TAXREP 35/00

SURRENDER OF RELIEVABLE TAXES BY ONE MEMBER OF A GROUP TO ANOTHER

Letter submitted in December 2000 by the Tax Faculty of the Institute of Chartered Accountants' in England and Wales to the Inland Revenue in response to a consultative paper posted on the Revenue's website

CONTENTS

SURRENDER OF RELIEVABLE TAXES BY ONE MEMBER OF A GROUP TO ANOTHER

1 We refer to the paper on group surrenders of double tax relief (DTR) posted to the Revenue's website on 3 October 2000 and welcome the opportunity to comment.

2 We note that since this consultation paper was published, the Pre-Budget report announced further changes in relation to the availability of excess unrelieved foreign tax credits (EUFT). We will write to you again if we have any further points as a result of these proposed changes.

GENERAL COMMENTS

Access to the consultation paper

3 We have expressed our concern in relation both to the publicity and access to the consultation paper on in-country mixing in our letter dated 5 December to Susan New. We attach as an appendix a copy of that letter. The comments which we made appear equally applicable to this consultation exercise.

Uncertainty and Flexibility

4 The comments we made in paragraphs 6 and 7 of the above letter are equally applicable here.

5 We are concerned that the introduction of the mixer cap and the complicated rules for the utilisation of EUFT will result in increased tax and compliance costs to many UK multinational groups. We think it is important the UK continues to enjoy a tax regime that is competitive when compared to other similar jurisdictions. We remain concerned that the DTR changes may have upset this balance. We appreciate that the DTR rules cannot be viewed in isolation and that other proposals out for consultation, for example deferral relief for disposals of substantial shareholdings and the proposed reform of intellectual property, may increase the attractiveness of the UK as against other jurisdictions. Nevertheless, neither of those consultations have yet reached firm conclusions whereas the DTR changes are shortly to be in force and need to be addressed by multinationals now.

6 We therefore take the view that the group surrender relief rules should be reasonably flexible and provide companies with a variety of options to use relievable foreign tax.

DETAILED POINTS

Definition of Group

7 The consultation paper favours the 75% subsidiary test. However, in view of the comments made above, we see no particular reason why relievable tax should not be surrendered between companies within a 51% group. Prior to the abolition of ACT for dividends paid from 6 April 1998, it was possible to surrender surplus ACT to a 51%

subsidiary and there seems no reason why those long established rules could not be revived for these purposes.

8 However, we suspect that the ACT rules will need to be amended so as to allow unrelieved foreign tax to be surrendered up to a holding company and across to a fellow subsidiary rather than just down from a 51% holding company.

9 In principle, we see no reason why these rules should not be extended to include consortium companies and would be happy to consider this aspect further with you. We agree that this would require a change in section 806H, ICTA 1988.

Relievable tax

10 We note the wide range of possibilities. Again, we would prefer a reasonably flexible approach. This would suggest that a company should be allowed to surrender the relievable foreign tax (or relievable withholding tax) regardless of whether the company can use it itself.

11 The surrendered tax will then be treated as if had been suffered by the claimant company and the same rules would apply as apply to the calculation of its own foreign tax credit position. In effect, it would then be pooled with the claimant company's double tax credits.

What tax can be surrendered?

12 For the reasons already described in the above paragraphs, we prefer alternative b) to alternative a).

How may tax be utilised?

13 We would prefer option c). ie. a company would not be limited in the amount of foreign tax it could claim, so that any surplus would be available for carry forward.

14 Paragraph i). In principle, we see no reason why surrendered foreign tax should be treated differently to foreign tax arising in the claimant company. However, we appreciate the policy need to restrict the carry forward of surrendered tax in a claimant company where there is a change of ownership of the claimant company (cf. section 245, ICTA 1988).

15 Paragraph ii)

a. We do not see why there should be a time limit for carry forward of surrendered foreign tax;

b. See comment at i) above.

c. We are not sure that a company joining a group should be allowed to claim for foreign tax suffered by a group company which arose before the claimant company joined the group.

d. We do not see why foreign tax surrendered to a group company should be restricted if the surrendering (rather than the claimant) company leaves the group.

Accounting Period

16 We think that option c) preserves neutrality, ie. neither advances or delays relief and is to be preferred.

Time Limits

17 We agree with the proposed time limits.

Form of Claim

18 We think that simplified group arrangements will be necessary. In any event, it should be relatively straightforward to design simplified arrangements bearing in mind the precedents that already exist in relation to group relief.

Variation of claim

19 We agree that a variation should be possible provided that the time limits have not expired.

Controlled foreign companies (CFCs)

20 We agree with the comments made.

OTHER POINTS

21 The Regulations will need to include a provision to ensure that where a payment is made for the surrendered tax, the amount is not subject to corporation tax. A suitable precedent is found in the provisions relating to group relief.

FURTHER INFORMATION

22 We would be happy to discuss these points further either by way of letter or in a meeting.

FJH/AM
14-11-1
7 December 2000

APPENDIX

5 December 2000

FJH/14-11-1

Ms Susan New
Inland Revenue
International (External Relations Group)
Victory House
30 - 34 Kingsway
London WC2B 6ES

Dear Madam

IN-COUNTRY MIXING
SECTION 801(2A) AND SCHEDULE 30 TO FINANCE ACT 2000

1 We refer to the consultative paper on in-country mixing posted to the Revenue's website on 3 October 2000 and welcome the opportunity to comment.

GENERAL COMMENTS

Access to the consultation paper

2 We have already expressed our concerns with the consultative process on double taxation relief in our earlier representations (see for example paragraph 6 of TAXREP 17/00, our representations on the Finance Bill 2000). We do not intend to repeat our concerns again but we were surprised that this consultation, along with the consultation on surrenders of DTR, were included within a considerable volume of other explanatory material all posted to the Revenue's website on the same day. No press release was issued so unless you keep a close eye on the Revenue's website, it would be easy to have missed these two consultation exercises.

3 Further, although this paper is described as a 'consultative paper', it does not appear within the 'consultations' section of the Revenue's website. This is disappointing given that in October the Revenue upgraded its consultation webpages. We welcome the fact that the Revenue's website now includes a clearly defined 'consultation register' which is a considerable improvement on the previous consultation pages. The register applies 'from October 2000' so a person checking the site would have expected this consultation paper to be on the register. However, it is not on the register and neither

does it appear if you click on the link back to consultation documents prior to October 2000.

4 We presume that this consultation must have fallen between gap in the move from the old consultation pages to the new consultation register. Whilst this consultation may affect only a limited number of companies, for those that are affected it is very important. The consultation register should include full details of all outstanding consultations, even if they affect only a small number of taxpayers.

5 Similar comments apply also to the consultation on group surrenders of DTR.

Uncertainty

6 We continue to be concerned that the UK tax rules for multinationals are dogged by uncertainty as to how the new rules will apply. Many companies will be well into the first accounting period in which the new DTR rules apply without knowing the precise form of the new rules. In the short term, this uncertainty will hamper the ability to UK multinationals to invest overseas but in the longer term it may damage the UK's international competitiveness.

Flexibility

7 In view of the fact that the UK DTR rules as amended by the Finance Act 2000 will be highly complicated to apply in practice, we think that they should be reasonably flexible and not force groups to adopt structures merely to maximise DTR.

DETAILED POINTS

Which dividends should be excluded from the mixer cap?

8 We think that Option 2 is preferable as this will preserve flexibility and not force companies to adopt the type of structure set out in ii) purely for tax purposes. There may be good commercial reasons as to why a group adopts the structure i), not least because it ensures that the subsidiaries are directly owned from the UK. Either structure could arise quite naturally and we do not see why either structure should be disadvantaged as against the other.

9 We are not convinced that the Revenue has the power under section 801(2A), ICTA 1988 to make the regulations to cover in-country mixing in option 2 without a change in the primary legislation. We also expect that the Regulations to allow for mixing as set out in Option 2 will be more extensive. However, this is a necessary consequence of following Option 2.

Should disapplying the mixer cap be automatic?

10 We note the comments made that there may be certain circumstances where it be advantageous to apply the mixer cap. On the basis of the general comment made above that the system should be reasonably flexible, we think that Option 1 is preferable, ie. that in-country mixing should be optional.

Branches

11 We agree that the proposed Regulations should cover the position where a UK company has more than one overseas branch in an overseas jurisdiction.

Exclusion of certain companies

12 We note the concerns with dual residents and understand why in-country mixing may need to be restricted. We suggest that Option 2 should be followed and suggest that dual resident companies be allowed to elect along the lines set out in section 749(3)(d) (Controlled foreign companies - election as to residence).

Further anti-avoidance provisions

13 We note the comment that further anti-avoidance provisions may be required. If such provisions are required, then it is important to ensure that any such rules are properly targeted

FURTHER INFORMATION

14 We would be happy to discuss these points further either by way of letter or in a meeting.

Yours faithfully

Frank Haskew
Technical Manager
Direct Dial: 0207 920 8618
Direct Fax: 0207 920 8780
Email: FHaskew@icaew.co.uk