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23 February 2011

Dear Mr Bowyer and Ms Gardiner

Comments of the Revenue Law Committee on the Draft Tax Consultation Framework and Draft Protocol on Announcements Outside Scheduled Fiscal Events

We are grateful for the opportunity to comment on the above consultation documents dated December 2010.

By way of background, 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 in respect of the draft Tax

Consultation Framework and the draft Protocol on Announcements Outside Scheduled Fiscal Events has been prepared by the CLLS Revenue Law Committee.

The Committee previously commented on the Tax Policy Making consultation document published in June 2010. Some of the comments included in our letter of 22nd September 2010 apply equally to the December 2010 documents and are therefore repeated in this letter.

Tax Consultation Framework (the 'Framework')

As a general comment, the Committee welcomes the aim of increased engagement with interested parties on changes to tax policy and legislation.

In particular, we support the proposed formal **five stage approach to the development and implementation of tax policy** and the involvement of taxpayers and advisers at each stage. We regard it as sensible and logical that the stages run consecutively, so that each one informs the next. However, we note that in the consultation document "Security for PAYE and NICs", published on 9 December 2010, it is stated that all stages are being run concurrently. Such a deviation from the multi-stage approach undermines the positive aims set out in the Framework and we consider that this concurrent approach should not be adopted regularly.

The proposed **three month timetable for publication of Finance Bill legislation** is welcomed, provided the eight week period for consultation leaves sufficient time for Treasury and HMRC to properly consider all comments and produce a well thought out revised draft of the legislation.

The Framework does not address the **role of Parliamentary Counsel and HMRC solicitors in the consultation process**. As noted in our comments on the June 2010 consultation document, legal issues are often sidelined during consultations. HMRC solicitors and Parliamentary Counsel do not currently take part in the consultation process. Involvement of such individuals in the consultation would allow interested parties to better understand the rationale behind legislative drafting and allow those drafting the legislation to probe and clarify points being raised. In the Committee's view, it would result in a more productive and efficient dialogue during consultation and improved final legislation.

The Framework does not adequately deal with the role of **consultation in relation to guidance**. As noted in our comments on the June 2010 consultation document, there is often no proper consultation on HMRC guidance when it is revised and such guidance is too often used to supplement unclear or incomplete legislation. Paragraph 7 of the Framework should be strengthened so that consultation on guidance takes place alongside consultation on draft legislation.

Additionally, the Committee previously commented that it is often unclear in relation to new or revised guidance what changes have been made. A recent example was the publication of a revised version of HMRC6 in December 2010. The revision was simply accompanied by a note stating that "HM Revenue & Customs does not consider that the latest revisions have altered the current position in most cases" (implying that the revisions have altered the current position in some cases). A blacklined version of the revised guidance was not produced and without a detailed and time-consuming review of this 86 page document it is not possible to determine how the current position has in fact changed. This approach is inconsistent with the Government's stated aims of transparency, stability and predictability of the tax system. Blacklined versions of

guidance should be published where existing guidance is updated or revised to enable users to work out quickly what has changed.

The Framework also reserves significant **discretion for the Government to depart from the outlined approach to consultation** "in other circumstances where the Government decides not to consult during tax policy development". These circumstances are undefined. This potential wide reserved right therefore detracts from the transparency and certainty that the Framework aims to provide to taxpayers.

Intrinsic in any consultation process is the need to ensure that interested parties are made aware, in a timely manner, of **the existence of consultations and the publication of any relevant documents**.

We note for example the process for the publication of Finance Bill 2011 documents and related consultations which spanned approximately two weeks in December 2010. In the absence of a Pre-Budget Report, where all documentation is generally published on a single day, it is imperative that all announcements and publications are issued in a consistent manner and are available to everyone at the same time.

Linked to this point, we note that the Framework includes a commitment to continue to develop and improve the consultation tracker page on the Treasury and HMRC websites. This page is potentially very useful and we welcome its further development. It is imperative however that the page is kept up to date. Every ongoing consultation should be displayed along with the stage at which such consultation is at in order that it may be relied upon by taxpayers and advisers. At the present time, the page does not meet this standard. For example, in relation to Tax Policy Making, only the 22 June 2010 consultation is listed whilst the 9 December 2010 consultation is omitted. It would also be useful if users were able to access a link to the relevant documents from each of the consultations displayed on the tracker page. Such a link is currently only available in relation to certain of the consultations.

As a final comment, the Committee welcomes the **last stage of the development and implementation process: reviewing and evaluating the change**. The general approach outlined in the Framework is welcomed and we consider that it has the potential to make significant improvements in the quality of tax law. However, we agree that the implementation of the Framework should be monitored to ensure that the Government consistently delivers on the commitments set out therein. The work of the Tax Professionals Forum in this regard is therefore welcomed.

Draft Protocol on Announcements Outside Scheduled Fiscal Events (the 'Protocol')

The Government's intention to take a more strategic approach to tackling tax avoidance by reducing the need for frequent change to legislation is generally welcomed. We also welcome the Government's aim behind the Protocol of providing greater clarity and certainty to taxpayers and advisers as to the circumstances in which the Government will announce tax changes which have immediate effect outside the usual Budget process.

However, we consider that the Protocol falls short of providing such clarity and certainty, particularly in respect of paragraph 4 of the Protocol which sets out the circumstances in which such changes may be made.

The circumstances set out at paragraph 4 are imprecise and ambiguous. The term 'significant' is referred to throughout but is undefined, resulting in a subjective test which

leaves the Government with a considerable amount of discretion. We consider that it would be preferable to impose some material delineation on the term 'significant' and therefore on the Government's powers to legislate in the given circumstances. For example, in limb three of the test (prevention of "significant losses to the Exchequer"), greater certainty would be provided if such losses could be quantified in the Protocol.

We acknowledge that the Government will always require the ability to legislate quickly in certain circumstances, but in order for the Protocol to have value and meaning to taxpayers and advisers, such circumstances should be more precisely defined.

We think it is instructive to consider the ongoing process of enacting the Disguised Remuneration legislation in the light of the proposed Protocol, as this emphasises the Protocol's limitations. This legislation was published in draft on 9 December 2010, with parts of it having immediate effect. It would therefore fall within the scope of the Protocol as anti-avoidance legislation published outside a scheduled fiscal event (on the assumption that following the abolition of the Pre-Budget Report, the Budget is now the only scheduled fiscal event in the calendar).

Our view is that the process relating to the Disguised Remuneration rules has been very disappointing, although we acknowledge that some teething troubles might have been expected as these rules were the first instance of the introduction of a major anti-avoidance regime under the new policy making guidelines. However, it is our very clear view that Government must aspire to do much better if it is to meet its goal of the UK tax system restoring its reputation for stability. And as a result, the Protocol, if it is to be useful, should look to hold Government to a significantly higher standard than was attained in this case. As HMRC has now acknowledged, the initial draft of the Disguised Remuneration rules was in many respects much too wide, catching a number of innocent transactions to which it should as a policy matter have had no application. Nonetheless it applied immediately, and as a result it has caused - and continues to cause - enormous uncertainty to large numbers of businesses engaged in nothing that could be characterised as avoidance.

Despite these problems, we think that the way the Disguised Remuneration process was managed is entirely consistent with the draft Protocol. In our view this implies that the draft Protocol does not hold the Government to an adequate standard. In particular, we think it is an important principle that where anti-avoidance legislation is to take effect prior to its enactment, it should be narrowly targeted at the perceived abuse in question. Our experience with this kind of legislation is that it is the attempt to anticipate all future avoidance structures, rather than the closing down of existing ones, which leads to innocent arrangements being called into question, and in turn the issues of instability of the tax system and uncertainty which the Government is quite correctly trying to limit.

This principle of measures announced with immediate effect being narrowly targeted should be reflected in the Protocol if it is to be meaningful - otherwise, as the Disguised Remuneration experience has shown, it is entirely possible to create damaging confusion without testing the boundaries of the Protocol at all. We think a regime where disclosed schemes could be closed immediately outside scheduled fiscal events with targeted measures, followed by a relatively short consultation period to produce fuller regimes which could be expected to prevent mutations of those schemes arising without damaging innocent arrangements, would more properly balance the avoidance risk to the Exchequer against the certainty and stability which business needs.

Finally, we would like to request clarification of the meaning of the term "scheduled fiscal events". We note that the Protocol variously refers to "legislative change outside the Budget" (paragraph 2) and "a scheduled event like the Budget" (paragraph 7).

Particularly given the abolition of the requirement for a Pre-Budget Report, is the intention that "scheduled fiscal events" refers only to the Budget? If not, we would appreciate clarification of the other events intended to fall within its scope.

We trust that the above comments will be of assistance. As a Committee of experienced tax lawyers, we are very well placed to comment on the process relating to tax law making and we would be happy to meet with Treasury/HMRC to discuss this topic further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bradley Phillips'.

BRADLEY PHILLIPS

Chair

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.

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