

TAXREP 59/04

INCOME TAX (TRADING AND OTHER INCOME) BILL: CONSEQUENTIAL POWERS (TAX LAW REWRITE)

*Memorandum submitted in December 2004 by the Tax Faculty of the
Institute of Chartered Accountants in England and Wales
in response to an invitation to comment issued in
November 2004 by the Inland Revenue
Tax Law Rewrite Team*

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INTRODUCTION

1. We welcome the opportunity to comment on Paper CC(04)20, published on 24 November at <http://www.inlandrevenue.gov.uk/rewrite/exposure/menu.htm>, concerning proposed new powers contained in clauses 882 (Consequential amendments) and 883 (Commencement and transitional provisions etc) of the Income Tax (Trading and Other Income) Bill ('ITTOIB') to enable the Treasury to make by Order consequential amendment, transitional and savings provisions in limited circumstances after enactment of the Bill.

KEY POINT SUMMARY

2. We appreciate the need for necessary changes to the rewritten law to be able to be made expediently, accept that a Treasury Order is the best way of achieving this end and acknowledge that draft clauses 882 and 883 prohibit any changes to the law as it was immediately before 6 April 2005. In view of the complexity of tax law, which can frequently admit more than one interpretation, and especially in the case of a modification affecting a change in the law resulting from a Proposed Rewrite Change, we consider that there should be consultation, even if for less contentious amendments it is confined to the Tax Law Rewrite Steering and Consultative Committees.
3. The best way of ensuring that this happens would be to include an obligation to consult within clause 882 (and clause 883) itself. Failing this we suggest that the undertaking in para 12 of paper CC(04)20 and paras 1886 and 1890 of the Explanatory Notes to the ITTOIB, that any matters that require the powers to be invoked will be discussed with the Steering and Consultative Committees or its successors, should be confirmed by way of a Ministerial Undertaking during the course of the Bill's progress through Parliament.

WHO WE ARE

4. 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.
5. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. 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.

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6. 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 11,000 members of the ICAEW who pay an additional subscription.

DETAILED COMMENTS

7. Clauses 882 and 883, as published on 1 December 2004 in the Income Tax (Trading and Other Income) Bill, now incorporate actual Schedule and section references to Income Tax (Trading and Other Income) Act ('ITTOIA'), but nothing turns on this for the purposes of Paper CC(04)(20) and the drafting of the clauses is otherwise unchanged from those attached to the Paper (apart from acceptable minor changes made to clause 883).
8. Paper CC(04)(20) focuses consultation on clause 882(2) – (5) and on clause 883(5), which deal specifically with the proposed Treasury powers to be exercisable by Order. We have no objection in principle to these powers being given to the Treasury and, subject to our comments below, are content with the approach in and structure of the clauses.
9. We accept that the purpose of clause 882(2) is precautionary only: an Order to be made by the Treasury only where found necessary in practice to rectify the consequential amendments and repeals effected by ITTOIA. The hope is that this power need not be used, but a more realistic expectation is that its exercise may be found necessary in view of the complications in the existing legislation and in particular arising from the income tax/corporation tax split approach in its rewriting. Modification by Order is also appropriate as a fast-tracking mechanism to effect necessary correction, rather than otherwise via the Finance Bill process.
10. It is appropriate that the Treasury should make 'such modifications' (clause 882(2) and (3)) and such transitional or saving provision (clause 883(5)) as it considers appropriate in connection with the coming into effect of ITTOIA, limited in clause 882(2) to modifications appropriate 'in consequence of [ITTOIA]' only and as further limited under clause 882(4) to not changing the effect of the law.
11. The drafting of any modification within these limitations, or of any transitional or saving provision under clause 883(5), is at the discretion of the Treasury. It is clearly sensible that the Tax Law Rewrite draftsman should draft the modification or provision for the purposes of the Order, the need for this having either been identified by the Inland Revenue itself or in consequence of outside representations made to the Inland Revenue.
12. However, a major feature of the Tax Law Rewrite is the requirement for the rewrite draftsmen to consult upon their work as the rewriting of the tax legislation progresses, particularly with the Steering and Consultative Committees but also more widely with outside professional bodies etc and with the public generally.

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13. There is no provision in clause 882 or in clause 883 that such consultation should be entered into prior to the making of any Order found to be necessary after ITTOIA is enacted.
14. In principle it is preferable that such consultation should take place, as safeguarding the obligation not to change the effect of the law. Whilst clearly the Tax Law Rewrite draftsman would not consciously breach this obligation, the benefit of other independent expert scrutiny must add to the certainty that any modification does not change the effect of the law. This is of general relevance in the case of taxation legislation, which can frequently admit of different interpretations, and is specifically relevant in the case of orders to which clause 882(5) applies where the modification affects a change in the law resulting from a Proposed Rewrite Change. As regards the latter, it will be most important that a rewrite Change, already subjected to consultation and focussed attention, should not be modified to unintended effect. Whilst this risk exists, we would not over-emphasise it as we would expect most modifications or transitional or saving provision by Order to be of minor and probably technical relevance only and unlikely in practice to create any new adverse consequence for the taxpayer (nor, of course, should they create any unintended advantage). Taxpayers, or more likely their representatives, might also be expected to draw attention to any amendment made which was considered invalid.
15. Accepting the benefit of consultation in the case of a proposed Order, the question then arises how to ensure that it takes place.
16. The preferable and most certain approach would be to include an obligation to consult within clause 882 (and clause 883) itself. This might require publishing the proposed Order in draft and inviting any comments from any source on it within a set period, which would logically be quite short in a fast-tracking context. Ideally there would then need to follow a 'response to responses' stage, setting out the Tax Law Rewrite team's reaction to points made and any revised draft order. In theory, this could prove to be a long-running process if respondents still objected to the drafting. In practice, this situation should arise infrequently if at all, as in most cases it is to be expected that the original draft Order would prove acceptable, and the response to responses might simply be confirmation of this. If there was, exceptionally, prolonged dispute then the original drafting could at the least be regarded as challengeable as inappropriately changing the effect of the law and the lengthier process would be justified.
17. This would, however, clearly be a more cumbersome procedure than that envisaged in clauses 882 and 883, and the question arises whether some alternative form of informal consultation might work instead.
18. The proposed undertaking, set out in paragraph 12 of Paper CC(04)20, and now confirmed in Explanatory Notes paragraphs 1886 (clause 882) and 1890 (clause 883), that any matters which require the clause 882 or 883 powers to be invoked would be brought before the Steering and Consultative Committees for consideration and would only be taken further forward if these Committees were content for the Tax Law Rewrite Project to proceed with them, is close in effect and procedure to the possible statutory approach indicated above.

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19. Such a proposed undertaking must be robust. As presently drafted the undertaking is that the Inland Revenue (for the Treasury) will consult with the Tax Law Rewrite Project's Steering and Consultative Committees. Whilst this is reassuring, although narrower in scope than wider public consultation, the robustness of the undertaking for taxpayers would be improved if express Ministerial authority were to be given to it and to a continuing commitment to consultation. Whilst the making of any Order might be expected sooner rather than later following the enactment of ITTOIA, provision ought also to be made for consultation at any time when the Consultative and Steering Committees had for any reason ceased to exist. Similarly, the giving of the undertaking should be capable of continuity following the merger of the Inland Revenue with HM Customs & Excise.

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