TAXREP 20/12

(ICAEW REP 78/12)

ICAEW TAX REPRESENTATION

EUROPEAN COMMISSION CONSULTATION ON DOUBLE NON-TAXATION

Comments submitted on 30 May 2012 by ICAEW Tax Faculty in response to European Commission consultation document *The internal market: factual examples of double non-taxation cases* published on 29 February 2012

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ICAEW European Commission Register of Interest Representatives.
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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *The internal market: factual examples of double non-taxation cases* published by the European Commission on 29 February 2012. The consultation aims to gather evidence of double non-taxation within the EU and with Third Countries.

2. We should 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 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 any tax system.

WHO WE ARE

4. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

5. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

6. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

7. We are listed on the European Commission Register of Interest Representatives. Our registration number is 7719382720-34.

MAJOR POINTS

8. We are concerned that the underlying premise of the paper seems to be that double non taxation is necessarily a bad thing. In practice it will often arise because tax systems established by reference to the circumstances in individual jurisdictions will not necessarily match up with the tax systems in other jurisdictions. This will cause mismatches when cross border activities are involved.

9. A matter of days after the publication of the European Commission consultation the OECD published a report *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues*. We are surprised that these two papers, which treat very similar topics, appear not to have been coordinated when so many EU member states are also members of OECD.

10. There needs to be a consistent approach at the international policy level and it is in our view important that two of the major supranational bodies which are concerned with tax policy should provide a coherent approach and there should be appropriate coordination between these approaches. We understand that the two organisations were aware that each was

working in the same area but the consultation and report do not demonstrate a clear, common, approach to the issues raised.

11. In our view the Commission paper seems to be less targeted than the equivalent OECD report which recommends that rather than harmonisation of domestic tax systems countries should consider specific domestic anti avoidance rules and/or rules specifically addressing hybrid mismatch arrangements. The specific recommendations in the OECD report are for countries to:

- Consider introducing or revising specific and targeted rules denying benefits in the case of certain hybrid mismatch arrangements;
- Continue sharing relevant intelligence on hybrid mismatch arrangements, the deterrence, detection and response strategies used, and monitor their effectiveness; and
- Consider introducing or revising disclosure initiatives targeted at certain hybrid mismatch arrangements.

12. It should be noted that there is no common tax system within the EU and member states continue to reserve the right to control their own corporate tax systems and rules. The way in which transactions and entities are treated, and whether income or gains are taxed or not, is largely based on the tax systems of the individual countries. Overlaying that there are bilateral agreements between countries aimed at the avoidance of double taxation, the OECD has formulated guidelines on transfer pricing and there is, in the European Union, the work of the EU Transfer pricing forum in this latter area. Finally some countries have taken steps to cover some issues of international avoidance such as the UK anti-arbitrage rules.

13. The Commission paper considers eight substantive issues but there is no definition of what is meant by undesirable double non taxation and we believe it would help understanding of the matters raised if such a definition was put forward. For instance some non taxation may be the result of deliberate policy choices by member states aimed to achieve particular economic and commercial objectives and if this non taxation extends across border then that is not necessarily an improper policy objective.

14. The breadth of the examples in the consultation document seem to extend the scope of non taxation to instances of low taxation and we are not clear that this is the real cause of the concern. If a suitable definition could be put forward, as we have suggested, then this would help target potential action at what are the real causes of concern.

15. We are also not clear why this work on non-taxation was not carried out by the Code of Conduct group of the European Union and we believe that group would be a more appropriate forum for work in this area.

16. The judgments of the Court of Justice of the European Union (CJEU) have consistently noted that tax is a competence of the individual member states and the Cadbury Schweppes judgment made clear that establishing a genuine business / subsidiary in another member state to benefit from an advantageous tax position is acceptable and is in accordance with freedom of establishment principle which underpins the European Union.

17. We believe it is appropriate for the European Commission to undertake work to ensure that the tax systems of the member states are co-ordinated to achieve agreed policy objectives. It is, however, important to ensure that the tax systems of the member states remain competitive in the current world where business is genuinely global and has real choices between different geographical locations.

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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 icaew.com/en/technical/tax/tax-faculty/~/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)