Tax Law Rewrite

Response to Paper CC/SC (08) 20
Bill 6: Manufactured payments and repos

8 January 2009

Introduction

1. In May 2008 we published on the HMRC internet website www.hmrc.gov.uk/rewrite Committee Paper CC/SC (08) 20 (manufactured payments and repos). The closing date for responses was 29 August 2008.

2. The purpose of this response document is to provide details of the substantive technical 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 Chartered Institute of Taxation;
- The Confederation of British Industry;
- The Institute of Chartered Accountants in England and Wales; and
- One individual.

4. The following abbreviations for tax legislation are used in this response document:

- ICTA Income and Corporation Taxes Act 1988
- ITA Income Tax Act 2007

5. We are 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.

Clause 4{j60manint}: Meaning of "manufactured dividend"

One respondent found the drafting of clause 4{j60manint} unclear.

6. ***We will consider whether the drafting can be sharpened.***

Clause 7{j60manint2}: Meaning of "manufactured interest" and "manufactured overseas dividend"

Question 1 We welcome comments on the proposal to use the same definition of "manufactured interest" in the "manufactured payments and repos" Part of Bill 6 as is being used in the "loan relationships" Part of Bill 5 (Change 609).

Respondents were content with this proposal

One respondent did not object to the proposal to align the definitions, but questioned whether this Part needed to use the concept of "manufactured interest" at all.

7. As explained below in the context of clause 19{j623A7C}, we consider that this Part does need to use the concept of "manufactured interest".

8. ***We intend to make Change 609 in the "manufactured payments and repos" Part of Bill 6.***

Clause 9{j6093}: Manufactured dividends on UK shares: Real Estate Investment Trusts

One respondent recommended merging clause 9{j6093}(1) and (2).

9. ***We will be happy to do this.***

One respondent thought that "to the extent that" would be clearer than "so far as" in clause 9{j6093}(2).

10. The two expressions mean the same thing.

11. ***We will retain "so far as" for the sake of consistency with section 576(2) of ITA.***

Clause 10{j6010}: Statements about manufactured dividends

One respondent thought that "to the extent that" would be clearer than "so far as" in clause 10{j6010}.

12. ***We will retain "so far as" for the sake of consistency with section 577 of ITA.***

Clause 12{j6063}: Manufactured overseas dividends: treatment of recipient

One respondent queried whether clause 12{j6063}(4) and (5) rewrote paragraph 4(4) of Schedule 23A to ICTA accurately.

13. The respondent correctly noted that ITA had amended paragraph 4(4). However, the respondent appears to have overlooked the subsequent amendment of paragraph 4(4) by SI 2007/3506.

14. ***We do not intend to adjust the clause.***

15. *One respondent suggested that it would be helpful for clause 12{j6063} to include a provision stating that it was subject to clauses 14{j6021} and 15{j6065}.*

16. ***We will be happy to do so.***

Clause 13{j6067}: Powers about manufactured overseas dividends

One respondent noted that clause 13{j6067}(4) referred to "the amount paid or payable to a person", where the source legislation had "the amount paid or payable to or by any person".

17. This change is merely verbal and does not change the law. Since any amount paid to one person is necessarily also paid by another, it is (as the respondent surmised) not necessary to refer explicitly to both aspects.

18. ***We will retain the wording under review for the sake of consistency with section 582(4) of ITA.***

Clause 14{j6021}: Manufactured dividends exceeding underlying payments

One respondent noted that the sidenote on this clause was inaccurate, in that the clause also dealt with manufactured overseas dividends.

19. ***We will change the sidenote to "Manufactured payments exceeding underlying payments". Cf. the sidenote on section 583 of ITA.***

One respondent noted that "accounted for" in paragraph 7(1)(b)(ii) of Schedule 23A to ICTA was rewritten in clause 14{j6021}(1)(b)(ii) as "accounted for and paid". The respondent thought that this introduced an additional statutory condition.

20. In references to the reverse charge, ITA consistently used the doublet "accounted for and paid". In particular, it was used in section 583(1)(b)(ii) of ITA. It is used in clause 14{j6021}(1)(b)(ii) for the sake of consistency with that provision. The change is merely verbal.

21. ***We do not intend to adjust the clause.***

Clause 15{j6065}: Manufactured overseas dividend less than underlying payments

One respondent noted that "accounted for" in paragraph 7(1)(b)(ii) of Schedule 23A to ICTA was rewritten in clause 15{j6065}(1)(b) as "accounted for and paid". The respondent thought that this introduced an additional statutory condition.

22. As explained above in the context of clause 14{j6021}, the change is merely verbal.

23. ***We do not intend to adjust the clause.***

Clause 17{j623A7A}: Manufactured payments under arrangements with unallowable purpose

One respondent noted that clause 17{j623A7A}(1)(c) was not present as an express condition in the source legislation.

24. As the respondent suggested, clause 17{j623A7A}(1)(c) brings out an implicit condition in the source legislation.

25. ***Clause 17{j623A7A}(1) does not change the law and we do not intend to adjust it.***

Clause 17(j623A7A}(3)(a) follows the source legislation in referring to "profits or gains". One respondent recommended replacing this with "income" or "profits".

26. Most of the applications of "profits", as defined in section 6(4)(a) of ICTA, will be rewritten in Bill 6. Accordingly, we will review the use of "profits or gains" and "profits" throughout the Bill when work on it is further advanced.

27. ***We are grateful for the respondent's suggestion.***

One respondent found clause 17{j623A7A}(6) obscure.

28. ***We will revisit the drafting of clause 17{j623A7A}(6).***

Clause 18{j623A7B}: Arrangements with an unallowable purpose

Clause 18{j623A7B}(2) and (3) rewrite paragraph 7A(3) of Schedule 23A to ICTA. One respondent preferred the format of the source legislation.

29. We have considered this carefully, and remain of the opinion that the format of clause 18{j623A7B}(2) and (3) is preferable. In particular, it seems to us that, in paragraph 7A(3), paragraphs (a) to (c) obstruct the flow of the sentence.

30. ***We intend to retain the format of clause 18{j623A7B}(2) and (3).***

One respondent thought that clause 18{j623A7B}(2) did not accurately rewrite the source legislation. Clause 18{j623A7B}(2) provides that arrangements have an unallowable purpose at any time if, at that time, "the purposes for which the company is a party to [the arrangements] include a purpose which is not among the business or other commercial purposes of the

company". From this the respondent inferred that, arguably, arrangements might be regarded as having entirely an unallowable purpose if the purposes motivating them included some minor uncommercial purpose. The respondent assumed that the phrase "("the unallowable purpose")" was used in the source legislation to clarify the point. In the respondent's view, this phrase clearly identifies the unallowable purpose as the particular uncommercial purpose and establishes that the existence of an uncommercial purpose does not taint the arrangements as a whole.

31. The extent to which the arrangements have an unallowable purpose is not, as such, relevant. If, to any extent, the arrangements have an unallowable purpose, then clause 17{j623A7A}(1)(b) = paragraph 7A(1)(b) of Schedule 23A to ICTA is satisfied.

32. The extent to which relief for the manufactured payment is denied depends, not on the extent to which *the arrangements have* an unallowable purpose, but on the extent to which *the manufactured payment is attributable to* the unallowable purpose. See clause 17{j623A7A}(2) = paragraph 7A(2) of Schedule 23A to ICTA.

33. Accordingly, clause 18{j623A7B}(2) does not change the law.

34. ***As an aid to navigation, we will include in clause 18{j623A7B} a definition of "the unallowable purpose" in clause 17{j623A7A}.***

Clause 19{j623A7C}: Sections 17{j623A7A} and 18{j623A7B}: supplementary provisions

In rewriting paragraph 7A(10) of Schedule 23A to ICTA, clause 19{j623A7C}(1) omitted "whether or not legally enforceable" as otiose. One respondent suggested reinstating those words.

35. ***We will be happy to do so.***

One respondent queried whether the definition of "manufactured payment" in clause 19{j623A7C}(1)(b) needed to include manufactured interest, given that clause 17{j623A7A} does not apply where the loan relationship equivalent applies (clause 17{j623A7A}(1)(d)).

36. Paragraph 7A of Schedule 23A to ICTA was inserted by FA 2004. It has a wider scope than paragraph 13 of Schedule 9 to FA 1996. It is possible for a case involving manufactured interest in respect of loan relationships to escape paragraph 13 but be caught by paragraph 7A. Accordingly, the rewritten paragraph 7A needs to retain the concept of "manufactured interest".

37. ***We do not intend to delete manufactured interest from the definition of "manufactured payment" in clause 19{j623A7C}(1)(b).***

The same respondent queried the need for "manufactured interest" to be defined separately in clause 7{j60manint2}, given that the only operative provision in which it was used was clause 19{j623A7C}(1)(b).

38. ***We will delete the definition of "manufactured interest" in clause 7{j60manint}(2) and insert in clause 19{j623A7C}(1)(b) a suitable reference to the relevant provision of the Corporation Tax Bill.***

Clause 22{j6081}: No tax credits for borrower under stock lending arrangement

One respondent thought that clause 22{j6081}(1)(c) should use the definition of "manufactured dividend" in clause 4{j60manint}.

39. Clause 22{j6081}(1)(c) corresponds to section 592(1)(c) of ITA.

40. ***We do not intend to adjust the clause.***

Clause 23{j6083}: No tax credits for lender under creditor repo or creditor quasi-repo

One respondent thought that clause 23{j6083}(1)(c) should use the definition of "manufactured dividend" in clause 4{j60manint}.

41. Clause 23{j6083}(1)(c) corresponds to section 593(1)(c) of ITA.

42. ***We do not intend to adjust clause 23{j6083}(1)(c).***

The opening words of clause 23{j6083}(3) refer to a creditor quasi-repo, and one respondent thought that this was inappropriate.

43. ***On reflection, we agree. We will be happy to remove the reference to a creditor quasi-repo.***

Clauses 29{j6090} to 31{j6091}: Cash collateral under stock lending arrangements; quasi-stock lending arrangements

One respondent noted that the definitions of "money" in sections 736C(11) and 736D(10) of ICTA were not being rewritten in clauses 29{j6090} to 31{j6091}, and inferred that the relevant definition was being rewritten elsewhere and would apply for the purposes of these provisions.

44. The definitions of "money" in sections 736C(11) and 736D(10) of ICTA are otiose. They will not be rewritten.

45. It is envisaged that the 2009 Finance Bill will repeal sections 736C and 736D of ICTA. See the HMT/HMRC consultation document *Principles based approach to*

financial products avoidance, currently available at http://www.hm-treasury.gov.uk/prebud_pbr08_productsavoidance.htm.

46. ***We do not intend to adjust the clauses at this stage.***

Clause 31{j6091}: Meaning of "quasi-stock lending arrangement" and "quasi-cash collateral"

Two respondents noted that section 736D(9) of ICTA was not being rewritten in clause 31{j6091}, and inferred that Bill 6 would rewrite section 839 of ICTA and apply it for the purposes of that clause.

47. ***We are happy to confirm the respondents' understanding.***