



ICAEW TAX REPRESENTATION

FINANCE BILL 2012 DRAFT CLAUSES: INFORMATION POWERS

Comments submitted in February 2012 by ICAEW Tax Faculty to HM Revenue & Customs in response to the draft Finance Bill 2012 clauses on Information Powers published on 6 December 2011.

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the draft Finance Bill 2012 clauses on Information Powers published on 6 December 2011.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. We responded to the previous (July 2011) consultation Bringing HMRC's information powers into line with international standards for tax information exchange. Our comments are published in TAXREP 59/11.
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 world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
6. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create 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 POINT SUMMARY

8. We are pleased to note that of the proposed methods of amending Sch 36, FA 2008, HMRC has adopted the method which makes relatively limited changes to the Sch 36 powers. However, we are concerned that the drafting of new para 5A(7) is far too wide, and that the appeal rights are too limited. We also make recommendations on safeguards which should be included in HMRC guidance.

COMMENTS ON THE DRAFT CLAUSES

9. In TAXREP 59/11 we said that any extension to the information powers should be no more than is absolutely necessary to enable the UK to satisfy its international information exchange requirements, and we would be concerned if domestic powers were widened. We recommended that of the three proposed methods of amending Sch 36, FA 2008, the third method should be adopted. We are pleased to note that this is the approach which has been taken.
10. We have some comments on aspects of the latest draft clauses.
11. Most importantly, we are concerned that the draft legislation now includes a new para 5A(7) to Sch 36, which was not in the July 2011 draft. We think this is far too widely drafted. We appreciate that it is intended to cover joint accounts (as explained in the December 2011 summary of responses, at para 2.17). However, the new para 5A(7) is written far more widely than that and could in theory extend to all bank customers with UK addresses but overseas bank accounts. The wording should be made much more specific to deal just with the joint account situation it is intended to address.
12. As an example of the effect of the current wording of new para 5A(7), we think there is a risk that HMRC could use it to go to a firm of accountants and ask for a list of the names and addresses of all of its clients who have used a scheme which HMRC considers to be an abusive marketed tax scheme. This would be a very major extension of HMRC powers and would undermine the ongoing HMRC consultation on working with tax agents.
13. In para 5A(5), condition D refers only to data held by 'the officer'. We recommend that this should refer to data held 'by HMRC'. The officer should be required to make sure that the information about the taxpayer's identity is not held elsewhere in HMRC, before he or she issues the information notice. Amending condition D in this way would ensure that this is done.
14. We would also like an assurance (possibly as an alternative to amending condition D) that the HMRC officer will take reasonable steps to search for the information elsewhere within HMRC before burdening a third party with an information notice. This should be incorporated in HMRC guidance.
15. Unlike other Sch 36 third party notices, there is no requirement to obtain tribunal approval beforehand. We understand that (as explained in paragraph 3.12 of the July 2011 consultation document) this is because HMRC envisages that this could mean that it takes too long to obtain the information requested by an overseas jurisdiction.
16. However, the right of appeal against the information notice is restricted, as it only applies where it would be unduly onerous to comply with the notice. We are concerned at the implications of this restricted appeal right coupled with the lack of any requirement for prior approval from the tribunal. We do not think the grounds for appeal cover all the situations where a third party might quite reasonably be unable to comply with the notice. For example, they may no longer have the information, having destroyed it once the required record-keeping period has passed. In this case, there are no grounds of appeal (the 'unduly onerous' grounds do not apply) and if HMRC does not accept that the third party does not have the records, the latter must wait for HMRC to issue a penalty notice and appeal against that.
17. We should like to repeat two comments made in our earlier TAXREP 59/11 with regard to safeguards and how the power is operated:
18. HMRC should only use the new power where the third party can be expected to be able to identify the taxpayer from the information given, and can do so without a disproportionate compliance burden. We trust that HMRC guidance will make this clear and also clarify what sort of identifying information HMRC must hold before issuing a notice to a third party.

19. We think that an additional safeguard would be for HMRC to provide a report on the use of this new power. This could be an annual report and would set out how often the power had been used and whether it was used solely in connection with information exchange requests or for domestic purposes as well.

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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

www.icaew.com/~media/Files/Technical/Tax/Tax%20news/TaxGuides/taxguide-4-99-towards-a-better-tax-system.ashx).