



CAPITAL ALLOWANCES FOR STRUCTURES AND BUILDINGS DRAFT SECONDARY LEGISLATION

Issued 24 April 2019

ICAEW welcomes the opportunity to comment on the **draft secondary legislation for Capital allowances for structures and buildings** published by HM Revenue & Customs (HMRC) on 13 March 2019. This representation is further to the separate meeting we had with HMRC and HM Treasury in December 2018 in which members related their own experiences and views and our subsequent representation submitted as ICAEW representation 21/19.

This response of 24 April 2019 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, ICAEW Tax Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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MAJOR POINTS

1. ICAEW welcomes the opportunity to respond to the draft secondary legislation, **Capital allowances for structures and buildings**.
2. We welcome the reintroduction of a tax relief for the construction cost of structures and buildings and note that it has been made effective from the date of its announcement on 29 October 2018.
3. As stated in our earlier submission, a change of this magnitude should have begun with a full and open discussion with specialists from business before being implemented. While we understand the government's desire to encourage businesses to begin qualifying investment as soon as possible, to introduce the specifics of this relief piecemeal, does not give the clarity and certainty the tax system needs. The short time allowed to comment on the secondary legislation makes a comprehensive consultation with our members difficult to achieve.
4. We are particularly concerned that the need to retain a record of the original construction cost for 50 years through changes of ownership, including enhancement costs will be onerous, particularly for overseas properties.

GENERAL COMMENTS

Lack of adequate consultation

5. We welcome the reintroduction of a tax relief for the construction cost of structures and buildings. The new Structures and buildings allowance is effective for costs of constructing new structures and buildings under contracts incurred on or after 29 October 2018.
6. In December 2017, the Government published **The new Budget timetable and the tax policy making process** in which it set out how the move to a single fiscal event cycle impacts on the tax policy making and consultation process. It also reaffirmed the government's commitment to the principles set out in **Tax policy making: a new approach**, published in 2010, to create a more predictable, stable and simple tax system.
7. We are concerned that although welcome, this important change to the capital allowances system should have been accompanied by full and open discussion with specialists from business before being implemented.
8. The legislation will amend Capital Allowances Act 2001 which we welcome as the SBA becomes defined by primary legislation.

Reliance on HMRC guidance

9. We understand the government's desire to encourage businesses to begin qualifying investment as soon as possible, and its concern that a period between announcing the change and its practical implementation would inevitably have led to some contracts being delayed. However clarity will be needed about how some of the detail will be interpreted in practice and HMRC guidance becomes an important element when businesses seek to apply the rules.
10. If more time had been allowed for discussion, then these details could have formed part of a consultation package and a piecemeal approach to implementation could have been avoided.
11. The use of the expression 'insignificant' in para270CE regarding qualifying use is one such example. We presume this will be 10% as expressed in the earlier Technical Note and so will be included in HMRC's guidance in due course, but this remains unknown six months after the legislation has been in effect.
12. Expenditure may already qualify as either plant and machinery or as an integral feature. Business will now have a third category to consider. Although there is already a considerable body of case law and examples of what falls to which relief, this is unlikely to get simpler.

There remains the risk of misclassification needing to be remedied at a later date, which could be later than the amendment window for a business' tax return.

Allowance statement requirement

13. Section 270IA sets out the requirement for evidence of qualifying expenditure, the allowance statement requirement. We are concerned that this imposes a considerable administrative burden for an SBA claim.
14. It is not clear what evidence is needed and the key elements would seem to be date and cost. The key date is presumably 29 October 2018 and although this may be very pertinent now and in the near future, will be more of a hurdle to establish although less relevant to newer expenditure as we move away from the start date.
15. It is also unclear what evidence would be needed for a self build project where there may not be a single contract for the construction.
16. Vendors of properties with an SBA attached will need to keep detailed records to substantiate claims to the allowance by later owners of the property. There also will need to be a statutory requirement for these to form part of the package of documents available on sale. As the relief will be for 50 years, the document trail will also need to last 50 years. This is administratively challenging and while advances such as block chain might eventually be a way to record these costs, we question whether this administrative burden might prove too onerous for commercial reality at this time.

Complexity of capital allowances

17. The Office of Tax Simplification (OTS) in its report [Accounting depreciation or capital allowances? Simplifying tax relief for tangible fixed assets](#), published in June 2018 summarises its conclusions saying
18. '...nothing in this review has made the structure of the CA regime seem simple. It is complicated and at times unfair as between different businesses. The only benefit of the way that tax relief is currently given is that it exists already and some people are familiar with it. The CA system should be improved.'
19. The new SBA joins the relief already available for plant and machinery but has not simplified the capital allowances system.

Exclusion of dwellings

20. We understand the policy intent is to give relief for business investment in commercial enterprises, but not for investment in buildings to be let as dwellings. The definition of a dwelling is not straightforward and is different for different taxes.
21. As an illustration, we have had several comments from members on the complexity of identifying whether student halls of residence are regarded as dwellings for different taxes.
22. The intention is that student accommodation is to be regarded as residential for the purposes of the SBA. This is contrary to its definition for other taxes.
23. For Stamp Duty Land Tax where different tax rates apply to purchases of residential and non-residential property, we must first consider whether the property is suitable for use as a dwelling to establish which scale of rates applies. While residential accommodation for students is generally regarded as a dwelling, a hall of residence for students in further or higher education is specifically not a dwelling, see Meaning of "residential property" s116(1) to (3), Finance Act 2003. So purchasing a hall of residence attracts lower rates of SDLT.
24. For Capital Gains Tax (CGT), higher rates apply to gains on disposals of dwellings. Para 4 Schedule B1, TCGA 1992 defines a dwelling for CGT, but paras 4(7) and (8) specifically exclude certain purpose built student accommodation from being regarded as suitable for use as a dwelling. So a purpose built hall of residence which has enough bedrooms and high enough occupancy rates is not a dwelling for CGT purposes.

25. We suggest that a list of existing definitions is provided to accompany the legislation to give clarity.

Leases

26. The rules for leases appear extremely complex and at the meeting we had with HMT/HMRC led to intense debate. We understand that 35 years was selected based on commercial principles, but it wasn't totally clear what these are. The relative balance of capital and income elements is obviously an area where the tax treatment is important, however, the complexity of the calculations seems disproportionate to the sums involved, particularly for smaller transactions.
27. The calculation of the SBA seems particularly problematic where leases of less than 50 years are involved and seems to be caused largely by the absence of a balancing adjustment on disposal.
28. Detailed guidance to the draft legislation will be needed.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

- **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
- **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.
- **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
- **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
- **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.
- **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.
- **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.
- **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.
- **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.
- **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 <https://goo.gl/x6UjJ5>).