



TAXREP 11/13

(ICAEW REP 15/13)

ICAEW TAX REPRESENTATION

ATTRIBUTION OF GAINS TO MEMBERS OF CLOSELY-CONTROLLED NON-RESIDENT COMPANIES AND TRANSFER OF ASSETS ABROAD

Comments submitted on 6 February 2013 by ICAEW Tax Faculty in response to draft legislation relating to *Attribution of gains to members of non-resident companies and Transfer of assets abroad* published on 11 December 2012 by HM Revenue and Customs

Contents

	Paragraph
Introduction	1-4
Who we are	5-7
Key point summary	8-9
Major points	10-20
Ten Tenets for a Better Tax System	Appendix 1

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the draft legislation relating [Attribution of gains to members of non-resident companies and Transfer of assets abroad](#) published by HM Revenue & Customs (HMRC) on 11 December.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. We submitted our comments on the original consultation in [TAXREP 53/12](#).
4. Information about the Tax Faculty and 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

5. ICAEW is a professional membership organisation, supporting over 140,000 chartered accountants around the world. Through our technical knowledge, skills and expertise, we provide insight and leadership to the global accountancy and finance profession.
6. Our members provide financial knowledge and guidance based on the highest professional, technical and ethical standards. We develop and support individuals, organisations and communities to help them achieve long-term, sustainable economic value.
7. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

KEY POINT SUMMARY

8. We are disappointed to note that the points we made in [TAXREP 53/12](#) have not been taken on board. We reiterate all the points made in that representation with particular emphasis as below.
9. We are pleased to note that you will be undertaking a more thorough review of the wider representations made in the responses to the consultation document published on 30 July 2012.

MAJOR POINTS

10. It is our view that the amendments made to the draft legislation as published on 11 December 2012 do not increase the likelihood of the UK law being EU compliant; if anything the position is worse than previously.
11. EU law makes no distinction between trading and investment activities. It is the actual substance of an activity that is relevant and should determine whether s13 and/or the transfer of assets abroad (TOAA) provisions apply.
12. There is concern that active investment companies may not fall within the definition of economically significant activities; the definition should expressly include the letting of property and dealing in property and dealing in shares and other investments. In addition freedom of

establishment was allowed where a single asset was held ([National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam: C-371/10](#)).

13. The s13 and s720 provisions relate to the freedom of movement of capital. Notwithstanding the increase in the threshold for s13 to 25% the s13 legislation can apply in situations where there is not definite influence (because of the wide connectedness definitions) and having regard to this and to the antecedents of the legislation it is clear that the legislation is not limited to cases where there is definite influence over an establishment (see [Scheunemann v Finanzamt Bremerhaven: C-31/11](#) particularly at para 27ff.
14. We welcome the increase to 25% from 10% for the participation test but the 25% holding should apply to individual holdings, and not include associates, or at the very least the 25% threshold should apply only where the shareholding without associates exceeds say 10%.
15. The issue of partners being connected persons (for the purpose of determining the interest of a participator in a company) for s13 has not been addressed. This is particularly pertinent for private equity investors.
16. We do not consider that the new approach to the TOAA exemption in Condition A of new s742A is EU compliant.
17. If the new s742A test as drafted is introduced, it would be extremely difficult for individual taxpayers to be clear as to whether or not they satisfy Condition A.
18. New s742A(5) ITA provides that (subject to sub-section (10)) to be a genuine transaction the transaction must be on arm's length terms. There are many transactions that are not on arm's length terms albeit they are nonetheless 'genuine'. For example, a dividend paid between a corporate and its parent company. Such dividend could not be paid unless the two corporates were connected.
19. There is no *de minimis* for the TOAA provisions. In theory, the transfer of only £1 could result in a potential charge on the transferor on income of an offshore structure.
20. The new exemptions should not be limited to transactions effected after 5 April 2012 (ref to page 22 of the Summary of Responses). To be EU compliant, the amendments need to include pre-existing structures.
21. The new relevant income matching rules in s732 -735 ITA apply a LIFO principle. This is in contrast to the current remittance basis rules that have been in place since 2008 which provide for FIFO matching. This inconsistency will lead to confusion and probably extra costs for persons who have spent time and money determining relevant income pools on a FIFO basis.

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