

ICAEW TAX FACULTY REPRESENTATION

TAXREP 41/10

DISCLOSURE OF INHERITANCE TAX AVOIDANCE

Comments submitted on 13 October 2010 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Treasury in response to the consultation document issued on 27 July 2010 by HM Revenue & Customs

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DISCLOSURE OF INHERITANCE TAX AVOIDANCE

INTRODUCTION

1. In this document we present the response of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) to the above-named discussion document published by HM Revenue & Customs (HMRC) on 27 July 2010 at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_030624.
2. We are pleased to have the opportunity to respond to this consultation. We would 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 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 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, the Institute provides leadership and practical support to over 134,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute 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 Institute ensures these skills are constantly developed, recognised and valued.
6. The Tax Faculty is the focus for tax within the Institute. 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.

MAIN POINTS

7. We are concerned that the regulations are predicated on the basis of statutory reliefs (namely business property, agricultural property, maintenance funds, and conditionally exempt transfers) being within the disclosure provisions and so needing to be specifically exempted. We consider that being entitled to a relief ordained by Parliament is not something that would be within tax avoidance disclosure regulations at all as a matter of first principles.
8. The impact assessment seems understated given that any firm that potentially advises on setting up trusts will need to have procedures in place to ensure that they comply with these regulations. Such procedures including training will give rise to initial set-up costs (estimated as negligible) and ongoing costs (woefully underestimated).

COMMENTS AND ANSWERS TO SPECIFIC QUESTIONS

IHT Description Regulations

Question 1: Is the proposed description is the best means of bringing IHT, as it applies to trusts, within the DOTAS regime?

And

Question 2: Does the exemption in draft Regulation 3 achieve the right balance so that avoidance schemes are disclosed whereas arrangements not involving avoidance are not?

And

Question 4: If you think an alternative description would be more appropriate, can you suggest one and explain why it would be preferable?

And

Question 5: Do you have any comments on the detail of the draft Regulations in Part A of the Technical Note?

9. We are concerned that the regulations are predicated on the basis of certain statutory reliefs, namely business property, agricultural property, maintenance funds, and conditionally exempt transfers, being within the provisions and so needing to be specifically exempted.
10. We consider that being entitled to a relief ordained by Parliament in circumstances where the legislative tests are met is not something that would be within tax avoidance disclosure regulations at all as a matter of first principles: these main reliefs should be outside the scope and not in it and then excluded.

Question 3: What arrangements that are not concerned with tax avoidance might be required to be disclosed under the proposed description?

11. As every time a client asks for IHT planning advice, prima facie it appears that it will fall to be notified, we should welcome clarification in the rules of whether the following will be notifiable:
 - The gifting of assets to a relevant property trust up to the nil rate band, where those assets are to be sold, thus enjoying an extra nil rate band, as noted in [TAXline May 2010 item 117](#). Is the subsequent sale a 'step' and therefore avoidance?
 - Multiple trusts established on successive days, with a view to being fed by payments which are 'normal expenditure out of income' and only to the extent that each trust's value remains below the nil rate band; and
 - Life insurance policies written in trust.
12. We should welcome clarification of the meaning of 'any element' in regulation 3(1). In the relevant property trust example above, the 'scheme' has been published so is in the public domain, but what if it had not been published?
13. We should welcome clarification of who is the 'person' to whom FA 2004 s306(1)(b) *Meaning of "notifiable arrangements" and "notifiable proposal"* applies in the context of IHT, for example where the result of planning could be to enhance the funds in a discretionary trust. While the trustees are undoubtedly within the definition of person, since they hold assets only in a fiduciary capacity it is clearly not the trustees who benefit if the trust assets are more valuable than they would have been. There may be no such person living at the time of the planning, for example unborn grandchildren and we do not consider that the unborn can be regarded as able to benefit for this purpose.

IHT information requirements

14. We have no comments on Questions 6-10.

Impact Assessment

Question 11: Do you have any comments on the assumptions made in the impact assessment?

15. The impact assessment seems much understated given that any firm that potentially advises on setting up trusts will need to have procedures in place to ensure that they comply with these regulations.
16. The estimate of £100,000 for the yearly cost to both HMRC and promoters will be correct only if the exclusions are very clear and wide so that very few advisers need to look at these regulations. If all firms have to train staff and establish systems, which we suspect will be the case, then £100,000 is a very considerable underestimate of the ongoing cost which we would estimate is more likely to run into £millions.
17. The impact assessment also ignores initial setting up and training costs, which we find inexplicable.

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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.com/index.cfm?route=128518>).

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