THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW REPRESENTATION

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FINANCE BILL 2010 - PARLIAMENTARY BRIEFING

Parliamentary Briefing submitted on 6 April 2010 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales in relation to Finance Bill 2010 published on 1 April 2010.

Chartered Accountants' Hall
Moorgate Place London EC2R 6EA UK
www.icaew.com

T +44 (0)20 7920 8100
F +44 (0)20 7920 0547
DX 877 London/City

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INTRODUCTION

1. This Parliamentary Briefing by the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) is in relation to the Finance Bill 2010 published on 1 April 2010.

2. Information about the Tax Faculty and the 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

3. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

4. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

5. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 11,000 members of the Institute who pay an additional subscription, and a free weekly newswire.

KEY POINTS SUMMARY

6. Our key points are as follows:

   - The current Finance Bill contains a number of contentious items for which there has been inadequate time for consideration and consultation;
   - The time available for debate of these proposals in Parliament on 6 April is likely to be inadequate; and
   - We recommend that the proposals we have identified below should not be enacted with the other provisions in the current Finance Bill but should, instead, be included as part of the first Finance Bill to be introduced in the new Parliament.

A FINANCE BILL NEEDS ADEQUATE PARLIAMENTARY SCRUTINY

7. We are extremely concerned that a considerable number of measures announced in the Budget on 24 March 2010 are included in the Finance Bill and, because of the limited time for debate, will be passed into law without adequate Parliamentary scrutiny.

Time-table for Budget and (first) Finance Bill 2010

8. The Budget was presented by the Chancellor of the Exchequer to Parliament on 24 March 2010 .

9. The Finance Bill was published on Maundy Thursday 1 April two days after Parliament had begun its Easter recess on Tuesday 30 March.

10. The Finance Bill, as published, contains 73 clauses and 22 schedules and is 174 pages in length.

11. The Finance Bill received its First Reading on 30 March.

12. The Finance Bill is to receive its Second Reading in the House of Commons on the day that Parliament reconvenes after the Easter recess, Tuesday 6 April 2010.

The 2005 precedent

13. In 2005, as in 2010, a General Election was imminent.

14. In 2005 all the measures announced in that year's Budget were included in a (first) Finance Bill of 324 pages.

15. The Finance Bill was then truncated, by agreement with the Opposition Parties, and a reduced (second) Bill of 203 pages was debated by the Committee of the Whole House.

16. The Second Reading and debate on that year's Finance Bill lasted a mere four hours and the (2005) Bill, in effect, received immediate Royal Assent prior to the dissolution of Parliament. We commented at the time (page 21 *TAXline* May 2005 edition):

> ''…huge swathes of complicated and often poorly drafted legislation have been passed into law 'at a stroke' with little or no debate and certainly no time for proper consideration and consultation. It calls into question whether Parliament is fulfilling its constitutional duty to scrutinise legislation.'

The likely time-table in 2010

17. The likelihood is that the only debate on the 2010 Finance Bill will take place on Tuesday 6 April and may be as brief as the 2005 equivalent debate.

18. It is unclear at the time of finalising this Parliamentary Briefing whether the Government will agree that any of the clauses in the 2010 Bill of 174 pages should be dropped before the Bill is debated in Parliament.

19. We strongly urge, for the reasons set out below, that certain clauses and schedules should be removed from the current Bill to allow for appropriate Parliamentary scrutiny in a new Parliament and to allow for consultation with representative bodies including ICAEW Tax Faculty and other concerned persons.

The need for detailed consideration of the majority of Finance Bill provisions

20. Immediately following the Budget on 24 March 2010 we submitted comments to the Financial Secretary to the Treasury, other members of the Government, and to the Opposition Parties. This was published as Initial comments from the ICAEW on the 2010 Budget, TAXREP 21/10. See http://www.icaew.com/index.cfm/route/171314/icaew_ga/Faculties/Tax/Publications_and_technical_guidance/TAXREP_21_10/pdf

21. Our view then, and now, is that in the time available only those measures which set the rates and allowances for the forthcoming tax year or which are entirely uncontroversial should be included in a Finance Bill for which there is so limited time for scrutiny by Parliament.

22. In our earlier submission we wrote:

‘Our first key principle of taxation is that *tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.* We are concerned to ensure that large swathes of potentially complicated and poorly targeted and drafted legislation could be passed into law ‘at a stroke’. We urge government and the opposition parties to ensure that this approach is not applied.

Only those provisions that have to be enacted immediately regarding rates and allowances to keep within the timetable of the Provisional Collection of Taxes Act 1968, or which are entirely uncontroversial, should be included in any Finance Bill passed before Parliament is dissolved.’

SPECIFIC POINTS AND RECOMMENDATIONS

Clause 24 and Sch 3
Pensions: high income excess relief charge

23. The proposals are highly complex and will be difficult for those affected to understand, often creating unexpected and very high tax liabilities for those at whom the proposals were not aimed.

24. The legislation will create significant extra initial and ongoing administrative burdens and costs for pension schemes, employers and individuals which are unacceptable at a time when government is seeking to reduce administrative burdens on business.

25. Furthermore we do not believe there has been adequate time to consider the detailed proposals set out in a 74 page technical note which accompanied the Budget announcement.

Our recommendation

26. We propose that these provisions should not be enacted in the current Finance Bill but should be introduced in the first Finance Bill of the new Parliament when there has been more time to consider alternative approaches to reducing the cost of pensions’ tax relief.

Clause 31 and Sch 7
Charities and community amateur sports clubs: definitions

27. This change in the law is being introduced as a result of the ECJ judgment on 27 January 2009 in the case of *Hein Persche v Fonanczamt Ludenscheid* C-318/07.

28. The new rules and the way they are administered should not impose too much additional red tape and bureaucracy and should not hamper charities in achieving their charitable objects. A charity needs to able to know, without doubt, whether it qualifies for tax breaks at any time.

29. In the proposed new definition of organisations eligible for charity reliefs there is a reference to ‘fit and proper’ persons. We are concerned that a new condition is being introduced into these provisions without the opportunity for adequate debate.

30. Furthermore the monitoring of this new test will fall to HMRC rather than to the Charity Commissioners in England and Wales or the equivalent bodies in the rest of the UK, namely the Scottish Charity Regulator in Scotland the Charity Commission for Northern Ireland which is in the process of being established.

Our recommendation

31. We propose that these provisions should not be enacted in the current Finance Bill but should be introduced in the first Finance Bill of the new Parliament when there is time for adequate debate.

Clause 33 and Sch 9
Charities – Miscellaneous amendments

32. Schedule 9 para 2 proposes that the current wording of s 547(b) Income Tax Act 2007 and s 500(b) Corporation Tax Act 2010 should be changed to allow HMRC to determine what steps the charity must take to ensure that payments will be applied for charitable purposes. The current wording requires the trustees to take 'such steps as are reasonable in the circumstances' and where there is a dispute between the charity and HMRC allows appeal to the Tribunal. The proposed change would unfairly adjust the balance of power between any charity and HMRC.

33. Schedule 9 para 7 proposes powers by way of statutory instrument to limit the number of claims in relation to gift aid relief that a charity can make in a tax year. On the basis that it is not actually known how great an additional demand will be placed on HMRC resources by extending the tax relief to EU states, we would suggest that rather than enact a change now that could cause problems to charities a 'wait and see' policy should be adopted with full consultation with charities so that any changes that may have to be implemented are accepted and understood.

Our recommendation

34. We propose that these provisions should not be enacted in the current Finance Bill but should be introduced in the first Finance Bill of the new Parliament when there will be time for adequate debate.

Clause 35 and Sch 10
Foreign currency bank accounts

35. The draft legislation is based on the HMRC view that the exchange rate to use is that on the date of remittance. The new legislation is thought to be required because of an issue with section 37 Taxation of Chargeable Gains Act 1992 where there is a remittance of foreign currency which derives from foreign income originally received in a foreign currency. The alternative view (which we support) with respect to the exchange rate to use is that where foreign income is received in a currency other than sterling the exchange rate to use is that on the date the income arises (or, where reasonable, the average for the tax year in which the income arises).

36. If the HMRC view on the exchange rate should prove to be incorrect then the legislation, as currently drafted for immediately enactment, will either be irrelevant or not adequate to deal with the problem identified.

Our recommendation

37. In view of the continuing uncertainty as to the correct position we propose that these provisions should not be enacted in the current Finance Bill but should be introduced in the first Finance Bill of the new Parliament when there will be more opportunity to resolve the technical issues in a satisfactory way.

Clause 36 and Sch 11
Penalties: offshore income etc

38. Clause 36 and Sch 11 introduces a system of higher penalties for under-declaration of tax relating to non-UK income or gains.

39. This builds on the existing penalty regime for errors in returns, failure to notify a liability to tax or to make a return on time, but the level of penalty will depend on what sort of tax information exchange agreement (TIEA) the UK has with the country where the overseas income or gains arise. For some jurisdictions the standard penalties will be increased by a factor of either 1.5 or 2, and in the worst cases could be as much as 200% of the tax underpaid. The new rules will

apply to income tax and capital gains tax and are intended to apply for tax periods beginning on or after 1 April 2011.

40. These proposals are substantially different from those put forward in HMRC's previous (December 2009) consultation, and no draft legislation was published at all. It will be impossible to give proper consideration or Parliamentary scrutiny to these important changes which could affect many people.

41. At the heart of the new penalty regimes introduced by Finance Acts 2007, 2008 and 2009 is the intention that penalties should depend on the taxpayer's behaviour. Although this forms the basis of the Finance Bill proposals, there is a significant departure in that penalties will also depend on the jurisdiction involved and what sort of information exchange arrangements (if any) the UK has with it. Whether the UK has managed to set up a suitable TIEA is a matter outside the taxpayer's control.

42. We do not condone tax evasion and will support any reasonable efforts to tackle it. Increased penalties may be not unreasonable where a person deliberately puts money in an offshore jurisdiction which he or she knows lacks an effective TIEA with the UK, in order to evade tax.

43. However, it seems to us unfair that for careless mistakes (as opposed to evasion) the level of penalty should depend on what sort of agreement the UK happens to have in place with the relevant offshore jurisdiction. The underlying assumption seems to be that everyone who invests in jurisdictions without an adequate TIEA does so in order to evade UK tax. However, this is not true and we are concerned that it may have a disproportionate impact on many whose investment is in a particular territory for bona fide reasons – eg they have come to the UK to work and the overseas territory is their home country.

44. We are pleased to note that there should be no penalties where the taxpayer has taken reasonable care, but this raises the question of what HMRC would regard as reasonable care. Ignorance of the law is usually not regarded as a defence, but the tax law on overseas income and gains is complex and we are concerned that those who simply do not understand or know about the rules might end up with a penalty. Further, it is difficult to see how such people would know about TIEAs or which overseas jurisdictions have them with the UK.

45. The provisions also raise some practical questions, such as how penalties would be applied where the behaviour occurred over a number of years and the exchange agreement with the other jurisdiction changed over time.

Our recommendation

46. These provisions should not be enacted in the current Finance Bill and should not be brought into force until there has been time for proper consultation and scrutiny. Both the new proposals and the draft legislation should be put out for public consultation.

Clause 39 and Sch 13
Transactions in securities

47. As stated in Budget Note 41 this new legislation represents a considerable restructuring of the previous legislation and this new legislation will be effective from Budget Day, 24 March 2010, even before the current Finance Bill will receive Royal Assent.

48. Because we believe it is fundamentally unfair and undemocratic for legislation to be effective before the detail of that legislation is made clear to taxpayers we recommended in our *Initial comments from the ICAEW on the Budget* TAXREP 21/10 that this provision should only be included in the first Finance Bill of the new Parliament.

Our recommendation

49. We propose that these provisions should not be enacted in the current Finance Bill but should be introduced in the first Finance Bill of the new Parliament.

Clause 57 and Sch 18
Disclosure of tax avoidance schemes

50. We submitted our response, TAXREP 12/10, to the consultation published on 9 December 2009. A major concern was the change in the penalty regime and after the Budget announcement (Budget Note 64) we wrote in our *Initial comments from the ICAEW on the 2010 Budget* TAXREP 21/10 that:

> 'The existing £5,000 penalty will be replaced, it is proposed, with a daily £600 penalty. This £600 daily penalty was one of the two options set out in the consultation document but we preferred the option which provided for an increase in the penalty to the extent that there has been non-compliant behaviour by the promoter or user. We remain strongly of that view that this would be a better option.'

Our recommendation

51. We remain of that view and we recommend that all these measures should be the subject of proper Parliamentary scrutiny and should not be enacted in the current Finance Bill but should be included in the first Finance Bill of the new Parliament.

Clause 58
Security for payment of PAYE

52. We are extremely concerned that this proposal has been introduced with no prior consultation and in our view it should be withdrawn so that there can be proper consultation on the proposal.

53. In our *Initial comments from the ICAEW on the 2010 Budget* TAXREP 21/10 we wrote:

> 'We are disappointed with this proposal. First, we believe that this measure should have been subject to prior consultation. We have been engaged for some time in the continuing discussions with HMRC about the proposal to apply interest to late payments of PAYE, but at no stage was this proposal tabled for consideration. Paragraph 9 states that HMRC 'have consulted twice before on the greater use of securities' but we do not think that this is a fair reflection of the position nor the outcome of the consultation process, as we and we suspect many others were not in favour of it. The implication of agreement having been reached by a double consultation could almost be described as a gross distortion of the position. As far as we are aware at no stage since the November 2008 consultation has HMRC ever indicated that it was seriously considering introducing such powers for PAYE.
>
> Whilst it is of course right for HMRC to ensure that PAYE is paid on time, HMRC has already included measures to counter this in the Finance Act 2009, namely the rules which will charge interest on late paid PAYE. These rules have only just come into force and we think that they should be given a chance to bed down and see if they are effective in ensuring that PAYE is paid on time rather than taking what is a draconian step which can result in a criminal offence if the security imposed is not paid.
>
> In the tough financial climate, many businesses are facing cash-flow problems and it is inevitable that some may pay PAYE late. The new interest charge is intended to address that problem. We find this provision wholly at odds with the announcement in the Budget that the 'Time to pay' arrangements will be extended for the life of the next Parliament. We believe that there is an urgent need for HMRC to clarify the circumstances when such powers will be used, together with evidence of how many times HMRC is likely to request security. It seems to us that such a measure may well force many firms into liquidation at a

time when HMRC should be seeking to help businesses who are struggling financially but where the underlying business is viable.

It is wrong in principle and undemocratic that HMRC can set a level of security and then impose a criminal penalty in the event that the security is not paid. Whilst we appreciate that the taxpayer may appeal against the imposition of the security and the amount, the grounds on which the taxpayer will be able to appeal are not specified. We believe that on the basis of the evidence provided so far, this penalty is disproportionate.'

Our recommendation

54. For the reasons outlined above we propose that these provisions should not be enacted in the current Finance Bill but should be introduced in the first Finance Bill of the new Parliament.

Clause 65 and Sch 21
Furnished holiday lettings

55. In our discussions with Government officials about the proposal to abolish furnished holiday lettings relief our view was that retaining the scheme, extended to properties elsewhere in the EEA but restricting the tax benefits available, would have been preferable to total abolition. We put out our views most recently in TAXREP 10/10 see http://www.icaew.com/index.cfm/route/170721/icaew_ga/Faculties/Tax/Publications_and_technical_guidance/TAXREP_10_10/TAXREP_10_10/pdf We regret that our proposals for compromise have not been pursued.

56. Our comments in TAXREP 10/10 are reproduced below:

'The fundamental problem with abolishing the scheme altogether, is that businesses must now self assess whether a property business is carrying on a trade and be taxed as a trade, or whether it is to be taxed as property income. This creates an unnecessary and unwelcome administrative burden.

The guidance in the Technical note issued on 9 December 2009 is inadequate and avoids all the difficult issues. The position of each business will need to be considered on a case by case basis and reviewed every year. This will lead to costly Tribunal hearings, which will waste public money and give rise to a new body of case law. This could and should have been avoided.

A clear statement is needed on where the dividing line is between trading and passive income from letting property. This should include how HMRC will in future distinguish hotels from other furnished holiday lets. '

57. A major concern with the actual legislation is the lack of a statutory definition of dwelling house in Capital Allowances Act 2001.

Our recommendation

58. There should be a statutory definition of dwelling house in Capital Allowances Act 2001.

IKY
6 April 2010

E ian.young@icaew.com

APPENDIX 1

THE 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 http://www.icaew.com/index.cfm?route=128518).