



INHERITANCE TAX: EXCLUDED PROPERTY (FINANCE BILL 2019-21, CLAUSE 72)

Issued 20 April 2020

Text of ICAEW briefing for MPs on clause 72: Inheritance tax: Excluded property etc in **Finance Bill 2019-21** published by government on 19 March 2019.

This briefing submitted on 20 April 2020 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

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TEXT OF BRIEFING FOR MPS ON THE **FINANCE BILL** BY ICAEW TAX FACULTY

EXECUTIVE SUMMARY

1. The clause changes the IHT status of trusts to which assets are added. This change will have effect from the time that the trust was set up, so is retrospective. However, as the clause is not an anti-avoidance measure but is just a change to the law, retrospection is not appropriate and the clause therefore does not follow Parliamentary convention.
2. As a detailed consultation was promised but has not materialised (save for the consultation in July 2019 on the draft legislation), trustees will be unsure where they stand.
3. We recommend that the clause is deleted from this Finance Bill and that HMRC conducts a formal public consultation with a view to any changes being effective on a non-retrospective basis from Royal Assent of a subsequent Finance Bill.
4. This would comply with Parliamentary convention, make it simpler for trustees and settlors to understand from when they have to comply with the new provisions, and not impose unexpected IHT liabilities where none exist on the basis of current law as generally understood.

THE MEASURE

5. This clause provides that additions of assets by individuals domiciled in the United Kingdom to trusts made when they were non-domiciled cannot be excluded property and are therefore within the scope of inheritance tax (IHT). These changes mean that where offshore assets are held in trust, whether or not the property has excluded property status, the scope of IHT is dependent on the domicile status of the person adding the assets to the trust rather than the domicile of the settlor at the time when the settlement was first created.
6. The amendments made by this clause are treated as always having been in force in relation to any charge under IHTA 1984 arising on or after Royal Assent

OUR CONCERNS

MAIN CONCERNS

Retrospection

7. The clause is to be treated as always having been in force. This will result in unexpected IHT charges arising as a result of past events.
8. Parliamentary convention is that retrospection is permissible only when tackling unacceptable avoidance schemes, and then subject to certain stated conditions, for example those in the Rees Rules as amended by subsequent statements (see HoC briefing paper no.4369 *Retrospective Taxation* published on 8.4.20).
9. Given that the clause is not countering avoidance but is changing long-standing rules that are familiar to trustees and are clearly stated in the existing law, as confirmed in the Court of Appeal case *Barclays Wealth Trustees (Jersey) Ltd & Dreehan v HMRC* [2017] EWCA Civ 1512 (13 October 2017), new legislation on this point should not affect events that happened earlier than the measure is enacted, ie Royal Assent.

Lack of consultation

10. Following the announcement of this measure in Budget 2018, we met HMRC in November 2018. We were led to understand that a detailed consultation paper on the changes would be issued in Spring 2019 and we would have the opportunity to submit a formal response to the

proposals. However, the expected consultation paper was not issued. We are disappointed by this lack of consultation.

Timing issues

11. Whilst we appreciate that there was an announcement in Budget 2018, the lack of a formal consultation paper or any follow up until the draft legislation was published last summer will have meant that trustees of offshore trusts are unlikely to have considered these changes in the necessary detail.
12. We are concerned that as the legislation is scheduled to commence from Royal Assent of this Finance Bill there will be insufficient time for trustees to take advice to help them understand the full implications and decide whether they want to take any action to unwind structures etc.

DETAILED CONCERNS

Definition of “property”

13. The legislation includes the word property on various occasions. For example, the word property is used five times in sub-clause (2). The meaning of property is not defined in this legislation.
14. There are already problems over the meaning and interpretation of the word property and these provisions overlay those issues making an existing issue even worse.
15. We should welcome confirmation that the use of the word property in this legislation is not intended to include:
 - transfers of value generally;
 - interest-free loans; and
 - fees paid as a result of funds passing into the trust bank account and then coming out (money in and out).

Accidental tainting of an excluded property trust

16. We would welcome assurance that HMRC will adopt a proportionate approach if a taxpayer accidentally taints a trust such that there is a mixture of excluded and non-excluded property.
17. We would prefer if the legislation were clarified on this point.
18. What we mean by a proportional approach is best explained by way of an example:
 Sophia settled the Sophia Offshore Discretionary Trust when she was foreign domiciled and not UK deemed domiciled. By mistake she added a further £5 million to the trust when she was deemed UK domiciled. Immediately prior to this settlement the trust property was worth £15 million (all of which was excluded property).
 As such, assuming the property remains non-UK situs, going forward the trust should be seen as being made up of 75% excluded property and 25% non-excluded property.
19. With respect to distributions the equitable tracing rules from case law should be applied (ie, as in *Clayton’s Case*, but if this does not result in an equitable outcome, then consider *Barlow Clowes v Vaughan*).

OUR RECOMMENDATION

20. Delete the clause, and carry out a proper consultation with a view to the new provisions coming into effect non-retrospectively at Royal Assent to a subsequent Finance Bill.

FURTHER INFORMATION

As part of our Royal Charter, we have a duty to inform policy in the public interest.