

TAXREP 27/09

TAX LAW REWRITE: DRAFT BILL 6: CORPORATION TAX

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

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INTRODUCTION

1. We welcome the opportunity to comment on draft Bill 6: Corporation Tax published by HMRC Law Rewrite project team on 3 March 2009 at http://www.hmrc.gov.uk/rewrite/draft_legislation_menu.htm .
2. We have previously commented by letter in the case of Paper CC/SC(08)36 (Bill 6: Authorised Investment Funds) and in various TAXREPs on the Committee Papers listed in Appendix B in Volume 2 of the March 2009 Draft Corporation Tax Bill (List of publications issued), including Paper CC/SC(08)42 (Factoring of income etc) and Paper CC/SC(08)43 (Bill 6: Sale and leaseback etc) which are not listed, containing earlier versions of the majority of the draft clauses. We have also reviewed the related Response Documents listed in that Appendix (other than that to Paper CC/SC(08)35). In consequence of this detailed past review further relatively minor comments only now arise. As an essential guide, we have also drawn attention to necessary amendments to the Explanatory Notes (Commentary) in Volume 1 of the March 2009 Draft Bill.
3. We did not respond to Paper CC/SC(08)35 (Bill 6: Oil Taxation), as being of limited interest to most of our members in view of its specialist nature; but we note that a response was received from The UK Oil Industry Taxation Committee who are clearly a leading expert in this area of taxation. It follows that we have not reviewed clauses 261-323 in Bill 6 either.
4. We note that the draft clauses issued in Paper CC/SC(07)15 (Bill 5: Currency), which were excluded from Bill 5, are now included in Bill 6. We also note that there has been some movement of material between Bill 6 and the Taxation (International and Other Provisions) Bill during the course of the work on these two Bills.

Who we are

5. 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

6. Bill 6 is a substantial rewrite Bill, comprising 1123 clauses and 4 Schedules, and complements the Corporation Tax Act 2009 in rewriting almost all the primary legislation relating to corporation tax and making that legislation easier to understand and to navigate. We commend the drafting of Bill 6 as part of this major achievement.
7. In view of the combined size of the Corporation Tax Act 2009 and Bill 6 it is perhaps a little surprising that it should still be necessary to refer to paragraph 8 of Schedule 18 to FA 1998 (through clause 2(5)) for guidance on the actual calculation of the corporation tax payable for an accounting period on net total profits (as determined in clause 4). Nevertheless we agree that this is appropriate in the context of

corporation tax self-assessment, with the administrative aspects of which Schedule 18 to FA 1998 deals more fully.

8. We note from Explanatory Notes Part 2 paragraphs 136, 215, 916, 1200, 1202, 1204, 1206, 1238, 1241, 1253, 1267, 1332, 1390, 1462, 1580, 1625, 1626, 1630, 2182, 2223, 2810, 3026, 3452, 3463 and 3532 that further work remains to be done on Bill 6 (including Schedules 1 and 2) and that any changes arising from FA 2009 will be incorporated in the draft Bill over the course of the summer and that a small number of additional new clauses are to be published for consultation (Explanatory Notes Part 1 paragraph 39 refers). We also note that the rewritten provisions will be amended if the source legislation changes in consequence of ongoing consultation (Explanatory Notes Part 2 paragraphs 22, 131, 1198, 1227, 1271, 1285, 1308, 1364, 1514 and 1691 refer, as well as any changes arising from consultation which are included in FA 2009).

ANSWERS TO QUESTIONS

9. **Q1** The 'total profits' (after deduction of expenses of management) in s 75(1) ICTA appear to equate to 'the company's profits' in paragraph 8(1) Schedule 18 FA 1998 (Calculation of tax payable) which in turn equate to the clause 4 'net total profits'. On this analysis, we agree that it is appropriate that s 1219(1) CTA 2009 should now be amended so that a company's expenses of management are allowed as a deduction from its total profits at Step 2 in clause 4(2). This then aligns the approach in s 1219 CTA 2009 with that in clause 4.

Whilst there does not appear to be any clear reason for giving such priority, we do not object to the s 1219(1) deduction being given priority at Step 2 in s 4(2) of CTA 2010 (deductions from total profits). We assume that this follows from s 75(1) ICTA providing that expenses of management are deductible in calculating total profits, which implies an immediately prior relationship in arriving at those profits. We also note that the revised drafting in the proposed s 1219(1A) accords with both current interpretation and practice (Explanatory Notes paragraph 46] and agree that the effect of the law does not appear to be changed by this amendment.

10. **Q2** We have no objection to the proposal to impose the requirement of reasonableness in the exercise of the power to obtain information in clause 25(1) (Power to obtain information).
11. **Q3** We are content with the drafting of clause 35 (Ring fence trades: further extension of period for relief) which rewrites s 393B of ICTA which was inserted by s 111 FA 2008.
12. **Q4** We have no objection to the proposal not to rewrite, in clause 173 (Assumptions to be applied if non-UK resident company involved), the alternative £100 limit in paragraph 5F(7)(b) of Schedule 18 to ICTA.
13. **Q5** We have no objection to the proposal to now exclude through clause 538(5) the percentage of properties attributable to non-members of the group. It does appear more appropriate to exclude from a group's property rental business the percentage of that business held by a non-member of the group.

14. **Q6** We consider that it is appropriate, as drafted in clause 556(1) (Funds awaiting reinvestment), to allow the cash proceeds from the disposal of an asset used wholly and exclusively for the purposes of property rental business to be held by any company within the group and not only by the company which disposed of the asset.
15. **Q7** Having regard to the commentary in Change 43 in Annex 1, we support the proposal to aggregate the periods of mixed use in drafting clause 556(5).
16. **Q8** We support the proposal to exclude by means of clause 577(4)(c) a non-member's percentage of the assets in calculating the "notional amount" under clause 577 (Meaning of "the notional amount").
17. **Q9** We support the proposal not to rewrite condition 7 of regulations 3(1) and 10(1) SI 2006/2866 in clause 595 (Notice for Part to apply: joint venture company) but to instead now rewrite the balance of business tests in clause 601, putting joint venture companies on the same basis as joint venture groups.
18. **Q10** We support making it explicit in clause 600(6), as regards both a joint venture company and joint venture groups, that the clause 591 early exit provisions should continue to apply after the UK REIT regime has ended.
19. **Q11** We welcome the simplification of regulation 14(2) to (7) of SI 2006/2864 and support the proposal not to rewrite regulation 14(4)(b) of SI 2006/2866.
20. **Q12** It appears that Explanatory Notes paragraph 2114 should refer to clause 606(4) and (5) (Member of joint venture group liable for additional charge) and that Explanatory Notes paragraph 2115 should refer to clause 606(1) to (3). Q12 appears to refer to clause 606(4), and the reference to 'member of a venturing group' in Explanatory Notes paragraph 2114 should presumably be to 'venturing group' only. Clause 606(4) rewrites regulation 24(1), (2) of SI 2007/3425. It would appear appropriate that clause 606(4) should refer to a 'venturing group' rather than to a single member of that group in determining whether the '75% or more' level of shareholding in MJVG has been attained, but the latter is what regulation 24(1) of SI 2007/3425 actually provides. We appreciate that the regulation can be changed, and in principle do not object to the reference to 'venturing group' in clause 606(4) but, if the foregoing understanding is correct, it would be helpful if the Explanatory Notes could explain more clearly why this change is sought.
21. **Q13** We have no objection to the proposal to apply the definition of "normal commercial loan", through clause 608(2)(b) (Interpretation etc), to joint venture companies as well as to joint venture groups.
22. **Q14** We have no objection to the use of the term "court investment fund". Should this also be used in the italicised heading over clause 629 (Court investment funds)?
23. **Q15** We are content with the drafting of clause 721(4) (Meaning of "change in the ownership of a company").
24. **Q16** Having regard to the explanation in paragraph 2577 of the Explanatory Notes, we have no objection to the proposal to rewrite sections 774A to 774G to ICTA for corporation tax purposes as Part 18 Chapter 1 (Factoring of income etc – Finance arrangements). We note that these provisions may be amended or repealed by FA 2009.

25. **Q17** We are content with the revised clause 901 (Application of Chapter to further transfers of a trade) rewriting s 343(7) of ICTA.
26. **Q18** We are content with clauses 902-905 rewriting s 343ZA of ICTA.
27. **Q19** We support the proposal to make it explicit that apportionments under clause 904 (Apportionment if part of trade treated as a separate trade) are to be reasonable as well as just.
28. **Q20** With reference to the analysis in Change 6 in Annex 1, it is clearly simpler to now refer to “Northern Ireland legislation” in the definition of “Act” in clause 1069 (The definitions). This term will in consequence now include Acts of the Parliament of Ireland and Orders in Council under section 85 of the Northern Ireland Act 1998, which have hitherto been excluded from the definition of “Act”. Was there any policy reason for this exclusion? If not, we have no objection in principle to the definition of “Act” now being extended through inclusion of the wider coverage within “Northern Ireland legislation”.
29. **Q21** We support the proposal to omit the words “profession, vocation” in paragraph (b) of s 832 of ICTA from the definition of “period of account” in clause 1069 (The definitions).
30. **Q22** Having regard to the explanation in Change 58 in Annex 1, we support the proposal to apply the defined term “personal representatives” for the purposes of the Corporation Tax Acts thereby bringing the income tax and corporation tax codes back into line.

SPECIFIC COMMENTS ON DRAFT LEGISLATION

cl 3 Corporation tax rates

31. Clause 3 is correctly drafted to refer to the main rate and the small profits rate as the two corporation tax rates. Where marginal relief applies the effective corporation tax rate will be different. Although not itself a ‘rate’ it would nevertheless appear helpful to the user if clause 3 were to include an appropriate reference to marginal relief, perhaps by signposting the appropriate clauses in Part 2 Chapter 3.

Part 3 Companies with small profits

32. There is now no Overview in Part 3.

cl 20 Section 19(3): treatment of certain non-trading companies

33. **(4)** We criticised the drafting of Paper CC/SC(08)03 clause 6(4) (Section 5(3): treatment of certain holding companies) in paragraph 10 of our TAXREP 13/08 dated 15.2.08. The response in paragraphs 31 and 32 of the 11.7.08 Response Document is unhelpful, and the drafting of (now) clause 20(4) remains unduly restrictive. As this now also affects new sub-clause 20(5), the company should be allowed a short time at least after the end of the accounting period in which it receives a dividend within which to pay it on. At the extreme, how could any dividend received at the close of the last day of an accounting period be paid out again as a dividend from the company itself on that day in compliance with company law?

cl 45 Registered industrial and provident societies

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34. Whilst the definition of registered industrial and provident society has now been removed from clause 45 (it was included as clause 1(4) in Paper CC/SC(08)33), the definition in clause 83(1) does not apply to it as it is applicable to Part 4 Chapter 5 only.

cl 152 Use of relevant company's assets

35. (4) Is the explanation in Explanatory Notes paragraph 653 correct? Doesn't sub-clause 152(4) exclude banks from the application of clause 152 only to the extent that the normal commercial loan made in the course of banking business exceeds the cost to the relevant company of the assets mentioned in sub-clause 152(1)(b), rather than wholly excluding the bank from the application of the clause in respect of the loan?

cl 260 Minor definitions etc

36. (2) Having regard to the explanation in Explanatory Notes paragraphs 933-934, why is s 382(2) ITA 2007 not being consequentially amended to align it with clause 260(2)?

cl 377 Determining the percentage share in the profits or loss of a business

37. (2) We note that Paper CC/SC(08)41 draft clause 34(2)(a), relating to a company's share in any capital allowances and charges under CAA 2001, is not now rewritten in draft clause 377(2). We assume that this is because capital allowances and charges are respectively already taken into account as expenses and income in arriving at the profits or loss of the business referred to in clause 377(2).

cl 928 Qualifying income or gains

38. (2) With reference to paragraph 16 of the 12.2.09 Response Document to Paper CC/SC(08)34 we note that clause 928(2)(a)(iv) has not been amended as proposed. Why is this?

DETAILED COMMENTS ON DRAFTING

cl 85 Loss relief to be reduced in case of write-off of government investment

39. (5) Within the brackets following 'Section 86' should 'relevant' now be deleted (the final bullet point in paragraph 16 of the 22.5.08 Response to Paper CC/SC(07)38 refers)?

cl 133 Unrelieved part of claimant company's total profits

40. (8) In Explanatory Notes paragraph 558, in the first sentence, insert 'with' immediately after 'deals'.

cl 161 Application and interpretation of sections 162 to 174

41. (2) In the definition of "the relevant time", delete 'in' immediately before 'mentioned'.

cl 189 Gifts and benefits linked to periods of less than 12 months

42. (8) In Step 2 of clause 189(8), in the second paragraph and within brackets, should 'then' be 'the'?

cl 247 Meaning of "loan" and "interest"

43. In Explanatory Notes paragraph 915, in the third line, the reference to 'profit share return' should be to 'alternative finance return'.

- cl 400 Restrictions on leasing partnership losses**
44. (3) Insert 'section' immediately before '31'.
- cl 425 Recovery of bad debts following reduction under section 424**
45. In Explanatory Notes paragraph 1423, in the second line, insert 'debt' after 'bad'.
- cl 544 Gains**
46. In Explanatory Notes paragraph 1895, in the third sentence, 'with' should be 'within'.
- cl 562 "The section 562 amount"**
47. In Explanatory Notes paragraph 1976, in the second sentence, '1792' should be '1791'.
- cl 582 Termination by notice: officer of Revenue and Customs**
48. In Explanatory Notes paragraph 2032, in the second line, should 'to' (the Commissioners) be 'by'?
- cl 607 Cases where no additional charge due**
49. In Explanatory Notes paragraph 2118, for 'regulations 14(1) and (2) of SI 2006/3425' substitute 'regulation 14(1) of SI 2006/2867'.
- cl 653 Meaning of "organised on an amateur basis"**
50. (1) In clause 653(1)(c), 'nets' should be 'net'.
- cl 655 Exemption for UK trading income**
51. (6) In clause 655(6), 'party' should be 'partly'.
- cl 681 Restrictions on debits to be brought into account**
52. (6) In clause 681(6) should 'debts' be 'debit', to align with the title of section 732?
- cl 688 Meaning of certain expressions in section 687**
53. (2) In clause 688(2), in the third line, 'relationship' should be 'relationships'.
- cl 705 Meaning of certain expressions in section 704**
54. (2) In clause 705(2), in the third line, 'relationship' should be 'relationships'.
- cl 896 Modified application of CAA 2001**
55. (4) In clause 896(4) the reference should be to subsection (2) and not to subsection (3).
- cl 911 Power to surrender tax refund**
56. With reference to paragraph 10 of the 26.11.08 Response Document to Paper CC/SC(08)19, why has no signpost to regulation 9 of SI 1998/3175 (the Corporation Tax (Instalment Payments) Regulations 1998) been included in the Explanatory Notes?
- cl 943 Overview of Part**
57. There is no signpost in clause 943 to Chapter 8 (Interpretation of Part).
- cl 1069 The definitions**
58. In the definitions of "retail prices index" should the reference in (a) to 'the Office for National Statistics' be to 'the Statistics Board' and the reference in (b) to 'that Office'?

be to 'the Board' as in the s 989 ITA 2007 definition, or has there been a name change?

cl 1104 Scotland

59. Is it intended to amend s 1008 of ITA 2007 (Scotland) to include a reference to the meaning of "mortgage"?

Sch 4 Index of defined expressions

60. 'arrangements' for the purposes of Chapter 3 of Part 22 is defined in s 907(1) not 908(1).

There is a blank line on page 624 (Schedule 4).

TJH/PCB
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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>.