

# Tax Representation



**TAXREP 18/09**

## **DOUBLE TAXATION AGREEMENTS**

**WRITTEN SUBMISSION TO THE HMRC BUSINESS INTERNATIONAL TAX  
TREATY TEAM ON THE ANNUAL REVIEW OF DOUBLE TAXATION TREATIES  
2009-10**

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| ICAEW Tax Faculty, Chartered Accountants' Hall,<br>PO Box 433, Moorgate Place, London EC2P 2BJ<br><a href="http://www.icaew.com/taxfac">www.icaew.com/taxfac</a> | T +44 (0)20 7920 8646<br>F +44 (0)20 7920 8780<br>E <a href="mailto:taxfac@icaew.com">taxfac@icaew.com</a> |
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## FINANCE BILL 2007

### INTRODUCTION

1. We are writing in response to the letter of 4 January 2009 from Steve Reszetniak, Senior Policy Adviser, in which he asked for comments on what should be the UK Government's priorities in the year to March 2010 for the UK's network of Double Taxation Agreements (DTAs) and Double Contribution Agreements (DCAs).
2. As we noted in our submission in 2008 the DCA network is currently small but as income tax and social security contributions are tending to converge in many countries it is increasingly important that the two networks are more evenly matched.
3. We also noted in last year's submission the fact that the UK has not concluded any new gift or inheritance tax treaties in the last 10 years despite the increase in cross –border migration. For example, there are several hundred thousand expatriate British citizens living in Spain, with which there is currently no treaty. While there may not have been a great demand from these British citizens for change this may be because the double taxation is effectively suffered only after their deaths. It would be helpful if HMRC could clarify whether it has a policy in relation to IHT treaties.
4. In the balance of this document we refer only to DTAs.
5. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex A. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex B.

### STRATEGIC ISSUES

6. We continue to believe that this annual review should be carried out from a more strategic viewpoint. We also believe that it would be helpful for HMRC to indicate as part of the review the issues that it wishes to pursue, particularly for renegotiations and protocols.
7. We have in mind that this review can be along the lines of other formal consultations when HMRC sets out the issues for discussion or sets of proposals on which it welcomes comments.
8. In our submission in 2008 we suggested that it would be helpful to have some indication from HMRC as to where it stands on the major treaty issues of which many have been under active consultation through OECD.

#### *Article 5 – Permanent Establishment and treatment of services*

9. When we responded to the OECD public discussion draft of December 2006 we were concerned about the OECD proposals as there was no definition for services and the proposals could lead to an extension of the taxing rights of services which did not constitute a permanent establishment in the country where the services were performed. The updated version of the OECD Model Convention was published in July 2008. In the note to the Observations on the relevant part of the Commentary (before paragraph 43) we note that the UK is not

among the countries that state that they do not share the view of the source state countries. It would be helpful to have some indication as to the UK view on this general issue.

10. We also asked, in 2008, for some indication as to HMRC's view on other recent OECD proposals and consultations as to how the authorised OECD approach to attribution of profits to permanent establishments will be addressed.

#### *Article 4 – Resident*

11. If the definition in Article 4 is interpreted strictly it tends to deny exempt institutions access to the treaty benefits. We appreciate that that might have been the general intention of the treaty negotiators 20-30 years ago, but we believe that this is no longer necessarily the case. In recent years there have been several examples of protocols, exchanges of notes or memoranda of understanding clarifying that the parties to various treaties now agree that various forms of collective investment fund, pension fund or charity can be treated as treaty residents.
12. Since these funds are a major source of portfolio investment we believe that it is now reasonable to agree on the application of article 4 to such entities whenever a new treaty is negotiated or an existing treaty revised.
13. In addition, we would welcome some indication from the UK treaty team as to why, in for instance the latest UK Netherlands treaty, it has not adopted the place of effective management test, under Article 4(3), to determine the residence of a person other than an individual but has introduced the alternative formulation in paragraph 24.1 of the Commentary to the OECD Model Tax Convention.
14. We do not believe that the absence of an effective tie breaker is acceptable in the current globalised market place and it runs counter to the HMRC objective to create a tax system which provides certainty and clarity for business.

#### *Article 25 – Mutual Agreement Procedure*

15. It would be helpful to know whether the UK is going to seek to introduce binding arbitration under Article 25 in new and renegotiated treaties. If that is the case then we believe that the UK should support baseball style arbitration for transfer pricing disputes. Under this style of arbitration each side would submit a settlement proposal to a panel of arbitrators and the panel would then choose one or other of the settlement proposals.
16. We favour consistency of approach in determining treaties e.g. for REIT dividends in Article 10. We do not have strong views as to what the formulation in this instance should be, but that it should be consistent across the UK treaty network.

#### *Other points*

17. We also believe that the UK should press ahead and, as a matter of urgency, put in place full Tax Information Exchange Agreements (TIEAs) with all the UK dependent territories. We would welcome information as to whether that is

current Government policy and, if so, when HMRC anticipates that a full set of TIEAs will be in place.

18. We feel there is scope for improving procedures for refunding tax withheld in excess of treaty rates when the process in some countries can take several years.

## **DETAILED COMMENTS – COUNTRIES**

### *Angola*

19. Some of our members have suggested that a treaty with Angola would be helpful.

### *Brazil*

20. We appreciate the potential difficulties of dealings with Brazil but other countries have in recent times negotiated their own treaties with Brazil and although some have high withholding taxes on trade mark royalties they do, otherwise, appear quite reasonable.

### *Bulgaria, Guernsey and Jersey*

21. These three countries were on the list re 2007-08, when talks were said to be under way or under consideration, but they have not been on the two most recent lists. Can HMRC explain the current position.

### *Canada*

22. At the 2007 stakeholders' meeting attended by ICAEW representatives and others the point was made that HMRC should have a further look at the UK Canada treaty following the conclusion of the latest Canada-US protocol.

### *China*

23. The importance of China as a trading partner cannot be underestimated and the treaty with China is likely to be one of the most important that the UK enters into. It is, therefore, a little disappointing to see that whereas China was thought to be the fifth in line for ratification when the 2008 review was undertaken it has now slipped back outside the first ten countries.

### *EU Member States*

24. We continue to regard it as a priority to have modern treaties with all fellow members of the EU and we should like to know whether that is also a priority for HMRC.

### *Kosovo*

25. In the light of the UK Government's recognition of the independent state of Kosovo could HMRC clarify whether the old treaty with Yugoslavia will continue to apply until a new Treaty is negotiated.

*United States of America*

26. The treaty with the US is the most important of the 117 treaties which have been entered into and it is now time for the first five year review of the 2001 treaty as envisaged in the Exchange of Notes.
27. We note that the US now has arbitration in its model and OECD has also included arbitration in Article 25(5) of its current, 2008, Model Convention. We would welcome confirmation that the UK negotiators will aim to include arbitration in any protocol to the 2001 treaty.
28. We also recommend that some of the restrictions to claiming the zero withholding on dividends, which the US has foregone in some other treaties including with Japan, should also be removed from the UK treaty.

Iky March 2009

## 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 132,000 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>.