ICA EW REPRESENTATION 120/17
TAX REPRESENTATION

FINANCE BILL 2017-18

SETTLEMENTS: ANTI-AVOIDANCE

ICA EW welcomes the opportunity to comment on the draft legislation published on 13 September 2017.

This response of 25 October 2017 has been prepared on behalf of ICA EW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICA EW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICA EW Tax Faculty’s Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

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Who we are

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INTRODUCTION

1. The draft legislation consists of a single schedule entitled “Settlements: Anti-Avoidance” [sic] comprised of 2 parts as follows:
   a) Part 1: Capital Gains Tax (CGT)
   b) Part 2: Income Tax

2. Part 1: CGT makes various significant amendments to the CGT settlements’ anti-avoidance legislation (s87 et seq TCGA 1992).

3. Part 2: Income Tax makes various significant changes to:
   a) the settlement’s regime (at s619 et seq ITTOIA 2005); and
   b) the transferor of assets abroad (ToAA) regime (s714 et seq ITA 2007).

4. Finance Bill 2017-19 (at the time of writing progressing through the Parliamentary review stages with scrutiny by the House of Commons scheduled to end on 26 October 2017) also enacts changes to all of the provisions listed above. This means that the draft legislation cannot be viewed in isolation; rather the legislation in Finance Bill 2017-19 and the draft legislation must be considered together and should form a coherent package of changes to the offshore trust provisions. Our comments below, therefore, pick up on the:
   a) main concerns we have with respect to what will be the Finance (No 2) Act 2017 legislation; and
   b) the interaction between the Finance (No 2) Act 2017 legislation and the draft legislation.

5. Our comments are confined to areas:
   a) where the legislation
      i) does not work in accordance with the Government’s policy intentions;
      ii) is insufficiently clear; or
   b) where we want to confirm our understanding of how the legislation is intended to work.

6. It seems unlikely that at this stage in the Parliamentary proceedings any changes will be put through Finance Bill 2017-19. As such, where changes to the 2017/18 legislation are required we ask for them to be put through the Finance Bill 2017-18 with retrospective effect.

7. A meeting was held on 16 October 2017 between HMRC policy and technical officers and representatives from the professional bodies and other stakeholders. We were represented at this meeting and found it helpful as it provided a forum to discuss various relevant issues. Specifically, the following new CGT and income tax provisions were discussed in some detail:
   a) close family member legislation; and
   b) the anti-re-cycling provisions.

8. Where relevant we acknowledge in the detailed comments section of this response the benefit of the meeting in adding value to our analysis.

9. For the purposes of this response we are assuming that the offshore trust provisions in Finance Bill 2017-19 will be enacted without amendment.

10. Our key concerns with the offshore trust legislation in Finance (No) 2 Act 2017 and with the draft legislation are set down in the Executive Summary.

11. All references within this response are to the draft legislation published on 13 September 2017 unless otherwise stated.
EXECUTIVE SUMMARY

Inability to rely on HMRC guidance

12. Our ICAEW Representation 109/17 set down various concerns that we have with the offshore trust legislation that will become law as part of Finance (No) 2 Act 2017:

a) As discussed in paragraphs 20 to 40 there are some important areas where the offshore trust provisions passed in Finance (No) 2 Act 2017 need to be changed with retrospective effect.

b) Our other concerns could be dealt with in HMRC guidance, if it were possible to rely on that guidance.

13. As we stated in ICAEW Representation 109/17 taxpayers should have both:

a) a legitimate expectation that HMRC guidance can be relied upon; and
b) should not have to go to court to prove this.

14. Unfortunately, rather than the above being the case there have been too many instances of HMRC changing its guidance with insufficient publicity given to the change and (even worse) with HMRC seeking to apply the change of opinion retrospectively. Furthermore, the Courts have made it clear that currently HMRC guidance has no authority and HMRC has had notable success in arguing that its guidance cannot be relied upon1.

15. The various instances where HMRC has gone back on its guidance retrospectively has undermined trust in HMRC and we are firmly of the view that any short-term gain that is achieved in extracting additional tax as a result of acting in such a manner is undermined by the impact such behaviour has on its relationship with taxpayers. It would, therefore, be better for taxpayers, tax practitioners and HMRC if the legal position in respect of HMRC guidance was put beyond doubt so that it could not be changed retrospectively. Finance Bill 2017-18 should introduce a new provision which gives HMRC guidance binding force with changes to the guidance only being effective going forward.

HMRC guidance and issues with Gov.uk

16. In addition to being able to rely on HMRC guidance it is vital that the guidance can be pitched at the correct level and that it can go into sufficient detail. This is particularly important in an area as technically complex as the offshore trust provisions.

17. The move to the Gov.uk website has made it difficult for this to be achieved given the lack of understanding on the part of the custodians of the Gov.uk website when it comes to tax issues. HMRC has sufficient resource constraints without having to enter into negotiations to get appropriate guidance on the website without the guidance being dumbed down such that its usefulness is negated and/or the changes result in inaccuracies.

18. When HMRC had its own website Frequently Asked Questions (FAQs) were often used to illustrate practical points. These were very useful and it is extremely unhelpful that Gov.uk will not allow FAQs.

19. We appreciate HMRC’s commitment to work with the professional bodies and answer FAQs put to them so that these can be posted on our website. We also appreciate the fact that when the HMRC Manuals are updated for the changes the FAQs may then be published within the

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1 See the Court of Appeal decision in Revenue and Customs v Hutchinson [2017] EWCA Civ 1075 (26 July 2017) and Samarkand Film Partnership No 3 & Ors v Customs EWCA Civ 77 (24 February 2017).
relevant section of the manual. We do not, however, think that it is helpful that Gov.uk should be dictating to HMRC how it should put out guidance. If HMRC wants to publish FAQs as part of the initial guidance that it releases then it should be able to do so. It may not be possible to go back to the time when HMRC had its own website but it would be better if HMRC had autonomy over the contents of its part of the Gov.uk website.

Changes to the Finance (No 2) Act 2017 provisions

20. There are, as mentioned in paragraph 12 above, some important areas where the Finance (No 2) Act 2017 (F (No 2) A 2017) offshore trust legislation needs to be changed. These are discussed in detail below. Changes should have retrospective effect (there should be no issue with this as everything suggested is to make the legislation work as intended and would not be disadvantageous to those affected).

Issues with the protected foreign-source income (PFSI) definition

21. The ToAA legislation is complex and any changes made where always going to be difficult to draft. This is particularly the case as the original legislation is problematic (the Tax Law Rewrite making clear various problems with the legislation that the ICTA drafting covered up due to its comparative brevity). The whole of the ToAA legislation really needs a fundamental rewrite but that would be a highly laborious task taking more time than is available now.

22. As discussed in our ICAEW Representation 109/17 we are concerned about s 721A (see paragraphs 84 to 96 of our earlier response) and s 729A (see paragraphs 99 to 107 of our earlier response).

23. We believe that s 721A needs to be adjusted so that where there is an underlying company:

   a) the necessary link between the trustees and the underlying company is precisely established; and

   b) the PFSI definition is adjusted, so that where the income of the underlying company has been taxed on the settlor it cannot be taxed again when it is “dividended” up to the trust.

24. The comments in connection with s 721A above also apply for s 729A. In addition, we are not clear why s 729A(4)(d) is included (s 729A4(e) following on from this). We are concerned that these provisions will restrict what can qualify as PFSI for an underlying company under s 729 and would suggest that if nothing further is done they are at least deleted.

Remittances by trustees – ToAA issues

25. A key intention behind the income tax changes was to align the remittance basis provisions with those for s 87, TCGA 1992. That is there should only be a tax charge on the settlor/beneficiary where the benefit is remitted to the UK and the trustees should be able to spend both pre-6 April 2017 and post 5 April 2017 trust income in the UK without triggering a remittance. As discussed in detail in our ICAEW Representation 109/17 (specifically paragraphs 120 to 125 and paragraphs 127 to 128) the necessary changes to the ToAA legislation were not put through Finance (No 2) Act 2017 to achieve this. The same problem is present in the draft clauses for the settlements’ regime legislation (s 643F, ITTOIA 2005).

26. The draft legislation should be amended, so that income arising to the trustees (or arising within an underlying company) is not taken into account when considering if remittances have been made. It should only be remittances of the actual benefits that causes a tax charge on the settlor/beneficiary. The ToAA legislation should be amended retrospectively since that charge is in point from 6 April 2017. This is particularly important as trustees may have already taken actions relying on the policy intention and not realising this was not delivered by the legislation. Actions taken could, if nothing is done, mean that taxable remittances are attributed to the settlor contrary to assurances given.
Remittances by trustees – settlements’ legislation issues

27. There is an issue with respect to pre-6 April 2017 income. As discussed, in paragraphs 58 to 65 of our ICAEW Representation 109/17 the problem is that the s 628C, ITTOIA 2005 transitional provision only considers the position of trustees, so is insufficient when there is one or more underlying company in the structure (as will often be the case). The legislation should be changed so that in addition to excluding trustees from the definition of relevant income in relation to “transitional trust income” all underlying companies are also excluded.

28. We also do not understand why the reference to 2008/09 is necessary in s 628C and would suggest that it is removed so as to avoid confusion (see paragraph 62 of our ICAEW Representation 109/17).

29. In addition to the above issue with s 628C there is no transitional provision for either s 629, ITTOIA 2005 or s 633, ITTOIA 2005 pre-6 April 2017 income. This should be remedied by introducing transitional provisions for each section modelled on amended s 628C or by having one transitional provision that applies to all the settlements’ legislation charging provisions.

Drafting issues with changes to ToAA to remove restriction to UK residents

30. We understand that changes to the ToAA legislation at ss 731 to 732, ITA 2007 were to enable s 733A, ITA 2007 to attribute to the UK resident settlor the benefit paid to a non-UK resident close family member.

31. The provisions, however, appear to go beyond this specifying that there will be a matching of gains to non-UK residents and that there is a charge to tax on the PFSI where there is matching to a non-UK resident settlor or non-UK resident close family member of the settlor. We assume this was not the intention and that the legislation needs adjusting with retrospective effect.

32. Further changes are made to the legislation by the draft clauses. We are not clear what the intentions behind these changes are but do not think that they have been achieved, as the new sub-section (1)(c) which is to be inserted into s 731, ITA 2007 does not seem to restrict the scope of the F (No 2) A 2017 changes to UK residents but rather extends the situations in which the charge can apply to non-UK residents to situations where the new anti-recycling rule applies.

Tainting a trust

33. We cannot see any reason why the trust protection provisions in F (No 2) A 2017 were drafted such that a transfer/loan between trusts that both enjoy protected status should be treated as tainting the recipient trust. Likewise, we also do not see why splitting protected trusts is seen as an issue. We raised these issues a number of times during previous consultations.

34. We were disappointed that despite the fact that there can be no mischief in either action and that not allowing these actions will cause significant difficulties and for some settlers may be felt sufficiently onerous to negate any advantages from the protections and lead to them leaving the UK (contrary to Government policy) no changes were made. We would ask again that this matter is reconsidered with a view to putting a change through Finance Bill 2017-18 with retrospective effect to 6 April 2017.

Aligning the tainting provisions with the new value of benefits provisions

35. To avoid tainting a trust transactions must be on arm’s length terms. There is an inclusion in the tainting legislation of a definition of what constitutes “arm’s length terms” for loan funds made available and this aligns with the new benefits provisions legislation. However, the tainting legislation does not cover the two other benefits dealt with in in the benefits valuation legislation (these being movable property and land made available).
36. The concern is that without specific legislation aligning the legislation the individual may have to choose between paying tax on a benefit/capital payment and tainting the trust (as the valuation provisions give rise to a higher valuation than is the case under arm’s length terms). For example, if a trustee lends an asset to the settlor and the market based commercial fee is (say) 2% of capital value, the settlor will taint the trust if he pays a higher fee under the new benefit valuation rules so as to ensure there is no benefit/capital payment.

**Settlors can now be taxed on pre-arrival foreign income within the PFSI definition**

37. The non-transferor charge has always included income arising to the trust prior to a beneficiary becoming UK resident within the “relevant income” pool if that income has not been paid away. Similarly, the CGT provisions include unmatched pre-arrival gains. The settlements’ legislation and the transferor charge were, however, different. These charging provisions only subjected the settlor/transferor to tax on income arising after the settlor had become UK resident. For foreign domiciliaries it is generally the settlor/transferor charge that was in point as the individual sets up the trust and intends to be a beneficiary during his or her life.

38. The new regime is different as the charge in the settlor mirrors the non-transferor charge. Where trusts have been established long before the settlor came to the UK and there is significant pre-arrival income within the settlement this is a serious issue for settlors who do not want to be taxed on what they see as “clean capital”. The change will mean that some individuals decide not to come to the UK and may lead to others leaving prematurely.

39. Consideration should be given to a provision for settlors to only include as PFSI income arising after they have become UK resident.

**Alignment of provisions**

40. Wherever possible the anti-avoidance provisions should be aligned. Alignment is simpler and should prevent both double charging and opportunities for avoidance occurring. As such, where we recommend changes to the draft legislation (such as the close family member legislation for CGT and the settlements’ legislation) we also suggest retrospective amendments to the legislation for the ToAA legislation.

**Offshore income gains**

41. It is not clear that offshore income gains (OIGs) have been considered specifically in connection with the various changes enacted to the offshore trust provisions.

42. They must continue to be calculated in accordance with the CGT provisions and follow the CGT offshore trust provisions as amended by Statutory Regulation 2009/3001 (OIGs being matched to prior to capital gains) unless they drop into the ToAA charge.

43. For settlors OIGs fall into the ToAA charge if they are not matched under TCGA 1992, s 87 in the tax year. This is an issue for individuals who are deemed UK domiciled as without changing Statutory Regulation 2009/3001, reg 19 the trust protections will not work for OIGs. This is because they will not fall within the relevant foreign income definition and will not, therefore, be protected foreign source income. They will not be PFSI because the PFSI only covers relevant foreign income and OIGs can only be relevant foreign income under current reg 19 where they are subject to tax on the remittance basis (something they cannot be for deemed domiciliaries). Without a change to reg 19 there will, therefore, be a tax charge in the year regardless of whether a capital payment is made to the settlor or not. This would not have been the intention, so reg 19 will need to be amended with retrospective effect to 6 April 2017.
**Close family member legislation**

**Definition**

44. The concept of a close family member is used in the ToAA legislation, the settlements’ legislation and the CGT legislation. There is one aligned definition but this definition does not take account of:

a) What happens when the close family member ceases to be a close family member, as will happen: (i) in the tax year that a minor child is born or reaches the age of 18; (ii) if the settlor marries or divorces his spouse/civil partner; and (iii) if individuals start or cease to cohabit.
b) What happens when the settlor dies.

45. To avoid split year situations the individual should, where close family membership starts, be deemed to be a close family member for the entire year.

46. The individual should continue to be a close family member:

a) in the tax year their status with respect to the settlor changes; and
b) in the tax year that the settlor dies (where the individual is a close family member during any part of the tax year).

47. The legislation should specifically make this clear (as it does for s 86, TCGA 1992) rather than leaving this to HMRC guidance.

**Remittances**

48. Where the close family member legislation applies it is not clear what counts as a remittance of the capital payment or benefit where the settlor is a remittance basis user. It should be the remittance of the capital payment or the benefit by the close family member or any other relevant person in connection with the settlor.

**Foreign tax credit issues**

49. The legislation appears to proceed on the basis that a non-UK resident close family member will not pay tax on the offshore trust distribution in the territory where they are resident. This will not necessarily be the case and it is not fair for the same distribution to suffer tax twice without any relief.

50. The legislation should incorporate a relief mechanism so the settlor can claim relief for the foreign tax suffered. In addition, consideration should be given to switching off the provision where the non-resident close family member pays tax at an effective rate of 75% or above of our highest tax rate.

**Aligning the provisions**

51. Currently the CGT and income tax provisions are different. In addition to introducing unnecessary complexity this means that there is the potential for a double charge. Having considered the provisions we feel that it would be better to amend the CGT provisions so that they are aligned, as closely as possible, with the ToAA income tax provisions. The various changes set down in paragraphs 44 to 50 above should be put through all the provisions.
The anti-recycling provisions

Aligning the provisions

52. We have said in the past that with the Ramsay doctrine and the General Anti Abuse Rule (GAAR) we do not see the need for these provisions. This is particularly the case given how long and complicated the provisions are. We do not, however, expect the provisions to be dropped at this stage.

53. We would though ask for consideration to be given to simplifying the legislation by at least aligning the three provisions as much as possible. We do not, for example, understand why for example CGT s 87I(1)(g) is so wide when the income tax provisions look to the year of matching (which is more coherent). Again, as far as possible we should like to see alignment taking into account the better features of the three current sets of provisions. The various changes set down in paragraphs 54 to 62 should be put through all the provisions.

Whose intention?

54. From our discussions with HMRC during the 16 October meeting we understand that the current intention is to consider whether either the trustee or the original beneficiary (with no other individuals being considered where there is a chain) intends the distribution to be passed to the subsequent UK resident recipient. We do not understand why the intention of the trustee alone is important, as the trustee cannot make the original beneficiary pass on the distribution if the beneficiary does not want to. It seems to us that it is the intention of the original beneficiary that matters and that this should be the only consideration.

55. The legislation should be adjusted to make it clear that it is just the intention of the original beneficiary that is being considered.

Clarification of “arrangements”, “intentions” and “benefit”

56. We understand that the legislation is aimed at genuine cases of avoidance and that it is not intended to affect the majority of capital payments. Whilst this is comforting the legislation itself could be construed in a wider manner than we discussed at the 16 October meeting. We should like to see within the legislation a list (clearly stated to not be exhaustive) of actions that will not be taken to be arrangements or to show intentions such that the provisions would be triggered. The list should cover:
   a) Wills
   b) Operation of Intestacy
   c) Survivorship (such as the original beneficiary’s property held by way of joint tenancy)
   d) Operation of reserved property right rules
   e) Letters of Wishes
   f) General intentions to benefit family or friends at some point

57. The legislation should be changed to make it clear that “benefit” includes only gratuitous benefit, rather than (say) a benefit arising under a contract undertaken on commercial terms.

58. In genuine cases of avoidance, the onward transfer will generally occur very soon after the original distribution. The following presumption could be introduced:
   a) if the onward transfer occurs within six months of the original capital payment it is deemed to be caught by the legislation unless it can be demonstrated that there were no arrangements or intentions at the time of the original distribution (or the onward transfer if earlier) to pass on the whole or part of the capital payment to the UK resident;
b) if the onward transfer occurs after six months of the original capital payment it is presumed to not be caught by the legislation unless it can be demonstrated otherwise (the burden of proof being on HMRC).

In either case the taxpayer should have a right of appeal to the tribunal.

The removal of capital up to the amount settled

59. It does not seem to us to be appropriate that the legislation should apply when a non-UK resident settlor is receiving a capital distribution and the overall total of capital distributions received is less than what he or she settled in the trust. Where the trust was established without any UK tax considerations being taken into account the non-resident settlor should be able to remove his or her capital without triggering the provisions. A charge would not be imposed if a non-resident individual had not settled funds into trust and made a gift from their own resources and it should not be different if the individual chooses to settle funds into trust and then withdraws some of those funds (by way of a capital distribution) to make a gift.

Foreign tax credit issues

60. The legislation appears to proceed on the basis that a non-UK resident close family member will not pay tax on the offshore trust distribution in the territory where they are resident. This will not necessarily be the case and it is not fair for the same distribution to suffer tax twice without any relief.

61. The legislation should incorporate a relief mechanism so the settlor can claim relief for the foreign tax suffered. In addition, consideration should be given to switching off the provision where the non-resident close family member pays tax at an effective rate of 75% or above of our highest tax rate.

Commencement provisions

62. The ToAA commencement provisions whilst is will only apply a charge for matching from 2018/19 does not seem to remove from charge situations where the onward payment was made prior to 6 April 2018. It would be easiest if the new legislation only applies where both the capital payment and the onward payment happen after 5 April 2018. At a minimum, the new legislation should not apply where the onward payment occurs prior to that date.

Changes to the settlements’ legislation

63. We are concerned that s 643C, ITTOIA 2005 does not work as intended. The formula does not seem to us to achieve the desired result where there is more than one beneficiary. We also do not understand why PFSI is given a different meaning in s 643C to s 628A, ITTOIA 2005.

64. The problem with s 643F, ITTOIA 2005 is discussed in paragraph 25. Rather than remittances being linked to bringing the benefit into the UK the link has been made to the income arising within the trust meaning that the trustees cannot remit trust income to the UK. This was supposed to be possible in order to boost the economy by attracting funds from offshore trusts for investment.

65. In contrast to s735A, ITA 2007 of the ToAA legislation, s643G, ITTOIA 2005 of the settlements’ legislation will not match UK source income. There is, therefore an issue where the settlor can benefit under the trust and is non-UK resident and a close family member is UK resident and in receipt of benefits. S624 will not tax the UK source income on the settlor (albeit it will be taxed on the trustees). The UK income will not form part of the PFSI by definition. It could therefore transpire that a trust with UK source income and foreign source income where the benefit is provided out of taxed UK income, will still be matched to protected foreign source income. We believe that this is a defect in the legislation that needs to be corrected, by introducing a
matching mechanism along the lines of s735A, ITA 2007, so that there cannot be matching to PFSI.

**Interactions**

66. The interactions between the two sets of income tax anti-avoidance provisions and the CGT offshore trust anti-avoidance provisions are extremely complex.

67. Since the charges can overlap it is critical that there are appropriate relieving provisions to prevent double charges from arising. Specific changes to the legislation should be made in relation to the problem areas we highlight in paragraphs 251 to 264 below. We are, however, concerned that there has been insufficient time to produce any detailed case study examples, let alone enough to be confident that the draft legislation has been stress tested. Issues are likely to have been missed. As such, we feel that there should be a just and reasonable provision inserted into the three sets of anti-avoidance legislation such that if the legislation does not specifically provide for the necessary deductions to avoid double charging such deductions can be claimed by affected taxpayers on a just and reasonable basis (taking into account the current order of priority (so ToAA first, then settlements’ charge, then OIGs and finally capital gains)).

**DETAILED COMMENTS ON THE DRAFT LEGISLATION**

**PART 1 CAPITAL GAINS TAX**

**Part 1 Para 1(1) s87D**

**Comment**

68. For the purposes of ss87 and 87A (only), s87D seeks to disregard capital payments to individuals who are non-UK resident in the year of receipt.

69. There are three exceptions (two in s87D(1) and one in s87D(2)) which modify the new rule when, broadly:

   a) The recipient is a close family member of a UK resident settlor;
   b) The recipient is temporarily non-UK resident; or,
   c) The capital payment is made in the year the settlement ceases.

70. As a minor point, it is unclear why the draftsman has specified that the beneficiary must be non-UK resident “at all times in that year” and at other places in the draft has specified “at any time” since under the statutory residence test (the SRT) one is either resident or not for a full tax year.

**Our recommendation**

71. The drafting should be consistent and in line with the SRT.

**Part 1 Para 1(1) s87E**

**Comment**

72. The gateway to s87E is s87D so the recipient must be non-UK resident in the year of receipt. Consequently, a capital payment received in the year of departure (assuming split year applies) is not within s87E (albeit it may be dealt with under a later section cf s87K).

73. However, the application of split year to cases involving s87 is also modified later in the draft clauses (discussed further below).
74. The effect of s87E is to treat the capital payment as received for ss87 and 87A purposes (only) in the year of return.

75. Transitional provisions apply for periods of temporary non-UK residence which commenced before 8 July 2015 (the Summer Budget announcing the original changes).

Part 1 Para 1(1) s87F

Comment

76. Section 87F modifies the rule in s87D such that capital payments made to a non-UK resident in the year a settlement ceases are not disregarded if at least one other recipient is UK resident.

77. It would appear that this requirement will be met by a nominal contribution to a UK resident charity if it were felt that it was beneficial to fall within s87F. However, and on the other hand, there will be scenarios where disregarding the payment to a non-UK resident is beneficial (notwithstanding the onward gift provisions).

78. It is not clear why s87F turns off s87D(2) while the other exceptions turn off s87D(1). Nothing appears to turn on this, however, so no amendments are required.

Part 1 Para 1(1) s87G

Comment

79. Section 87G is designed to attach to a UK resident settlor (whether or not the settlor is a beneficiary of the trust) a capital payment which would otherwise be treated as received by a close family member. This is important as other, later sections attempt to attach gains and/or income rather than capital payments. We comment further on this divergence of approach later.

80. The CGT approach is different from and wider than the income tax approach (for ToAA and the settlement's legislation). The differences between the provisions could result in the settlor being subject to tax under the CGT provisions and the close family member being subject to tax on all or part of the benefit under the ToAA provisions.

81. S87G applies irrespective of the residence of the original recipient i.e. it applies to the capital payment even if the recipient is UK resident.

82. It is not clear from s87G what is “on the remittance basis”. Presumably it is the remittance of the capital payment by the close family member (or any other relevant person in connection with the settlor) which triggers the remittance for the settlor?

83. A scenario discussed during the 16 October meeting is one where the settlor and spouse are UK resident. The spouse receives a capital payment. S87G attributes that capital payment to the settlor and absolves the spouse of ever receiving the capital payment (cf s87G(2)(b)). The capital payment is unmatched. The settlor becomes non-UK resident. In this scenario, it appears that there is nothing to re-attach the capital payment to the spouse who in effect receives a capital payment tax free in the UK.

84. We understand that HMRC did not want to over-complicate already highly complex provisions by trying to re-allocate charges where residence positions changes. Furthermore, where there is income within the settlement the spouse will be subject to tax under the non-transferor charge.

85. The legislation appears to proceed on the basis that a non-UK resident close family member will not pay tax on the offshore trust distribution in the territory where they are resident. This will not
necessarily be the case and it is not fair for the same distribution to suffer tax twice without any relief.

**Recommendations**

86. Making it clear, on the face of the legislation, how the s 87G remittance basis works.

87. Alignment of the CGT provisions as closely as possible with the income tax provisions.

88. Credit should be given for foreign tax paid by the close family member and consideration given to disapplying the charge where the close family member suffers an effective rate of tax of 75% or above in their jurisdiction of residence.

**Part 1 Para 1(1) s87H**

**Comment**

89. This section defines close family member.

90. It is not clear if close family members remain close family members after the settlor is dead. In the absence of legislative wording:

   a) spouses/civil partners are no longer close family members after the death of the settlor as they will be widows or widowers;
   b) minor children of the settlor continue to be minor children under they reach the age of 18 regardless of whether the settlor is alive or dead;
   c) minor children of the spouse/civil partner (and not the settlor’s progeny) will presumably not be as their parents are not;
   d) those who in the lifetime of the settlor were living with him or her as if they were spouses/civil partners will not be.

91. Treating minor children of the settlor differently makes no sense in terms of the intentions behind this legislation.

92. Also see below re death and onward gifts.

93. Consideration also needs to be given to changes of status in the tax year, that is individuals either becoming or ceasing to be close family members.

94. One final comment we would make is that the scenario which would appear to most require s87G is where there is a UK resident settlor and non-UK resident close family members (as opposed to UK resident close family members who will be subject to tax). The inclusion of co-habittees by s87H(2) (defined around the concept of “living together”, as in the remittance basis legislation in Part 14, ITA 2017) will not, therefore, be applicable in cases the legislation has been most specifically designed to catch.

**Recommendations**

95. To avoid split year situations the individual should, where close family membership starts, be deemed to be a close family member for the entire tax year.

96. The individual should continue to be a close family member:

   a) in the tax year their status with respect to the settlor changes; and
   b) in the tax year that the settlor dies (where the individual is a close family member during any part of the tax year).
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In the tax year following and all subsequent years he or she should not be a close family member.

97. The legislation should specifically make this clear (as it does for s 86, TCGA 1992) rather than leaving this to HMRC guidance.

Part 1 Para 1(1) s87I

Comment

98. Section 87I runs to sixteen lengthy subsections, so we deal with them in turn.

99. S87I(1): This is the gateway that turns on subsections (3), (4), (5) & (6). It has many limbs and each bullet below deals with a separate limb:

a) A beneficiary must receive a capital payment.

b) The beneficiary must not be a close family member at the payment time or at that time they must be a close family member but the settlor is non-UK resident.

These do not appear to be the correct filters. S87I appears to be trying to stop recycling of capital payments but presumably this is only an issue if the original beneficiary is non-UK resident (or perhaps taxed on the remittance basis). We would have expected this filter to require the original beneficiary to be:

i) a non-close family member at the payment time; or,

ii) a close family member at the payment time where the settlor is non-UK resident;

iii) who is either: non-UK resident in the year matching would occur but for s87D (disregard of capital payments to non-UK residents); or a remittance basis (RB) user in the year of matching and not all of the payment is remitted.

c) There must be an intention and it must be reasonable to expect the payment to be received by a recipient at a time when they are UK resident –

i) It is not clear whose intention is relevant – the trustees’ or the original beneficiary’s? We understand from our meeting on 16 October that the original thinking was that an intention on the part of either the trustee or the original beneficiary would be sufficient. We would prefer that the intention had to be held by both the trustee and the original beneficiary. We appreciate though that this will not be acceptable and would ask that at least the intention is cut down to just the original beneficial as an intention just on the part of the trustee is meaningless, as once the capital payment is made the trustee cannot make a beneficiary with no intention to pass the gift on do anything of the sort. The trustee will find it difficult to have accurate calculations carried out for pool purposes where the intentions of the original beneficiary is not known. If the trustee makes reasonable enquiries of the original beneficiary and is not told about the onward gift it may be that subsequent gains allocations to other beneficiaries who receive capital payments are incorrect. HMRC should allow amendments to be made to the other beneficiaries returns out of time, so tax refunds can be obtained and there should be no interest or penalties if extra tax is due (perhaps because of matching to gains in earlier years than was originally thought to be the case) because of this.

ii) It is also not clear where the onus of proof will be placed. It would be unreasonable to place the onus on the tax payer to show that the provisions do not apply for anything other than a short period (six months).

iii) We note that an onward gift expected to be made the day before the recipient intends to become UK resident will not be within s87I.

iv) Finally, we note that there is no mention of temporary non-resident rules. It therefore appears possible that a large capital payment could be made to a non-UK resident beneficiary (A) and said beneficiary can then gift funds to a recipient beneficiary (B) who is non-UK resident for one year. B can then return to the UK and s87I does not apply.
We understand from the meeting of 16 October than HMRC is aware of this and has decided not to over complicate already long and complex legislation by trying to cater for changes in residence.

d) The original beneficiary must then make a gift – we assume that gift does not include anything contained in a Will or by operation of Intestacy or by operation of reserved property right rules (no matter how described) and this should be made explicit (e.g. gift during lifetime).

e) The gift must be “in connection with” the capital payment – this could be construed as a very low threshold, albeit we understand from the 16 October meeting that this was not the intention. To reflect the intent the legislation should be changed (see our recommendations below).

f) The recipient must be UK resident when the gift is received (see comments above in relation to temporary non-residence).

g) The original beneficiary must be either non-UK resident or on the remittance basis for one year in between the capital payment being received and the onward gift (see comments above in relation to the residence filter). Why being non-resident for one year in between is relevant to the operation of s87I is not clear to us.

100. S87I(2): This deals with chains of onward gifts. We note that while the sister provisions for the settlements’ legislation have a similar provision (but used in a different and specific scenario), the sister provisions in ToAA are quite different (though s 733B(11), ITA 2017 seems to apply to subsequent gifts). As all these provisions are presumably trying to achieve the same effect but for different matching rules, it is unfortunate that they are not consistent. This is due to the different structure adopted in s87I versus s643I and s733B.

101. S87I(2): We note that at s87(2)(c) there is a requirement for the intermediate recipient to be the donor in turn. This does not seem to take in account spousal relationships in that a receipt by an individual could very well be matched by a gift from a spouse and it would fall outside this section as while “indirect” is a broad test, it is perhaps not that broad.

102. S87I(2): There is also a requirement at subsection s87I(2)(d) for the final recipient to be UK resident at the date of receipt and for each intermediate recipient to be non-UK resident. By routing the original payment onto a UK resident then a non-UK resident then a UK resident, it appears that neither s87I(1) nor s87(2) is turned on.

103. Consider also the following (alternative) example: The trustees make a capital payment to a non-UK resident beneficiary (A), who makes an onward payment to a non-UK resident (B), who makes an onward payment to a UK resident (C) who makes an onward payment to a UK resident (D). S87I(1) is not in point for the payment from A to B as B is non-UK resident. The payment from B to C is not within either s87I(1) nor s87(2) as D is the last gift recipient not C. And the payment from C to D is not within s87(2) as C is UK resident.

104. S87I(3): This splits the capital payment into 3 parts:

   a) The part which is matched under s87 and taxed (i.e. remitted);
   b) The part which is matched under s87 and untaxed (i.e. retained offshore); and,
   c) The part which is not matched.

105. S87I(3): It is not immediately clear at what point in time this split is to be established. It cannot be at the date of the payment because of how s87 operates – it requires all the events of the tax year to be considered. S87I(5) states that it has effect for the gift year and later years. If the gift year and the year the capital payment is made are the same year then presumably the split takes effect after the matching has been done under s87.
106. S87I(4): No comment.

107. S87I(5): If the unmatched part of the capital payment is greater than nil, then s87I(5) attributes on to the subsequent gift recipient a capital payment of (broadly) the unmatched amount (unless the onward transfer is less than the unmatched amount in which case the amount attributed is the onward transfer). It would be much simpler if the legislation said this, assuming that this is the intended meaning, rather than rely on an algebraic approach which may be inaccessible to a number of readers.

108. S87I(6): This subsection attempts to attribute to the gift recipient an amount of gains being (broadly) the amount of untaxed gains matched to the original beneficiary on receipt of the original capital payment.

109. By way of example: The trustees make a capital payment to A of £100,000. This is matched to gains such that it represents £65,000 gains and £35,000 is unmatched. A is a RB user and doesn’t remit. A then gifts £75,000 to B. S87I(1) is in point. The capital payment is sliced as follows:

a) \( T = 0 \);
b) \( U = £65,000 \);
c) \( R = £35,000 \);
d) \( G = £75,000 \).

S87I(5) attributes to B £35,000 as a capital payment (as \( G > R \)). And s87I(6) attributes £40,000 of gains to B (as \( G - R \leq U \)).

A is left with £25,000 which is untaxed gains (i.e. taxable on the remittance basis).

110. S87I(6): The gains of the original beneficiary are treated as reduced by so much as is attributed onwards to the onward gift recipient “from the end of the gift year”. The chronology is unclear since several things appear to be happening at the end of the year simultaneously notwithstanding that they need to take place stepwise in series and not in parallel.

111. It is possible to foresee the following scenario:

a) The trustee T makes a capital payment of £1,000,000 to A in year 1;
b) It is unmatched and in year 2 A makes an onward gift to B of £50,000 that is within s87I;
c) B is treated as having received a capital payment of £50,000 under s87I(5);
d) A is treated as a result of s87I(5) as having received a capital payment of £950,000 only;
e) A’s capital payment was made in year 1. B’s however is treated as having been made in year 2;
f) Both A and B are UK resident remittance basis users;
g) A brings his capital payment of £950,000 to the UK. B always retains his offshore;
h) A gain is realised by the trustees of £50,000. It is matched to B’s capital payment in preference due to how the rules in s87A operate;
i) The trustees realise a gain in year 3 of £60,000. A makes another onward payment in year 3 to B again within s87I. B’s capital payment is matched in preference to the year 1 payment to A;
j) In this way, A can use the provisions of s87I to defer the matching of capital payments until such time as A leaves the UK while enjoying the use of the funds in the UK in the interim (ignoring matching under the Settlements legislation or ToAA);
k) See comments later regarding B and what constitutes a remittance of the onward payment by B.

112. S87I(7): This subsection defines the matched amount.
113. S87I(8)&(9): These subsections define the taxed and untaxed parts of a matched amount. See later comments re migrating beneficiaries.

114. S87(10): This subsection fixes the timing for onward gifts made in anticipation of a capital payment being received.

115. S87(11): As noted above, s87I has a provision designed to deal with chain payments. S87I(11) also seems to be concerned with chains in that it turns on s87I(12) if the subsequent recipient (broadly) is UK resident, an RB user and does not remit the onward capital payment in full to the UK. The distinction is that s87I(2) appears to be designed to deal with non-UK resident chain payments since s87I(1) cannot do so due to the UK residence requirement at s87I(1).

116. S87(12): This subsection appears to be readying the ground for the re-application of subsection (1) so that the part of the onward gift that is not remitted can be plugged back into s87I(1) and recycled.

117. S87I(13): The onward gift could well be in excess of the original receipt by the original beneficiary but it is not clear why s87I(13) is required: it would appear that the operation of s87I(5) and (6) restrict how much can be attributed on to the subsequent recipient to an amount equal to G (s87I(4)) and G it restricted to the original capital payment by s87I(4)(b).

118. S87(14): This subsection is designed to make s87I(1) work with the onward gift specified in s87I(12). It states: "Where the amount mentioned in subsection (1)(a) is treated as arising...". It is not clear at all that any amount is mentioned in (1)(a) as arising. It does refer to a payment. Presumably it should be read as "Where the payment in (1)(a) is treated as being made because of the operation of subsections (12) and (13)...

119. S87I(15): The definition of "gift" includes any benefit. This strongly suggests that legacies under Wills, or by operation of law (ie survivorship), intestacy or forced heirship would all be caught. This seems to far too wide. In addition, it should be made clear that the term 'any benefit' includes only gratuitous benefit, rather than (say) a benefit arising under a contract undertaken on commercial terms. For example, if the trustees and a beneficiary enter into a contract for exploitation of pooled assets (ie land) any profit arising to the beneficiary would not be a benefit provided that a fully commercial joint venture had been entered into.

120. S87I(16): The remittance basis is applied to matched onward capital payments by the amendments to s87B (discussed further below). The purpose of s87I(16) and specifically the references to (11) and (12) are not clear. Presumably it is to deal with the case where the payments referred to have not been matched and so are not covered by s87B (as amended)?

121. It does not seem to us to be fair that the legislation should apply when a non-UK resident settlor is receiving a capital distribution and the overall total of capital distributions received is less than what he or she settled in the trust.

122. The legislation appears to proceed on the basis that the original beneficiary will not pay tax on the offshore trust distribution in the territory where they are resident. This will not necessarily be the case and it is not fair for the same distribution to suffer tax twice without any relief.

Recommendations

123. See paragraphs 52 to 62 above.
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Part 1 Para 1(1) s87J

124. S87J sets out the cases where the settlor is liable for tax on the onward gift (notwithstanding the settlor is not the actual onward recipient). For the avoidance of doubt, earlier provisions attribute the gain to the settlor for certain, “normal” capital payments. S87I then deals with onward payments and attributes both capital payments and accrued gains onto the onward recipient. This section, s87J, then seeks to attribute both capital payments and accrued gains to the settlor which have first been attributed from the original recipient to an onward recipient.

125. S87J(1): This is the gateway to s87J(2) which shifts the capital payment element of the onward payment (the R) to the settlor.

126. S87J(3): This is the gateway to s87J(4) which shifts the accrued gains element of the onward payment (the U) to the settlor.

127. The remittance basis is applied to the accrued gains by the amendment to s87B (discussed below). However, like s87G it appears that it is the remittance or otherwise of the onward capital payment by the recipient (not the settlor) which will determine whether there has a tax charge on the settlor.

Part 1 Para 1(1) s87K

128. This section deals with migrating beneficiaries and effectively states that the unmatched capital payments of migrating beneficiaries are to be disregarded for the purposes of s87 and s87A.

129. S87K(2)(d): The distinction being drawn by the two limbs is not immediately obvious since the preamble in s87K(2)(d) states that the matching under s87A is as it applied for the relevant tax years. We would suggest that the two limbs are merged.

130. S87K(3): If a beneficiary receives a capital payment and is a close family member and the settlor is UK resident, the capital payment is attributed to the settlor and the beneficiary is then treated as if they had never received it.

If the settlor migrates (and whether or not the beneficiary does) s87K(1) does not seem to be triggered and the capital payment will “wash out” future gains to the non-UK resident settlor. The reason s87K(1) does not appear to be triggered is that the conditions within s87K(2) focus on the original beneficiary and not the deemed recipient (i.e. the settlor).

131. Additionally, and as alluded to above, there is no mechanism to re-attach the capital payment to the original beneficiary on migration with the consequence that they appear to receive the capital payment tax free in the UK (ignoring here the income tax matching rules).

Part 1 Para 1(1) s87L

132. The gateway to s87L is s87K so this section is only in point when s87K applies to disregard a capital payment. The conditions in s87L re-iterate several of the conditions in s87K cf s87L(e).

Part 1 Para 1(2)

133. No comment.

Part 1 Para 1(3)

134. No comment.
Part 1 Para 1(4)

135. This amends the status quo so that split year is no-longer available on s87 gains. We are not sure why it was felt necessary to do this and would welcome an explanation as it seems unduly penal.

Part 1 Para 1(5)

136. This paragraph seeks to extend the remittance basis to gains matched under s87I & s87J and links those gains to the onward payment for the purposes of establishing whether they have been remitted.

Part 1 Para 1(6)

137. No comment.

Part 1 Para 1(7)

138. No comment.

Part 1 Para 1(8)

139. No comment.

Part 1 Para 1(9)

140. No comment.

Part 1 Para 1(10)

141. No comment.

Part 1 Para 1(11)

142. This paragraph introduces the commencement dates for s87D and s87E. S87D & s87E will apply to unmatched capital payments brought forward into 2018/19. This means that where unmatched capital payments are brought forward into 2018/19 trustees will need to establish the residence status of beneficiaries for the tax year the capital payments were received (and whether the temporary non-UK residence provisions applied to them). This will be onerous and seems to be totally unwarranted. We would strongly suggest this is re-considered.

Part 1 Para 1(12)

143. This paragraph introduces the commencement dates for s87F & s87G. If unmatched capital payments from pre-2018/19 can be disregarded under s87D then s87F should have commencement/transitional provisions to match so that said unmatched capital payments are not disregarded if the conditions of s87F are met. √

Part 1 Para 1(13)

144. This paragraph introduces the commencement dates for s87I & s87J. Both can apply to capital payments made prior to 2018/19 where the onward payment is made after 5 April 2017. Given that the legislation requires an investigation into the subjective intention at the date of payment we feel that it is unwarranted, retrospective and that the commencement provision should only apply where the capital payment itself (or if earlier the onward transfer) occurs after 5 April 2017.
Part 1 Para 1(14)

145. This paragraph introduces the commencement dates for s87K & s87L. Again, this is retrospectively requiring an analysis of unmatched capital payments made prior to 6 April 2017.

Part 1 Para 1(15)

146. No comment.

Part 1 Paras 2(1)-2(4)

147. No comment.

PART 2 INCOME TAX

SETTLEMENTS’ REGIME

Part 2 Para 3

148. No comment.

Part 2 Para 4

149. No comment.

Part 2 Para 5

150. No comment.

Part 2 Para 6

151. No comment.

Part 2 Para 7

152. No comment.

Part 2 Para 8

153. No comment.

Part 2 Para 9 s643A

Comments

154. S643A attempts to do two things: introduce a benefits charge and attribute said charge onto the settlor in certain circumstances. It runs to six subsections so we deal with each in turn.

155. S643A(1): This is the main provision. It treats income as arising to an individual. It draws on later definitions of untaxed benefits and available protected income but is subject to the provisions of subsections (2) to (5) which attribute the income to the settlor in certain scenarios.

156. S643A(2): This is a gateway to the application of subsections (3) and (4). It requires:

   a) A charge under s643A(1) for a tax year;
   b) On an individual (the recipient of the benefit) who is not the settlor;
   c) Who is either non-UK resident or on the RB;
d) While the settlor is UK resident and (broadly) foreign domiciled.

157. S643A(3): If the individual (the benefit recipient) is non-UK resident or if none of the income is remitted (in the year it is treated as arising), then the income becomes that of the settlor (and the settlor alone).

158. S643A(4): If the individual (the benefit recipient) is UK resident but some of the income has been remitted (in the year it is treated as arising), the balance becomes income of the settlor (and the settlor alone).

159. Nowhere in s643A does it specify that the recipient must be a close family member.

160. It is unfortunate that this attribution to the settlor is not identical to the machinery deployed in s87G which attributes capital payments to the settlor and not gains (analogous to income in this case). The CGT provisions are also wider. Recommendation - the provisions should be aligned as closely as possible, as discussed in paragraphs 51 and 87.

161. It is important to ensure that a benefit/capital payment matched under s643A falls out of the definition of capital payment for s87, TCGA 1992 purposes. Later consequential amendments appear to achieve this.

162. S643A(5): The primary charging provision at 643A(1) does not specify how to deal with scenarios where more than one individual has untaxed benefits. For example, s87, TCGA 1992 specifically adopts an apportionment approach. S643A(5) says only to adopt a just and reasonable approach. This approach will make it very difficult for tax payers to account for the tax due unless they are aware of the approach that HMRC has taken. From the meeting on 16 October we understand that apportionment was not used as this might not always produce a reasonable result and it was thought using “just and reasonable” would allow flexibility in such situations. Recommendation - we suggest that the legislation is amended to state that income should be attributed proportionately where there is a choice unless it is not reasonable to do so.

163. S643A(6): This states that the RB applies but it does not state to what the RB is to apply i.e. what must be remitted to trigger the charge. The natural candidate is the benefit. We return to this later when we discuss s643F.

Part 2 Para 9 s643B

164. This section defines “untaxed benefits total” which is a key component of the charge under s643A.

165. S643B(1):

a) Step 1: As mentioned above, the requirement that the benefit recipient be a close family member in order for benefits to transfer to the settlor is nowhere stated in s643A. It is only as a result of step 1 that this result follows. Step 1 applies, in practice, only to the settlor and the settlor’s close family. For a non-close family member, step 1 is Nil and so there is no charge under s643A;

b) Step 2: No comment;

c) Step 3: Deduct from the total benefits, anything already taxable as income, anything matched under s643A in an earlier tax year, anything matched under ToAA (which should be included in the first deduction in any event), and anything matched to gains in a prior year; and,

d) Step 4: The non-nil balance is the untaxed benefit amount.
166. S643B(2): This requires that the individual be (broadly) foreign domiciled. If a settlor becomes domiciled in the UK, or is a formerly domiciled resident (FDR) it appears that he or she will be taxable on the arising basis under s624 going forward but not subject to a benefits charge on past income.


Part 2 Para 9 s643C

168. This section defines “available protected income” (API) which is a key component of the charge under s643A.

169. API = PFSI-TOAA-TI

170. S643C(2):

a) PFSI: It is not clear why this is not just defined as protected foreign source income as per s628A;

b) TOAA: This removes from API the amount of PFSI already matched under ToAA; and,

c) TI: This removes amounts already matched under s643A. The divergence between (a) and (b) in the definition of TI in terms of which year to consider poses an issue. It implies that for each person it is necessary to first look at all the other recipients and deduct their amounts (see limb (b)) to work out the API.

We do not, however, understand how this can work with benefits to more than one beneficiary as in such a situation the current formula seems to us to be circular.

For example

Year 1, the PFSI is £30,000 and A has benefit of £40,000 and B has benefits of £35,000. For A, TI is £35,000 so the API is Nil. For B TI is £40,000 so the API is Nil. Consequently, nothing is matched for either A or B, notwithstanding they both have benefits and the PFSI is £30,000.

An alternative construction would see both the £35,000 and the £40,000 matched to the £30,000 so that £60,000 of income was treated as arising.


Part 2 Para 9 s643D

172. This section seeks to remove from the calculation of benefits in step 1 of s648B any benefits already matched in a prior year under s87 et seq.

173. As discussed above, we are concerned that the current divergence in the close company family member charging provisions for CGT and income tax could lead to a charge to the settlor for CGT purposes and a charge on the beneficiary for income tax purposes. It is not clear that anything in the provisions prevents this from happening. The best way of avoiding this issue and generally simplifying the legislation would be to align the rules with the CGT close family member provisions being changed in line with ToAA as far as possible.
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Part 2 Para 9 s643E

174. No comment.

Part 2 Para 9 s643F

175. This section attempts to apply the remittance basis to the 643A charge. As mentioned above, there is no reference in s643A to remittance issues. Under s643F, the deemed income is treated as RFI. And the benefit and available protected income (API) are treated as deriving from the deemed RFI.

176. As both the benefit and the API (as defined in subsection (5)) derive from the deemed RFI, the trustees cannot bring the underlying protected foreign source income to the UK as if it is matched there will be an immediate tax charge. This is contrary to what was announced and what we have been repeatedly told in the stakeholder meetings. The same issue exists with the ToAA provisions (see our ICAEW Representation 109/17). Both defects need to be addressed with the ToAA adjustment having retrospective effect to 6 April 2017.

Part 2 Para 9 s643G

177. This section expands on when the benefit or API “relates” to deemed income for the purposes of s643F. It is a matching rule similar that found at s735A ITA 2007 and the objective is presumably to identify deemed income with real income so that it can be determined whether the deemed income has been remitted (or not as the case may be).

178. S643G(2): This is best illustrated by example – we will focus on Year 2 but we need to work up Year 1 as a precursor. Consider a trust only (ignore ToAA and s87) generating income each year and providing benefits:

<table>
<thead>
<tr>
<th>Year</th>
<th>Benefits provided to A</th>
<th>Income (all foreign)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>£300,000</td>
<td>£170,000</td>
</tr>
<tr>
<td>2</td>
<td>£400,000</td>
<td>£870,000</td>
</tr>
<tr>
<td>3</td>
<td>£250,000</td>
<td>£510,000</td>
</tr>
</tbody>
</table>

a) Year 1: Work out the deemed income under s643A. The untaxed benefit total is £300,000. The API is £170,000. The deemed income is £170,000.

b) Year 2: Work out the deemed income under s643A. The untaxed benefit total is £300,000 + £400,000 - £170,000 = £530,000. The API is £170,000 + £870,000 - £170,000 = £870,000. The deemed income is £530,000.

c) A is an RB user so under s643G:

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Income</th>
<th>Deemed income</th>
</tr>
</thead>
<tbody>
<tr>
<td>£300,000</td>
<td>£170,000</td>
<td>£170,000</td>
</tr>
<tr>
<td>£400,000</td>
<td>£870,000</td>
<td>£530,000</td>
</tr>
</tbody>
</table>

d) Presumably then £530,000 of the £870,000 year 2 income and the £400,000 of year 2 benefit and £130,000 of the year 1 benefit are to be treated as derived from the £530,000 of year 2 deemed income for the purposes of the remittance basis.

179. S643G(2): Unlike s735A, s643G will not match UK source income. Consider the scenario where the settlor can benefit under the trust and is non-UK resident but a close family member is UK resident and in receipt of benefits. S624 will not tax the UK source income on the settlor (albeit it will be taxed on the trustees). The UK income will not form part of the protected foreign source income by definition. It could therefore transpire that a trust with UK source income and foreign source income where the benefit is provided out of taxed UK income, will still be
matched to protected foreign source income. **Recommendation – adjust s 643G so that it is aligned with s 735A in that it also matches benefits to UK source income.**

Part 2 Para 9 s643H

180. See comments above.

Part 2 Para 9 s643I

181. This section introduces rules to attribute deemed income to recipients of onward gifts. It fulfils a role similar to the new s87I. However, notwithstanding the similar function, the structure is not the same.

182. To expand on this point, given that s731 et seq, s87 et seq and s643A et seq are all trying to capture the same capital payment, we strongly recommend that the rules dealing with onward attribution of gains, income or capital payments/benefits are identical.

183. Section 643I runs to sixteen lengthy subsections so we deal with them in turn.

184. S643I(1): This is the gateway. Unlike s87I(1), s643I(1) turns on both s643I and s643J. It has many limbs and each bullet below deals with a separate limb:

a) Income (the deemed income) must be treated as an individual’s under s643A (ignoring the clauses which potentially divert it to the settlor);

b) The deemed income must be matched to a benefit under s643G – it is hard to contemplate a scenario where this is not the case except the case of an individual not taxed on the remittance basis in which case it would be easier just to specify that the individual must be on the RB in the year of the s643A attribution;

c) The deemed income must not be attributed to the settlor under s643A(2) to (5);

d) Like s87I there must be an intention and it must be reasonable to expect the payment to be received by a recipient at a time when they are UK resident – the same comments as made above in respect of the same provisions in s87I apply here;

e) the original beneficiary must then make a gift;

f) The gift must have some connection to the benefit – A very low threshold;

g) The original beneficiary must be either non-UK resident or taxed on the RB – this is a totally different filter to that found in s87I(1)(g) which has some (seemingly arbitrary) requirements regarding residence and RB for the years between receipt of the original benefit and the onward gift. For the avoidance of doubt, the filter in s643I seems more appropriate albeit limb (ii) specifies no remittance at all; and,

h) The recipient of the onward gift must be a settlor or close family member which makes sense in the context of this charge.

185. S643I(2): Unlike s87I there is no provision dealing with chains of onward gifts. Presumably this is because of the different structure of s643I. Whereas s87I(1) does not apply to non-UK resident onward recipients, such scenarios are specifically contemplated in s643I(1).

186. S643I(2): This is an additional gateway to turning on s643I(4) and it requires the recipient of the onward gift to be UK resident in the year of receipt of the gift and in the year of matching and not on the RB in the charging year (broadly the matching year or gift year whichever is later).

187. Given that this section is entitled the “attribution of deemed income”, the residence requirement in the year of matching seems to be at odds with the title since it could be thought implicit in the title that the matching has happened before the onward gift. Once one examines the clauses it appears that the draftsman is also contemplating an onward gift with the matching occurring after said gift. Consideration should be given to changing the title of the section. This approach and the gateway in s643I(1) does pose practical issues as it requires, inter alia,
amount to be matched and if the gift is made in year 1 and the matching happens in year 5, then the gateway requires a retrospective analysis of subjective matters at the time of the gift. How this will work in practice is unclear.

188. The problem is broadly, as noted above, that s643I takes a fundamentally different approach than that taken in s87I. S87I seeks to attribute already accrued gains and unmatched capital payments. It does not try to attribute gains that may accrue in the future. Where there is no matching at the gift date, it just attributes the capital payment and plugs that unmatched capital payment into the normal rules for future matching (if any). It is this temporal contortion in s643I that poses the practical issue.

Recommendation - as discussed above, we feel that the various anti-recycling rules should be aligned as closely as possible. Changing the settlements’ regime provisions so that in this respect they are aligned with the CGT provisions would resolve the practical issues. The changes suggested in paragraph 52 to 62 above should also be made.

189. S643I(3): This is a further route into s643I(4). The requirements are the same except that the recipient of the onward payment is taxed on the RB in the charging year and there is not a full remittance in the charging year.

190. S643I(4): This subsection treats an amount of the onward gift as income of the recipient in the charging year (i.e. later of gift year or matching year).

191. S643I(4): Interestingly it does not deal with the scenario where the onward recipient of the benefit is on the RB and remits nothing in the charging year (but remits in a subsequent year).

192. S643I(5): This introduces a cap on the income treated as arising under subsection (4). The onward gift could very well be in excess of the benefit provided and in turn the actual deemed income. It appears to work as follows:

   a) There is API of £100,000;
   b) A capital distribution (benefit) is made of £120,000;
   c) The deemed income is £100,000;
   d) An onward gift of £200,000 is made that comes through the gateway and includes the whole £120,000 of the benefit;
   e) The recipient of the onward gift is on the arising basis at the material time(s);
   f) S643I(4) says treat £120,000 as income of the onward recipient;
   g) But then s643I(5) says to deduct £20,000 such that the onward recipient is treated as receiving £100,000 of income.
   h) However now consider that instead of being on the arising basis in the example above, the onward recipient is on the RB and remits £115,000 in the charging year;
   i) Now s643I(4) says the onward recipient is treated as receiving £115,000 and s643I(5) deducts £15,000 so he is treated as receiving £100,000 of income.

193. S643I(6): This is the gateway to s643I(8) and requires that the onward recipient is non-UK resident for the gift year or alternatively, is non-UK resident in the matching year (if later).

194. S643I(7): This is an alternative but similar gateway to s643I(8) and requires, inter alia, that the onward recipient is on the remittance basis in the year of matching and does not fully remit the onward gift.

195. S634I(8)-(10): These are similar to the provisions in s87I(12) et seq. The point here, as there, appears to be to ready the unremitted (or untaxed) portion of the onward gift so that it can be plugged back into s643I(1).
196. **S643I(9): Consider the following:**

   a) Trust income £100,000.
   b) Distribution of £120,000 to A who is on the remittance basis at all material times.
   c) No remittance.
   d) Onward gift to B of £120,000 who is on the remittance basis at all material times.
   e) No remittance.
   f) Onward gift to C of £50,000 who is on the arising basis.
   g) All gifts come through the gateway. Ignore attribution to the settlor.

   The analysis would appear to be as follows: A has deemed income of £100,000. B is not within s643I(4). S643I(7) applies and B is treated (for subsection (1) purposes only) as having received from the trustees deemed income of £120,000 (the amount of the gift) less £20,000 (being £120,000 - £100,000) = £100,000. C is then treated, by the repeated application of s643I(1) et seq, as receiving income of £50,000.

197. **S643I(10):** this modifies subsection (1) so that it can deal with the onward payment of the previous onward payment. However, the omission of subsection (d) does not appear to be correct. The implication is that there needs to be an intention for A to pay to B, but not B to pay to C. The alternative is that one person in the chain having an intention to pass it on means everyone in the chain is tainted by this person’s thoughts, which seems inequitable. However, from the discussions during the meeting on 16 October we do not think this was intended. During that meeting it was made clear that it was only the intention of the original beneficiary that should be taken into account. **Recommendation** – adjust the legislation to make it clear that it is only the original beneficiary’s arrangements and intentions that are taken into account.

198. **S643I(11):** This, rightly, removes from the original beneficiary any income attributed to another person by S643I. As regards chains, it is possible for A to have deemed income, for income to be attributed to B and also to C. The attribution is not A to B to C but A to B and A to C in which case the reference in (10) to the original beneficiary does appear to work.

199. **S643I(12):** This subsection makes it clear that the application of s643I need not be to the whole amount of matched income.

200. **S643I(13):** No comment.

201. **S643I(14):** No comment.

202. **S643I(15):** No comment.

203. **S643I(16):** The purpose of this provision is not immediately clear.

**Part 2 Para 9 s643J**

204. This is analogous to s87J. However, s87J seeks to attribute both capital payments and accrued gains to the settlor which have first been attributed from the original recipient to an onward recipient. S643J only seeks to attribute income – see discussion above re the divergence in approach.

205. **S643J is subject to the same gateway as s643I and then two further gateways at s643J(1) & s643J(2).**

206. **Ss643J(1)&(2):** The material requirement is that the onward close family member recipient is not charged to tax on some or all of the onward gift.
207. S643J(3): this is the operative subsection and it attributes to the settlor some of the original deemed income of the original beneficiary. The inclusion of s643I(8)(i) is now clearer as it seeks to remove from the second onward gift (in a chain) any amount already attributed to the settlor. It is not immediately clear that the original beneficiary gets a corresponding deduction as it is not addressed in this section. One must turn to s643I(11) to find the relief.


209. Ss643J(5)-(7): No comment.

210. S643J(8): Same comment as per s643I(16) and s87I(16).

Part 2 Para 9 s643K

211. This section has no counterpart in the changes to s87. It deals with the scenario where there is an onward gift to the settlor or close family member from a person outside this class. Unlike s643A, s87A is not a charge on the settlor and close family members and so such a provision is not required. Without its inclusion here, s643A could be circumvented by a payment to a non-close family member and an onward gift to a close family member as, in such a scenario, s643I would not be engaged as it relies on s643A.

212. This could have been incorporated efficiently in the structure of s643A et seq without the need for bolting on yet another separate provision.

213. Unlike the preceding sections, s643K focuses on benefits instead of income (for obvious reasons but again unhelpful in that it adds to the complexity of what is happening and what needs to be tracked).

214. S643K(1): The gateway to s643K is lengthy but the material provision is that the original recipient of the benefit is not the settlor or a close family member. The remainder of the gateway is similar to s643I.

215. S643K(2): Unlike s643I, s643K does have a provision dealing with chains (similar to that found in s87I(2) but with slightly different conditions). Our comments above re s87I(2) apply equally here.

216. S643K(3): This is the operative clause in that it attributes to the last recipient in the chain a capital payment/benefit. This capital payment/benefit then plugs into s643A et seq.

217. Ss643K(4)&(5): No comment.

Part 2 Para 9 s643L

218. This section attempts to apply the remittance basis to income treated as arising under s643I or s643J. Unlike the rules introduced for s643A which treat the underlying income and the benefit as deriving from the deemed income, under s643L only the onward payment is treated as derived from the deemed income.

TRANSFER OF ASSETS ABROAD (ToAA)

Part 2 Para 10

219. No comment.
Part 2 Para 11

220. This paragraph contains minor changes to, and introduces new subsection 1C into, s731 ITA 2007. S731(1C) is a consequential change to ensure that the other changes discussed below are effective.

Part 2 Para 12

221. This paragraph amends s732(1)(e) such that s731 applies if, inter alia, the individual is not liable to income tax on the benefit except as a result of s731, 643A, 643I and 643J.

Part 2 Para 13 s733B

222. This paragraph inserts a new s733B. The F (No 2) A 2017 amendments to s731 et seq already introduced a new provision to attribute to the settlor (transferor) income which would otherwise be deemed to be a close family member’s under s731.

223. Therefore, in a manner similar to the proposed changes to s87 et seq, this round of draft clauses needed to include the following:
   a) The basic anti-recycling provision (s733B); and,
   b) Anti-recycling where there are onward gifts attributed to the settlor (s733C).

224. S733B deals with the onward gifts. It runs to sixteen lengthy subsections so we deal with them in turn.

225. S733B(1): This is the gateway. Unlike in s87I but like in s643I and s643J it turns on both s733B and s733C. It has many limbs and each bullet below deals with a separate limb:
   a) Income (the deemed income) must be treated as an individual’s under s732 (ignoring the clauses in s733B and s733C which potentially divert it to the settlor).
   b) The deemed income must be matched to protected income and a benefit under s735A.
   c) Like s87I and s643I there must be an intention and it must be reasonable to expect the payment to be received by a recipient at a time when they are UK resident – the same comments as made above in respect of the same provisions in s87I apply here.
   d) The original beneficiary must not be a close family member or must be a close family member where the settlor is non-UK resident.
   e) The original beneficiary must then make a gift – See earlier comments re gifts and death;
   f) The gift must have some connection to the benefit – as discussed on the face on it this is very low threshold, albeit we understand that it is not to be applied as such.
   g) The original beneficiary must be either non-UK resident or taxed on the RB – this is the same filter as found in s643I but a totally different filter to that found in s87I(1)(g) – see earlier comments above.

226. Ss733B(2)&(3): Similar to s643I, these subsections act as further gateways into subsection (4). The requirements are broadly the same, so see earlier comments.

227. S733B(4): This subsection attributes to the onward recipient an amount of income under s732 in the amount of the value of the onward gift.

228. S733B(5): This caps the amount of income attributed under (4) in the same was as in s643I.

229. Ss733B(6)&(7): in an analogous manner to s643I, these subsections act as further gateways into subsection (8). The requirement is broadly that the onward recipient does not pay tax on an element of the onward gift in the charging year.
230. **Ss733B(8)-(11):** These subsection deal with chains of onward payments in the same manner as in s643I. See comments above for discussion.

231. Incidentally, again we note that there is no standalone provision akin to s87I(2) also seeking to deal with chains. Again this is presumably due to the fact that s733B(1) is not restricted to UK residents, unlike s87I.

232. **S733B(12):** This ensures that there is no double charge once income has been attributed to the onward recipient by removing it from original beneficiary.

233. **S733B(13)-(15):** No comment. See above.

**Part 2 Para 13 s733C**

234. **This is similar to s87J and s643K. However, where s87J seeks to attribute both capital payments and accrued gains to the settlor which have first been attributed from the original recipient to an onward recipient, s643J only seeks to attribute income – see discussion above for the divergence in approach. S733C follows the latter approach.**

235. **S733C is subject to the same gateway as s733B and then two further gateways at s733C(1) & s733C(2).**

236. **Ss733C(1)&(2):** The material requirement is that the onward close family member recipient is not charged to tax on some or all of the onward gift.

237. **S733C(3):** This is the operative subsection and it attributes to the settlor (broadly) an amount of the deemed income of the original beneficiary. The inclusion of s733B(8)(i) is now clearer as it seeks to remove from the second onward gift (in a chain) any amount already attributed to the settlor. It is not immediately clear that the original beneficiary gets a corresponding deduction as it is not addressed in this section. One must turn to s733B(12) to find the relief.

238. **S733C(4):** No comment.

239. **Ss733CJ(5)-(7):** No comment.

240. **S733C(8):** Same comment as per s643I(16), s643J(8) and s87I(16).

**Part 2 Para 14**

241. **This paragraph amends s734 which currently removes from the total untaxed benefits in s733(1) any benefits already matched under s87. The amendment extends this to ensure any benefits matched under new s87I and s87J are dealt with in a similar fashion.**

242. A similar provision is required to ensure that benefits matched under the new settlements legislation matching rules are likewise removed and so cannot be matched again.

**Part 2 Para 15**

243. **Paragraph 15 introduces new s735C which seeks to apply the remittance basis to income attributed under s733B and s733C. It treats the income so attributed as RFI.**

244. **Unlike the rules introduced for s643A which treat the underlying income and the benefit as deriving from the deemed income, s735C is similar to s643L in that it is only the onward payment that is treated as derived from the attributed income.**
CONSEQUENTIAL AMENDMENTS

Part 2 Para 16

245. This amendment ensures that capital payments/benefits matched under the new ss 643A, 643I, 643J and ss733B and 733C, are not counted again for s87 purposes (i.e. double matching is avoided). 

COMMENCEMENT PROVISIONS FOR INCOME TAX AMENDMENTS

Part 2 Para 17

246. The changes wrought by paragraphs 3 to 16 (i.e. the income tax changes) have effect for 2018/19 onwards. Importantly, s643B benefits provided prior to 2018/19 are out of scope. Likewise, for s643C income arising prior to 2018/19 is out of scope.

247. However, there appear to be no commencement provisions for the ToAA amendments which implies that onward payments whenever made need to be re-analysed to account for potential matching in 2018/19 and thereafter. We would strongly recommend that this is amended so that the changes do not act retrospectively.

NOTE ON INTERACTIONS

Overall comment

248. Aside from the ensuring each benefits charge works properly on a standalone basis it is necessary to ensure that they interact in a sensible manner such that benefits matched under one do not fall to be taken account again under another. The capital payments terminology (in the CGT legislation) and benefits terminology (in the income tax legislation) are used interchangeably in what follows.

Overall recommendation

249. The interactions between the two sets of income tax anti-avoidance provisions and the CGT offshore trust anti-avoidance provisions are extremely complex.

250. Since the charges can overlap it is critical that there are appropriate relieving provisions to prevent double charges from arising. Specific changes to the legislation should be made in relation to the problem areas we highlight in paragraphs 251 to 264 below. We are, however, concerned that there has been insufficient time to produce any detailed case study examples, let alone enough to be confident that the draft legislation has been stress tested. Issues are likely to have been missed. As such, we feel that there should be a just and reasonable provision inserted into the three sets of anti-avoidance legislation such that if the legislation does not specifically provide for the necessary deductions to avoid double charging such deductions can be claimed by affected taxpayers on a just and reasonable basis (taking into account the current order of priority (so ToAA first, then settlements’ charge, then OIGs and finally capital gains).

Section 87 et seq

251. A benefit matched under s643A, s643I, s643J, S732, s733B or s733C is removed from the definition of capital payment under s97 TCGA by Part 2 Para 16 of the draft clauses. The drafting removes capital payments “treated as an individual’s [income]” under the above sections.
252. **S87:**

   a) **S643A:** No comment.

   b) **S643I:** This provision attributes matched income so it requires matching of the capital payment in A’s hands – the capital payment so matched should therefore fall away for s87 purposes.

   c) **S643J:** Again, this provision attributes matched income so it requires matching of the capital payment in A’s hands – the capital payment so matched should therefore fall away for s87 purposes.

   d) **S643K:** This section attributes capital payments. It is not immediately clear that the onward attributed capital payment received by B is to be identified with the actual capital payment received by A. Which means that if the attributed capital payment is matched in B’s hands, it may not necessarily follow that the capital payment in A’s hands will be removed from future matching under s87 (cf s97(3)).

   In addition, as discussed, the differences between the income tax close family member charging provisions and that for CGT means that a double charge is possible. The current legislation is not sufficiently clear in removing a benefit taxed on the close family member from the capital payment attributed to the settlor. **Recommendation** - we feel that the better solution is to align the provisions so the issue cannot occur. At a minimum, the legislation should be adjusted so anything attributed to the close family settlor under the income tax charging provisions is deducted from the capital payment attributed.

   e) **S732:** No comment.

   f) **S733B:** This provision attributes matched income so it requires matching of the capital payment in A’s hands – the capital payment so matched should therefore fall away for s87 purposes.

   g) **S733C:** Again, this provision attributes matched income so it requires matching of the capital payment in A’s hands – the capital payment so matched should therefore fall away for s87 purposes.

253. **S87I:**

   a) To the extent that this section attributes gains, the comments above re s87 apply.

   b) This section can also attribute capital payments. It is necessary to consider a capital payment received by A and passed to B and the nature of that capital payment in B’s hands i.e. while s97 may remove a matched capital payment from A does it also remove it from B? In order to come within s87I however there must be a capital payment in A’s hands in the first place thus the removal of a capital payments (due to income matching elsewhere) at this stage (i.e. in A’s hands) necessarily removes the onward capital payment to B.

254. **S87J:**

   a) Same comments as per s87I apply.

   **Section 643A et seq**

255. A capital payment matched under s87, s87I, s87J is removed from subsequent matching under s643A by s643D for all years after they have been matched to gains. The drafting refers to gains “accruing to a person”.

33
256. A capital payment matched under s732, 733B or s733C is removed from subsequent matching by s643B which removes from the benefits the following: “where the whole…of a benefit …is taken into account [under ToAA], the amount…taken into account in doing that…”.

257. **S643A:**

   a) S87: No comment.

   b) S87I: This section can attribute gains. In which case, the capital payment so matched will be removed from matching under s643A. It can also attribute capital payments. These will be subsequently matched under to gains under s87, s87I or s87J so will also be removed from further matching under s643A so long as HMRC agree that the subsequent matching is done by reference to the original benefit provided to A (which indirectly it is).

   c) S87J: Same comments as per s87I.

   d) S732: No comment.

   e) S733B: This section attributes income so matching must occur in the original beneficiary’s hands. Therefore, any capital payment so matched should be removed from matching under s643A.

   f) S733C: This section attributes income so matching must occur in the original beneficiary’s hands. Therefore, any capital payment so matched should be removed from matching under s643A.

258. **S643I:**

   a) This section attributes income so the removal of a capital payment from A (due to income or gains matching elsewhere) will remove any subsequent attribution. This means that the same comments as per s643A apply.

259. **S643J:**

   a) This section attributes income so the removal of a capital payment from A (due to income or gains matching elsewhere) will remove any subsequent attribution. This means that the same comments as per s643A apply.

**Section 732 et seq**

260. A capital payment matched under s87, s87I, s87J is removed from subsequent matching by the amendment in Part 2 Para 14. It amends s734 such that chargeable gains are treated as accruing to “a person…by reference to…the benefit…”.

261. There do not appear to be any explicit provisions dealing with benefits matched under s643A et seq. While the ToAA provisions do take precedence, there may be scenarios in which there is matching under s643A et seq and then subsequent matching under ToAA; this could happen if the motive defence were to be lost for whatever reason.

262. **S732:**

   a) S87: No comment.

   b) S87I: This section can attribute gains. In which case, the capital payment so matched will be removed from matching under s732. It can also attribute capital payments. These will be subsequently matched under to gains under s87, s87I or s87J so will also be removed from
further matching under s732A so long as HMRC agree that the subsequent matching is done by reference to the original benefit provided to A (which indirectly it is).

c) S87J: Same comments as per s87I.

d) S643A: It is not clear that benefits, matched under s 643A are removed from subsequent matching under s732. In addition, it is not clear that PFSI matched under s 643A is removed from potential matching under the ToAA provisions.

e) S643I: It is not clear that these are removed from subsequent matching under s732.

f) S643J: It is not clear that these are removed from subsequent matching under s732.

263. S733B: This section attributes income so the removal of a capital payment from A (due to matching elsewhere) will remove any subsequent attribution. This means that the same comments as per s732 apply.

264. S733C: This section attributes income so the removal of a capital payment from A (due to matching elsewhere) will remove any subsequent attribution. This means that the same comments as per s732 apply.
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 http://www.icaew.com/-/media/corporate/files/technical/tax/tax-news/taxguides/taxguide-0499.ashx).