TAXREP 7/13

(ICAEW REP 11/13)

ICAEW TAX REPRESENTATION

DEFERRAL OF PAYMENT OF CORPORATE "EXIT CHARGES"

Comments submitted on 6 February 2013 by ICAEW Tax Faculty in response to draft Finance Bill clauses published on 11 December 21012 and to a Technical Consultation on the same subject published on the same date

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the draft Finance Bill clauses published on 11 December 21012 and to comment on a Technical Consultation on the same subject published on the same date

2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

3. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

4. ICAEW is a professional membership organisation, supporting over 140,000 chartered accountants around the world. Through our technical knowledge, skills and expertise, we provide insight and leadership to the global accountancy and finance profession.

5. Our members provide financial knowledge and guidance based on the highest professional, technical and ethical standards. We develop and support individuals, organisations and communities to help them achieve long-term, sustainable economic value.

6. 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.

OUR COMMENTS

7. We believe that the current proposals in the draft clauses still fall short of what is required in order for the proposed legislation to comply with European law and EC treaty freedoms. Under European law it should be possible for gains to be deferred until the relevant asset is actually disposed of: the proposed 10 year gap on deferrals in some cases, and compulsory spreading in others, means that the current draft legislation does not achieve this.

8. The current proposals relate to exit charges arising in relation to chargeable assets, intangible assets, loan relationships and derivative contacts. However, when a company ceases to be UK resident, it is treated as ceasing to carry on its trade and this can give rise, for example, to capital allowances balancing charges and profits arising from the revaluation of trading stock. We consider that companies should also be able to defer payment of tax in respect of these assets.

9. We also consider that the equivalent charge in s80 TCGA 1992 in relation to trustees ceasing to be UK resident is likely to be in breach of EC treaty freedoms where UK trustees resign and are replaced by trustees of another EU or EEA state.

Questions in Technical Consultation

Question 1: Other EU/EEA Member States have either changed, or are in the process of changing, their rules to permit deferral in the area of exit taxes. What experiences, if any, from your dealings with these countries do you think the UK should take into account when adopting its own arrangements?

10. We are aware that Austria, Italy, the Netherlands and Sweden have already introduced rules for the deferral of corporate exit charges, and there are proposals to introduce legislation in France this year. Since most of these rules have been introduced relatively recently, we have limited practical experience to date.

Question 2: Which of the three options outlined in likely to be most attractive to your business, or to the business that you represent?

11. This will depend upon the particular facts and circumstances of each case. As indicated in the consultation document:

- immediate payment may be attractive to businesses which do not want to deal with the administrative requirements of deferral and / or are unwilling to pay interest;
- the instalment method may be attractive where there are a very large number of assets such that the tracking required under the realisation method would be administratively complex; and
- the realisation method may be attractive to businesses which expect to hold the assets for more than six years and where the number of assets involved is not such as to render the realisation basis unduly onerous to apply.

12. The realisation method is likely to be attractive to most taxpayers unless they would find the associated monitoring requirements too administratively burdensome. However, we agree that companies should be given a choice of any of these three alternative methods.

Question 3: (i) Do you agree that companies that chose to defer until realisation of assets should be required to provide regular information on all assets held?

13. See the response to Question 4 below.

(ii) If there were to be a de minimis threshold for reporting then in your view what should that level be, and how should assets below the threshold be treated?

14. We suggest that a company should only be required to report to HMRC where aggregate net profits and gains under the exit charge provisions (as defined) total £1 million or more.

Question 4: What is the most appropriate form of report and annual return and what is the minimum amount of information that should be required?

15. We agree with the European Commission proposal that it should be sufficient for the company concerned to make an annual return stating that the company is still in possession of the assets transferred, accompanied by a declaration made at the time of the actual disposal or realisation of an asset.

Question 5: The Government is proposing a requirement to provide adequate security against non-payment of the tax liability in certain cases. Do you agree that such security should be requested in exceptional cases only or should there be a requirement to provide security in all cases?

16. In the National Grid Indus BV judgment, the CJEU indicated that Member States may request security, such as a bank guarantee, where there is a risk of non-recovery of the tax (paragraph 74). However, in the de Lasteyrie case (C-9/02), which concerned French exit tax provisions for individuals, the CJEU held that a provision for deferral of payment of tax which was conditional on the setting up of guarantees was a restriction on the freedom of establishment.

17. Giving security can be onerous and costly. Based on the CJEU judgments in National Grid Indus BV and de Lasteyrie, and taking into account the fact that HMRC can obtain assistance with collection of tax under some double taxation agreements or the EU Mutual Assistance Recovery Directive (MARD), we consider that security should only be requested in exceptional cases where there is a serious risk of non-recovery of tax and the MARD does not apply. The circumstances in which security will be requested should be incorporated into the legislation, or at least set out in published HMRC guidance.

Question 6: It is envisaged that only changes necessary to permit the deferred payment of exit taxes in appropriate cases will be made.

(i) What, if any, other changes to the existing exit tax regime that have not been discussed in this document do you think are required?

18. When a company migrates its tax residence out of the UK it ceases to be within the charge to corporation tax. This can result in capital allowances balancing charges and the (re)valuation of trading stock and we believe that a company should be able to defer payment of tax in respect of these charges when it migrates to another EU or EEA member state.

(ii) Do you have any other comments on the scope or design of the reform?

19. Based on the CJEU's decision in the National Grid Indus BV case (C-371/10) we believe that any limitation on the deferral period would be contrary to EU law.

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APPENDIX 1

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)