



DRAFT FINANCE BILL 2015 CLAUSES: ENFORCEMENT BY DEDUCTION FROM ACCOUNTS

ICAEW welcomes the opportunity to comment on the draft legislation and the Tax Information and Impact Note about enforcement by deduction from accounts (EDA) published by HM Revenue & Customs on 10 December 2014.

This response of 11 February 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the 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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ENFORCEMENT BY DEDUCTION FROM ACCOUNTS

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the draft legislation and the Tax Information and Impact Note about 'Enforcement by deduction from accounts' (EDA) published by HMRC on 10 December 2014. This procedure was previously known as 'Direct recovery of debts' (DRD).
2. By way of background: we responded to the 2014 public consultation on DRD in TAXREP 39/14. We also held a number of meetings about the proposals with HMRC and with the minister, and DRD was the subject of our flagship Wyman Symposium in July 2014.
3. We should be pleased to discuss any aspect of our comments in this TAXREP and to take part in all further consultations on this area. We currently arranging a meeting with HMRC to discuss this legislation.
4. We note that secondary legislation is due to be published in spring 2015 with further details of these powers and safeguards. This legislation may address some of our questions and concerns but is not yet available. Therefore, the comments in this document are made solely on what is in the draft primary legislation and notes.

KEY POINT SUMMARY

5. ICAEW did not support the DRD proposals as published in 2014. Our concerns related primarily due to the lack of judicial independent oversight or appeal rights, and the concern that HMRC would try to recover debts from people for whom such enforcement action would be entirely inappropriate.
6. We were therefore welcomed the changes to the procedure announced on 21 November 2014, particularly the introduction of an appeal right to the county court and special protections for vulnerable people.
7. We also welcome the fact that this measure will not be enacted before Parliament is dissolved but is intended for a Finance Bill after the general election, allowing time for proper consideration of legislation.
8. As we made clear in our response to the DRD consultation, ICAEW has no sympathy with those who do not pay their tax when they are able to do so, and we agree that HMRC must have effective powers to collect such debts. However, we do have some concerns about the draft Finance Bill legislation as it stands, which are set out in detail in the next section. Our chief concerns are as follows.
9. The draft legislation does not reflect many of the additional safeguards announced last year. We assume therefore that these will be in secondary legislation or in HMRC guidance. However, we are strongly of the opinion that safeguards must be explicit in primary legislation or else explicit in a ministerial statement.
10. In particular, the safeguards for vulnerable people, such as a face-to-face meeting with HMRC before EDA action is taken, are not stated explicitly in the legislation. There is simply a condition (Condition C, at para 2(4)) that 'HMRC is satisfied that the person is aware that the sum is due and payable by the person [to HMRC]'. The requirement for HMRC to be satisfied is not a strong enough safeguard. The legislation should make clear what HMRC is obliged to do in order to be satisfied. We also recommend that the legislation includes a definition of 'vulnerable person'.

11. There are extremely wide powers in this legislation for the Treasury to make amendments to it by statutory instrument. This creates uncertainty and undermines the strength of any safeguards the legislation contains. Given the sensitivity around the application of these powers, we think that either the Treasury should not be granted such sweeping powers to change the rules or there should be a ministerial statement that they will not be used to compromise the safeguards set out in the statement of 21 November 2014.

DETAILED COMMENTS ON THE DRAFT LEGISLATION

12. Section 1(2) contains the power for the Treasury to amend any of the provisions this legislation (primary and secondary) by statutory instrument. We think this undermines the strength of any safeguards the legislation contains and also creates uncertainty for the taxpayer and other dealing with EDA.
13. We believe that the Treasury should not be given such sweeping powers to change the safeguards set out in the statement on 21 November 2014. These are controversial powers that need to be handled with great care and sensitivity and such a broad power to make changes is inappropriate. The draft legislation must be amended to restrict the power to make changes, or, as a minimum, there should be a ministerial statement to the effect that this power will not be used to undermine the safeguards that have been announced.
14. Para 2(4) in Sch 1 sets out Condition C, one of the conditions for a debt to be a relevant debt on which HMRC can use EDA: 'HMRC is satisfied that the person is aware that the sum is due and payable by the person [to HMRC]'. The legislation does not define what HMRC has to do to be satisfied. The safeguards here are the crucial ones that HMRC must have contacted the debtor a minimum number of times, will guarantee to have a face-to-face visit, will identify vulnerable customers, etc – all mentioned in the explanatory notes (at para 2).
15. However, these safeguards are not in the legislation and we assume therefore that they will either be in secondary legislation or in HMRC guidance. We are strongly of the opinion that safeguards should be in primary legislation as far as possible. We are particularly concerned that such crucial requirements are not left to non-statutory guidance. The current drafting of Condition C is not sufficiently specific or robust. It should stipulate the need for a face-to-face meeting and also define a vulnerable taxpayer and how such a person is to be treated.
16. The procedures for HMRC to issue a hold notice and for the deposit-taker to comply with it (paras 4 to 6) are complicated and impose tight time limits on the banks. It will be for the banks to comment on how feasible these procedures will be for them to operate, but we do have a concern that with complicated rules there could be mistakes in freezing the accounts.
17. Para 4(5)(b) refers to the safeguard of leaving at least £5,000 in the accounts or 'such greater amount as may be specified in the hold notice'. The explanatory notes (at para 14) refer to HMRC having discretion to leave more in the accounts, eg if a business needs to pay salaries – we assume the details of this will be in secondary legislation. We are concerned that in practice it will be difficult for HMRC to know how much the business might require. We think that the secondary legislation and accompanying notes should provide more detail on how this will operate.
18. The legislation presents particular problem for joint account holders. First, the rule is going to be that funds in joint accounts are pro-rated to determine how much can be frozen. There is no provision for a different split to take account of a different beneficial ownership.
19. Secondly, it is going to quite some time before the account holders find out that their funds have been subject to a hold notice. The process is that HMRC will send the bank the hold

notice, the bank has five working days to comply with it, and then five working days to tell HMRC it has done so and to say which accounts have been frozen. HMRC must then tell the debtor, the joint account holder(s) and any other third parties 'as soon as reasonably practicable'. So it could be three or more weeks until the account holders hear what has been done to their funds, which is extremely hard on those who are not the debtor.

20. We are concerned that para 6(6) does not impose a time limit on HMRC to tell the account holders that their accounts have been frozen; it must simply do this 'as soon as reasonably practicable'. It is essential, so that this power satisfies the test of fairness and proportionality, that HMRC should also be required to meet a time limit – say five working days, the same as that given to the banks.
21. A person can object to the making of a hold notice, within 30 days of the date on which they are told about it by HMRC (para 8). The grounds on which a person can object are set out in para 8(3). They do not include the grounds that the bank has made a mistake in freezing the accounts, nor that the proportion in which a joint account has been frozen is incorrect. Both these grounds should be included.
22. There is no discretion for HMRC to accept a late objection to a hold notice; we think that there should be.
23. HMRC must consider an objection (para 9) but the legislation does not set out how HMRC is to do this, nor does it set a time limit for it to be done. Again we think it is essential that HMRC is also given a time limit in which to do this and respond to the debtor.
24. If the person is not happy with how HMRC has determined their objection, the right of appeal to the county court is set out in para 10. The right must be exercised within 30 days of getting the determination. The grounds for appeal are similar to those for making an objection, and they should include the grounds that the EDA has been incorrectly applied to the accounts.

We welcome the right of appeal to the county court. We have some concerns about how this appeal right will operate in practice and also whether the county court will be properly equipped to review the appeal. For example, when looking at whether the debt is an established debt, ie whether it was properly assessed/determined and is out of time for appeal or the appeal has failed, will the court take HMRC's word for it or will it look more closely at what has been done to establish the debt? As we understand it, under current county court procedures the court does not have jurisdiction to enquire behind the amount on a certificate of debt presented by HMRC. Will this be the same procedure under these rules? We expect that these concerns will be addressed as part of the detailed preparations for implementation and we would be happy to discuss this further.

25. There is no discretion for a late appeal to be made; again we think there should be.
26. Para 17 allows HMRC to vary many of the provisions in this legislation by way of secondary legislation – this is in addition to the power in Section 1, mentioned above. This includes the ability to vary the time limit to make an objection. Therefore the 30 days to make an objection could be reduced. We do not think it is right that the time limit for an important safeguard set out in primary legislation can be reduced by secondary legislation – it should be done only by primary legislation.
27. The response to the DRD consultation, published on 21 November 2014, says that the Tax Assurance Commissioner will include statistics on EDA in his annual report and that there will be a full review of EDA and a report to parliament after two years. Neither of these things is in the draft legislation. We think they should be prescribed in statute.

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 icaew.com/en/technical/tax/tax-faculty/-/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)