The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 - Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

By email to:

HMRC, Attention David Harris and Robert Sandford
david.harris@hmrc.gsi.gov.uk
robert.sandford@hmrc.gsi.gov.uk

cc
The Cabinet Office
servicedesk@cabinet-office.gsi.gov.uk

22 February 2013

Dear Sir

Revenue Law Committee response to the HMRC Tax and Procurement Discussion Document and Draft Guidance of 14th February 2013

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 19 specialist committees. This response has been prepared by the CLLS Revenue Law Committee.

We have the following comments on the proposals which clearly will have an impact on a particular sector of businesses:

1. While no-one can sensibly argue with the sentiment that "Taxpayers' money should not be funding tax dodgers" what is needed is a sensible balance, given that making procurement decisions based on a supplier's tax compliance rather than their ability to deliver the desired services at the best price risks an (admittedly hard to measure) Exchequer cost. For the reasons set out below, we do not consider that the current proposals are well balanced and are probably unworkable in practice.

2. The proposals have the potential to lead to "disproportionate" punishment in that non-compliance could lead to suppliers failing to be awarded contracts or to have contracts terminated where the financial loss could potentially significantly dwarf the tax considered to be avoided. There is a real risk that businesses that rely on government business could be severely prejudiced.

3. Before commenting on the specific proposals, we note that it is considered that the proposals have been designed to be compliant with the EU Procurement Directive and the Public Contracts Regulations 2006. The EU Procurement Directive allows for the exclusion of a bidder which *"has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority."* As a general comment, if a taxpayer files a tax return believing it to be completed on a correct basis but subsequently pays further taxes as a result of a tribunal/court decision or settlement with HMRC, can it be said that the taxpayer has been guilty of not fulfilling its legal obligations as a taxpayer (particularly, in the absence of any penalties being applicable)?

4. The proposals will impose a huge additional compliance burden on companies (10 years is too long a period, a much shorter period such as 3 years would seem more reasonable). The compliance burden will be even more burdensome in relation to monitoring non-UK tax affairs.

5. It also seems unfair that if a group has been rehabilitated to low risk status in HMRC's eyes, a completely separate standard would apply for procurement purposes.

6. To apply the rules retrospectively also appears manifestly unfair and unjust. It should be noted that the whole attitude and approach towards tax-planning by the Courts has changed fundamentally during the last 10 years period for a variety of different reasons. We would also make the point that the attitude of many taxpayers has also changed dramatically and that reformed characters should not be punished. It would only be fair to apply the rules looking forward from 1st April 2013 as suppliers cannot now "undo" the past.

7. The application to both UK and non-UK tax compliance is very troublesome. How does a supplier determine what is an "equivalent" foreign tax? The proposed approach risks discrimination against UK groups given that there will often not be clear foreign equivalents of the UK's anti-avoidance rules.

8. The reference to TAARs in addition to the proposed GAAR makes the proposal very wide ranging as by definition it is not limited to "egregious" type arrangements. TAARs often contain "main purpose" tests which are potentially applicable to transactions where there are also significant commercial main purposes. Also, some TAAR's do not have any purpose tests or may be triggered because of the actions of other parties to a transaction (in such cases it would seem unfair to include them for these purposes).

9. It is also not clear what will be considered a TAAR under UK tax law for this purpose. Trying to determine TAARs in foreign jurisdictions may well be impossible.

10. The reference to disclosure under DOTAS also seems inappropriate. DOTAS was not originally strictly aimed at unacceptable tax planning, but initially at

arrangements involving financial instruments that generated a tax benefit and then (broadly) at innovative/confidential arrangements that generate a tax benefit. This was and continues to be made clear in the DOTAS guidance, which states that HMRC do not regard all tax arrangements that include or meet a hallmark description as unacceptable, and that they appreciate that schemes that are not avoidance may nevertheless need to be disclosed. Certainly when these rules were introduced a number of so-called "protective disclosures" were made, and specifically stated that disclosure was being done on that basis and should not be taken as meaning that obtaining a tax advantage was in fact a main benefit.

11. We assume the rules are intended to apply on a group worldwide basis. This obviously unfair if a company is acquired into a group within the last 10 years. Also, if not limited to the actual bidding entity, do the rules cover minority shareholders in a bidding company or will it be limited to entities under the same control as the supplier?

12. The practical application of the rules and how responsibilities will be split between the Cabinet Office, HMRC and the Government procurement teams is unclear, particularly where a negative response is provided but is accompanied with an explanatory statement. In such situations, it is stated that "legal advice" will need to be sought by procurement teams before they can proceed with the supplier or the procurement. Who will provide this advice and what exactly is the legal question being asked of the relevant lawyers? Would the procurement team really bother to do a thorough job of this in all cases given the procurement threshold is as low as £113,057 (for services)?

13. Treating amendments following any agreement with HMRC in the same way as losing before the courts seems unfair as taxpayers may choose to settle a case for a variety of reasons unconnected with the technical point in issue and sometimes where HMRC may not in fact have a strong case. If this is also to apply to other jurisdictions, it will be truly unworkable as the dynamics around settling disputes in certain jurisdictions is very often not purely technical.

14. This would also motivate taxpayers to litigate: a taxpayer may otherwise have been willing to settle a difficult point challenged by HMRC, but if the consequences of doing so would be being shut-out from winning government contracts then surely this could be such a disastrous consequence for a potential supplier that they would be incentivised to litigate to the bitter end. Also, as a general comment, the correct tax treatment in many cases is open to interpretation and may lie in a developing area of case law or may depend upon the correct identification of arms length comparisons.

15. It would also seem unfair for the rules to be applied were a supplier to become non-compliant because of retrospective legislation being introduced.

16. How are the rules to apply where a taxpayers wins in a lower court and subsequently loses on appeal or vice versa or where the relevant transaction was outside the time period but the tribunal or court judgment was within it?

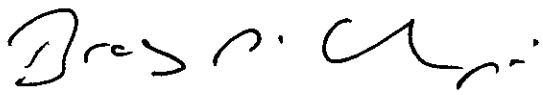
17. It is unclear whether the existence of an occasion of non-compliance and the inability to self-certify will (i) act as an automatic block in progressing within a bidding process or (ii) just form part of the overall scoring process of a contract

and may be more heavily weighted. Also, how long will a supplier be "tainted" for? This all needs to be clarified.

18. It will also be vital that in practice all government procurement teams operate the rules in the same way and assess any act of non-compliance on a sensible basis – otherwise there is a real risk of breaching the EU Procurement Directive. How will this be managed in practice?

In summary, for efficient procurement the playing field needs to be level and seen to be level. These proposals risk this not being the case and that ultimately will not benefit the wider body of taxpayers and may severely prejudice particular businesses.

Yours faithfully,



Bradley Phillips
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.

B.S. Phillips (Herbert Smith Freehills LLP) (Chairman)

H. Barclay (Macfarlanes LLP)

C.N. Bates (Norton Rose LLP)

D. Friel (Latham & Watkins LLP)

P.D. Hale (Simmons & Simmons LLP)

M.J. Hardwick (Linklaters LLP)

C. Hargreaves (Freshfields Bruckhaus Deringer)

C. Yorke (Allen & Overy LLP)

K. Hughes (Hogan Lovells LLP)

N. Mace (Clifford Chance LLP)

G. Miles (Slaughter and May)

J. Scobie (Kirkland & Ellis LLP)

N. Mace (Clifford Chance LLP)

C.G. Vanderspar (Berwin Leighton Paisner)

S. Yates (Travers Smith LLP)