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Dear Sir or Madam,

RE: CITY OF LONDON LAW SOCIETY'S RESPONSE TO STAMP TAXES ON SHARES MODERNISATION

Please find below The City of London Law Society's ("**CLLS**") response to the HM Revenue & Customs ("**HMRC**") consultation document published on 27 April 2023 entitled "Consultation: Stamp Taxes on Shares modernisation" (the "**Consultation**").

INTRODUCTION

The CLLS represents approximately 17,000 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 to the Consultation has been prepared by the CLLS Revenue Law Committee in consultation with the Company Law Committee. The current members of the Revenue Law Committee are herewith:-

http://www.citysolicitors.org.uk/clls/committees/revenue-law/revenue-law-committee-members/

OVERVIEW

Members of the CLLS Revenue Law and Company Law Committees deal with stamp taxes daily. The combined membership has an enormous amount of "coal face" experience of the day to day logistics and operation of these taxes. A number of us experienced the move from Stamp Duty to Stamp Duty Land Tax in 2003 and can appreciate the ways in which it works better than stamp duty did (for example replacing group relief letters with a simple notification requirement) as well as some missed opportunities for modernisation and reform.

A number of aspects of the current stamp duty regime are an embarrassment to have to explain to clients. The baffling complexities of the tests for the availability of group relief (see in particular our comment on Question 41), the geographic scope (see our response to question 8) and the continued need to qualify legal opinions by reference to an incomprehensible rule which pre-dates even the Stamp Act 1891 and has probably been completely irrelevant since SDLT was introduced 20 years ago (see our comment on Question 48).

We welcome the extent to which the comments we made in our response dated 13 October 2020 to the "Call for Evidence" have been reflected in the Consultation and would like to offer the services of the Committees to help HMRC take the opportunity to effect a long-overdue modernisation and clarification of an area of law which has become something of a basket of oddities. We would be happy to meet to discuss any of the comments below – don't hesitate to contact the Revenue Law Committee using the contact details at the end of this letter.

1. **QUESTION 1: DO YOU AGREE THAT THE GOVERNMENT SHOULD PURSUE A SINGLE TAX ON SECURITIES INSTEAD OF MAINTAINING TWO SEPARATE TAXES?**

   Yes; this will eliminate a significant degree of complexity relating to the interaction of the existing stamp duty and SDRT regimes. It also provides a welcome opportunity to modernise the taxation of non-CREST transfers. However, see our comments below on the charging point/accountable date as an instance where it may be preferable for the new tax to continue to distinguish between CREST and non-CREST transactions.

2. **QUESTION 2: DO YOU AGREE THAT ANY NEW SINGLE TAX SHOULD BE SELF-ASSESSED WITH TRANSACTIONS THAT ARE NOT PROCESSED THROUGH CREST BEING REPORTED AND PAID VIA A NEW HMRC ONLINE PORTAL?**

   Yes. We also agree with the need to maintain the current CREST system. For completeness, would note that some changes may be necessary to the descriptions of the CREST Transaction Stamp Status (TSS) values as a result of these proposals (for instance the current TSS indicating group relief is available requires a letter of direction to have been adjudicated by HMRC as exempt).

3. **QUESTION 3: DO YOU AGREE THAT HAVING A NON-STATUTORY PRE-CLEARANCE SYSTEM IS AN APPROPRIATE APPROACH? IF NOT, WHY NOT?**

   Yes. However, we would note that relief under sections 75 or 77 FA 1986 depends on satisfying a condition that (broadly) the acquisition is being effected for bona fide commercial reasons and not for the purpose of tax avoidance. At present (see STSM042360) HMRC accepts that this condition is met where a statutory clearance for the transaction has been obtained under certain direct tax provisions (such as section 138 TCGA 1992). It would be preferable to place this practice on a statutory footing (either by providing for a specific statutory pre-clearance procedure for the FA 1986 conditions or deeming them to be satisfied where one of the other specified statutory clearances has been obtained) to avoid having to rely on HMRC guidance.

4. **QUESTION 4: DO YOU AGREE THAT THE NEED FOR A UTRN TO BE PRESENTED TO REGISTRARS IS AN APPROPRIATE ASSURANCE AND DETECTION MEASURE TO HAVE IN PLACE?**

   The need for such a requirement is obviously limited in relation to a tax which (unlike stamp duty) can be directly enforced against the liable party. Nevertheless, we can understand why HMRC might wish to preserve the linkage to share registration as a means of information-gathering.

   However, we think it is important to recognise that under the new STS regime the purpose of preserving the linage *would* be limited to information gathering (as opposed to an incentive to paying the tax). Care should therefore be taken to ensure that the requirement to present a UTRN does not unduly or inappropriately slow down the updating of the register.

We question in particular whether it is necessary for the tax to be paid before a UTRN is issued. For comparison, under the current SDLT rules the SDLT5 certificate (which is required to register the transaction at HM Land Registry) is issued following submission of the SDLT return but payment of the SDLT is not required. (Submitting the return obviously puts HMRC on notice of any SDLT that is due, and the existence of penalties and enforcement powers provides the reason for the taxpayer to pay the tax). We see no obvious reason the same approach could not be adopted for the STS and we think it would be preferable to do so as it eliminates an unnecessary hurdle to same-day completion and registration of transactions.

See also our comments below on timing. If tax is required to be paid before transfers can be registered, this further strengthens the case for a different charging point for transactions completed outside of CREST.

We also note that if obtaining a UTRN on a same-day basis will be the only way to achieve a same-day transfer of legal title to in-scope securities it will be very important that the government portal is stable and reliable. The hours within which it is possible to submit an application/pay duty (if required) and still receive a UTRN will also be important, particularly for international transactions where there may be completion outside of UK business hours.

It would be helpful to clarify that company registrars will not be held liable for updating the register of members upon receipt of a UTRN.

We would also note that the current language of section 17 SA 1891 ("*any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records*") is of wide and uncertain scope. It would be preferable for the new rules to specify clearly that the restriction on registration applies only to company registrars. This should, for example, ensure that Companies House no longer needs to consider the stamp duty treatment of court orders giving effect to transfer schemes. That in turn would mean there is no longer a need to engage with HMRC to obtain formal confirmation that the order is not subject to stamp duty before the scheme can be registered with Companies House. Removing this administrative burden seems to us precisely the kind of modernisation and simplification that the new regime should adopt.

5. **QUESTION 5: DO YOU AGREE WITH THE PROPOSED APPROACH IN RESPECT OF THE LIABLE AND ACCOUNTABLE PERSONS? IF NOT, WHY NOT AND WHAT WOULD YOU SUGGEST INSTEAD?**

Yes

6. **QUESTION 6: DO YOU AGREE THAT A SINGLE CHARGING POINT AS OUTLINED CAN WORK AND IS THE CORRECT APPROACH IN ANY NEW SINGLE TAX? IF YOU DO NOT THINK IT IS THE BEST APPROACH, WHAT WOULD YOU PROPOSE AND WHY?**

If a single charging point is adopted it would make more sense for it to be the date of transfer of the securities, in keeping with the current stamp duty regime. For transactions completed outside CREST, there is often a significant gap between signing and completion. Funds generally flow at completion, including funds used to pay the stamp duty. Requiring stamp duty to be paid before completion would require sources of funding to be drawn down in two steps which would add cost and complexity to transactions. It would be highly irregular to require payment of stamp duty before completion of the share transfer i.e. before the purchase price had been paid to the seller. It is usual for conditional sale agreements to provide that completion takes place x number of working days after the conditions are satisfied (because the timing is often highly unpredictable e.g. regulatory conditions) and

so this would potentially involve two draw-downs of monies. It also seems unfair to require payment of stamp duty on a purchase price which has not yet been paid.

We recognise that SDRT currently performs a sort of anti-avoidance role to prevent "resting on contract" type schemes to avoid stamp duty which were once prevalent for land transactions. Hence the Office of Tax Simplification suggested in their 2017 report that the charging point should be substantial performance of an agreement to transfer securities for money or money's worth (see paragraph 3.46). This seems a sensible suggestion.

Changing the charging point would also be an opportunity to correct a flaw in the current SDRT regime, which is that sometimes agreements to transfer securities are aborted or otherwise amended before they are completed. If parties agree to transfer securities and then "tear up" the agreement before it is completed, no stamp tax should be due. It is also common, especially in transactions in the United States, for an umbrella agreement to transfer shares to be reached with a nominated buyer entity within a group of companies but with flexibility to change the buyer entity before completion. Such flexibility would not appear to amount to the contract being "conditional", raising the prospect of SDRT being due more than once in respect of what is really only a single share transfer.

What is meant by an agreement being "conditional" (in the context of SDRT currently) is also not well-understood and would need clarifying. For example, does it extend only to conditions precedent to the formation of the contract to buy and sell or also to conditions precedent to completion? Must the condition be "suspensory" (in the sense that it is not legally possible to complete the sale without it being satisfied), or will a condition which is capable of being waived suffice?

It may be preferable to retain the existing timings for securities settled in CREST as whilst having two different charging points adds complexity, that may be justified in order to avoid disrupting the existing CREST systems. We do, however, think it would be exploring with CREST whether such a change in charging point would actually have any significant operational implications.

7. **QUESTION 7: DO YOU AGREE THAT A SINGLE ACCOUNTABLE DATE OF 14 DAYS FROM THE CHARGING POINT WOULD WORK AND IS THE CORRECT APPROACH? IF NOT, WHAT WOULD YOU DO DIFFERENTLY AND WHY?**

If, as currently proposed, the charging point were to be the date of agreement then we do not think this would be the correct approach. As noted above, there is often a significant gap between signing and completion for non-CREST transactions. For example, it is very common for completion to occur at a month end, and to be a minimum number of days after the final condition to completion is satisfied. In such a scenario completion will often be at the end of the month after that in which the charging point arises. A fixed time limit of 14 days from the charging point will mean a significant number of transactions where stamp duty is required to be paid before completion, which is cumbersome in requiring two separate drawdowns of funds. It also represents a significant acceleration of the tax liability compared to the current regime which has the potential to catch taxpayers unawares.

For the reasons given above we think the better approach (at least for non-CREST transactions) would be for the charging point to be substantial performance of the agreement (which in a normal commercial situation should be the date of completion) and for the accountable date to be 30 days after that. This would better accord with current commercial practices and expectations as to the payment of stamp duty.

As an alternative, were the date of agreement to be adopted as the charging point then it would be necessary for the accountable date to be considerably later than is currently proposed (say, 60 days from the charging point) to try and minimise the difficulties referred to above. The legislation would also need to include an ability to easily and quickly reclaim any stamp duty paid in the event that the transaction did not complete (or not pay in circumstances where the contract is terminated in advance of payment of the stamp duty, e.g. within the 60 day period).

8. **QUESTION 8: DO YOU AGREE THAT THE CURRENT SDRT GEOGRAPHICAL SCOPE RULES SHOULD APPLY TO ANY NEW SINGLE TAX ON SECURITY TRANSACTIONS? IF NOT, WHAT WOULD YOU SUGGEST AND WHY?**

No. The geographical scope should be limited to securities issued by a UK incorporated company. Moreover, we suggest that the treatment of interests issued by UK incorporated companies over non-UK securities be simplified with a general exclusion where they derive most or all of their value from underlying foreign securities. The current section 99(4) of the Finance Act1986 has a number of flaws and gives rise to confusion which will only get worse with increased use of electronic registers and in the context of distributed ledger technology. Question 9 itself seems to be a symptom of this confusion.

The “place of register” rule in section 99(4)(a) creates a trap for the unwary whilst lacking an obvious rationale. Its removal would also avoid the need to analyse difficult issues around where electronic registers are “kept”. (In the context of distributed ledger technology there may be no answer to this.) Members of the CLLS regularly advise on capital markets transactions which are governed by UK law but relate to overseas securities. In those circumstances often most or all of the service providers are located in the UK and we have to advise the use of a non-UK registrar purely to avoid having to analyse the securities (which would often be exempt loan capital in any event) from a UK SDRT perspective. It is not clear what the purpose of the “place of register” rule is as it does not prevent avoidance of UK stamp duty by having, for example, a Jersey company which is tax resident in the UK. We have never come across a non-UK company with its register located in the UK so the rule would not, as far as we are aware, appear to generate any stamp tax revenue. It may however remove some corporation tax revenue from the UK as registrar business is forced offshore.

In addition, on its face, section 99(4) of the Finance Act 1986 is incapable of applying to securities issued by an entity which is not a body corporate. This raises difficult questions concerning securities issued by, for example, foreign governments and foreign partnerships or other fund vehicles which are not obviously bodies corporate.

There is mention in the Consultation of the concept of “paired shares” in section 99(6A) Finance Act 1986 being redundant, having originally been included in 1986 to cover shares in Eurotunnel. It is certainly an annoyance in order to advise on whether shares issued by a company incorporated outside the UK are subject to UK stamp tax to always have to check that they are not paired with UK shares. They never are. We would therefore propose that it would be a useful simplification and modernisation to delete (or not replicate) section 99(4)(b) of Finance Act 1986.

The current treatment of interests issued by UK incorporated companies but over non-UK shares (including, but not limited to, UK depositary interest over non-UK shares) is not logical. The Stamp Duty Reserve Tax (UK Depositary Interests in Foreign Securities) Regulations (SI 1999/2383) exclude UK depositary interests from being chargeable securities if certain conditions are met, but the policy rationale for having such a limited exclusion is unclear. Such interests should simply be outside the territorial scope of STS

on the basis that the value of the interest all relates to the underlying share which itself is outside the scope. We would note that HMRC's approach to the nature of depositary interests and their treatment for stamp duty purposes (i.e. separate interest or look through) is not wholly consistent (albeit generally helpful in getting to the "right" answer). In particular, where UK depositary interests are issued in respect of UK shares (or non-UK shares but where the entity is UK tax resident so that The Stamp Duty Reserve Tax (UK Depositary Interests in Foreign Securities) Regulations (SI 1999/2383) do not apply) that are held in a clearance system, HMRC typically accept that there is no SDRT on transfers of the UK depositary interests on the basis that the underlying securities are in a clearance system. Certainty as to the right "interest" to be testing for the purposes of UK stamp duty rules and clarity as to the treatment of such arrangements should be an aim of the new regime. This is the case not least because the involvement of clearance system/depositary providers generally requires advisers to provide opinions as to the stamp duty treatment, which can be difficult to give on the unconditional terms required. This often necessitates approaches to HMRC in order to provide certainty, even where advisers are confident that HMRC will agree based on prior correspondence.

9. **QUESTION 9: DO YOU AGREE IT IS NOT NECESSARY TO DEFINE WHERE AN ELECTRONIC SHARE REGISTER IS KEPT UNDER ANY NEW SINGLE TAX ON SECURITIES? IF NOT, WHY NOT?**

The proposal here seems to be to remove the relevance of the location of the register as suggested in our answer to question 8 above:

> "The government does not propose to define where an electronic share register is kept for any single new tax, but instead to use whether shares are in a UK incorporated company or not as the key factor for whether they are in scope."

However if the proposal is to retain the register rule but not deal with the question of where an electronic register is kept we do not agree. We would strongly advocate removing the relevance of the register. Failing that, a rule for identifying the location of an electronic register would be necessary. It may be extremely difficult to formulate such a rule in a way which is both future-proof as regards developments in registration technology and definitively allocates the location of the register to only one jurisdiction, however.

10. **QUESTION 10: DO YOU AGREE THAT THE PROPOSED SCOPE IS APPROPRIATE, CAPTURES WHAT YOU WOULD EXPECT IT TO CAPTURE AND EXCLUDES WHAT YOU WOULD EXPECT IT TO EXCLUDE?**

Taking "normal" debt out of scope is welcomed. Clarifying that all loans (as opposed to bonds) are out of scope (which we hope is the meaning behind the reference to "stock and bonds with equity like features" under the heading Tax Base in the Consultation) is also welcomed. There is uncertainty in the legal market whether the current exemption for "non-marketable debentures" is sufficient to exempt all loans from stamp duty, given that this analysis relies on a factual matter (being whether loans would be capable of listing on a stock market in the UK).

See also the answer to question 38 below in relation to non-marketable debentures.

11. **QUESTION 11: IS THERE ANYTHING THAT IS CURRENTLY CAPTURED BY STAMP DUTY AND SDRT THAT WOULD NOT BE CAPTURED THROUGH THIS APPROACH TO SCOPE?**

Yes, there are a number of things which are currently within the scope of stamp duty but on which no duty is paid in practice, as highlighted in the Office of Tax Simplification report from 2017. We welcome that these things will not be captured by the proposed modernised scope.

12. **Question 12: Do you agree that the government should explore a different approach to the loan capital exemption? Do you foresee any issues with such an approach?**

This distinction between "plain-vanilla" loan capital being outside the scope of STS versus it being in-scope but specifically exempt could become very important in light of the Consultation statement (under the heading of "Interest on repayment") that all transactions that are in-scope, including those that qualify for an exemption or relief, must be notified to HMRC without exception. If all transfers of "plain-vanilla" loan capital were to become notifiable to HMRC (when they are not currently), this could introduce a huge new compliance burden for the debt capital markets.

It will need to be clear that any new formulation of "in-scope" loan capital excludes all of the previously exempt loan capital. If there is any room for interpreting the scope as potentially covering debt which was previously exempt loan capital, grandfathering would be required to cover the large volume of long-term debt currently trading in reliance on the exempt loan capital definition.

13. **Question 13: Do you agree that the granting of security interests is currently out of scope?**

Generally yes, although the route to that conclusion is not always straightforward. If the definition of "consideration" used for the new tax is based on the current SDRT definition of "money or money's worth" this could put a strain on aspects of the current analysis relied on to conclude that the grant of most types of security interest are outside the scope of stamp duty (and therefore that, provided there is an instrument of transfer executed, any SDRT charge on grant of the security is franked). This is because there is a concern that a lender agreeing to advance funds (or agreeing to do so at a lower rate of interest than it otherwise would) may amount to "money or money's worth" for the transfer of securities by way of legal or equitable mortgage as security for the loan. (This is the reason for the "Flag 5" procedure in CREST). Whilst there can be other reasons why the grant of a security interest does not give rise to SDRT currently, an express exemption from the new tax (akin to that for SDLT) would be preferrable.

14. **Question 14: Do you think that the government should specify that the granting of security interests is out of scope in legislation and that it wouldn't open up any route for avoidance?**

Yes. We don't see any route for avoidance.

15. **Question 15: If we chose not to specify that the granting of security interests is out of scope, can you share how much time you would expect to spend establishing and showing the correct tax position for lenders and how often you would be likely to do this?**

See answer to Question 13 above.

16. **QUESTION 16: DO YOU AGREE THAT NON-UK FUND EQUIVALENTS SHOULD HAVE AN EQUAL STATUTORY FOOTING TO UK FUNDS? WHAT ARE THE BENEFITS AND DISADVANTAGES OF DOING SO IN YOUR VIEW?**

17. **QUESTION 17: DO YOU HAVE ANY ALTERNATIVE SUGGESTIONS FOR HOW THE GOVERNMENT MIGHT DEAL WITH IN SPECIE CONTRIBUTIONS AND REDEMPTIONS, BEARING IN MIND THE NEED TO GUARD AGAINST SIGNIFICANT LOSSES TO THE EXCHEQUER?**

18. **QUESTION 18: DO YOU AGREE THIS IS THE CORRECT APPROACH TO MERGERS? IF NOT, WHY NOT AND WHAT WOULD YOU PROPOSE? IF YOU ARE PROPOSING AN ALTERNATIVE WHAT ARE THE BENEFITS AND DISADVANTAGES OF THAT OPTION?**

The Consultation's proposed approach to foreign law mergers leaves significant uncertainty as to how they are to be treated. This is particularly so given that it asserts that the *Save & Prosper Securities* case (one of the very few pieces of case law which offers any guidance in this area) is only relevant to mergers of Collective Investment Schemes. The legislation needs to clearly define whether, and it what circumstances, mergers of two or more entities, at least one of which holds in-scope UK securities, is within the scope of STS.

19. **QUESTION 19: DO YOU AGREE THAT THIS IS THE CORRECT WAY TO DEAL WITH CALL OPTIONS AND WARRANTS?**

We agree that it would be a helpful simplification to take the granting of options and warrants out of scope.

The legislation should make clear that, from the point of view of territoriality, what matters is the jurisdiction of incorporation of the issuer of the securities over which the call option or warrant is written (not the jurisdiction of the issuer of the option or warrant itself). Otherwise this risks pushing UK issuers of options/warrants over non-UK securities to make the option/warrant cash-settled so as to avoid unnecessarily bringing the option/warrant within scope. It is hard to see a justification for this distinction (why a transfer of a cash-settled call option issued by a UK company over non-UK shares should be outside the scope of stamp tax but if the option were to give the holder a right to require physical settlement of the non-UK shares this would become in-scope).

It hopefully goes without saying that if the underlying securities are outside the scope of stamp tax, a call option/warrant over them should be too (although this is not clear from the Consultation).

20. **QUESTION 20: DO YOU THINK THAT THIS TREATMENT OF OPTIONS AND WARRANTS MAY OPEN UP ANY ROUTES TO AVOIDANCE?**

There is an obvious route to avoidance along the lines of the *George Wimpey* case itself where substantial amounts are paid for an option, thus reducing the amount paid for the shares themselves on exercise. The solution could be an extension of the so-called "DITMO" rules in eg section 93(4)(b)(ii) and (4A) of the Finance Act 1986 to transactions not involving the 1.5% regimes, or a rule which aggregates the amounts paid for an option and its exercise (like section 144 of the Taxation of Chargeable Gains Act 1992).

21. **QUESTION 21: IF YOU DO NOT THINK THE GOVERNMENT'S PROPOSAL IS THE CORRECT WAY TO DEAL WITH OPTIONS AND WARRANTS, WHAT WOULD YOU DO DIFFERENTLY AND WHY?**

See answer to question 19 above

22. **QUESTION 22: IS THERE ANY REASON WHY YOU THINK THE GOVERNMENT SHOULD NOT RETAIN THE EXISTING TREATMENT OF LAND TRANSACTIONS THAT ARE CURRENTLY IN THE SCOPE OF STAMP DUTY RATHER THAN SDLT?**

It seems contrary to the spirit of either simplification or modernisation to retain the ghost of stamp duty for transactions which were commenced over 20 years ago. We would suggest that the transitional provisions for SDLT (paragraphs 3, 4, 4A and 4B of Schedule 19 of the Finance Act 2003) are repealed for any land transaction with an effective date after the implementation date of the modernised stamp tax. This would bring completion of a pre-2003 contract for the sale of land into the charge to SDLT. To the extent that SDLT would give rise to a less favourable result, it is important that taxpayers are given sufficient notice of this change in order to complete the transaction under the existing stamp duty rules before this change comes into force. We note that many "resting on contract" arrangements involved a long stop date for transfer of legal title of 20 years and any alteration may well mean that the contract falls within SDLT rather than stamp duty in any event (by virtue of Schedule 19 Finance Act 2003) therefore the scope of this change may be limited.

23. **QUESTION 23: DO YOU AGREE THAT TAKING PARTNERSHIP INTERESTS OUT OF SCOPE AND DEALING WITH ANY POTENTIAL AVOIDANCE ISSUES THROUGH ANTI AVOIDANCE LEGISLATION IS THE CORRECT APPROACH? IF NOT, WHAT APPROACH DO YOU THINK WE SHOULD TAKE, WHY, AND HOW WOULD THAT APPROACH DEAL WITH ANY POTENTIAL ABUSE?**

The obvious abuse under the new stamp tax would be transferring in-scope securities to a partnership with the purpose of then transferring the partnership interests rather than the securities themselves. The choice to hold in-scope securities through another vehicle which is not in-scope (for instance a non-UK incorporated vehicle) or to establish a vehicle which is not in scope for the relevant transaction is not in itself abusive. In the case of a contribution of in-scope securities to a vehicle outside the charge to stamp duty, under the current rules a combination of the anti-avoidance provisions within the group relief rules and new section 47A Finance Act 2019 would likely ensure that a contribution/transfer of in-scope securities to a non-UK vehicle with a view to transferring the not in-scope securities would be counteracted. The anti-avoidance rule should be drafted sufficiently clearly that advisors are able to confirm that it does not apply in non-abusive situations and with an eye on the circumstances in which arrangements not involving a partnership would give rise to counteraction.

In particular, guidance should provide comfort in relation to the use of limited partnership by the PE/VC industry. They are adopted as a flexible structure which provides for transparency and limited liability for the investors. They are not generally established with a view to being freely transferable but limited partners do sometimes exit as a result of a change in strategy or circumstances and secondary transactions are becoming more common. There would be additional complexity and lack of competitiveness with alternative structures and jurisdictions if such secondary transfers attracted stamp duty.

24. **QUESTION 24: DO YOU AGREE WITH THIS VIEW ON THE PAYMENT OF PENSION BENEFITS AND AGREE WITH THE PROPOSED APPROACH?**

Broadly we agree, however we offer a suggested tweak. The proposed approach would appear to involve a move from transactions which are outside the scope of stamp duty to transactions that are within scope of the new tax but where an exemption is available. This would appear to involve an administrative notification process to claim relief so will generate additional work for taxpayers and HMRC compared with the current system, without raising any tax revenue. An alternative would be to define consideration as "money or money's

worth, excluding (a) undertaking obligations to pay pension benefits, (b) the issuance of a life insurance policy, (c) [any others]".

25. **QUESTION 25: DO YOU THINK THERE IS ANY POTENTIAL FOR AVOIDANCE WITH THE GOVERNMENT'S PROPOSED APPROACH TO THE PAYMENT OF PENSION BENEFITS?**

We can't think of one.

26. **QUESTION 26: IF YOU DON'T AGREE WITH THE GOVERNMENT'S VIEW ON THE PAYMENT OF PENSION BENEFITS AND THE PROPOSED APPROACH PLEASE EXPLAIN WHY?**

See above

27. **QUESTION 27: DO YOU AGREE THAT LIFE INSURANCE POLICIES WOULD FALL INTO SCOPE AND DO YOU AGREE WITH THE PROPOSED APPROACH? IF NOT, WHY NOT?**

See answer to question 24 above.

28. **QUESTION 28: DO YOU SUPPORT THE PROPOSAL TO USE MONEY OR MONEY'S WORTH FOR CONSIDERATION UNDER ANY SINGLE STS TAX?**

Yes. See also the answer to question 24 above.

29. **QUESTION 29: ARE THERE ANY FURTHER INSTANCES THAT ARE NOT CAPTURED WHERE TRANSACTIONS WOULD BE BROUGHT INTO SCOPE WHERE ADDING A CHARGE WOULD BE DISRUPTIVE THAT YOU THINK WE SHOULD CONSIDER? WHEN TELLING US OF FURTHER INSTANCES, PLEASE ILLUSTRATE THE IMPACT OF ADDING A CHARGE AND THE EXTENT OF THE DISRUPTION.**

30. **QUESTION 30: ARE THERE ANY FURTHER INSTANCES WHERE TRANSACTIONS WOULD BE BROUGHT INTO SCOPE BY USING THE SDRT DEFINITION OF CONSIDERATION THAT WOULDN'T NATURALLY FIT INTO THE SYSTEM AS OUTLINED THAT GOVERNMENT NEEDS TO CONSIDER?**

Currently the transfer by a company of a subsidiary to its shareholder in consideration for a reduction of its share capital is not stampable as a reduction of share capital is not stampable consideration. If HMRC were able to confirm in guidance that a reduction in share capital is not "money's worth" this could replicate the current position (that this transaction would not attract stamp duty or SDRT) without requiring any other changes.

31. **QUESTION 31: IS THERE ANYTHING PROPOSED IN THIS SECTION ON CONSIDERATION THAT COULD OPEN UP A ROUTE FOR AVOIDANCE?**

32. **QUESTION 32: DO YOU AGREE WITH THE GOVERNMENT'S PROPOSALS FOR DEALING WITH UNCERTAIN AND UNASCERTAINABLE CONSIDERATION?**

We note that SDLT has no long stop date for deferral and Welsh Land Transaction Tax has a 5 year long stop. We recognise the issues HMRC has with the SDLT approach and that a long stop date makes sense but would suggest that the Welsh approach of 5 years is a better compromise than the 2 year limit suggested in the Consultation. Two years seems too short given that the majority of earn-outs we see in the market are for three years (with recent examples we are aware of running for four or five years). A five-year limit seems to us likely to capture the majority of earnouts.

We welcome the ability for a taxpayer to reclaim overpaid tax in all scenarios which is a welcome improvement over the existing stamp duty rules.

33. **QUESTION 33: IF NOT, HOW DO YOU THINK WE SHOULD DEAL WITH UNCERTAIN AND UNASCERTAINABLE CONSIDERATION FOR ANY SINGLE TAX ON SECURITIES?**

Please see above

34. **QUESTION 34: DO YOU AGREE WITH THE REASONING BEHIND THE PROPOSAL TO REMOVE THE DE MINIMIS? IF NOT, WHAT JUSTIFICATION CAN YOU GIVE FOR RETAINING IT?**

No. The *de minimis* was originally introduced to relieve taxpayers and HMRC of an administrative burden in relation to transactions raising a negligible amount of duty. There are still a vast number of transactions which legitimately occur for a price of below £1000 and so to our mind this rationale holds good today. Removing the de minimis would entail a vastly increased administrative burden for taxpayers and HMRC and would, we imagine, be disproportionate to the tax raised. If anything, given that the threshold was originally introduced 15 years ago, we think there would be a case for raising it to take account of inflation.

In the event that the policy decision is taken not to retain the *de minimis* for payment of tax we suggest that there could, in a similar way to SDLT, usefully still be a *de minimis* limit under which exempt transactions need not be notified.

35. **QUESTION 35: IS THERE ANYTHING THAT YOU DO NOT THINK HAS BEEN SUFFICIENTLY CONSIDERED IN RELATION TO THE GEOGRAPHICAL APPLICATION OF INTERMEDIARY RELIEF?**

36. **QUESTION 36: DO YOU THINK THAT THE GOVERNMENT SHOULD EXPLORE WHETHER THERE IS AN EASIER WAY FOR INTERMEDIARIES TO APPLY OR NOT APPLY INTERMEDIARY RELIEF TO PARTICULAR TRANSACTIONS?**

37. **QUESTION 37: IS THERE ANY REASON WHY YOU THINK THE GOVERNMENT SHOULD CHANGE THE GEOGRAPHICAL APPLICATION OF STOCK LENDING AND REPURCHASE RELIEF THAT IT MAY NOT BE AWARE OF?**

38. **QUESTION 38: DO YOU AGREE THAT THIS IS THE CORRECT APPROACH TO DEBENTURES? IF NOT, WHY NOT AND WHAT WOULD YOU DO DIFFERENTLY?**

The Consultation is incorrect to state that there is no specific exemption for debentures. Paragraph 25(a) of Schedule 13 to the Finance Act 1999 provides an exemption for instruments on which duty was abolished by section 64 of the Finance Act 1971, which includes non-marketable debentures.

Our understanding of the section of the Consultation entitled “Tax base” is that only bonds with equity-like features (and not loans) would be within scope. This would leave non-marketable debentures with equity-like characteristics which are bonds as a category of instrument which is currently exempt from stamp duty but would be within the scope of the proposed new tax. Whether the concept of marketable securities would continue to have any relevance depends on the outcome of the further work on the 1.5% charges. However it is an unsatisfactory concept and it is questionable whether it needs to be retained in order to define the scope of the new tax or provide a niche exemption for non-marketable debentures. It is important, however, that the current exemption is not abolished accidentally. We note that the non-marketable debenture exemption is currently relied on by the market to exempt transfers of large portfolios of commercial loans which are likely to be covered by the loan capital exemption in any event but where the cost of analysing that exemption against each loan would be disproportionate.

39. **QUESTION 39: DO YOU AGREE THAT THIS IS THE CORRECT APPROACH TO SHARE BUYBACKS? IF NOT, WHY NOT AND WHAT WOULD YOU DO DIFFERENTLY?**

The question of whether it is correct to retain the distinction between a share buyback and a redemption or cancellation of shares, and whether to charge stamp duty on share buybacks where the shares are held in a clearance system is a policy decision. We would note that where the shares are held in a clearance system by virtue of an overseas listing, the Exchequer is not collecting any STS on their transfer so it isn't clear why this "final" transfer should be subject to charge. The policy around this is potentially linked to any decisions regarding the 1.5% charge. On the face of it, a transfer of a share into a clearance system by person A, followed by a transfer by person A to person B, followed by a share buyback would attract a total stamp duty charge of 2% with only a single change in beneficial ownership having occurred.

It would be helpful if HMRC's practice of allowing stamp duty group relief to be claimed on intra-group share buybacks could be put on a statutory footing.

40. **QUESTION 40: IF OUTLINING AN ALTERNATIVE APPROACH TO SHARE BUYBACKS, WHAT ARE THE BENEFITS AND DISADVANTAGES OF THAT APPROACH?**

41. **QUESTION 41: DO YOU AGREE THAT WE SHOULD INCLUDE GROUP RELIEF IN ANY NEW SINGLE TAX?**

Yes. We would hope that it could be simplified. The legislation has been added to and amended over the years to prevent an "envelope trick", predominantly where land was transferred to a company before the introduction of SDLT in 2003 but also where UK securities are transferred intra-group to a non-UK company in contemplation of a stamp-free transfer of the shares of that company. The Consultation acknowledges that section 27(3)(b) of the Finance Act 1967 is now redundant, but we would also suggest that the remainder of section 27(3) adds nothing useful to the requirement, added to section 42(2) Finance Act 1930 by the Finance Act 2000, that there are no arrangements in existence by virtue of which at that or some later time any person has or could obtain…control of the transferee but not of the transferor.

It is also possible to read the current arrangements test in section 42(2) as disqualifying relief where there are arrangements for the transferor to leave the group of which the transferee will remain a part (including by virtue of the transferor being liquidated). This is because there could be said to be arrangements in existence by virtue of which at some later time a person has control of the transferee but not the transferor. However, this is not how HMRC applies the rule in practice, in light of comfort given by a statement in Parliament by the Economic Secretary at the time that aspect of the legislation was introduced (see Hansard 18 July 2000, column 253). This should be put on a statutory footing instead.

42. **QUESTION 42: DO YOU AGREE THAT THE GOVERNMENT SHOULD INCLUDE RECONSTRUCTION AND ACQUISITION RELIEFS IN ANY NEW SINGLE TAX?**

Yes

43. **QUESTION 43: IS THERE ANYTHING YOU WOULD LIKE TO HIGHLIGHT WITH REGARDS TO MAKING THE LEGISLATION FOR RECONSTRUCTION AND ACQUISITION RELIEFS CLEARER?**

Disqualifying arrangements under section 77A of the Finance Act 1986 work oddly. We understand that the purpose of the rule is to stop taxpayers avoiding stamp duty on the sale of a UK company by inserting a new company not incorporated in the UK as its parent with

a view to the sale, the new company's shares being outside the scope of stamp tax. However it is so widely drafted that if the insertion of a new UK incorporated top company is being implemented at the same time that a sale is contemplated, there could be a double charge to stamp duty. In such circumstances an obvious solution would be for the new top company to be incorporated outside the UK, such that the anti-avoidance rule encourages the exact mischief it is designed to avoid! Perhaps instead disqualifying arrangements should be limited to where the new top company is not incorporated in the UK, or where there is a purpose of reducing the amount of stamp duty payable compared with a direct sale of the target company.

HMRC's (controversial) view that the effect of section 77(4) of the Finance Act 1986 is that section 77 requires a 'mirroring' of the target's funded debt (and any other non-share capital 'stock') should be limited to debt securities which are themselves in-scope for STS purposes.

HMRC should consider seeking to align the 'mirroring' requirements with those used in other tax legislation. For example, the different tests in section 77 and the EIS rules can lead to complicated structuring being required for no obvious reason. (A key problem tends to be that some tests look to a snapshot of the registers before and after (such that the acquirer needs to issue one or two fewer shares to take account of the subscriber share(s) that it already has in issue) but some tests require an issue of exactly the same number of shares as are acquired.)

44. **QUESTION 44: DO YOU AGREE THAT THE GROWTH MARKET EXEMPTION SHOULD BE RETAINED UNDER ANY NEW SINGLE TAX? IF NOT, WHY NOT?**

Yes

45. **QUESTION 45: IN LIGHT OF THE CONSIDERATION OF RELIEFS AND EXEMPTIONS AND THEIR CONTINUED FUNCTIONALITY, ARE THERE ANY MARKET DEVELOPMENTS THAT SHOULD BE CONSIDERED?**

46. **QUESTION 46: DO YOU AGREE THAT THE COMPLIANCE REGIME AS OUTLINED ABOVE IS APPROPRIATE AND PROPORTIONATE FOR ANY NEW SINGLE TAX ON SHARES?**

47. **QUESTION 47: IF NOT, WHAT DO YOU THINK SHOULD BE DIFFERENT, HOW WOULD YOU CHANGE THE PROPOSED COMPLIANCE REGIME AND WHY?**

When a taxpayer fails to realise the tax is payable it will not submit a return or pay the tax. As a result tax-geared penalties should only be charged for non-payment of tax, not late notification of the tax. If tax is unpaid at 12 months and no return has been submitted then the government is already collecting a 15% penalty; it should not collect an additional tax-geared penalty for what amounts to the same failure. Fixed penalties are appropriate for administrative failures and the tax-geared penalties should be reserved for the failure to pay the underlying tax.

48. **QUESTION 48: DO YOU AGREE THAT THESE PROVISIONS ARE NOW REDUNDANT AND NO LONGER NEEDED? IF NOT, CAN YOU EXPLAIN WHY NOT INCLUDING THEM IN LEGISLATION FOR ANY NEW SINGLE TAX WOULD BE AN ISSUE?**

We find this section of the Consultation odd as it seems to conflate two concepts. One is completely redundant legislation which can have no further purpose, even for "grandfathering" transfers which took place under the stamp duty regime. The second is

the longer list of legislation which may need to be retained to retain the integrity of historic transfers under the stamp duty regime but should not have any equivalent within the new single tax. The most obvious example of this latter category is s.14 of the Stamp Act 1891. We think the Consultation is really focussing on the first category when asking this question but in any event we agree that the three listed provisions should not be replicated under the new STS regime.

We mentioned in our response to the earlier “call for evidence” that section 117 of the Stamp Act 1891 should be abolished. It is an embarrassment for CLLS members that this needs to be mentioned as a qualification in most legal opinions on the validity and enforceability of documents as its scope is unclear and documents (such as loan facilities) which law firms regularly give legal opinion on often include wide tax indemnities which would include stamp duty. We expect that it may have been relevant pre-2003 to “resting on contract” type stamp duty planning but given the need to pay stamp duty in order to update company registers it is difficult to see it having any application since the introduction of SDLT. It certainly should not be replicated in the new tax and in our view should not be retained as part of “grandfathering” old transactions.

As mentioned in response to question 41 we consider that all of section 27(3) of the Finance Act 1967 is redundant.

49. **QUESTION 49: ARE THERE ANY OTHER EXISTING PROVISIONS THAT ARE NOW REDUNDANT AND NO LONGER NEEDED?**

We think there will be many. As mentioned in response to question 22 the general approach should be to bring all transactions within the scope of the new stamp tax or SDLT and abolish what remains of stamp duty.

50. **QUESTION 50: ARE THERE ANY OTHER EXISTING PROVISIONS THAT DO NOT WORK IN PRACTICE?**

Is bearer instrument duty to be abolished entirely (or is that intended to be part of the “1.5% charge” to be considered separately)? If so, the exemptions from SDRT for certain categories of UK and non-UK bearer instruments in sections 90(3) to (3F) of the Finance Act 1986 should be reconsidered before they are reproduced in STS.

We would also encourage, wherever possible, the modernisation of terminology and elimination of concepts such as ‘capital stock’ and ‘funded debt’ whose precise meaning is unclear. We appreciate that in doing so care will need to be taken not to inadvertently alter the scope or operation of the new tax, but we are strongly of the view that the new tax must be rooted in clearly defined and well-understood concepts.

POINTS OF CONTACT

Should you have any queries or require any clarifications in respect of our response or any aspect of this letter, please feel free to contact me by telephone on 020 7296 5783 or by email at Philip.harle@hoganlovells.com.

Yours faithfully

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