

TAXREP 65/05

VAT: DISCLOSURE: NOTICE 700/8

Memorandum submitted in November 2005 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to an invitation to comment issued in October 2005 by HM Revenue and Customs

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VAT: DISCLOSURE: NOTICE 700/8

INTRODUCTION

1. We welcome the opportunity to comment on draft Notice 700/8 sent to us as a member of JVCC on 6 October by HMRC.
2. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex A. Our Ten Tenets for a Better Tax System are in Annex B.

KEY POINTS AND RECOMMENDATIONS

3. Our key points and recommendations are:
 - Overall the notice provides a credible explanation of a complicated subject. However, at a policy level, we remain concerned about the impact on UK plc (see Annex C).
 - The need for taxpayer certainty is paramount (see our Ten Tenets for a Better Tax System in Annex B). We therefore consider that HMRC should not refuse to provide a ruling on the grounds that the transaction is for tax avoidance purposes.
 - Owing to the slowness of postings to HMRC website, notice of additional schemes or hallmarks to be included in the disclosure regime should be by way of Business Brief or Press Release, so that the public will become aware as early as possible, ie once the GNN posts it to their website.
 - The parts of the Notice that have the force of law need to be made clearer.

GENERAL COMMENT

4. Overall, the notice is likely to be successful in helping taxpayers to comply with their obligations. The guidance is a credible attempt to try and explain a complicated subject, subject to our detailed comments below.
5. However, at a policy level, these rules will not help the UK to be more competitive as they appear very burdensome. Reading the notice confirms our views previously expressed in our Finance Bill 2004 representations (TAXREP 19/04) and the House of Lords Economic Affairs Committee Finance Bill 2004 Sub-committee that the proposals are so widely drawn that anything that does not maximise the VAT cost to business can be classed as a tax avoidance scheme. We include in Annex C a summary of our concerns as expressed in TAXREP 19/04. There is no agreed or stated definition of avoidance or any satisfactory evidence of the cost to the exchequer of the sort of avoidance that the government considers unacceptable. In the absence of a definition, the government seem to take the stance that they can classify as avoidance and therefore unacceptable anything that they do not like at a particular time. On the basis of the disclosure rules, this potentially covers anything that does not maximise tax take. The need for taxpayer certainty is paramount (see our Ten Tenets for a Better Tax System in Annex B). , and we therefore consider that HMRC should not refuse to provide a ruling on the grounds that the transaction is intended to save tax.

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DETAILED COMMENTS

Para 1.3: Who should read this notice?

6. This is possibly one of the most important sections of the notice and therefore it would be helpful if it answered the question more fully. We suggest that the simplest way would be to refer the reader to the decision charts in paras 4.1 and 7.1.

Para 2.2: Why is there a requirement to notify HM Revenue & Customs?

7. Paragraph 2.2 is helpful inasmuch as it provides insight into government thinking. However, much of this wording is emotive. A VAT notice giving guidance about what registered persons need to do to comply with the law is not the place for emotive statements.
8. We think that this section should be redrafted to stick to the facts. The proper answer true answer to this question is that ‘Parliament has decided agreed that HMRC should be in a position to be given early information about certain arrangements that might lead to a VAT advantage in order that it can consider whether to put a stop to those that those arrangements providing such an advantage it considers does not maximise tax take’.

Para 2.3: Can I get a ruling on the arrangements and transactions I’m planning to do?

9. We consider that as part of its care and management obligations, HMRC should give rulings on what transactions it considers to be inside and outside the law, even where the saving of tax may be the main objective. Certainty is a paramount objective. It is clear from the statements in paras 5.6 and 8.9 that HMRC may not always find it easy to determine whether arrangements comply with the law. If HMRC has problems deciding what is the law, what chance has the trader, who has to apply the law in real time without the benefit of hindsight, of ensuring that the way in which a transaction is structured will be acceptable to HRMC? Enabling customers to comply with the law timeously is part of the orderly administration of a tax system in accordance with our Ten Tenets for a Better Tax System (Annex B).

Para 2.4: Are all notified arrangements regarded as avoidance and challenged?

10. In the second line, ‘regarded’ should read ‘regard’.

Para 3.3: New listed schemes

11. The paragraph says that ‘we (HMRC) will give one month’s notice of the intention to list a new scheme’. We would welcome clarification of whether this means that there will be a one month’s consultation period, and how this will be put into effect, for example by way of a JVCC Paper, or whether it means that the draft statutory instrument will be laid one month before it is due to take effect.
12. The paragraph should explain where on the website www.hmrc.gov.uk notice will be given. Providing simply the address of the home page is not good enough. The name

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and full web address of the page should be stated here: we suggest that the page on HMRC's website to be used be <http://www.hmrc.gov.uk/whatsnew.htm>.

13. If it is intended that notice will be posted on 'All VAT Updates' at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_UpdatesContent&id=SHOW_ALLUPDATES_VAT, this page needs to be updated much more regularly than is the case currently. For example, on 17 November 2005, the latest item posted is dated 27 September 2005. In passing we would note that on 17 November 2005, the latest Business Brief ('BB') on HMRC's VAT website page dedicated to VAT BBs http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&columns=1&id=LIB_VAT_BB05 is BB 19/05 dated 10 October 2005 whereas the GNN website displays BB 20/05 dated 28 October 2005. These sorts of delays and inconsistencies need to be addressed if taxpayers are to be able to rely on the information on HMRC's website.
14. Given the delays in posting VAT material to the HMRC website, we suggest that notice be given by way of Press Release or Business Brief so that people can become aware as soon as it is published, which will be as soon as the document appears, normally on the day of publication, on the GNN site and that the GNN website address be provided in Notice 700/8.

**Paras 5.2 and 8.2: How do I notify HM Revenue & Customs? and
Paras 5.4 and 8.7: Where do I send my/our notification?**

15. We think that where to send the notification is part of how to notify and, in the light of the fact that the paragraphs have the force of law and the penalty provisions where one gets it wrong, we recommend that paras 5.2 and 5.4 be merged and similarly 8.2 and 8.7. Failing this, we suggest that the titles of paras 5.4 and 8.7 should be the same.
16. Where the affairs of traders are dealt with by a specific HMRC Officer, as happens for large businesses, traders and advisers may well send notifications to their normal contact. We recommend that such Officers be given appropriate instructions, ie to forward notifications to the correct address as a matter of urgency, so that on receipt of a notification which should have been sent to 100 Parliament Street they can help to ensure that penalties for non-compliance do not arise unnecessarily.
17. If the addresses have been cited differently elsewhere, for example in VAT Notes or Business Briefs or Press Releases, then a correction(s) should be issued in those sources if it is intended to levy penalties on those who use the address stated in any of these sources.

PCB
18.11.05

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ANNEX A

ICAEW AND THE TAX FACULTY: WHO WE ARE

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.

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.

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.

To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at tdtf@icaew.co.uk or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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; see http://www.icaew.co.uk/taxfac/index.cfm?AUB=TB2I_43160,MNXI_43160.

POLICY ISSUES

Extract from Finance Bill 2004 representations (TAXREP 19/04)

8. We are concerned that the current proposals are so widely drawn that anything that does not maximise the VAT cost to business can be classed as a tax avoidance scheme. We have illustrated in the main VAT section a number of entirely innocuous and every day transactions that would be caught by the current proposals.
9. Our main concerns are as follows:
 - Customs have not produced any definition of what constitutes unacceptable tax avoidance. The definition in Sch 11A is so widely drawn that it means that anything which does not maximise the VAT cost to business is a tax avoidance scheme. Assuming that businesses will not be required to maximise their VAT costs, there is no clear definition of what tax planning is acceptable to Government, and what is not.
 - there has been no credible estimate of the extent of tax avoidance, and thus the financial justification for these measures is unclear.
 - the notification requirements for VAT go considerably further than those from the Inland Revenue.
 - both business and Customs will incur significant compliance and administration costs, but no estimate of these has been given.
 - Parliamentary scrutiny and supervision of these provisions is reduced by the use of secondary legislation (yet to appear) to define major concepts.
 - there is considerable doubt whether the provisions comply with Human Rights law and European Law more generally, and therefore whether they are lawful.
 - the notification provisions are only the first stage of a developing regime. It is therefore even more important that the law is clear and properly focussed from the outset.

(see paragraphs 61 to 120 [of TAXREP 19/04 -see http://www.icaew.co.uk/viewer/index.cfm?AUB=TB21_64554] for detailed comments)