THE CITY OF LONDON LAW SOCIETY

4 College Hill
London EC4R 2RB

Telephone 020 7329 2173
Facsimile 020 7329 2190
DX 98936 – Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

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Neil Nagle
Andy Mill
David Hannigan
HMRC
100 Parliament Street
3rd Floor
London SW1A 2BQ

By email:
neil.nagle@ hmrc.gsi.gov.uk
andy.mill@hmrc.gsi.gov.uk
david.hannigan@hmrc.gsi.gov.uk

Dear Gentlemen

Re: Finance Bill 2009
Taxation of the Foreign Profits of Companies – Debt Cap and International Movement of Capital provisions

We submitted comments to the Government on the original draft proposals relating to the taxation of foreign profits on 3 March 2009.

We appreciate that the Government has taken steps to positively address some of the concerns raised by the CLLS and others in the responses to the consultation. However, significant concerns do remain.

We now make further comments on the provisions relating to the debt cap and international movement of capital aspects of the measures contained in the Finance Bill 2009 (including the draft legislation on financial services companies and anti avoidance rules released on 5 June 2009). As the relevant provisions have already been debated in Public Committee, we make these comments in the knowledge that it is unlikely to be possible at this stage to influence the form of the Finance Bill before it is enacted. We therefore make these further comments in the hope that the legislation will be reviewed further before its planned implementation and in the hope that matters raised will be taken into account in formulating the proposed HMRC formal guidance.

In addition to the further general comments below, we comment specifically on the financial services provisions (paragraphs 6A to 6G), the anti avoidance rules in Part 5A and the new international movement of capital rules. Paragraph references are to the amended draft schedule 15 to the Finance Act 2009 as at 5 June 2009.

General comments on the debt cap rules

We would like to take this opportunity to reiterate some of the points we raised at the original consultation and to make some further general remarks.

The policy behind the imposition of the debt cap

It remains our view that the policy behind the imposition of the debt cap is flawed and therefore we remain against the introduction of the rules. We accept the introduction of the rules is now inevitable but strongly recommend that matters be reviewed on an ongoing basis and, if the fears expressed by us and others are realised, that further consideration be given to abandoning the debt cap provisions in their entirety. We do not accept the Government view that these rules are a "light-touch restriction" on interest deductibility.

A common theme in the representations made to the Government related to the fact that the rules were very complex and not always clear. This continues to be the case especially as not all the accompanying Regulations have been published yet.

The requirement that companies have to submit a statement about allocated disallowances creates additional unwelcomed complex compliance obligations. We note that it remains the case that wholly domestic groups, even where they do not ultimately suffer any extra tax as a result of the debt cap will incur significant compliance costs producing these statements and allocating disallowances and exemptions between group companies.

Assuming it will help with these general concerns, we believe it vital that there is early publication of detailed HMRC Guidance and proper consultation on it.

Timing

The Government announced in the 2009 Budget that the debt cap rules would come into effect on 1 January 2010. We are very concerned that even this revised timing is unworkable. We are in mid-June and the rules are still not yet in final form (amendments are still being made, not all the accompanying regulations have been published and, as yet, no sight of any HMRC detailed guidance).

Pushing the implementation date back further in relation to the new debt cap rules would allow taxpayers to come to grips with what is very complex legislation and allow them to prepare for the new legislation before it comes into force (particularly to educate staff, accommodate the additional compliance burdens placed upon them and get accounting systems in place). It will also give HMRC time to further review the rules before implementation.

The Financial Services Exemption (Paragraphs 6A – 6G)

In general, we would appreciate further clarity from the Government in relation to which businesses qualify for the exemption. Will it cover companies whose only activities are managing assets (such as fund managers)? Also, will the exemption cover a company whose only activities are investing or trading in debt assets rather than originating the lending of money itself?

In Paragraph 6A2(b), reference is made to ‘substantially all’. The Government is asked to provide guidance as to what this means.

In Paragraphs 6C(2) and 6D(4), reference is made to a 'significant' part of the total income'. The Government is asked to provide guidance as to what this means.

The Anti Avoidance rules (Part 5A)

These rules are drafted very widely and are very complex (further adding to the general complexity!). We are most concerned that these rules could inadvertently catch innocent transactions and tax planning arrangements that should not be considered to be abusive.

It is vital that HMRC publish detailed guidance on these rules.

The new international movement of capital rules

As stated previously, we welcome the abolition of the current Treasury Consent regime from 1st. July 2009. We still cannot see any imperative for imposing reporting requirements for cross-border transactions going forward and it remains our view that these reporting rules should be dropped.

We would make the following comments about the draft statutory instrument "International Movement of Capital (Required Information) Regulations" released on 5 June 2009:

- We welcome the further list of excluded transactions (which mirror the current Treasury general consents).
- We assume in Paragraph 4 of the draft regulations that it is the value at the date that the transaction completes. Will proper independent valuations need to be obtained?
- Please could the Government confirm that it is not necessary to report the creation of a legal or equitable mortgage or charge over the shares in a foreign subsidiary whether the mortgage or charge is granted by a UK resident or non resident member of the group. Such charges are a very frequent element in normal capital markets transactions, and the limited exemptions in paragraph 9 of Schedule 17 will not apply when security is granted in respect of loans to UK companies or to a trustee for investors in securities issued to the bond markets.

Yours sincerely

Bradley Phillips
Chair
Revenue Law Committee

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4 College Hill, London EC4R 2RB
Tel: 020 7329 2173, Fax: 020 7329 2190
E-mail: mail@citysolicitors.org.uk

THE CITY OF LONDON LAW SOCIETY
REVENUE LAW COMMITTEE

The City of London Law Society is the local Law Society for solicitors practising in the City of London. It has a number of specialist Committees, the Revenue Law Committee being one of them. This response has been prepared and reviewed by the Revenue Law Committee as a whole.

Individuals and firms represented on this Committee are as follows:

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Norton Rose LLP

Hilary Barclay
Macfarlanes LLP

Karen Hughes
Lovells LLP

Paul Hale
Simmons & Simmons

Michael Hardwick
Linklaters LLP

Colin Hargreaves
Freshfields Bruckhaus Deringer

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Stephen Shea
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Simon Yates
Travers Smith LLP