



# ICAEW REPRESENTATION 32/16

## TAX REPRESENTATION

### Company distributions – draft clauses 16 – 18 Finance Bill 2016

ICAEW welcomes the opportunity to comment on [draft clauses 16 – 18 Finance Bill 2016](#) published by HM Treasury and HM Revenue & Customs on 9 December 2015. Comments on the accompanying consultation document [Company distributions](#) are covered separately in ICAEW representation 31/16.

As various stages of the consultation process were omitted before the consultation document and draft legislation were published, and because the legislation will affect a wider group than its target, we consider that it is inappropriate to restrict the consultation to eight weeks. This is contrary to the recommended 12 week period in the government guidance regarding consultations <https://www.gov.uk/government/publications/consultation-principles-guidance>. The proposed changes will impact on many transactions, not just those cited in the consultation document, and lead to unfair outcomes and additional administrative burdens. A proper consultation could help avoid this collateral damage.

This response of 3 February 2016 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

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## MAJOR POINTS

### Key point summary

1. Concerns over the validity of clearance applications made now for transactions occurring on or after 6 April 2016 have already been raised with you and the letter dated 20 January 2016 regarding this issue is attached as Appendix 2. For information, we also attach your response dated 29 January 2016.
2. We are disappointed at the lack of consultation process concerning the changes to the transactions in securities rules in clause 16. The changes to the regime in 2010 were preceded by a lengthy period of consultation and both HMRC and advisers were fully aware of reasons why changes were being made.
3. In general, the changes being made to the counteraction process by clause 17 are a welcome simplification.
4. We foresee a number of practical difficulties with the operation of clause 18, as set out below. This document, together with the response to the associated consultation document on company distributions, set out potential issues that have been identified.

### General comments

5. While the stated reason for this review is the changes to dividend taxation, as the changes to dividend taxation are driven by the continued desire to reduce the corporation tax rate, the reduction in the corporation tax rate must be the ultimate reason for the review.

### Clause 16

6. The proposed change in the motive test in s684(1)(c), ITA 2007 from the “purpose of the person in being a party to the transaction in securities” to the “purpose of the transaction in securities” should be well publicised to prevent clearance applications being rejected on the basis that the purpose of the transaction has not been described.
7. The proposed change in persons affected in s684(1)(d), ITA 2007 from “the person” to “any person” arguably widens the scope of the legislation to the position it was from 1960 until 2010. Is this widening of scope intentional?
8. While it is noted from the draft explanatory notes that it is a point of clarification, it is questionable whether it is necessary to add “a repayment of share capital or share premium” to the list of examples of transactions in securities in s684(2), ITA 2007. It is difficult to see why it would not be a transaction in securities, regardless of this clarification.
9. The addition of “a distribution in respect of securities on a winding up” to the list of examples of transactions in securities in s684(2), ITA 2007 overrides the basic presumption behind the legislation that a liquidation is not a transaction in securities and will widen its scope. This will increase the associated administration for HMRC and taxpayers. What is the reason behind this change in scope?
10. Should the proposed new s685(7A), ITA 2007 simply be a replacement for the deleted s685(6)? We note that the change in wording clarifies that a simple reduction of capital is not exempted from the transactions in securities rules as it is not an amount available for distribution by way of a dividend, even though it is a return of amounts subscribed.
11. Which definition of control should apply to the proposed new s685(7B), ITA 2007 as control is not a defined term in s713, ITA 2007? Is it the definition in s995, ITA 2007?
12. The definition of associate in the proposed new s686, ITA 2007 is to be an amended version of s681DL, ITA 2007. We would question whether that is an appropriate definition as that

definition refers to associates (ie, plural), whereas proposed new s686(3), ITA 2007 refers to both associate and associates. Also, it is strange that trustees do not appear to be associated with beneficiaries.

13. For the purposes of the definition of associate used by the proposed revised income tax advantage test in s687(2), ITA 2007, it is not clear whether a body of persons in s681DL, ITA 2007 includes a company as arguably, a company is a singular person.
14. As set out in Appendix 2, the commencement rules in subclause (10) call into question how the clearance service will operate during the transitional period.

### Clause 17

15. The changes to the administrative process are generally welcome. It is assumed that this does not change the fundamental premise that the transactions in securities rules are outside of self assessment and therefore taxpayers should continue to self assess on the basis that the transaction is subject to capital gains tax.
16. It is assumed that the normal powers and safeguards that apply to self assessment enquiries will apply to such enquiries. Are cross references to TMA 1970 required to clarify how the enquiry process will operate where not otherwise specified?
17. The proposed new s698(5), ITA 2007 is a welcome clarification of how the rules interact with the general time limits in s34, TMA 1970.
18. It is not clear what purpose is served by requiring HMRC to explain why it does not consider that an income tax advantage should be counteracted (proposed s698(1) and s698A, ITA 2007).
19. With the exception of changes to time limits introduced by clause 17, consideration should also be given to introducing this simplified process to transactions that took place wholly before 6 April 2016.

### Clause 18

20. Condition B in the proposed s396B(3) and s404A(3), ITTOIA 2005 will need to be considered for two years from the date of the distribution which extends beyond the self assessment deadline related to the distribution. From a practical standpoint, if circumstances change such that Condition B could apply, but the taxpayer considers that Condition C is not met, the taxpayer must reflect this in a return through an amendment, although this could only be made by making an entry on the white space of the return. Will this be adequate disclosure for HMRC's system to be able to capture it?
21. Condition B, and in particular, proposed s396B(3)(b) and s404(3)(b), ITTOIA 2005 do not even require the individual to be carrying on or involved in the trade or activity for the condition to be met. Relatives (perhaps estranged relatives) that happen to carry on the same type of trade or activity through another company (perhaps because there is a family tradition in the business), would mean that the taxpayer is caught by this leg of Condition B. This is absurd. The taxpayer would then be relying on the fact that Condition C is not met (if that is possible – see paragraph 24 below). The purpose of this test is not clear.
22. It is envisaged that there will be significant contention over whether the trade or activities are the “same as, or similar to” those carried out by the company that has been wound up. Clear statutory provisions would be better than guidance. The use of the words, “such a trade or activity” in proposed s396B(3)(b) and (c) and s404A(3)(b) and (c) ITTOIA 2005 is even less clear and we would recommend that the drafting is improved.

- 23.** The meaning of “activity” and “involved” in s396B(3) and s404A(3) ITTOIA 2005 is not clear – does either “activity” or “involved” include employment? If activity includes employment, then this will preclude the common practice of the former business owner continuing in a consultancy role post the business sale, which is common to facilitate a smooth handover. If either includes employment, then this would prevent working for a family member who happens to have a business in the same trade.
- 24.** Condition C (proposed s396B(4) and s404A(4) ITTOIA 2005) would appear to catch every distribution on a winding up because realistically everything could be distributed in advance as a dividend. Is this intentional? In the absence of being able to target the legislation better, HMRC will need to provide guidance on this.
- 25.** Sections 396B(6)(b) and s404A(6)(b) ITTOIA 2005 do not seem to cover fully demerger situations and we would recommend that this is rectified to ensure that demergers are excluded as this appears to be the intention as set out in the explanatory notes.

## 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 via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).

## APPENDIX 2



20 January 2016

Adrian Coates  
HM Revenue & Customs

Dear Mr Coates

### **Draft clause 16 Finance Bill 2016 and clearance applications**

Our members have expressed concern over the transitional rules in draft clause 16 and, in particular, how subclause (10) will apply in respect of clearances for transactions occurring on or after 6 April 2016 where the clearance is sought before that date.

We understand that the vast majority of clearances granted under s701, ITA 2007 are granted on the basis of the motive test ie, that the person entering into the transactions in securities does not have an intention to obtain an income tax advantage. Clause 16(10)(d) does not appear to apply to such cases on the basis that they would satisfy both the current motive test and the proposed new motive test. Our interpretation of this is that where neither the individuals concerned nor the arrangements as a whole are designed to obtain an income tax advantage, clearances granted prior to 6 April 2016 remain valid, even if some or all of the transactions in securities occur on or after that date. We would welcome confirmation from HMRC that this is indeed the case.

Given the current uncertainty over the validity of clearances granted before 6 April 2016, it would also be helpful if the Clearance and Counteraction Unit were able to grant clearances that state that the clearance is either valid under the rules as they apply up to 5 April 2016, but not necessarily thereafter; or, alternatively, that the clearance is valid under both the old and the proposed new legislation, so that any clearance granted is valid even if some or all of the transactions in securities occur on or after 6 April 2016. Otherwise, it is envisaged that there will be a flood of resubmissions of clearance applications on 6 April 2016. Can HMRC please confirm that the Clearance and Counteraction Unit is empowered to grant clearances in those terms?

Finally, we will be responding with considered comments on draft clauses 16-18 of the Finance Bill together with the consultation on company distributions, but would like to seek comfort for our members concerning the operation of clearances in advance of that submission.

We would like to publish this letter together with your response please as soon as possible.

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**Date** 29 January 2016  
**Our ref**

Dear Ms Monteith

Thank you for your comments regarding the proposed changes to the Transactions in Securities legislation. We fully appreciate the concerns that you raise and have been discussing potential solutions.

Firstly, I can confirm that the Clearance and Counteraction team are already using the following wording where they believe that a clearance given now might not be valid should the proposed changes be brought in on 6 April 2016:

*The Board take the view that the notification given in this letter may become void with effect from 6 April if the proposed changes to the transactions in securities provisions which were published on 9 December 2015 come into effect as drafted.*

I can also confirm that the team have also been providing a view on the matter where they have been specifically asked. Following your feedback, and representations received from various other parties, the Clearance and Counteraction have agreed that it would be helpful to go further than this. Starting now, all clearances will contain either the wording quoted above, or the following wording (or variants thereof):

*The Board consider that this clearance will not be affected by the proposed changes to the transactions in securities provisions which were published on 9 December 2015.*

Assuming that the proposed legislation is passed by Parliament, there will be a slightly different issue from 6 April 2016 until Royal Assent is received. I can also confirm that during this period both clearance and refusal letters will contain similar wording to the above in order to provide the applicant with as much certainty as is possible. The precise wording is currently the subject of discussion with HMRC Solicitors.

I can confirm that I am happy for you to publish this letter, or to publicise the content in any way you deem necessary, as I agree it will be useful to circulate the information as widely as possible.

I hope that this satisfies your concerns, but if you or your members have any further issues that you would like to discuss, please let me know. Otherwise, I look forward to you receiving your reply to the consultation.

Yours sincerely

**Adrian Coates**