

## TAXREP 20/08

### WRITTEN SUBMISSION TO THE HMRC CUSTOMS AND INTERNATIONAL TAX TREATY TEAM ON THE ANNUAL REVIEW OF THE DOUBLE TAXATION AGREEMENTS 2008-09

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Chartered Accountants' Hall PO Box 433 Moorgate Place London EC2P 2BJ <a href="http://www.icaew.com">www.icaew.com</a>	T +44 (0)20 7920 8646 F +44 (0)20 7920 8780 DX DX 877 London/City
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## INTRODUCTION

1. We are writing in response to the letter of 31 January 2008 from Steve Reszetniak, Senior Policy Adviser, in which we were asked to provide comments on what should be the UK Government's priorities in the year to March 2009 for the UK's network of Double Taxation Agreements (DTAs) and Double Contribution Agreements (DCAs).
2. Although the DCA network is very small it is becoming increasingly important for the two networks to be matched in the light of the increasing convergence of the two imposts.
3. We also note that the UK has not concluded any new gift & 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.

## EXECUTIVE SUMMARY

5. We recommend that this annual review should be carried out from a more strategic viewpoint.
6. We believe HMRC should indicate as part of the review the issues it wishes to pursue, particularly for renegotiations and protocols. The review that we are proposing could be along the lines of most other formal consultations when HMRC sets out the issues for discussion or sets out proposals on which it would welcome comments.

## SOME STRATEGIC ISSUES

7. It would be particularly helpful to have some indication from HMRC as to where it stands on the major treaty issues many of which are under active consultation through OECD.
8. The issues we have in mind are, in relation to the OECD Model Convention, set out below.

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

9. OECD published a public discussion draft in December 2006 and ICAEW Tax Faculty was one of the respondents. All the comments received by OECD were published on their website on 17 January 2008. In our response, see <http://www.oecd.org/dataoecd/17/55/39918799.pdf> we were concerned about the OECD proposals in that there was no definition proposed for services and the proposals would lead to an extension of the taxing rights to services which did not

constitute a permanent establishment in the country where the services were performed.

10. It would be helpful to have some indication as to HMRC's views on other recent OECD proposals and consultations such as how the authorised OECD approach to attribution of profits to permanent establishments will be addressed.
11. We believe the UK ought to come out strongly in favour of mandatory binding arbitration.

## **DETAILED COMMENTS - ARTICLES**

### **Article 13 – Capital Gains**

12. We should be grateful for confirmation as to whether it is current HMRC policy when negotiating new treaties to include a provision which ensures that a section 13 TCGA 1992 charge will continue to apply. For example this would appear to be the effect of Article 13 (9) of the current treaty with Australia.

‘The provisions of this Article shall not affect the right of the United Kingdom to levy according to its laws a tax chargeable in respect of income or gains from the alienation of any property on a person who is a resident of the United Kingdom at any time during the fiscal year in which the property is alienated, or has been so resident at any time during the 6 years immediately preceding that year.’

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

13. The new OECD arbitration provision will appear shortly in a revised version of Article 25 in the OECD Model Convention and we believe the UK should take a strong lead in ensuring that as many countries as possible adopt this in their bilateral agreements.

### **The growth of generalised anti-avoidance provisions**

14. UK treaties are bound to become uncompetitive if the domestic anti-avoidance agenda enters into the treaty network as a disproportionate approach is bound to increase treaty shopping rather than decrease it.
15. We are concerned by this potential development and we would welcome comments from HMRC.

## **DETAILED COMMENTS - COUNTRIES**

### *Angola*

16. A treaty with Angola would be helpful for some of our members.

### *Bulgarian, Guernsey and Jersey*

17. These three countries were on last year's list re 2007 – 08 where talks were said to be under way or under consideration but they are not on the current, 2008 – 09, list. Can HMRC explain what is the current position.

### *Canada*

18. 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*

19. We believe it is important for a new Treaty to be concluded with China both to reflect its importance in terms of flows of investment but also as a model for other Asian countries. We are pleased to note that China is listed in the countries with which negotiations have taken place in the past three years and at number 5 in the list it is estimated that this is one of the first treaties that will be finalised. .

### *EU Member States*

20. We 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*

21. 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 (US)*

22. The treaty with the US is the most important of all the 115 treaties which have been entered into and we note that it is coming up for its first five year review as provided by the 2001 Exchange of Notes. It remains a touchstone for all the other treaties.
23. We note that the US now has arbitration in its model and OECD is moving that way. We believe that ADR (Alternative Dispute Resolution), including arbitration, is the modern way to resolve the inevitable disputes that arise in big money issues such as transfer pricing and we believe that this should be included in a protocol to the US treaty. We note that the US tax court sends transfer pricing cases to an arbitrator so the US government should be favourably disposed to this development in the UK US treaty.

iky 29 Feb 2008

**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.