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Dear Sirs

Revenue Law Committee response to Office of Tax Simplification competitiveness review

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Revenue Law Committee.

We welcome the Office of Tax Simplification's competitiveness review of the administration of the UK tax system. We consider that much progress has been made in improving competitiveness in many areas, but that in other areas there are still real issues and there is much work to do.

As noted above, the focus of the City of London Law Society is predominantly on larger businesses, as it is those which typically form the greater part of the client base of our member firms. However, within that pool of larger businesses there are still a great number which are not large enough to qualify for the appointment of a Customer Relationship Manager ("CRM") by HMRC, and so many of the issues around interaction with HMRC which small businesses find difficult are also in point for those businesses which our members represent.

1. OVERALL COMMENT

1.1 Our view is that in relation to corporation tax paid by large businesses (by which we would mean businesses qualifying for a CRM), the administration of the UK

tax system is greatly improved over the last few years, and overall represents a competitive advantage of the UK.

1.2 More broadly the corporation tax roadmap and the related consultation exercises (some initiated prior to the current government, others launched by it) have been very helpful. Those consultation exercises have been genuine, and the significant time commitment put into them by industry has clearly been worthwhile as the eventual measures have on the whole properly addressed legitimate industry concerns (even if, inevitably, there is not full agreement with every policy decision).

1.3 Where a CRM is in place, businesses broadly feel that they can have a constructive ongoing dialogue with HMRC which enables them to have sensible discussions about uncertainties of treatment, straightforward disclosures where innocent errors are discovered and generally a constructive relationship.

1.4 However for non-CRM qualifying businesses, interaction with HMRC in relation to all taxes is problematic. It is necessary to approach HMRC offices which employ no staff familiar with the taxpayer's affairs via general e-mail addresses or telephone numbers, and there appears to be a deliberate policy of not giving out direct line numbers or individual e-mail addresses at HMRC such that it is frequently impossible to carry out an ongoing dialogue with a specific responsible officer at HMRC. This is not good enough, and this burden of course falls disproportionately on smaller businesses which lack the resources to obtain specialist tax advice.

1.5 Unfortunately, even in relation to larger businesses, we cannot come to the same broadly positive conclusion as we have in relation to corporation tax when considering income tax and National Insurance. It is clearly not within the scope of your review to comment on rates, but we would emphasise the point that the rate differentials now in play within the individual tax system (whether between capital and income, or between employment and non-employment income) are at historically very high levels. This is naturally acting as a powerful incentive to taxpayers to seek the lower rates (whether in accordance with Parliament's intention or not), which in turn is encouraging explicit anti-avoidance legislation or changes in policy (sometimes incorrectly presented as anti-avoidance).

1.6 A disturbing pattern is emerging where such legislation is introduced: minimal or ineffective consultation, over-draconian legislation and untaxing via HMRC guidance (sometimes even coupled with legislation that is effective immediately). The resultant uncertainty, and on occasion the inadvertent imposition of tax contrary to policy, has been damaging to the UK's competitiveness. We would highlight in particular the Disguised Remuneration legislation, this year's new Salaried Members rules and (away from income tax and NIC) the introduction of the penal 15% SDLT rate for certain high value residential property acquisitions as cases where business confidence in the policy-making and implementation processes has been greatly damaged. We would emphasise in this context that we are not taking issue with the measures themselves (not that all were popular with business, but Government is clearly entitled to direct policy as it sees fit), but with the confusion surrounding the policy and implementation associated with them.

1.7 Finally, although not identified in the list of taxes you are focussing on in your call for evidence, in our view some of the most significant administrative problems arise in the field of stamp taxes. There are a number of points – some simple,

some requiring more serious policy thought – where we would recommend action be taken.

2. RECOMMENDATIONS: CERTAINTY, THE RULE OF LAW ETC

2.1 We have a broad concern, applicable to all taxes, that tax policymakers are insufficiently conscious of the importance of the rule of law – that is, the constitutional right of a citizen to determine the law applicable to him at any given date. Related to this is a similar problem of lack of respect for legislation as the only proper source of law, and over-reliance on guidance.

2.2 The current Government has legislated retrospectively against certain types of stamp duty land tax avoidance schemes, and also against what it perceived to be avoidance structures in the field of corporation tax on loan relationships. In many of these cases the relevant structures had been known to HMRC for some time prior to the retrospective change (although we would accept that HMRC's internal communication systems may have been inadequate to convey this knowledge to policymakers: improvements in this area of tax administration are doubtless necessary too). We do not consider that this is acceptable. Business must know that the law in place when transactions take place will be the law that applies to them. This principle is either absolute or it is nothing – once it has been broken once, further breaches are only questions of degree. It is not an adequate response to warn in advance on a generic basis that retrospective legislation might be applied in an area. It is hard to overstate how damaging to business perception of a jurisdiction it is if a government indulges in retrospective taxation.

2.3 Even where legislation is not expressly retrospective, it can effectively be so. Probably the most egregious recent example of this was the last government's introduction of the Bank Payroll Tax (a remarkable tax in that its entire charging period had passed before it became law). As at the date of introduction of the tax, policy (let alone effective drafting) had not been finalised as to what a "bank" was and hence who might be subject to the tax. Our view is that the tax system should include administrative safeguards to prevent legislation being introduced with immediate effect where it has not been substantially finalised.

2.4 Over-reliance on guidance is another serious problem. It is clear from the case of *Gray's Timber* that a court will (indeed must) ignore any published guidance in forming its view of the law. This must be correct, as otherwise guidance would effectively have the force of statute despite not passing through Parliament. An extreme example of this problem was the draft Salaried Members legislation within the current Finance Bill. Both law and policy in this field are underdeveloped (we would note the House of Lords' Economic Affairs Committee's recommendation that introduction be deferred for a year, which was regrettably ignored by the Government).

2.5 By way of example, the policy view as to whether "costs plus" remuneration – favoured by many fund managers, a business sector which it is express Government policy to attract to the UK – should be subject to employer's NIC under the new rules changed late in the day. This change was reflected not in law but in guidance – the legislation is sufficiently ambiguous that it can be read either way. This is not good enough. The measures themselves were inevitably unpopular with those businesses to which they potentially applied, but the protracted uncertainty created by the heavily-criticised process of their

introduction in particular has materially damaged the UK's competitiveness in an area of the economy which the Government has identified as key.

2.6 Government and HMRC must also improve their institutional memory in relation to policy decisions. Members of our Committee have had experiences of talking to HMRC officials who have no idea why particular provisions are included within given legislation, even where that legislation was introduced relatively recently. In the world of the General Anti-Abuse Rule, where it is necessary to identify the consistency or otherwise of a transaction with policy, it will in turn be necessary for that policy to be identifiable if excessive uncertainty is not to result.

2.7 Increasingly in new policy initiatives the taxpayer's right to appeal is being watered down. We would highlight in this context that there is no appeal against an HMRC determination that a bank has breached the Banking Code of Practice on Taxation. Similarly, under the current proposals relating to "follower notices", the taxpayer has no right of appeal against the issue of such a notice on a number of important grounds. This absence of a right to appeal lends to a denial of the right to have one's rights and duties determined by law, rather than official discretion. This should not be acceptable in a constitutional democracy, and it erodes confidence in the robustness of the UK's legal system.

2.8 Finally we would note a concern about the involvement of experts (especially professional advisers) in the private sector in informal, often unannounced, consultations. We would not want to discourage this, as in our view it clearly leads to better law and policy. However, we do not believe that Government is sufficiently conscious of the need not to give such individuals and their clients a commercial advantage by reason of their advance knowledge of changes. Where it is intended that any legislative change following informal consultation will take place some time after announcement the issue is of little sensitivity as those not "in the know" will have plenty of time to see the changes and respond. However, where any change is to be effective immediately on announcement (or very soon thereafter), it is in our view inappropriate for any individuals outside Government to be involved.

3. RECOMMENDATIONS: CORPORATION TAX

3.1 As noted above, in our view great strides have been taken to improve the administration of corporation tax. We therefore think this is the area where least further work is needed, although we would reiterate the point above that the ability for non-CRM qualifying businesses to engage in helpful ongoing dialogue with HMRC should be improved.

3.2 There is a degree of inconsistency in the availability of non-statutory clearances. In some areas a practice has developed where HMRC is extremely helpful and responsive: we would highlight the question of whether a given group is a trading group for the purposes of the substantial shareholding exemption as such a case. Likewise in the field of debt restructuring HMRC deserve credit for their responsiveness. However, outside those areas where it is almost the case that a practice has developed around clearances, it can be much harder to obtain clear rulings in a reasonable timeframe. As legislation becomes inexorably more complex, the need for transaction-specific guidance only increases.

4. RECOMMENDATIONS: VAT

4.1 Significant improvements have been made in the time taken to process applications for VAT registration. However, there is still scope for much more improvement. Our view is that it should normally be possible to achieve the issue of a VAT number within a week of an application for registration, and that this should be adopted as a target for HMRC to achieve.

4.2 Considerable practical uncertainty in real estate transactions can be created when a taxpayer is unaware whether it has exercised an option to tax over a property. Typically in such circumstances, HMRC's records are also inadequate to clarify the position. We see no policy reason why the exercise of an option to tax should not be a matter of public record. We would therefore recommend setting up a public register of options to tax – perhaps most obviously this could be done via the Land Registry being required to be notified of options and noting them on the relevant title. We would expect that this could be done at minimal cost given that most options will be exercised when land is acquired, and so Land Registry filings will be being made in any case.

5. RECOMMENDATIONS: INCOME TAX/NIC

5.1 It is extremely odd that income tax on employment income and National Insurance apply to essentially the same tax base but have subtly different rules. In July 2011 the Government published a consultation document (in part in response to earlier work of the OTS) seeking views on the integration of the operation of the income tax and National Insurance systems. As yet there has been no Governmental follow up to this consultation. We would strongly urge that this work be expedited.

5.2 We recognise that income tax and National Insurance are probably the most politically sensitive of the UK's taxes, and as such policy cannot be assumed to be driven purely by theory or analysis of the preferable economic outcome. However it is our view that too much policy making in this area has been rushed and/or ill thought through.

5.3 We have already highlighted the Salaried Members proposals in this year's Finance Bill as a particularly serious example of this, doubly so as they should not be seen as an anti-avoidance measure as opposed to a simple policy change. It is not an adequate answer to criticism that business was given insufficient time to respond to say, as representatives of the Government have, that they had announced in good time that something would be done in this area. Major changes in policy were made very close to the effective date of the rules. This process has done enormous damage to the reputation of the UK with the internationally mobile fund management industry in particular.

5.4 Similar problems arose in relation to the Disguised Remuneration rules introduced in December 2010. These were a pure anti-avoidance measure, targeted against egregious schemes which we wholeheartedly agree needed to be closed down. However, perhaps out of an awareness that since parts of the rules would have immediate effect it would be difficult to extend their scope after initial publication, the initial draft of the rules was extraordinarily wide. Internal communication within Government was inadequate: the tax rules initially introduced a penal tax regime for remuneration arrangements which were shortly to be made compulsory in certain regulated industries. Great uncertainty ensued over a period of some months, and the fact that the eventually finalised rules

were materially improved as against the initial draft (if still widely seen as excessive in scope) does not change the fact that the process of introducing the rules created a damaging perception of the UK's tax system.

5.5 Our key recommendation in this area is that the natural desire to put new legislation in place as soon as possible once a need has been identified must be better balanced against the reputational damage which can result if that legislation is not ready. Ironically in these circumstances the Government's tax policy making protocols may be proving counter-productive, due to the self-imposed obligation to publish law in early December if it is to be ready for the next year's Finance Bill. To be clear we welcome those protocols which have broadly led to an improvement in policymaking, but the dangers of extra deadlines are evidently real.

5.6 Ideally, to, effect this recommendation, we would like to see the introduction of a formal check to the legislative process (an Office of Tax Changes, perhaps) which would be independent of Government in the same way as the OBR. This agency should have the power to prevent legislation being put forward in circumstances where it is not yet adequately formed, having regard to its proposed effective date.

6. RECOMMENDATIONS: STAMP DUTY AND STAMP DUTY RESERVE TAX ("SDRT")

6.1 The current arrangements for the payment of stamp duty on stock transfer forms are hopelessly outdated and in urgent need of improvement.

6.2 At present it is an offence for a company secretary to register an unstamped stock transfer form (as this is within the scope of the general prohibition of registration of unstamped documents in s.17 Stamp Act 1891). Over-the-counter stamping is only available in Birmingham, and even then only if the taxpayer can book an appointment having satisfied the Stamp Office of an exceptional business need. In practice it is extremely difficult to persuade the Stamp Office of such a need. If no appointment can be booked the stock transfer forms must be sent by post and so even in the most straightforward cases it will typically take over a week before the form is received back by the taxpayer and the transfer can be registered.

6.3 This is absurd. We seek to promote London as one of the world's leading financial centres and yet it is typically not possible to register share transfers executed there for over a week. We would acknowledge that it is relatively rare for it to be critically important that a document be stamped immediately, but on those occasions when it is important the logistics are extremely troublesome.

6.4 We would urge the repeal of the rule that a company secretary commits an offence if he registers an unstamped stock transfer form. This rule predates the introduction of SDRT, at which stage it was an understandable response to the need to make sure that non-directly assessable stamp duty would actually be paid. It is no longer needed now SDRT will arise so the liability to pay duty in respect of a transfer is enforceable by HMRC. If this rule were to be repealed, it would be difficult to envisage cases in which same-day stamping would continue to be necessary, so no change to the existing administrative arrangements for payment would be necessary.

6.5 If it is not felt possible to repeal this rule (despite that being in our view the cleanest and easiest solution to the problem), then in our view it is essential that great improvements be made to the process of getting stock transfer forms stamped. Most critically it must be made possible to get forms stamped while you wait by attending the Stamp Office in normal business hours (ie without the need to make an appointment, or to demonstrate a particular need for urgent stamping). Secondly, although the logistics of getting documents stamped in Birmingham can generally be managed to some degree, our strong view is that the facility should be available in London – not least as we would anticipate that a return of the ability to stamp on a walk-in basis would lead its widespread use.

6.6 We would urge consideration of improving the interaction between stamp duty and SDRT. SDRT must be paid on the seventh day of the month following the agreement which attracts duty (reflecting the need for CREST to make monthly settlements of duty collected to HMRC) while stamp duty can be paid up to 30 days after execution of a stock transfer form without interest or penalties arising. It is therefore very common for a taxpayer to be in default of an SDRT liability pending submission of a stock transfer form for stamping, and it is not wholly satisfactory that this is addressed by HMRC stating that as a matter of practice it will ignore the SDRT liability if the stamp duty is paid in reasonable time.

6.7 In the longer term we would suggest a review of whether stamp duty should be abolished given the existence of the directly assessable SDRT charge, although we would note that if this was done much more easy to use systems for accounting for SDRT outside CREST would need to be set up.

6.8 We would suggest the introduction of group and reorganisation reliefs from SDRT even if stamp duty is retained. We have seen instances where groups have moved substantial holdings of dematerialised shares between group members, unaware that in so doing they have triggered an SDRT liability where there is no document of transfer which can be stamped as exempt. In such cases it is necessary to create a memorandum of the agreement to transfer the shares after the event which is itself stampable, and in respect of which group relief can be obtained so franking the SDRT liability. The absence of straightforward reliefs from SDRT is adding unnecessary complexity to the system.

7. RECOMMENDATIONS: STAMP DUTY LAND TAX ("SDLT")

7.1 Review is needed of the rules governing leases with uncertain rent. At present a tenant taking out a lease of more than five years' duration with uncertain rent is required to pay SDLT on an estimated basis on entering into the lease, and then file a further return after five years (or, if earlier, when the rent becomes certain) reflecting the true position and either paying further SDLT or reclaiming SDLT already paid as appropriate.

7.2 HMRC have no systems in place to remind taxpayers of this obligation. Taxpayers also routinely overlook the obligation, and HMRC acknowledge that there must be very widespread non-compliance as they see very few returns at the five year point. Furthermore, on the assumption that taxpayers are properly fulfilling their self-assessment obligations and making a good estimate of the tax due at the outset, the amounts of tax at stake as a result of the subsequent inadvertent non-compliance would be expected to be small.

7.3 A flipside of the same problem exists for larger businesses which are all too aware of the obligation, but for whom it is impossibly onerous. We are aware of at least one business which operates a chain of outlets at transport and other hubs which at any given time has several hundred low-value turnover leases in place. On average this business is required by the current rules to submit an average two or three five-year returns every day. This is not practical at a realistic cost.

7.4 Ideally we would like to see the obligation to submit a further return after five years removed entirely. However, we suspect that this would be seen as an avoidance/evasion opportunity by HMRC as it would be difficult to police the adequacy of estimates made at the outset of leases (although given that HMRC currently has no system to monitor and follow up at the five year point, we would query whether there would be any increased opportunity for avoidance/evasion compared to the current position). If this is not possible we would suggest that the obligation to file a further return should only arise if it would disclose an additional duty payment of more than 50% (for instance) of the original. This would be an imperfect solution in that it would be likely that the obligation would continue to be overlooked, but at least it would mean that in most cases there would be no failure to pay tax as a result.

7.5 SDLT has been the subject of large numbers of marketed avoidance schemes. This has in part derived from defects in administration some of which may be instructive as other taxes move to electronic filing. The key points have been:

7.5.1 There is no "white space" on a land transaction return for a taxpayer to make disclosure of the analysis behind the position it has taken, and apparently historically there have been insufficient resources at HMRC to review covering letters or transaction-specific disclosures whether or not e-filing has been used.

7.5.2 Extraordinarily there is no space on a land transaction return where a taxpayer is required to indicate if an avoidance scheme disclosable under DOTAS has been used. This has meant HMRC has been unable to identify those returns into which it should be enquiring when it becomes aware of a scheme, with unfortunate effects for innocent taxpayers (see below).

7.5.3 HMRC's user interface for e-filing of land transaction returns is extremely poor. Advisers (including many of our member firms) who handle reasonable numbers of SDLT returns are finding that it is ultimately cost efficient for them to purchase commercial software to handle the process due to the time savings that result as against using HMRC's systems alone. This is unacceptable: if e-filing is to be required it is incumbent upon the Government to produce a system which works efficiently on a standalone basis.

7.6 The history of SDLT sub-sale relief, the resultant schemes and the attempts to close them down is something of a case study in poor tax administration. However, where we are today is that the key points of analysis underpinning the schemes have been refuted by the courts and HMRC is attempting to identify and assess as many taxpayers which have used the schemes as it can. It is considerably hampered in this task by the defects in the system referred to above. Unfortunately it has responded to this issue with a systematic abuse of the discovery assessment regime.

7.7 Discovery assessments are designed to enable HMRC to reopen particular returns where new and material information comes to their attention after the end of the normal enquiry window which indicates that the return may disclose an insufficiency of tax. However, at present HMRC appear to be randomly sampling old returns where reliefs have been claimed and which are not on their face inconsistent with the use of a sub-sale scheme. A standard form letter has been created which is being sent to taxpayers stating that HMRC has found information at the Land Registry and Companies House indicating an insufficiency of tax, and that a sub-sale scheme has been used.

7.8 In the majority of cases we have seen where these assessments have been received, no sub-sale or other avoidance scheme has been used and the submission of a return with nil duty payable was uncontroversial. Clearly in none of these cases would there have been any information at the Land Registry or Companies House to suggest the use of a sub-sale scheme, since there was no scheme.

7.9 In our view this is an egregious abuse of the discovery assessment regime by HMRC. We are aware that in at least one response to a taxpayer querying what information had been discovered, they have indicated it is a normal procedure for a random sample of self-assessment returns to be checked. This of course is entirely legitimate within the normal enquiry window, but is wholly inappropriate as a basis for issuing discovery assessments. Discovery assessments by their nature should be issued when particular facts arise in relation to a particular case: random sampling is an absolute contravention of their purpose. The very use of a standard form letter to taxpayers in the discovery context is indicative of an abuse of the procedure by HMRC.

7.10 Businesses are being put to costs in responding to these wholly baseless assessments, but wider questions of confidence in the system are raised. We understand the political pressure to clamp down on avoidance, and we also understand the economic need to ensure that tax properly due is collected. However, it will be very detrimental to the UK's competitive position if HMRC is seen to respond to these pressures (and, frankly, to attempt to correct its own earlier failures) by harassing innocent taxpayers through the inappropriate use of its powers. Behaviour of this type is doubly concerning given the upcoming increases in HMRC's powers to tackle avoiders.

7.11 We would also note in the context of SDLT another regrettable example of over-hasty legislating which has damaged the UK's reputation with a key investor group. The penal 15% SDLT charge applying on the acquisition of high value residential property was introduced in March 2012 with immediate effect, and initially applied to a breadth of transactions which was entirely unreflective of the policy objective. The undue breadth of the charge was quickly acknowledged by the Government, but change proved procedurally impossible until Royal Assent of the following Finance Act in July 2013.

7.12 During this period the penal charge would have applied to acquisitions of high value residential property by funds in the course of fully commercial investment, which was accepted by the Government almost immediately after the introduction of the charge as inappropriate. During the period until this was corrected a number of proposed transactions on which our member firms were advising were abandoned due to the tax charge rendering them uneconomic, with a very material amount of investment being lost to the UK economy as a consequence.

As well as the direct financial cost to the economy of the lost investment, significant reputational damage was suffered by the UK within the real estate investment community from both the initial ill-targeted imposition of the charge and then the apparent inability to adjust it quickly once it was realised by Government that it applied to a range of transactions going way beyond the intended scope of the policy.

8. CONCLUSION

8.1 In the core area of corporation tax, great strides have been made especially for larger businesses in making the UK's tax administration enhance our competitive position.

8.2 Away from corporation tax, and in particular in more politically sensitive areas, the position is far less satisfactory due to failures of administration at the policy generation and legislative drafting stages. There have been too many instances across the various taxes of legislation being produced in haste and then repented over at leisure. The sense of policy confusion, especially when contributed to by frequent significant change after announcement (as in the case of the salaried members rules) is very damaging to the UK as it undermines the objectives of delivering predictability and certainty.

8.3 We believe it would be useful to create an independent body which would have the power to veto the promulgation of tax legislation where either the legislation itself or the policy behind it are insufficiently developed having regard to its proposed effective date. We have a suspicion that there have been occasions on which HMRC officials have understated the difficulties involved with proposals when briefing Ministers, perhaps concerned that if they miss their slot in the Finance Bill timetable their measures may be lost altogether. At other times policy has clearly been driven from the political level without due consideration, with HMRC left to pick up the pieces. Whilst to some extent inevitable in a democracy, these phenomena are hugely damaging to the UK tax regime's reputation for stability, and the creation of a constitutional check to limit the scope for them to occur would in our view be of real benefit.

8.4 Whether or not an independent body is feasible, we would urge a more realistic and open dialogue between ministers and officials about whether proposals are ready to be implemented than would appear to occur at present. Officials must feel able to say to ministers that proposals are not ready without fear of being criticised for failing to deliver; likewise ministers must press their officials hard on the question of deliverability. Ministers in particular must appreciate better the volume of second- and third-order questions that often lie behind any given apparently simple high level policy decision, and allow due time for their resolution either internally within government or via consultation.

If you think it would be useful to arrange a meeting to discuss our comments further, do please let me know and I would be happy to arrange this.

Yours faithfully,

Simon Yates
Chair
The City of London Law Society Revenue Law Committee

THE CITY OF LONDON LAW SOCIETY
REVENUE LAW COMMITTEE

Individuals and firms represented on this committee are as follows.

S. Yates (Travers Smith LLP) (Chairman)

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