



TAXREP 35/12

(ICAEW REP111/12)

ICAEW TAX REPRESENTATION

FINANCE)No 4) BILL 2012 BRIEFING INFORMATION POWERS - CLAUSE 222

Briefing submitted in June 2012 by ICAEW Tax Faculty in relation to the above provisions in Finance (No 4) Bill 2012

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INTRODUCTION

1. ICAEW submitted Briefings to the Public Bill Committee on various clauses in Finance (No 4) Bill 2012. The present TAXREP reproduces the content of the Briefing on the provisions in clause 222 Information Powers.

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

BRIEFING

INFORMATION POWERS (Clause 222)

SUMMARY

Clause 222 extends the information powers in Sch 26, Finance Act 2008. It enables HMRC to require a third party to provide information about a taxpayer where HMRC does not know that person's identity but does hold other information about them.

HMRC has explained that the power is needed to comply with international information exchange requirements. **However, the new power could be used in situations other than this and our concern is that it is too widely drafted.**

In particular, we are concerned that new para 5A (7) is too widely drafted and should be more specific, and that the right of appeal is inadequate.

We would be happy to provide further information or meet to discuss these issues in more detail. For further information please contact Tax Faculty head [Frank Haskew](#) on 020 7920 8618 or [Sarah Buckley](#), Public Affairs Manager, on 020 7920 8694.

BACKGROUND

HMRC has explained that a peer review by the Global Forum on Transparency and Exchange of information for Tax Purposes has identified a deficiency in HMRC's information powers where an overseas authority request information about a taxpayer who is identified not by name but by some other identifying information. Schedule 36 does not currently provide for HMRC to obtain the

information where the taxpayer's name is not provided. The legislation in Clause 222 is designed to remedy this.

HMRC published the initial consultation document on this change to Sch 36, FA 2008 in July 2011, together with draft legislation.

HMRC published a summary of responses in December 2011 together with draft clauses for the Finance Bill 2012. The legislation had altered little except to introduce a sub-para 5A(7).

The Finance Bill 2012 contains the same clauses as in December 2011.

ICAEW has participated in this consultation at all stages. We responded to the July 2011 in [TAXREP 59/11](#) and to the December 2011 consultation in [TAXREP 11/12](#).

CLAUSE 222: WHAT IT DOES

Clause 222 introduces a new paragraph 5A 'Power to obtain information about persons whose identity can be ascertained' into Sch 36, FA 2008. In essence, this enables HMRC to find out a taxpayer's identity (name, address and, where relevant, date of birth) from a third party, where HMRC holds identifying information about the taxpayer but does not actually know their identity. Having established the taxpayer's identity, HMRC can then use its other Sch 36 powers to obtain whatever further information may be required.

The power is not restricted to the requirements of international information exchange: HMRC says this could contravene EU law and would also run counter to the UK's aim of aligning rules across taxes.

Clause 222 contains various safeguards, principally that HMRC must reasonably require the information to check the tax position of the taxpayer, and must believe that the third party will be able to identify the taxpayer from the identifying information which HMRC holds. A right of appeal against a para 5A notice is inserted into para 31, Sch 36.

OUR COMMENTS AND RECOMMENDATIONS

As noted, the wording of this clause has not changed since the draft published in December 2011. Therefore all our comments and recommendations in [TAXREP 11/12](#) remain valid.

Our two main concerns are:

- New para 5A(7), which was introduced after the initial consultation, is far too widely drafted. It enables HMRC to use this power to check the tax position of a class of persons as well as an individual taxpayer. We understand that this is intended to cover the situation where information is needed about joint accounts. However, the new para 5A(7) is written far more widely than that and could in theory extend to all bank customers with UK addresses but overseas bank accounts. The wording should be made much more specific to deal just with the joint account situation it is intended to address.
- The right of appeal against the information notice is restricted, as it only applies where it would be unduly onerous to comply with the notice. Coupled with this, unlike other Sch 36 third party notices, there is no requirement to obtain tribunal approval beforehand. These two factors mean that the safeguards are inadequate.

The grounds for appeal should cover all the situations where a third party might be unable to comply with the notice, including that HMRC has failed to comply with conditions A to D. We do not think the grounds for appeal as drafted do cover all the situations where a third party might quite reasonably be unable to comply with the notice. For example, the third

party may no longer have the information, having destroyed it once the required record-keeping period has passed. In this case, there are no grounds of appeal (the 'unduly onerous' grounds do not apply) and if HMRC does not accept that the third party does not have the records, the latter must wait for HMRC to issue a penalty notice and appeal against that.

Further concerns are:

- In para 5A (5), condition D refers only to data held by 'the officer'. We recommend that this should refer to data held 'by HMRC'.
- The officer should be required to make sure that the information about the taxpayer's identity is not held elsewhere in HMRC, before he or she issues the information notice.
- HMRC should only use the new power where the third party can be expected to be able to identify the taxpayer from the information given, and can do so without a disproportionate compliance burden. We trust that HMRC guidance will make this clear and also clarify what sort of identifying information HMRC must hold before issuing a notice to a third party.
- We think that an additional safeguard would be for HMRC to provide a report on the use of this new power. This could be an annual report and would set out how often the power had been used and whether it was used solely in connection with information exchange requests or for domestic purposes as well.

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ICAEW 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 icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)