolidated Fund may be made only on the authorisation of Parliament. This is done by means of an annual appropriation. The Bill to enable this to be done sets out the sums of money which government proposes should be applied towards each department of government. Heads of expenditure are grouped under "votes", i.e. sums on which individual votes of Parliament are taken. During the course of the government's financial year some fine-tuning may be required to the figures in the Appropriation Act, and a Supplementary Appropriation Bill may be presented to Parliament for authority to adjust votes (usually by increasing the sums originally allocated).

The drafting of Appropriation and Supplementary Appropriation Bills follows a pattern from which there is usually little need to depart substantially.

Not all public expenditure will, however, be authorised by Appropriation Acts. The Constitution or other specific Acts will typically authorise certain types of expenditure to be charged directly on the Consolidated Fund: e.g. the salaries of High Court judges and certain constitutional officers,

and money required for repayment of loans and to meet liabilities under government guarantees. This authorisation precludes the necessity for the expenditure to have to be included in the annual estimates and thus be subject, at least in theory, to the hazard of being voted down in Parliament.

20.4 Government borrowing, guarantees and lending

All borrowing by governments needs the express authority of Parliament. The borrowing may be either external or internal and, particularly in the case of the former, either general or specific.

Legislation to authorise **external** borrowing (e.g. from international banks and development agencies), which would probably be in currency other than the local currency, would state the general purpose for which loans could be obtained, for example 'for the purpose of financing general development in Utopia', and specify a limit, in terms of the local currency, to which this type of borrowing could extend. Specific loan authorisation legislation might be required in certain cases, for example where the limit of borrowing under general legislation has been reached, or where different terms and conditions are required from the normal.

Internal borrowing usually takes the form of the issue of various types of security, although other methods may be authorised in general terms.

Statutory authority is also required to enable governments to give guarantees (usually required in respect of loans made for purposes of local authorities or statutory corporations). This would be given either under a general authority (subject to the approval of Parliament in each particular case and subject to an overall stated maximum commitment) or a specific loan guarantee Act.

Lending by governments may also be authorised in respect of statutory corporations, together with relevant provisions on accounting and repayment. However, the philosophy of governments generally has tended towards encouraging privatisation and the raising of capital in the private sector.

20.5 Taxation

Undoubtedly the most important area of government financial legislation for legislative counsel is that concerning its main source of revenue: taxation. The need for clarity of expression is self-evidently paramount and, although the courts have moved away from literalistic construction of taxing statutes, they will not readily presume or imply an intention to tax. Taxation statutes can be reduced to a number of basic elements.

20.5.1 The contents of taxation statutes

Imposition of the tax

Although the word 'tax' is the most usual one to describe both the process of levying money for government purposes and the money itself so raised, a variety of other names are also used, including:

Duty: used to signify money raised by the customs and excise department from importation of goods into the country ('import duty') and also occasionally from exportation of goods; and, in the form of 'excise duty', from certain goods manufactured locally (typically beer, wine, spirituous liquor and tobacco, and occasionally also refined motor spirit); the word is also applied to the tax on the estates of deceased persons ('estate duty') and elsewhere.

Rates: a tax raised for the purposes of local authorities, typically on the value of immovable property (known as the 'rateable value') and payable annually in a lump sum or in instalments.

Cess: in some jurisdictions used to signify a tax raised for the purposes of local authorities otherwise than on immovable property.

Toll: a tax imposed on the use of land transportation facilities (particular roads and bridges); in modern times tolls are often applied towards offsetting the capital cost of building, and the upkeep, of those facilities.

Levy: as a verb this word is used to describe the process of raising taxation; as a noun, it is usually used to signify a tax authorised to be raised by subsidiary legislation for specific purposes, often in furtherance of the industry or activity on which it is charged.

The largest part of a central government's revenue is raised in most jurisdictions by three main taxes on income and goods generally: income tax (including corporation tax); sales tax, or its more modern expanded equivalent, value added tax (a tax on, *inter alia*, services that would otherwise have to be raised under a number of separate Acts); and import duty. However, the revenue is supplemented by a large variety of other taxes, of which examples include taxes on:

- capital gains
- entertainments ('betting tax', 'entertainment tax')
- estates of deceased persons ('estate duty', 'inheritance tax', 'capital transfer tax')

- heads of population ('poll tax')
- immovable property ('rates', 'property tax', 'hut tax')
- instruments ('stamp duty')
- processes ('oil refinery throughput tax')
- provision of services ('hotel accommodation tax', 'airport tax')
- specific transactions (e.g. sale of second-hand motor vehicles)
- transfers of property between living persons ('capital transfer tax')
- travel ('airport tax', 'vehicle excise duty', 'road/bridge tolls').

The raising of money on certain activities can be expressed as a tax on different components of them. For example, airport tax could be raised as a tax on **air travel** or alternatively on **the use of airport facilities**.

Rate of tax

The rate is most often expressed as a percentage of the value of the income, goods, services, etc., taxed (i.e. an *ad valorem* tax, duty, etc.). Alternatively, tax can be expressed as a fixed sum, related either to measurement of goods, etc., taxed, for example:

- per tonne, kilogramme or gramme (as with coal, lubricating oil or tobacco)
- per litre (as with beer or motor spirit)
- per cubic or square metre (as with cement or fabrics)
- per kilowatt hour (electricity)

or related directly to the subject matter of the tax:

- per head of population (poll tax)
- per journey (airport tax, road or bridge toll)

or simply expressed as a set annual amount (vehicle excise duty).

What is often considerably more complex is the assessment of the value of the thing to be taxed. The complexity of income tax legislation is well known; apart from setting different levels, or 'bands', of tax, it must deal with numerous special cases, exemptions and allowances, as well as complex anti-avoidance provisions, for example provisions for certain benefits to be treated as income. Provisions in customs and excise legislation for assessing the value of imported goods are often sufficiently complex to require being set out in a Schedule.

Persons liable to pay

Precise identification of the persons liable to pay tax is the next requirement of the legislation. In most cases, this will be apparent from the nature of the tax (income tax by the wage or salary earner, import duty by the importer, estate duty by the executors or administrators), although this does not absolve the drafter from the duty to make this clear.

In other cases, the person liable to pay will not be apparent from the nature of the tax and will depend on how the Act is drafted. The liability to pay hotel accommodation tax, for example, could be expressed to be that of the **hotel guest**, in which case the hotel proprietor would almost certainly have to be appointed as collector of the tax on the government's behalf (see the paragraph on **collection** below). On the other hand, the liability could be made that of the **hotel proprietor**, but with the power to pass on the tax to the hotel guest.

When liability to tax arises

Liability to tax would normally arise on the happening of:

- the activity which is being taxed (the earning of a salary, the importation of goods, the purchase of goods or services, the purchase of a ticket for entertainment, the undertaking of a journey, etc.); or
- the state of affairs which precipitates it (death, purchase of immovable property, purchase or lease of a vehicle, etc.).

In a complex area of taxation such as VAT, the liability might be attached to a specific event in the transaction (e.g. the raising of an invoice for goods or services).

When the tax is payable

In many cases the liability to pay is contemporaneous, or practically so, with the liability to tax itself (VAT, sales tax, import duty and airport tax), or may even in practice **precede** the happening of the taxable event (e.g. where tickets are purchased for entertainments which are taxed, or for flights in respect of which airport tax is added to the cost of a ticket).

But very often there is a delay between liability to tax and the requirement to pay it. For example, income tax – unless collected under a 'Pay as you Earn' scheme – must be the subject of an assessment, itself dependent on the submission by the taxpayer of a return of income; and estate duty, where a final assessment of the amount payable may have to await lengthy liquidation processes, for example of foreign-held capital.

Exemptions

So far as possible, exemptions should be set out in the Act, but it is not always practicable to do this and power is often given to exempt by subsidiary legislation.

Refunds, repayments, rebates and remissions

One or more of this loosely connected series of devices are commonly included in taxation legislation both for repaying sums of money to the taxpayer and for forbearance to collect tax due. The terms are not all mutually exclusive, but the following are their usual meanings:

- **Refund:** a return of tax overpaid by the taxpayer; this can arise in a number of situations, for example after reassessment of liability to tax on an appeal, or after a reclaim of tax deducted at source, such as on investment dividends or bank interest.
- **Repayment:** similar to the last term, although it more usually refers to a refund of a total amount paid in error, for example on later acceptance by the revenue authorities that the taxpayer was not liable in law for the amount collected.
- **Rebate:** a repayment, or discount of tax otherwise due, usually made under a formal scheme, for example for complying with a government incentive for setting up manufacturing plant in an economically depressed area, or exporting manufactured goods.
- **Remission:** a forbearance by government to collect tax technically due; commonly used in cases of import duty otherwise due on goods imported, for example for the purposes of charitable organisations.

Collection

Where the administrative arrangements for the collection of a tax are to be made directly by government then there is no need for legislative provisions on the matter; it can be dealt with by internal directions from the Treasury. In many instances it will be necessary to provide for tax to be collected by a person on behalf of government, for example hotel accommodation tax might be collected by the hotel proprietor, airport tax by the airlines, etc.

However, part of the collection process **as it affects the taxpayer** with regard to the more complex taxes such as income tax involves the setting up of procedures for returns, assessments, and for appeal procedures, the latter typically being accompanied by a requirement to pay the assessed amount pending the outcome of an appeal.

Taxation statues often make provision for the recovery of tax by a speedy procedure in the magistrates' courts known as 'summary recovery of debt'. And, especially in statutes providing for the main areas of taxation, there are typically detailed rules concerning distraint (i.e. seizure in accordance with the law) on movable and immovable property of the taxpayer including, in the case of immovable property, the power to apply to the court for a charging order.

Where a collecting agent is appointed, the government will need to take powers to audit the accounts of the agent. This in turn will involve detailed provisions on accounting, including the duty to keep records and make returns (provisions which are likely in practice to be made in subsidiary legislation). Final resort powers of entry, search and seizure will also be required.

Offences and penalties

These will be required, *inter alia*, for non-payment, failure to account, false or misleading returns, and obstruction of inspectors.

Subsidiary legislation

In the more complex taxing statutes, detailed rules will be needed to flesh out the legislation, provide for forms, appeal procedures, etc.

20.5.2 Special procedures for 'money bills'

Because of its importance and potential political sensitivity, legislation dealing with government finance is commonly subject to special procedures in the legislature which are set out in the Constitution. The following definition is typical:

> In this section 'money Bill' means:
> (a) an appropriation Bill or a supplementary appropriation Bill, including any other Bill for the payment, issue or withdrawal from the Consolidated Fund or any other public fund of money charged on those funds, or of any alteration in the amount of such a payment, issue or withdrawal;
> (b) a Bill for the imposition, increase, reduction, withdrawal or cancellation of a tax or duty.

Typically, special conditions applicable to such a Bill would include:

- in a bicameral system, following the UK, introduction into, and with power of rejection or amendment only by, the lower Chamber; or, where power to reject or amend lies with both Chambers, procedure for where the Bill is passed by one Chamber and not the other
- express sanction for the introduction of the Bill to be given by the Head of State, or Minister responsible for finance

- introduction itself to be only by the Minister responsible for finance
- lack of power in the Head of State to veto.

20.5.3 The Finance Bill and provisional collection of taxes

In most jurisdictions one of the most significant of the money Bills will be the annual Finance Bill (at least in so far as the Bill introduces matters which come within the concept of a money Bill). This is introduced by the Minister responsible for finance in order to give legislative effect to the government's proposals for changes in the levels of taxation for the coming year so that there may be collected the necessary level of revenue required to meet proposed expenditure. The Bill itself will typically propose, *inter alia*, amendments to a number of taxation Acts.

Where new rates of particular types of tax are to be introduced (e.g. import duty, VAT) it is desirable that they should take effect immediately, in order to prevent the possibility of, for example, stockpiling of goods on which it is known that the tax, and hence the overall cost, will rise. Thus it is necessary to enable the new taxes in the Bill to be levied as soon as it is introduced. The device for doing this is, typically, a Provisional Collection of Taxes Act, under which an order, or resolution of the legislature, will authorise taxes in the Bill to be collected as from the date of the order or resolution (i.e. the date of publication and introduction of the Bill) **as though the Bill had been passed into law**.

The device clearly needs to operate under specified limitations, and the enabling Act will provide that the order or resolution will cease to have effect on the happening of a number of events:

- failure to introduce the Bill, or more likely to have it read a second time, within a fixed time (usually 3 or 4 months)
- rejection or withdrawal of the Bill
- failure to pass the Bill into law within a fixed time (usually 6 months)
- (as normally happens in practice) the passing of the Bill into law.

Similar provisions on cessation will apply where individual taxes in the Bill are voted down or withdrawn. The consequence of this happening on any but the last of these events could be extremely inconvenient for Government, as the legislation will typically require taxes collected up to that point to be refunded.

Finally, the drafting consequence of such an order or resolution is that the provisions thus brought into effect will, when the Bill is enacted, need to be expressed to operate **retroactively** from the date of the order or resolution.