



TAXREP 26/13

(ICAEW REP 39/13)

ICAEW TAX REPRESENTATION

TAX AND PROCUREMENT

Comments submitted on 28 February 2013 by ICAEW Tax Faculty in response to HMRC Discussion Document and Draft Guidance *Tax and Procurement* published on 14 February 2013

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the discussion document and draft guidance *Tax and Procurement*
http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_032594 published by HM Revenue & Customs (HMRC) on 14 February 2013.
2. On 26 February 2013 we attended a meeting with HMRC, jointly with other professional bodies and business representatives, at which we were able to put forward some key comments and concerns and discuss aspects of the discussion draft and draft guidance. Given the very limited time we have had for gathering comments, our comments below reflect the key concerns of members.
3. We should be happy to pass on further comments which may arise. We would be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
4. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

5. ICAEW is a professional membership organisation, supporting over 140,000 chartered accountants around the world. Through our technical knowledge, skills and expertise, we provide insight and leadership to the global accountancy and finance profession.
6. Our members provide financial knowledge and guidance based on the highest professional, technical and ethical standards. We develop and support individuals, organisations and communities to help them achieve long-term, sustainable economic value.
7. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

KEY POINTS SUMMARY

8. While we understand and are happy to support the Government's overall policy aims in this area, we do not think these proposals will achieve them in their current form. They have not been properly thought through, are disproportionate and potentially damaging to the UK's competitiveness.
9. Our particular concerns with these measures include the following:
 - the time allowed for consultation is far too short – two weeks is not long enough and it should be extended for at least a further month;
 - the start date should be deferred to 1 October 2013;
 - there should be no backdating of the proposal;

- the time limit for non-compliance should be reduced from the proposed ten years to no more than six years;
 - In order to reduce uncertainty the definition of non-compliance needs to be clarified and its scope reduced so that it covers only the major areas of potential avoidance;
 - The definition of a supplier needs clarification to cater for a variety of business structures; and
 - HMRC's guidance needs to be improved.
10. For the above reasons, we believe the current proposals should be withdrawn for further consideration and further consultation. A revised set of proposals should then be developed that better meet the Government's policy objectives.

MAJOR POINTS

These proposals need to be withdrawn and rethought

11. We appreciate that these measures are a part of the Government's efforts to curb what it considers to be unacceptable tax avoidance. However, while we support the Government's aim to reduce tax avoidance, we are not convinced that these proposals in this form are the right way forward to achieve the overall policy objectives.
12. To retain the confidence and support of UK businesses any measures must be proportionate, fair and reasonable and not put UK businesses at a competitive disadvantage. These proposals do not do that. On the contrary they do not appear to have been properly thought through, are uncertain and unclear in scope and potentially damaging to the UK. For the reasons set out in more detail below, we believe that the current proposals are flawed. They should be withdrawn for a rethink and a further round of consultation. New proposals should then be put forward that satisfy the Government's policy aim without damaging UK business.

The measures are potentially harmful to UK businesses

13. The proposals as currently drafted appear disproportionate and potentially damaging to the UK's competitiveness and growth prospects, particularly if other jurisdictions do not operate to the same or similar standards to those of the UK. The proposals could perversely provide a competitive advantage to overseas suppliers over UK suppliers, especially where the overseas tax regime's rules are more relaxed in this area than the UK. This would be a totally counterproductive policy outcome.
14. Aside from the concern above this is a potentially onerous reporting requirement. Suppliers with tax obligations in foreign jurisdictions will be required to certify that there has not been an 'occasion of non-compliance' in relation to the equivalent foreign tax rules. We are concerned that this will place a disproportionate burden on large UK based multinational companies which may operate internationally. Such businesses may operate in as many as 100 foreign jurisdictions and will have to assess what are the equivalent foreign tax rules in all those countries and then determine whether there has been an 'occasion of non-compliance' in those jurisdictions. While we accept the underlying policy purpose, namely that businesses should be consistent in their approach to tax planning across jurisdictions; this will place an onerous burden on such businesses.

The time allowed for consultation is far too short

15. This discussion document needs more time for consultation. The current consultation has been over a period of only two weeks, the very minimum 'allowed' under the new Consultation Principles. The new Consultation Principles were published in July 2012 and which superseded the 2008 Code of Conduct on Consultation. Under the new Consultation Principles

the 'timeframe for consultation should be proportionate and realistic' and 'might typically vary between two and twelve weeks'.

16. We appreciate that this new area of Government policy has been developed by two Government Departments, Cabinet Office and HMRC, and the Government wants the policy to be in place by 1 April 2013. But this new policy has been in active development, within Government, since the Chief Secretary to the Treasury, made his announcement in Parliament on 25 September 2012:

'HMRC and the Cabinet Office have been tasked with looking into how the Government can use the procurement process for government contracts to deter the very small minority of companies and individuals that do so from evading tax and using aggressive tax avoidance schemes.'

17. In the light of the contentious nature of the detail of the policy proposal now under consideration, we do not believe that a two week period for consultation is proportionate and realistic to allow for a policy to be developed with the collaboration of outside stakeholders such as ourselves. For an important element of Government policy in combating what it considers to be unacceptable tax avoidance this is very disappointing, given that there has been a four and a half month gap between the September statement and the publication of this discussion document.

The start date should be deferred to 1 October 2013

18. To give proper time for consideration we believe that the time period for consultation should be extended until at least 31 March 2013, with any policy then being introduced only after the detailed representations have been considered and a further draft produced which seeks to address the concerns raised.
19. Given the need for further consultation on this proposal the start date should be deferred. We believe that as a minimum, the start date would be put back to 1 July 2013 but even this date is likely prove optimistic given the concerns. A more realistic and reasonable date would be 1 October 2013.

There should be no backdating

20. These proposals should apply to actions undertaken after the agreed start date and not apply retrospectively to actions before that date. We do not think it would be right even to apply the proposals to actions after 25 September 2012, the date of the announcement, because the proposals in the discussion document go much wider than the statement that was made at that time.
21. We think the primary aim of the new regime should be to reinforce and influence future behaviour rather than try and apply it to past actions. Attitudes to tax avoidance have changed considerably since then and we question whether it is right to judge the past actions of businesses by reference to the standards that would be expected of them today. We appreciate that Ministers wish to reinforce a culture change but it is equally important that businesses are not now punished for past actions which might have been viewed in a different light at the time.

The time limit for non-compliance should be reduced

22. The supplier must take into account 'occasions of non-compliance'. The period of non-compliance has not yet been finalised but at the end of draft Chapter 3 of the guidance it is stated 'the current proposal is that *ten years* is a reasonable length of time'.
23. The time limit will run from the date that the non-compliance is recognised ie the date of a court decision rather than the date when the particular arrangement were entered into or carried out. If a matter is referred to the Court of Justice of the European Union (CJEU) the process can take very many years in the CJEU and then subsequently back in the UK

domestic courts. If there is an initial unfavourable ruling in the domestic court but the final decision is favourable to the taxpayer/supplier that could restrict the taxpayer/supplier's ability to obtain contracts over a very long period of time.

24. We think that that is an unreasonably long period of time and potentially disproportionate. We recommend that it is reduced to no more than a maximum of six years.

The definition of non-compliance needs to be clarified and its scope reduced

25. There are a considerable number and variety of provisions in the UK tax code that might be regarded as targeted anti avoidance rules (TAARs). The blanket inclusion of TAARs therefore introduces considerable uncertainty, not least because there may be a disagreement as to what is a TAAR. Given this, we do not believe that successful action by HMRC under each and every TAAR should be treated as an occasion of non-compliance. We recommend that the definition should be restricted to a very limited number of the most important TAARs and that these are listed in the Guidance.
26. We are concerned that adjustments to tax returns could be treated as potentially non-compliant. Inevitably there will be cases of disagreement between taxpayers and HMRC about entries in the tax return. Sometimes, taxpayers will voluntarily agree to make an adjustment even though they disagree with HMRC's view, not least because the costs of contesting HMRC's views may be much higher than any tax at stake. If taxpayers then pay the tax and any interest due, we do not think that should be treated as an occasion of non-compliance.
27. Further, this could result in the law of unintended consequences with resulting behaviours that are contrary to the intended policy. Taxpayers might be more willing to fight a disagreement all the way through the courts rather than reach a speedy agreement if they are, or intend to, become suppliers to the public sector.

Who is included in the definition of supplier?

28. It is not entirely clear whether the supplier providing the certificate is the entity tendering for the work or will include others, for example group companies or sub-contractors. This needs to be clarified.
29. How will these provisions apply in a group context? Similarly, many tenders (particularly construction contracts) might be undertaken through a joint venture. Who will provide the certificate and how will non-compliance by only one party be treated? It would appear unfair to punish all joint venture parties in such cases.
30. Similar considerations apply if the supplier is a partnership. We presume that the proposals will apply only to the tax affairs of the partnership and not the individual partners?

Proportionality – setting the bar too high

31. These measures are potentially penal in nature and need to be both proportionate and properly targeted. There needs to be much greater clarity about these aspects. For example, the measures should only apply where a proportionate limit has been breached, for example that the amount of tax involved exceeds a set percentage of the contract or tender price.
32. There is a danger that by setting the bar too high, the proposals will be counterproductive, as most of the parties the Government would want to be on the tender list for particular contracts will be excluded. An alternative approach would be to make it a standard procurement requirement for contracts above a given value for potential suppliers to disclose their current tax status including matters that might be in dispute. The tender panel could then make their own decision taking those factors into account but there would be no automatic bar.

HMRC guidance needs to be improved

33. At the moment there is draft HMRC Guidance and also Cabinet Office Procurement Policy Information Note which can be found at http://www.cabinetoffice.gov.uk/sites/default/files/resources/PPIN_03_13_Tax_compliance_&_procurement_0.pdf which is rather more comprehensive and which, for example, sets out on page 9 the mitigating factors which are relevant if a supplier certifies that it has an occasion of non-compliance which it believes should not debar it from obtaining the particular contract.

34. The opening text to this section states:

Examples of “mitigating factors” Note - Minor penalties for late filing should be disregarded:

This is inconsistent with the intended target of these measures. We do not see how ‘minor penalties for late filing’ is relevant for these purposes as late filing in itself would not be caught by these proposals. It should be deleted.

35. We recommend that the guidance should contain all the relevant information about the Government’s tax and procurement policy so that readers do not have to go to several different documents, probably on different parts of the Government website, to fully understand the policy.

36. We believe that the guidance needs to be redrafted to take account of our points above. In particular it needs to be:

- made clearer;
- more proportionate;
- not place onerous worldwide reporting requirements on businesses; and
- does not discourage taxpayers from settling disputes.

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APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see [icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx](https://www.icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx))