Tax Representation

TAX FACULTY

TAXREP 40/09

Finance Bill 2009: Report Stage Briefing

Parliamentary Briefing submitted by the ICAEW on 30 June 2009 following the completion of the Finance Bill Committee stages and summarising our key concerns.

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Finance Bill 2009: Report Stage Briefing

Introduction

1 This Briefing summarises our key concerns with the Finance Bill 2009 following the completion of the Public Bill Committee stage.

2 A summary of our earlier representations and briefings on the Finance Bill (including where appropriate suggested amendments) is set out below:

Briefing	**Number**
Detailed Finance Bill 2009 Briefing	TAXREP 30/09
Clause 71 and Schedule 35, Pensions: Special Allowance Charge	TAXREP 32/09
Part 4: Value Added Tax	TAXREP 35/09
Clause 91, HMRC Charter	TAXREP 37/09
Clause 92 and Schedule 46, Finance Bill 2009, Duties of senior accounting officers of large companies	TAXREP 36/09
Clause 93, Publishing details of deliberate tax defaulters	TAXREP 38/09
Part 7 excluding clauses 91 to 93	TAXREP 39/09

3 In this document, we summarise our key concerns and have not repeated the amendments we proposed in our earlier Briefings except in relation to a proposed new amendment on clause 6 as detailed below.

Clause 6, Additional rate, dividend additional rate, trust rates and pension tax rates

4 Following further consideration of the effect of the income tax provisions in this Bill we would like to raise a new concern and suggested solution designed to ensure that the tax rules for settlor-interested trusts operate correctly and that double charges to tax do not arise.

5 A settlor is liable to income tax on the income of a settlement where he or she has retained an interest (s 624, ITTOIA 2005) or where income is paid to the settlor's minor, unmarried child (s.629). However, the trustees remain fully liable to income tax on that income. The settlor has a right of recovery of the extra tax to be paid because of this aggregation (s 646, ITTOIA) and, correspondingly, has to pay over to the Trustees any reduction in tax he has enjoyed because of the aggregation.

6 The existing rules do not appear to allow the settlor credit for any tax paid or suffered by (or credited to) the Trustees although by concession credit is allowed. Whilst the position has existed since the 2006 trust modernisation, we are concerned that as it is only a concession, it could be withdrawn. It now matters because of the increase in the trust rate from 40% to 50%. Presently, many settlors are 40% taxpayers which is the same rate as that currently paid by trusts. Once the 50% trust rate comes in, most settlors currently paying tax at 40% will become repayment cases.

7 ***Proposed amendment***

On page 3 line 8, insert new subsection (4A) as follows

'(4A) In section 646 ITTOIA 2005 (Adjustments between settlor and trustees etc.) insert after subsection (8)

(9) A settlor of a settlement in respect of which he is liable to pay income tax under section 624 or 629 is entitled to receive credit for any income tax paid by the trustees of such a settlement in calculating his income tax liability and to be repaid any excess of that credit over that liability.

(10) A settlor who receives a credit under subsection (9) above is to that extent not entitled to recover any tax from the trustees under subsection (1) above.

(11) This amendment to section 646 shall be deemed to have had effect from 6 April 2006.'

Clause 71 and Schedule 35, Pensions: Special annual allowance charge

8 We believe that all the key issues and our suggested amendments have been covered in detail in our previous briefings, particularly TAXREP 32/09.

9 In the current economic climate we understand the pressure to reduce tax relief given to high earners on their pension contributions. Nevertheless, we believe that the approach is wrong in principle and question the approach the approach that has been adopted, namely the introduction of 'anti-forestalling provisions'. These provisions go beyond the stated aim of the policy.

10 As drafted the anti-forestalling provisions will affect more than the target group. They can also operate unfairly and produce very high marginal tax rates. We appreciate that the Government has undertaken to examine some of the issues highlighted below to see what can be done and we hope that the Government will table amendments at Report Stage to address our concerns. These are summarised below:

- **Irregular contributions** – as drafted the provisions will adversely affect those who have not committed to a regular contributions contract (ie quarterly or more regular). The self employed and those with fluctuating profits such as farmers generally decide the level of contributions to make towards the end of the tax year when it should be possible to estimate profits with a reasonable degree of accuracy. Their contributions are therefore usually paid annually or perhaps twice a year. We recommended that the definition of regular contributions should be expanded to allow them to continue to make 'regular' annual contributions and not be caught by the anti-forestalling provisions. We therefore recommended that contributions of the three previous tax years are averaged when deciding the level of 'regular' contributions to be taken into account so that those making 'regular' annual contributions would not be limited to full tax relief on only £20,000 of pension inputs in a tax year.

- **Special annual allowance** – the special annual allowance is rather low, especially for those who have higher incomes and do not have an ongoing pension contribution pattern. We suggested an increase to £50,000. This would represent a more realistic level for higher earners and would also mitigate the effect of the provisions for those falling within them as a result of unexpectedly high earnings in only one tax year. If the limit is not increased as high as £50,000, we would nevertheless welcome an increase above £20,000.

- **Three year period for income threshold** - the new provisions apply where the individual has income of £150,000 or more, not only in the year of the increased pension input, but in either of the previous two years. This results in more individuals being affected than might otherwise be the case and particularly hits those with irregular income levels. We recommended that the provisions should apply only if income in the year of the pension input exceeded £150,000.

- **Cliff edge** – we have provided calculations illustrating how individuals whose income and pension inputs are virtually identical can suffer widely disparate net incomes as a result of the provisions and also of how the operation of the Special Annual Allowance Charge can result, where an individual's income drops, in no tax relief at all on pension inputs. Our suggestions as regards increasing the Special Annual Allowance and / or considering only the income of the year of pension input would go some way to mitigating the impact of these issues on such individuals.

- **Different pension providers** – protection is only given to individuals who continue to make contributions to the same pension provider. As a result, spreading investment risk is effectively being discouraged at a time when it should be encouraged. We suggested amendments to the wording of Schedule 35 so that 'the scheme' is replaced with 'a scheme'.

- **Older taxpayers** – as retirement approaches, individuals tend to have more income available and will want and be able to save more for their retirement. In the pre A-day rules, tax relief increased as an individual's age increased. After A-day this was considered unnecessary due to 'generous allowances' with full tax relief. We suggested that the anti-forestalling provisions should not apply to those over 50 so that those closer to retirement would not be discouraged from making pension savings.

- **Loss of confidence in pension saving** - the proposed major change to pensions tax relief will undermine taxpayers' confidence in saving using pensions. This is unfortunate coming so soon after taxpayers were promised a 'consistent and flexible system that is readily understood' and 'rules [that] will allow everyone to pay what they can afford when they can afford it. [Financial secretary to the Treasury – see TAXREP 29/09, Appendix 1]. Loss of tax relief on pension contributions will almost certainly have a negative impact on the pensions industry and result in individuals on higher incomes reconsidering their pension strategy. We recommended consulting before introducing anti-forestalling with a view to introducing, at an earlier date more equitable provisions which meet the Government's objectives.

- **Additional complexity** – given that the anti-forestalling provisions are intended to apply for under two tax years, they are unnecessarily complex and we believe alternative and simpler approaches could have been equally effective, and would have preferred an approach based on the reduction of the existing annual allowance.

Clause 92 and Schedule 46, Duties of senior accounting officers of large companies

11 Schedule 46 imposes new requirements and a personal liability on the senior accounting officer (SAO) to verify that a company and its subsidiaries maintain 'appropriate tax accounting arrangements'. We note that a number of amendments to Schedule 46 of the Finance Bill 2009 have now been agreed. We welcome particularly the inclusion in the legislation of revised size criteria which will limit the scope of the clause to genuinely 'large' companies.

12 Nevertheless we remain deeply concerned about this clause as it appears to be a disproportionate response to any perceived problem in this area. We would expect that most large companies will already have appropriate tax accounting arrangements but this measure will nevertheless impose significantly increased admin burdens and associated costs on them which may be out of proportion to any benefit.

13 Whilst we understand that it is not the Government's intention to import US Sarbanes-Oxley style legislation into the UK, this is exactly what this provision will do. Rather than introducing a measure that applies to all large companies that meet the size criterion, this measure should be aimed more closely at those companies that do not maintain appropriate systems.

14 Under current rules, a corporation tax return must be signed by an authorised officer who certifies that the return is correct and complete to the best of his or her knowledge and belief. If a company does not have appropriate tax accounting arrangements, then the corporation tax return is not likely to be correct and complete and the company will be exposed to penalties for submitting an incorrect return. We believe that any such measure should be the collective responsibility of the Board of Directors and that any fine should be levied only on the company.

15 Key concerns about this measure are set out below.

- **Increased admin burdens and international competitiveness -** as noted above the measure imposes potentially onerous personal liabilities on all SAOs in large companies. It is inevitable that even where their company's systems are already appropriate, all responsible SAOs will wish to protect their position. This protection is likely to take the form of engaging advisers to undertake detailed reviews of tax accounting systems and providing documented third-party confirmation that the systems are appropriate. The measure will therefore impose admin burdens and associated costs on all large companies regardless of whether they already have appropriate systems. There must be a danger that the costs to UK businesses will exceed any additional tax revenue raised. This measure is therefore likely to make the UK a much less competitive place to do business and that it will provide further encouragement to companies and groups to consider relocation.

- **An appropriate penalty -** we do not consider it appropriate to levy a flat-rate penalty for a failure to maintain appropriate tax accounting arrangements where there has been no loss of tax. The new penalty regime introduced by Sch 24, FA 2007 allows for penalties to be suspended for up to two years in cases of careless mistakes. In view of the personal nature of the penalties in paragraphs 5(2), 6(2) and 7(2), we think it would be appropriate that penalties could be suspended where a company undertakes to repair any weaknesses in its tax accounting arrangements. We also think that penalties should be capable of being reduced in 'special circumstances' as per the provisions in FA 2007.

- **Implementation Oversight Forum -** in order to ensure that clause 92 is implemented consistently and appropriately, we proposed in our earlier briefing (TAXREP 36/09) that a steering group should be established and we reaffirmed the need for this in a letter to the Financial Secretary to the Treasury dated 29 June 2009. The purpose of the Forum would be to provide assurance to the Financial Secretary to the Treasury and the HMRC Chairman and Commissioners that the policy outcomes of the proposals are being delivered in line with the undertakings given to Parliament. The forum would oversee the period of initial implementation, including the post-implementation review and benefits realisation work. Members of the forum would be drawn from external stakeholders, as well as relevant HMRC Directors. The remit of the forum would be to provide assurance to the Financial Secretary to the Treasury and the HMRC Chairman and Commissioners that the policy outcomes of the proposals are being delivered in line with the undertakings given to Parliament. The forum will oversee the period of initial implementation including the post-implementation review and benefits realisation work. Forum members should be mainly external stakeholders plus relevant HMRC Directors.

Clause 93, Publishing details of deliberate tax defaulters

16 Clause 93 introduces a power for HMRC to publish the names and other information about taxpayers who have incurred penalties and where the tax lost exceeds £25,000. The ICAEW supports efforts to combat tax evasion and it is right that Government considers a variety of policy options. However, the proposal raises a number of serious issues and we are disappointed that there was no prior consultation on this proposal. We would have preferred that this clause be dropped from the Bill to allow time for public consultation and for research into the success of similar schemes in other countries such as Ireland.

17 Key concerns with this measure are set out below.

- **Rights of appeal –** clause 93(6)(b) says that HMRC must give the taxpayer 'reasonable opportunity to make representations' about whether details should be published. However, there is no right of appeal against publication, although the taxpayer can appeal against a penalty. Appealing against a penalty provides recourse for a taxpayer who feels he or she does not fall into the category of deliberate default, or should have been given maximum penalty mitigation (which provides protection from publication). However, there may be other reasonable grounds on which a taxpayer would not want his or her name and details being published. For example:

  - A risk to personal safety – especially if addresses are published.

- An unacceptable impact on the safety or privacy of the taxpayer's family – again, especially if addresses are published.
- A likely adverse effect on the taxpayer's business, which could put jobs at risk.

- **Certainty for those who make disclosure -** we recognise that measures to counter tax evasion need to strike a balance between providing an effective deterrent while also encouraging errant taxpayers to come forward and regularise their affairs. The danger is that the greater the deterrent element, the greater the chance that errant taxpayers will be unwilling to approach HMRC. The provisions are linked to the new regime for penalties for incorrect tax returns in Sch 24, Finance Act (FA) 2007 and for failure to notify liability in Sch 41, FA 2008. Publication will only apply to failures in the 'deliberate' and 'deliberate and concealed' categories, and will not be done if the person has made full disclosure and in consequence obtained the **maximum** (our emphasis) possible penalty mitigation, as provided in Clause 93(11). The problem with the clause as drafted is that unless the penalty mitigation is 100%, then the test will not be met. Thus, even if penalties are mitigated by 99% the taxpayer would still be within these provisions.

  The interpretation of what is meant by 'disclosure' and the criteria for mitigating penalties are set out in HMRC guidance, not in legislation. This test therefore introduces considerable uncertainty as to whether a full reduction would be achieved and is likely in practice to be a very hard criterion for taxpayers to meet. Further, the FA 2007 penalty regime has only recently been introduced and there is little experience of whether full mitigation of penalties will be achievable in practice. This uncertainty leaves taxpayers exposed to being named even where they have sought (even if not as well as they could have done) to put their affairs in order. We therefore recommended that to give taxpayers greater certainty this test should be eased and that it would be reasonable to allow greater leeway where the disclosure was unprompted.

Clause 94 and Schedule 47, Amendment of information and inspection powers

18 Clause 94(2) gives HM Treasury power to amend the provisions of primary legislation (Sch 36, FA 2008, and Sch 47 of this Bill). This power to make amendments is wide in scope. The explanatory notes say that HMRC will use this power to repeal provisions which are no longer required. This is a welcome statement of the intention of this provision but the clause as drafted does not confine the power to such repeals. We would like a government statement clarifying the intention of this provision and that it will only be used in such circumstances set out above.

Clause 95 and Schedule 48, Extension of information and inspection powers to further taxes

19 The information and inspection provisions in Schedule 36, FA 2008 are extended to include inheritance tax. We are concerned about the extension of these powers to inheritance tax. Many executors will be bereaved close family or friends of the deceased. They may also be elderly. Tracing all assets and lifetime gifts can be very difficult and particularly so for these people in the difficult circumstances they find themselves. We therefore consider that the information and inspection provisions in

Schedule 36 should not be extended to IHT. In the circumstances we would welcome a statement that these powers will be operated with a 'light touch' in relation to family executors etc.

Clause 100 and Schedule 53, Late payment interest on sums due to HMRC

20 Key concerns with this measure are set out below.

- **Draft regulations** – these need to be published showing how interest will be calculated need to be published. It is still not known what will be the interest differential. Thus a key element of the provisions is missing and Committee members need this information available to them to help inform any debate.

- **Corporation tax and petroleum revenue tax** – these have been excluded from the legislation in the Finance Bill and we would welcome clarification as to why they are.

- **PAYE -** we would welcome clarity on how the proposed introduction of an interest charge on late paid PAYE is to operate as we are not clear to what extent this proposal is implemented in this Finance Bill.

Clause 101 and Schedule 54, Repayment interest on sums to be paid by HMRC

21 Similar comments apply here as per clause 100 above.

Section 105 and Schedule 55, Penalty for failure to make returns etc

22 Paragraph 25 of Schedule 55 sets out the penalty position for late submission of partnership returns which is that the initial penalty is £100 *per partner*. We appreciate that this provision is similar to the existing penalty provision in s 93A, TMA 1970 but this per partner penalty is widely perceived to be rather harsh and potentially unfair, not least because individual partners are often then unable to estimate their partnership profit share and are thus likely to file their personal return late and incur a personal late filing penalty. Therefore, each partner is potentially being penalised twice for what is effectively a single late filing. We would welcome a Ministerial statement to the effect that an individual taxpayer who is a member of a partnership will have a reasonable excuse for late submission of is or her personal tax return where the late submission was as a result of the late submission of the partnership return of which that person was a member.

Further contact

23 For any further enquiries please contact:

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