TAXREP 25/13

(ICAEW REP 38/13)

ICAEW TAX REPRESENTATION

Implementation of International Tax Compliance (United States of America) Regulations 2013

Comments submitted on 27 February 2013 by ICAEW Tax Faculty in response to HMRC draft Guidance Notes and Draft Legislation *International Tax Compliance (United States of America) Regulations 2013* issued on 18 December 2012

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the HMRC draft Guidance Notes and Draft Legislation International Tax Compliance (United States of America) Regulations 2013 published by HM Revenue & Customs (HMRC) on18 December 2012.

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.

MAJOR POINTS

7. ICAEW Tax Faculty has liaised with the Society of Trust and Estate Practitioners (STEP) in reviewing the Draft Legislation and Draft Guidance which were issued on 18 December 2012 and are part of the Implementation of the UK-US FATCA Agreement.

8. We agree with the analysis contained in the STEP response. We have reflected below the four key areas reflected in the submission by STEP but have begun by noting a key difference between trusts in the United States and the United Kingdom which we believe makes it difficult to satisfy the US FATCA requirements in a way without making it unnecessarily onerous for UK trusts and trustees.

Difference between trusts in the United States and trusts in the United Kingdom

9. It is worth bearing in mind that there is a difference between US and UK legislation as far as the taxation of trusts is concerned. In the US trusts are taxed by reference to the grantor, who is similar to but not quite the same as a settlor. Grantor trusts are taxed on the grantor who may have no interest in either the capital or income of the trust. In the United States the majority of trusts are grantor trusts.

10. In the UK trusts are very rarely taxed on the settlor and then it is only the income that is taxed and not capital gains. The normal, default, position in the United Kingdom is that it is the trustees who are subject to taxation.

The status of trusts and trustees under the IGA

11. It is clear from the statements made by both the UK and the US authorities that the intention is to shield UK family trusts from the onerous reporting requirements of FATCA. But at the moment we are concerned that the current approach will mean that a large number of UK family trusts will be categorised as Financial Institutions (FIs) and will face significant and, in the light of the objective of the two governments, unnecessary compliance costs.

12. We agree with STEP that the problem arises because of the current approach of categorising trusts by reference to the nature of their trustees.

13. The draft guidance (paragraph 2.20) suggests that "in most cases trusts will fall to be Non Financial Foreign Entities (NFFEs) as they will not fall within the definition of the four types of Financial Institution".

14. It is increasingly common in the UK for professional practices to insist on trustee appointments being taken by their in-house trust companies rather than individuals as part of their risk management process. This will prejudice their status under FATCA as NFFEs.

15. We believe that the declared objectives of FATCA could still be achieved if trusts could be categorised by their purpose and family trusts could then be reported on by their associated FIs.

Trust reporting

16. It is very common for family trusts to hold significant non-financial assets such as real property and chattels. At the moment the reporting requirements and associated guidance suggested for trusts which are categorised as FIs are designed for institutions which primarily hold financial assets. We recommend that HMRC explicitly confirm that trusts holding substantially only real property and chattels are not to be included in the definition of FIs. There would be costly annual valuations for these trusts with little additional information of value under FATCA.

17. Where trusts are taken to be NFFEs it is possible that FIs could be required to report on trusts that hold non-financial assets such as real property and chattels. We recommend that such FIs are explicitly not required to include such assets in the account balance report as this would require costly annual valuations with little additional information of value being reported to HMRC/IRS.

Identification of "Controlling Persons" and "Specified US Persons"

18. If the trust is treated as an NFFE then it is necessary to identify any "Controlling Person" that is a Specified US Person (Article 2.2.a.1 of the IGA). The guidance indicates that "Controlling Person" is to be identified in a manner consistent with the recommendations of the Financial Action Task Force (FATF) which only use the term "controlling shareholders" for which there is a 25% threshold. It would be helpful to clarify that that is also going to be the threshold under FATCA.

19. Some thought needs to be given as to how the 25% rule is to apply to a discretionary trust where any individual beneficiary could have anything between 0 and 100% if it is on a distribution basis then is the percentage by reference to all the distributions that particular year, or over a longer period, or by reference to a capital value. It is very hard to apply the concept as it stands to a discretionary trust.

20. If the trust is an FI it has to identify each "Specified US Person that is an account holder" (IGA Article 2.2.a.1)

Certified Deemed-Compliant Status

21. Family trusts that are deemed to be FIs might find that the most effective way to deal with their reporting requirements will be by obtaining "certified deemed-compliant status" as outline in the US regulations. But it is not clear that this option is available under the IGA.

Third party reporting

22. Where trusts are to be FIs it is recommended that they can be "sponsored" i.e.. another FI involved with the trust undertakes to perform all necessary FI reporting duties.

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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)