ICAEW REPRESENTATION 121/16

TAX REPRESENTATION

FINANCE BILL 2016: CLAUSE 136: STAMP DUTY: ACQUISITION OF TARGET COMPANY'S SHARE CAPITAL

Briefing for the Report Stage debate on Finance Bill 2016 submitted on 10 August 2016 by ICAEW Tax Faculty

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Internationally recognised as a source of expertise, ICAEW Tax Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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REPORT STAGE BRIEFING

Stamp duty: acquisition of target company's share capital (Clause 136)

- **Measure:** New clause 10, now clause 136 of Finance Bill 2016, introduces new s77A Finance Act 1986 to restrict the application of section 77. This new provision restricts the existing stamp duty share-for-share relief rules in 'takeover' cases where HMRC perceives stamp duty is being avoided.

  Until 29 June 2016, when the new clause was introduced, no stamp duty was payable where the shares in one company were exchanged in return for an issue of shares by the transferee company, so long as the shares issued were of the same class(es) and in the same proportions as the shareholdings in the target company. This is known as stamp duty acquisition relief and allows reconstructions to take place in a tax neutral way.

  Clause 136 of the Finance Bill is an anti-avoidance measure that denies stamp duty relief where an exchange of shares is carried out at a time when there are arrangements for a person to obtain control of the acquiring company.. However, the new clause has a detrimental effect on standard demerger transactions, too, which we believe to be unintentional.

- **Background:** We are very concerned this clause was announced during the passage of the Finance Bill at Committee of Whole House, with no prior period of consultation or debate. Sufficient time should be allowed for discussion among the profession and other stakeholders concerned to ensure the policy intention of the measure is met and there are no negative implications for unintended targets.

  We do not understand the need for s 77A as there is already a condition under s 77(c) to qualify for relief which requires that "*the acquisition is effected for bona fide commercial reasons and does not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to stamp duty, stamp duty reserve tax, income tax, corporation tax or capital gains tax".* As the condition in s 77 has been in force since 1986 it is surprising that 30 years after the legislation was introduced a loophole has appeared which requires immediate remedy without consultation.

  The new measure will have a negative impact on commercial demergers, which are not the intended target of the change, and will result in double charges to stamp duty in many cases.

  The new clause is introduced to prevent the avoidance of stamp duty on takeovers, although the impact is much wider. The new rules will negatively impact many genuine reconstructions, such as demergers where two or more shareholders in a company wish to separate the trades or businesses of the existing company and to carry on the trades or businesses through separate companies. Part of the process of demerging naturally results in one of the shareholders acquiring control of a new holding company, inserted by a share exchange transaction which will now, under clause 136, carry a charge to stamp duty. Whilst there may technically be a change in control, in substance a takeover has not taken place as the same shareholders are carrying on the same trades or businesses, simply in separate companies.

  In fact, the result is that there will be a partial double charge to stamp duty: firstly on the share exchange, as just described and, secondly, when the other part of the business is transferred to the other shareholder via a new company. While we appreciate that stamp duty is levied on transactions, in the scenario of a demerger the same set of shares is transferred twice but in essence there is only one transaction taking place, that of the demerger. So a charge to tax on both legs of the transaction imposes a partial double charge. This is not the policy intention behind the change, the TIIN states "Government policy is that stamp duty is paid on takeovers of UK companies" and says "Takeovers are not reconstructions". As such it appears the charge in the reconstruction scenario illustrated is simply an unintended consequence of the way the new rules are drafted.

We also note this provision might bite where there is a share exchange prior to a sale of the new holding company in a full-priced transaction. As a result, there will be a stamp duty charge on the share exchange, followed by another charge of the same amount when the shares of the holding company are sold. This is genuine double taxation in a completely inoffensive sequence of transactions.

We note the new provision specifically carves out 'merger' transactions from its scope, and it is unclear as to the policy reason behind the government's decision to charge stamp duty in a demerger but not in a merger. In both a merger and a demerger scenario one shareholder will lose out on part of the business to the other shareholder, therefore we would expect if the underlying substance of a merger and demerger mirror one another, the stamp duty share for share relief rules should follow.

- **Our recommendation:** To ensure genuine commercial reconstructions are not affected by the new anti-avoidance measures we suggest clause 136 (new clause 10) specifically excludes demergers, making the tax system fairer and removing the double tax charge. Clarity is also needed in the legislation to make it clear in which circumstances s 77A FA 1986 will not apply.

  The amendment should be fairly straightforward. We suggest a carve out be inserted so that s 77A FA 1986 does not apply where the person that might obtain control is a shareholder immediately prior to the transaction. That should exclude both share exchange events described above from the scope of the new rule. If there is a later disposal of the new holding company to a third party stamp duty will be chargeable in the normal way. Where someone becomes a shareholder shortly before the exchange transaction in order to qualify for the carve out relief it would be caught by the existing rule at section 77(3)(c) FA 1986, which prevents relief where there is a scheme or arrangements to avoid stamp duty or SDRT.

FURTHER INFORMATION

As part of our Royal Charter, we have a duty to inform policy in the public interest.
ICAEW offers impartial expert briefing on the Budget, the Finance Bill and ad hoc policy issues for MPs, Peers and parliamentary staff.

To request further information or a briefing from one of our Tax Faculty experts, please contact:
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APPENDIX 1

ICAEW 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 via http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax).