



ICAEW TAX FACULTY REPRESENTATION

TAXREP 3/11

REVIEW OF DOUBLE TAXATION TREATIES AND DOUBLE CONTRIBUTION AGREEMENTS 2011-12

Memorandum submitted in January 2011 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales to the HMRC Business International Tax Treaty Team in relation to the Annual Review of Treaties 2011-12

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REVIEW OF DOUBLE TAXATION TREATIES AND DOUBLE CONTRIBUTION AGREEMENTS 2011-12

INTRODUCTION

1. We are writing in response to the letter of 23 December 2010 from Steve Reszetniak, Senior Policy Adviser, in which he asked for comments on what should be the UK Government's priorities in the year to March 2012 for the updating of the UK's network of Double Taxation Agreements (DTAs) and Double Contribution Agreements (DCAs).
2. As we have noted in our previous submissions, most recently in 2010 (TAXREP 7/10), the DCA network is currently small but as income tax and social security contributions are tending to converge in many countries it is increasingly important that the two networks are more evenly matched.
3. We also noted in last year's submission the fact that the UK has not concluded any new gift or inheritance tax treaties in the last 10 years despite the increase in cross –border migration.
4. Within the EU alone, the European Commission estimates that there are around 450,000 successions each year with a cross-border dimension ([Proposal for a regulation on international successions](#), 14 October 2009). There are several hundred thousand expatriate British citizens living in Spain, with which there is currently no treaty. While there may not have been a great demand from these British citizens for change this may be because the double taxation is effectively suffered only after their deaths. It would be helpful if HMRC could clarify whether it has a policy in relation to IHT treaties.
5. In the balance of this document we refer only to DTAs.
6. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex A.

WHO WE ARE

7. The Institute of Chartered Accountants in England and Wales (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, 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.

GENERAL COMMENTS

8. We note the priorities that are followed when negotiating treaties, as set out in the Annex to the letter of Steve Reszetniak, and we think these reflect an appropriate and strategic approach.
9. Following the submission of our paper (TAXREP 7/10) on the programme of work for 2010-11 a small team from ICAEW Tax Faculty met with the HMRC treaty negotiating team on 12 February 2010. We welcome the approach of the team which is to ensure that we have in place a network of treaties with our major trading partners and that these treaties, for instance, aim to have minimal or zero withholding taxes and a PE threshold which mirrors the OECD approach.
10. We would welcome the addition of an arbitration clause to the Mutual Agreement Article of the Treaties with our major trading partners as this will encourage more productive negotiations under the Mutual Agreement procedures. This is now included in Article 25(5) of the 2010 model OECD Convention.

DETAILED COMMENTS – GENERAL

11. At this year's meeting with Representative Bodies, which is scheduled for 11 February 2011, and which our representatives will be attending it would be helpful to have an update on the position re countries where the terms of existing treaties include a 'subject to tax' provision and are, as a result, adversely affected by the foreign company profits exemption that was introduced in FA 2009.
12. We note that the recently concluded treaties or protocols with countries such as France and Switzerland include provisions addressing the treaty status of some specialised legal entities (e.g. partnerships and collective investment funds) established in the contracting states. We think that this is a helpful development and suggest that HMRC should consider addressing these issues more generally in the course of negotiations for new or revised treaties.

DETAILED COMMENTS – COUNTRIES

Brazil

13. We appreciate that there is scepticism as to whether the Brazilian authorities would be prepared to agree reasonable terms in a potential Double Tax Agreement, and then apply them in an appropriate way so as to bring benefit to UK businesses that are doing business with Brazil. Nevertheless we believe the situation needs to be kept under review because as Brazilian businesses become more international there will be pressure from within Brazil for a network of Double Tax Agreements to be established and negotiations between our two countries may then take place on a more reasonable basis.
14. We would welcome an update on Brazil at the meeting on 11 February 2011.

China

15. We note that negotiations have taken place with China with a view to replacing the existing, and very old, treaty between the two countries and China is on the list attached to Steve Reszetniak's letter as being a country with which a treaty is likely to be concluded in the not too distant future.

16. The main priorities of a new treaty with China would be to eliminate capital gains on disposals of shares in Chinese companies and elimination of service PE issues.

Iceland

17. We consider that the limitation of benefit provisions in the interest and royalty Articles 11(7) and 12(6) of the UK/Iceland treaty are contrary to the freedom of establishment Article 31 of the EEA agreement, having regard in particular to the absence of an EEA derivative benefits clause and the ECJ Open Skies cases, and notwithstanding the D and ACT Class IV cases in the European Court of Justice.

India

18. We note that India has recently amended its tax code and the impact could be an enlargement of the Indian tax base. We recommend that the UK should monitor developments in India closely.

Panama and Paraguay

19. We note that the UK currently does not have a treaty with either of these two countries. Is there any intention to begin negotiations with a view to putting treaties in place?

Singapore

20. At the meeting with Representative Bodies last February we were advised that negotiations were taking place to upgrade the existing treaty. However, there is no mention of Singapore in the list of countries with which negotiations have taken place in the past three years appended to the letter of 23 December 2010. We would welcome clarification of the current position.

Spain

21. We note that a protocol with Spain is likely to be published imminently. It would be helpful to know whether that is going to result in the reduction in any of the withholding tax rates which apply under the existing treaty.

United States of America

22. The treaty with the US is the most important of the more than 100 treaties which have been entered into and it is now time for the first five year review of the 2001 treaty as envisaged in the Exchange of Notes. We appreciate that there was somewhat of a hiatus in 2009-10 with the new incoming US administration.
23. We note that the US now has arbitration in its model as has OECD in Article 25(5) of its current, 2010, Model Convention. We would welcome confirmation that the UK negotiators will aim to include arbitration in any protocol to the 2001 treaty.
24. We also recommend that some of the restrictions to claiming the zero withholding on dividends, which the US has foregone in some other treaties including with Japan, should also be removed from the UK treaty.

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ANNEX A

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/index.cfm?route=128518>.