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HM Revenue & Customs  
Business Customer Unit  
Room 3/46, 100 Parliament Street  
London  
SW1A 2BQ  
For the attention of Mr Hussein Saleh  
By email: anti-avoidance.simplification@hmrc.gsi.gov.uk

30 October 2009

Dear Sir

## **Re: HM Revenue & Customs Consultation Document: Simplifying Transactions in Securities Legislation**

We are grateful for the opportunity to comment on the above consultation document dated 31 July 2009.

By way of background, the City of London Law Society (“CLLS”) represents approximately 13,000 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.

Our comments on the consultation document are as follows.

### **1. General corporation tax comments**

We note that a repeal of the Transactions in Securities legislation for corporation tax is now under consideration (rather than replicating the legislation proposed in the consultation document for income tax). We are strongly in favour of the corporation tax legislation being repealed.

Corporation tax is payable at the same rate for income as for gains and there is a wealth of anti-avoidance legislation available to HMRC within the corporation tax regime. Accordingly, in our view, the current Transactions in Securities legislation in Section 703 et seq. Income and Corporation Taxes Act 1988 for corporation taxpayers is uncertain and complex, making it burdensome for business, and is unlikely to create a great deal of revenue for the public purse. (Question 2.5.3 in the Consultation Document.)

## **2. General income tax comments**

While we welcome HMRC's aims of simplifying complex legislation, increasing certainty and reducing the administrative burden on taxpayers, we find it difficult to say that a broad anti-avoidance rule which contains a "main purpose" test can achieve those aims. This point is highlighted by the amount of guidance which HMRC recognises would still be required if the proposals were to be implemented as currently drafted.

On the whole, however, we would expect the proposed legislation to be acceptable to taxpayers. (Questions 2.5.1 and 2.5.2.)

## **3. Comments on specific proposals**

### **3.1 Proposal 1: Targeting tax avoidance**

A more directly focused rule would be helpful. The proposed wording for Section 683 is clearer than the present wording in Section 684 ITA 2007 and Section 703 TA 1988. (Question 3.5.1.)

However, we are not convinced that this re-formulation of Section 684 and Section 703 will achieve very much in practice. Prudent taxpayers will always see a clearance as their route to certainty if they are concerned that transactions potentially fall within this type of regime. (Question 3.5.2)

We note that the second paragraph in Section 3.5 refers to HMRC's discussion document dated 31 July 2009 entitled "Simplifying Unallowable Purpose Tests".

We have also commented on that discussion document. As we have said in that submission in relation to that document, we continue to have concerns over the complexity and compliance burden for taxpayers that accompanies a "main purpose" test, particularly where the guidance does not include specific "harmful" and "innocent" examples. (Questions 3.5.3 and 3.5.4.)

### **3.2 Proposal 2: Definition of close company**

We do not object to the use of the existing definition of a "close company" in Section 414 TA 1988, and we welcome the proposal to repeal current circumstance "C". (Question 4.5.1.)

### **3.3 Proposal 3: Remaining circumstances**

We welcome the proposal to repeal current circumstance "A". (Question 5.5.1.)  
As we have mentioned above, we welcome the proposal to repeal current circumstance "C". (Question 5.5.2.)

Consequently, we welcome the repeal of Sections 692 to 694 ITA 2007. (Question 5.5.2.)

Again, we are not convinced that the changes to current circumstances "D" and "E" are significantly better than the original legislation, though arguably it is marginally clearer. (Question 5.5.4.)

### **3.4 Proposal 4: Change of ownership**

We welcome the introduction of a change of ownership rule to lessen the compliance burden for taxpayers.

However, we consider the conditions to be unduly onerous in some respects. For example, there may be good commercial reasons why a person or entity may invest in a business in which someone with whom he or it is (or has at one time been) connected has previously invested.

The two year qualification period is also unhelpful; it takes away the very upfront certainty that the change of ownership threshold appears to be trying to give. As a result, prudent taxpayers are still likely to submit clearance applications.(Question 6.5.1.)

In addition, we would question whether it is necessary to set the threshold so high (75%) when other anti-avoidance rules (for example, the loss restriction provisions in Section 768 et sq. TA 1988) treat a change of ownership as taking place as soon as a 50% threshold is breached. We acknowledge that in both cases HMRC is trying to tackle tax avoidance, but fairness is an important consideration for taxpayers and it would help HMRC's relationship with business to be seen to be acting fairly. (Question 6.5.4.)

### **3.5 Proposal 5: “Tax advantage”**

In our view, the proposed Section 686 ITA 2007 has the disadvantage of assuming that any taxpayer, if within the Transactions in Securities legislation, will necessarily have avoided the maximum possible amount of income tax that could be paid on a different transaction. (Question 7.6.1.)

The provisions should counteract the actual tax advantage and not hypothesise about the maximum possible tax advantage. The latter is unlikely to reflect the reality of many situations and could result in unfairness and double taxation. (Question 7.6.2.)

For the above reasons, the existing formulation (looking to the actual tax advantage and capping the tax at a maximum based on a distribution analysis) is strongly preferable.

### **3.6 Proposal 6: Scope of the legislation**

Proposal 5, which HMRC states in Proposal 6 is the key to clarification that the Transactions in Securities legislation does not apply to transactions which turn capital into income, should not be enacted in its current form. For that reason it may be useful to add a provision clarifying that such transactions do not fall within the Transactions in Securities legislation. (Question 8.5.1.)

### **3.7 Proposal 7: Guidance**

We welcome the proposal to introduce clear guidance which will give taxpayers more certainty as to the tax consequences of transactions they undertake. If guidance is sufficiently clear, it should increase certainty and reduce compliance burdens (including the need to submit clearance applications). (Questions 9.5.1 and 9.5.2.)

However, in recent years there has been a trend towards briefer legislation and longer guidance. It is imperative that the guidance does not take on the role

which the legislation is intended to fulfil. Again that can lead to unfairness because it places undue reliance on HMRC practice which does not have the force of law and can be withdrawn without notice. That creates uncertainty, one of the key things HMRC appears to be trying to avoid through this consultation exercise.

As we have noted above, the need for long and seemingly comprehensive guidance highlights the continuing complexity of the underlying legislation, rendering this simplification exercise rather less effective than HMRC might hope.

Yours faithfully,

**David McIntosh**  
**Chair**  
**City of London Law Society**

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REVENUE LAW COMMITTEE**

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