

Tax Representation



TAXREP 64/08

TAX LAW REWRITE: BILL 7: INTERNATIONAL & OTHER PROVISIONS

TRANSFER PRICING AND ADVANCE PRICING AGREEMENTS

Memorandum submitted in September 2008 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to Paper CC/SC(08)24 issued in June 2008 by HMRC Tax Law Rewrite Team

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 64/08

Tax Law Rewrite: Bill 7: International & Other Provisions
Transfer pricing and advance pricing agreements

TAX LAW REWRITE: BILL 7: INTERNATIONAL & OTHER PROVISIONS

TRANSFER PRICING AND ADVANCE PRICING AGREEMENTS

INTRODUCTION

1. We welcome the opportunity to comment on the draft clauses in Paper CC/SC(08)24 (Bill 7: Transfer Pricing and Advance Pricing Agreements) issued in June 2008 at www.hmrc.gov.uk/rewrite/index.htm.
2. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are in Annex 1. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex 2.

GENERAL COMMENT

3. Apart from minor drafting comments below, we are content with the drafting of Parts 1 (Transfer pricing) and 2 (Advance pricing agreements).

ANSWERS TO QUESTIONS

4. **Q1** Having regard to the explanation in Change 701 in Annex 1, we support the proposal to define “party” as any party to the advance pricing agreement other than the Commissioners for HM Revenue and Customs in drafting clause 78(3) and (5) (Advance pricing agreement: effect of revocation or breach of conditions).
5. **Q2** Having regard to the explanation in Change 701 in Annex 1, we support the proposal to rewrite “party to a section 85 agreement” as meaning any party to such an agreement other than the Commissioners for HM Revenue and Customs in drafting clause 85(2) (Advance pricing agreement: party’s duty to provide information).

SPECIFIC COMMENTS ON DRAFT LEGISLATION

6. **cl 3 The “participation condition” referred to in section 1(1)(b)**
(1) It would appear more logical to set out Condition A in (a) and Condition B in (b), particularly as the Condition B sub-clauses (3) and (4) follow Condition A sub-clause (2).
7. **cl 15 Interpreting Part in accordance with OECD principles**
(6), (7) Should sub-clause (7) precede (6)?
8. **cl 24 Meaning of “qualifying territory” and “non-qualifying territory”**
(7), (8) Should sub-clause (8) precede (7)?

- cl 57 Elections under section 54(1) or 56(1)**
9. **(7)** The reference to 'paragraph (b)' should be to 'paragraph (1)(b)' (of either section 54 or 56).
- cl 64 The requirement for the Commissioners' sanction**
10. **(3)** The reference to 'Subsection (3)' should be to 'Subsection (4)'.
- Sch 1 Repeals**
11. As Schedule 28AA of ICTA is to be entirely repealed, where will paragraph 8 of that Schedule (Foreign exchange gains and losses and financial instruments) be rewritten?

DETAILED COMMENTS ON DRAFTING

- cl 6 Indirect participation: defined by sections 7 to 10**
12. In Explanatory Notes paragraph 21, the reference to 'Clauses 7 and 10' should be to 'clauses 7 to 10'.
- cl 11 Meaning of "connected" in section 7**
13. In Explanatory Notes paragraph 28, 'sections 7' in the heading should be 'section 7' and a full-stop is needed between '7' and 'It' in the first line.
- cl 15 Interpreting Part in accordance with OECD principles**
14. In Explanatory Notes paragraph 36, in the second line, 'organisations' should be 'organisation's'.
- cl 37 Giving effect to section 36 claims**
15. In Explanatory Notes paragraph 78, in the heading 'sections 36' should be 'section 36'. In the first sentence a gap is also needed between '36' and 'claim'.
- cl 41 Tax treatment if actual interest exceeds arm's length interest**
16. In Explanatory Notes paragraph 85, the first 'interest' should be 'tax' (would be deductible).
- cl 80 Advance pricing agreement: application for agreement**
17. In Explanatory Notes paragraph 147, in the first sentence, for 'reply' substitute 'apply'.
- cl 83 Advance pricing agreement: annulment for misrepresentation**
18. The explanation in Explanatory Notes paragraph 150 does not appear to relate to clause 83 which deals with the consequence of an advance pricing agreement being nullified by reason of misrepresentation.
- cl 84 Advance pricing agreement: penalty for misrepresentation**
19. In Explanatory Notes paragraph 151, in the first sentence, 'and' should be 'or'.

TJH/PCB
3.9.08

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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.co.uk/index.cfm?route=128518>.