



FINANCE BILL 2025-26 CLAUSES 37 & 38 ANTI-AVOIDANCE: COMPANY RECONSTRUCTIONS

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BRIEFING FOR MPS ON THE FINANCE BILL BY THE ICAEW TAX FACULTY

KEY POINTS

We support the introduction of new anti-avoidance rules applicable to company reorganisations through clauses 37 and 38 of the Finance Bill. We believe that the new tests will be easier for taxpayers to apply and for HMRC to administer due to the removal of a “commercial reasons” test.

We believe that similar improvements should be made to other anti-avoidance tests within the taxes acts to provide consistency and to ensure those tests focus on the potential loss of tax to the Exchequer.

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THE MEASURE

1. Provisions in the Taxation of Chargeable Gains Act (TCGA) 1992 ensure that, in certain circumstances, where shares are sold by a taxpayer and others are received in return, no chargeable gain arises. These circumstances include company reorganisations and situations where the purchaser of a company or group issues shares or loan notes as consideration.
2. An existing anti-avoidance provision at s137 prevents this treatment from applying unless the arrangement “is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.”
3. The requirement to demonstrate bona fide commercial reasons causes disputes between HMRC and taxpayers/agents even in cases where it is clear that there was no loss of tax. This can hold up transactions and lead to uncertainty for both the purchasers and the vendors, as well as wasting HMRC’s resource in determining whether a transaction is commercially motivated, regardless of the fact that there is no potential loss of tax.
4. Under the new rules, HMRC is instead given the power to adjust the tax result on a just and reasonable basis if the main purpose, or one of the main purposes, of arrangements relating to the share exchange is to reduce or avoid liability to capital gains tax or corporation tax.
5. These new rules ensure that HMRC can focus on the potential loss to the Exchequer, rather than whether there is a commercial reason for the transaction (which is not something HMRC officers have necessarily been trained to determine).

OUR CONCERN AND OUR RECOMMENDATIONS

6. There are equivalent versions of the existing s137 anti-avoidance test in other parts of the taxes acts. For example, this test is used to determine whether an exemption from stamp duty applies on the transfer of shares and whether a charge to corporation tax arises on the transfer of intangible assets, such as goodwill.
7. We are concerned that the benefit of replacing the test in TCGA will be reduced if the test continues to apply to other parts of the taxes acts. HMRC, taxpayers and agents will still be required to consider and argue whether genuine commercial reasons exist for the transaction if those parts of the taxes acts are in point.
8. If it is not possible to change the rules in this Finance Bill, would the government commit to entering into a discussion or consultation about changing them in a future Finance Bill?

SUGGESTED AMENDMENTS

9. The following section sets out the areas of the taxes acts most likely to apply to transactions to which s137 relates. There are other parts of the legislation that also include ‘bona fide commercial reasons’ or ‘genuine commercial reasons’ tests. We would support a review of all these tests to determine whether they still satisfy the reasons for which they were introduced.

Intangible assets: Chapter 11, Part 8, Corporation Tax Act 2009

10. Sections 831 to 833 set out a genuine commercial requirement, which must be met for transfers referred to elsewhere in Chapter 11 to occur on a tax neutral basis.
11. We believe that these sections should be replaced with wording along the lines of the amended s137 TCGA 1992, such that an Officer of the Revenue and Customs can make adjustments on a just and reasonable basis to the tax neutral treatment otherwise provided for in Chapter 11. The clearance procedure currently available could be replaced with one confirming that no such adjustments will be made.

Stamp duty: section 75, FA 1986

12. Section 75 provides that no stamp duty is chargeable where a company (the acquiring company) acquires the whole or part of an undertaking of another company (the target company) in pursuance of a scheme for the reconstruction of the target company. Two conditions must be met for this treatment to apply, as set out in s75(4) and (5).
13. We believe that the first part of the second condition, currently set out at s75(5)(a) should be removed.
14. A further sub-section should be added, allowing an Officer of Revenue and Customs to make a just and reasonable adjustment, along the lines of that set out in the amended s137.

Enterprise investment schemes (EIS): Chapter 8, Part 5, Income Tax Act 2007

15. Section 247 provides for continuity of EIS income tax relief where the company issuing the shares on which relief is granted is acquired by a new company. Among various conditions, s247(1)(f) provides that HMRC must have confirmed before the issue of the new shares that it is satisfied that the exchange will be effected for genuine commercial reasons and will not form part of a scheme or arrangement, as mentioned in s137(1), TCGA 1992.
16. An amendment is required to s247(1)(f) in any event because s137(1) will no longer include the phrase “scheme or arrangements”, following the changes included in the Finance Bill.
17. We believe that s247(1)(f) and (2) should be repealed and replaced with a new sub-section which allows HMRC to make a just and reasonable adjustment along the lines of that set out in the amended s137.

FURTHER INFORMATION

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

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](#).