



## INHERITANCE TAX AND EXCLUDED PROPERTY ADDED TO AND TRANSFERRED BETWEEN TRUSTS (DRAFT FINANCE BILL 2019-20)

Issued 5 September 2019

ICAEW welcomes the opportunity to respond to the **draft Finance Bill 2019-20 legislation** consultation on **Inheritance Tax and excluded property added to and transferred between trusts** published by HMRC on 11 July 2019.

This response of 5 September 2019 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

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## EXECUTIVE SUMMARY

1. The changes were raised last year as part of Budget 2019. We broadly discussed our concerns with HMRC as part of a bi-lateral December 2019 meeting ICAEW Tax Faculty representatives had with a relevant HMRC official. We did not have significant details at that stage but one of our main issues was the apparent retrospective action of the legislation<sup>1</sup>. This is still a concern.

## THE MEASURE

2. This clause introduces legislation to provide that additions of assets by individuals domiciled in the United Kingdom to trusts made when they were non-domiciled cannot be excluded property and are therefore within the scope of Inheritance Tax.

## PARTICULAR POINTS WE ARE CONCERNED ABOUT

### Lack of consultation paper

3. Our understanding was that a consultation paper on the changes would be issued and we would have the opportunity to submit a formal response to the proposals. However, the expected consultation paper was not issued. We are disappointed by this lack of consultation.

### Timing issues

4. Whilst we appreciate that there was an announcement in November 2018 the lack of a consultation paper or any follow up until now will have meant that trustees of offshore trusts are unlikely to have considered these changes in the necessary detail. We are concerned that the legislation will come in from Royal Assent and there will be insufficient time for trustees to take advice so as to understand the full implications and whether they want to take any actions to unwind structures etc.

## Our concerns

### Multiple uses of the word “property”

5. The draft legislation includes the word ‘*property*’ on various occasions. For example, the word ‘*property*’ is used three times in section 1(2). The meaning of property is not defined in this legislation. We would like to confirm that the use of the word property in this legislation is **not** intended to include:
  - transfers of value generally;
  - interest free loans; and
  - fees paid as a result of funds passing into the trust bank account and then coming out (money in and out).

### Accidental tainting of an excluded property trust

6. We would like to confirm that HMRC accepts that a pragmatic approach should be adopted if a taxpayer accidentally taints a trust such that there is a mixture of excluded and non-excluded property. Specifically, we would like to confirm that a proportional approach will be adopted. We would prefer if the legislation were clarified on this point.
7. What we mean by a proportional approach is best explained by way of an example:

Sophia settled the Sophia Offshore Discretionary Trust when she was foreign domiciled and not UK deemed domiciled. By mistake she added a further £5 million to the trust when she was deemed UK domiciled. Immediately prior to this

<sup>1</sup> House of Commons Library, “Retrospective legislation”, Standard Note SN/PC/06454, 14 June 2013 – see page 2 for the section “What is retrospective legislation?”

settlement the trust property was worth £15 million (all of which was excluded property).

As such, assuming the property remains non-UK situs, going forward the trust should be seen as being made up of 75% excluded property and 25% non-excluded property.

With respect to distributions the equitable tracing rules from case law should be applied (*Clayton's Case* but if this does not result in an equitable outcome then consider *Barlow Clowes v Vaughan*).

### **Our recommendation**

8. Delay the proposals for 12 month and carry out a proper consultation.

## 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 https://goo.gl/x6UjJ5](https://goo.gl/x6UjJ5)).