ICAEW
REPRESENTATION 20/25

PERSONAL TAX OFFSHORE ANTI-AVOIDANCE LEGISLATION - CALL FOR EVIDENCE

Issued 18 February 2025

ICAEW welcomes the opportunity to comment on the personal tax offshore anti-avoidance legislation - call for evidence, published by HMRC on 30 October 2024, a copy of which is available from this link.

ICAEW has many concerns about the current anti-avoidance rules, as their evolution has created areas where their application lacks clarity. Taxpayers have no route for obtaining certainty about their tax position. ICAEW would welcome a detailed review of the operation and interaction of all of the provisions.

This response of 18 February 2025 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW 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. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 169,000 chartered accountant members in over 146 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

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KEY POINTS

The anti-avoidance provisions that are part of this call for evidence are an unduly complex set of provisions, which have existed since the 1930s. Their evolution over the course of time, including interpretations by the Courts and the defences to these rules, has meant that the rules have become unduly onerous and detached from commercial reality. The rules have to be considered together, and taxpayers cannot get certainty on their tax position. The legislation as it stands struggles to meet at least six of ICAEW's Ten Tenets for a Better Tax System (see Appendix 1). ICAEW considers that it is now time to redesign the rules, to make them fit for purpose for the current era.

ICAEW welcomes the government's review of these rules, and we look forward to engaging on more detailed proposals later this year.

BACKGROUND TO THE CALL FOR EVIDENCE

On 29 July 2024, the government announced its intention to conduct a review of the offshore anti-avoidance legislation to modernise the rules and ensure they are fit for purpose. With the removal of non-domicile status from 6 April 2025, the government recognises that new offshore structures could be brought into the scope of these rules. It therefore intends to carry out a review on whether the rules are working as intended. This call for evidence marks the beginning of this process. Responses to this call for evidence will be used to inform areas which will be subject to a formal consultation in 2025.

HMRC's stated aims are:

1. To understand and identify areas where the personal tax offshore anti-avoidance rules could be improved or updated.
2. To explore options to modernise these rules to
    - remove ambiguity and uncertainty in the legislation;
    - make the rules simpler to apply in practice; and
    - ensure these provisions are effective

The call for evidence relates to the following legislation:

1. Settlements legislation (Ch5, Pt5, ITTOIA 2005)
2. Transfer of assets abroad (Ch2, Pt13, ITA 2007)
3. Capital gains tax (CGT) (ss 3-3A, ss86-87, and Sch 4C, TCGA 1992)

ANSWERS TO SPECIFIC QUESTIONS

Q1: What could be done to simplify this legislation?

ICAEW's Ten Tenets (see Appendix 1) state that legislation should be:

- Certain (Tenet two);
- Simple (Tenet three);
- Properly targeted (Tenet five)
- Regularly reviewed (Tenet eight);
- Fair and reasonable (Tenet nine); and
- Competitive (Tenet ten).

As it stands, these anti-avoidance provisions struggle to meet these six Tenets.

Income tax settlement rules

1. The operation of these rules should be considered alongside those discussed below, so that as regards the taxation of income and offshore income gains a single coherent set of rules emerges.

Transfer of assets abroad

2. The single most important anti-avoidance tax code that relates to income is the transfer of assets abroad (ToAA) legislation set out at Ch2, Pt13, ITA 2007. We consider that it needs to be modernised. The existing rules relating to transferors within s720, ITA 2007 can be traced back to s18 and Sch 2, FA 1936, which became law on 16 July 1936 and set a pattern that has largely remained unchanged since.
3. Although attempts have been made over a number of years to bring the regime up to date, the problem still persists that these rules were originally designed in an age where international trade and investment was very different from the circumstances of today. A further factor is that there has grown up an extensive body of judicial decisions against which these rules have to be measured.
4. A regular pattern has emerged whereby the courts have attempted to construe the rules in a manner that is in tune with current commercial practices, only for the government of the day to introduce amendments which have the effect of making the legislation more complex and further removed from commercial practice.
5. An example of this was the decision of the Supreme Court in favour of the taxpayers, in *Fisher v HMRC* [2023] UKSC 44, which was subsequently countered by F(No.2)A 2024. This extended the charging regime to transfers made by closely held companies. We have identified various problems or areas of uncertainty caused by this legislation, including in our 2024 Budget representation (ICAEW REP 48/24), in that:
    - It potentially applies to intra-group transactions between subsidiaries, which is broader in scope than we believe was intended (see para 12 of our 2024 response).
    - It lacks a clear definition of whether an individual is 'involved' directly or indirectly in the decision making of the company (s720A(4), ITA 2007). Does this apply to decision making in general or to the decision-making process that was specific to transferring assets abroad?
    - It is unclear about when an individual's involvement is tested? It would be sensible for this to be when the decision is made, but the legislation is silent.
    - It is silent on how the income of the closely-held company should be apportioned where there are multiple participators and also where there is scope for a charge under more than one provision (eg, s720 or s731, ITA 2007). The risk is that 100% of the income could be attributed to a UK-resident individual who only has a small shareholding. Although s743, ITA 2007 prevents a duplication of charges, apportionment should not be left to a decision by an HMRC officer, as provided for in s743(2), which creates uncertainty for taxpayers.
    - The 2024 changes apply to income arising from 6 April 2024, even if the transaction occurred many years ago. The information needed to make a complete self assessment disclosure may no longer exist.
6. The position has been compounded by the extension of the rules to catch individuals receiving a benefit as a result of relevant transactions. The combined effect makes this area of taxation extremely complex.

Capital gains tax (CGT) legislation

7. While not perfect, this legislation does not have the same number of issues that have to be faced in connection with ToAA.

Q2: What could be done to remove inconsistencies and align this legislation?

8. A thorough review should be undertaken in conjunction with representatives from interested trade and professional bodies, including those involved with taxation.
9. At para 18 of ICAEW's response to the 2024 ToAA legislative changes (ICAEW REP 48/24), we noted that there was no clearance mechanism in place for this legislation. Taxpayers are reliant on making sufficient 'white space' disclosure on their returns, and are uncertain of whether their

tax return will be enquired into. With the changes to the taxation of non-UK domiciled individuals, more people will need to self assess whether the ToAA rules apply to them.

Q3: What are your views on how the motive defence tests are applied and what areas of these tests could be improved?

10. The rules are a mishmash of provisions that need to be revised and completely brought up to date.
11. The ToAA exemptions potentially involve three sets of rules, as there are slightly differing definitions:
    i. all transactions are post-4 December 2005 (s737, ITA 2007);
    ii. all transactions are pre-5 December 2005 (s739, ITA 2007); or
    iii. there are transactions spanning both periods (s740, ITA 2007).

12. It is unclear if the EU exemption at s742A(3), ITA 2007 can be relied upon after 31 December 2020.
13. In our 2024 response, we suggested five areas for amendment of the TOAA rules (paras 22-25):
    - The F(No. 2)A 2024 provisions should apply to relevant transactions that occur on or after 6 April 2024 instead of income arising on or after 6 April 2024.
    - A statutory clearance mechanism should be introduced to increase certainty for taxpayers potentially within scope of the legislation.
    - The breadth of this new legislation should be limited to reduce the uncertainty for taxpayers and workload for HMRC.
    - The 'involvement' condition should be defined and limited to decisions in relation to the transfer in question.
    - Minority participators should be subject to a different test of connection.

Q4: Do you have any suggestions on how the government should approach personal tax offshore anti-avoidance legislation in these areas going forward?

14. The approach should be undertaken in conjunction with interested trade and professional bodies, including those involved with taxation. The onus should be on establishing a set of provisions that does not penalise offshore commercially aligned investments or structures.
15. At para 17 of our 2024 response, we enquired about whether HMRC was expecting an increase in motive defence claims and if so, whether it had sufficient resources to deal with them. If there has been an increase, or if one is still expected following the 2024 changes noted above, then HMRC should be properly supported and staff should be given sufficient training, so that enquiries are progressed promptly, and taxpayers are not left in an uncertain position.

Q5: Are there any other personal tax offshore anti-avoidance provisions the government should consider as part of the consultation?

16. One such set of rules are those concerned with the taxation of offshore income gains realised by offshore entities. Here three sets of rules are potentially engaged. Those within the ToAA code, those concerned with matching trust gains to benefits received by UK residents and where gains of closely-held non-resident companies are apportioned to participators. Again, this is unduly complex.

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).