

Part 1: Tax avoidance

Overview

1. The draft clauses rewrite sections 703 to 709 of ICTA for the purposes of corporation tax.
2. Sections 703 to 709 of ICTA were enacted as a wide-ranging anti-avoidance rule which would enable the Crown to counter all manner of devices to avoid tax involving transactions in shares or other securities or the manipulation of a company's assets or both, and to forestall the creation of such devices in future.
3. Chapter 1 of Part 13 of ITA 2007 rewrote sections 703 to 709 of ICTA for the purposes of income tax, and paragraphs 154 to 161 of Schedule 1 to ITA 2007 consequentially amended those sections to apply solely for the purposes of corporation tax.
4. The draft clauses replicate Chapter 1 of Part 13 of ITA 2007 as far as possible. They differ from Chapter 1 of Part 13 of ITA 2007 in two respects.
5. First, where the draft clauses rewrite provisions of ICTA which are corporation tax specific there are no corresponding provisions in ITA 2007. These are noted in detail in the commentary on clauses 5 and 6. In addition there are some provisions in ITA which are not reflected in the draft clauses. Sections 703 to 709 of ICTA, as amended, do not include any provisions corresponding to sections 699 and 712 of ITA 2007 (limit on amount assessed in section 689 and 690 cases; application of Chapter where individual within section 684 dies), because these sections are income tax specific; accordingly, no such provisions appear in the draft clauses.
6. Second, where necessary the draft clauses use terminology specific to corporation tax where Chapter 1 of Part 13 of ITA 2007 uses terminology specific to income tax. For example, since persons other than companies are not liable to corporation tax, the draft clauses use the word "company" to refer to the taxpayer where Chapter 1 of Part 13 of ITA 2007 uses the word "person".
7. In rewriting sections 703 to 709 of ICTA for the purposes of income tax, Chapter 1 of Part 13 of ITA 2007 included some minor changes in the law. Respondents to the consultations on the draft income tax clauses supported these changes, and they were approved by the Joint Committee on Tax Law Rewrite Bills when it considered the Income Tax Bill. The same changes are proposed in the draft clauses, for the purposes of corporation tax. They are highlighted in the commentary on clauses 12, 15 to 18, 22, 25 and 26.
8. General issues of principle raised by the rewrite of sections 703 to 709 of ICTA were considered and resolved in the course of the project's work on what became Chapter 1 of Part 13 of ITA 2007. For details, see:

- Paper CC/SC (05) 31 – Transactions in securities;
- Paragraphs 2129 to 2288 of the draft explanatory notes on the draft Income Tax Bill; and
- Paragraphs 297 to 301 of the Response Document published following consultation on the draft Income Tax Bill.

9. These documents are currently available at <http://www.hmrc.gov.uk/rewrite/exposure/menu.htm#2>.

10. The rewrite of this legislation for the purposes of corporation tax raises a new point of detail, which is highlighted in the commentary on clause 7.

Chapter 1: Transactions in securities

Clauses 1 to 4: Overview of Chapter, meaning of “corporation tax advantage”, company liable to counteraction of corporation tax advantages and exception where no tax avoidance object shown

11. *Clauses 1 to 4* introduce the Chapter and provide definitions of “corporation tax advantage” and the company liable to counteraction. They are based on sections 703(1) and (2) and 709(1) and (2A) of ICTA.

12. Except as noted in the Overview above, these clauses replicate exactly sections 682 to 685 of ITA 2007.

Clause 5: Abnormal dividends used for exemptions or reliefs (circumstance A)

13. *Clause 5* is the first in a sequence of clauses in which the sets of circumstances in section 704 of ICTA are laid out and expanded in six separate clauses. It is based on sections 704 A and 709(3) of ICTA.

14. This clause is very similar to section 686 of ITA 2007. The main change is in *subsection (4)* where the purposes listed differ from those listed in section 686(4) of ITA 2007 to cater for the application of the clause to companies.

Clauses 6 and 7: Deductions from profits obtained following distribution or dealings (circumstance B) and circumstance B deductions used for group relief

15. *Clauses 6 and 7* are based on sections 704 B and 709(3) of ICTA.

16. Clause 6 is very similar to section 687 of ITA 2007. But Chapter 1 of Part 13 of ITA 2007 has no equivalent of clause 7, which concerns group relief and is corporation tax specific.

17. Section 704 B(2) of ICTA, on which clause 7 is based, provides that “section 703 shall apply” rather than “this Chapter shall apply”. But it would be highly anomalous if the other provisions of Chapter 1 of Part 17 of ICTA could not apply in a case within section 704 B(2) of that Act For example, if a counteraction notice was

given, the taxpayer would be unable to appeal under section 705 of that Act. It is therefore considered that the reference to section 703 in section 704 B(2) of ICTA refers by implication to the other provisions of Chapter 1 of Part 17 of that Act. *Subsection (2)* of clause 7 therefore provides that “This Chapter applies” – not merely those provisions of the Chapter which are based on section 703 of ICTA.

Clauses 8 and 9: Receipt of consideration representing company’s assets, future receipts or trading stock (circumstance C) and receipt of consideration in connection with relevant company distribution (circumstance D)

18. *Clauses 8 and 9* are based on sections 704 B, 704 C, 704 D and 709 of ICTA.

19. Except as noted in the Overview above, these clauses replicate exactly sections 688 and 689 of ITA 2007.

Clause 10: Receipt of assets of relevant company (circumstance E)

20. This clause is based on sections 704 E and 709(3) of ICTA. Apart from differences of the kind described in the Overview, it replicates section 690 of ITA 2007.

21. The project intends to rewrite sections 254 and 704 E of ICTA in the same Bill. *Subsection (8)(b)* will be adjusted in due course.

Clause 11: Meaning of “relevant company” in sections 9 and 10

22. This clause defines “relevant company” in the same way as section 691 of ITA 2007. It is based on section 704 D of ICTA.

23. *Subsection (1)* reflects the amendment to section 704 D of ICTA made by paragraph 7(7) of Schedule 26 to FA 2007.

24. The project intends to rewrite sections 416 and 704 D of ICTA in the same Bill. *Subsection (4)* will be adjusted in due course.

Clause 12: Abnormal dividends: general

25. *Clause 12* is the first of three interpretative sections about abnormal dividends. It is based on section 709(4) of ICTA. Clause 12 of this Bill and section 692 of ITA 2007 are identical.

26. This clause replaces the reference to “the Board” with a reference to “an officer of Revenue and Customs” (namely, the officer dealing with the case). See *Change 5* in Annex 1 to the explanatory notes on ITA 2007, reproduced for ease of reference in Annex 1 to this paper, and *Change 4* in Annex 1 to CC/SC (07) 18 (loan relationships).

27. HMRC’s internal procedures restrict the exercise of the Commissioners for Revenue and Customs’ functions under Chapter 1 of Part 17 of ICTA to a small group of specialist officers. This change in the law will have no effect on this practice.

Q1. Change 1 reproduces Change 5 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 5 in ITA 2007 across to corporation tax in clause 12.

Clauses 13 and 14: Abnormal dividends: the excessive return condition and the excessive accrual condition

28. *Clauses 13 and 14* define the excessive return condition and the excessive accrual condition. They are based on section 709(4) to (6) of ICTA.

29. Except as noted in the Overview above, these clauses replicate exactly sections 693 and 694 of ITA 2007.

Clauses 15 to 18: Preliminary notification that section 3 may apply, opposed notifications and counteraction notices

30. *Clauses 15 to 18* are concerned with the procedure for counteraction of corporation tax advantages. They are based on sections 703(3), (9), (10) and (12) and 704 E(2) of ICTA; apart from differences of the kind described in the Overview, they replicate sections 695 to 698 and 700 of ITA 2007.

31. As explained in the commentary on clause 12, clauses 15 to 18 replace references to “the Board” with references to “an officer of Revenue and Customs” (namely, the officer dealing with the case). See *Change 5* in Annex 1 to the explanatory notes on ITA 2007, reproduced for ease of reference in Annex 1 to this paper, and *Change 4* in Annex 1 to CC/SC (07) 18 (loan relationships).

Q2. Change 1 reproduces Change 5 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 5 in ITA 2007 across to corporation tax in clauses 15 to 18.

Clauses 19 to 21: Timing of assessments in section 10 cases and clearance procedure

32. *Clause 19* is a special rule for the timing of assessments in section 10 cases. It is based on section 704 E(2) and (3) of ICTA.

33. *Clauses 20 and 21* are concerned with the clearance procedure. They are based on section 707 of ICTA.

34. Except as noted in the Overview above, these clauses replicate exactly sections 700 to 702 of ITA 2007.

Clause 22: Power to obtain information

35. This clause gives HMRC power to obtain information relevant to this Chapter. It is based on section 708 of ICTA; apart from differences of the kind mentioned in the Overview, it replicates section 703 of ITA 2007.

36. As explained in the commentary on clause 12, *clause 22* replaces references to “the Board” with references to “an officer of Revenue and Customs” (namely, the officer dealing with the case). See *Change 5* in Annex 1 to the explanatory notes on ITA 2007, reproduced for ease of reference in Annex 1 to this paper, and *Change 4* in Annex 1 to CC/SC (07) 18 (loan relationships).

Q3. Change 1 reproduces Change 5 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 5 in ITA 2007 across to corporation tax in clause 22.

37. *Subsection (6)* changes the 28-day information gathering time limit to 30 days. See *Change 2* in Annex 1 to this paper, which corresponds to *Change 108* in Annex 1 to the explanatory notes on ITA 2007.

Q4. Change 2 reproduces Change 108 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 108 in ITA 2007 across to corporation tax in clause 22.

Clauses 23 and 24: The tribunal and appeals against counteraction notices

38. *Clause 23* prescribes how the special tribunal for the purposes of this Chapter is to be constituted. It is based on section 706 of ICTA.

39. *Clause 24* is concerned with appeals against counteraction notices. It is based on section 705(1) and (5) of ICTA.

40. Except as noted in the Overview above, these clauses replicate exactly sections 704 and 705 of ITA 2007.

Clause 25: Rehearing by tribunal of appeal against counteraction notices

41. *Clause 25* is concerned with the tribunal rehearing appeals against counteraction notices. It is based on section 705(2), (3) and (5) of ICTA. Clause 25 of this Bill and section 706 of ITA 2007 are identical.

42. As explained in the commentary on clause 12, clause 25 replaces references to “the Board” with a reference to “an officer of Revenue and Customs” (namely, the officer dealing with the case). See *Change 5* in Annex 1 to the explanatory notes on ITA 2007, and *Change 4* in Annex 1 to CC/SC (07) 18 (loan relationships).

Q5. Change 1 reproduces Change 5 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 5 in ITA 2007 across to corporation tax in clause 25.

Clause 26: Statement of case by tribunal for opinion of High Court or Court of Session

43. This clause is concerned with appeals from the tribunal to the High Court (in England and Wales) or the Court of Session (in Scotland). It is based on sections 705(5) and 705A of ICTA. Clause 26 of this Bill and section 707 of ITA 2007 are identical.

44. As explained in the commentary on clause 12, *subsection (1)* replaces a reference to “the Board” with a reference to “an officer of Revenue and Customs” (namely, the officer dealing with the case). See *Change 5* in Annex 1 to the explanatory notes on ITA 2007, and *Change 4* in Annex 1 to CC/SC (07) 18 (loan relationships).

Q6. Change 1 reproduces Change 5 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 5 in ITA 2007 across to corporation tax in clause 26.

45. *Subsection (2)* removes the requirement in section 705A of ICTA for the dissatisfied party to declare “his or their dissatisfaction” before requiring the tribunal to state a case for the opinion of the court. This is a minor administrative change in the law. See *Change 3* in Annex 1 to this paper, which corresponds to *Change 109* in Annex 1 to the explanatory notes on ITA 2007.

Q7. Change 3 reproduces Change 109 in ITA 2007 and so brings the income and corporation tax codes back into line. We welcome comments on the proposal to carry Change 109 in ITA 2007 across to corporation tax in clause 26.

Clauses 27 to 31: Cases before High Court or Court of Session, effect of appeals against tribunal’s determination under section 25, appeals from High Court or Court of Session, proceedings in Northern Ireland and interpretation of Chapter

46. *Clauses 27 to 30* are concerned with appeal procedures. They are based on sections 705A and 705B of ICTA.

47. *Clause 31* is interpretative. It is based on section 709(2) of ICTA.

48. Except as noted in the Overview above, these clauses replicate exactly sections 708 to 711 and 713 of ITA 2007.

Annex 1

Change 5 in Annex 1 to the explanatory notes on ITA 2007: References to “officer of Revenue and Customs”

This change replaces references to “the Board of Inland Revenue” (and one reference to “the Commissioners for Her Majesty’s Revenue and Customs”) in the source legislation with references to “an officer of Revenue and Customs”.

References in the source legislation to “the Board of Inland Revenue” are treated by section 50(1) of CRCA as references to “the Commissioners for Her Majesty’s Revenue and Customs”. The rest of this note accordingly refers to the Commissioners for Her Majesty’s Revenue and Customs (the Commissioners) rather than to the Board of Inland Revenue.

The provisions affected by this change will in future authorise or require things to be done by or in relation to an officer of Revenue and Customs rather than by or in relation to the Commissioners. This reflects the way in which HMRC is organised and operates in practice. Section 13 of CRCA allows nearly all functions conferred on the Commissioners to be exercised by any officer. All of the functions affected by this change, which are in the main concerned with administrative processes, are in fact exercised by officers of the Commissioners, and the Commissioners themselves are not personally involved in their exercise.

Where the source legislation provides for a claim or election to be made to the Commissioners, this Act does not expressly state to whom such a claim or election is to be made. Where a return has been issued, section 42(2) of TMA requires the claim to be made in the return if possible and the return must be made to the officer who issued it. Similarly, where the claim is to be made outside a return, paragraph 2(1) of Schedule 1A to TMA requires the claim to be made to an officer.

Where a claim was formerly to the Commissioners, this change has a further consequence. Under section 46C of TMA (claims in a return) and paragraph 10 of Schedule 1A to TMA (claims outside a return), appeals concerning such claims are to the Special Commissioners. This contrasts with the rules in sections 31B to 31D of TMA under which, in most cases, a taxpayer may appeal to the General Commissioners or elect under section 31D to appeal to the Special Commissioners. The abolition of the requirement that a claim must be made to the Commissioners means that the rules in sections 31B to 31D will generally apply to appeals affected by this change. But in a few cases, especially where the issue is likely to be complex, appeals remain reserved to the Special Commissioners.

This Act also removes any unnecessary references to any claim or election being in a form specified by the Commissioners. In relation to a claim or election in a return section 113 of TMA provides that the return shall be in such form as the Commissioners prescribe. Paragraph 2(3) of Schedule 1A to TMA makes parallel provision in relation to claims and elections made outside returns.

Section 113 of, and Schedule 1A to, TMA do not apply to the form of certificates, notices etc. Where the source legislation provides that the Commissioners determine the form of such documents, this Act retains that approach, even though section 13 of CRCA means the work can be, and is, done by officers in practice. This is in order to indicate that such material is prescribed for HMRC as a whole.

Each provision affected by the conversion or omission of references to the Commissioners will be identified in the Table of Origins by a cross-reference to this change.

In ITEPA and ITTOIA references to “an inspector” in the source legislation which were converted to “the Inland Revenue” (meaning any officer) were also identified as a change. But references to an inspector are treated by section 59(2) of CRCA as references to an officer of Revenue and Customs. It follows that it is no longer appropriate to identify the conversion of such references as a change.

This change has no implications for the amount of tax due, who pays it or when. It affects (in principle and in practice) only administrative matters.

Change 2: Transactions in securities: power to obtain information: minimum time to respond: clause 22

This change provides that the recipient of a notice to provide information relevant to the legislation on transactions in securities or transfers of assets abroad must have at least 30 days to reply, rather than at least 28 days.

Section 708 of ICTA enables HMRC to serve notices requiring the recipient to provide information relevant to the legislation on, respectively, transactions in securities and transfers of assets abroad.

Section 708 requires that the recipient must be given at least 28 days in which to reply. In other similar provisions, such as section 778 of ICTA, which is rewritten in [the clause of this Bill corresponding to section 771 of ITA 2007], the statutory minimum is 30 days.

Clause 22 of this Bill rewrites section 708. It harmonises the time limits by setting the statutory minimum at 30 days.

This change has no effect for the amount of tax paid, who pays it or when. It affects (in principle but not in practice) only administrative matters.

Change 3: Transactions in securities: statement of case by tribunal for opinion of court: clause 26

This change affects the procedure on income tax appeals concerning transactions in securities by removing the requirement for the dissatisfied party to “declare his or their dissatisfaction” before requiring the tribunal to state a case for the opinion of the court.

Chapter 1 of Part 17 of ICTA (transactions in securities) has its own appeals procedure. This includes the option for the dissatisfied party to require an appeal which has been heard by the Special Commissioners to be re-heard by the special tribunal constituted under section 706 of ICTA.

Section 705A(1) and (2) of ICTA provide:

(1) Immediately after the determination by the tribunal of an appeal re-heard by them under section 705 of this Act, the appellant or the Board, if dissatisfied with the determination as being erroneous in point of law, may declare his or their dissatisfaction to the tribunal.

(2) The appellant or the Board, as the case may be, having declared his or their dissatisfaction, may, within thirty days after the determination, by notice in writing require the tribunal to state and sign a case for the opinion of the High Court.

Under sections 705A(12) and 705B(1) of ICTA, in Scottish and Northern Irish appeals the case is stated for the opinion of the Court of Session sitting as the Court of Exchequer in Scotland and the Court of Appeal in Northern Ireland, respectively.

Section 705A thus obliges the dissatisfied party to declare his or their dissatisfaction before requiring the tribunal to state a case.

This obligation is considered to be superfluous.

Section 56 of TMA also deals with tax appeals to the courts by way of case stated. Section 56 of TMA (statement of case for opinion of High Court) was amended by SI 1994/1813, which (among other things) confined section 56 to appeals from the General Commissioners and substituted section 56A of TMA (appeals from the Special Commissioners). SI 1994/1813 repealed section 56(1) and (2) of TMA, the wording of which was identical in all material respects to section 705A(1) and (2). It is considered a historical accident that the obligation to declare dissatisfaction has been retained in section 705A of ICTA when it has been omitted from section 56 of TMA.

Clause 26, which is based on section 705A of ICTA, therefore omits the requirement for the dissatisfied party to declare dissatisfaction before requiring the tribunal to state a case.

This change has no implications for the amount of tax due, who pays it or when. It affects (in principle and in practice) only administrative matters.