

TAXREP 67/08

TAX LAW REWRITE: BILL 5: CORPORATION TAX

**LOAN RELATIONSHIPS, DERIVATIVE CONTRACTS AND
INTANGIBLE FIXED ASSETS: PROVISIONS AFFECTED
BY THE EUROPEAN MERGERS DIRECTIVE**

*Memorandum submitted in September 2008 by the Tax Faculty of the
Institute of Chartered Accountants in England and Wales in
response to Paper CC/SC(08)27 issued in June 2008
by HMRC Tax Law Rewrite Team*

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

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Loan relationships, derivative contracts and intangible fixed assets:
provisions affected by the European Mergers Directive

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LOAN RELATIONSHIPS, DERIVATIVE CONTRACTS AND INTANGIBLE FIXED ASSETS: PROVISIONS AFFECTED BY THE EUROPEAN MERGERS DIRECTIVE

INTRODUCTION

1. We welcome the opportunity to comment on the draft clauses in Paper CC/SC(08)27 (Bill 5: Loan relationships, derivative contracts and intangible fixed assets: provisions affected by the European Mergers Directive) published on 20 June 2008 at <http://www.hmrc.gov.uk/rewrite/index.htm>.
2. 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

3. Subject to our comments below, we are content with the drafting of the clauses for provisions relating to the loan relationships, derivative contracts and intangible fixed assets Parts of Bill 5 that were amended or supplemented by the Corporation Tax (Implementation of the Mergers Directive) Regulations 2007 (SI 2007/3186) and the Corporation Tax (Implementation of the Mergers Directive) Regulations 2008 (SI 2008/1579) and relate to European cross-border transfers of business, mergers and, where relevant, other related matters.
4. Paper CC/SC(07)32 (Bill 5: Intangible fixed assets) draft clauses 114-117 substantially rewrote paragraphs 87 (Transfer of non-UK trade) and 87A (formation of SE by merger: transfer of non-UK trade) of Schedule 29 to FA 2002. These clauses were omitted from the February 2008 draft Bill 5 and the above paragraphs 87 and 87A were amended in SI 2007/3186 (paragraph 87A being further amended by SI 2008/1579). Is it still intended to rewrite these two paragraphs and, if so, where in Bill 5, or in another rewrite Bill?
5. Paper CC/SC(07)18 (Bill 5: Loan relationships) draft clauses 55-57 rewrote paragraph 12B of Schedule 9 to FA 1996, but were omitted from the February 2008 draft Bill 5. Paragraph 12B of Schedule 9 to FA 1996 was substituted by new paragraphs 12B and 12C in SI 2007/3186. Substituted new paragraph 12B of Schedule 9 to FA 1996 is rewritten in Appendix A draft clauses 23-26 and 29; but new paragraph 12C of Schedule 9 to FA 1996 is not rewritten in Paper CC/SC(08)27. What is intended as regards rewriting new paragraph 12C?
6. Paper CC/SC(07)21 (Bill 5: Derivative Contracts) draft clauses 114-116 rewrote paragraph 30B of Schedule 26 to FA 2002 relating to the formation of an SE by merger, but were omitted from the February 2008 draft Bill 5. Paragraph 30B of Schedule 26 to FA 2002 was substituted by new paragraphs 30B and 30C (the latter

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relating to the formation of an SE by merger) in SI 2007/3186. New paragraph 30C of Schedule 26 to FA 2002 is not rewritten in Paper CC/SC(08)27. What is intended as regards rewriting new paragraph 30C?

7. SI 2007/3186 inserted paragraphs 12H(3)-(5) and (as amended by SI 2008/1579) 12I(3)-(5) into Schedule 9 to FA 1996 (Loan relationships: special computational provisions). Are these provisions to be rewritten in Bill 5, or elsewhere?
8. The same query arises as regards paragraphs 30G(3)-(5) and 30H(3)-(5) of Schedule 26 to FA 2002 inserted by SI 2007/3186, relating to derivative contracts, and as regards inserted paragraphs 85B(3)-(5) and 85C(3)-(5) of Schedule 29 FA 2002 inserted by SI 2007/3186 (as amended by SI 2008/1579) and relating to intangible fixed assets.
9. All of these provisions relate to transparent entities.

SPECIFIC COMMENT ON DRAFT LEGISLATION

cl 5 Transfer of assets on European cross-border transfer of business

10. (2) Should 'trade' read 'business'?

DETAILED COMMENTS ON DRAFTING

Appendix A Transferee leaving group after replacing transferor as party to loan relationship: introduction

11. **cl 10(4)** In the definition of "the relevant 6 year period" should the reference to section '2(1)' be to section '2(2)' and the reference to section '2(2)' be to '2(3)'?
12. In the definition of "the relevant group", should the reference to section '2(1)' be to section '2(2)' and the reference to section '2(2)' be to '2(3)'?
13. In the definition "the relevant loan relationship" should the reference to section '1(2)(b)' be to section '2(1)(b)'?

Appendix B Introduction to Chapter

14. **cl 7(6)(b)** Are the words 'to any person mentioned in that paragraph' necessary? They are not included in the similar Appendix A clause 23.

TJH/PCB
3.9.08

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>.