

ICAEW REPRESENTATION

TAXREP 9/11

TAX POLICY MAKING: DRAFT TAX CONSULTATION FRAMEWORK

Comments submitted on 23 February 2011 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the consultation document *Tax Policy Making: Draft Tax Consultation Framework* published on 9 December 2010.

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INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the consultation document *Tax Policy Making: Draft Tax Consultation Framework* issued by HM Revenue & Customs (HMRC) on 9 December 2010.
2. We have submitted separate comments on the Draft Protocol on Announcements Outside Scheduled Fiscal Events that was published at the same time as the draft Framework.
3. Information about the Tax Faculty and the 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. The Institute of Chartered Accountants in England and Wales (ICAEW) operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, ICAEW provides leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The ICAEW is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
5. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The ICAEW ensures these skills are constantly developed, recognised and valued.
6. The Tax Faculty is the focus for tax within ICAEW. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter TAXline to more than 11,000 members of the Institute who pay an additional subscription, and a free weekly newswire.

EXECUTIVE SUMMARY

7. We welcome the Framework and support the principles set out in Chapter 2.
8. We recommend that the Framework is enshrined in a statutorily backed Code of Practice and subject to external oversight.
9. Consideration should be given to using the expertise of the House of Lords to improve tax law.
10. Tax law should normally be set out in primary legislation and subject to proper Parliamentary scrutiny. There should be greater scrutiny of Statutory Instruments and a chronological list with hyperlinks should be included on HMRC's website.
11. Tax avoidance legislation should be properly targeted rather than being widely targeted whose scope is then cut down by non-statutory guidance.
12. We would welcome the opportunity to discuss how Impact Assessments might be improved further so that they become an essential tool in the evaluation process.

GENERAL COMMENTS

13. On 22 June 2010 the Government published *Tax Policy Making: a new approach*. ICAEW Tax Faculty submitted its response in September 2010 - this was published as TAXREP 38/10. In our response, we welcomed the new approach to tax policy making. The approach set out in the Consultation mirrors much of what we have said in previous representations. More than ten years ago we set out our own view as to how the then tax system could be improved and what principles should underpin a good tax system.
14. Our key concerns about the previous approach were:
- a lack of clear strategy for the tax system;
 - consulting too late (and over too tight a timescale) in the policy development cycle;
 - the length and complexity of the tax code;
 - uncertainty due to the volume and timing of tax changes; and
 - inadequate Parliamentary scrutiny of tax legislation.
15. More recently, we have responded to the Treasury Committee inquiry *The principles of tax policy*. This has been published as TAXREP 2/11. Our comments below are consistent with that response.

DETAILED COMMENTS

16. We welcome the Framework and support the principles set out in Chapter 2. We have the following additional comments.

A formal Code of Practice

17. The Government's proposals are a considerable improvement on previous policy and should lead to improved tax legislation in the longer term. However, this approach will require sustained effort over the longer-term. We therefore believe that the Framework should be enshrined in a statutorily backed Code of Practice (the Code).

Oversight of the Code

18. There should also be external monitoring of how the government of the day has complied with the Code and we suggest that there should be a periodic review of new legislation, either by the Treasury Committee or some other suitable oversight body.

A role for the House of Lords

19. The House of Lords has considerable expertise in drafting tax law which could be used to improve tax law. We have suggested in the past that, without undermining the long established principle that the House of Commons should be the arbiter on Money Bills, consideration should be given to whether the House of Lords could be given a role in examining and improving Finance Bill measures. The deliberative process should be carried out in collaboration with those who have to operate and actually run the systems, including agents and the professional bodies. There is an argument for disengaging many of the measures, particularly those of a technical nature, from the traditional Finance Bill timetable and putting such measures through a separate process. The current Government approach demonstrates that such an approach should be possible and has resulted in improved opportunities for scrutiny.

Drafting of tax law

20. Tax law should be clear, properly targeted and generally included in primary legislation. It is particularly important that anti-avoidance measures are properly targeted and are not 'catch all' measures whose scope is then cut down by HMRC guidance. This is not a satisfactory approach following the 2005 House of Lords decision in the *Wilkinson* case [2005] UKHL 30. Such guidance cannot be relied upon and, given that it may be changed at any time, is unlikely to be of much practical help in the event of a dispute.

Subject to proper Parliamentary scrutiny

21. It is important that tax law is subject to proper Parliamentary scrutiny. It is for this reason that we have always argued that substantive tax legislation should be set out in primary tax legislation and not in secondary tax legislation. There has been a tendency in recent years to include within the primary law powers for the executive to, in effect, rewrite the primary tax legislation by way of secondary legislation. It is reasonable for Parliament to delegate minor and administrative measures to the executive but not otherwise. We believe that as a matter of principle any changes to tax law which are not merely administrative should be put through the Finance Bill process and subject to proper Parliamentary scrutiny. Such principles and practice could be set out in the Code suggested above and again be subject to a review process.
22. More generally we believe that there is a need for greater scrutiny of, and publicity for, Statutory Instruments. In relation to improved scrutiny, the number of tax-related Statutory Instruments has grown considerably over the years and Parliament needs to be satisfied that they are subject to a thorough review. In relation to publicity, taxpayers need to have ready access to tax legislation but with the volume of tax legislation and the large number of Statutory Instruments published each year, this is a far from easy task. It is not sufficient to list selective ones on HMRC's *What's new* webpages. HMRC's website should have a dedicated page that lists in chronological order all tax related Statutory Instruments that have been published together with hyperlinks to the underlying documents.
23. It is also clear that a proper understanding of tax legislation and the manner in which it will be implemented require any guidance to be produced at the time that the proposals are being debated and before they are enacted. We welcome the Government's recognition of the need for this approach and believe that it should be codified so as to ensure that it is followed in the future. There should also be consultation with interested parties on that guidance to ensure that it is clear and correctly reflects the primary and secondary legislation which it explains.

Impact assessments

24. We welcome the commitment to producing impact assessments which we believe should help to achieve greater transparency on the objectives and anticipated impacts of particular policy measures. However, we believe that they require further work to ensure that they become an essential tool in evaluating tax policy and we would welcome the opportunity to work with officials to develop them further.

IKY/FH

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APPENDIX 1

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. It can be accessed from the following page:
<http://www.icaew.com/en/technical/tax/tax-faculty/tax-guidance-notes?utm=widget>