Tax Law Rewrite

Response to Paper CC/SC (08) 10

Bill 6: Permanent establishments and UK representatives

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Introduction

1. We published committee paper CC/SC (08) 10 on 31 March 2008 on the HMRC internet website www.hmrc.gov.uk/rewrite. The closing date for responses was 27 June 2008. The draft clauses rewrite:

- sections 148 and 152 of, and Schedule 26 to, FA 2003, which determine what constitutes a permanent establishment of a company in a territory, and

- section 150 of that Act, which deals with the assessment, collection and recovery of corporation tax from the UK representative of a non-UK resident company carrying on a trade through a permanent establishment in the United Kingdom.

2. The purpose of this response document is to provide details of the substantive points made and to explain our analysis and proposals in respect of them. Minor points such as suggestions to improve punctuation are not covered, but all comments received have been carefully considered.

3. We received written responses from the following:

- the Institute of Chartered Accountants in England and Wales and

- the CBI.

4. We are very grateful for all the comments made, many of which were detailed and we appreciate the time and effort that went into them. We are sending each respondent a copy of this response document.

5. The following abbreviations are used:

- FA 2003 the Finance Act 2003 (and similarly for other Finance Acts)

- HMRC Her Majesty's Revenue and Customs

- ITA the Income Tax Act 2007

- TMA the Taxes Management Act 1970.

Clause 5: The independent broker conditions

Q1. We welcome comments on the addition of the words "(apart from this subsection)" in clause 5(6).

Both respondents supported this proposal.

Clause 6: The independent investment manager conditions

A respondent commented that the words "independent businesses dealing with each other at arm's length" in subsection (5) did not have quite the same meaning as the words "independent businesses that deal with each other at arm's length" in the source legislation. The respondent expressed the view that the wording used in the source legislation can only refer to the general course of dealing between the parties, whereas the rewritten version seems to be referring to the terms of the particular transaction under consideration. The respondent considered that it may be more sensible to express this test by reference to the terms of the particular transaction, rather than some wider relationship between the parties, but did not consider that it is clear which is meant.

6. We do not consider that the words used in clause 6, which are also used in section 818(4) of ITA also based on paragraph 7(2) of Schedule 26 to FA 2003, have any different effect to those in the source legislation.

The respondent also considered that it is not clear from the wording as it stands (either in the source legislation or in the rewritten version) whether the requirement is –

(a) that when the investment manager acts on behalf of the non-UK resident in relation to the transaction in question they actually are independent businesses dealing with each other at arm's length; or

(b) that when the investment manager acts on behalf of the non-UK resident in relation to the transaction he does so on terms such as would have applied between (hypothetical) independent businesses dealing with each other at arm's length.

The respondent observed that the latter seems more closely to represent the approach of SP1/01 and that, in particular, version (a) would appear to be inconsistent with paragraph 22 of the statement.

7. We do not consider that there is any distinction. If when the investment manager acts on behalf of the non-UK resident in relation to the transaction the investment manager does so on terms such as would have applied between (hypothetical) independent businesses dealing with each other at arm's length, then in relation to the transaction in question the investment manager and the non-UK resident are in fact independent businesses dealing with each other at arm's length.

8. Among other things, SP1/01 gives guidance on the circumstances in which HMRC will consider the independent capacity test in paragraph 3(2)(c) of Schedule 26 to FA 2003 to be met. SP1/01 was re-issued in substantially revised form in July 2007. The guidance is now to be found in paragraphs 35 to 44.

9. ***We do not propose to amend clause 6.***

Clause 8: Section 7: interpretation

Q2. We welcome comments on the use of "the total of the non-UK resident company's income" in clause 8(3).

Both respondents supported this proposal.

Clause 11: Meaning of "investment manager" and "investment transaction"

A respondent asked whether regulations made under the power in paragraph 3(3) of Schedule 26 to FA 2003 as amended by Schedule 16 to FA 2008 would continue to be made by statutory instrument which is subject to annulment in pursuance of a resolution of the House of Commons.

10. The amendments made by Schedule 16 to FA 2008 to paragraph 3(3) and (4) of Schedule 26 to FA 2003 have been made after consultation with the investment management industry and are designed to enable HMRC to react quickly to bring new products within the scope of the investment manager exemption where this is appropriate.

11. ***Accordingly, regulations made by HMRC under the power in paragraph 3(3) of Schedule 26 to FA 2003 as amended (and the corresponding powers in section 127(12) of FA 1995 and section 827(2) of ITA, which have been amended by FA 2008 in identical manner) are not subject to any Parliamentary procedure.***

Chapter 2: Collection etc. of tax from UK representatives of non-UK resident companies

Q3. We welcome comments on the proposal to include Chapter 2 in Bill 6.

Both respondents supported the proposal to include these administrative provisions alongside Chapter 1 in Bill 6 rather than in TMA.