ICAEW
REPRESENTATION 107/18

FINANCE BILL 2018-19: CLAUSES 33 AND 34

Issued 31 August 2018

ICAEW welcomes the opportunity to respond to the consultation on draft Finance (No. 3) Bill 2017-19 legislation: Clauses 33 and 34: Time limits for assessments involving offshore matters: IT, CGT and IHT published by HMRC on 6 July 2018.

This response of 31 August 2018 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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ICAEW Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)20 7920 8100 **icaew.com**

EXECUTIVE SUMMARY

1. The Extension of Offshore Time Limits Consultation Document published on 19 February 2018 was the first consultation document on the subject and focused on the design principles for legislation to extend the time limits for HMRC to assess tax in cases involving offshore income, gains or chargeable transfers. We are disappointed that there was no consultation on the policy itself, which is contract to the principles in the policy paper The new Budget timetable and the tax policy making process.
2. The Extension of Offshore Time limits Summary of Responses Document seems to make it quite clear that there was very little that was going to be changed as a result of the consultation responses. We are though pleased that:
   - the proposals will not be extended to corporation tax;
   - the extension in the time limits will not apply to personal representatives of deceased individuals; and
   - HMRC will not be able to make an assessment where it could reasonably be aware of information has been received under mandatory exchange of information agreements.
3. We do not think it is right that the distinction between innocent and careless errors is being removed by the new legislation. The distinction between innocent and careless errors should remain with a reduced assessment period for innocent errors.
4. We would also dispute that the measures will not impose significant compliance burdens.
5. We are concerned that extending the time limits increases the period that taxpayers must wait before they know they have closure in their tax affairs, and also causes problems where records have not been retained for the years which will be brought into the 12-year assessment period.
6. These new provisions also raise various significant issues for tax agents, concerning record-retention and data protection rules, and professional indemnity insurance concerns.
7. While we disagree with the proposals, we think that generally the draft legislation achieves the stated aims. We have concerns with respect to the draft legislation in both clause 33 and clause 34 where HMRC receives information from overseas through mandatory automatic exchange. The provisions seem rather imprecise and unclear as to what the assessment time limit will be in such circumstances.
8. Contrary to what has been said in the various papers produced we firmly believe that the proposed commencement rules are retrospective. If the proposal is enacted in Finance Act 2019 they should only apply to tax years from 2019/20 onwards.

MAJOR POINTS

9. The Extension of Offshore Time Limits Consultation Document published on 19 February 2018 was the first consultation document on the subject and focused on the design principles for legislation to extend the time limits for HMRC to assess tax in cases involving offshore income, gains or chargeable transfers.
10. Specifically, the consultation considered the design principles for legislation implementing the minimum tax assessment limit of 12 years announced at the Autumn Budget 2017 in cases of non-deliberate offshore tax non-compliance. There was no consultation on the policy itself.
11. The lack of consultation on the policy was particularly surprising given the commitments in the policy paper published on 6 December 2017 entitled The new Budget timetable and the tax policy making process. In chapter 3 of that policy paper there is a significant focus on early stage consultation on policy. Clear-cut commitments to consult on policy have, therefore been breached very soon after being reiterated.
12. We support the government's aim of tackling tax non-compliance, and accept that the policy decision to enact these proposals is a decision for government. Nonetheless we have strong concerns about them. We would recommend the following changes:

- the distinction between innocent and careless errors should remain with a reduced assessment period for innocent errors;
- the taxpayer safeguards should be strengthened, so that it is more difficult for HMRC to raise an assessment in the extended time period.

13. In order to respond adequately to challenges by HMRC, taxpayers will need to retain records. Otherwise they will not be able to show whether any additional tax demanded by HMRC is correctly due. Taxpayers who may have kept records for more recent years, as required by statute, will be disadvantaged if they no longer have records for the earlier years covered by the 12-year assessment period.
14. For tax agents these new provisions raise various significant issues that will need to be considered such as:
    - the need to retain records to protect clients from these potential late assessments versus the need to keep within the GDPR requirements; and
    - whether professional indemnity insurance will need to be kept up for longer (well into retirement).
15. Taxpayers want to engage with an efficient and fair tax system and to have certainty and closure with respect to their tax affairs. This measure runs counter to that, as 12 years is not a reasonable period of time to have to wait to have closure when you have not knowingly done anything wrong (and indeed may not have even been careless).
16. Following on from the above points, we are concerned that extending the assessment period sends out the wrong message about the UK tax system to the internationally mobile individuals that we want to attract to the UK for the good of the economy. Making the personal tax arena a less attractive place in the UK could also indirectly impact on corporate investment from foreign companies that want to be able to attract a good workforce to the UK.
17. The 6 July 2018 Policy Paper included a summary of impacts which showed that up to the end of 2022/23 they are in aggregate only expected to bring in £15 million. There is no indication of the impact on HMRC resources (this part of the impact assessment not having been considered) so the net Exchequer yield is likely to be even less. We do not see how such a small yield can justify the negative impacts described above.
18. We do not accept the contention that the proposed commencement provisions are not retrospective. Furthermore, this contention is contrary to the 14 June 2013 House of Common Library Standard Note SN/PC/06454 on “Retrospective legislation” the first chapter of which defines the terms (see Appendix 1).

SPECIFIC COMMENTS ON CLAUSES 33(2) AND 34(3)

19. These are the main provisions extending the time limits.

Our concern

20. Our concern is with the draft legislation in both clause 33 and clause 34 where HMRC receives information from overseas through mandatory automatic exchange. The provisions seem rather imprecise and unclear as to what the assessment time limit will be in such circumstances.

Our recommendation and suggested amendment

We recommend that these provisions are redrafted to make it clear that where mandatory automatic exchange of information applies the standard four years (innocent error) and six years (carelessness) time limits apply. In such circumstances we can see no reason why HMRC cannot raise discovery assessments in those periods. HMRC should look at the information that comes in from automatic exchange on a timely basis and should act on it in a timely fashion.

APPENDIX 1

Definition of "retrospective legislation as per chapter 1 of the 14 June 2013 House of Common Library Standard Note SN/PC/06454 on "Retrospective legislation".

1 What is retrospective legislation?

Retrospective legislation is generally defined as legislation which 'takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'.[1]

According to the *Oxford Dictionary of Law*, retrospective (or retroactive) legislation is:

> *Legislation that operates on matters taking place before its enactment, e.g. by penalizing conduct that was lawful when it occurred. There is a presumption that statutes are not intended to have retroactive effect unless they merely change legal procedure.*[2]

Under its entry for 'retrospective' Stroud's Judicial Dictionary of Words and Phrases outlines the principle:

> *… 'nova constitutio futuris formam imponere debet, non proeteritis', that is unless there be clear words to the contrary statutes 'do not apply to a past, but to a future, state or circumstance'.*[3]

The previous Government's position on introducing retrospective legislation was set out by Harriet Harman, the Solicitor General, in answer to a question from Jonathan Sayeed:

> ***Mr. Sayeed:*** *To ask the Parliamentary Secretary, Lord Chancellor's Department if he will make a statement on the Government's policy on the introduction of retrospective legislation.*
>
> ***The Solicitor-General:*** *I have been asked to reply. The Government's policy before introducing a legislative provision having retrospective effect is to balance the conflicting public interests and to consider whether the general public interest in the law not being changed retrospectively may be outweighed by any competing public interest. In making this assessment the Government will have regard to relevant international standards including those of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was incorporated into United Kingdom law by the Human Rights Act 1998."*[4]

[1] *Craies on Legislation, 9th edition, p432 n136*
[2] *Elizabeth A Martin (ed), Oxford Dictionary of Law fourth edition, 1997, p406*
[3] Daniel Greenberg and Alexandra Millbrook, *Stroud's Judicial Dictionary of Words and Phrases* sixth edition, 2000, Vol 3, p2315
[4] HC Deb 6 March 2002, Vol 381 c409-10W

APPENDIX 2

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).