



ICAEW TAX REPRESENTATION

**CONTROLLED FOREIGN COMPANIES (CFC) REFORM**

**Comments submitted on 24 February 2012 by ICAEW Tax Faculty in response to the publication on 31 January 2012 of further and amended draft legislation to be incorporated in Finance Bill 2012 in relation to the new, reformed, CFC Regime**

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# CONTROLLED FOREIGN COMPANIES (CFC) REFORM

## INTRODUCTION

1. We are writing to comment on the further draft clauses re *Controlled foreign companies (CFCs) reform* published on 31 January 2012.
2. This follows our earlier submissions i.e. TAXREP 70/11 re the Gateway test and TAXREP 8/12 re the other provisions which appeared in the draft legislation published on 6 December 2011.

## WHO WE ARE

3. The 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, the 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. The Tax Faculty is the focus for tax within ICAEW.
4. 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 Institute ensures these skills are constantly developed, recognised and valued.
5. The Tax Faculty is the focus for tax within the Institute. 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.

## COMMENTS

### Gateway test

6. As we have noted in our earlier representations, TAXREP 8/12 and 70/11, the Gateway test is going to be key to the new CFC regime and our first paper concentrated on those provisions and set out our concerns. These concerns were that the original draft of the Gateway test is far too complicated and is not going to operate as a genuine gateway enabling the majority of groups to be able to self-assess themselves as exempt from the CFC regime without the need to go through the detailed tests.
7. We look forward to seeing the revised version of the Gateway and if possible in advance of the publication of the Finance Bill itself on 29 March.

### Temporary Period Exemption

8. We are concerned that restricting the temporary period exemption to 12 months rather than the 3 years envisaged in the June 2011 Consultation Document is going to present very considerable difficulties for multinational groups following a major acquisition.

9. We understand that there is concern that a longer period than 12 months would fall foul of the TFEU State Aid provisions. Our view, however, is that the case of Paint Graphos C-78/80-08 sets out circumstances where State Aid can be justified as being proportionate and supportable on public policy grounds and we believe that case is directly relevant to these CFC Reform proposals.

## Chapter 17 – Exemptions for profits from Qualifying Loan Relationships

10. We welcome the expansion of this Chapter which we commented on in our earlier paper, TAXREP 8/12, as being too compressed.
11. We welcome the provision in section 371QC which provides for the complete exemption from profits, in the stated circumstances, rather than the 75% exemption provided for in section 371QE.
12. We also welcome the removal of what had been section 371QD(6) which would otherwise have been section 371QH(6) in the 31 January redraft.
13. We think the new anti-avoidance provisions in section 371QH(9)-(11) are arguably too widely drafted, particularly the “wholly or partly and directly or indirectly” wording of section 371QH(9)(b). We would request that the HMT/HMRC/business working group monitoring TAARs discussed at the 11 January 2012 Open Day be asked to comment on the need for, and the drafting of, these provisions.

## Part 2 – Foreign Permanent Establishments

14. We are disappointed that the foreign branch exemption is to be restricted to trading companies.
15. We remain concerned that, following the Adria-Wien Pipeline case C-143/99 and the Commission negative decision against Ireland regarding an exemption for dividends/foreign branch profits remitted to Ireland and reinvested there that the restriction of the UK foreign branch exemption to trading companies may amount to a horizontally selective measure constituting recoverable fiscal state aid.

## Further contact

16. For any further enquiries please contact:

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| Ian Young<br>International Tax Manager, ICAEW Tax<br>Faculty<br>Email: <a href="mailto:ian.young@icaew.com">ian.young@icaew.com</a><br>Tel: +44 (0)20 7920 8652 | Peter Cussons<br>Partner, PwC LLP<br>Email: <a href="mailto:peter.cussons@uk.pwc.com">peter.cussons@uk.pwc.com</a><br>Tel: +44 (0)20 7804 5260 |
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## 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.com/~media/Files/Technical/Tax/Tax%20news/TaxGuides/taxguide-4-99-towards-a-better-tax-system.ashx> ).