



FINANCE (NO.2) BILL 2023-24 CLAUSE 22 TRANSFERS OF ASSETS ABROAD

Issued 21 May 2024

Briefing for MPs on the **Finance Bill** by ICAEW Tax Faculty.

Internationally recognised as a source of expertise, ICAEW Tax 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. ICAEW Tax Faculty's *Ten Tenets for a Better Tax System* are summarised in Appendix 2.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 186,500 chartered accountant members and students around the world. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

© ICAEW 2024

All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information, please contact: taxfac@icaew.com

ICAEW

Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
icaew.com

The Institute of Chartered Accountants in England and Wales (ICAEW) incorporated by Royal Charter (RC000246)
Registered office: Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK

EXECUTIVE SUMMARY

1. The FB legislation will add further uncertainty for taxpayers and increase workload for HMRC.
2. The legislation will make the transfer of assets abroad (ToAA) code even more complex than it is currently. The ToAA legislation is likely to become more relevant due to the proposed changes to the taxation of non-UK domiciled individuals and their trusts.
3. The legislation is too broad and as drafted, gives rise to income tax liabilities for those whom we believe it cannot be the intention to tax under the rules.

THE MEASURE

4. The ToAA legislation is an anti-avoidance provision designed to prevent UK resident individuals from transferring ownership of income-generating assets to an overseas person while still being capable of benefitting from the income generated.
5. As noted in the [Explanatory Notes](#), this clause introduces a provision which is intended to ensure that UK tax cannot be avoided where a UK resident close company, or a non-resident company that would be close if it were UK resident, is used to make the transfer to the overseas person.
6. The provision has been introduced in response to the Supreme Court judgment in [Commissioners for His Majesty's Revenue and Customs v Fisher \[2023\] UKSC 44](#). However, as drafted, the provision extends beyond the circumstances of that case. While ICAEW understands the rationale for this anti-avoidance provision, it considers that it is not properly targeted in line with ICAEW's Ten Tenets for a Better Tax System by which we benchmark the tax system and changes to it (summarised in Appendix 2).
7. The clause will apply to income arising on or after 6 April 2024.

OUR CONCERN AND OUR RECOMMENDATIONS

8. Where a transaction fulfils the criteria of falling within the ToAA legislation, it is for the taxpayer to self assess whether a charge arises. Aspects of this self assessment can be difficult in practice. The amended legislation will bring a greater number of transactions within scope of the ToAA provisions and will add a further layer of complexity.
9. The draft provision in clause 22 of the Finance Bill applies to all income arising on or after 6 April 2024. This means that taxpayers will be required to apply the new legislation to transactions that occurred in the past – perhaps many years in the past. The information that is now required to make a self assessment was not previously required. This means that evidence may no longer be available. We consider that, if enacted, the new provisions should apply to relevant transactions that occur on or after 6 April 2024.
10. The provision can apply when the relevant participator did not object to the making of the relevant transfer. This also includes past transactions. Some taxpayers who were not supportive of a particular transaction may not have formally 'objected', if they knew the matter in question would be approved due to other shareholders in the company having a majority of the votes. Such taxpayers would now be within the scope of the draft provision, even though we do not consider they are within the spirit of what is being targeted by the draft legislation.
11. The draft legislation applies to individuals who are 'involved' with a company, but it is unclear what this term means in the draft legislation as it is not defined. The burden is on the shareholder to demonstrate that they were not involved in the decision making, regardless of the size of their shareholding and whether they are a director of the company or not. As drafted this clause is extremely broad and could catch many individuals who we do not consider are the intended target. We suggest that 'involvement' should be limited to 'involvement' with the transaction under consideration.

12. The new provision is broader in scope than we believe is intended. For example, the legislation potentially applies to intra-group transactions between subsidiaries. Even if it is intended that intra-group transactions are in scope, given that there may be many such transactions, consideration of whether this legislation may bite is incredibly onerous.
13. The new legislation is likely to be a particular issue for private equity (PE) firms. This is because all partners are connected persons and the close company definition can be fulfilled even with a number of shareholders. Many PE firms include partnerships and companies in their structures. HMRC expects the taxpayer to quantify the amount of income potentially at stake before claiming any of the statutory reliefs. This is very difficult to do where complex arrangements are involved and a taxpayer has no certainty that they fall within the terms of the legislation.
14. The new legislation contains an avoidance condition which adds further complexity. Instead of applying TOAA in all cases where a transfer was made and the participator did not object, we consider that, if such a rule is to be introduced, the participator's motives should be considered, as opposed to simply testing for an act of objection.
15. In many cases, the taxpayer will be relying on the exemptions in s736–s742, Income Tax Act 2007 (ITA 2007), which for post-4 December 2005 transactions are that there is no tax avoidance purpose for any of the transactions, or that transactions were genuine commercial transactions with any tax avoidance being merely incidental. This is also known as the 'motive defence'.
16. It should also be noted that the ToAA rules can currently apply on the remittance basis for eligible UK resident non-domiciled individuals. With the proposed changes to the regime for non-UK domiciled individuals from 6 April 2025, the population that needs to self assess whether the rules apply will grow significantly. Given the international nature of the non-UK domiciled population, it is likely that these individuals will have more non-UK interests to which the application of the ToAA legislation will need to be considered.
17. The combined effect of the broad scope of this provision and the increased population within scope of the rules will lead to increased workload for HMRC in reviewing returns claiming the motive defence. Has HMRC quantified:
 - how many more ToAA motive defences it expects to have to deal with;
 - how much time it expects to spend dealing with this increase; and
 - how much extra resource it will require to meet this additional workload?
18. There is no clearance mechanism to provide taxpayers with an assurance about whether their transaction:
 - falls within the scope of the new (draft) legislation;
 - falls within the scope of the existing ToAA legislation; and/or
 - the motive defence applies.

Therefore, taxpayers are reliant on making sufficient disclosure on their self assessment return with the attached uncertainty of not knowing whether their return will be enquired into by HMRC.
19. Under the existing ToAA legislation, it is possible for more than one individual to be within the scope of taxation on the same income as there are no apportionment rules. Section 743, ITA 2007 provides a provision to prevent duplication of charges, though the legislation is worded in such a way that HMRC has the discretion to decide on whom a tax liability should fall. This also creates uncertainty for taxpayers.
20. There is also the question of who is the transferor? There are potentially lots of candidates where there are multiple individual shareholders who could be caught by either the income or benefits charge.
21. It is also contrary to ICAEW's Ten Tenets for a Better Tax System by which we benchmark the tax system and changes to it (summarised in Appendix 2). In particular, it is contrary to the need for the tax system to be certain (tenet 2), simple (tenet 3), easy to collect and to calculate (tenet 4), and properly targeted (tenet 5).

SUGGESTED AMENDMENTS

22. The new provisions should apply to relevant transactions that occur on or after 6 April 2024 instead of income arising on or after 6 April 2024.
23. A statutory clearance mechanism should be introduced to increase certainty for taxpayers potentially within scope of the legislation.
24. The breadth of this new legislation should be limited to reduce the uncertainty for taxpayers and workload for HMRC.
25. The 'involvement' condition should be defined and limited to decisions in relation to the transfer in question.
26. Minority participators should be subject to a different test of connection.

FURTHER INFORMATION

As part of ICAEW's Royal Charter, we have a duty to inform policy in the public interest.

APPENDIX

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](#).