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ICAEW REPRESENTATION

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TAX POLICY MAKING: DRAFT PROTOCOL ON ANNOUNCEMENTS OUTSIDE SCHEDULED FISCAL EVENTS

Comments submitted on 23 February 2011 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the consultation document *Corporate Policy Making: Protocol on Announcements outside scheduled Fiscal Events* published on 9 December 2010.

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CORPORATE POLICY MAKING: PROTOCOL ON ANNOUNCEMENTS OUTSIDE SCHEDULED FISCAL EVENTS

INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the consultation document *Corporate Policy Making: Protocol on Announcements outside scheduled Fiscal Events* issued by HM Revenue & Customs (HMRC) on 9 December 2010.
2. We are pleased to have the opportunity to respond to this consultation. We would be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. 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

4. The Institute of Chartered Accountants in England and Wales (ICAEW) 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, ICAEW provides leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The ICAEW is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
5. 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 ICAEW ensures these skills are constantly developed, recognised and valued.
6. The Tax Faculty is the focus for tax within ICAEW. 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.

EXECUTIVE SUMMARY

7. ICAEW Tax Faculty welcomes the proposed Protocol which we believe reflects long-standing practice and both UK and EU legal precedents.
8. We welcome the proposal that the operation of the Protocol will be scrutinised by the Forum of Tax Professionals (the Forum). However, there may be instances where ICAEW Tax Faculty takes a different view to members of the Forum and we therefore reserve the right to take up any concerns we have with Ministers directly.
9. We do not think that there is a need at this stage to seek to identify every possible risk, or the nature of such risks. The operation of the Protocol will be monitored by the Forum and bodies such as ICAEW Tax Faculty and if problems arise we would expect them to be raised at that stage.
10. We do not think that the term "significant" should be defined further although it would be helpful to have some guidance and examples of how the term might be applied in practice. If problems arise in practice with the scope of the definition, then any concerns should be raised through the Forum.

11. We believe that a detailed technical note and justification should always accompany every announcement under the Protocol, even if draft clauses are published at the same time.

GENERAL COMMENTS

Background

12. The prevailing custom in relation to changes to the law, to which we fully subscribe, is that government does not, except in the most exceptional of circumstances, introduce legislation which has retrospective effect.
13. This has the consequence that taxpayers, when taking decisions, will be taxed by reference to the law at the time at which they take those decisions.
14. If the law is to be changed then this should generally only have effect at some time in the future and usually not before the new law has been enacted.
15. This will provide certainty to business and taxpayers which is an absolutely fundamental principle of any good tax system. It is one of the key principles set out in the ICAEW Tax Faculty's Ten Tenets as set out in Appendix 1.
16. The general principles by reference to which changes in the law can be introduced with immediate effect was first articulated by Peter Rees, who subsequently became Lord Rees and was Chief Secretary to the Treasury from 1983 to 1985, when the 1978 Finance Bill was being debated in Committee and there was a proposal to 'backdate' the effect of Clause 26 (ending the loss relief for dealings in commodity futures) to 1976.
17. Peter Rees put forward the proposition that if government sought to end some scheme, or some exploitation or abuse of a provision in the then prevailing law, they should:
- clearly announce what they were intending to do and the mischief that they were going to put an end to;
 - refer the issue to a special parliamentary committee, the then Tax Reform Committee;
 - immediately publish a draft clause setting out what new law would be introduced to achieve the stated objective; and
 - introduce that clause into the next available Finance Bill for enactment.
18. Finally Peter Rees recommended that any new legislation should only come into effect from the date of the announcement.
19. This position has in more recent times received the full support of the late Lord Bingham in his Sir David Williams 2006 lecture on the rule of law, which was expanded into a book published in February 2010. Lord Bingham argued very forcibly that only when there was clear justification, and after careful consideration, should laws ever have other than effect on future behaviours. In the 2006 lecture Lord Bingham stated:
- The core of the existing principle [of the rule of law] is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws **publicly and prospectively promulgated** and publicly administered in the courts. ...any derogation calls for close consideration and clear justification.'
20. There is also the EU legal doctrine of legal certainty and preservation of legitimate expectations. This has the consequence that if a clear statement is made as to how the law is going to be changed then it is quite legitimate for the subsequent change in law to be backdated to the date of the announcement. But it is not so clear that the change can go back further than the date of the announcement if 'legal certainty and preservation of legitimate expectations' are to be preserved.

21. The Draft Protocol on Announcements outside Scheduled Fiscal Events will enshrine the Rees doctrine as being part of official government policy and uphold the EU doctrine of legal certainty and preservation of legitimate expectations
22. ICAEW Tax Faculty therefore welcomes the codification of this prevailing practice.
23. In relation to the original Rees Doctrine, there is no longer a Tax Reform Committee but it is proposed that:
- ‘the [current] Forum of Tax Professionals will review announcements as standing agenda item at its regular meetings and provide Ministers with a view as to how the Protocol is being observed in practice’.
24. We believe that the proposed arrangement will give a measure of independent scrutiny of the use to which the Protocol is put. However, as we are not directly represented on the Forum there may be instances where we take a different view to members of the Forum and wish to take it up with Ministers directly.
25. Subsequent to the formulation of the Rees doctrine, in 2004 the UK government introduced the Disclosure of Tax Avoidance Schemes rules that required taxpayers and promoters of tax avoidance schemes to disclose details of certain defined schemes to the revenue authorities. Since 2004, therefore, government has been made aware, more or less in real time, of schemes that are being introduced and used and it has the opportunity to stop them by announcing a change to the law with immediate effect under the existing Rees doctrine and, in the future, under the currently proposed Protocol.

SPECIFIC COMMENTS AND QUESTIONS RAISED IN THE CONSULTATION DOCUMENT

26. The Consultation Documents invites views on a number of specific issues that are listed below together with our own comments.

Will the criteria set out in paragraph 4 of the draft protocol enable the Government to strike the right balance between stability in the tax system and protection of the Exchequer? Should other criteria be considered?

27. For the reasons we have set out above we believe that the proposals will provide certainty in relation to the tax system and should also provide protection to the tax system.

The draft Protocol does not specify the nature of the risk to the Exchequer that might prompt an announcement to be made. As stated earlier, although more common in the case of avoidance, post announcement changes may also be made to prevent losses to the Exchequer not associated with avoidance. Comments are welcome on whether the Protocol should be more specific about the nature of the risks for which an immediate change of legislation might be appropriate.

28. We do not think that there is any need at this stage to seek to identify every possible risk, or the nature of such risks. The new system is to be monitored by the Forum of Tax Professionals and we are confident that if that body is of the view that the government is not using the Protocol in an appropriate way, then suitable representations will be made.

29. Bodies such as ICAEW Tax Faculty will also be monitoring arrangements and we will also comment if we believe that the proposed Protocol is not being applied correctly.

The draft protocol uses the term “significant” in the proposed criteria but does not attempt to define the term. This is intended to meet the objective of allowing scope to address both potential tax losses that are large in absolute terms as well as losses that are smaller but sizeable enough to undermine a particular regime. But comments are welcome on whether sufficient guidance on what

“significant” would mean in practice could be given by way of illustrative examples or whether more guidance should be included in the protocol.

30. At this stage we do not see that “significant” should be defined further and consequently it should take its ordinary meaning. Again, if problems arise we suggest that in the first instance they be discussed by the Forum of Tax Professionals, subject to the caveat mentioned in paragraph 24 above.
31. Clearly the government knows the circumstances when it has been using the Rees doctrine to date and we presume that the criterion adopted to date will be carried over under the new Protocol. It would be helpful to have guidance as to what the government understands by the term significant and illustrative examples would make such guidance more useful.
32. Including any guidance and examples in the Protocol itself has the merit of keeping everything ‘in the same place’ which will assist in making this area of policy easier to understand and monitor.

Are there suggestions for improvements to the process for making and publicising announcements described in paragraphs 5, 6 and 7 of the draft protocol, recognising that key elements of the process are dictated by the need to provide legal certainty?

33. We believe that there should always be a detailed technical note accompanying every relevant announcement and not just when ‘draft clauses cannot be published on the day of the announcement’, as seems to be suggested in the third bullet point of clause 5 of the protocol. This is in line with Lord Bingham’s statement that there should be ‘clear justification’ for these changes to the law which have immediate effect.
34. We also believe that the scrutiny of the Protocol by the Forum of Tax Professionals needs to be transparent and full Minutes of their deliberation should be published on the HMRC website, within a reasonable time of the relevant meeting, say a month. The Minutes should explain in sufficient details for readers of the Minutes to be absolutely clear on all the issues that were raised and discussed: it will not be sufficient for the Minutes merely to record that the announcement under the Protocol was discussed.

IKY/FH
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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. It can be accessed from the following page:
<http://www.icaew.com/en/technical/tax/tax-faculty/tax-guidance-notes?utm=widget>