

## TAXREP 81/08

## TAX LAW REWRITE: BILL 6: CORPORATION TAX

## CLOSE COMPANIES

***Memorandum submitted in November 2008 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to Paper CC/SC(08)38 issued in September 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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Tax Law Rewrite: Bill 6: Corporation Tax  
Close companies

# TAX LAW REWRITE: BILL 6: CORPORATION TAX

## CLOSE COMPANIES

### INTRODUCTION

1. We welcome the opportunity to comment on the draft clauses in Paper CC/SC(08)38 (Bill 6: Close companies) issued on 12 September 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 the minor comments below, we are content with the rewriting of sections 414 to 417 and 419 to 422 of ICTA and Schedule 12 to FA 1989.
4. Having regard to Explanatory Notes paragraph 125, we note that clause 28(7) (Power to obtain information) is under review and subject to change.

### ANSWERS TO QUESTIONS

5. **Q1** We agree that the close company legislation needs to be disentangled. We are generally content with the structure of the Part but, as a small point, it might be made more clearly in the Overview that the purpose of Chapter 2 is to define which companies are and are not to be close companies, with the expressions defined being subsidiary to this purpose. In this context, the source s 414(1) ICTA more directly states that it is interpretative of “close company”. An appropriate amendment of clause 1(1) might achieve this and also aid an understanding of Chapter 2, the first seven clauses of which are necessarily (but somewhat intimidatingly) a series of definitions.
6. **Q2** The definitions in clauses 2 to 8 appropriately rewrite the source legislation. In particular, we agree the drafting treatment referred to in Explanatory Notes paragraphs 25 and 26. We also draw attention to our comments on clause 4(2) and (3) (and, similarly, on clause 8(1) and (2)).
7. **Q3** The definition of “close company” is a relatively complex matter and we consider that the definition in clause 9, supported by clauses 10-16, rewrites it more intelligibly than in the source legislation.
8. **Q4** We are content with the rewrite of s 414(2) to (2D) of ICTA (and of the relevant part of s 414(1) ICTA) in clauses 9 to 11. The relating of the separate clauses 10 and 11 specifically to sub-clause 9(3) is particularly effective in clarifying the meaning of “close company” as is the use, in this context, of the new labels “majority winding up rights” and “relevant winding up rights”. There is arguably a case for defining

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“relevant winding up rights” in a separate section, to emphasise that it is an alternative to “majority winding up rights”, but we hold no strong view on this.

9. **Q5** Subject to our comments on clauses 13 and 16, we are content with the drafting of clauses 12 to 17 (Companies which are not to be close companies).
10. **Q6** We agree the proposal to extend the exception made by clause 19 to advances, in accordance with practice.
11. **Q7** Apart from minor comments on clause 18, we are content with the drafting of clauses 18 to 27 (being Chapter 3, Charge to tax in case of loan to participator).
12. **Q8** We support the proposal to impose the criterion of reasonableness in clause 28(1).
13. **Q9** We are content with the drafting of clause 28. We agree that it is appropriate to also expressly impose the criterion of reasonableness in clause 28(1).

## **SPECIFIC COMMENTS ON DRAFT LEGISLATION**

### **cl 1 Overview of Part**

14. **(4)** Subject to our response to Q1 and the focus on the meaning of “close company”, as it relates to a single definition amongst a number of definitions in clauses 2-8, might sub-clause 1(4) be merged with sub-clause 1(1) through referring to “including the expressions “close company” and “participator”?

### **cl 4 Meaning of “control”**

15. **(3)** In drafting clause 4(2) and (3) we assume that the words “but without prejudice to the generality of the preceding words” in s 416(2) ICTA are considered to be superfluous where clause 4(3) is prefaced “In particular ...”? Similar comments apply to clause 8(1) and (2), rewriting s 417(1) ICTA.

### **cl 10 Meaning of “majority winding up rights” and “relevant winding up rights”**

16. **(2)** Explanatory Notes paragraph 37 is not readily intelligible.

### **cl 13 Companies controlled by or on behalf of Crown**

17. **(1)** Should clause 13(1) be drafted as set out in the quotation in Explanatory Notes paragraph 47 (“if as a result of section 9(2) it is controlled ...”)?

### **cl 16 Particular types of quoted company**

18. **(1)(c)** The use of ‘any such shares’ in s 415(1)(b) ICTA is confusing. Is this considered to refer to all or only some of the shares within s 415(1)(a)? If all of them, in clause 16(1)(c) should “any such shares” be “the shares” as relating to all the shares referred to in clause 16(1)(a) rather than apparently relating only to those within clause 16(1)(b) which have been listed and dealt in on a recognised stock exchange within the preceding 12 months? If only some of them, the drafting of clause 16(1) is correct. It would be helpful if the Explanatory Notes could clarify.

### **cl 18 Charge to tax in case of loan to participator**

19. **(2)** The use of the words “is to be due”, in place of “shall be due” in the source section 419(1) ICTA, appears stilted. We assume that the intention of the clause

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18(2) drafting is to indicate that the due date for payment of tax is at some date following the making of the loan or advance (whether within the accounting period or not), but, if so, is this change really justified?

20. The same comment applies to the use of “is to be” in clause 18(3). The use of this form of words in clause 18(4) and (5), however, does appear appropriate.

#### **DETAILED COMMENT ON DRAFTING**

##### **cl 18 Charge to tax in case of loan to participator**

21. **(8)** In clause 18(8)(b) and (c), should “participators” and “companies” respectively be in the singular?

TJH/PCB  
12.11.08

## 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](mailto: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>.