

TAXREP 28/09

TAX LAW REWRITE: DRAFT BILL 7: TAXATION (INTERNATIONAL AND OTHER PROVISIONS)

*Memorandum submitted in May 2009 by the Tax Faculty of the
Institute of Chartered Accountants in England and Wales
commenting on a draft Bill published in March 2009
by HMRC Tax Law Rewrite Team*

Contents

Paragraph

| | |
|--|-------|
| Introduction | 1-4 |
| General comments | 5-10 |
| Answers to questions | 11-39 |
| Specific comments on draft legislation | 40-55 |
| Detailed comments on drafting | 56-65 |

Annex 1 - Who we are

Annex 2 - The Tax Faculty's Ten Tenets for a Better Tax System

| | |
|--|--|
| ICAEW Tax Faculty, Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ www.icaew.com/taxfac | T +44 (0)20 7920 8646 F +44 (0)20 7920 8780 E taxfac@icaew.com |
|--|--|

TAX LAW REWRITE: DRAFT BILL 7: TAXATION (INTERNATIONAL AND OTHER PROVISIONS)

INTRODUCTION

1. We welcome the opportunity to comment on draft Bill 7: Taxation (International and Other Provisions) published by HMRC Tax Law Rewrite project team on 3 March 2009 at http://www.hmrc.gov.uk/rewrite/draft_legislation_menu.htm.
2. We have previously commented in TAXREPs 11/08, 48/08 and 64/08 respectively concerning Papers CC/SC(08)01 (Tax arbitrage), CC/SC(08)12 (UK representatives of non-UK residents) and CC/SC(08)24 (Transfer pricing and advance pricing agreements). We have also reviewed the related July, October and December 2008 Response Documents. Drafts of the clauses now included in Schedules 2 and 3 were first published in October 2008 in Papers CC/SC(08)42 and 43, to which we responded as part of the Bill 6 consultation. In consequence of this we have reviewed earlier versions of clauses 106-218 and 222 and Schedules 2-4, the remainder of Bill 7 being new material.
3. We have not reviewed Schedule 1: Oil activities (new Chapter 16A of Part 2 of ITTOIA 2005), as we did not review the related Paper CCD/SC(08)35 issued in July 2008.

Who we are

4. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are in Annex 1. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex 2.

GENERAL COMMENTS

5. The draft Taxation (International and Other Provisions) Bill more clearly rewrites the international tax provisions which it addresses, in particular the Double taxation relief provisions in Part 2. The relocation of various other rewritten tax provisions through Schedule 5 should also prove helpful to users.
6. We note from Explanatory Notes paragraph 29 that, in view of the review of the taxation of foreign profits of companies, the draft Bill does not yet include any clauses rewriting the ICTA Part 18 provisions which specifically relate to receipts of foreign dividends.
7. We note from Explanatory Notes paragraph 30 that various necessary saving and transitional provisions remain to be drafted.
8. We note from Explanatory Notes paragraph 32 that clauses based on sections 807B-807G of ICTA (DTR: European cross-border transfers of business and European cross-border mergers), which were inserted by CTA 2009, also remain to be drafted.

9. We note also the comments in Explanatory Notes paragraphs 603, 672, 789, 808, 826, 842 and 855 from which future amendments to the draft Bill may arise.
10. As an essential guide, we have drawn attention to necessary amendments to the Explanatory Notes (Commentary) in Volume 1: Introduction of the March 2009 Draft Bill.

ANSWERS TO QUESTIONS

11. **Q1** We have no objection in principle to the proposal to rewrite not only the DTR provisions relating to income tax and corporation tax in Part 2 (Double taxation relief) but also the DTR provisions relating to capital gains tax and PRT.
12. **Q2** Having regard to the commentary in the Explanatory Notes paragraph 36, we agree that the use of the terms “double taxation arrangements” and “unilateral relief arrangements” is appropriate. We accordingly support the structure of Chapter 1 of Part 2, with clauses 2-7 dealing with DTAs and clauses 8 and 9 with unilateral relief arrangements.
13. **Q3** In a double taxation relief context it appears reasonable to interpret the reference in s 277(1) TCGA to ‘capital gains’ as a reference to ‘chargeable gains’. In applying s 277(1) TCGA to s 788(8) ICTA, which latter provision refers to ‘chargeable gains which . . . are not subject to double taxation’, it accordingly appears appropriate to rewrite clause 3(2)(b) as applying s 2(1) even if arrangements include chargeable gains that are not subject to double taxation.
14. **Q4** By omitting to state to whom a claim under clause 6(2)(a), (3)(a) or (4) must be made the claimant is left to determine this but, having regard to the comments in the final paragraph of Change 2 in Annex 1, this ought not to cause any difficulty in practice. We appreciate that a simple statement instead that the claim is to be made to an officer of Revenue and Customs could be misleading (as the claim will normally be made in a return or through an amendment to a return).
15. **Q5** We are content with the structure of Chapter 2 of Part 2 (Double taxation relief by way of credit).
16. **Q6** We support the proposal to draft clause 23(4) (Unilateral relief for tax on UK branch, agency or permanent establishment) to provide for a limit on the amount of relief which may be allowed, rather than as a condition which must be met if relief is to be allowed at all. In line with generally accepted practice, this is an appropriate construction.
17. **Q7** We support the proposal, in clauses 27(3) and 31(3), to bring into line with practice the law on the order in which credit relief is allowed.
18. **Q8** We support the proposal to require apportionments under clauses 28 and 34 to be both just and reasonable.
19. **Q9** We have no objection to the proposal to use the term “accounting period” in clause 36 (Applying section 34(2): royalty income).

20. **Q10** We support the proposal, in clauses 47, 55, 57 and 58, to give officers of Revenue and Customs the function of administering the provisions directed against schemes and arrangements which are designed to increase DTR (Change 2).
21. **Q11** We are content with the structure of Chapter 3 of Part 2.
22. **Q12** We are content with the structure of Part 3 (double taxation relief for special withholding tax).
23. **Q13** We are content with the rewrite of s 24 FA 1974 (Returns of persons treated as employees) in Part 2 of Schedule 5 (Relocation of section 24 of FA 1974) and we agree that relocation to TMA 1970 as ss 8(4A) and (4B), 8ZA and 15A is appropriate having regard to the nature of these provisions.
24. We are content with the relocation via Part 3 of Schedule 5 of s 42 ICTA (Appeals against determination under ss 34 to 36 or Chapter 4 of Part 3 of ITTOIA), as rewritten, into ITTOIA 2005 as new ss 302A, 302B and 302C as concerning that Act.
25. We are content with the relocation of s 152 ICTA (Notification of taxable amount of certain benefits), as rewritten, into TMA 1970 as ss 54A, 54B and 54C of that Act.
26. We are content with the rewritten s 475 ICTA and its insertion now as new s 154A of ITTOIA, remedying its unintended omission from that Act.
27. We are content with the rewritten sub-sections 700(4)-(6) ICTA and their insertion now as new ss 682A and 682B in ITTOIA.
28. Subject to a minor specific comment, we are content with the rewritten s 787 ICTA and its insertion now as s 809ZE of ITA 2007 (Tax relief schemes and arrangements) appropriately within Part 13 (Tax Avoidance) of that Act.
29. Subject to a minor specific comment, we are content with the rewritten ss 130-132 FA 1998 (Company migration) and their insertion now, as tax management provisions, as ss 109A-109E in TMA 1970.
30. We are content with the rewriting of s 151 FA 1989 and, having regard to Explanatory Notes paragraph 1046, its insertion now as s 30AA in TMA 1970.
31. We are content with the rewriting of s 200 FA 1996 (Domicile for tax purposes of overseas electors) for income tax purposes and its relocation as s 835A in ITA 2007 (please also see our response to Q15).
32. We are content with the rewriting of s 36 FA 1998 (Arrangements with respect to payment of corporation tax) and its insertion now as s 59F of TMA 1970 suitably within Part 5A (Payment of tax) of that Act.
33. We are content with the rewriting of s 118 FA 1998 (Claims for income tax purposes) and its insertion now as ss 43E and 43F in TMA 1970 suitably within Part 4 (Assessments and claims) of that Act.
34. We are content with the rewriting of s 144 FA 2000 (Offence of fraudulent evasion of income tax) and its insertion now as s 106A in TMA 1970 suitably within Part 10 (Penalties, etc) of that Act.

35. We are content with the rewriting of s 199 FA 2003 (Savings income: Community obligations and international arrangements) and its insertion now as ss 18B-18E in TMA 1970 suitably within Part 3 (Other returns and information) of that Act.
36. We are content with the rewriting of s 61F(No 2)A 2005 (Continuity for transitional purposes) and its appropriate insertion now as new paragraphs 87A, 87B and 87C forming new Part 10A (SEs) of Schedule 18 to FA 1998 (company tax returns, assessments and related matters).
37. Subject to a minor specific comment, we are content with the rewriting of paragraph 13 (and the relevant supplementary provisions of paragraphs 14 and 15) of Schedule 13 to FA 2007 (Requirements to deduct tax from manufactured payments: creditor repos and debtor repos) and its insertion now as ss 925A-925F in ITA 2007 suitably (having regard to Explanatory Notes paragraph 1074) within Chapter 9 of Part 15 (Manufactured payments) of that Act.
38. **Q14** Having regard to the explanation in Change 14 in Annex 1, we agree the proposal to clarify in the to be inserted s 54B(4)(a)(ii) Taxes Management Act 1970 that it is the application to make a late objection, rather than the objection itself, that must be made without unreasonable delay after the end of the relevant 60 days period.
39. **Q15** We do not consider that it would be appropriate to refer to the capital gains tax element of this provision in s 835A of ITA 2007. Whilst it would appear logical to also relocate s 200 of FA 1996 into TCGA in a rewritten capital gains tax version (and also into IHTA 1984 in a rewritten inheritance tax version), identical to the s 835A now proposed for insertion into ITA 1007 specifically for income tax purposes, as this section has presumably served well since 1996, and neither CGT nor IHT is to be rewritten, it might be better left in FA 1996 as applicable post 5 April 2010 to CGT and IHT only.

SPECIFIC COMMENTS ON DRAFT LEGISLATION

- cl 6 The effect given by section 2 to double taxation arrangements**
 40. **(7)** We assume that the s 989 ITA 2007 definitions of “UK resident person” and “non-UK resident person” are applied on the basis that clause 6(3) applies to individuals (liable to capital gains tax) only.
- cl 11 Time limits for claims for relief under section 10(2)**
 41. We note that clause 11 gives effect to the prospective amendments made by Schedule 39 to FA 2008, and that transitional provision may be needed depending on when these amendments are to come into force.
- cl 35 Applying section 34(2): asset in hedging relationship with derivative contract**
 42. **(4)** Should ‘an asset’ be replaced by ‘an asset or a contract’ as in the source s 798B(2) ICTA which envisages either being designated as a hedge for accounts purposes?

- cl 37 Applying section 34(2): royalty income**
43. **(2)(a)** Should the reference to ‘arising from a single asset’ be to ‘arising from a single transaction, arrangement or asset’ as in the source s 798B(3)(a) and as relating to clause 34(2)?
- cl 41 Earlier years’ non-trading deficits on loan relationships**
44. Is it considered unnecessary to subject clause 41 to clause 43 in the same way as s 797(3B) ICTA is subject to s 797A of ICTA, on the basis that clause 41 deals only with non-trading deficits?
- cl 43 Non-trading debits on loan relationships**
45. **(4)** Should ‘can’ in clause 43(4) be replaced by ‘must’ in view of the mandatory application of the excess in the source s 797A(7) ICTA applying s 797(3) ICTA?
- cl 46 Duty to give notice that adjustment has rendered credit excessive**
46. **(6)** Would it be simpler to omit clause 46(6) and insert ‘in writing’ after ‘Notice’ in clause 46(3). It is not clear why clause 46(6) refers only to capital gains tax when the source s 806(3) ICTA requires notice generally to be given in writing.
- cl 50 Section 49(2) and (4): schemes enabling attribution of foreign tax**
47. **(1)(b)** Whilst the singular can be construed as including the plural, would it nevertheless be prudent in an anti-avoidance provision to still retain the qualification “(or to more than on such other source)” in clause 50(1)(b) as in the source paragraph 2 of Schedule 28AB to ICTA?
- cl 52 Section 49(2) and (4): schemes about claims or elections etc**
48. **(1)** We agree that it is appropriate to include ‘or giving rise to’ in clause 52(1), whereas the source paragraph 4(1) of Schedule 28AB to ICTA refers to ‘increasing’ (a claim) only.
- cl 57 Counteraction notices given before tax return made**
49. **(2)** With reference to Explanatory Notes paragraph 162 the words ‘the provision referred to’ (in the notice) may be confusing in the context of clause 47(2). We prefer the source s 804ZC(2)(b) reference to ‘complying with the notice’.
50. Similar comments apply to clause 59(2), (5) and (6) (Amendment, closure notices and discovery assessments in section 58 cases).
- cl 94 Correcting assessments where relief is available**
51. **(6)** We note the comments in Explanatory Notes paragraph 243, but it may be more prudent to still rewrite clause 94(6) as also relating to a chargeable gain. Presumably the thinking behind s 790(11) ICTA was to cover a situation where the disposal proceeds of an asset, incorporating a chargeable gain on disposal, could in some way be placed in the hands of a person other than the person beneficially entitled to the disposal proceeds.
- Sch 5 Miscellaneous relocations**
52. In paragraph 44 of Schedule 5, as regards the inserted s 809ZE(5), in the definition of “interest” is it appropriate to also refer to ‘profit share return’?
53. In paragraph 46 of Schedule 5, as regards the inserted s 109A(8), the reference to ‘the officer’s decision’ jars somewhat with the reference in s 109A(5)(b) to the

Commissioners giving approval. Whilst we understand that a delegated officer will in fact take the decision, it may be appropriate in s 109A(8) to nevertheless refer to 'the Commissioners' decision' in this instance.

54. In paragraph 86 of Schedule 5, in drafting s 925D(3) of ITA 2007 is it now considered unnecessary to refer to the paragraph 15(7)(a) Schedule 14 FA 2007 power for the regulations to make different provisions for different cases?

Sch 7 Changes in the law

55. **Part 2** Do sub-paragraphs 10(2), (4) and (6) also need to refer to petroleum revenue tax?

DETAILED COMMENTS ON DRAFTING

cl 6 The effect given by section 2 to double taxation arrangements

56. (3) In Explanatory Notes paragraph 48, in the third sentence, the reference to subsection (3)(c) should be to subsection (3)(b).

cl53 Section 49(2) and (4): schemes that would reduce a person's tax liability

57. (5) Should the reference in clause 53(5) be to 'income tax, corporation tax or capital gains tax'?

cl 58 Counteraction notices given after tax return made

58. (5)(a) Should 'required' in clause 58(5)(a) be 'requested' as in the source s 804ZC(7)(a), and consistent with the reference to 'request' in clause 58(5)(b)?

cl 171 Appeals

59. In the definition of "discovery assessment", within the brackets, should 'paragraph 52 that Schedule' be 'paragraph 52 of that Schedule'?

Sch 1

60. In the italicised heading to the inserted section 225M (Tariff receipts, etc), 'reciepts' should be 'receipts'.

Sch 3 Factoring of income etc

61. In Explanatory Notes paragraph 786, in the second sentence, 'Bills' should be 'Bill'.
62. In Explanatory Notes paragraph 802, there are two full stops to the penultimate sentence. In the last sentence 'be' should be 'being'.

Sch 4 UK Representatives of non-UK residents

63. **para 17** As regards s 828Q of ITA 2007 (Interpretation of Chapter), both "investment manager" and "investment transaction" are terms defined in s 827 ITA 2007. In this context the commentary in Explanatory Notes paragraph 949 is a little confused. It appears to relate to the reference to "investment manager" in s 828Q(3), whilst correctly referring to the s 127(12) FA 1995 source for the definition of "investment transaction" as inserted by FA 2008.

Sch 5 Miscellaneous relocations

64. In paragraph 25 of Part 4 of Schedule 5, inserted s 54(3) should presumably refer in the first line to 's 54B(1)' rather than to 's 54'.

65. In paragraph 86 of Part 16 of Schedule 5, in (to be inserted) s 925A(2)(b) should 'arrangements' be 'arrangement'? In s 925B(2)(b) it would then be appropriate to also refer to 'arrangement'. Whilst the source paragraph 13(2)(b) of Schedule 13 FA 2007 does refer to 'arrangements', this appears to be at odds with the use of 'arrangement' in the opening part of paragraph 13(2).

TJH/PCB
14.5.09

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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>.