ICAEW
REPRESENTATION 99/21

RESIDENTIAL PROPERTY DEVELOPER TAX DRAFT LEGISLATION

Issued 13 October 2021

ICAEW welcomes the opportunity to comment on the Residential Property Developer Tax draft legislation published by HM Treasury on 20 September 2021, a copy of which is available from this link.

This response of 13 October 2021 has been prepared by ICAEW's Tax Faculty. Internationally recognised as a source of expertise, the faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. Our Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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GENERAL POINTS

1. Of the potential methods of determining the profits subject to the residential property development tax (RPDT) mentioned in the consultation document, it appears that option 2(a) has been decided upon (an activity-based approach, taking profits as computed for corporation tax purposes as the starting point). One of the potential adjustments to profits considered on page 15 on the consultation document is one required to recognise development activities from build to rent activity where the properties concerned are transferred to a fellow group company to be leased out whilst the developer's interest in the development is sold. There does not appear to be an adjustment included within the draft legislation to deal with this.
2. It may be that such an adjustment (ie, the imposition of an arm's length inter-company pricing agreement) is implied in that the companies concerned would need to consider transfer pricing as part of the calculation of their profits subject to corporation tax. However, if those companies are outside the scope of transfer pricing, such as through the application of the exemption for small and medium-sized enterprises at s166, TIOPA 2010, then no such adjustment would be required. If HMRC intends that such an adjustment would apply in all cases, we recommend that provision is included to that effect in the legislation.
3. We note that student accommodation has been excluded from the definition of residential property at clause 5(2)(j). We look forward to seeing the summary of responses to determine the rationale for this exclusion.

DETAILED COMMENTS

Clause 3: RPD activities

The measure

4. This clause defines the activities a company is undertaking if it is to fall within the scope of the RPDT.

Our concern

5. We assume that HMRC intends that only companies that are developing residential properties are subject to the RPDT. We take this from the wording at clause 3(1)(b).
6. Clause 3(2) goes on to list examples of activities that are carried out for the purposes of, or in connection with, the development of residential property. While they do not correspond exactly, they appear to reflect the various phases of development activity referred to in pages 10 and 11 of the consultation document.
7. If looked at individually, we would not consider most of the activities listed in clause 3(2) as constituting property development (eg, (b) designing and (e) marketing). The way that the legislation is currently worded, we are concerned that companies carrying on these activities in isolation and without any other development activity could become subject to the tax. We assume that this is not the intention of the legislation.
8. Clause 3(1) states that activities are only RPD activities if the RP developer has or had an interest in the land concerned. This would therefore remove certain service providers such as

architects and estate agents from the scope of this tax. Nevertheless, we are concerned, that if a company obtains an interest in land which it then provides a service in respect of, it could become within the scope of the tax, even though it is not involved in the development of residential property on that land.

9. An example of this might be an estate agent that, as a result of its business model, acquires legal ownership of the properties it is marketing. Such companies would not benefit from the restriction provided for in the interest in land provision.

Our recommendation

10. We recommend that clause 3 includes a definition of residential property development and that it then goes on to say that if a company is carrying on such development activities, it would also be subject to tax on activities related to that development, as currently listed in clause 3(2).

Suggested amendment

11. Our suggestion is that a new clause 3(2) is inserted that reads as follows:

> "For the purposes of subsection (1)(b), activities that are carried out for the purposes of, or in connection with, the development of residential property are the creation of new or renovation of existing residential property, or the conversion of existing buildings into residential property".

12. A new clause 3(3) could then go on to say "If a company carries on any of the following development activities, it is also subject to tax on any profits arising from those activities if they are carried out in connection with the development of residential property" and then list out the activities currently included in clause 3(2).

Clause 4: RPD activities: interest in land

The measure

13. This clause defines the meaning of "interest in land" for the purposes of clause 3(1)(a). Clause 4(1) states that an RP developer has, or had, an interest in land if it or a related company has or had one or more of the interests set out in that sub-clause.
14. Clause 4(2) defines a company that is related to an RP developer.

Our concern

15. We assume that a company is related to an RP developer if either of the tests (a) or (b) in clause 4(2) are met. There is no "or" between sub-clauses (a) and (b) and so there is some doubt as to whether this assumption is correct or whether both tests need to be met.

Our recommendation

16. Our recommendation is that the word "or" is inserted between sub-clauses (2)(a) and (b) if that is what is intended.

Suggested amendment

17. We also suggest that sub-clause (2)(a) makes it clear that the definition of a group is contained at clause 18.

Clause 14: Allowance: joint venture companies

The measure

18. This clause provides for the calculation of the annual allowance for the RPDT where the profits of a member of a joint venture (JV) company are not chargeable to corporation tax. It provides for the allowance of a JV company to be reduced and for the exempt member to instead have an annual allowance that can be allocated to its JV interests.

Our concern

19. Clause 14(1) refers to a member of the joint venture company (B) "that is not liable to the tax". The legislation does not define what this means. The explanatory notes provide some examples, such as institutional investors and offshore companies without a UK permanent establishment. It is not clear whether B would be "not liable to the tax" for these purposes if it did not carry on residential property development activities.

Our recommendation

20. If it is intended that the term "not liable to tax" at clause 14(1) is only intended to apply to companies carrying on residential property activities which are not subject to the RDPT, we recommend that the legislation is amended to make this clearer.

Suggested amendment

21. Our suggested amendment is to replace the words "not liable to the tax" at clause 14(1) with the following:

> "carries on residential property development activities that are outside the scope of RPDT".

Clause 18: Groups

The measure

22. This clause provides the definition of a group of companies for most purposes of the RPDT including the allocation of the allowance under clause 13. The definition refers to a company, B being a 75% subsidiary of another company, A and also provides for other tests under which companies A and B would form part of the same group. A further definition of a group for loss relief purposes is included at para 21 of Sch 1 of the draft legislation. This definition only refers to 75% subsidiaries. We should be grateful for clarification as to why there are different definitions of a group for different purposes of these rules. Unless there are specific benefits to this, it creates unnecessary complication and fails to meet test 3 of our ten tenets for a better tax system.

Our concern

23. There is no definition of a 75% subsidiary included in the draft legislation. We assume that the definition at s1154, CTA 2010 will be used for this purpose. This definition refers to A owning directly or indirectly at least 75% of B's ordinary share capital.
24. Clauses 18(4)(b) and (c) refers to A being beneficially entitled to the profits available for distribution to equity holders and assets available on a winding up to equity holders respectively of B. It does not specify whether that entitlement is direct or indirect through a chain of companies.

Our recommendation

25. We recommend that it is made clear whether the definition of a 75% subsidiary at s1154 is being used for this purpose.

Suggested amendment

26. If it is intended that the beneficial entitlements referred to at clauses 18(4)(b) and (c) can be traced through a chain of companies we suggest that the words "directly or indirectly" are added to sub-clauses (b) and (c) after the words "beneficially entitled", in each case.

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 https://goo.gl/x6UjJ5).