LOAN RELATIONSHIPS DEEMED RELEASES AND DEBT BUYBACKS

COMMENTS FROM THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND TO HM REVENUE & CUSTOMS

9 MARCH 2012
The Institute of Chartered Accountants of Scotland welcomes the opportunity to comment on the document “Loan relationships deemed releases and debt buybacks Draft Legislation, Explanatory Note and Tax Information and Impact Note” dated 27 February 2012

ICAS has no objection to the principle of HMRC taking effective action, through the enactment of legislation, to close loopholes such as in this case, which arise from the defective drafting of earlier legislative provisions. Indeed, in our representations in June 2011 to the General Anti-Avoidance Rule Study led by Graham Aaronson QC, we queried whether the information gained by HMRC under the Disclosure of Tax Avoidance Schemes provisions was being used as effectively as it might be by HMRC to deal with specific tax avoidance arrangements notified. We also support the use of targeted legislative provisions, rather than the introduction of general and so less certain, wording or interpretations, to address specific issues.

We do however have a number of reservations on the retrospective application of the draft provision to 1 December 2011, rather than being effective from the date of the announcement. We consider that retrospection in tax is, in principle, inappropriate and flawed, and should not be applied. We do not comment on the merit of this specific provision or on behalf of any particular taxpayer, rather about the principle of retrospection itself, in all circumstances and for all taxpayers.

We note the Minister’s assurances that a retrospective approach will only be taken in circumstances which are “wholly exceptional”. There is subjectivity of interpretation of that phrase, and, indeed, the possibility that its application may change at any time as a matter of HMRC internal policy, rather than after proper consultation and legislative scrutiny. This results in a situation of tax uncertainty in the minds of many businesses, advisers and taxpayers, which has been greatly increased by the reality of the introduction of this retrospective provision.

Taxpayers should know the tax consequences of their activities and decisions at the time, as a matter of entirely sensible commercial practice and reflective of a competitive tax regime. The European Court of Human Rights has a role in reviewing tax retrospection, and of judgements such as that in National & Provincial Building Society and others v United Kingdom. However, that kind of appeal is slow, time consuming and extremely expensive for any taxpayer to make and it is simply not appropriate that UK taxpayers are left with that as their only route to protecting their exposure to retrospective legislation being enacted. It should be a last route to take, but not the only one, to deal with perceived unfairness or appropriateness of retrospection.

ICAS is keen therefore to seek assurances from HM Treasury and HMRC that a policy announcement be made to restore a sense of certainty around changes to the UK tax regime. This is consistent with the representations we made on 14 February 2011 on the draft Protocol on Announcements Outside Scheduled Fiscal Events, a copy of which is attached to this document, and developed in view of this current development.

If HMRC and HM Treasury are unable to confirm that retrospection as a principle will not be repeated in the future, we would wish a policy announcement to address the following concerns:

1. In light of this experience, further explanation needs to be given of what HMRC regards as “wholly exceptional” in the use of retrospective provisions; is that in terms of potential tax cost, or referring to infrequency of use (and if so, how many times a year?) or of the area of tax (such as a loophole in anti-avoidance provisions)? There should be clarity for taxpayers and openness on the intended approach in future.
2. Retrospective arrangements should not be announced which affect a sizeable number of taxpayers, say over 10, unless this is in connection with a single, unique aggressive tax planning scheme where a greater number are involved on a group or collective basis, when it should involve only those in that scheme. Details of the HMRC view of the numbers (but not the identity) they believe will be affected should be publicised with the announcement. This should remove uncertainty about the possibility of widespread changes and unintended consequences.

3. That retrospective changes will not give rise to any penalties or interest charges, when tax has been paid on account in good faith in respect of payments due prior to any change being announced.

4. That HMRC will protect taxpayer confidentiality in relation to the reasons for retrospection; the media announcement should focus on the detailed justification for the retrospection in law, not the identity of the alleged taxpayer.

5. That appropriate consultation with the representative bodies or the Forum of Tax Professionals should take place before such an announcement is made. The policy approach on announcements outside scheduled fiscal events cited time as the reason for departing from the accepted consultation approach. It is difficult to see how time could be an issue when the real question is the appropriateness of backdating.

We look forward to the outcome of the review process.
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